No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES FITZGERALD BRANCH,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court resolve a split between the Ninth and Third circuits, where the Third Circuit has condemned the admission of evidence for a non-hearsay purpose when its non-hearsay probative value is de minimis but its substantive (hearsay) value is great, and where the Ninth Circuit applies no such rule?

STATEMENT OF RELATED PROCEEDINGS

The proceedings identified below are directly related to the above-captioned case in this Court.

- *United States v. Charles Branch,* No. 21-cr-00403-PA, U.S. District Court for the Central District of California. Judgment entered September 13, 2022.
- *United States v. Charles Branch,* No. 22-50202, U.S. Court of Appeals for the Ninth Circuit. Memorandum Opinion entered January 9, 2024. Petition for Rehearing denied on May 21, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Charles Branch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

On January 9, 2024, the Ninth Circuit Court of Appeals issued an unpublished decision affirming petitioner's conviction and sentence. Appendix A, App-1. On May 21, 2024, the appellate court denied petitioner's petition for review. Appendix C, App-12.

JURISDICTION

The court of appeals entered its judgment on January 9, 2024, and denied a petition for rehearing on May 21, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Federal Rule of Evidence 801(c) defines hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted."

Federal Rule of Evidence Rule 801(b) defines the "declarant" as "the person who made the statement."

Federal Rule of Evidence 802 provides that "[h]earsay is not admissible unless any of the following provides otherwise: [¶] a federal statute; [¶] these rules; [¶] or other rules prescribed by the Supreme Court."

INTRODUCTION

In a trial for possession of stolen mail where the case was weak that petitioner knew the mail was stolen, evidence was admitted of an uncharged occasion on which petitioner was seen on a video stealing mail from mailboxes. This evidence came in through the arresting police officer who relayed what another officer told him he had seen on the video. In a memorandum opinion, the Ninth Circuit affirmed petitioner's convictions, concluding that the evidence was non-hearsay admitted to explain why the arresting officer searched petitioner's bag on that occasion, or, in the alternative, that it was admissible under the present sense impression exception to the rule against hearsay.

Certiorari is warranted because the opinion of the Ninth Circuit conflicts with the law of the Third Circuit, which has condemned as an area of "widespread abuse" the practice of admitting hearsay evidence for the non-hearsay purpose of providing "context" for an arrest or for its "effect on the listener," when its real effect is to come in for the truth. This important issue of law must be addressed to provide guidance to the courts below on a matter of significant importance in criminal trials.

STATEMENT OF THE CASE

A. The Charged Occasions on Which Petitioner Was Found in Possession of Others' Mail

On September 5, 2020, petitioner was arrested outside an apartment complex following a call to police regarding a man matching petitioner's description standing by the mailboxes of an apartment complex, with a cart and two bags. Police determined that there had been no burglary and there was no indication that any of the mailboxes had been tampered with. However, petitioner was arrested on a parole violation warrant, and his possessions were searched, revealing 188 items of mail not addressed to petitioner, including letters and various credit and debit cards not under petitioner's name. None of the mail was from the apartment complex where petitioner was arrested.

On February 16, 2022, petitioner was arrested by UCLA police responding to a trespassing call at the Geffen Academy, a private school affiliated with UCLA. Petitioner provided a driver's license with the name Gerard Bell, but the image on the license did not match petitioner. Petitioner was arrested and his bags were searched, producing about 204 pieces of mail not addressed to petitioner.

B. The District Court Proceedings

At trial, the government introduced evidence of the two charged occasions on which petitioner was found in possession of mail belonging to other people as well as a third, uncharged, occasion on which petitioner was arrested with other people's mail in his possession. In particular, on November 23, 2020, UCLA police officer Isaac Koh

responded to a suspected burglary at a student housing complex at UCLA. Koh testified that he "overheard on the police radio that one of the detectives had replayed back the surveillance camera footage of the mail area" and saw "a subject matching the defendant's description removing mail items from the mailboxes of the Olive Court Apartments mail area, and he was seen on the footage putting the mail envelopes and mail items into that black drawstring bag. And he specified the location of the drawstring bag was hanging in front of the defendant around his neck." The statement was admitted over petitioner's hearsay objection, as the officer who made the statement did not testify at trial.

Petitioner was arrested and in his possession were found mail items including items addressed to the Olive Court apartment complex, as well as credit cards, various drivers licenses, a notepad with checking account numbers, and checks including more than one with petitioner's name on them.

The jury convicted petitioner of the two counts of possession of stolen mail in violation of 18 U.S.C § 1708, based on the September 5, 2020, and February 16, 2022 incidents.

C. The Ninth Circuit Proceedings

The court of appeals affirmed. Petitioner argued that the description of him on video stealing mail items was inadmissible hearsay that was highly prejudicial because it was by far the best evidence that petitioner had stolen mail himself, rather than having come into the possession of the mail by some other means. Though the evidence concerned uncharged misconduct, it painted petitioner as a mail thief,

shoring up a crucial gap in the government's case—the absence of compelling evidence that petitioner knew the mail was stolen. If the evidence had not been admitted, petitioner argued that it is reasonably probable that he would have obtained a better outcome at trial.

The appellate court rejected petitioner's argument, concluding first that the description heard by Officer Koh was not hearsay introduced for the truth of the matter stated, but merely offered for the effect on the listener: "Detective Anderson's description of the suspect was therefore not hearsay, as it was offered to explain Officer Koh's actions regardless of whether Detective Anderson's statement was true." App-2. The court further concluded that even if the description of petitioner stealing mail was admitted for the truth, it was admissible under the present sense impression exception to the hearsay rule because "Anderson had personal knowledge of what he was describing, and he described the surveillance footage 'while or immediately after' viewing it. Fed. R. Evid. 803(1)." App-3.

Mr. Branch filed a petition for rehearing and rehearing en banc, arguing that the court's opinion conflicted with the Third Circuit's approach to comparable evidence which condemned the practice of admitting evidence as non-hearsay when its true purpose or effect is to come in for the truth. The Ninth Circuit denied the petition. App-12.

REASONS FOR GRANTING THE PETITION

The appellate court's conclusion that the evidence of the contents of a video showing petitioner stealing mail were not admitted for the truth of the matter but rather admitted to show the effect on Officer Koh, represents an issue of exceptional importance and an issue on which the Ninth Circuit is at odds with at least one other. In particular, allowing in highly prejudicial evidence to establish "context" for the jury—and the effect on the listener here is merely that—when its real purpose or effect is to establish something else entirely, presents a serious threat to criminal defendants, and one with which the Third Circuit disagrees.

The Third Circuit addressed this oft-cited reason for admitting damaging evidence in *United States v. Sallins*, 993 F.2d 344, 346 (3d Cir. 1993), concluding that "[w]hile officers generally should be allowed to explain the context in which they act, the use of out-of-court statements to show background has been identified as an area of 'widespread abuse.'" *Id.*, *quoting* 2 *McCormick On Evidence* § 249, at 104 (4th ed. 1992); *see also United States v. Price*, 458 F.3d 202, 205 (3d Cir. 2006). In *Sallins*, a gun possession case, an officer testified that he and his partner responded to a radio dispatch stating that a 911 call had just reported that a black man in black clothes was on a particular block carrying a gun. The officer testified that he responded to the report by approaching the block, where he observed a black man in black clothes, Sallins, walking along the sidewalk. Upon seeing the police car, Sallins appeared to throw something and then ran away. One officer pursued and arrested Sallins, while the other looked under the cars near where Sallins had been walking, and discovered

a gun. *Sallins*, 993 F.2d at 344. At trial, the district court permitted the responding officers to describe the contents of the radio dispatch about the 911 call, as "background" explanation of their actions. *Id*.

On appeal, the Third Circuit held that because the testimony about the contents of the radio report was admitted only for "background"—that is, to explain why the officers responded to the scene-and not as substantive evidence that Sallins had possessed the gun—the incriminating details about the contents of the radio report should not have been admitted:

> Whether a disputed statement is hearsay frequently turns on the purpose for which it is offered. If the hearsay rule is to have any force, courts cannot accept without scrutiny an offering party's representation that an out-of-court statement is being introduced for a material non-hearsay purpose. Rather, courts have a responsibility to assess independently whether the ostensible non-hearsay purpose is valid.

Id. at 346. Thus, "[i]f the legitimate non-hearsay probative value of particular testimony is nil or de minimis, and the substantive (hearsay) value is great, then it should be excluded. Such scrutiny is necessary 'if the hearsay rule is to have any force' in the context of police radio reports.'" *Price*, *supra*, 458 F.3d at 208, *quoting Sallins*, 993 F.2d at 347; *see also United States v. Lopez*, 340 F.3d 169 (3d Cir. 2003) (testimony of prison guards that they searched Lopez's cell because they had "received information that Lopez was in possession of heroin," improperly admitted as background explanation for the officers' conduct in searching his cell.)

The case at bar represents exactly the threat discussed by *Sallins*. While the Ninth Circuit may have been correct that the description of a video in which petitioner was seen stealing mail explained why the officers searched his bag, that

explanation was entirely unnecessary. The jury was not being called upon to determine whether there was a Fourth Amendment violation or some other deficiency in the search. They did not need an explanation of why the officer search petitioner's bag. In any case, there was more than adequate other evidence to establish why the police detained and searched petitioner. As the government noted in its opposition on appeal, evidence was admitted that responding officers were informed over the police radio that the burglary occurred in the mail area of the apartment complex, and that the suspected burglar was "a [b]lack male, short hair, black sweater, gray sweat pants, wearing a light blue backpack." According to Officer Koh's testimony, petitioner was detained because he matched the description. This evidence having been admitted, it was entirely gratuitous and highly prejudicial to recite another officer's description of petitioner actually stealing mail. It is apparent why police were at the scene, why they detained petitioner, and why they searched his bags.

Thus, the value of Officer Koh's recitation of another officer's review of the video for the purpose of establishing a reason why the officers searched petitioner was either "nil or de minimis" (*Price*, *supra*, 458 F.3d at 208); its misuse by the jury, however, was a near certainty. This is exactly the danger of admitting evidence of minimal value to establish "context" or "effect on the listener" when the evidence is sure to be considered for its truth.

As this is a recurring matter of exceptional importance and because the appellate opinion represents, in effect, a split between two circuit courts on an

important point of law, the petition for a writ of certiorari should be granted to resolve confusion among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: July 19, 2024

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