

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JEFFREY BARHAM, ET AL.	:
Plaintiffs	:
	:
v.	: Civil Action No. 02-CV-2283 (EGS)
	:
CHIEF CHARLES H. RAMSEY, ET AL.	:
Defendants	:
	:
_____	:

**PLAINTIFFS' SUPPLEMENT  
REGARDING APPLICABILITY OF  
GROH V. RAMIREZ, 540 U.S. \_\_\_\_ (2004)  
TO THE MOTIONS TO DISMISS BASED ON QUALIFIED IMMUNITY**

On February 24, 2004,<sup>1</sup> the U.S. Supreme Court delivered its opinion in Groh v. Ramirez, 540 U.S. \_\_\_\_ (2004), No. 02-811 (February 24, 2004), which addressed the issue of whether an officer is entitled to qualified immunity for an unconstitutional search that was, without dispute, conducted with restraint and in good faith, where there was probable cause for a search warrant to issue, and on the basis of a warrant with a clerical error on its face that was not known to, or relied upon, by the responsible officer.

The Supreme Court entertained and rejected argument that the failure to afford Groh with qualified immunity for his constitutionally unlawful search would create a constitutional

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<sup>1</sup> In response to inquiry from plaintiffs' counsel, counsel for the defendants have represented that they do not intend to initiate a supplement regarding the applicability of Groh v. Ramirez and prefer, instead, to file a response or responses to any supplement filed by plaintiffs. Plaintiffs have no objection to the defendants' filing of such responses on any timetable that is acceptable to the defendants and the Court.

violation out of a purported clerical error, would impose “new” and “novel” obligations upon law enforcement, would penalize actions taken in good faith, or would hamper or impede law enforcement.

The Groh Court ruled that qualified immunity did not protect Officer Groh from being held financially liable on an individual basis. The Court reiterated the standards respecting the limitations of the qualified immunity defense, and recognized the existing rule of law that requires law enforcement and government officials to ensure that their responsibilities are conducted in conformity with clearly established constitutional rights.

While Groh arises in the context of an unconstitutional search and (potential) seizure of property, its approach with respect to qualified immunity is no less applicable in the circumstances present in Barham which implicate hundreds of unconstitutional searches and seizures of persons. In the Barham case, the facts are even more difficult for the individual defendants, as there was not a single warrant (defective or otherwise) that issued or on which they relied as the basis for any of the hundreds of false arrests they made on September 27, 2002.

#### **The Facts of Groh**

Jeff Groh, a veteran officer, was a special agent for the Bureau of Alcohol, Tobacco and Firearms. On the basis of a citizen report there existed probable cause to believe that on Joseph Ramirez’s ranch there was located an unlawful stock of weapons, including an automatic rifle, grenades, and a grenade and rocket launcher. Groh, slip op. at 1 -2 .

Groh prepared and executed a detailed application for a search warrant, which described in particularity the items which were to be searched for. Id. The application was supported with a detailed affidavit setting forth the basis for probable cause. Id.

A Magistrate Judge reviewed the application, found that the affidavit established probable cause to believe that contraband was concealed on the premises and that sufficient grounds existed for the issuance of a search warrant. Id. at 2-3.

The Court therefore issued the search warrant.

Groh led the team that executed the search warrant. According to the Supreme Court, Groh “acted with restraint in conducting the search.” Id. at 9. He also presented a copy of the search warrant to Mrs. Ramirez and, upon request the following day, faxed to Ramirez’ counsel a copy of the page of the application that listed with particularity the items to be seized. Id. at 3.

The warrant, however, was thereafter discovered to be constitutionally deficient because, even though Groh identified with particularity the items to be searched for in both the affidavit and the accompanying application, when he typed up the warrant and offered it to the Magistrate, he accidentally entered a description of the property to be *searched* in the part of the warrant form that called for a description of the property to be *seized*. Id. at 2 (Kennedy, J., dissenting).

#### **Applicability of Groh to Barham**

No property was seized during the search. Nevertheless, the Ramirez family sued Officer Groh alleging that there had been a violation of their Fourth Amendment rights because of the unlawful search.

The Supreme Court rejected Groh’s claims of qualified immunity, reaffirming the duty of government agents - subject to the pain of individual financial liability upon failure - to “make sure” that their conduct abides by constitutional requirements. Groh, slip op. at 11, n.6.

Groh contended that the deficiencies in the warrant were mere clerical errors, id. at 4, that Groh acted in good faith and that the deficiency in the warrant was the product, at worst, of a

lack of due care, *Id.* at 13. He submitted that his actions - albeit constitutionally faulty - were consequently protected under the doctrine of qualified immunity. Groh argued that to not immunize his unconstitutional conduct would create novel and new obligations upon government. *Groh*, slip op. at 11, n.6 . These claims echo some of the contentions raised by the District of Columbia, the MPD and their decision and policy makers.

The evident fallacy in such arguments is that there is no societal interest in immunizing violations of clearly established constitutional rights. These arguments were rejected outright by the Supreme Court.

“[Groh] mischaracterizes the [lower court’s] decision [rejecting qualified immunity] when he contends that it imposed a novel proofreading requirement on officers executing warrants. The court held that officers leading a search team must ‘Mak[e] sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct.’ That is not a duty to proofread; *it is, rather, a duty to ensure that the warrant conforms to constitutional requirements.*” *Groh*, slip op. at 11, n. 6 (emphasis added) (citations omitted).

Likewise, the *Barham* plaintiffs seek to impose no greater obligation upon the involved command and policy officials to make sure- - before they surround and arrest hundreds of political dissenters and onlookers - - that they are not violating those persons’ constitutional rights and, in the case of the Mayor, to make sure that he is not ratifying, participating in, or continuing unconstitutional police misconduct.

The *Groh* Court found that, given the availability of the relevant information (i.e., the face of the warrant itself), it was objectively unreasonable for Groh to have carried out the search.

“No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively

unconstitutional.” Groh at 13, citing Payton v. New York, 445 U.S. 573, 586-588. In the Barham case, it is also fair to state that the unconstitutionality of warrantless arrests in the absent of probable cause is equally well established. See, e.g., Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977).

The Groh Court further took into consideration that internal police guidelines placed Groh on notice that he might be liable for executing a manifestly invalid warrant. Groh, slip op. at 12. The existence of such policies is not a matter of constitutional magnitude, standing alone, but serves to underscore that, especially given such notice, it is not offensive either to constitutional norms or sensibilities about fairness to impose financial liability.

In Barham, internal MPD training and guidelines likewise place officers on notice as to the exacting procedures and standards to be followed in the conduct of mass arrests of political assemblages, see, e.g., MPD Manual for Mass Demonstrations and Responding to Civil Disturbances, and on notice that officers or officials may liability in connection with an unlawful arrest in the absence of probable cause.<sup>2</sup>

The Groh Court took into consideration, and rejected, the argument that immunity was necessary to avoid impeding effective law enforcement. The Court expressly considered the argument that the difficulty and importance of a law enforcement agent’s duty, and the “heat of

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<sup>2</sup> Plaintiffs have not yet received documentary production from the District. Plaintiffs possess portions of the MPD training material for use of force, which provides that “Liability of law enforcement officers, civil and criminal, may at anytime throughout an officer’s career be an issue of concern.” MPD training does not restrict itself to merely the liability that may attach for directly engaging in unconstitutional violations, but even places officers on notice that *derivative* or bystander liability may attach for failing to prevent another officer’s unconstitutional conduct. A specifically identified constitutional violation in this training is “Unlawful arrest - when there is no probable cause.” See attached excerpts, MPD Lesson Plan for Use of Force, September 14, 2000.

an ongoing and often dangerous” situation might justify sufficient latitude to afford the officer immunity for his constitutional violations. Groh, slip op. at 14, n.9. Noting the absence of exigency under the facts of Groh, the Supreme Court found that “This is not the situation, therefore, in which we have recognized that ‘officers in the dangerous and difficult process of making arrests and executing search warrants require ‘some latitude.’” Groh at 14, n.9, citing, Maryland v. Garrison, 480 U.S. 79, 87 (1987); See also Maryland v. Garrison, 480 U.S. 79, 86 n.11 (1987), quoting Brinegar v. United States, 338 U.S. 160, 167 (1940) (“[acceptable] mistakes must be those of reasonable men, acting of facts leading sensibly to their conclusion of probability”).

For the reasons asserted in plaintiffs’ opposition, it was objectively unreasonable under the circumstances of the Barham case, for the defendants to have acted as they did based on the information then reported and observed.

As Groh reflects, and as should be applied in Barham, where an official fails to abide by (or, as in the Barham case, acts in defiance of) clearly established constitutional requirements protecting the civil rights of the public, that official cannot seek refuge from accountability by successfully invoking qualified immunity for such misconduct.

Under the facts of Barham, the defendants could not have maintained an objectively reasonable belief that there existed probable cause to mass arrest as a group the hundreds of political dissenters, onlookers and bystanders as was intentionally committed on September 27, 2002.

Respectfully submitted,

March 18, 2004

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**LESSON PLAN**

<b>SUBJECT:</b>	Use of Force / Use of Force Model
<b>PROGRAM:</b>	Recruit / Lateral and In-Service
<b>TIME:</b>	Two Hours
<b>PREPARED BY:</b>	Lieutenant David K. Kamperin
<b>DATE PREPARED:</b>	September 14, 2000
<b>METHOD OF INSTRUCTION:</b>	Lecture and Practical
<b>TRAINING AIDS:</b>	Transparency/Overheads and PowerPoint
<b>EQUIPMENT:</b>	Lap top computer/In-Focus
<b>STUDENT HANDOUTS:</b>	Quiz and Use of Force Handbook
<b>SKILLS LAB:</b>	Practical Knowledge Exercise

**SCOPE OF INSTRUCTION:**

The scope of this level is to educate members of the Metropolitan Police Department in the laws, policies and procedures relative to the proper use of force and the Use of Force Model. This will enhance the understanding of force options and legal consequences that members of the Metropolitan Police Department will be held responsible for.

**INSTRUCTIONAL OBJECTIVES:**

At the conclusion of this block of instruction, the members will be familiar with and have a practical understanding of the laws, policies and procedures relative to the use of force and the Use of Force Model

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Time (Elapsed) Actual	Use of Force / Use of Force Model	Instructor's Notes
	<p>3. <u>Survival Shadow</u></p> <p>The officer assessment and selection arrows are bordered with a red line to indicate that the officer is in a high-risk occupation. The officer must constantly be reminded that imminent danger causing death and/or serious bodily injury may occur at any time.</p> <p><u>IV. Bystander Liability</u></p> <p>Liability of law enforcement officers, civil and criminal, may at anytime throughout an officer's career be an issue of concern. One type of liability is what is called "bystander liability."</p> <p>An officer may be held civilly or criminally liable for standing by and failing to intervene in a violation of clearly established constitutional rights.</p> <p>1. Defined</p> <p>Civil or criminal liability which falls upon the law enforcement officer who knowingly witnesses or has knowledge of a clear violation of constitutional rights but fails to intervene to stop it.</p> <p>2. Types of Constitutional Rights Violations</p> <p>a. Compelled Confession-the use of force to extract a confession.</p> <p>b. Warrantless Search-when the officer know or should have known a warrant is required.</p> <p>c. Unlawful Arrest-when there is no probable cause</p> <p>d. Excessive use of force-the officer knows or should have known there is no necessity for the level of force used.</p>	<p>&lt;&lt;&lt;Standard&gt;&gt;&gt; objective reasonableness</p>

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Time (Elapsed) Actual	Use of Force / Use of Force Model	Instructor's Notes
	<p>Any of the above examples may result in civil or criminal liability, even if you the officer did not physically participate, but stood by and did nothing to stop the clear violation of a constitutional right.</p> <p>2. Legal Theory</p> <p>The main legal theory of bystander liability are conspiracy and duty, including the duty to keep a person in custody free from harm.</p> <p>a. Conspiracy</p> <p>Courts have ruled acquiescence can amount to a conspiracy agreement when one officer watches as an open breach of the law exists and does nothing to seek its prevention.</p> <p>b. Duty</p> <p>There is a duty borne by police associated with the protection of constitutional rights, which is well established in case law.</p> <p>3. Court Decisions</p> <p><u>Byrd v. Brishkie, 446 F. 2d (1972)</u></p> <p>A police officer who to intervene to prevent a constitutional violation by other police officers may also be personally liable for civil damages. The court held that both supervisory and non-supervisory officers who were present during the unconstitutional acts could be held liable.</p> <p><u>U.S. v. Reese, 2F. 3d 870 (1993)</u></p> <p>The Ninth Circuit held that a police sergeant who stood by and failed to prevent other officers from</p>	<p>DUTY-</p> <p>Recognized during the 1950s and 1960s desegregation cases-14<sup>th</sup> Amendment requires public officials to exercise their duty to preserve law and order and to provide for the personal safety of individuals.</p>

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Time (Elapsed) Actual	Use of Force / Use of Force Model	Instructor's Notes
	<p>beating suspects may be convicted of criminal civil rights violations.</p> <p><b><u>U.S. v. Koon 34 F. 3d 1416 (1994)</u></b></p> <p>As a result of the Rodney King incident the court said, "...a person in official custody has a right to be free from harm inflicted by a third person, and...an official who willfully subjects a custodial subject to a deprivation of that right is subject to criminal liability."</p> <p>Police officers have a <b>duty</b> to intercede when their fellow officers violate the constitutional rights of a suspect or other citizens.</p> <p>Courts have recognized that intervening to stop the constitutional violation may be a defense to both civil and criminal liability if a realistic opportunity to prevent the violation exists.</p> <p><b><u>V Reporting Requirements</u></b></p> <p>Any member who uses a force option above the level of contact controls shall report the incident to his / her supervisor. Additionally, members shall report the incident and the circumstances surrounding the use of force on the Use of Force Incident Report.</p> <p>Members shall ensure that proper medical attention is rendered to the subject as soon as possible when force is used that causes an injury, or in the case of OC Spray when flushing the affected area with water does not relieve the subject.</p>	<p>Note:</p> <p>Here the court is saying the official willfully allowed or permitted, rather than merely standing by...</p> <p>How important is the "code of silence"-is it worth the loss of your job, possessions, family, and/or freedom?</p> <p>Any level where force is used that causes pain, injury or death to the subject. This includes force levels within the Compliance Techniques, Defensive Tactics, and Deadly Force. It includes, among other things – OC Spray, Personal Weapons (hands, feet, etc) Impact Weapons, K-9, Firearm.</p>

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