No. _____

In the
Supreme Court of the United States

RASHID TURNER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether good faith should apply when law enforcement agency has a policy, written or unwritten, where the officer who conducts a search of a cell phone is not provided a copy of a judicially authorized warrant before searching a cell phone.

Whether the Double Jeopardy Clause is violated when a defendant is convicted under both the Hobbs Act and the Federal Bank Robbery Act for the same incident.

LIST OF PROCEEDINGS

1. *United States v. Rashid Turner*, Case No. 8:18-cr-00080, United States District Court for the Middle District of Florida; judgment entered September 13, 2019;

2. *Rashid Turner v. United States*, Case No. 19-13704; United States Court of Appeals for the Eleventh Circuit; Petition for Rehearing En Banc denied December 21, 2022; judgment entered December 29, 2022;

3. *Rashid Turner v. United States*, Case No. _____ ; United States Supreme Court; _____

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Rashid Turner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's initial opinion was unpublished and was issued on September 13, 2022. Turner filed a petition for panel rehearing on October 27, 2022. The Eleventh Circuit denied rehearing in an order issued on December 21, 2022.

JURISDICTION

The Eleventh Circuit denied rehearing on December 21, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The United States District Court for the Middle District of Florida had original jurisdiction of this federal criminal case pursuant to 18 U.S.C. §3231.

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

United States Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

RELEVANT STATUTORY PROVISIONS

Section 1951(a) of Title 18 provides:

> **(a)** Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Section 924 (c)(1)(A) of Title 18 provides:

> **(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

Section 2113 (a) of Title 18 provides:

> **(a)** Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

STATEMENT OF THE CASE

1. On July 18, 2018, the Grand Jury indicted Turner along with two codefendants, Petrie Addison and Zachary Gloster for allegedly conspiring with other persons to affect commerce by robbery "by unlawfully taking and obtaining property belonging to Family Dollar, Dollar General, Wells Fargo Bank, and Seacoast Bank businesses…against their will by means of actual and threatened force, physical violence, and fear of injury, immediate and future, to their persons." See Superseding Indictment, Doc. 37, pages 2 – 3.

2. The Superseding Indictment alleged that Addison and Turner obstructed, delayed, and affected commerce by robbery of property belonging to Family Dollar on "or about August 27, 2017, in the Middle District of Florida…" The Superseding Indictment also alleged that the robbery included the use of "actual and threatened force, physical violence, and fear of injury, immediate and future, to his or her person" in violation of 18 §§ U.S.C. 1951 (a) and (2). Superseding Indictment, Doc. 37, page 3.

3. The Superseding Indictment alleged that Addison and Turner obstructed, delayed, and affected commerce by robbery of property belonging to Dollar General on "or about October 28, 2017, in the Middle District of Florida…" The Superseding Indictment also alleged that the robbery included the use of "actual and threatened force physical violence, and fear of injury, immediate and future, to his or her person" in violation of 18 §§ U.S.C. 1951 (a) and (2). Superseding Indictment, Doc. 37, page 4.

4. The Superseding Indictment alleged that on "or about October 28, 2017, in the Middle District of Florida", Addison and Turner used, carried, and brandished a firearm during and in relation to a violation of 18 U.S.C. §1951, a crime of violence, and did possess a firearm in furtherance of such crime in violation of 18 U.S.C. §§ 924 (c)(1)(A)(ii) and 2. See Superseding Indictment, Doc. 37, page 5

5. The Superseding Indictment alleged that Addison and Turner obstructed, delayed, and affected commerce by robbery of property belonging to Wells Fargo Bank on "or about November 18, 2017, in the Middle District of Florida…" The Superseding Indictment also alleged that the robbery included the use of "actual and threatened force physical violence, and fear of injury, immediate and future, to his or her person" in violation of 18 §§ U.S.C. 1951 (a) and (2). See Superseding Indictment, Doc. 37, pages 5-6.

6. The Superseding Indictment alleged that on or about November 18, 2017, Addison and Turner took "from the person and presence of bank employees, by force and intimidation, certain property and money, that is, United States currency in the approximate amount of $21,745" belonging to Wells Fargo Bank, which is "insured by the Federal Deposit Insurance Corporation", in violation of 18 U.S.C. §§ 2113(a) and 2. See Superseding Indictment, Doc. 37, page 6.

7. The Superseding Indictment alleged that on "or about November 18, 2017, in the Middle District of Florida" Addison and Turner used, carried, and brandished a firearm during and in relation to a violation of 18 U.S.C. §1951, a crime

of violence, and did possess a firearm in furtherance of such crime in violation of 18 U.S.C. §§ 924 (c)(1)(A)(ii) and 2. See Superseding Indictment, Doc. 37, page 7.

8. The Superseding Indictment alleged that Addison, Turner, and Gloster obstructed, delayed, and affected commerce by robbery of property belonging to Seacoast Bank and its customers on "or about December 4, 2017, in the Middle District of Florida…" The Superseding Indictment also alleged that the robbery included the use of "actual and threatened force physical violence, and fear of injury, immediate and future, to his or her person" in violation of 18 §§ U.S.C. 1951 (a) and (2). Superseding Indictment, Doc. 37, pages 7-8.

9. The Superseding Indictment alleged that on "or about December 4, 2017, in the Middle District of Florida" Addison, Turner, and Gloster took "from the person and presence of bank employees, by force and intimidation, certain property and money, that is, United States currency in the approximate amount of $75,987.20" belonging to Seacoast Bank, which is "insured by the Federal Deposit Insurance Corporation", in violation of 18 U.S.C. §§ 2113(a) and 2. See Superseding Indictment, Doc. 37, pages 8-9.

10. The Superseding Indictment alleged that on "or about December 4, 2017, in the Middle District of Florida" Addison, Turner, and Gloster used, carried, and brandished a firearm during and in relation to a violation of 18 U.S.C. §1951, a crime of violence, and did possess a firearm in furtherance of such crime in violation of 18 U.S.C. §§ 924 (c)(1)(A)(ii) and 2. See Superseding Indictment, Doc. 37, page 9.

11. Turner was arrested on August 7, 2018 and plead not guilty.

12. The Grand Jury returned a Second Superseding Indictment on February 1, 2019, against Turner and the two codefendants. The Second Superseding Indictment included an additional allegation not in the Superseding Indictment. The Second Superseding Indictment alleged that on "or about August 27, 2017, in the Middle District of Florida" Addison and Turner used, carried, and brandished a firearm during and in relation to a violation of 18 U.S.C. §1951, a crime of violence, and did possess a firearm in furtherance of such crime in violation of 18 U.S.C. §§ 924 (c)(1)(A)(ii) and 2. See Second Superseding Indictment, Doc. 100, page 4.

13. Turner filed several pretrial motions including a Motion to Dismiss Counts 6, 7, 9, and 10 of the Second Superseding Indictment under the Double Jeopardy Clause. See Defendant's Motion to Dismiss under the Double Jeopardy Clause, Doc. 102. On April 15, 2019, the Honorable William F. Jung denied the motion citing to *Blockburger*, the Eleventh Circuit's prior precedence, the independence of the Grand Jury to render charges, and the reasoning of Government's response in Doc. 124. See Transcript of Status Conference and Motion Hearing on April 15, 2019, pages 27-28.

14. Turner also filed a Motion to Suppress LG cell phone. See Defendant's Motion to Suppress Evidence, Doc. 165.

15. The District Court also denied Turner's Motion to Suppress Evidence related to the LG cell phone discovered in the getaway vehicle related to the Wells Fargo Bank robbery. The Court found that Turner abandoned the cell phone and relinquished any interest in the phone. See Order, Doc. 209, pages 5-7. The Court

also found the delay in getting the search warrant was not unreasonable under the totality of the circumstances. Doc. 209, pages 8-10. The Court also found that the inevitable discovery doctrine applied because exclusion would privilege form over substance when a warrant could have and was ultimately obtained. Doc. 209, page 13.

16. After the motions were denied, Turner proceeded to a jury trial from May 20, 2019 to May 29, 2019. The Honorable William F. Jung presided.

17. On May 29, 2019, the jury found Turner guilty of the following charges: conspiracy; interference with commerce by robbery related to Dollar General on October 28, 2017; using, carrying, or brandishing a firearm during or in relation to a crime of violence; interference with commerce by robbery related to Wells Fargo Bank on November 18, 2017; bank robbery related to Wells Fargo Bank on November 18, 2017; using, carrying, or brandishing a firearm during or in relation to a crime of violence; interference with commerce by robbery related to Seacoast Bank on December 4, 2017; bank robbery related to Seacoast Bank on December 4, 2017; using, carrying, or brandishing a firearm during or in relation to a crime of violence. The jury found Turner not guilty of interference with commerce by robbery related to Family Dollar on August 27, 2017; using, carrying, or brandishing a firearm during or in relation to a crime of violence. See Transcript of May 29, 2019, pages 113-116; Verdict Form, Doc. 216.

18. On June 13, 2019, Turner filed a Motion for New Trial asserting among other grounds: (1) the trial court erroneously allowed the jury to consider both the

Hobbs Act robbery counts under 18 U.S.C. §1951 and the Bank Robbery Act under 18 U.S.C. §2113, for the same robbery of a Wells Fargo bank on November 18, 2017, and for the robbery of a Seacoast bank on December on December 4, 2017; and (2) the trial court erred when it denied Turner's Motion to Suppress Evidence related to cell phone data from the LG cell phone. See Defendant's Motion for New Trial, Doc. 221.

19. The District Court entered an Endorsed Order denying Turner's Motion for New Trial on June 14, 2019. See Doc. 222

20. On July 3, 2019, Turner filed his Motion to Strike the Verdicts on Counts Five, Eight, and Eleven of the Second Superseding Indictment. See Doc. 223. Turner asserted that those counts should be struck as unconstitutional as language in the verdict form mirrored language from the residual clause in 18 U.S.C. §924(c)(3)(B) which was previously found unconstitutionally vague.

21. The Government responded to the Motion to Strike the Verdicts on July 14, 2019. See Doc. 224. On July 16, 2019, the District Court entered its Order denying Turner's Motion to Strike the Verdicts. See Doc. 227.

22. On September 13, 2019, the District Court sentenced Turner to a prison term of 492 months. In doing so, the District Court rejected Turner's objections to the crime of violence predicate for the firearm charges and the duplicative nature of the Hobbs Act robbery counts under 18 U.S.C. §1951 and the Bank Robbery Act under 18 U.S.C. §2113 pursuant to the Double Jeopardy Clause.

23. The evidence at Turner's trial demonstrated that in the summer of 2017 Petrie Addison met Turner at a basketball court in Fort Myers, Florida. See Testimony of Petrie Addison, Doc. 313, page 120-21.

24. Turner came up with an idea to rob a bank, Wells Fargo, after the pair had committed other robberies of Dollar stores, because of the bank's location on the highway near the interstate in Hernando County, which is almost three hours from Fort Myers where Addison lived. See Addison Testimony, Doc. 313, page 188-89.

25. They drove to the Wells Fargo bank and parked near an emergency door with Turner giving the car keys to Addison. See Addison Testimony, Doc. 313, page 198.

26. Addison entered the bank, jumped over the counter, and put money into the bags. See Addison Testimony, Doc. 313, page 201.

27. Addison jumped over the counter, and they ran out the emergency door. *Id.* Addison realized the keys fell out of his pocket and went back into the bank to get them. See Addison Testimony, Doc. 313, page 201-02.

28. Addison returned to the car and Turner was not there, so Addison drove off by himself. See Addison Testimony, Doc. 313, page 201-02.

29. Shortly after driving away from the bank, Turner called Addison from an unknown phone number letting Addison know that Turner was in another car. See Addison Testimony, Doc. 313, page 202-03.

30. Police pursued Addison, who ended up getting into a car accident in Pasco County. See Addison Testimony, Doc. 313, page 206.

31. Addison ended up surrendering to law enforcement after initially fleeing the accident. See Addison Testimony, Doc. 313, page 206-07.

32. Police transported Addison to the county jail and took possession of his cell phone. See Addison Testimony, Doc. 313, page 207.

33. The Hyundai crashed by Addison was impounded and transported to the Hernando County Sheriff's Office where the robbery occurred. See Testimony of Detective Tommy Breedlove Doc. 309, page 35.

34. Detective Breedlove secured a search warrant for the car and an Apple iPhone found on the person of Addison. See Breedlove Testimony Doc. 309, page 35.

35. During the warrant authorized search of the car, an LG cell phone was found on the driver's floorboard. See Breedlove Testimony Doc. 309, page 36.

36. Detective Breedlove drafted a search warrant for the LG cell phone that was ready to be signed by a judge on November 28, 2017, but he did not take it immediately for judicial signature. See Breedlove Testimony Doc. 309, page 71-74.

37. Without a signed search warrant for the LG cell phone, Sergeant Power performed an extraction of the cell phone on January 2nd. See Breedlove Testimony Doc. 309, page 76-78.

38. It was common for Sergeant Power to examine a cell phone without seeing a warrant. See Testimony of Sergeant William Power, Doc. 309, page 126-127.

39. Detective Breedlove provided a copy of the extraction to a detective with an FBI task force. See Breedlove Testimony Doc. 309, page 82.

40. Information from the extraction of the LG cell phone provided law enforcement with numerous pieces of incriminating evidence against Turner. See Power Testimony, Doc. 309, page 132.

41. Detective Breedlove realized the search warrant had not been judicially authorized on January 8 when he was contacted and asked for a copy of the search warrant. See Breedlove Testimony Doc. 309, page 82-83.

42. When he realized no warrant existed that authorized the search of the phone, Detective Breedlove took the unexecuted warrant to a judge to be reviewed. See Breedlove Testimony Doc. 309, page 83.

43. After the District Court denied Turner's Motion for New Trial and Motion to Strike and imposed a 492-month sentence, Turner appealed to the Eleventh Circuit.

44. Following the submission of briefs and the presentation of oral argument, the Eleventh Circuit affirmed the District Court on all issues.

45. Specifically, the Court held that the good faith exception applied to Turner's motion to suppress the LG cell phone because the warrant affidavit did not mislead the judge into believing Turner's codefendant denied ownership of the phone. Furthermore, the phone was found in the getaway car for a bank robbery. Appendix A, page 7.

46. The Court also found that Detective Breedlove acted in good faith rather than "some sort of strategic action" upon discovering the warrant had not been signed yet. Appendix A, page 8.

47. Therefore, the Court affirmed the District Court's denial of Turner's motion to suppress under the good faith exception. Appendix A, page 8.

48. The Court also affirmed the District Court's denial of Turner's motion to suppress cell-site data because under *United States v. Joyner*, 899 F.3d 1199, 1204–05 (11th Cir. 2018), cell-site records obtained under Section 2703(d) triggered the good faith exception to the warrant requirement prior to the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Appendix A, page 8-9. Thus, *Joyner* foreclosed Turner's argument for disclosure, and finding the District Court did not err. Appendix A, page 9.

49. The Court also affirmed the District Court's admission of testimony by Special Agent Bush because Special Agent Bush did not use the PenLink software to produce the data she testified about. Appendix A, page 9. Instead, she took it to another detective who had been trained in using the software to put it in a "user-friendly format." Appendix A, page 9-10. Thus, the admission of the testimony was not an abuse of discretion.

50. The Court also affirmed the District Court's denial of Turner's Motion to Strike Counts Five, Eight, and Eleven. The motion was based on the fact the verdict form for those counts contained the same language as Section 924(c)'s residual, which the Supreme Court held to be unconstitutionally vague in *United States v. Davis*, 139 S.Ct. 2319 (2019) but Turner conceded it was foreclosed by the decision of this Court in *United States v. St. Hubert*. Appendix A, page 10. The Court also found Turner's motion to be procedurally defective because he did not object to

the verdict form and failed to preserve the issue. Appendix A, page 10-11.

51. Lastly, the Court affirmed the denial of Turner's allegation that the Second Superseding Indictment violated the Double Jeopardy Clause in Counts Six, Seven, Nine, and Ten where Turner was charged with violating the Hobbs Act and the FBRA. Appendix A, page 11. The Court found that they are bound to a "'strictly textual comparison'" when comparing criminal statutes for double jeopardy purposes as held in *United States v. Bobb*, 577 F.3d 1366, 1373 (11th Cir. 2009) as opposed to looking at the legislative intent. Appendix A, page 12. In comparing the criminal statutes, the Court found that the Hobbs Act requires the robbery or attempted robbery to affect commerce, which is not required under the FBRA. In comparison, the FBRA requires the crime be committed against a bank, credit union, or any savings and loan association. Appendix A, page 12-13. Therefore, the Eleventh Circuit found the district court correctly denied Turner's motion to dismiss based on double jeopardy grounds. Appendix A, page 13.

REASONS FOR GRANTING THE WRIT

I. The Petition should be granted so that the Supreme Court can decide whether the good faith exception should be applied when law enforcement failed to get a search warrant signed before searching the contents of a cell phone.

"[T]he governments' use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." *Pa. Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 362 (1998). Instead, the violation is completed by the illegal search or seizure, "and no exclusion of evidence from a judicial or administrative

proceeding can 'cure the invasion of the defendant's rights which he has already suffered.'" *Id.* The exclusionary rule is judicially created and seeks to deter illegal searches and seizures. *Id.* at 363. Exclusion applies only "where its remedial objectives are thought most efficaciously served." *Id.* Exclusion is unwarranted if it does not result in appreciable deterrence. *United States v. Janis*, 428 U.S. 433, 454 (1976). Furthermore, the deterrence benefits must outweigh its substantial societal costs. *Scott*, at 363.

The Supreme Court has recognized a "good faith" or *Leon* exception to the Fourth Amendment exclusionary rule. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984); *also Mass. v. Sheppard*, 468 U.S. 981 (1984). If law enforcement acted in good faith reliance that the warrant was valid, then the exclusionary rule is not appropriate. *Id.* The reason for exclusion is to deter unlawful police conduct. *United States v. Gerber*, 994 F.2d 1556, 1561 (11th Cir. 1993). Or put another way, it is to deter future violations. *United States v. Lara*, 588 Fed. Appx 935, 938 (11th Cir. 2014) (citing *United States v. Herring*, 492 F.3d 1212, 1216 (11th Cir.2007) (other citation omitted).

"When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *United States v. Campbell*, 26 F.4th 860, 878 (11th Cir. 2022). The exclusionary rule serves as an "incentive to err on the side of constitutional behavior." *United States v. Davis*, 598 F.3d 1259, 1266 (11th Cir. 2010), *aff'd*, 564 U.S. 229, 131 S.Ct. 2419 (2011). To honor the Constitution, law enforcement must

have policies, practices, and procedures in place that create an environment where Constitutional obligations are honored.

Here, Detective Breedlove asked Sergeant Power to conduct a search or extraction of the data on the LG cell phone, but he did not present Sergeant Power with a judicially authorized search warrant. Doc. 309, at 76-78. After the extraction, a copy of the data was provided to an FBI task force. *Id*. at 82. It was common for Sergeant Power to examine a cell phone without seeing a warrant. Doc. 309, 126:13-19; 127-28:25-2. In retrospect, Sergeant Power knew he should have asked for a copy of the warrant when presented with a cell phone to examine. Doc. 309, 127:23-24.

The Supreme Court should not find that good faith existed because the policy and practice of detectives not presenting a judicially authorized search warrant to the officer assigned to conduct a search created the foreseeable consequence that a search would be conducted without an authorized search warrant. A finding of good faith here would incentivize other agencies to adopt similar policies that foreseeably lead to Fourth Amendment or other constitutional violations that could be avoided. Instead, law enforcement agencies should be shown the "importance of 'the incentive to err on the side of constitutional behavior,'" which here would be a cell phone extraction officer being provided a copy of a judicially authorized search warrant before conducting a cell phone extraction. *Davis*, 598 F.3d at 1266. The exclusionary rule is about deterrence and exclusion here would rightly deter other law enforcement agencies and officers from instituting or allowing similar policies and practices that

will lead to foreseeable Fourth Amendment or other constitutional violations. Here a simple, unburdensome checklist could have prevented the warrantless search.

The good faith exception has to an extent rendered the exclusionary rule toothless. To deter law enforcement the exclusionary rule necessitates some bite. Where an agency or officers have a custom or practice that invites the real possibility of a Fourth Amendment violation like there is here, good faith should not apply, and exclusion is the proper outcome to deter similar future behavior. The practice or custom here was reckless or grossly negligent, so the deterrent value is strong and outweighs the costs of exclusion. The search was void *ab initio* as it was conducted with no warrant and thus no judicial review and the authorization inherent in that review. Good faith cannot redeem searches with no warrants.

"[I]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing the affidavit." *United States v. Lehder-Rivas*, 955 F.2d 1510, 1522 (11th Cir. 1992) (quoting *United States v. Leon,* 468 U.S. 897, 926 (1984)).

An "obviously deficient" warrant is regarded as "warrantless", and it is a "basic principle of Fourth Amendment law" that warrantless searches are presumptively unreasonable. *Groh v. Ramirez*, 540 U.S. 551, 558-59 (2004) The Court went on to state that no reasonable officer could believe a warrant that plainly did not comply with the requirements set out in the text of the Constitution to be valid. *Id*. at 563. Furthermore, because the officer himself prepared the invalid warrant, he can't rely on the Magistrate's assurance that the warrant contained an adequate description of

the things to be seized and as a result a valid warrant. *Id*. at 564. The good faith standard is objective and "does not turn on the subjective good faith of individual officers." *Illinois v. Krull*, 480 U.S. 340, 357 (1987). The objective standard "requires officers to have a reasonable knowledge of what the law prohibits." *Leon*, 468 at 919, n. 20.

Thus, Detective Breedlove should not be able to claim good faith on an unsigned warrant application that he drafted and failed to seek any prior assurance from a judge that the proposed search was constitutional because he subjectively thought he was acting in good faith. It was presumptively unreasonable when Detective Breedlove requested Sergeant Power to search the cell phone prior to getting the search warrant authorized. It was also unreasonable for Sergeant Power to search the cell phone without having a copy of a court authorized search warrant. It's not objectively reasonable to allow an agency to have a policy, written or unwritten, where the officer who conducts a search is not handed a signed authorized search warrant before conducting a search of a cell phone. To find no good faith here would deter law enforcement agencies from allowing similar policies and to proactively prevent or modify such policies.

"Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate.'" *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 316 (1972). This is the heart of the Fourth Amendment. *Id*. "Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *Id*. at 318. "The Fourth Amendment does not contemplate the executive

officers of Government as neutral and disinterested magistrates." *Id.* 317. "Their duty and responsibility are to enforce the laws, to investigate, and to prosecute." *Id.* "[U]nreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *Id.*

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. Appendix A. 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). Fourth Amendment interests would be diminished by applying the good-faith exception to a search conducted in the absence of any warrant whatsoever.

II. The Petition should also be granted to determine whether Double Jeopardy Clause is violated when a defendant is charged with robbery under both the Hobbs Act, 18 U.S.C. §1951, and the Federal Bank Robbery Act, 18 U.S.C. §2113, for the same offense conduct and settle the circuit split between the Eleventh and Seventh Circuits

The Eleventh Circuit addressed the applicability of the Double Jeopardy

Clause to the Hobbs Act and the Federal Bank Robbery Act (FBRA) in *United States v. Reddick*, 231 Fed. App'x. 903 (11th Cir. 2007) finding Double Jeopardy does not apply to an offense charged under both the Hobbs Act and the FBRA. However, unpublished decisions in the Eleventh Circuit, with or without opinion, are not precedential and not binding. *Ray v. McCullough, Payne, & Haan, LLC*, 838 F.3d 1107, 1109 (11th Cir. 2016). On the other hand, the Seventh Circuit has found Double Jeopardy applies when a defendant is charged under the Hobbs Act and FBRA for the same incident. Therefore, Turner urges this Court to address the conflict with the Seventh Circuit and adopt the Seventh Circuit's finding in *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007).

In reaching the conclusion that the same bank robbery cannot be punished under both §§1951 and 2113 the Seventh Circuit cited three sister circuits: *United States v. Holloway*, 309 F.3d 649, 651-52 (9th Cir. 2002); *United States v. Golay*, 560 F.2d 866, 869-70 (8th Cir. 1977); and *United States v. Beck*, 511 F.2d 997, 1000 (6th Cir. 1975). See *McCarter*, 406 F.3d at 463.

The Second Superseding Indictment twice charged Turner with the same offense under the Hobbs Act and the FBRA. Counts Six and Seven charged Turner with robbing the Wells Fargo on November 18, 2017, with Count Six charging him with Hobbs Act Robbery and Count Seven charging him with a violation of the FBRA. See Second Superseding Indictment, Doc. 100. Second, the Second Superseding Indictment charged Turner of robbing the Seacoast Bank on December 4, 2017, in

Count Nine under the Hobbs Act and Count 10 under the FBRA. See Second Superseding Indictment, Doc. 100.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V, cl. 2. "A multiplicitous indictment, which 'charges a single offense in more than one count,' violates double jeopardy principles 'because it gives the jury numerous opportunities to convict the defendant for the same offense.'" *United States v. Cannon*, 987 F.3d 924, 939 (11th Cir. 2021). The Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932) created in essence a presumption that Congress does not intend the same act to be punished twice under different statutes unless there are different elements, which tests whether each statute "requires proof of an additional fact which the other does not." *Id.* at 304.

In *McCarter*, the court found it was redundant to charge the defendant under both the Hobbs Act and the FBRA because both punish attempted bank robbery. 406 F.3d at 463. The elements of the Hobbs Act and FBRA are different because the Hobbs Act requires that the robbery interfere with interstate commerce while the FBRA requires that the robbery be of a bank. *Id.*; *Reddick*, 231 Fed. App'x. at 918-919. "[W]here, as in the present case, the consequences of the act are the same—namely, a bank is robbed—in fact are *always* the same, when the bank-robbery statute is violated—the fact that bank robbery is also punishable (and no more severely) under the Hobbs Act provides no rational basis for double punishment…" *McCarter*, 406 F.3d at 463 (emphasis in original).

"Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature ... intended that each violation be a separate offense." *United States v. Davis*, 854 F.3d 1276, 1286 (11th Cir. 2017). Only if the legislative intent is unclear, does the court apply the "same elements" test as set forth in *Blockburger*. *Id*. In deciding whether the legislative intent is clear, the court in *McCarter* looked back at the 1986 amendment to the FBRA. The Court determined it was clear from the amendment and the House committee report that extortion, and by implication bank robbery, would be prosecuted exclusively under the FBRA. *McCarter*, 406 F.3d at 464.

While the Ninth Circuit addressed this legislation in the same context, it found that the committee report only made the FBRA exclusive as to bank extortion. *United States v. Holloway*, 309 F.3d 649, 651–52 (9th Cir.2002). The Seventh Circuit reasoned, however, that robbery wasn't before Congress, and that bank extortion was addressed because of a conflict among the circuits on whether bank extortion could be punished separately under both statutes. *McCarter*, 406 F.3d at 464. It reasoned that "[t]he *logic* of the committee report extends equally to bank robbery." *Id*. (emphasis in original). This Court should adopt this reasoning. If this Court does not agree that Congress intended for the FBRA to exclusively apply to bank robbery, it is at best ambiguous as whether it should apply. Therefore, this Court should apply the rule of lenity and construe it in favor of the accused. *United States v. Wright*, 607 F.3d 708, 716 (11th Cir. 2010) (Pryor, J., concurring).

While the District Court stated that it would not give someone consecutive time for the same acts and sentenced Turner to concurrent terms on Counts Six, Seven, Nine, and Ten, (Doc. 322, page 27; Doc. 258), "it cannot be assumed that a multiplicity of concurrent sentences will have no adverse consequences for appellant." *United States v. Canty*, 469 F.2d 114, 126 (D.C. Cir. 1972) (citing *Benton v. Maryland*, 395 U.S. 784, 787-791 (1969) (other citations omitted). Because the District Court allowed Counts Six, Seven, Nine, and Ten to be tried simultaneously, it created the opportunity for the jury to give more credibility to those counts before any testimony or evidence had been introduced as Turner had been charged twice for the same act for these counts. This increased the odds that the jury would find him guilty of one or both counts. Therefore, this Court should grant the writ, adopt *McCarter's* reasoning and/or its conclusion, and reverse the District Court's denial of Turner's Motion to Dismiss on Double Jeopardy grounds. In turn, the Court should remand the matter to be set for a new trial, since the District Court allowed the Hobbs Act and the FBRA counts to be tried simultaneously, Turner was prejudiced because he faced two counts for each bank robbery which could give those counts more credibility to the jury before ever hearing any evidence.

The Petition for Writ of Certiorari should be granted and find that the good faith exception does not apply when law enforcement searched a cell phone before submitting a search warrant to a judicial officer for review as well as find that the Double Jeopardy Clause is applicable to convictions under the FBRA and Hobbs Act for the same incident and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, Rashid Turner respectfully requests that his Petition for Writ of Certiorari be granted.

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