UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Case #16-2174

TREY SIMS,

Appellant,

v.

Kenneth E. Labowitz, Administrator Pursuant to
Code of Va. §64.2-454 of the Estate of DAVID E. ABBOTT,

Appellee.

***

Claiborne Richardson,

Defendant.

APPELLANT SIMS' RESPONSE TO APPELLEE'S PETITION FOR REHEARING *EN BANC*

On Appeal From The United States District Court
Eastern District of Virginia, Alexandria Division

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Unlike appellant Trey Sims' pending petition for *en banc* review of the panel decision in this case, the petition of appellee's decedent David Abbott[1] should be denied, as it is supported by no ground for such review cognizable under applicable jurisprudence.

I. Standard of Review

"An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35 (a). "[W]hen the panel majority and dissent have already set forth in detail their respective interpretations of the record, '[n]o jurisprudential value is enhanced by having the facts aired and debated again' before *an en banc* court." *Spicer v. Commonwealth,* 66 F.3d 705, 713–14 (4th Cir. 1995) (Motz, J, dissenting in the grant of *en banc* review).

> [I]t is well understood that it is only in the rarest of circumstances when a case should be reheard *en banc*. In other words, for the appellate system to function, judges on a circuit must trust one another and have faith in the work of their colleagues.

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[1]For clarity, reference in this memorandum is made to Detective Abbott, not to the administrator designated to receive service of process for his estate under Virginia law.

Id. (citations omitted). Where the court is in agreement regarding the "governing legal principles," and judges "differ only in the application of these principles to the facts of th[e] case," *en banc* review is inappropriate. *Id.* at 713. *Cf., Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009) ("[I]f the legal standard is correct, then the full court should not occupy itself with whether the law has been correctly applied to the facts. . . . If that were the appropriate course, then our dockets would be overloaded with *en banc* polls contesting a panel's examination of particular sets of facts.")

Factual and Procedural Background

Trey Sims brought this lawsuit for violation of his Fourth Amendment rights when plaintiff's decedent, police detective David Abbott, forced him to manipulate his penis for photography. Trey – a minor at the time – and his then girlfriend had mutually exchanged "sexts," Trey sending a video of himself fondling himself. He was prosecuted for producing child pornography, *i.e.*, for taking the photos and videos of himself. In the course of investigating the charges, Det. Abbott requested and secured a warrant authorizing him to search for "[p]hotographs of the genitals . . . of Trey Sims that will be used as comparisons in recovered forensic evidence from the victim and suspect's electronic devices. This includes a photograph of the

suspect's erect penis." Supp. J.A. 72-75. To execute the warrant, Det. Abbott took Trey from his home to the local juvenile detention center, took him into the locker room, and ordered him to drop his pants so that pictures could be taken of his penis. Two other armed officers were present. When Trey reluctantly complied, Det. Abbott directed him to touch and manipulate his penis in different ways to simulate the masturbation depicted in the sext. The photos were taken for the ostensible purpose of identifying Trey's penis as the one depicted in sext he had sent to his girlfriend. Det. Abbott took the pictures on his personal cell phone.

Following the dismissal of the juvenile charges against him, Trey sued Det. Abbott, bringing claims under the Fourth Amendment and 18 U.S.C. §2255, which creates a right of action for victims of child pornography. The district court dismissed his lawsuit. Trey appealed that decision, and a majority of the panel reversed on the Fourth Amendment claim, finding that "[w]e cannot perceive any circumstance that would justify a police search requiring an individual to masturbate in the presence of others." *Sims v. Labowitz*, __F.3d__, 2017 WL 6031847 at *5 (4th Cir. Dec. 5, 2017). Qualified immunity, the majority held, was unavailable in the circumstances "[b]ecause there was no justification for the alleged search to photograph Sims' erect penis and the order that he masturbate in the presence of others," and thus "well-established Fourth Amendment limitations

on sexually invasive searches adequately would have placed any reasonable officer on notice that such police action was unlawful." *Id.* at *6. Judge King dissented on the basis that Det. Abbott was acting at a prosecutor's direction and pursuant to a warrant, and so entitled to qualified immunity. *Id.* at *8-13. The panel upheld the dismissal of Trey's statutory claim.

Det. Abbott has petitioned for *en banc* reconsideration of the majority's decision on two bases: that the decision conflicts with *Wadkins v. Arnold*, 214 F.3d 535, 543 (4th Cir. 2000) and *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991); and that the decision involves a matter of exceptional importance because the case involves an officer who conferred with a prosecutor before obtaining a warrant.[2] For the reasons that follow, neither Det. Abbott's petition nor, respectfully, Judge King's dissent affords this court a basis to grant *en banc* review.[3]

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[2] Det. Abbott also claims that the panel's decision conflicts with *United States v. Leon*, 468 U.S. 897, 920 n.21 (1984), recognizing officers' "sworn duty to carry out [the] provisions" of warrants. Trey does not question that such a duty exists. But the *Leon* footnote has no application to the present case, which is controlled by a body of law regarding manifestly unreasonable searches – in this case, sexually intrusive searches of minors – and whether and when qualified immunity may be denied even if an officer acts pursuant to a warrant. *See* discussion at 5-9, *infra.*

[3] *Contrast* Trey's pending petition for panel reconsideration or *en banc* review of the dismissed federal statutory claim providing a civil cause of action for

Argument

A. The Panel Majority's Decision Correctly Applies Settled Law Regarding Sexually Invasive Searches of Minors and Regarding Qualified Immunity

Appellee's petition ignores two tenets of controlling law: warrants do not insulate officers from civil liability when "it is obvious that no reasonably competent officer would have concluded that a warrant should issue," *Messerschmidt v. Millender*, 565 U.S. 535 (2012), and, regardless of reasonableness in requesting a warrant, "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Dalia v. United States*, 441 U.S. 238, 258 (1979). The majority properly concluded that "both the outrageous scope of the sexually intrusive search and the intimidating manner in which the search was conducted weigh strongly against any finding that the search was reasonable." *Sims*, 2017 WL 6031847 at *4.[4] Det. Abbott's petition affords

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forced participants in child pornography, ECF #45. A motion by the Children's Justice Fund for leave to file an *amicus* brief supporting Trey's petition is pending before the court. ECF #47.

[4]Appellee's petition suffers from a factual flaw as well: on its face, the warrant in this case authorized the *seizure* of lewd photographs, not the *making of new ones. See* Supp. J.A. 72-75. Ironically, it was Judge King's focused and tightly argued dissent addressing (and quoting) the warrant that alerted counsel to this fact, previously missed by all lawyers and judges in the case. While it is appropriate for this point to be noted (*see* brief discussion at 10-11, *infra*), Trey, who did not previously make this argument, does not need to, and does not, rely on

this court no basis on which to reconsider this decision *en banc*.

1. The Panel Decision Reflects Settled Law That Possession of a Warrant Does Not Automatically Entitle Officers to Qualified Immunity

Det. Abbott's estate cannot take solace in the fact that he was armed with a warrant and apparently acted at the suggestion of the prosecutor on the case. It is settled law that neither the approbation of a superior, nor the request of a prosecutor, nor the approval of a magistrate, is a talisman nullifying the obligation of a law enforcement officer to act reasonably. *Messerschmidt*, 565 U.S. at 547 (no immunity for officer who requests and receives warrant when "it is obvious that no reasonably competent officer would have concluded that a warrant should issue"). Two or three wrongs do not make a right.

At least three of this court's relatively recent §1983 cases have denied qualified immunity where officers acted on the basis of unreasonable warrants, issued by magistrates, after consulting with a prosecutor or superior officers. *Graham v. Gagnon*, 831 F.3d 176 (4th Cir. 2016) (officer who consulted with superior obtained warrant "outside the range of professional competence expected

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it to support his position on appeal. For the reasons cogently stated by the panel majority, Det. Abbott violated the Fourth Amendment without regard to whether he was directed to do so by the warrant.

of an officer"); *Rogers v. Stem*, 590 Fed.Appx. 201 (4th Cir. 2014) (officer consulted with superior and a prosecutor before procuring baseless arrest warrant); *Merchant v. Bauer*, 677 F.3d 656 (4th Cir. 2012) (officer consulted with prosecutor before procuring "patently deficient" arrest warrant).[5] The panel majority correctly concluded, in line with this and Supreme Court precedent, that neither the existence of a warrant nor the advice of a prosecutor immunizes Det. Abbott's "sexually invasive," "egregious" search of Trey. *Sims*, 2017 WL 6031847 at *4.

Detective Abbott relies principally on *Wadkins v. Arnold*, 214 F.3d 535, 542 (4th Cir. 2000). But *Wadkins,* like *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991) also relied on by Det. Abbott, addressed no more than whether an officer reasonably, if mistakenly, concluded that he had facts sufficient to constitute probable cause to arrest. Indeed, *Wadkins* expressly recognizes that "[o]f course, the mere fact that [the detective] acted upon the Commonwealth's Attorney's authorization in applying for the warrants does not automatically cloak [him] with the shield of qualified immunity," and that an officer is not "shielded from liability simply because the Magistrate decided to issue" a warrant. *Id.* at

[5]While these cases involved arrest warrants rather than search warrants, "the same standard is applicable in both contexts." *Graham*, 831 F. 3d at 183, n. 2.

543.[6]

Addressing, as it does, an officer's liability for an imperfect investigation of facts, *Wadkins* does not purport to address whether an officer can with impunity seek a warrant that is manifestly unreasonable as a matter of law, or execute a legitimate warrant in an outrageous fashion. *Wadkins* has nothing to do with intrusive searches, or with the controlling framework of *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), requiring "balanc[ing] the invasion of personal rights caused by the search against the need for that particular search." *Sims*, 2017 WL 6031847 at *4. Nor does *Wadkins* involve a challenge to "the manner in which a warrant is executed," the latter being "subject to later judicial review as to its reasonableness" under settled law. *Dalia v. United States*, 441 U.S. 238, 258 (1979). As the panel majority recognized, "[i]n the present case, the scope of the intrusion and the manner in which the search allegedly was performed involve overlapping inquiries." *Sims*, 2017 WL 6031847 at *4.

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[6]In *Wadkins*, a suspect who had written several bad checks attempted to deposit a check with a third party's signature that appeared forged. A prosecutor confirmed the existence of probable cause to charge forgery and a magistrate issued warrants for same. The charge was *nolle prossed* when the check in question proved to be good. *Id.* at 537-38, 540. Holding the arresting officer immune in the suspect's subsequent civil suit, the court explained that he was reasonable in seeking the warrants, observing that the fact that the magistrate issued them "bolsters the reasonableness of [his] actions." *Id.* at 543. Trey embraces these results, which have nothing to do with his case.

> [T]he manner that Abbott employed to execute the warrant, namely, ordering Sims to masturbate to obtain an erection, required that Sims perform a sex act in the presence of three armed officers. Such alleged conduct necessarily invaded Sims' bodily integrity even though no part of Sims' body was penetrated or physically harmed. *** Moreover, we observe that this sexually intrusive search was rendered more egregious by being conducted in a manner that would instill fear in Sims. . . Here, Sims alleged that he was "surrounded" by three armed officers as he questioned whether he was required to submit to Abbott's orders. Upon Abbott's insistence, Sims ultimately attempted to comply. Sims further alleged that the search caused him to suffer emotional harm. [Citation omitted.] Accordingly, both the outrageous scope of the sexually intrusive search and the intimidating manner in which the search was conducted weigh strongly against any finding that the search was reasonable.

Id. The panel majority could not "perceive any circumstance that would justify a police search requiring an individual to masturbate in the presence of others." *Id.* at *4-5.

Det. Abbott's petition – like the dissent – fails to address this dispositive law. Nor does the panel decision do anything to dilute the immunity of police officers who make reasonable mistakes. No *en banc* court need ponder the panel's conclusion that an officer violates a child's clearly established Fourth Amendment rights by forcing him to pull down his pants and fondle himself for pornographic photographs.

2. The Warrant Authorized the Seizure of Photographs Of Trey's Penis, Not the Making of New Photographs[7]

Det. Abbott sought and obtained a warrant authorizing a *search for* "*Photographs* of the genitals . . . of the body of Trey Sims that will be used as comparisons in recovered forensic evidence from the victim and suspect's electronic devices. This includes a photograph of the suspect's erect penis." Supp. J.A. 72-75. (Emphasis added.) What would a reasonable officer, experienced in seizing material specifically identified in search warrants, understand he or she was being commanded to do? *Seize photographs.* This makes perfect sense in the context of a prosecution for taking and possessing photographs alleged to constitute child pornography. An officer armed with this warrant could reasonably have searched Trey for photographs to compare to the photos forming the basis of the prosecution.

Where does the warrant authorize or command an officer to *make new photos*? The decision of Det. Abbott – who later committed suicide rather than be served with a warrant for his arrest for sexual abuse of minors – to photograph Trey on his personal cell phone emerges as not only appalling in its own right, but outside the scope of the warrant. Thus, Det. Abbott's representation that he "executed the warrant within the parameters set forth in the warrant," Br. at 8, is

[7]*See* note 4 at 5, *supra.*

incorrect, as is his attempt to distinguish *Graham*, *supra*, on the basis that Det. Abbott "obtained a warrant and acted within its scope." Petition at 10-11.

B. The Fact That This Case Involves Input by a Prosecutor and a Magistrate Does Not Make it One of "Exceptional Importance"

Fed.R.App.Proc. 35(a)(2) is concerned with decisions that challenge a body of settled jurisprudence. Det. Abbott has identified the fact that he conferred with a prosecutor before seeking his warrant as implicating a matter of "exceptional importance." Br. at 1. It does no such thing. Abundant recent case law addresses precisely this topic, *e.g.*, *Messerschmidt*, *Merchant*, *Rogers* and *Graham*, all *supra* at 6-7. The panel's decision in *Sims v. Labowitz* comes as no surprise. Officers are not free to request or to act on warrants ostensibly authorizing them to act in manifestly unreasonable, not to say outrageous, manners. This case does not alter qualified immunity jurisprudence. It is, on the point at issue, simply a case in which the panel majority correctly applied settled authority.

Conclusion

For these reasons, Det. Abbott's petition for *en banc* review should be denied.

Respectfully submitted,

TREY SIMS,

By counsel

Dated: December 28, 2017

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Certificate of Service

I, Victor M. Glasberg, hereby certify that on this 28th day of December 2016, I electronically filed the foregoing Appellant Sims' Response to Appellee's Petition for Rehearing *En Banc* with the clerk of the court.

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