

No. 19-5431

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JUL 08 2019

OFFICE OF THE CLERK

DeAndre Neal Cherry — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Seventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DeAndre Neal Cherry
(Your Name)

Po. Box 340
(Address)

Salters South Carolina 29590
(City, State, Zip Code)

NA
(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

- (1)- WAS THE PETITIONER'S FOURTH AMENDED RIGHT INFRINGED UPON WHEN THE OFFICERS CONDUCTED AN ILLEGAL SEARCH OF HIS VEHICLE ABSENT PROBABLE CAUSE
- (2)- WAS THE PETITIONER'S CONSTITUTIONAL RIGHT UNDER THE FIFTH AND EIGHTH AMENDMENT INFRINGED UPON WHEN THE OFFICERS DETAINED-ARRESTED HIM WITHOUT A CRIME BEING COMMITTED
- (3)- WAS THE PETITIONER'S CONSTITUTIONAL RIGHT UNDER THE FIFTH AMENDMENT INFRINGED UPON WHEN THE DISTRICT RELIED ON FABRICATED EVIDENCE BEING PROVIDED BY THE PROSECUTION.
- (4)- DID THE PETITIONER RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS JURY TRIAL
- (5)- WAS THE PETITIONER'S CONSTITUTIONAL RIGHT UNDER THE FIFTH AND SIXTH AMENDMENT INFRINGED UPON, WHEN HE WAS DENIED HIS RIGHT TO FACE HIS ACCUSER OR CROSS-EXAMINE THE INFORMANT

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:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A _____ to the petition and is

reported at No. 17-3018(7th Cir Court of Appeals) ; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____ ; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____ ; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____ ; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 8th 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: NA, and a copy of the order denying rehearing appears at Appendix NA.

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

- 1- Fourth Amendment of the United States Constitution
- 2- Fifth Amendment of the United States Constitution
- 3- Sixth Amendment of the United States Constitution
- 4- Eighth Amendment of the United States Constitution

STATEMENT OF THE CASE

Allegedly on June 14, 2012, Defendant- Appellant Deandre Cherry was indicted on one count of possession of at least 100 grams of heroin with the intent to distribute. R. 8. On August 27, 2012, Mr. Cherry filed two motions to suppress evidence obtained on the day of his arrest: physical evidence recovered from his vehicle and a statement he made to law enforcement thereafter. R. 32, 33. On November 27, 2012, the district court conducted an evidentiary hearing. R.47. The court denied Mr.Cherry's motions on April 11, 2013 R.59. After hiring new counsel, Mr.Cherry moved the court to reconsider its denial of his motions on September 8, 2014. R. 83, 92. The court denied the motion for reconsideration on May 6, 2015 R. 106. Mr.Cherry moved the court to produce Camera, Computer Chip or other source of Metadata for photos introduced in evidence during evidentiary hearing on September 8, 2014. R. 84. The court determined that such motion was moot on April 30, 2015. R. 104. Mr.Cherry moved the court on September 8, 2014 for disclosure of cooperating informants identity pursuant to Roiavarao v. United States. R. 85, said motion was denied by the court on April 30, 2015, R. 105.

On May 18, 2015, Mr. Cherry also filed a motion to dismiss the indictment due to the government's violation of its Brady obligations in failing to disclose electronic metadata concerning photographs taken of the recovered evidence on the day Mr.Cherry's arrest. This metadata was relevant to the determination of probable cause at the suppression hearing. R.107. The court denied that motion on June 24, 2016, R. 165.

The United States Attorney submitted a motion in limine to conceal valuable exculpatory evidence in regards to the confidential source-informant

On December 21, 2015. R. 155, the records(D.E.) does not show that the court ever specifically address this motion in limine at any time during the proceedings. Mr. Cherry moved the court to suppress statements pursuant to Corely, on June 24, 2016. R.164, said motion was denied June 28, 2016. R.168, this took place after Voir Dire had taken place.

Mr. Cherry proceeds to jury trial on June 27, 2017. R.167. He was convicted on June 29, 2016. R. 173. On September 13, 2017, Mr. Cherry was sentenced to a term of imprisonment of 240 months. R. 229, 231. The judgment and Commitment order was issued September 18, 2017. R. 231.

Mr.Cherry filed a timely notice of appeal and docketing statement on September 29, 2017, R.234, 235. Mr.Cherry appeals his conviction based on the district court's erroneous denial of his suppression montions and his motion to dismiss.

Mr.Cherry's Suppression motions were based on the premise that law enforcement officers did not have probable cause to arrest him or to search his vehicle and briefcase on May 31, 2012. During the hearing on these motions, the following facts were established:

On May 31, 2012, the DEA had an ongoing investigation involving an individual who supposed to pick up twenty-six kilograms of cocaine outside city of Chicago(at Suppression hearing 11/27/12, page 4). On May 31, at around 11:30 am., the DEA arrested this individual("the informant") and allegedly he agreed to cooperate. (at suppression hearing pgs 4-8). At the time of his arrest, law enforcement knew that the informant had a criminal background, which included previous federal drug charges. (at suppression hearing pg 20).

Once he agreed to cooperate, allegedly the informant told law enforcement that thirteen of the twenty-six kilograms of cocaine were supposed to be delivered to people he only knew as,"MO" and Big Al(at 11/27/12

of suppression hearing pages 5 and 70). The informant allegedly stated that the delivery was supposed to take place that evening at a residence near 147th and Loomis(Suppression hearing page 5). The informant allegedly provided law enforcement officers with a very general description of "MO": a black male of average height that weighed about 200 pounds(suppression hearing page 5); The informant allegedly stated that on a previous occasion "MO" had driven a white Mercedes SUV.(suppresion hearing page 5).

At that point, other than the informant, the agents had never heard of "MO" or Deandre Cherry.(Suppression hearing page 83).

Law enforcement decided to attempt a sting operation where the informant would deliver thirteen kilograms of sham cocaine to "MO". However, they chose not to have the informant take the sham cocaine to the residence he had mentioned on Loomis. Instead, they had the informant to make two unrecorded, unmonitored calls in an attempt to lure Mr.Cherry to a parking lot near 159th and Kedzie. During these calls, there was no discussion of drugs or money; there was no use of code words; there was no discussion of price or quantity.

(supression hearing, page 24)

Law enforcement was unable to corroborate any of the information the informant provided regarding the residence on Loomis where he allegedly said he was supposed to deliver the cocaine; also law enforecement did not corroborate if Mr.Cherry purpose of meeting with the informant was due to purchasing or obtaining narcotics(drugs).(suppression hearing page 24, and 25), The agents did not have the informant to identify the residence or who reside at said residence.(suppresion hearing page 21), further the agents sent a car into the area to look for a white mercedes, but could not locate one.(suppression hearing page 23)

Agents placed recording devices on the person of the informant, however

allegedly the recording device did not have a transmitter that would allow the agents to hear the converstion in real time..(suppresion hearing page 9), the informant was then instructed to engage "MO" in conversation in the car, and talk about the cocaine.(suppressoion hearing 7), he was instructed that when he exit the vehicle that would be the signal for arrest.(suppression hearing page 7),

At the direction of the agent the informant parked in a parking lot near a boast mobile store, later agents observed a white Mercedes SUV drive around the parking lot a little bit, goes out into the main drag Kedzie, and then comes right back and park right next to the coopoerating defendant's vehicle angle spot, so they were both facing north in the angled spot right next to each other, Mr.Cherry then exited his car and got into the passenger seat of the informant's car.(suppression hearing page 10 and 11)

None of the agents/officers could hear the conversation that transpired between Mr.Cherry and the informant.(suppression hearing page 9). A short time after Mr.Cherry enterd the vehicle agents saw the informant get out of the drivers side of the vehicle. (suppression hearing page 12). When the informant exited the vehicle the arrest of Mr.Cherry was then conducted, the agents and officers equipped with ballistic vests marked "police", and badges ,with guns drawn approached Mr.Cherry. (suppression hearing page 13)

Chicago Police TFO "Gamboa" detained Mr. Cherry, and stood by Mr.Cherry at the rear of his vehicle while conducted an illegal search of Mr. Cherry's vehicle.

REASONS FOR GRANTING THE PETITION

Mr.Cherry contends that the writ/petition should be granted because his constitutional rights under the Fourth, Fifth, Sixth, and Eight Amendment was infringed upon, and in light of such civil violations a writ/petition should be granted to right the wrong.

Mr.Cherry avers that his claim involves the corrupt and unethical conduct of law enforcement, a less than credible informant and a over zealous prosecutor who only desired a wrongful conviction. On May 31, 2012 the DEA agent arrested an individual(allege informant) who decided to cooperate. The agents ignoring the fact that the informant was on federal probation, without proper authorization(Pg.20, line 1-25 of Suppression Hearing)formulated a plan to deliver 13 kilograms of cocaine to Mr.Cherry at a Uncorroborated prearranged location(pg 21 lines 1-25 of Suppression Hearing). The agents did not take the time to corroborate the informants allegations concerning Mo(Mr.Cherry), that he was engaging or about to engage in any criminal activity(Pg. 21 lines 1-25 Suppression Hearing). Agents admitted under oath that they never corroborated the informant's allegations about a meeting place(Pg 27, lines 22-25 Supresion). Agents did not corroborate the informant through phone call, or by any other means(Pg 28, lines 1-21 Suppression Hearing). Agents directed the unapproved informant to call Mo to see if he would be willing to meet at a Boost Mobil Store located on 159th Kedzie(Pg. 28, lines 1-14 Supresion Hearing). There were only three(3) calls made to Mo: (1) the first call was made in the presence of the agents, this call only consisted of the unapproved informant asking Mo to meet him;(2) the second call consisted of the unapproved informant asking Mo, "how long will he be?";(3)the third call consisted of the unapproved informant calling Mo and giving him the description of the type of car he was sitting in, because clearly Mr. Cherry was unaware as to

where the allege informant was located(see transcription of recorded conversation of Mr. Cherry and the allege informant) listed as exhibit A). When Mr.Cherry arrived, he pulled next to the alleged informant's vehicle, exited his vehicle and, then entered the allege informant's vehicle and engaged this individual in conversation that did not involve him(Mr.Cherry) requesting to purchase any narcotics(see exhibit A) . Nowhere in the conversation did Mr.Cherry agree to take possession of any narcotics, nor did Mr. Cherry speak of distributing any narcotics, there was no use of code words, no mention of price or any money, there was no use of any incriminating conversation that would imply to the agents that he (Mr.Cherry) was involved in any illegal activity, on the other hand the recording will show that once the informant notified Mr.Cherry that narcotics was in the car, Mr.Cherry then asked the allege informant "what the fuck you do that stupid shit for", then the informant told Mr.Cherry that the narcotics in the car was going to someone else, the informant without notice to Mr.Cherry steps out of the car(which of course ,this move was the signal for the officers to make the arrest), Immediately law enforcement came on the scene, Mr. Cherry exited the vehicle and was detained immediately by officer Gamboa(see trial transcript pg. 391, line 6-7). Gamboa then place Mr. Cherry on the ground in a puddle of water, Gamboa then stood Mr.Cherry to his feet and then lead him to the rear of the Mercedes vehicle as the other officers conducted an illegal search of Mr.Cherry's vehicle.(see trial transcript, Page 395, line 20-25 and continued on page 396, line 1-22). Mr.Cherry was then taken to Oaklawn Police Station where he was allowed to make a call to his wife, in the presence of Officer Gamboa and Officer Crawford. During the phone call to his wife Mr.Cherry instructed her to contact his attorney,(Mr.Charles Murphy). Mr.Cherry was then housed overnight in Oaklawn Police Station, Around 10:00 am the next day (June 1, 2012), agent Walsh and Gamboa picked Mr.Cherry up, and transferred Mr.Cherry to the DEA office located in the downtown chicago area. This was now the, first conversation Mr. Cherry had with agents pertaining to the arrest that took place on May, 31, 2012.

Upon learning that the allege informant had allegedly stated to the agents that Mr.Cherry was to receive 13 kilograms, cocaine, the agent then stated that "they did not believe the informant, and that if Mr.Cherry provide a written statement they would speak to the prosecutor in regards to not objecting to Mr.Cherry receiving a bond, the agents stated that they could not make any promises according to the law, but that their word does hold weight in those circumstances. Under a great deal of stress Mr.Cherry did infact provide a hand written statement, and at the end of this statement he drew a line through the remainder of the paper to indicate that his statement had ended there. Immediately after that Mr.Cherry was rushed to the magistrate's office, where he was detained and held at the Metropolitan Correctional Center Chicago. Attorney Susan Shatz was present on 6-1-2012, Susan Shatz is a federal attorney who is employed at Charles Murphy Law Firm.

On June 5, 2012, Susan Shatz filed a noticed of appearance with the clerk of court, also a preliminary examination was set for June 15, 2012, but this hearing never occured due to the federal government filing a secret indictment on June 14, 2012. Mr. Cherry has yet to receive the grand jury transcript or minutes.(see D.E. 6, 7, and 8 of the docket sheet). On July 23, 2012 Mr.Cherry substitute counsel Beau Brindle. entered on record(see D.E. #25-26). On November 27, 2012 and Evidentiary Hearing was conducted, the arresting officer Gamboa was not present for this hearing.(see D.E.#47). On April 11, 2013, the motion to suppress the evidence and defendant's statements is denied.(D.E. 59), On May 16, 3014, a notice of attorney appearance was filed by Andrea Gambino as attorney for Mr.Cherry.(D.E. #71)

On September 8th 2014 three(3) motions were filed: (1) Motion for reconsideration of the Decision denying the motion to suppress evidence(D.E #83);(2) Motion to produce camera, computer chip, or other source of metadata for photos introduced into evidence during the evidentiary hearing(D.E. #84); (3)Motion to disclosure of cooperationg informants identifying information pursuant to Roviaro v. United States,(D.E #85), These three(3) motions was wrongfully denied by the court, Based on the court's "Assumption".(see Appendix 22 of Judge's order, Footnote (1)).

On June 24th 2016 Mr.Cherry filed a motion to suppress statement, pursuant to to Corely(D.E. 164); On June 28th 2016, the court denied said motion after the actual trial had begun.

CONSTITUTIONAL VIOLATIONS

- (1)- During the day of the suppression hearing and during the petitioner's jury trial he was denied his constitutional rights of the United States Constitution to confront his accuser, and cross-examine said accuser-informant, in violation of Mr.Cherry's Fifth(5), and Sixth(6) Amendment Rights.
- (2)- During the day of the suppression hearing and during the petitioner's jury trial, the prosecution failed to provide exculpatory evidence, in the form of A Camera; Computer Chip, other source of Metadata for Photos, In violation of Mr.Cherry's Fifth, and Sixth Amendment rights.
- (3)- During Mr. Cherry's voir dire proceedings, his counsel moved to strike a juror who had stated that they didn't understand english, but the court allowed said juror to remain, in violation of his Fifth Amendment.
- (4)- During Mr. Cherry's voir dire proceeding, the alternative juror was the nephew of the magistrate judge involved in said case.(see 159, lines 4 -5 of VOIR DIRE), inviolation of Mr.Cherry's Fifth Amendment.
- (5)- During Mr. Cherry's jury trial, the prosecution in their opening statement stated untrue facts into the actions of Mr.Cherry, evidence that was contradicted by Officer Gamboa, also the prosecution taylored their statement to conceal from the jury that the individual being employed was and confidential informant/source. in violation of his fifth amendment.
- (6)- During the prosecutions opening statement, the prosecution erroneously falsely stated that the agents had seen the heroin in a bag on the front passenger seat, and then placed him under arrest. this entire statement was and is inaccurate, the officers never stated such facts, the use of false statements and testimony during an individuals jury trial is a violation of Mr.Cherry's Fifth and Eight Amendment Rights.
- (7)- During Mr.Cherry's jury trial the prosecution informed the court that they had instructed all their witnesses not to elicit any information, or testify about any of the information they had from the informant. in violation of Mr.Cherry's Fifth Amendment and Eighth Amendment right.

(8)- During the Mr.Cherry's jury trial the prosecution admitted to a number of facts and clearly stated surveillance didn't witness an illegal drug transaction, that the officers didn't know the defendant(Mr.Cherry), and that he was taken to the ground the moment he exited the informant's vehicle. Mr.Cherry's arrest and conviction was all obtained in violation of his Fourth, Fifth, and Eighth Amendment Rights(*Wong Sun v. United States*, 371 U.S. (1962).

(9)- During the petitioner's jury trial, agent Brazao provided inconsistant and untrue statements, different than the statement he previously provided. (see suppression hearing page 12, line 13 -15);(see trial transcript, page 208, lines 1-20), the use of unclear an contradicting statements infringe upon Mr.Cherry's constitutional right to a fair and just trial(Fifth Amendment)(see report of investigation written by Brazao, page 2)

10)- Officer Brazao falsely stated in his investigation report that he actually arrested-detained Mr.Cherry, when the facts displayed that Officer Gamboa actually made the arrest.(see the investigation report prepared by Brazao page 2) . and(see trial transcript 212, line 22-25)

11)- During the petitioner's jury trial officer O'Reilly was allowed to sit at the prosecutions table, in violation of the Fifth Amendment right. State v. Sampson, kan, 102, 535 5/3/13; State v. Kirkpatrick,184 p.3d 247 2008.

12)- During Mr.Cherry's jury trial Officer O'Reilly who was a witness for the government was seen talking to the other witnesses outside the court room.(see page 361-364 of trial transcript) in violation of Mr.Cherry's Fifth Amendment right.

13)- Mr.Cherry's counsel was ineffective when she failed to challenge the techniques of the officers in regards to the informant and recording devices, Mr.Cherry issue is that the jury instruction #13 was wrongfully withdrawn, depriving the jury of the necessary information regarding the the use of informants, and that would enable them(the jury) to make the

sound decisions or determination in regards to the informant and his credibility or authority.

14)- The court reporter, Collen M. Conway purposely altered parts of the trial transcript that involved the testimony of officer Gamboa; Officer Gamboa had given testimony that stated" that he pounced on Mr.Cherry the moment he got out the car"

Mr.Cherry concludes that there was no probable cause for his arrest, the detaining officers did not have a particularized and objective bases for suspecting him in criminal activity.United States. v. Cortez 499 U.S. 965 99 L.Ed 2d 433 108 S.Ct 1234(1988).

In order to find probable cause based on association with persons engaging in criminal activity, so additional circumstances from which it is reasonable to infer participation in criminal enterprise must be shown, Pursuant to the Fourth Amendment, a police officer who seizes a person on less than probable cause"must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, Terry 392 U.S. at 21, Support "a reasonable and articulable suspicion, Reid v. Georgia 448 U.S. 438 440 100 S.Ct. 2752 56 L.Ed. 890 (1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DeAndre Cherry
Date: July, 08, 2019