

No. 02-1238, Criminal

In the United States Court of Appeals for the Eighth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

DALE ROBERT BACH,

Appellee.

On Appeal from the United States District Court for the District of Minnesota

Response of *Amicus Curiae* Electronic Privacy Information Center
to Appellee's, Dale Robert Bach's, Petition for Rehearing En Banc

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TABLE OF CONTENTS

| | |
|-------------------------------------|----|
| TABLE OF CONTENTS..... | i |
| TABLE OF AUTHORITIES..... | ii |
| STATEMENT OF THE AMICUS CURIAE..... | 1 |
| SUMMARY OF THE ARGUMENT..... | 1 |
| ARGUMENT..... | 1 |
| CONCLUSION..... | 9 |

TABLE OF AUTHORITIES
CASES

Bach v. U.S., 2001 U.S. Dist. LEXIS 21853 *9 (D. Minn. 2001).....2, 4, 7, 9

Boyd v. U.S., 116 U.S. 616 (1886).....5, 6

Commonwealth v. Sbordone, 424 Mass. 802, 678 N.E.2d 1184
(Mass. 1997).....3

Gouled v. U.S., 255 U.S. 298, 304 (1921)6

Harris v. State, 260 Ga. 860, 401 S.E.2d 263 (Ga. 1991).....2, 4

Morris v. State, 622 So. 2d 67 (Fla. Dist. Ct. App. 1993).....3, 7

People v. Boyd, 123 Misc. 2d 634 474 N.Y.S.2d 661
(N.Y. Sup. Ct. 1984).....3, 4

State v. Kern, 81 Wash. App. 308, 914 P.2d 114 (Wash. App. 1996).....4

Schalk v. State, 767 S.W.2d 441 (Tex. App. 1988).....2, 5

State v. Ricci, 472 A.2d 291 (R.I. 1984)4

State v. Wade, 544 So. 2d 1028 (Fla. Ct. App. 1989).....3

U.S. v. Bach, 2002 U.S. App. LEXIS 23726 (8th Cir. Nov. 18, 2002).....2

U.S. v. Clouston, 623 F.2d 485 (6th Cir. 1980).....4

U.S. v. Robertson, 21 F.3d 1030 (10th Cir. 1994).....4

Weeks v. U.S., 232 U.S. 383 (1914)6

STATUTES

18 U.S.C. § 2703(e) (2002).....7

18 U.S.C. § 3105 (2002).....4

SUMMARY OF THE ARGUMENT

The opinion in U.S. v. Bach, 2002 U.S. App. LEXIS 23726 (8th Cir. Nov. 18, 2002) entirely fails to account for the fact that the justification for having a search performed by someone other than a police officer is distinct from and does not merit removing the requirement that an officer be present to serve the warrant. The procedural requirement that an officer be present to serve a warrant, established by statute and upheld by the district court, is necessary to prevent encroachment upon well-established Constitutional protections. The opinion of the Eighth Circuit panel essentially creates a regime in which a police officer presence has been eliminated from the warrant process, in which an individual's privacy can be invaded simply by turning on a fax machine.

ARGUMENT

I. The Court's Opinion Failed To Distinguish Between "Service" and "Execution" of a Warrant

A. The Justification for Civilian Execution of a Search Warrant Does Warrant Eliminating Officer Service Requirement

The prior opinion fails to distinguish between an officer's presence at the service of a warrant, and an officer's presence at the execution of that warrant. While it may be true that, in some limited circumstances, civilian

searches are more reasonable than searches by law enforcement officers, U.S. v. Bach, 2002 U.S. App. LEXIS 23726 *9 (8th Cir. Nov. 18, 2002), the justification for this exception does not extend to abrogation of the requirement of an officer's presence at the service of the warrant. This Court should accept the petition for rehearing en banc in order to affirm the district court's conclusion that "[t]he circumstances of this case, ... do not justify [the officer's] choice to fax the warrant to Yahoo and allow Yahoo employees to conduct the search and seizure without any supervision or instruction." Bach v. U.S., 2001 U.S. Dist. LEXIS 21853 *9 (D. Minn. 2001).

The justifications for having an expert execute the search in certain circumstances are that the search requires special skills that the officer does not possess, or the operation of dangerous equipment that the officer is not trained to use. Such is the case in all the cases cited by the Eighth Circuit's panel in support of the proposition that "civilian searches are sometimes more reasonable than searches by lawyers." Bach, 2002 U.S. App. LEXIS 23726, *9, citing to Harris v. State, 260 Ga. 860, 401 S.E.2d 263, 266 (Ga. 1991) (Where search of dental records requires "utilizing equipment and procedures requiring expert skill and having a high potential for harm to the person being searched," search may be executed by dentist); Schalk v. State,

767 S.W.2d 441, 453-54 (Tex. App. 1988) (where officer lacks requisite expertise and skill to differentiate a trade secret from a legitimate software program, search may be executed by civilian software expert); State v. Wade, 544 So. 2d 1028, 1030 (Fla. Ct. App. 1989) ("were [the police] not allowed to utilize the assistance of experts to identify such property, then it would simply be impossible for law enforcement officers to execute a search warrant for the seizure of computer equipment and parts."). In exceptional circumstances, a civilian's expertise might make a search performed by him less intrusive than the same search performed by untrained law enforcement officials—for example, an expert trained to search a particular computer system will be able to more accurately target the files that should be searched pursuant to a particular warrant. See Commonwealth v. Sbordone, 424 Mass. 802, 678 N.E.2d 1184, 1190 (Mass. 1997) ("Permitting knowledgeable or expert civilians to participate in executing a warrant minimizes the intrusiveness of the search."); People v. Boyd, 123 Misc. 2d 634, 638, 474 N.Y.S.2d 661 (N.Y. Sup. Ct. 1984).

However, the fact that an expert civilian performs the search is distinct from the presence of the officer at the service of the warrant: "Assistance is one thing, displacement quite another." Morris v. State, 622 So. 2d 67, 69 (Fla. Dist. Ct. App. 1993). For example, in State v. Kern, in approving a search

of bank records performed by bank employees where the officer was not trained or qualified to search the records himself, the court held that "[the officer] did participate in the search in that he appeared at the bank, spoke with bank personnel, and required them to provide him with the records specified in the search warrant. In so doing, [he] specifically informed bank personnel of the exact scope of the search and initiated the bank's procedures." 81 Wash. App. 308, 914 P.2d 114, 118 (Wash. App. 1996); See also Harris, 401 S.E.2d at 863 (warrant served by officer and executed by dentist).

As the district court recognized, although most jurisdictions permit some amount of civilian involvement in the execution of search warrants, never has civilian involvement in the service and execution of a search warrant been raised to such a level as to entirely eliminate official involvement in the process. Bach, 2001 U.S. Dist. LEXIS 21853, *8-9; See, e.g., 18 U.S.C. § 3105 (2002); U.S. v. Robertson, 21 F.3d 1030, 1032-1034 (10th Cir. 1994); U.S. v. Clouston, 623 F.2d 485, 486 (6th Cir. 1980); Harris, 260 Ga. 860; State v. Ricci, 472 A.2d 291, 298 (R.I. 1984) (crime victim allowed to be present during search to confirm identity of stolen property); Boyd, 123 Misc. 2d at 638 (use of corroboration witness to identify stolen property provided "augmented assurance that the warrant

would not be executed with excess"); Schalk, 767 S.W.2d at 454. However, this is exactly the result that has been reached by the Eighth Circuit's panel. By permitting law enforcement officers to serve a warrant by fax for a search that is subsequently executed by a civilian, the Court has effectively removed law enforcement presence from the equation.

B. Protection of Constitutional Safeguards Warrants Officer Service Requirement

EPIC's amicus brief in this matter, filed before this court on July 26, 2002, lays out the historical, Constitutional, and statutory justifications for the procedural requirement that an officer be present to serve a warrant, even where that warrant is to be executed by a civilian party. Brief of Amicus Curiae Electronic Privacy Information Center in Support of Appellee, Dale Robert Bach, Urging Affirmance (EPIC's Amicus Brief). Amicus incorporates by reference this previous submission, and in particular urges this Court to recall EPIC's historical argument, summarized below, which sets forth the traditional justifications for the procedural requirement of an officer's presence at the service of a warrant. See EPIC's Amicus Brief, at 2-9.

Since the 1700s, United States law has required an officer's presence during the service of a search warrant. See Boyd v. U.S., 116 U.S. 616, 624 (1886). The Fourth Amendment was adopted as a procedural safeguard

against abuse of governmental authority. Weeks v. U.S., 232 U.S. 383, 391 (1914). The Supreme Court has recognized that relaxing such well-established procedures could lead to "gradual depreciation of the rights secured by [the Fourth Amendment] by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." Gouled v. U.S., 255 U.S. 298, 304 (1921).

This court should recognize the importance of strict adherence to procedural safeguards, because "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing ... by silent approaches and slight deviations from legal modes of procedure." Boyd, 116 U.S. at 633 (emphasis added). Therefore, "[i]t is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon." Id. Procedural formalities are critical in preserving our privacy—especially in a rapidly developing technological age—in order to maintain cherished values of humanity and civil liberty.

The fact that, in certain circumstances, it may be reasonable to have a search assisted or performed by a civilian has no bearing upon the formality—in place to safeguard citizens from unreasonable searches and seizures—of having an officer present at the service of that warrant. This

requirement serves to remind the officer, as well as the civilian, that the search must be conducted according to Constitutional principles. An officer, by virtue of his or her vocation, has knowledge and experience regarding the legality of the scope of a search that a civilian aiding in the search does not, even if the civilian is an expert in the technical methods by which the search is conducted. The district court properly recognized that unlike civilians, police officers are uniquely trained to safeguard Constitutional rights: "Police officers have taken an oath to uphold federal and state Constitutions and are trained to conduct a search lawfully and in accordance with the provisions of a warrant." Bach, 2001 U.S. Dist. LEXIS 21853 *9. "This oath is of no small moment as a protection to our citizens": Officer presence at the service of the warrant serves to bring the severity of the procedure to the attention of the civilian performing the search. Morris, 622 So. 2d at 69; Sbordone, 424 Mass. at 808-9.

In addition, as explained in EPIC's amicus, law enforcement officers faced civil penalties for the improper seizure of evidence while civilians conducting searches are not. EPIC's Amicus Brief, at 15-17. Furthermore, ISPs are specifically exempted from liability under 18 U.S.C. § 2703(e). Id. at 14-17. The district court correctly recognized the danger that this immunity poses to Fourth Amendment protections:

Without an officer present, this conditional grant of immunity may become an irrefutable protection for internet service providers to conduct searches that traverse the clearly defined limits of a warrant. In the particular context of this case, there were no safeguards ensuring that the Yahoo employees conducting the search and seizure of information in Bach's e-mail account were cautiously abiding by the terms of the Ramsey County warrant.

U.S. v. Bach, 2001 U.S. Dist. LEXIS 21853 *9. Because an e-mail provider is immune from liability stemming from its cooperation with a warranted search, it is imperative to foster accountability by preserving the formalities associated with service of a search warrant.

The application of Fourth Amendment protection to privacy interests in digital environments raises important questions concerning the procedural service of a valid search warrant. As the legal system responds to advances in technology the law must protect Fourth Amendment guarantees by ensuring that searches are conducted in a manner conducive to the protection of Constitutional rights. If the government seeks to search an individual's property, it must ensure the presence of a law enforcement officer to personally serve the warrant in order to preserve of Fourth Amendment privacy rights.

CONCLUSION

Although in limited circumstances, civilian searches may be more reasonable than searches by law enforcement officers, the justification for this exception does not extend to an abrogation of the requirement of an officer's presence at the service of the warrant. The opinion in U.S. v. Bach, 2002 U.S. App. LEXIS 23726 (8th Cir. Nov. 18, 2002) fails to account for the historical, constitutional, and statutory justifications for the procedural requirement that an officer be present to serve a warrant; particularly that such formalities are required to prevent unintentional encroachment upon Constitutional protections. For this reason, and those stated within EPIC's amicus, this Court should accept the petitioner's petition for en banc rehearing.