No. 22-7098

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

I. Failing to get a search warrant signed prior to searching a cell phone and failing to provide a copy of a signed search warrant to person assigned to search a cell phone is not objectively reasonable.

The exclusionary rule should not be applied "where the officer's conduct is objectively reasonable." *United States v. Leon*, 468 U.S. 897, 919 (1984). However, the Government misdirects the argument by shifting focus to the District Court's reliance on the subjective feelings and intent of Detective Breedlove and the officer who conducted the search (Sergeant Power). Gov't Reply at 10-11. Specifically, the Government relies on the District Court's observation that Detective Breedlove's "countenance was one of repentance", and "that he did not engage in some sort of strategic action." *Id*. Instead, this Court should conduct objective reasonableness analysis by looking at the inaction of the detective. Furthermore, Detective Breedlove "made a mistake and attempted to rectify it." *Id*. Here there is no warrant. Allowing *Leon* to cure the situation would allow the resurrection of a nullity. This Court has long ago dispensed with the messiness of subjective inquiries to test the need for Fourth Amendment suppression remedies. *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.") Allowing subjective factors to seep into the analysis would cause the Fourth Amendment to be regulated by thought and not conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011). The two "limited exceptions to this rule are

special-needs and administrative search cases. *Id*. This case does not fall under either of those categories and the Government has not argued that it does.

Regarding the officer who actually conducted the search, the Government pointed out that he believed that the warrant had been judicially authorized. *Id*. However, this merely looks at the subjective intent and feelings, and not whether they acted in an objectively reasonable manner. Simply, it is not reasonable to draft a search warrant that is ready to be signed and not get it signed until after the search is completed. Detective Breedlove only had the cell phone searched after a detective from another jurisdiction, Detective Toner, inquired about the results of the search. Tr. 76-7. Once Sergeant Power conducted his search, an extraction of the phone, Detective Breedlove provided a copy of the contents of the phone to Detective Toner and other members of an FBI task force. *Id*. at 82. Detective Toner then asked for a copy of the search warrant, which is when Detective Breedlove realized the search warrant had not been judicially authorized. Most troubling is the fact that it was common for Sergeant Power to search a cell phone without seeing a warrant. *Id*. at 126-27. This case is not about benefiting a defendant but rather about setting limits on unreasonable errors, promoting policies that cure defective searches, and setting limits on the curative effects of good faith doctrine.

While the Government highlighted how Detective Breedlove was repentant during his testimony and how he attempted to rectify his mistake, the actions that occurred prior to that were not objectively reasonable. Or to put it another way, not promptly taking a completed search warrant to be signed by a judge is not objectively

reasonable. Having a cell phone searched and an extraction performed by a coworker without providing a copy of a judicially authorized warrant is not objectively reasonable. Searching a cell phone without being provided a copy of a judicially authorized search warrant is not objectively reasonable.

In assessing the unreasonableness of the conduct at hand, Detective Toner's actions are instructive. Detective Toner worked for another agency, and he had a reasonable expectation that the phone contents would be provided along with the warrant authorizing the cell phone search. Indeed, he asked for a copy of the warrant after receiving the contents of the searched cell phone. It is common sense police procedure that if a colleague provides a cell phone to be searched that the cell phone is accompanied by an authorized search warrant so that person searching it knows the parameters and any limitations of the search. Being apologetic, repentant, and attempting to rectify the prior mistake does not undo the prior objectively unreasonable conduct.

Exclusion is appropriate when the deterrence benefits of suppression outweigh its heavy costs. *Davis v. United States*, 564 U.S. 229, 237 (2011). Exclusion cases focus on the "flagrancy of the police misconduct" at issue. *Id*. at 239. "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring v. United States*, 555 U.S. 135, 143 (2009). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id*. at 145.

Here, Detective Breedlove can properly be charged with knowledge that the search was unconstitutional because he knew and most certainly should have known that the search warrant had not been judicially authorized before he asked Sergeant Power to search. Moreover, Sergeant Power stated that it was common for him to search phones without having a search warrant simultaneously provided to him. This is evidence of recurring and systemic gross negligence to the extent that it was only a matter of when and not if a Fourth Amendment violation would occur. *Leon's* ever expansive jurisprudence should be cabined at this no warrant juncture. There is not so much as the shell of a search warrant and affidavit upon which to buttress *Leon's* saving grace. Therefore, suppression of the cell phone should be granted along with a new trial.

II. Congress clearly intended for §2113 to be the sole vehicle for bank robbery charges

"Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature-in this case Congress-intended that each violation be a separate offense." *Garrett v. United States*, 471 U.S. 773, 778 (1985). "[T]he *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history." *Id.* at 779. Here, Congress intended that 18 U.S.C. §2113 be only vehicle to prosecute bank robbery based on the face of the statute because it is titled Bank robbery and incidental crimes and is commonly referred to as the Federal Bank Robbery Act (FBRA). This along with Congress' addition of extortion to §2113(a) of the FBRA in

1986, in resolving a circuit dispute "over whether crimes of extortion directed at federally insured banks were covered by the FBRA, the Hobbs Act, or both," (Gov't Reply at 14) makes it clear that Congress intended bank robbery to solely be prosecuted under the FBRA. As a result, Petitioner's convictions under 18 U.S.C. § 1951 should be reversed.

The Government also asserts that this question arises infrequently, and four published decisions have addressed similar questions, so this Court should not worry about it coming up that much. Gov't Reply at 15. However, this is flawed reasoning to deny the petition because this is a repeatable problem, and the intent of Congress must supersede the charging whims of prosecutors. Otherwise, this Court is leaving it to the vagaries of individual prosecutors to determine what kinds of conduct "are so morally reprehensible that they should be punished as crimes." *United States v. Kozminski*, 487 U.S. 931, 949 (1988). And of course, the Government's argument ignores the individual injustice visited upon Petitioner.

In response to Petitioner's claim of prejudice for facing two counts for each bank robbery, the Government replies that the Double Jeopardy Clause "does not prohibit the government from prosecuting a defendant for such multiple offenses in a single prosecution." Gov't Reply at 16; quoting *Ohio v. Johnson*, 467 493, 500 (1984). However, this does not address the real concern Petitioner faced when the Government overcharged him because no reasonable jury could ignore the momentum flowing from the numerosity of charges. Two counts for the exact same conduct of robbing a bank serves only to bolster the prosecution's case.

This Court has stated that "we think it is consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." *Prince v. United States*, 352 U.S. 322, 329 (1957). Therefore, this Court should find that the FBRA based on the clear legislative history that Congress intended for it to be the sole charging vehicle for bank robberies, and to do otherwise violates Double Jeopardy.

CONCLUSION

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

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