

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

SCOTT MITCHELL BUMMER,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

Whether, during a three-day hearing, the Petitioner's absence from a telephonic conference on the second day violates his right to due process.

Whether the district court violated Petitioner's *Fourth Amendment* rights by denying the Petitioner's motion to suppress.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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UNITED STATES CONSTITUTION

Fourth Amendment *passim*.

Fifth Amendment (Due Process) *passim*.

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The Petitioner, Scott Mitchell Bummer, (referred to herein as Petitioner), respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The memorandum decision of the Court of Appeals (App. A) is

unpublished, *United States v. Scott Mitchell Bummer*, No. 17-30046 (9th Cir. July 20, 2018).

JURISDICTION

The judgment of the Ninth Circuit was entered on July 20, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's argument necessarily implicates his constitutional right to due process of law under the *Fifth Amendment*. Therefore, the relevant provisions of the *Fifth Amendment* to the United States Constitution are reproduced at App. B.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. Introduction

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit from a criminal conviction entered in the United States District Court for the District of Montana. Petitioner was convicted of conspiracy, possession with intent to distribute methamphetamine and possession of a firearm in furtherance of a drug trafficking crime. *See*

21 U.S.C. §§ 846, 841(a)(1), and 18 U.S.C. 924(c)(1)(A).

The district court sentenced Petitioner on March 14, 2017.

Petitioner received two 120-month concurrent terms of imprisonment for the drug charges, followed by the mandatory consecutive 60-month sentence for the gun charge. The total sentence is 180 months, i.e., fifteen years.

2. Course of Proceedings

Petitioner was indicted on August 21, 2015. A superseding indictment was filed on October 23, 2015. (ER 298). On November 10, 2015, defense counsel filed a motion and brief in support seeking to suppress evidence discovered pursuant to a search warrant issued by a state court in Montana. The crux of the motion was that law enforcement included materially false information or recklessly and negligently omitted material information from the search warrant application. Had the state court been properly and truthfully informed, argued Petitioner, the state court would not have found probable cause to issue the search warrant for Petitioner's home and business.

The district court set a hearing on Petitioner's motion to suppress.

The hearing was spread over the course of three days. On the first day, December 7, 2015, the district court ruled – over the Government’s objection – that Petitioner had overcome the high burden for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). The Government called witness and Petitioner’s counsel cross-examined them. Proceedings on the Petitioner’s motion could not be completed in one day, so the district court ordered the hearing to recommence on December 10, 2015. (ER 299).

The next day, December 8, 2015, the district court held a conference call between Petitioner’s counsel and counsel for the Government. (ER 81-97). Petitioner was not present and the record is silent on how the parties were even notified of the call. There is no order setting the teleconference. It just happened. At the hearing, the district court informed the parties it had “made an error at the outset. I jumped to the hearing a little too quickly.” (ER 89).

Based on the Government’s argument, the district court backtracked from its earlier ruling for a *Franks* hearing. The court reiterated the Government’s arguments on the prerequisites for a

Franks hearing and concluded that in order to “get us back on track,” the next proper step “would be to have an *in camera, ex parte* proceeding with [the Assistant United States Attorney] and the agents to provide information regarding the warrants¹, and their criminal history and backgrounds, for me to determine whether this is something that would raise a question about misleading omissions to the state court judge in this case.” (ER 91).

Although both Petitioner’s initial motion and the testimony from the first day of the hearing raised other information that undermined the validity of the search warrant application, the district court’s main focus during the telephonic hearing was the claim that confidential informants had a history that would undercut their credibility. Consequently, on December 10, 2015, when everyone – including the Petitioner – convened, the district conducted an *ex parte, in camera* hearing with the law enforcement officer who swore the search warrant application and the Assistant United States Attorney. There is no record of this hearing, however.

¹The district court likely intended to say “informants” rather than “warrants.”

At the conclusion of the *in camera* hearing, the district court resumed proceedings. The court concluded knowledge of the informant's identity would not help Petitioner "establish that there was substantial falsehoods in the warrant affidavit or that there were materially-misleading omissions." (ER 74-75). Additionally, the court concluded that, even if it struck the reference to the informant and the informant's information from the application for the search warrant, that "sufficient probable cause has been set forth in the remainder of the affidavit to support the warrant." (ER 75). The court denied Petitioner's motion to suppress.

Petitioner's jury trial lasted two days and resulted in conviction. The district court sentenced Petitioner to a term of imprisonment of 180 months, the mandatory minimum sentences for the offenses of conviction.

3. Ninth Circuit Panel's Memorandum

Petitioner appealed to the Ninth Circuit Court of Appeals. On appeal, Petitioner raised two issues. First, that his due process rights were violated by his absence from the December 8, 2015 portion of the

evidentiary hearing. Second, Petitioner argued the district court erred in denying the motion to suppress. The Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction in an unpublished memorandum decision on July 20, 2018. *United States v. Scott Mitchell Bummer*, No. 17-30046, *2-3 (9th Cir. July 20, 2018). The memorandum is replicated in Appendix A. Petitioner did not seek a petition for rehearing or rehearing *en banc*.

B. STATEMENT OF FACTS

1. Background Facts²

The Petitioner was not the original target of the investigation that would eventually ensnare him. Rather, as with most drug investigations, it began at the bottom. In 2014, law enforcement interviewed a woman who admitted she was receiving quantities of methamphetamine from Tony Amato. The woman never met the Petitioner but had personal knowledge that Amato's source of supply was in Helena, MT. Mr. Amato is from Great Falls, MT.

²This summary of facts was derived primarily from the Opening Brief of the Defendant - Appellant before the Court of Appeal for the Ninth Circuit.

In February 2015, Detective Patrick Kruse conducted four controlled purchases of methamphetamine from Jaymee Bennett. Ms. Bennett informed Det. Kruse that “her source” had to go to Helena” to obtain the source’s drugs. (ER. 109). Ms. Bennett did not identify her source. Law enforcement eventually identified Mr. Amato as Ms. Bennett’s source of methamphetamine.

Law enforcement obtained a warrant from a United States judge for Mr. Amato’s “cell phone, for the pings.” (ER 110). Using this information, law enforcement was able to ascertain Mr. Amato was traveling to Helena from Great Falls. Det. Kruse contacted Det. McDuffie, an officer in Helena. Det. McDuffie knew “right off the bat” that the residence to which Mr. Amato traveled on one occasion belonged to Mr. Bummer. Det. McDuffie reportedly knew of Petitioner’s residence because Det. McDuffie had purchased a 1969 Mustang from Mr. Bummer and had traveled to Mr. Bummer’s residence to get the Mustang. (ER 180).

On April 11, 2015, Det. Kruse “received pings that Amato’s cell phone was moving or giving GPS coordinates . . . toward Helena.” (ER

118). Det. Kruse contacted the Customs and Border Patrol Air Branch and asked that they undertake aerial surveillance of Mr. Amato's travels. Det. Kruse also contacted Det. McDuffie in Helena and asked that Det. McDuffie establish ground surveillance on Mr. Amato. Det. Kruse remained in Great Falls but in contact with the surveillance operations. Det. Kruse learned Mr. Amato arrived in Helena and went directly to a residence that was eventually determined to belong to Mr. Bummer. (ER 120).

Surveillance reported that Mr. Amato departed Petitioner's residence and traveled to a different residence by Holter Lake. There Mr. Amato picked up a boat and towed it behind his vehicle back to the Great Falls area. Prior to arrival in Great Falls, law enforcement pulled Mr. Amato over, searched him, and found over four ounces of methamphetamine in his pants. Law enforcement transported Mr. Amato back to the police station, *Mirandized* him, and Mr. Amato agreed to speak with the officers. In the interview, which was recorded by video, Mr. Amato was visibly agitated and high on drugs. Mr. Amato testified at trial he had smoked methamphetamine on the way back

from Helena to Great Falls on April 11.

Det. McDuffie – who had traveled from Helena to Great Falls – observed Mr. Amato’s interrogation. After hearing only part of the interrogation, Det. McDuffie returned to Helena to prepare a search warrant for Mr. Bummer’s home and business. Det. McDuffie’s search warrant application and the warrant itself would later become the subject of a motion to suppress evidence recovered by the execution of the search warrant as well as the quasi-*Franks* hearing. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Petitioner’s motion to suppress alleged that Det. McDuffie’s application for the search warrant contained false information and recklessly omitted information pertaining to the credibility of an unreliable informant. (ER 294). The Government objected to Mr. Bummer’s motion arguing that Det. McDuffie’s application made a sufficient showing of probable cause based on the totality of the circumstances. (Doc. 55).³ The Government maintained that even if certain information was excised from the application, there were would

³Docket references made are to the original district court docket entries.

still be sufficient probable cause to justify issuing the warrant. (Doc. 55 at 14).

The Government also objected to Petitioner's request for a *Franks* hearing. In response, the Government set forth the five preliminary requirements to be entitled to a *Franks* hearing. *See United States v. Dicesare*, 765 F.2d 890, 894-95 (9th Cir. 1985). The Government argued that Petitioner was not entitled to a *Franks* hearing because he had not satisfied the five prerequisites for such a hearing to be held. Initially the district court disagreed and set a hearing on Petitioner's motion to suppress.

The first hearing was held on December 7, 2015. (Doc. 56). Over the Government's objection, the district court concluded that Petitioner "had cleared that threshold to establish a right to a *Franks* hearing. . . . So we are going to go ahead with the *Franks* hearing." (ER 102). Testimony was then presented by Det. Kruse and other witnesses, all of whom were cross-examined by Petitioner's counsel. The *Franks* hearing did not conclude on December 7, however. Because the Government had additional witnesses to present but not the time to do so, the

district court continued the *Franks* hearing to December 10, 2015. (ER 224-227).

No further testimony was ever taken, however. On December 8, 2015, the district court – apparently without either impetus or order – initiated a telephonic hearing between itself, defense counsel, and Government’s counsel. Petitioner was not present for this hearing. (ER 83). The district court informed the parties it had “made an error at the outset. I jumped to the hearing a little too quickly.” (ER 89). Rather than continue the hearing that had already commenced, the district court concluded “the best path would be for the *ex parte, in camera* hearing with [the Assistant United States Attorney] and the agents, to allow me to evaluate any threshold substantial showing of falsehood that would relate to the omission or misleading omission regarding the criminal history or the backgrounds of the informants.” (ER 92).

That telephonic conference converted Petitioner’s *Franks* hearing back to a preliminary inquiry into whether a *Franks* hearing was even necessary. Therefore, on December 10, the district court began with an *ex parte* hearing with only the Government’s counsel and agents. It

appears no record was made of the *ex parte* portion of the hearing. Counsel for Petitioner objected to the impromptu turnaround of the proceedings, but was overruled by the district court based on the *Franks* standard. (ER 93-94).

After the *ex parte* proceedings, the district court reconvened and ruled.

I completed the *in-camera* review of the confidential informant's identity, history, and any issues with credibility that [defense counsel] raised. After a thorough inquiry, I am satisfied with the knowledge that the informant's identity would not enable Mr. Bummer to establish that there was substantial falsehoods in the warrant affidavit or that there were materially-misleading omissions. As such, I will not require the government to disclose the informant's identity.

The district court went on to conclude that "the informant's history proves insignificant to the determination of probable cause." (ER 74-75). Finally, the district court stated that, even if it was inclined to strike reference to the informant and the informant's information from the application for the search warrant, "sufficient probable cause has been set forth in the remainder of the affidavit to support the warrant." (ER 75). "So, as I determined, Mr. Bummer is not entitled to an open evidentiary hearing on his *Franks* claim and I'm denying his motion to

suppress the evidence seized during the search of his home and business.” (ER 78). The district court did not address any favorable testimony that supported Petitioner’s motion that had been heard at the earlier *Franks* hearing on December 7, 2015.

Petitioner was eventually convicted and sentenced. He appealed two issues to the Court of Appeals for the Ninth Circuit. First, Petitioner argued his due process rights were violated when the district court conducted the telephonic hearing on December 8 in his absence. Second, he argued the district court erred in denying his motion to suppress. The Court of Appeals affirmed the denial of the motion to suppress and concluded no due process violation occurred. (Appendix A).

REASONS TO GRANT THE PETITION

- A. THE DISTRICT COURT DENIED PETITIONER HIS RIGHT TO DUE PROCESS OF LAW BY HOLDING A CRITICAL TELEPHONIC HEARING IN THE PETITIONER’S ABSENCE, WHICH FUNDAMENTALLY ALTERED THE COURSE PREVIOUSLY TAKEN ON THE PETITIONER’S MOTION TO SUPPRESS.**

The Ninth Circuit’s memorandum decision first concluded that the telephonic conference was not a critical stage in the proceedings.

(Appendix A at 2). The Ninth Circuit relied on two of its prior opinions *United States v. McChesney*, 871 F.3d 801 (9th Cir. 2017) and *Hovey v. Ayers*, 458 F.3d 892 (9th Cir. 2006).

In *McChesney*, the Ninth Circuit set forth three factors that must exist that would qualify a proceeding as a critical stage: “(1) whether ‘failure to pursue strategies or remedies results in a loss of significant rights,’ (2) whether ‘skilled counsel would be useful in helping the accused understand the legal confrontation,’ and (3) whether the ‘proceeding tests the merits of the accused’s case.’” *McChesney*, 871 F.3d at 808 (quoting *Hovey*, 458 F.3d at 901); (Appendix A, n. 1.) In Petitioner’s case, the Ninth Circuit noted that because Petitioner was represented by counsel, only the first and third factors were relevant to Petitioner’s case. (Appendix A, n.1).

Counsel’s presence notwithstanding, Petitioner had a right to be present at the telephonic conference given the magnitude of that conference on the outcome of the *Franks* hearing already underway and the ultimate resolution of the motion to suppress. Petitioner’s presence was necessary to defend against the charge and participate in the

proceedings on a critical motion to suppress. *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934). Petitioner had a right to be present at any stage of the proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). The right to be present includes situations where the defendant is not actually confronting witnesses or even evidence against him. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (*per curiam*).

As to the telephonic conference, the Ninth Circuit ruled,

First, the telephonic conference was not a critical stage in the proceedings so as to require Bummer's presence because it dealt primarily with the procedural issue of how to conduct a *Franks* hearing. And even if it were a critical stage, nothing in the records suggests that Bummer's presence on the line during the call itself would have contributed in any way to the proceeding's fairness, and so no due process violation occurred.

(Appendix A at 2)(internal citations and quotations omitted). Contrary to the Ninth Circuit's holding, the telephonic hearing was much more than a procedural issue on the *Franks* process. The *Franks* process had already begun and the court had heard evidence that supported Petitioner's motion to suppress. The telephonic hearing, while

superficially procedural in nature, had the effect of negating the previous testimony as well as precluding additional anticipated testimony in support of the motion to suppress.

The Ninth Circuit's holding that "nothing in the record suggests that [Bummer's] presence on the line during the call itself would have contributed in any way to the proceeding's fairness," unfortunately misses the point. Petitioner's contribution to the record was thwarted by the very fact that he was excluded from being present on the line. Given the silent record, it is purely speculative to conclude Petitioner's presence would not have contributed to the proceeding's fairness. One could equally speculate about contributions the Petitioner could have made had he been present with counsel.

What is evident from the record, however, is the significant shift in the proceedings that occurred during the telephonic conference. Petitioner, who was in custody throughout pretrial proceedings, left court the afternoon of December 7 believing his *Franks* hearing would continue on December 10 with more testimony and evidence in support of his motion to suppress. He arrived in court on December 10 to

entirely different proceedings which deprived him of further testimony and evidence in support of his motion. Petitioner arrived in court, heard a summary of a hearing he was unaware of, an offer of proof from his counsel and the court then went into *ex parte, in camera* proceedings. The court returned and denied Petitioner's motion without reference or consideration to the evidence heard on December 7.

In light of the effect of the telephonic hearing, the factors relied upon by the Ninth Circuit are insufficient to address whether the hearing was a critical stage. The first factor, whether failure to pursue strategies or remedies results in a loss of significant rights, is a factor more directed to the importance of counsel at any particular stage, not a defendant's presence at that stage. Regardless, Petitioner's presence at the hearing could have altered the strategy or remedy pursued. For example, given the district court's abrupt shift in the proceedings, Petitioner may have elected to change the suppression theory from a *Franks* approach to a more traditional *Fourth Amendment* challenge to the warrant and the application, especially in light of the evidence provided by the witnesses at the December 7 hearing.

The third factor referenced by the Ninth Circuit, whether the proceeding tests the merits of the accused case, is satisfied by the December 8 telephonic hearing. In addition to the drug counts, Petitioner was also charged with possession of a firearm in furtherance of a drug trafficking crime. The only evidence supporting the merits of the government's prosecution for that charge was a firearm discovered in Petitioner's home as a result of the search warrant. Had Petitioner's motion been successful, dismissal of that count would have been necessary.

Under these circumstances, the Ninth Circuit resolution of the Petitioner's due process claim using the "critical stage" analysis of whether the right to counsel is infringed, is a flawed analysis. Even striking the second factor which specifically references counsel, the remaining factors are insufficient to ensure the Petitioner's due process right to be personally present is secured. Therefore, the Ninth Circuit's memorandum decision should not stand.

B. DISTRICT COURT VIOLATED PETITIONER'S *FOURTH AMENDMENT* RIGHTS IN DENYING THE MOTION TO SUPPRESS.

Notwithstanding the district court’s finding on the reliability of the confidential informant referenced in the search warrant application, the evidence that was heard during the December 7 hearing – regardless of whether it was a *Franks* hearing or not – was sufficient to reveal an absence of probable cause to issue the warrant. “The touchstone of the *Fourth Amendment* is reasonableness. Reasonableness, in turn, is measured in terms of examining the totality of the circumstances.” *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (internal citations and quotations omitted).

In denying Petitioner’s motion to suppress, the district court did not examine the totality of the circumstances. Rather, it simply concluded that even if reference to the confidential informant was stricken, there was still sufficient probable cause to issue the warrant. (ER 75). The district court did not examine the remaining circumstances, however. For example, Det. McDuffie omitted that Mr. Amato was high on methamphetamine when he made his statement to law enforcement. Objectively, self-serving and incriminating statements made by individuals under the influence of

methamphetamine, hoping to better their position, are insufficient to establish probable cause. *See United State v. Hall*, 113 F.3d 157 (9th Cir. 1997).

“Even if we entertain some doubt as to an informant’s motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first hand, entitles his tips to greater weight than might otherwise be the case.” *Illinois v. Gates*, 462 U.S. 213, 234 (1983). This assumes, however, that the judge issuing the search warrant is aware of the aspects of the informant’s motives that would generate doubt. In the Petitioner’s case, that evidence was not provided to the judge who issued the warrant.

In denying the Petitioner’s motion to suppress, the district court did not evaluate the totality of the circumstances, including evidence heard during the December 7 hearing. That evidence was part of the circumstances and undermined the probable cause that served as a foundation of the warrant. Consequently, the district court’s decision to deny Petitioner’s motion to suppress should not stand.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated this 1st day of October, 2018.

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