

18-9143

No. _____

Supreme Court, U.S.
FILED

MAR 25 2019

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Justin Fuller — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS OF THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Justin Fuller

(Your Name)

Mendota FCI

P.O. Box 9

(Address)

Mendota Ca 93640

(City, State, Zip Code)

(Phone Number)

ORIGINAL

RECEIVED

APR 26 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED

APR 2 - 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

LIST OF PARTIES

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

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

April Russo United States Attorney

211 W Fort st Suite 2001

Detroit, MI 48226

United States Department of Justice Appeals

Ross Goldman

950 Pennsylvania Ave NW Suite 1264

Washington, DC 20530

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
CONCLUSION.....	13

INDEX TO APPENDICES

APPENDIX A

United States Court of Appeals of The Sixth Circuit

APPENDIX B

United States District Court of The Sixth Circuit

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

QUESTIONS PRESENTED

1. When in a "Pre-Franks" procedure does a Court error by considering evidence submitted by the government to make the threshold determination of a defendant's entitlement to a Franks hearing ?
2. When deciding the question whether to grant a Franks hearing, does the court error by offering its own explanation for omissions and/or discrepancies and contradictions in a affidavit and relying on that explanation to deny a Franks hearing ?
3. To obtain a Franks hearing is a burden of production, proof by preponderance of the evidence must wait until the Franks hearing itself ?

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Haines v. Kerner 404 U.S. 519, 520 (1972)	5
Franks v. Delaware 438 U.S. 154 98 S. Ct. 57 L. Ed 2d 667(1978)8,10,12	
United States v. McMurtrey 704 F.3d 502 (7th cir 2012)	8
United States v. Glover 755 F.3d 811 (7th Cir 2014)	9 ,12
United States v. Harris 464 F.3d 733(7th Cir 2006)	9
Haakenstand v. Symdom (7th Cir 2017)	11
United States v. Bell (7th Cir 2016)	11
United States v. Abernathy 843 F.3d 243 (6th Cir 2016)	11
United States v. Graf 784 F.3d 1 (1st Cir 2015)	12

STATUTES AND RULES

Federal Rules of Criminal Procedure 33
Federal Rules of Criminal Procedure 41

OTHER

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 3 2019.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT 4

Unreasonable search 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 search, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses. and equal protection.

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, with just compensation.

Statement of the Case

Petitioner proceeds before the Court as a Pro Se (indigent) litigant who is untrained/unlearned in matters as they pertain to the law and/or legal proceedings. It is therefore necessary to invoke the United States holding in Haines v. Kerner 404 U.S. 519, 520 (1972), Wherein the court held that a motion drafted by a Pro Se litigant is to be held to a less strigent standard than one formally drafted by a trained/professional lawyer. It is respectfully requested that Petitioner's motion is construed accordingly. Agent Adam Christensen in Michigan was doing a investigation having to do with a N.I.T. warrant arrested a individual in his investigation. Agent Christensen then interviewed the arrestee. The arrestee didn't name petitioner in the interview he did name other people and there conduct. Agent Christensen went to the website the arrestee gave him and went undercover. Agent Christensen learned about other user's on the website. He observed and recorded hundreds of hours of online activity - both text chat and video. During the operation Agent Christensen watched anonymous people converse with no way to trace the anonymous people. Agent Christensen learned from the anonymous conversation's social media accounts without corroborating the evidence he subpoenaed social media accounts. To determine the ip address's of the social media accounts without corroborating that the ip address's was the same as the anonymous people he seen conversating he seen. Agent Christensen contacted agent's in those area's where he traced the social media account's to. Agent Christensen contacted Agent Wenning's from California gave him limited information and had

Agent wenning's get a search warrant for petitioner's residence. Agent wenning's omitted all information of Agent Christensen from the search warrant not naming him as the source of the information for the search warrant. Agent wenning's mislead the issuing judge that he had personal knowledge of the investigation. Petitioner filed a timely motion to suppress evidence and for a Franks hearing (DKT 119) with a government document that contradicted the search warrant affidavit before trial. Making the substantial preliminary showing by showing the warrant affidavit contained false statements. Those false statements were material to the finding of probable cause. The District Court chose to hold a so-called "Pre-Franks hearing" to give the petitioner an opportunity to supplement and elaborate on the original motion. If the initial Franks motion did not make the required substantial preliminary showing then the court need not hold a pre-Franks hearing to provide a further opportunity. The contradictions are not conclusive as to which one was false but it is obvious from the face of the two documents both could be correct. Taken together petitioner believes they made a sufficient preliminary showing of falsity. At the pre-Franks hearing petitioner supplemented and elaborated on the original motion. Without finding that petitioner either had or had not made his preliminary Franks showing. The court permitted the government to offer additional facts and evidence that had not been before the issuing judge. Petitioner was not permitted full cross-examination on the government's evidence. This left petitioner with no full opportunity to challenge the warrant under Franks. The District Court then relied on the untested government evidence to find that petitioner failed to make a showing sufficient to obtain a full

Franks hearing. The case went to trial co-defendant testified at trial that he did not identify petitioner in advance of the undercover operation. This contradicted the government's evidence they offered at the pre-Franks hearing. This underscores the need for a full Franks hearing. The District Court denied petitioners motion for new trial and Franks hearing. Petitioner then filed a timely direct appeal. The Appeals court does not address the "substantial preliminary showing". The court does not address whether a District Courts errs in considering evidence submitted by the government when making the determination of a petitioners entitlement to a Franks hearing. The Appeals Court instead officers its own explanation for the omissions and relying on that explanation denying petitioners motion for a full Franks hearing. To this day petitioner has not had a opportunity to challenge the evidence against him in the pre-Franks hearing.

Reasons for Granting the Petition

Franks v. Delaware 438 us 154 98 S. Ct. 57 L. Ed 2d 667 (1978)

The Supreme Court held that when a defendant makes a substantial preliminary showing that the police procured a warrant to search a property with deliberate or reckless misrepresentations in the warrant affidavit and where such statements were necessary to the finding of probable cause. The Fourth Amendment entitles the defendant to an evidentiary hearing to show the warrant was invalid. In this petition for writ of certiorari, I attempt to get clarification on issues concerning the procedure a District Court and Appeals Court may or must use in evaluating a criminal defendants motion to suppress evidence under Franks. A District Court that is in doubt about whether to hold a Franks hearing has discretion to hold a so-called "Pre-Franks" hearing to give the defendant an opportunity to supplement or elaborate on the original motion. Though permissible, the procedural improvisation is not without risk, as the SPARSE CASE LAW INDICATES. Not only are Federal Courts using this procedure but state courts are too, that are later reviewed by a Federal Court. The Seventh Circuit Court of Appeals has been the front runner of looking into the procedure of a Pre-Franks hearing. Circuit Judge Hamilton wrote a opinion in United States v. McMurtrey 704 F.3d 502 (7th Circuit 2012), they held that "The district Court should not give the government an opportunity to present its evidence on the validity of the warrant with out converting the hearing into a full evidentiary Franks hearing, including full cross-examination of Government witness." Other Circuits are split and others are not making a determination on this issue. In McMurtrey

the District Court relied on the untested Government evidence to find that the defendant had failed to make a showing sufficient to obtain a full Franks hearing much like the case under review. The Seventh Circuit Court of Appeals remanded for a full Franks hearing. They held the procedure was erroneous because it denied defendant his full opportunity to challenge the warrant under Franks. In *United States v. Glover* 755 F.3d 811 (7th Circuit 2014) said District Court erred by offering its own explanation for the omissions in the affidavit and by relying on that explanation to deny a Franks hearing. They went on to say for a Franks hearing the defendant need not overcome the courts speculation regarding an innocent explanation for the falsity or omission. While reasonable explanations for the omission of the information might well exist. The defendant need not disprove them before the Franks hearing itself. In *United States v. Harris* 464 F.3d 733 (7th Circuit 2006) he filed a pretrial motion and requested a Franks hearing. Harris submitted his own affidavit the District Court ordered the Government to file a supplemental affidavit from the detective detailing with his surveillance of the residence. The District Court denied Harris motion to suppress and request for a Franks hearing. The case went to the court of appeals. They held the District Court erred. Considering new information presented in the supplemental filing that supported a finding of probable cause was beyond the courts analytical reach. Rather its consideration of new information omitted from the warrant affidavit should have been limited to facts that did not support a finding of probable cause. Allowing the Government to bolster the magistrates

probable cause determination through post-hoc filings does not satisfy the Fourth Amendment concerns addressed in Franks. The opportunity to cross-examine an officer who has intentionally or recklessly made false statements to procure a search warrant is an important aspect of a Franks hearing, "Because it is the magistrate who must determine independently whether there is probable cause, would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." Franks 438 US at 165 Therefore in Forrests supplemental filing that support a finding of probable cause. We will not consider them on appeal. Petitioner here has all three cases wrapped in to the case under review now. District Court held a Pre-Franks after peptitioner filed the motion to suppress. Petitioner at the hearing supplemented and elaborated on the original motion. The District Court let the Government do a post-hoc filing by entering in a FBI302. The FBI302 was not before the issuing judge. The FBI302 was from a FBI Agent that is not named on the affidavit. There is no way by reading the four corners of the affidavit to tell what role this agent had in the investigation. The court relied on the untested evidence and denied the motion. When the case got to the Appeals Court they offered there own explanation for the discrepancies in the affidavit. Taking Harris, Glover and McMurtrey in to consideration each court erred in there procedure of Pre-Franks. The Sixth Circuit Court of Appeals held "This court has not addressed whether a District Court errs in considering evidence submitted by the Government to make the threshold determination of a defendants entitlement to a Franks hearing." they think it is hamless. If all

were harmless then why did Judge Hamilton, Williams and the two Chief Judges Wood and Flaum go to the great length to outline the Pre-Franks procedure? Because Franks and the Fourth Amendment are important. Petitioner and the courts need more guidances on the Pre-Franks procedure to insure equal protection of the law. In the *Haakenstad v. Symdon* (7th Circuit 2017) petitioner filed a 2254 to have Federal Court review his case, When he moved to suppress evidence challenging a warrant affidavit that led to a search of his apartment. He argues that the Circuit Court erred by denying him an opportunity to examine the affidavit and by characterizing the hearing as a Pre-Franks hearing when it was a full Franks hearing. It allowed him to proceed beyond preliminary review. When a petitioner files a Franks motion where does the preliminary review stop and the Full Franks start. In *United States v. Bell* (7th circuit 2016) the court held a Pre-Franks hearing where defendant was allowed to develop his arguments and the Government was limited to arguing that Defendant has not met the requirements for a Franks hearing based on the information contained in the affidavit. If the government is limited to the four corners of the affidavit then this view is right. The Sixth Circuit Court of Appeals wrote in *United States v. Abernathy* 843 F.3d 243 (6th cir 2016) "When determining whether an affidavit establishes probable cause, the United States Court of Appeals for the Sixth Circuit looks only to the four corners of the affidavit; information known to the officer but not conveyed to the magistrate is irrelevant. The Sixth Circuit does not consider recklessly and materially false statements in the affidavit

that have been properly stricken during a Franks hearing. In the First Circuit Court of Appeals *United States v. Graf* 784 F.3d 1 (1st Circuit 2015) they said "neither we nor the Supreme Court has explicitly addressed whether it constitutes legal error for a trial court to consider Government evidence before deciding whether a Franks hearing is warranted. We need not do so today. For purposes of our analysis, we can assume, without deciding, that Graf's take on the first question is the correct one." The Supreme Court clearly set the standard for going beyond the four corners in the Franks context: "To mandate an evidentiary hearing" *Franks* S. Ct. at 2684. When the Court permits the Government in a "Pre-Franks" hearing to offer additional evidence to explain the discrepancies in the affidavit. It leaves the defendant with no full and fair opportunity to resolve Federal Constitutional claims but to have a full Franks hearing. Circuit Judge Hamilton I think said it best in *United States v. Glover* "These are matters to be tested in a Franks hearing based on evidence, not resolved on appeal by our speculation. Petitioner here looks to the Supreme Court for guidance in this "Pre Franks" procedure. To help all the State and Federal Courts that use the procedure to guide them to make their determinations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, Justin Fuller

Justin Fuller

Date: 3-24-19