NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANDRE MARTEL WINN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit's application of the inevitable discovery exception—without requiring any factual basis to support it—is contrary to this Court's precedents and so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

2. Whether the Ninth Circuit's validation of a warrant authorizing the search for and seizure of all electronic devices within a residence, without requiring that they be connected to any suspect or criminal activity, based only the observed presence of a suspect at that residence, is contrary to this Court's precedents and the decision of the Court of Appeals for the D.C. Circuit in *United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption.

DIRECTLY RELATED LOWER-COURT PROCEEDINGS

United States v. Winn, No. 16-cr-00516 HSG (N.D. Cal. Apr. 16, 2018)

United States v. Winn, No. 18-10473 (9th Cir. May 1, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Andre Martel Winn respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's order denying Winn's motion to suppress is attached as Appendix ["App."] 10-22. The Ninth Circuit's memorandum affirming the denial of Mr. Winn's motion to suppress and his conviction is attached at App. 1-9.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered its judgment in favor of respondent on May 1, 2020, with Judge Berzon dissenting. App. 1, 7. It denied Winn's petition for rehearing and rehearing en banc on July 22, 2020, with Judge Berzon voting to grant panel rehearing. App 23. This petition is timely under S. Ct. R. 13.3 and this Court's Order of March 19, 2020 regarding filing deadlines.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment guarantees freedom from unreasonable searches and seizures:

> 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.

INTRODUCTION

Officers in this case obtained a warrant to seize all the electronic devices from a residence at which a crime suspect had been briefly observed, even though the suspect had already been arrested and his phone had been seized. Upon entering the home with the warrant, the officers searched Winn, a non-suspect who was the resident of the home, and seized his phone. Further search of the home revealed contraband, and the non-suspect, Winn, was arrested. In total disregard of this Court's inevitable discovery jurisprudence, the Ninth Circuit merely presumed that Winn would have been arrested and his phone seized incident to arrest based on the post-search probable cause, relieving the government of any burden to show what investigative steps were being taken, or routinely would have been taken, apart from the illegal search and seizure. The Ninth Circuit held in the alternative that probable cause existed for the wholesale electronic device search and seizure clause, in conflict with *United States v. Griffith*, 867 F.3d 1265, 1268 (D.C. Cir. 2017). In so doing, the Ninth Circuit and the district court endorsed an interpretation of the Fourth Amendment that "would verge on authorizing a search of a person's home almost anytime there is probable cause to suspect her of a crime." *Id.* at 1275. Based on the clear departure from Fourth Amendment precedent and the critical importance of warrants purporting to authorize residential searches for electronic devices without proof of their likely presence or requirements that they be connected to the criminal activity being investigated, this Court should grant the petition.

STATEMENT OF THE CASE

Local police ["SLPD"] obtained a state warrant on January 20, 2016, to search an apartment in Oakland, California, as well as a car owned or under the control of James Williams, and a phone that they had on that date "located on the person of WILLAMS during his arrest." App. 24-25. The affidavit supporting the warrant explained that SLPD was investigating a shooting that had occurred at a mall on January 14, 2016, six days earlier. App. 28. James Williams, a gang member, was a suspect. App. 28-29. SLPD had learned Williams' cell phone number and obtained a state warrant on January 17, 2016, for "for 30 days of continuous GPS tracking of WILLIAMS cellular phone." App. 29. From that tracking, SLPD determined that Williams' phone had been in the area of a specified intersection in Oakland, California. *Id.* With "several surveillances in the area," SLPD "ultimately located the apartment." *Id.*

On January 19, 2016, at 9 p.m., police surveilling the apartment saw Williams "exit the [apartment] door, look around the area, and reenter the door, securing it." App. 30. The next morning at 8:30, surveilling officers saw Williams leave the apartment. *Id.* They arrested him elsewhere and seized a cell phone "located on his person." *Id.*

The warrant for the apartment authorized the seizure of evidence of criminal activity or gang association; clothing consistent with that worn during the shooting; identification and location information of people who may be associated with Williams; indicia "tend[ing] to establish the identity of person[s] exercising

dominion and control" of the apartment; guns; photographs of the apartment; and all electronic devices, even though Williams' phone had already been taken from him upon arrest. App. 26. The warrant did not authorize the search of Williams' or anybody else's person.

The apartment searched based on the state warrant was Winn's apartment, not Williams'. App. 2. Even though Winn was not suspected in the investigation or referenced in the warrant affidavit, SLPD seized Winn's cell phone from his person pursuant to the warrant's broad electronic devices provision. App. 13. After the seizure, they found firearms and cocaine, which gave them probable cause to arrest Winn. They later searched his phone without a warrant. App. 5. SLPD then provided Winn's phone and the contents they had illegally downloaded to the FBI. App. 15.

The FBI had determined that two guns that had been sold in Nevada on January 19, 2016, were among the guns located during the search of Winn's apartment. App. 38. The FBI was "interested" in Winn's phone and other evidence seized by SLPD in its investigation of the mall shooting. App. 39. Approximately a month after receiving Winn's phone and its downloaded contents from SLPD -- and after viewing the downloaded contents -- the FBI obtained a federal warrant to search Winn's phone. App. 39-41. The affidavit stated that its information was "'not derived from any of the recovered contents of the Subject Telephone.'" App. 15 (quoting affidavit).

I. The district court upheld the searches and seizures

The district court rejected Winn's challenges to the legality of SLPD's search of his apartment and seizure and search of his cell phone and the FBI's subsequent search of his cell phone. App. 10. The warrant was supported by probable cause to search Winn's home because SLPD "believ[ed] it was the home of James Williams," and that belief was supported by the GPS tracking that placed Williams in the vicinity of the apartment as of January 17 and SLPD's observations of Williams at the apartment on the evening of January 19 and the morning of January 20. App. 12. "On this basis, the SLPD concluded that Williams '[had] dominion and control of the residence and thus [would] have property related to this investigation inside it.'" *Id.* (quoting affidavit; brackets in original).

The district court rejected Winn's argument for a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), based on SLPD knowing that the resident of the apartment was not Williams. App. 13-14. The district court discounted video evidence of one of the searching officers telling Winn, "We have a search warrant for your residence, for your cousin." App. 14. It concluded that the omission of any such knowledge was not intentional or reckless and that the addition of this information would not have negated probable cause. *Id.*

The district court held that SLPD properly seized Winn's phone based on a sufficiently specific warrant. App. 13. The warrant identified "cell phones" as property to be seized; this description was sufficiently specific "in light of the [affidavit's] explanation regarding the importance of cell phones in criminal investigations." *Id.*

Finally, the district court held that the FBI's later warrant search of Winn's phone was not tainted by SLPD's prior warrantless search, even though the FBI affiant had viewed the contents of the phone before seeking the federal warrant. App. 14-17. It accepted the affiant's statement that it was his practice to obtain a federal warrant even if an item may have been searched by local police and that his affidavit for the federal warrant "'did not include any information derived from SLPD's download of the phone or his review of a copy of that download.'" App. 15 (quoting declaration; brackets omitted). Because the federal affiant "expressly disclaimed reliance on the SLPD's search in its application for a warrant," the good-faith exception did not come into play. App. 16-17. Moreover, the federal affiant was a different person from the officer who conducted the initial illegal search. App. 17 (citing *United States v. Bah*, 794 F.3d 617 (6th Cir. 2015)).

II. The Ninth Circuit upheld the searches and seizures

The two-judge Ninth Circuit majority upheld the challenged searches and seizures, although on different bases than the district court. It concluded that SLPD had probable cause to search Winn's apartment based on Williams' being "an overnight guest mere days after the alleged shooting." App. 3. SLPD was not reckless in omitting the non-material information that the apartment belonged not to Williams but to Winn. App. 4-5. The affidavit sufficiently described the cell phones to be seized, "and there was probable cause that the cell phones would contain evidence relating to the shooting incident." App. 4. Because SLPD would have arrested Winn and searched him incident to arrest when they found guns and

cocaine in the apartment, the inevitable-discovery exception excused their seizure of his phone from his person. App. 5. Finally, the majority held that the federal warrant to search Winn's phone was not tainted by SLPD's warrantless search of the phone because the seized firearms would have led the FBI to obtain a warrant even had SLPD not told the FBI about and provided it with the contents of the phone. App. 5-6.

III. Judge Berzon dissented and would have reheard the case

Judge Berzon, dissenting, concluded that SLPD's warrant to search Winn's apartment lacked probable cause. "[T]he information contained in the warrant affidavit was insufficient to establish that Williams had a sufficient connection to the apartment to provide probable cause for a broad search of the home to find items connected to Williams's recent crime." App. 7. Not only was the evidence connecting Williams to Winn's apartment weaker than that in other cases in which the suspects were considered mere "casual social guests," "the reasons given in the affidavit for expecting to find evidence of Williams's crime in Winn's apartment were tied repeatedly to the affidavit's assertions that the apartment was Williams's 'residence.'" App. 8 (internal quotation marks omitted).

Judge Berzon also determined that the FBI's phone search was tainted by SLPD's search of Winn's apartment, without which the SLPD would not have had Winn's phone to give to the FBI. App. 8-9. Because SLPD failed to inform the magistrate "that the basis for their belief that Williams resided in the apartment to

be searched was tenuous," they did not act in good faith, and the good-faith exception did not apply. App. 9.

REASONS FOR GRANTING THE WRIT

The Court should grant review because the Ninth Circuit's application of the inevitable discovery rule without any factual support in the record represents a fundamental disregard of precedent warranting summary reversal. This case also presents an important legal issue demanding clarification: whether the Fourth Amendment prohibits the wholesale search for, and seizure of, all electronic devices at a location, including from the persons of non-suspects, based only on the fact of a suspect having been observed at the residence. The D.C. Circuit has clearly held such a warrant violates the Constitution. *Griffith*, 867 F.3d at 1275 (assuming, without proof, that every suspect has a cellphone "would verge on authorizing a search of a person's home almost anytime there is probable cause to suspect her of a crime."). The opinion of the divided panel below is inconsistent with that holding. Because of the ubiquitous nature of cell phones, their evidentiary significance, and their vulnerability to significant invasions of privacy, this issue is of paramount importance. Courts and police officers should be given guidance as to when and which cellphones may be seized from the home and reminded that the widespread use of cellphones and the vast quantities of information they contain do not negate the bedrock principles that warrants must be based on probable cause that an item is likely to be found at a location and limited to those items relevant to the investigation.

IV. Waiving the government's burden to prove inevitable discovery, without explanation, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

Remarkably, the Ninth Circuit upheld SLPD's seizure of Winn's cell phone primarily based on the inevitable discovery exception to the exclusionary rule.[1] App. 5. Neither the government nor the Ninth Circuit majority pointed to any facts in the record to show what actions the SLPD officers would have taken had the warrant not authorized the seizure of all cell phones, regardless of their connection to the case. The SLPD officer who seized the phone from Winn said he did so during a pat-search before he searched the apartment and "pursuant to the search warrant." App. 34. Although SLPD arrested Winn "after the search of the apartment," based on firearms, ammunition and cocaine found during the search, *id.*, the officer was silent as to SLPD's particular interest in Winn's phone, what the officer would have done had he not searched Winn and illegally seized his phone, and SLPD's practices with respect to booking phones. *Id.* The government failed to present any evidence whatsoever – no testimony, policies, practices, or protocols – to prove that officers necessarily would have arrested and searched Winn and booked his phone into evidence the moment they found contraband in his bedroom. There was no attempt to establish the necessary factual basis for the inevitable discovery exception.

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[1] The district court's avoidance of inevitable discovery perhaps was based on the government's failure to provide any supporting facts, Ninth Circuit Excerpts of Record ["ER"] 204-05, if not its explicit disavowal of reliance on the exception during argument on the motion. ER 18.

It is a blatant violation of the burden established in *Nix v. Williams*, 467 U.S. 431 (1984), to premise the application of the inevitable discovery rule solely on the probable cause developed after the illegal search rather than on a factual analysis of the likely course of the investigation had there been no violation. But the panel did just that, upholding the introduction of the phone based on its own factual assumption that, after discovering guns, ammunition and cocaine in Winn's room, SLPD surely "*would have* arrested Winn and searched him incident to arrest" *and* booked the phone. App. at 5 (emphasis added). This was more than a mere misapplication of the law. It was a conscious disregard of the test established by this Court.

The panel not only failed to observe the narrow purpose and scope of the inevitable discovery doctrine; it departed from the accepted and usual course of judicial proceedings by speculating as to what officers might have done with the probable cause they developed.[2] Since 1984, a court's decision to forgive an illegal search under the doctrine "involves *no speculative elements* but focuses on *demonstrated historical facts* capable of ready verification." *Nix*, 467 U.S. at 444 n.5 (emphases added). Here, the panel's observation that "SLPD would have been *entitled* to secure the phone" incident to his arrest, App. 5 (emphasis added), explicitly alludes to a test that is directly contrary to *Nix* and Ninth Circuit

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[2] Further establishing the nature of its departure from established judicial process, the panel cited no inevitable discovery cases. App. 5. The only case it did cite, *United States v. Hartz*, 458 F.3d 1011 (9th Cir. 2006), relates to the scope of the search incident to arrest doctrine.

opinions, which previously had not hesitated even to find *clear error* in a district court's factual finding of inevitable discovery in the absence of such facts. *United States v. Lopez-Soto*, 205 F.3d 1101, 1107 (9th Cir. 2000); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1400 (9th Cir. 1989) ("[M]erely assum[ing]" an officer would have acted in a way he was "entitled" to is insufficient to meet the government's factual burden) (emphasis omitted)). The panel opinion, equating entitlement to arrest with inevitable discovery, departs from decades of precedent and proceedings.

Even if the panel's opinion had contained a factual basis and could thus be squared with the Ninth Circuit's own precedent, it would conflict with that of other circuits. Numerous courts have held that "the illegality can be cured" by the inevitable discovery doctrine "only if the police possessed and were pursuing a lawful means of discovery *at the time the illegality occurred*." *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1985) (emphasis added; citing cases).[3] The Ninth Circuit has eschewed such a rigid rule, suggesting that the doctrine should cover not only simultaneous independent investigations but also "instances where, based on the historical facts, inevitability is demonstrated in such a compelling way that operation of the exclusionary rule is a mechanical and entirely unrealistic bar." *United States v. Boatwright*, 822 F.2d 862, 864 (9th Cir. 1987) (noting that, in such an instance, the doctrine could apply "whether or not two independent

[3] A circuit split remains on this issue. *See United States v. D'Andrea*, 648 F.3d 1, 12 n.16 (1st Cir. 2011) (noting split and citing cases).

investigations were in progress"); *see also United States v. Kennedy*, 61 F.3d 494, 499 (6th Cir. 1995) (holding that "compelling facts" could overcome the usual requirement of two independent investigations). But such compelling facts typically involve "routine" required procedures (such as an inventory search of an already-impounded car) or evidence that the legal avenue was the "only available procedural step." *Ramirez-Sandoval*, 872 F.2d at 1400; *accord Lopez-Soto*, 205 F.3d at 1107. The opinion in this case merely adds to this lack of uniformity.

The Ninth Circuit's inevitable discovery application in this case starkly relieved the government of a substantive burden clearly imposed by this Court. It should be summarily reversed.

V. This case creates a circuit split about the permissibility of warrants authorizing seizures of all electronic devices, without regard to ownership or likelihood of presence, based on the brief appearance of a single non-resident suspect at the location.

The Ninth Circuit also sanctioned a warrant for the seizure of all electronic devices within the residence, without probable cause that the suspect likely maintained electronic devices there and without any limitation on which electronic devices could be seized. Protecting the privacy of the home has long been at the very heart of the Fourth Amendment. *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). This Court more recently has confirmed the heightened privacy interests in the contents of cell phones and the corresponding constitutional protection to which they are entitled. "A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form -- unless the phone is." *Riley v. California*, 573

U.S. 373, 396-97 (2014). By upholding the seizure from Winn's apartment of all cell phones based solely on allegations of prior criminal conduct by a non-resident, App. 4 -- whose own cell phone the police already had seized, App. 25 -- the Ninth Circuit in this case not only failed to give sufficient weight to these Fourth Amendment interests but also created a circuit split.

In *Griffith*, the D.C. Circuit rejected the argument that "whenever officers have reason to suspect a person of involvement in a crime, they have probable cause to search his home for cell phones because he might own one and it might contain relevant evidence." 867 F.3d at 1268. The warrant in *Griffith*

> authorized officers to search for and seize all cell phones and other electronic devices in Griffith's residence. The supporting affidavit, however, offered almost no reason to suspect that Griffith in fact owned a cell phone, or that any phone or other device containing incriminating information would be found in his apartment. In our view, the fact that most people now carry a cell phone was not enough to justify an intrusive search of a place lying at the center of the Fourth Amendment's protections -- a home -- for any phone Griffith might own.

Id.

According to the warrant affidavit in *Griffith*, the defendant was -- like Williams in this case -- a suspected gang member and involved in a shooting. *Id.* at 1268-69, 1271. It also included, as here, a statement based on the affiant's training and experience that gang members involved in criminal activity communicate and share information via cell phones and other electronic devices. *Id.* at 1269. The judge issued a warrant to search the suspect's girlfriend's apartment, where there was evidence that he was living, for "all electronic devices." *Id.* at 1269-70. Based on the warrant, police seized several cell phones found in the apartment. *Id.* at

1270. Given that the affidavit, like the one at issue in this case, "provided virtually no reason to suspect that Griffith in fact owned a cell phone, let alone that any phone belonging to him and containing incriminating information would be found in the residence," yet "the warrant authorized the wholesale seizure of all electronic devices discovered in the apartment, including items owned by third parties," "the warrant was unsupported by probable cause and unduly broad in its reach." *Id.* at 1270-71.

At least one district court has followed *Griffith* in requiring more than assumptions about cell phones and allegations of criminal conduct against a suspect connected with a residence to justify the search of the residence for and blanket seizure of all cell phones found in it. *See Matter of Search Warrant Application for the Search of a Townhome Unit*, 2020 WL 1914769, at **3-4 (N.D. Ill. Apr. 20, 2020) (unpublished) (requiring warrant authorizing police to seize electronic devices located in residence to include limitation that devices be "connected to the subject offense or in the possession of the target of the offense"; "In this Court's view, *Riley* and *Griffith* counsel caution before a court authorizes seizure of all electronic devices from a premises.").

The lower courts in this case took the opposite approach on facts that are even less supportive of probable cause than *Griffith* found inadequate to support even a good-faith reliance on the warrant. As SLPD's affidavit here noted, police had found a cell phone on Williams when they arrested him on the day the warrant was requested and obtained. App. 30. So even the assumption "that most people today

own a cell phone," which *Griffith* held was not sufficient, 867 F.3d at 1272-73, would not have been enough here, where there would have had to have been a basis for believing Williams had cell phones in the apartment *in addition to the one police had seized from him that day.*

Griffith summed up the breadth of the proposition it was rejecting: "because nearly everyone now carries a cell phone, and because a phone frequently contains all sorts of information about the owner's daily activities, a person's suspected involvement in a crime ordinarily justifies searching her home for any cell phones, regardless of whether there is any indication that she in fact owns one." *Id.* at 1275. Accepting this proposition "would verge on authorizing a search of a person's home almost anytime there is probable cause to suspect her of a crime." *Id.* The warrant here went even further. There was no reason to believe here, as there was in *Griffith*, that the searched apartment was Williams' "home," or any other place where a second cell phone connected to him or in which evidence of his suspected criminal activity, six days earlier, might be found. Thus, accepting the search here would effectively authorize a search of any location, and the seizure of any cell phone within that location, whenever a person suspected of criminal activity has been seen at the location.

As in *Griffith*, the warrant here also was "overbr[oad] in allowing the seizure of all electronic devices found in the residence." 867 F.3d at 1275. By "broadly authoriz[ing] seizure of *all* cell phones and electronic devices, without regard to ownership," the warrant's "sweep far outstripped the police's proffered justification

for entering the home," including to obtain evidence related to Williams' criminal activity. *Id.* at 1276. *Griffith* concluded that the affidavit was so lacking in probable cause that the good-faith exception did not apply. *Id.* at 1279. Yet the lower courts here upheld the warrant to seize from Winn's apartment all cell phones. App. 4, 13; *see also United States v. Wagner*, 951 F.3d 1232, 1248 n.14 (10th Cir. 2020) (rejecting overbreadth challenge to warrant that allowed police to seize any computer at residence, regardless of ownership: in contrast to *Griffith*, agents there "had probable cause to search Mr. Wagner's residence for any device that soldiermike could have used to access Playpen or child pornography. Because soldiermike's identity was unknown, the Residence Warrant was not overbroad for failure to limit seizure to devices Mr. Wagner owned.").

The police here seized Winn's cell phone from his person, though it was his home and he was not suspected of wrongdoing, and the district court upheld the seizure, App.13, based on the warrant to search for evidence related to Williams, his suspected involvement in a shooting and his gang affiliations. App. 28-32. The Ninth Circuit majority did not thoroughly address the legality of the seizure of Winn's cell phone, instead invoking the inevitable discovery exception to the exclusionary rule. App. 5. The majority also held, however, that the warrant was sufficiently particular because "it sufficiently described the items to be seized, including cell phones, and there was probable cause that the cell phones would contain evidence related to the shooting incident." App. 4. In doing so, it created a conflict with *Griffith*.

VI. This case presents a good vehicle for resolving the conflicts

There is no factual dispute as to the two issues raised in this petition. There was no evidence in the record, beyond the post-search development of probable cause, upon which an application of the inevitable discovery rule could have been premised. Likewise, there was no explanation for the departure from the usual and accepted course of judicial proceedings undertaken by the panel when it violated the burden-shifting procedure set forth in *Nix*. Finally, the warrant for the seizure of all electronic devices relied on an affidavit that did not allege that the suspect likely maintained an electronic device at the residence, and it contained no limitations on which devices within the residence might be seized. The district court and the panel held that the warrant was supported by probable cause and drafted with specificity. The propriety of seizing all electronic devices in a residence based merely on probable cause that a suspect has a nexus to that residence is thus squarely presented, in direct conflict with *Griffith*.

CONCLUSION

For the reasons stated above, Mr. Winn respectfully asks this Court to issue a writ of certiorari.

Dated: Dec. 18, 2020

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