No. 23-_____

IN THE

Supreme Court of the United States

FRANKLIN PAUL ELLER, JR.,

Petitioner,

vs.

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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QUESTION PRESENTED

For more than a century, this Court has recognized the exclusionary rule as the appropriate remedy for violations of the Fourth Amendment. *See Weeks v. United States*, 232 U.S. 383 (1914); *see also Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (acknowledging that the exclusionary rule "is an essential ingredient of the Fourth Amendment"). But the Court has also emphasized that application of the exclusionary rule should be a "last resort," rather than a "first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). In keeping with this view, the Court has carved out several exceptions to application of the exclusionary rule. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1 (1995) (good faith exception); *Nix v. Williams*, 467 U.S. 431 (1984) (inevitable discovery doctrine); and *Murray v. United States*, 487 U.S. 533 (1988) (independent source doctrine).

This Court, however, has yet to recognize an exception to the exclusionary rule regularly applied by lower federal and state courts. Under the "severance doctrine," a court presented with an impermissibly overbroad search warrant may be able to "sever" the portion of the search warrant that violates the Fourth Amendment from the remaining constitutionally permissible portions of that warrant, thereby allowing enforcement of the non-tainted portion of the warrant.

In this case, the United States Court of Appeals for the Ninth Circuit held that severance was the appropriate response to a claim that a search warrant served on the Internet Service Provider Yahoo!, Inc. ("Yahoo") was impermissibly overbroad and therefore violative of the Fourth Amendment. The Ninth

Circuit's flawed application of the severance doctrine to the search warrant in this case, however, places the Ninth Circuit at odds with other circuit courts of appeal and creates uncertainty concerning the scope and application of the severance doctrine.

This petition for writ of certiorari presents the following questions:

(1) Is severance of any overbroad warrant a permissible exception to the exclusionary rule; and if so,

(2) What it is the appropriate method to determine whether a warrant is capable of severance?

PARTIES TO THE PROCEEDING

Franklin Paul Eller, Jr., petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

- *United States v. Franklin Paul Eller, Jr.*, No. 20-10425 (9th Cir.). Opinion and memorandum disposition filed on January 25, 2023; Petition for Rehearing and Rehearing En Banc denied April 4, 2023.
- *United States v. Franklin Paul Eller, Jr.*, No. 3:16-cr-08207-DGC-1 (D. Ariz.) Judgment and sentence entered December 17, 2020.

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Petitioner Franklin Paul Eller respectfully asks the Court to review the decision of the United States Court of Appeals for the Ninth Circuit in this matter.

PROCEEDINGS BELOW

The published and unpublished decisions of the court of appeals are reproduced in the appendix at page 1a and 11a. The published decision is also reported at 57 F.4th 1117 (9th Cir. 2023). The district court's judgment and sentence for Mr. Eller is reproduced in the appendix at page 19a and is not reported.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion and memorandum decision in this case on January 25, 2023. That court denied a timely filed petition for rehearing on April 4, 2023. By order of June 12, 2023 (Application No. 22A1068), Justice Kagan extended the time for filing the petition to and including August 17, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The Fourth Amendment to the United States Constitution 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.

STATEMENT OF THE CASE

This petition for writ of certiorari concerns a sweepingly broad search warrant that permitted the FBI to obtain from Yahoo all of Franklin Eller's sent and received emails (including deleted and draft emails), instant messages, and any attachments, from the date of the creation of his Yahoo account until the date of the warrant, a period of over nine years. This unfettered search of Mr. Eller's email account was based solely on an affidavit attesting that the FBI had probable cause to believe that, between January and May 2012, he received child pornography on the account. (Appendix ("App.") at 13a, 55a)

The FBI Investigation

The FBI's investigation in this case began in September 2014, when Yahoo submitted a CyberTipline Report to the National Center for Missing and Exploited Children ("NCMEC") reporting the discovery of suspected child pornography images found in the account of a Yahoo email user (hannah_sweetycole@yahoo.com) in the Philippines. (App. at 51a) From the CyberTipline Report, the FBI developed suspicion that other Yahoo account users in the Philippines coordinated with the owner of hannah_sweetycole@yahoo.com to sell "sexually explicit shows and/or images" of children. (App. at 51a to 53a) Negotiation for many of these transactions occurred via Yahoo Messenger, a now defunct instant messaging service operated by Yahoo. (App. at 53a)

The FBI's extensive investigation into the purported sales and purchases of these shows and images was labeled "Operation Swift Traveler." The investigation revealed that approximately 70 Yahoo email users communicated with various Yahoo email accounts in

the Philippines regarding sex shows involving children. Mr. Eller was one of the Yahoo account holders believed to have been in contact with the Philippines suspects.

In November 2014, the FBI obtained the search warrant at issue in this appeal from the United States District Court for the District of Columbia allowing it to search the accounts of several Yahoo email users, including Mr. Eller, believed to be associated with the transactions being investigated in Operation Swift Traveler. The multi-suspect warrant contained a single section describing the "[i]nformation to be disclosed by Yahoo! (the "Provider") to facilitate execution of the warrant." (App. at 62a to 63a) This section pertained to each of the suspects identified in the warrant. The provision at issue in this petition required Yahoo to disclose:

> (a) The contents of all e-mails associated with the account, from the time of account creation to the present, including stored or preserved copies of e-mails sent to and from the account, e-mail attachments, draft e-mails, the source and destination addresses associated with each e-mail, the date and time at which each e-mail was sent, and the size and length of each email[.]

(App. at 62a)

Mr. Eller's Yahoo account was created in 2005. Because the warrant required disclosure of all data from the date of the account's creation, the records disclosed by Yahoo pursuant to the warrant in 2014 contained nearly a decade of data that fell outside the

January-to-May-2012 timeframe for which the FBI alleged it had probable cause to search.

Once the FBI obtained the many years of records from Mr. Eller's Yahoo account, a special agent conducted a multi-day review of those records. The special agent reviewed more than 1552 of Mr. Eller's Yahoo email conversations. She discovered that none of those emails related to any child sexual exploitation matters. The special agent also found no suspected images of child pornography in the multitude of records.

During her multi-day search of Mr. Eller's entire Yahoo account history, the special agent also read approximately 3736 instant message chats. Among those thousands of instant messages, the special agent found a few that appeared to involve discussions about live sex shows involving children. Those messages, however, did not come from the January-to-May-2012 timeframe alleged in the Yahoo Affidavit. Rather, the messages identified in the special agent's report were created more than two years later, in August 2014.

The District Court Proceedings

A grand jury in the District of Arizona indicted Mr. Eller, an Arizona resident, in September 2016 on four counts of coercion and enticement of minors, in violation of 18 U.S.C. § 2422(b). The four counts, derived from the instant messages obtained from Mr. Eller's Yahoo Instant Messenger archives, alleged that the offenses occurred in 2013 and 2014. Several months later, the government obtained a superseding indictment charging Mr. Eller with additional counts involving production and receipt of child pornography, all pertaining to the four coercion and enticement

accounts alleged in the original indictment. By the time of trial, the government had elected to prosecute each of the counts as attempts, rather than completed crimes.

Prior to trial, Mr. Eller moved to suppress evidence obtained pursuant to the Yahoo warrant. Among the arguments he raised in that motion was that the Yahoo Warrant was impermissibly overbroad as it pertained to him because it permitted the FBI to search the entirety of his email account, including thousands of emails and instant messages, without regard to the probable cause time frame alleged in the warrant affidavit. The district court denied the motion, however, finding that "[g]iven all the circumstances surrounding the government's investigation as set forth in the [Yahoo warrant affidavit], there was 'a fair probability that contraband or evidence of a crime [would have been] found' on Defendant's email outside of the limited date range presented by the government." *United States v. Eller*, 2020 WL 58569, at *9 (D. Ariz. 2020) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

At Mr. Eller's trial in 2020, the government presented the jury with transcripts of instant messages from 2013 and 2014 between Mr. Eller and four Yahoo account holders. The instant message transcripts, which were the keystone of the government's case against Mr. Eller, contained conversations in which the participants appeared to be negotiating for the purchase of live sex shows involving children.

The jury returned verdicts of guilt on all counts, and the district court subsequently imposed concurrent 180-month terms on each count.

Ninth Circuit Proceedings

On appeal, Mr. Eller again raised his overbreadth challenge to the Yahoo Warrant. In response, while still maintaining that the warrant was not overbroad, the government also argued for the first time that, even if the warrant were overbroad, both the severance doctrine and the good faith doctrine permitted the panel to affirm the district court's denial of the motion to suppress. The government maintained that, despite any overbreadth, under the doctrine of severance, items of trial evidence seized pursuant to valid portions of the warrant need not be suppressed.

The United States Court of Appeals for the Ninth Circuit (Senior Circuit Judge Bybee, Circuit Judge Owens, and Circuit Judge Collins) agreed, holding that any overbreadth in the Yahoo Warrant could be remedied by applying the severance doctrine.

The Ninth Circuit expressly declined to decide whether the warrant was overbroad. (App. at 12a) Rather, it concluded that probable cause existed to search Mr. Eller's Yahoo account at least from January 2012 onward. (App. at 13a) Then, purporting to rely on Ninth Circuit opinions applying the severance doctrine, the panel reasoned, "Thus, even if the search warrant was overbroad as to Eller's pre-2012 data, we need not decide the issue because the trial exhibits in dispute are from 2013 and 2014—a period for which the warrant affidavit gave probable cause and is therefore 'sufficiently specific and particular' to support severance." (App. at 13a (quoting *United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986)))

Mr. Eller now petitions this Court for a writ of certiorari on the Ninth Circuit's application of the severance doctrine.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's memorandum decision in Mr. Eller's appeal decided an important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(c). Specifically, without guidance from this Court concerning the appropriateness, scope, and proper application of the severance doctrine, the Ninth Circuit has developed a muddled and contradictory array of case law on the use of the severance doctrine to remedy overbroad warrants. In addition, as explained below, Ninth Circuit case law is at odds with the decisions of other circuit courts of appeal concerning the scope and proper application of the severance doctrine, thereby creating a circuit split. *See* Sup. Ct. R. 10(a).

Development of the Severance Doctrine in the Ninth Circuit

United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982), is the first opinion in which the Ninth Circuit addressed the issue of severance of an overbroad search warrant in the context of a motion to suppress evidence in a criminal proceeding. In *Cardwell*, the Court observed that, in *Andresen v. Maryland*, 427 U.S. 463 (1976), this Court "generally approved the severance of infirm portions of [a] warrant from valid portions, suppressing or returning items seized under the former portion, but not the latter." *Cardwell*, 680 F.2d at 78 (citing *Andresen*, 427 U.S. at 482 n.11). The Ninth Circuit emphasized in *Cardwell*, however, that "severance is not always possible. If no portion of the

warrant is sufficiently particularized to pass constitutional muster, then total suppression is required." *Id.* Because the Court in *Cardwell* found that the warrant was too overbroad to "pass constitutional muster," it did not permit severance in that case.

Two years after *Cardwell*, the Ninth Circuit again addressed the issue of severance in *United States v. Gomez-Soto*, 723 F.2d 649 (9th Cir. 1984). There, the Court evaluated a challenge to a warrant that authorized the seizure of numerous items identified in thirteen separate paragraphs of the warrant. See *Gomez-Soto*, 723 F.2d at 651-52 n.**. The Court found that one of the thirteen paragraphs "lack[ed] objective guidelines to aid the determination of what may or may not be seized" and was "thus unconstitutionally vague." *Id.* at 654. Citing *Cardwell*, the Court observed that its conclusion that one of the thirteen paragraphs was impermissibly vague did not require it to invalidate the entire warrant: "This court has embraced the doctrine of severance, which allows us to strike from a warrant those portions that are invalid and preserve those portions that satisfy the fourth amendment. Only those articles seized pursuant to the invalid portions need be suppressed." *Gomez-Soto*, 723 F.2d at 654 (citing *Cardwell*, 680 F.2d at 78). The Court determine that the offending paragraph could be severed from the warrant, which would permit it to "uphold the portion that remains." *Id.* at 654.

The Ninth Circuit next addressed severance in *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986). Finding the warrants at issue in that case impermissibly overbroad, the court considered whether the offending portions of the warrants could

be severed. Citing *Cardwell* and *Gomez-Soto*, the court observed that "[i]n this circuit we follow the rule that where invalid portions of the warrant may be stricken and the remaining portions held valid, seizures pursuant to the valid portions will be sustained." *Spilotro*, 800 F.2d at 967. But the court emphasized: "[The severance] doctrine requires, however, that *identifiable portions of the warrant be sufficiently specific and particular to support severance*." *Id.* (Emphasis added.) Specifically, the court noted the importance that offending portions of the warrant be "set forth in *textually severable portions*." *Id.* at 968 (emphasis added). Unable to find any such "identifiable portions of the warrant," the court affirmed the district court's order suppressing the seized evidence. *Id.*; *id.* at 968.

Relying on *Spilotro*, the Ninth Circuit again affirmed a district court's suppression order in *United States v. Stubbs*, 873 F.2d 210 (9th Cir. 1989). In *Stubbs*, the court reiterated that, where the challenged warrant is overboard "as a whole," the severance doctrine is inapplicable. *Id.* at 212, 213. The Ninth Circuit would later reach a similar decision in *United States v. Kow*, 58 F.3d 423, 428 (9th Cir. 1995).

In contrast, *In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847 (9th Cir. 1991), is a case in which the Ninth Circuit found severance to be appropriate. There, the court upheld the district court's decision to sever portions of two warrants served on separate offices of a law firm. *Id.* at 851. The warrants sought documents containing references to "Doe One or any of twenty-one other individuals or business entities which the Government suspected of being involved in [a] money laundering scheme." *Id.* The district court found that

there was no probable cause as to nine individuals or entities named in the warrants. *Id.* at 852. Affirming the district court's ruling, the court held that "[t]he fact that the district court found that the seizure of the property of nine persons or entities was invalid as not connected to the crime described in the affidavit [did] not affect the validity of the warrants insofar as probable cause exist[ed] to search for the papers of the other persons or entities identified in the . . . warrants." *Id.* at 858. Citing *Gomez-Soto* and *Spilotro*, the Court observed that "valid portions of a search warrant may be severed from the invalid portions." Particularly relevant to Mr. Eller's case, however, the court emphasized that "severance is not available when the valid portion of the warrant is 'a relatively insignificant part' of an otherwise invalid search." *In re Grand Jury Subpoenas*, 926 F.2d at 858 (quoting *Spilotro*, 800 F.2d at 967). *See also Kow*, 58 F.3d at 428.

The Ninth Circuit addressed the issue of severance once again in *United States v. Sears*, 411 F.3d 1124 (9th Cir. 2005), and once again it affirmed a district court's decision to sever portions of a warrant. *Sears* involved a discrepancy between an exhibit describing items to be seized, which the police provided to the issuing magistrate, and a revised version of that exhibit inadvertently provided to the officers who executed the warrant. 411 F.3d at 1126. The language of the revised exhibit expanded the scope of the search by including the phrases "or nearby" and "but not limited to," which did not appear in the exhibit provided to the issuing magistrate. *Id.*

The court determined that severance was possible in *Sears*. Specifically, it concluded that the words "or nearby" and "but not limited to," which rendered the

warrant overbroad, could be "excise[d]" from the warrant exhibit. 411 F.3d at 1130. Critical to the court's reasoning was that, as *Spilotro* required, these words represented only a small portion of the scope of the search as a whole. *Id.* at 1130-31. As the Court noted, "Although the [words "or nearby" and "but not limited to"] enlarged the scope of the warrant, the items for which [the issuing magistrate] found probable cause—in particular, cocaine and narcotics paraphernalia—formed 'the focus, and the vast majority' of the search." *Id.* at 1131.

A decade after *Sears*, the Ninth Circuit again employed the severance doctrine, but in a much different manner. In *United States v. Flores*, 802 F.2d 1028 (9th Cir. 2015), the defendant moved to suppress the government's search of her entire Facebook account, arguing, among other things, that the warrant was overbroad. *See id.* at 1044-46. On appeal, the court determined, as did the panel in this case, that it "need not decide whether the warrant was overbroad." *Id.* at 1045. Rather, the court concluded that it could employ the severance doctrine.

The court's application of the severance doctrine in *Flores*, however, was flawed. The opinion properly cites *Gomez-Soto* for the principle that the severance doctrine "allows [a court] to strike from a warrant those portions that are invalid and preserve those portions that satisfy the Fourth Amendment. Only those articles seized pursuant to the invalid portions need be suppressed." *Flores*, 802 F.3d at 1045 (quoting *Gomez-Soto*, 723 F.2d at 654). Rather than reviewing the language and contents of the warrant, however, the court in *Flores* then proceeded to consider *the evidence presented at trial*. *Id.* at 1045-46. The court observed that the only Facebook

messages introduced at trial were sent on the day of the defendant's arrest for the crime "and thus fell well-within even the narrowest of temporal limits." *Id.* The court concluded, "Therefore, even though the warrant had no temporal limit, the district court did not err in denying Flores's motion to suppress." *Id.* at 1046.

The Ninth Circuit's cursory application of the severance doctrine in *Flores* was inconsistent with the development of that doctrine and cannot support the ruling reached by the Ninth Circuit in Mr. Eller's case. Unlike the other severance doctrine opinions previously issued by the Ninth Circuit, *Flores*'s analysis rested entirely on what evidence was actually presented at trial, rather than on the scope and language of the warrant itself.

A close reading of *Flores* reveals that the Ninth Circuit was, in essence, employing a quasi-harmless-error analysis, rather than a proper severance doctrine analysis. Specifically, the court reasoned that "the district court did not err in denying *Flores*'s motion to suppress" *because* only limited evidence from the Facebook account was later admitted at trial. 802 F.3d at 1045-46. No other circuit court opinion employs this analysis, and with good reason. The analysis in *Flores* does not even address the Fourth Amendment implications in that case: the warrant allowed the government to search and seize over 11,000 pages of data when "only approximately 100 pages were truly responsive to the warrant." *Id.* at 1044. Upholding such a search conflicts with case law expressly holding that "severance is not available when the valid portion of the warrant is 'a relatively insignificant part' of an otherwise invalid search." *In re Grand Jury Subpoenas*, 926 F.2d at 858 (quoting

Spilotro, 800 F.2d at 967); *see also Kow*, 58 F.3d at 428.

The Ninth Circuit's Application of the Severance Doctrine in Mr. Eller's Case

Like *Flores*, the memorandum decision in Mr. Eller's case failed to properly apply the severance doctrine. Rather, it held that, "even if the search warrant was overbroad as to Eller's pre-2012 data," because probable cause existed to search Mr. Eller's account after 2012, and because the only trial exhibits admitted a trial were from 2013 and 2014, "severance" was appropriate. (App. at 13a) As in *Flores*, this analysis is essentially a harmless-error analysis, rather than one grounded in the Fourth Amendment. For example, the court in Mr. Eller's case did not consider whether "identifiable portions of the warrant [were] sufficiently specific and particular to support severance." *Spilotro*, 800 F.2d at 967 (emphasis added). Had it done so, it would have concluded that no portion of the Yahoo warrant applicable to Mr. Eller was capable of being severed from other portions. Further, the court failed to consider whether "the valid portion of the warrant [was] 'a relatively insignificant part' of an otherwise invalid search." *In re Grand Jury Subpoenas*, 926 F.2d at 858 (quoting *Spilotro*, 800 F.2d at 967); *see also Kow*, 58 F.3d at 428. Had it done so, it would have concluded that the two-year period for which it found probable cause to search Mr. Eller's Yahoo account paled in comparison to the nine-year search the FBI conducted. Because the two-year period the panel found proper was a "relatively insignificant part" of an otherwise invalid nine-year search, severance was not proper. *Spilotro*, 800 F.2d at 967.

The Circuit Split Between the Ninth Circuit and its Sister Circuits

The Ninth Circuit's application of the severance doctrine in *Flores* and in Mr. Eller's case places that court in conflict with the holdings of other circuit courts of appeal. *See, e.g.*, *United States v. Sells*, 463 F.3d 1148, 1155-62 (10th Cir. 2006) (setting forth detailed instructions for application of severance doctrine); *United States v. Cotto*, 995 F.3d 786, 798-99 (10th Cir. 2021) (applying *Sells*); *United States v. Galpin*, 720 F.3d 436, 448-449 (2d Cir. 2013) (adopting Tenth Circuit analytical approach in *Sells* and citing *Spilotro* in support); and *United States v. Christine*, 687 F.2d 749, 754 (3d Cir. 1982) ("By redaction, we mean striking from a warrant those severable phrases and clauses that are invalid for lack of probable cause or generality and preserving those severable phrases and clauses that satisfy the Fourth Amendment.").

The Tenth Circuit's application of the severance doctrine illustrates the conflict between the Ninth Circuit and its sister circuits. In *United States v. Naugle*, 997 F.2d 819, 822 (10th Cir. 1993), the Tenth Circuit, citing the Second Circuit, observed: "To make the severability doctrine applicable the valid portions of the warrant must be sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant." (Citing *United States v. George*, 975 F.2d 72, 79-80 (2d Cir.1992).)

In *United States v. Sells*, the Tenth Circuit elucidated the multi-step analysis required to apply the doctrine. 463 F.3d at 1155-60. First, the court must divide the warrant into individual phrases, clauses, paragraphs, or categories of items. *Id.* at 1156. Next, the court

must determine whether some portion of the warrant "describes with sufficient particularity items to be seized for which there is probable cause." *Id.* "'Otherwise, there is nothing for the severability doctrine to save.'" *Id.* (quoting *State v. Maddox*, 116 Wash. App. 796, 67 P.3d 1135, 1141 (2003)).

The next step in the *Sells* analysis requires the court to determine whether some part of the warrant is both constitutionally valid and *distinguishable* from the invalid portions. *Sells*, 463 F.3d at 1158 (citing *Naugle*, 997 F.2d at 822). "Where . . . each of the categories of items to be seized describes distinct subject matter in language not linked to language of other categories, and each valid category retains its significance when isolated from rest of the warrant, then the valid portions may be severed from the warrant." *Id.* However, the court must first determine that the valid portions of the warrant "make up the greater part of the warrant." *Id.* at 1158-59. This step of the analysis "focuses on the warrant itself rather than upon an analysis of the items actually seized during the search." *Id.* at 1159. Thus, under the analysis required by the Tenth Circuit, a court may apply the severance doctrine only where the valid portions of the warrant are sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant. *Id.* at 1161.

In contrast with the application of the severance doctrine in other circuits, the Ninth Circuit, through its rulings in *Flores* and this case, has fashioned a version of the doctrine that focuses not on the Fourth Amendment's core concern with the protection of privacy, nor with the validity of the warrant at issue, but rather on an entirely distinct, evidentiary issue. Specifically, under Ninth Circuit law as fashioned by

Flores and this case, a court can apply the severance doctrine regardless of the vastness and inappropriateness of the government's search of the defendant's property and regardless of whether the warrant itself is capable of being severed into valid and invalid parts. Rather, under the Ninth Circuit's development of the severance doctrine, "severance" of the "warrant" is permissible so long as the evidence ultimately admitted at the defendant's trial could have been obtained by use of a warrant that, unlike the warrant with which the court is actually presented, complied with the dictates of the Fourth Amendment. Such an analysis, however, is entirely divorced from the privacy concerns that underpin the Fourth Amendment. Under the Ninth Circuit's application of the severance doctrine, the government is now free to conduct a search of limitless scope, so long as the evidence it ultimately chooses to present at trial *could have been obtained* by a valid warrant. Such an approach contravenes the very core of the Fourth Amendment.

Mr. Eller therefore respectfully requests that this Court grant certiorari to resolve the important federal question of the severance doctrine's role in Fourth Amendment jurisprudence and to resolve the circuit split that exists concerning the proper scope and application of the doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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