SUPREME COURT

OF THE

STATE OF CONNECTICUT

SC 18065

STATE OF CONNECTICUT

V.

HERBERT J. BROWNE III

BRIEF OF THE AMICUS CURIAE CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF THE DEFENDANT-APPELLEE WITH ATTACHED APPENDIX

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TABLE OF CONTENTS

Page

AMICUS CURIAE'S ISSUE

1. The certified issue is: "Whether the Appellate Court correctly determined that the trial Court improperly denied the defendant's Motion to Suppress Evidence Seized Pursuant to a Search Warrant?" State v. Browne, 285 Conn. 903 (2008).

TABLE OF AUTHORITIES

Page(s)

A. CASES:

B. STATUTES, PRACTICE BOOK AND CONSTITUTIONAL AUTHORITIES:

C. OTHER AUTHORITIES:

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The organization submitting this brief is the Connecticut Criminal Defense Lawyers Association (CCDLA), P.O. Box 1766, Waterbury, CT 06721-1766.

CCDLA is a not-for-profit organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal defense lawyers' organization in Connecticut. An affiliate of the National Association Of Criminal Defense Lawyers, CCDLA works to improve the criminal justice system by, inter alia, insuring that the individual rights guaranteed by the Connecticut and United States Constitutions are applied fairly and equally and that those rights are not diminished. CCDLA has a strong interest in this case because this search and seizure issue goes to the heart of the Fourth Amendment's warrant requirement. Assuming that the misstating of the drug listed on the warrant was a "scrivener's error", i.e. the police officer meant to state the non-narcotic substance, marijuana, and instead listed a narcotic substance, cocaine – the constitutional implications flowing from this error in the warrant are quite significant. Either the majority opinion is correct when, referring to Groh v. Ramirez, 540 U.S. 551 (2004), it was held that, "*The fact that the application adequately described the 'things to be seized' does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents*" (State v. Browne, 104 Conn. App. 314 at 318, citing Groh, supra, emphasis added), or the dissenting opinion is correct that the error is constitutionally insignificant because the supporting affidavit correctly referred to

marijuana. This is an issue of first impression of great importance to the members of CCDLA and their clients. Accordingly, the Connecticut Criminal Defense Lawyers Association thanks this Court for allowing it to appear and participate amicus curiae.

I. STATEMENT OF FACTS AND PROCEEDINGS:

The amicus curiae adopts the statement of facts and proceedings of the defendant-appellee. The amicus does note that the appellant and the appellee make contradictory representations about whether or not the search and seizure affidavit was incorporated by reference into the search and seizure warrant. The state represents that the affidavit "was incorporated by reference in the Warrant." (S.B. p. 4.) The defendant represents that "the warrant did not incorporate the affidavit by reference...." (D.B., p. 8.) The dissenting opinion states that, "the warrant incorporated by reference the critical parts of the warrant application and accompanying affidavit." Browne, supra at 335. The majority opinion did not reach this sub-issue. The majority opinion holds that, "[e]ven if the state is correct that the affidavit and allegations sufficiently describe the items to be seized so as to inform the reader that marijuana, not cocaine, is the object of the search, here, as in Groh, the affidavit did not accompany the warrant." Id. at 319. The search and seizure warrant does not verbatim state that the affidavit "is incorporated by reference." Nor did it state verbatim, "see attached affidavit." (App. p. A6.) As the dissent noted, the preprinted warrant form language was nearly identical to the challenged warrant language in State v. Santiago, 8 Conn. App. 290 (1986). Browne, supra at 336. For purposes of the argument that follows, it is assumed that the search and seizure warrant did incorporate by reference the affidavit. The parties and the Appellate Court are in agreement that, "the principal object of this search was marijuana, and it was not listed on the warrant." Browne at 318. The parties and the Appellate Court are also in

agreement that "the affidavit did not accompany the warrant." Browne at 319.

II. ARGUMENT: The Plainly Invalid Search And Seizure Warrant Does Not Satisfy The Particularity Clause Of The Fourth Amendment By Referring To An Affidavit That Was Not Present At The Scene Of The Search.

The issue before this Court goes to the heart of the Fourth Amendment. The Warrant Clause of the Fourth Amendment states that "no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Chief Justice Rehnquist recognized in 1990 that:

> "the driving force behind the adoption of the Fourth Amendment,... was widespread hostility among the former Colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel. The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government..." United States v. Verdugo-Urquidez, 494 U.S. 259 at 266 (1990).

The amici curiae, National Association of Criminal Defense Lawyers and Professor George C. Thomas III, in United States v. Grubbs, 126 S.Ct. 1494, 547 U.S. 90 (2006), noted the following constitutional history:

> "From the Virginia confrontation over the writs, a direct line of succession may be traced through the various State declarations of rights to the federal Bill of Rights' Fourth Amendment. Virginia in 1776 became the first State to formally condemn general warrants in such a declaration of rights, and the six additional States that enacted declarations or bills of rights between 1776 and 1784 all included such a provision.... John Adams, who had looked on with reverence nineteen years earlier as James Otis eloquently proclaimed discretionary search-and-seizure authority intolerable, authored Massachusetts' 1780 version, which came very near to the Fourth Amendment in its structure and wording.
> ...

> The moral of this history is plain: The spirit animating the Fourth Amendment is an abhorrence for governmental search-and-seizure authorizations that place excessive *discretion*, and thus excessive *power*, in the hands of government agents. Warrants that fail to particularize in *all* possible respects the outer boundaries of the search-and-seizure power that they create therefore fly directly in the face of the core principle of the Fourth Amendment." (Id. at 23-24.)

Professor LaFave notes that the

> "most frequently quoted statement of these purposes is that in Marron v. United States. '*The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another*. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'" 5 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (4th ed. 2004), p. 605 (emphasis added).

Marron, supra, was decided in 1927. 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927). Professor LaFave also notes that "[t]he question of whether a defective description in the warrant may be saved by an adequate description in the affidavit arises with some frequency." (*LaFave*, supra, at p. 613.) Your amicus observes that this seems to be an understatement.

The dissent in Browne appears to construe the majority opinion as an inappropriate expansion of the Fourth Amendment.[1] Relying largely upon United

[1] "In expanding the scope of the fourth amendment to require that an incorporated warrant application and affidavit must accompany the warrant at the time of execution, the majority fails to even acknowledge this split among our federal courts. On this divided issue, I side with the minority of jurisdictions that concludes that the particularity clause does not require that an incorporated warrant application and affidavit must accompany the warrant at the time of execution.... The proposition today enunciated by the majority–that an incorporated warrant application and affidavit must accompany the warrant at the time of execution for the warrant to be valid–is inconsistent with that Connecticut statute. Furthermore, that proposition is not to be found in the United States

States v. Hurwitz, 459 F.3d 463 (4th Cir. 2006) and Baranski v. Fifteen Unknown Agents, 452 F.3d 433 (6th Cir. 2006), the dissent adopts the admitted minority view that "a search and seizure warrant that incorporates by reference the warrant application and affidavit supplies the requisite particularity to the search warrant, regardless of whether those documents accompanied the search warrant at the time of execution." Id., at 341. This is at odds with Professor LaFave's treatise. Referring to the invalidity of the "with-warrant" search which was found in Groh, LaFave noted:

> "As for whether there had been a valid with-warrant search, the Court in Groh disposed of that issue rather quickly, stating:
>
> 'The fact that the *application* adequately described the "things to be seized" does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. * * * And for good reason: "The presence of a search warrant served a high function," * * * and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection. We do not say that the Fourth Amendment forbids a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant. * * * But in this case the warrant did not incorporate the other documents by reference, nor did either the affidavit or the application * * * accompany the warrant. Hence, we need not further explore the matter of incorporation.'[2]
>
> What is striking about this passage is that in stating that 'most' rather than all Courts of Appeals take the incorporation-plus-accompanying approach, *it is acknowledged that there is a split of authority on this*

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constitution." 104 Conn. App. 314 at 339-340 (2007).

[2] Groh v. Ramirez, 540 U.S. 551 at 557 (2004).

> *issue, yet none of the other positions are even mentioned. Yet it is clear that the Court in Groh has accepted and adopted the incorporation/accompanying approach, without specifically saying so, as the discussion of whether there was a valid with-warrant search is abruptly ended because there was neither incorporation nor accompaniment.*" (*La Fave*, supra, p. 616, emphasis added.)

In Groh, without specifically holding, the United States Supreme Court has "adopted" both requirements of incorporation by reference and accompaniment of the affidavit with the warrant when the items described on the search and seizure warrant do not match the items referred to in the affidavit.

There is at least one law review article that addresses this issue: "Can A Search Warrant That Is Particular Upon Issuance Lose Its Particularity Upon Execution?" Justin H. Meeks, 9 F. Coastal L. Rev. 237 (Winter 2008). After reviewing the split of opinion among the federal circuits, the author refers to one of the salutary purposes of the particularity clause of the Fourth Amendment.

> "The Supreme Court has made it clear that one of the purposes served by the particularity requirement is 'assur[ing] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.' However, no assurance of any kind is given when the police show up at someone's home with a search warrant that describes the things to be seized as 'see affidavit' or 'see attachment,' but this document is absent during the search. 'Without seeing a copy of the affidavit [or attachment], the individual... has no way to know the limits of the officer's authority.' Practically speaking, at this point, what prevents the police from conducting a general search of the individual's home, seizing items that were not originally authorized to be seized, and adding these items to the absent affidavit or attachment after the search? Although this may seem like a worst-case scenario, the Fourth Circuit would likely explain that the property owner is not without recourse because the Fourth Amendment affords him the right to file a motion to suppress. However, this reasoning completely overlooks the fact that '[t]he chief purpose of the particularity requirement was to *prevent* general searches,' not provide

a remedy for them after the fact." Id. at 253-254.[3]

The article concludes by dismissing the Fourth and Sixth Circuit opinions relied on by the dissent in Browne as "irreconcilable with the language of Groh." Id. The language of Groh

> "indicates that if a search warrant incorporates another document by reference to provide the description of the items to be seized and this document is not present at the time of the search, the warrant loses its particularity upon execution and becomes invalid. *In Groh, the Supreme Court refers to an incorporated document accompanying a warrant at the time of a search on four different occasions. The Court did not make these references to suggest that incorporation by reference alone satisfies the particularity requirement at all phases of the warrant process; rather, it made these references to stress that the incorporated document must also be present at the time of the search in order for the warrant to remain particular upon execution.*
> The view of the Fourth and Sixth Circuits is also irreconcilable with the purposes of the particularity requirement. An absent incorporated document gives no assurance to the property owner as to what the officers have been authorized to search and seize. Furthermore, there is a possibility that officers might conduct general searches in such a scenario. This failure to satisfy the purposes of the particularity requirement provides ample support for the Third and Ninth Circuits' view that a warrant that is particular upon issuance can lose its particularity upon execution and become invalid if an incorporated document is not present at the time of the search." Id. (emphasis added).[4]

The dissent in Browne quoted from the Sixth Circuit's post-Groh decision, Baranski v. Fifteen Unknown Agents, 452 F.3d 433, 444 (6th Cir. 2006). "Groh did not establish a one-size-fits-all requirement that affidavits must accompany all searches to prevent a lawfully authorized search from becoming a warrantless one." Browne

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[3] Original footnotes omitted.

[4] Original footnotes omitted.

at 338. The Browne dissent does not mention that in Baranski, supra, the Sixth Circuit, sitting en banc, divided 7-to-6. Justice Clay, in his dissent, noted:

> "*Most importantly, however, the rationale behind Groh compels the conclusion that a warrant does not satisfy the particularity requirement unless the incorporated affidavit is present at the scene of the search.* The Groh court explained that the Fourth Amendment requires that a warrant describe with particularity the items to be seized not only to prevent general searches but also to '"*assure[] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search*."' Id. at 561 (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977) (citing Camara, 387 U.S. at 532)). *A warrant that incorporates an affidavit that is not present at the search cannot serve this function. Id. at 557. Without seeing a copy of the affidavit, the individual whose property is being searched or seized has no way to know the limits of the officer's authority.*" Id. at 453 (emphasis added).

The amicus curiae urges the panel of this Court to carefully consider Justice Clay's dissenting opinion in Baranski and to adopt its reasoning.

Thus far, not many appellate decisions from our sister states have been published regarding this. Massachusetts appears to be aligned with the dissent. See, e.g., Commonwealth v. Valerio, 870 N.E.2d 46 (Mass. 2007). Georgia is aligned with the majority opinion. See, e.g., Battle v. State, 620 S.E.2d 506 at 508 (G.A. App. 2005).

> "Accordingly, in light of Groh, we now hold that, where a search warrant fails to meet the particularity requirement on its face but instead incorporates a supporting document by reference, failure to leave a copy of that supporting document at the searched premises invalidates the warrant." Id. at 508.

The then-Solicitor General of the United States, Theodore Olson, filed an amicus curiae brief in Groh. He argued, inter alia, that:

> "[f]inding a Fourth Amendment violation based on a clerical mistake in the warrant, when the substantive policies of the Warrant Clause have been satisfied, would be contrary to the 'strong preference for warrants' and the associated rule 'that "in a doubtful or marginal case, a search under a warrant may be sustainable where without one it would fail."' Leon, 468 U.S. at 914 .... Furthermore, from the perspective of law enforcement officers, excessively rigid applications of the Warrant Clause could lessen the benefit of obtaining a warrant, and might discourage officers from utilizing the warrant process when a warrantless search would be permissible." Id. at 19.

Obviously these arguments failed in Groh.

III. CONCLUSION:

The search and seizure warrant application referred to cocaine. The search and seizure warrant referred to cocaine. The search and seizure warrant affidavit referred to marijuana. Assuming human error in the preparation of the search and seizure application and in the search and seizure warrant and further assuming that the warrant incorporated the affidavit by reference, the fact that the affidavit did not accompany the search and seizure warrant is fatal to the state's argument. Groh v. Ramirez requires that the decision of the Appellate Court be affirmed.

Ultimately, the decision this Court must make will be influenced by how one looks at and how one asks the question. If the question is considered simply in terms of technicalities and "scrivener's errors" then the dissenting opinion may well be the one chosen. On the other hand, if one considers not only the language of Groh but also our Fourth Amendment history, then the words of Justice Felix Frankfurter in his famous dissenting opinion in United States v. Rabinowitz, 339 U.S. 56, 68-69 (1950) will determine the outcome:

> "It is true... of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out in a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in [its prior decisions on the importance of Fourth Amendment protections] or one approaches it as a provision dealing with a formality. *It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper*." Id. (emphasis added).

The judgment of the Connecticut Appellate Court should be affirmed.

RESPECTFULLY SUBMITTED:
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CERTIFICATION

Pursuant to P.B. §62-7 the undersigned certifies that a copy of the foregoing was mailed to the following on this the 24th day of June, 2008.

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CERTIFICATION

Pursuant to Practice Book §67-2, the undersigned counsel certifies that the foregoing complies with this rule and is no smaller than 12 point font and is in the Arial typeface.

_____
CONRAD O. SEIFERT, ESQ.

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APPENDIX TO THE BRIEF OF THE AMICUS CURIAE CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION

Table of Contents to the Appendix

[5] The amicus is unable to ascertain where in the documents submitted to this Court these documents are published. However, after conferring with counsel, the amicus understands that they were published in one of the appendices to one of the briefs filed with the Connecticut Appellate Court in the opinion below.