Case No. 22-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BENTLEY A. STREETT,
Defendant-Appellant.

On Appeal from the United States District Court
For the District of New Mexico (Albuquerque)
The Honorable Judge James O. Browning
Case No. 1:14-cr-03609-JB-1

AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE TENTH CIRCUIT FEDERAL DEFENDERS FOR THE DISTRICTS OF KANSAS, OKLAHOMA, NEW MEXICO, AND UTAH IN SUPPORT OF THE APPELLANT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Other Authorities

RULE 29(a)(4)(D) STATEMENT

This timely amicus brief is filed pursuant to Federal Rule of Appellate Procedure 29(b). The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Tenth Circuit Federal Defenders for the Districts of Kansas, Oklahoma (Eastern, Northern, and Western Districts), New Mexico, and Utah represent indigent defendants charged with federal crimes throughout the Tenth Circuit and on appeal in this Court.

Amici have a particular interest in this case because the panel opinion resolves a critically important Fourth Amendment question in an unprecedented and problematic way.

RULE 29(a)(4)(E) STATEMENT

Neither party's counsel authored any part of this brief. Nor did either party or party's counsel contribute money intended to fund preparation or submission of this brief.

INTRODUCTION

Following a report that Bentley Streett unsuccessfully asked a 15-year-old for a nude photo, a detective obtained a warrant to search a home in Albuquerque. *United States v. Streett*, 83 F.4th 842, 845 (10th Cir. 2023). The warrant failed to establish probable cause to search the home, however, because the warrant affidavit did not establish a nexus between Streett and the home. *Id.* at 847-848. Rather than suppress the fruits of the unconstitutional warrant, the district court applied both the good-faith exception and the inevitable-discovery exception to save the fruits from suppression. *Id.* On appeal, this Court declined to address the good-faith exception and instead affirmed under the inevitable-discovery exception. *Id.* This Court held that "a revised affidavit and warrant would have been issued promptly if the initial warrant application had been denied. As a result, it was inevitable that the evidence of Mr. Streett's illegal behavior would have promptly been discovered." *Id.*

The panel's opinion raises an important doctrinal question about the exclusionary rule and its exceptions (attenuation, independent source, good faith, inevitable discovery): can those exceptions apply interchangeably in any case, or has the Supreme Court created the exceptions to apply to different Fourth Amendment violations?

The panel's opinion is the most recent case from this Court that considers the exceptions largely interchangeable no matter the facts of the case. *See*, *e.g.*, *United States v. Suggs*, 998 F.3d 1125, 1142-1143 (10th Cir. 2021); *United States v. Shrum*, 908 F.3d 1219, 1235-1240 (10th Cir. 2018); *United States v. Torres-Castro*, 470 F.3d 992, 999 (10th Cir. 2006). In contrast, as explained below, the Supreme Court has not employed this smorgasbord approach, but has instead employed a more disciplined approach when determining whether to apply the

exclusionary rule to deter unlawful police conduct. Because this Court's precedent has departed from Supreme Court precedent, and because this departure is outcome-determinative here, this Court should rehear this case en banc.

ARGUMENT

I. Overview of the Exclusionary Rule

The Supreme Court first recognized the exclusionary rule over 100 years ago in *Weeks v. United States*, 232 U.S. 383, 398 (1914). The exclusionary rule is not itself a constitutional right but is instead a judicially created remedy to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338, 348 (1974). The exclusionary rule is a "disincentive for law enforcement to engage in unconstitutional activity." *United States v. Knox*, 883 F.3d 1262, 1273 (10th Cir. 2018). Its purpose is to deter not just those officers who intentionally violate the law, but also those "plainly incompetent" officers who unintentionally violate the law. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Herring v. United States*, 555 U.S. 135, 144 (2009) (the exclusionary rule deters "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence").

In this Circuit, the exclusionary rule applies only if the defendant first establishes "a factual nexus between the illegality and the challenged evidence." *United States v. Jarvi*, 537 F.3d 1256, 1260 (10th Cir. 2008) (quotation omitted). To meet this burden, the defendant must adduce evidence establishing that "the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct." *United States v. Albert*, 579 F.3d 1188, 1197 (10th Cir. 2009) (quotation omitted).

Mr. Street easily satisfies this threshold requirement. Officers obtained an unconstitutional warrant, then searched his home pursuant to that unconstitutional warrant. 83 F.3d at 847-848. There is an obvious "factual nexus" between the unconstitutional warrant and the fruits of that warrant.

But that doesn't end the analysis because "the exclusionary rule is subject to several well-known exceptions" (discussed in Section II). *United States v. Cotto*, 995 F.3d 786, 795 (10th Cir. 2021). At present, this Court has not adopted a disciplined framework for applying the exceptions to the exclusionary rule. Rather, this Court has indicated that the exceptions can apply interchangeably, no matter the facts of the case. This case is an example: rather than analyze the exclusionary rule's application under the good-faith exception, this Court elected to use the inevitable-discovery exception. 83 F.4th at 848.

The Supreme Court has never adopted or approved this type of collective analysis. Rather, the Supreme Court has employed the exceptions independently, depending on the factual circumstances at play. *See*, *e.g.*, *Nix v. Williams*, 467 U.S. 431, 443 (1984) (expressly disapproving of a collective approach and holding that, if the tainted evidence is discovered through an independent source, the inevitable-discovery exception "does not apply").

II. Overview of the Exceptions to the Exclusionary Rule

The Supreme Court has recognized four exceptions to the exclusionary rule: good faith, *United States v. Leon*, 468 U.S. 897, 913 (1984); independent source, *Murray v. United States*, 487 U.S. 533, 535 (1988); attenuation, *Utah v. Strieff*, 579 U.S. 232, 238 (2016); and inevitable discovery, *Nix*, 467 U.S. at 448.

When officers obtain evidence via reliance on a **third party's mistake**, courts ask whether **the good-faith exception** saves the evidence from suppression. The good-faith exception can save the fruits of an unconstitutional search warrant issued by a neutral and detached magistrate. *Leon*, 468 U.S. 897, 913. This is the "most common application" of the good faith exception. *United States v. Herrera*, 444 F.3d 1238, 1249 (10th Cir. 2006). The good-faith exception can also save the fruits of an unconstitutional search or seizure if the officers conduct the search or seizure "in objectively reasonable reliance on binding appellate precedent." *Davis v. United States*, 564 U.S. 229, 232 (2011). When this happens, the mistake is attributed to the court who issued the erroneous decision, not the officer who complied with that decision.

The good-faith exception can also save the fruits of an unconstitutional search or seizure conducted pursuant to a subsequently invalidated statute. *Illinois v. Krull*, 480 U.S. 340, 342 (1987). When this happens, the mistake is attributed to the legislature who enacted the invalid statute, not the officer who enforced the statute. Finally, the good-faith exception can save the fruits of an unconstitutional search or seizure premised on erroneous information found in a database maintained by others. *Arizona v. Evans*, 514 U.S. 1, 14 (1995); *Herring*, 555 U.S. at 137. The mistakes in such cases are not attributed to the officers, but instead to the individuals who erroneously entered the information into the databases.

When an officer violates the Fourth Amendment, but the evidence at issue was **independently acquired** via a separate, independent source, courts ask whether the **independent-source** exception saves the evidence from suppression. *Murray*, 487 U.S. at

535. The Supreme Court has applied the independent-source exception only when officers first obtain a valid warrant before acquiring the evidence. *Id.*

When an officer violates the Fourth Amendment, but **a lawful intervening circumstance** breaks the causal chain between the unlawful police conduct and the discovery of the evidence, courts asks whether the **attenuation** exception saves the evidence from suppression. *Strieff*, 579 U.S. at 239. A pre-existing arrest warrant, for instance, may constitute an intervening circumstance under the attenuation exception. *Id.* at 242. A defendant's "independent act of free will," such as voluntary consent or a voluntary confession, may also constitute an intervening circumstance. *Id.* at 238. The passage of time may also attenuate unlawful police conduct. *See*, *e.g.*, *United States v. Ceccolini*, 435 U.S. 268, 279-280 (1978).

Finally, when an officer acquires evidence via unlawful conduct, but the evidence would have **inevitably been discovered via lawful means** absent the unlawful conduct, the **inevitable-discovery exception** can save the evidence from suppression. *Nix v. Williams*, 467 U.S. 431, 448 (1984). In *Nix*, for instance, the "lawful means" was a police-initiated volunteer search party. *Id.* at 435. The evidence indicated that the search party would have found the evidence (the victim's body) in three to five hours had the search not been suspended because of the defendant's unconstitutionally obtained statements. *Id.* at 449-450. *Nix* did not involve the Fourth Amendment, nor has the Supreme Court ever applied the exception to a Fourth Amendment violation, but this Court has often applied the exception to Fourth Amendment violations (as the panel did here).

III. This Court's Collective Approach, and the Need to Revisit It.

Multiple decisions from this Court demonstrate that this Court has often analyzed the exclusionary rule's application under an exception different than the one the facts support.

In one line of precedent, this Court has applied **the inevitable-discovery exception in cases involving an independent source**. *But see Nix*, 467 U.S. at 443 (expressly disapproving of such an analysis). In *United States v. Cunningham*, 413 F.3d 1199, 1201-1202 (10th Cir. 2005), for instance, the defendant consented to a search of the home, but this Court assumed that the consent was invalid. Although officers observed items in the home during the invalid consent search, they did not seize any of the items until they obtained a warrant to search the home. *Id.* This fact pattern is essentially identical to the fact pattern in *Murray*, the Supreme Court's independent-source case. *See Murray*, 487 U.S. at 538. Yet, rather than employ *Murray*'s two-pronged independent-source test, this Court employed the inevitable-discovery exception. *Id.* at 1201-1202.

This Court has conducted a similar analysis in two other factually similar cases. *United States v. Christy*, 739 F.3d 534, 538 (10th Cir. 2014) (applying inevitable discovery rather than independent source even though the officers seized the evidence only after obtaining a search warrant); *United States v. Larsen*, 127 F.3d 984, 986-987 (10th Cir. 1997) (involving bank records obtained from a lawful independent source – a grand jury subpoena; but not analyzing the issue under the independent-source exception).

This Court has also applied **the inevitable-discovery and independent-source exceptions in cases involving intervening circumstances**. In *United States v. Torres-Castro*, 470 F.3d 992, 999-1001 (10th Cir. 2006), for instance, the officers conducted an unlawful

protective sweep but did not seize the contested shotgun shells until after the defendant consented to a search. Although the defendant's consent to search was an intervening circumstance, rather than ask whether the defendant's consent attenuated the unlawful police conduct, this Court applied the inevitable-discovery exception. *Id.*

In *United States v. Forbes*, 528 F.3d 1273, 1274 (10th Cir. 2008), border agents conducted an unconstitutional search of a truck's trailer, which did not uncover any contraband. A drug-sniffing dog then alerted to contraband in the truck's tractor. *Id.* Although the dog sniff was an intervening circumstance, rather than ask whether the dog sniff attenuated the unlawful police conduct, this Court held that the dog sniff was an independent source. *Id.*

This Court has also applied **the inevitable-discovery exception in a case where there was not a factual nexus between the unlawful conduct and the evidence**. In *United States v. Eylicio-Montoya*, 70 F.3d 1158, 1160 (10th Cir. 1995), a passenger of a vehicle did not have standing to challenge the search of the vehicle, but claimed that evidence found in the vehicle had to be suppressed because of her unlawful arrest. This Court invoked the inevitable-discovery exception even though it determined that the evidence in the vehicle was a fruit of the lawful stop, not the defendant's unlawful arrest. *Id.* at 1166. In subsequent cases, this Court has not employed inevitable discovery in this type of fact pattern. *See*, *e.g.*, *United States v. Nava Ramirez*, 210 F.3d 1128, 1131 (10th Cir. 2000) (holding that the exclusionary rule did not apply under similar facts because of a lack of a factual nexus between the unlawful conduct and the evidence).

In Mr. Streett's case, the panel applied **the inevitable-discovery exception in a case involving a third-party mistake: an unconstitutional search warrant** issued by a

magistrate. 83 F.3d at 846-847. The panel's opinion is the first time that this Court has analyzed a third-party-mistake case under an exception other than the good-faith exception.[1] The panel ultimately refused to suppress the evidence under the inevitable-discovery doctrine by imagining a "presumed future world where the warrant would have been proper," a world in which the warrant-issuing judge rejected the invalid warrant, the officers then fixed the warrant, the warrant-issuing judge then issued the corrected warrant, and the officers conducted a valid search pursuant to the warrant. *Id.* at 851-852.

The panel's opinion, as well as the other cases discussed above, calls into serious question this Court's practice of treating the exceptions to the exclusionary rule as applicable in any case, no matter the circumstances. Had the panel applied the good-faith exception, as this Court and the Supreme Court have done in every other case involving an unconstitutional search warrant, the panel may have suppressed the evidence. *See*, *e.g.*, *United States v. Gonzales*, 399 F.3d 1225, 1230 (10th Cir. 2005) (suppressing evidence obtained from a warrant that plainly lacked the requisite nexus).

It is difficult to understand how the panel's pivot to inevitable discovery is consistent with binding precedent on the exclusionary rule. The exclusionary rule exists to deter Fourth Amendment violations, whether those violations are committed intentionally by corrupt

[1] *United States v. Loera*, 923 F.3d 907, 925 (10th Cir. 2019), involved a search warrant and inevitable discovery, but *Loera* was not a third-party mistake case. Because the officers in that case included unlawfully obtained information within the warrant, and because that information had to be excised, which resulted in a lack of probable cause, the mistake was attributed to the officers, not the warrant-issuing judge. *Id.* at 925-926. Thus, the good-faith exception could not have applied in *Loera*. *Herrera*, 444 F.3d at 1249 (good-faith exception is inapplicable when the officers rely on their own conduct, rather than a third-party's conduct).

officers or unintentionally by plainly incompetent officers. *Malley*, 475 U.S. at 341; *Herring*, 555 U.S. at 144; *Leon*, 468 U.S. at 919. In this respect, officers are expected to be "reasonably well-trained," *Leon*, 468 U.S. at 919 n.20, to have "a reasonable knowledge of what the law prohibits," *id.*, and to conform their conduct to Fourth Amendment precedent, *Davis*, 564 U.S. at 241 ("Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules."); *Herrera*, 444 F.3d at 1253 (officers within the Tenth Circuit are expected to know Tenth Circuit precedent).

When an officer does not act in objective good faith, such as when an officer obtains a search warrant that plainly violates the Fourth Amendment, the exclusionary rule's application is essential to deter the officer from future Fourth Amendment violations. *Leon*, 468 U.S. at 919. In this Court's words, "penalizing an officer for his or her own error does contribute to deterrence." *Loera*, 923 F.3d at 926. "Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant … rel[ies] on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923.

The need to deter Fourth Amendment violations via the exclusionary rule does not disappear when a court imagines a "presumed future world" in which the officer complied with the Fourth Amendment. *Streett*, 83 F.3d at 851-852. Just the opposite. Telling officers that this Court will ignore their constitutional violations by imagining a world in which they didn't commit those violations isn't deterrence; it's enabling future violations.

This Court's collective approach to applying the exclusionary rule's exceptions has reached the breaking point. If the panel opinion in this case survives, there is no reason to think that the "presumed future world" of law-abiding police officers will not replace the exclusionary rule. And without the exclusionary rule, there is nothing to deter officers from violating the Fourth Amendment.

CONCLUSION

This Court should grant Mr. Streett's petition and rehear this case en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 29(b)(4)

The undersigned certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(b)(4) in that it contains 2,600 words in a proportionally spaced typeface (13-point Garamond; as allowed by 10th Circuit Rule 32(a)), as shown by Microsoft Word 2016, which was used to prepare this brief.

s/ Daniel T. Hansmeier
DANIEL T. HANSMEIER
Appellate Chief

Dated: December 11, 2023

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on December 11, 2023, he electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Because counsel for the Appellant and the Appellee are registered CM/ECF users, they will also be served by the CM/ECF system. 10th Cir. R. 31.5. Pursuant to 10th Circuit Rule 31.5, 7 hard copies will be mailed to the Clerk of the Court at:

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