No. 19-13704-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RASHID TURNER
APPELLANT,
v.
UNITED STATES OF AMERICA
APPELLEE.

On Appeal from the United States District Court
for the Middle District of Florida
8:18-cr-00080-WFJ-JSS

PROPOSED BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ALABAMA, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AND AMERICAN CIVIL LIBERTIES UNION OF GEORGIA IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, *amici curiae* American Civil Liberties Union, American Civil Liberties Union of Alabama, American Civil Liberties Union of Florida, and American Civil Liberties Union of Georgia state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, 28-1, and 29-2, *amici* also certify that, in addition to the persons and entities named in the parties' certificates of interested persons, the following individuals or entities have an interest in the outcome of this case:

Entities:

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American Civil Liberties Union of Alabama (*Amicus curiae*)

American Civil Liberties Union of Florida (*Amicus curiae*)

American Civil Liberties Union of Georgia (*Amicus curiae*)

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CIRCUIT RULE 35 STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this court: *United States v. Leon*, 468 U.S. 897 (1984); *United States v. Davis*, 598 F.3d 1259, 1265 (11th Cir. 2010), *aff'd*, 564 U.S. 229 (2011); and their progeny.

Additionally, I express a belief, based on a reasoned and studied professional judgment, that this case involves a question of exceptional importance: Does the good-faith exception apply where an officer searches a phone without a warrant, purportedly justified by a warrant application that he drafted himself and failed to present to a judge?

Dated: November 3, 2022

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Does the good-faith exception apply where an officer conducts a warrantless search, purportedly justified by a warrant application that he drafted himself but failed to present to a judge?

STATEMENT OF FACTS

Amici agree with Appellant's statement of facts, *see* Appellant's Petition for Rehearing at 8–9.

STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization dedicated to defending the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Alabama, the ACLU of Florida, and the ACLU of Georgia are state affiliates of the national ACLU. The protection of privacy as guaranteed by the Fourth Amendment, and the preservation of longstanding remedies for violations of that guarantee, are of special concern to each organization.

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), counsel for *amici curiae* certifies that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

SUMMARY OF ARGUMENT

A panel of this Court erroneously permitted the use of evidence obtained pursuant to law enforcement's warrantless search in this case by expanding the good-faith exception to the exclusionary rule, in defiance of Supreme Court precedent limiting "good faith" to an officer's objectively reasonable reliance on facially valid authority. Suppression here is necessary to avoid radically expanding the good-faith exception, to deter police from treating judicial authorization of warrant applications as an optional formality, and to ensure law enforcement officers do not become "the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *See United States v. U.S. District Court* (*Keith*), 407 U.S. 297, 317 (1972). Because the panel opinion contradicts binding precedent and raises issues of exceptional importance, this case merits en banc review.

ARGUMENT

I. The Good-Faith Exception Applies Only Where an Officer Reasonably Relies on an External Source of Authority.

The panel's opinion, *United States v. Turner*, No. 19-13704, 2022 WL 4137756 (11th Cir. Sept. 13, 2022) (hereinafter "Op."), expands the scope of the good-faith exception in unprecedented ways that have grave consequences for Fourth Amendment rights in this Circuit.

Evidence obtained in violation of the Fourth Amendment is presumptively suppressed. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961). However, the Supreme Court

has created an exception where police rely in "good faith" on a judicially authorized, facially valid warrant that is later determined to be defective. *United States v. Leon*, 468 U.S. 897, 920–21 (1984). To establish good faith, an officer must have "reasonable grounds" to believe that a magistrate made a probable cause determination and "properly issued" the warrant. *Id.* at 922–23. The rule recognizes that "[i]t is the *magistrate's* responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Id.* at 921 (emphasis added). Thus, when an officer conducts a search relying on a warrant with hidden defects, "[t]he error . . . rests with the issuing magistrate, not the police officer." *Davis v. United States*, 564 U.S. 229, 239 (2011). Suppression in such circumstances is not required because "'punish[ing] the errors of judges' is not the office of the exclusionary rule." *Id.* (quoting *Leon*, 468 U.S. at 916).

In contrast, if a warrant is "obviously deficient," a search relying on it is regarded as warrantless and presumptively unreasonable. *Groh v. Ramirez*, 540 U.S. 551, 558–59 (2004). In *Groh*, the Court held that an officer could not reasonably rely on a warrant that contained "a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." *Id.* at 564. There, the warrant plainly violated the Fourth Amendment's particularity requirement, and because the officer "himself prepared the [obviously] invalid warrant," he could not argue that

he "reasonably relied on the Magistrate's assurance" of its validity. *Id.* Surely, then, an officer cannot claim good-faith reliance on an unsigned warrant application where he failed to seek any prior assurance from a magistrate that the proposed search was constitutional.

While the Supreme Court has applied the good-faith exception outside the warrant context, it has always required objectively reasonable reliance on facially valid *external* authority. *See Illinois v. Krull*, 480 U.S. 340 (1987) (statutes valid at the time of search but later invalidated); *Davis*, 564 U.S. at 241 (binding appellate precedent later overturned). As in *Leon*, these cases were grounded in the "absence of police culpability" and lack of deterrent value in suppression when officers reasonably rely on authorization from the legislature or judiciary. *See id.* at 240; *Krull*, 480 U.S. at 350. For similar reasons, the Court has applied the good-faith exception to officers' objectively reasonable reliance on the accuracy of computer records showing outstanding warrants that were later discovered to be inaccurate due to clerical employees' negligence in updating them. *See Arizona v. Evans*, 514 U.S. 1, 4 (1995); *Herring v. United States*, 555 U.S. 135, 137 (2009).

In each of these "good faith" cases, officers reasonably relied on *someone else's* authorization. "[T]he good-faith exception does not apply when officers rely on their own prior conduct." *United States v. Bagley*, 877 F.3d 1151, 1156 (10th Cir. 2017). The "good faith" exception does not apply whenever police subjectively

believe they are authorized to lawfully conduct a search. *See, e.g.*, *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003) (declining to extend the good-faith exception "to excuse [an unconstitutional search] based on an officer's mistake of law"); *United States v. Cos*, 498 F.3d 1115, 1132 (10th Cir. 2007) (good-faith exception did not apply where officers entered an apartment based on "their mistaken belief" that the person who answered the door had authority to consent to a search). Indeed, the Supreme Court could not have been clearer in its pronouncement that "the [good-faith] standard does not turn on the subjective good faith of individual officers." *Krull*, 480 U.S. at 355.

Instead, *Leon* and subsequent good-faith cases contemplate only "*objectively reasonable* police reliance on" a search warrant or other *external* source of authority—as this Court has already held. *United States v. Davis*, 598 F.3d 1259, 1265 (11th Cir. 2010), *aff'd*, 564 U.S. 229 (2011) (emphasis added). This objective standard "requires officers to have a reasonable knowledge of what the law prohibits." *Leon*, 468 U.S. at 919 n. 20; *Chanthasouxat*, 342 F.3d at 1280.

In this case, the panel's formulation of the good-faith exception—that "evidence should not be suppressed where it was obtained by law enforcement who act on a good-faith belief that their conduct does not violate the Fourth Amendment," Op. *3—directly conflicts with these precedents, and would allow any officer to disregard the warrant requirement (or other bedrock search and seizure limitations),

characterize these violations as innocent errors, and introduce evidence obtained through a warrantless (or otherwise unconstitutional) search. Here, Detective Breedlove, alone, was responsible for obtaining a warrant from a judge. He failed to do so. In applying the good-faith doctrine to this error and thereby excusing it, the panel radically extended the reasoning that justifies the good-faith exception in a manner incompatible with binding precedent.

II. A Warrant Application Cannot Constitute the External Authority Required to Invoke the Good-Faith Doctrine.

A warrant application is simply not a warrant. It is a *request* for external authorization—not such authorization itself. "[T]he very heart of the Fourth Amendment directive" is that a search requires "*both* the efforts of the officer to gather evidence . . . and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Keith*, 407 U.S. at 316 (emphasis added). "Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *Id.* at 318. This is because "our basic constitutional doctrine" holds that "individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *Id.* at 317.

Thus, "[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police . . . so that an objective mind might weigh the need to invade that privacy in order to enforce the law."

McDonald v. United States, 335 U.S. 451, 455 (1948). "This separate review by a member of the judiciary" is crucial for "protect[ing] us from the sometimes 'hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime' and serves as 'a more reliable safeguard against improper searches.'" *United States v. Martin*, 297 F.3d 1308, 1316 (11th Cir. 2002) (quoting *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979)).

The panel excused Detective Breedlove's violation of the warrant process because he eventually—*after* conducting the search—presented his warrant application to a judge, who purported to retroactively approve it. Op. *3. But presenting a warrant application to a judge *after* a search makes a mockery of the Fourth Amendment, because it does not allow the judge to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Leon*, 468 U.S. at 914 (quoting *Aguilar v. Texas*, 378 U.S. 108, 111 (1964)). Judges can only "check the 'well-intentioned but mistakenly over-zealous, executive officers' who are a part of any system of law enforcement," *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (footnote omitted), if officers must seek a warrant *before* conducting a search. "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity[.]" *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Absent an emergency that makes obtaining a warrant impractical, *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978), a post hoc warrant approval cannot remedy an officer's failure to obtain a warrant for two reasons. First, without a warrant signed by an independent magistrate, *nothing at all* exists to guide the officer's discretion in conducting the search apart from his own judgment. *See Coolidge*, 403 U.S. at 467 (requirement that warrants particularly describe the scope of the permissible search protects individuals from general, exploratory searches). Second, an unwarranted search cannot "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." *United States v. Chadwick*, 433 U.S. 1, 9 (1977). Both Fourth Amendment interests would be diminished by applying the good-faith exception to a search conducted in the absence of any warrant whatsoever.

III. Application of the Exclusionary Rule is Necessary to Deter Police Misconduct and Incentivize Adherence to Bedrock Fourth Amendment Rules.

The panel held that "the Fourth Amendment exclusionary rule [did not] require[] any further activity to incent[ivize] these police officers who know quite well how to conduct themselves." Op. *3 (first two alterations in original). But Detective Breedlove's failure to follow the most fundamental Fourth Amendment rule—get a warrant—is evidence that application of the exclusionary rule here *is*

necessary to "effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Krull*, 480 U.S. at 347 (citation omitted).

In developing the good-faith exception, the Supreme Court has been careful not to "jeopardiz[e] [the exclusionary rule's] ability to perform its intended functions," *Leon*, 468 U.S. at 905, namely "to deter police misconduct," *id.* at 916. And this Court "ha[s] not forgotten the importance of the 'incentive to err on the side of constitutional behavior,'" when it comes to the exclusionary rule. *Davis*, 598 F.3d at 1266. Suppressing evidence in this case would result in "appreciable deterrence" of unconstitutional searches, *see Leon*, 468 U.S. at 909, by reminding officers that, absent an emergency, "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy" of an individual, *McDonald*, 335 U.S. at 455–56. And here, the privacy violation inherent in searching a cell phone is considerable. *See Riley v. California*, 573 U.S. 373, 403 (2014) (explaining that cell phones contain our "privacies of life").

Detective Breedlove apparently did not realize he had never sought a search warrant until another officer—from a different office—later asked for a copy. Detective Breedlove did not seek a warrant after getting internal approval for his draft, nor did Breedlove or Power refer to a warrant while extracting or searching the data. Suppression is necessary to deter officers like Breedlove, and their departments, from conducting searches without systems to remind officers of the

Fourth Amendment's requirements and ensure they follow them. A simple checklist of the steps required before commencing a search, including getting a warrant and referring to it while conducting a search, could prevent the type of "reckless, or grossly negligent conduct," *Herring*, 555 U.S. at 144, that occurred here.

As Appellant argues, extending the good-faith exception to the conduct in this case would have the opposite effect, sending the message to officers and their departments that there is no reason to implement systems to ensure compliance with constitutional requirements. Appellant's Pet. for Reh'g 11–12. It is imperative that this Court rehear the case to ensure that officers are incentivized to comply with Fourth Amendment requirements, and deterred from relying on their own draft warrants as if they are equivalent to warrants issued by independent magistrates.

IV. Unpublished Opinions Affect the Development of Caselaw in this Court and Others, Despite Being Nonbinding.

Even as an unpublished decision, the panel's improper application of the good-faith exception will have a palpable effect on the development of Eleventh Circuit caselaw. Lower courts can, and do, rely on unpublished decisions when rendering their own rulings. *E.g.*, *United States v. Riley*, 706 F. App'x 956, 964 (11th Cir. 2017) (upholding district court's reliance on unpublished decisions in evidentiary rulings); Fed. R. App. P. 32.1 ("A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been . . . designated as 'unpublished.'").

For example, in *Lait v. Medical Data Systems, Inc.*, the district court adopted the "least sophisticated consumer" standard from an unpublished Eleventh Circuit opinion in the absence of binding authority. No. 1:17-CV-378-WKW, 2018 WL 1990513, at *3 (M.D. Ala. Apr. 26, 2018), *aff'd,* 755 F. App'x 913 (11th Cir. 2018). And in another recent decision, the district court relied on an unpublished Eleventh Circuit opinion with a similar fact pattern to rule on a suppression motion. *United States v. Ellis*, No. 19-20400-CR, 2019 WL 5790118, at *6 (S.D. Fla. Oct. 15, 2019).

Perhaps recognizing this reality, this Court has previously granted en banc review of unpublished panel decisions. *Pye v. Warden, Geor. Diagnostic Prison*, 50 F.4th 1025 (11th Cir. 2022); *Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021). The Supreme Court has also granted certiorari to review unpublished decisions from the Eleventh Circuit. *See, e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405 (2021); *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538 (2010). Consistent with these grants, the Court should grant en banc review here.

CONCLUSION

For these reasons, this Court should grant the petition for rehearing.

Dated: November 3, 2022 Respectfully submitted,

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[2] Counsel thank ACLU law-graduate fellow Kimberly Saltz for her assistance in preparing this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief complies with the type-volume limitation, typeface requirements, and type style requirements of Fed. R. App. P. 32(a) because it contains 2,551 words and has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using the word-processing system Microsoft Word 2019.

Dated: November 3, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

Dated: November 3, 2022

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