No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NADER ELHUZAYEL,

Petitioner,

v.

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

Much of the evidence used to convict petitioner Nader Elhuzayel resulted from electronic surveillance authorized under the Foreign Intelligence Surveillance Act ("FISA"). Petitioner moved to suppress this evidence on the ground that the surveillance order had been obtained illegally and was not supported by probable cause; petitioner also moved for disclosure of the order and application. The Ninth Circuit affirmed the district court's ruling that the order had been obtained lawfully and that petitioner was not entitled to disclosure of the order or the government submissions in support of the order. The question presented is:

> Whether the district court's in camera, ex parte review of the materials, application, and surveillance order without permitting disclosure or participation by defense counsel violates the Due Process Clause of the Fifth Amendment and the assistance of counsel guaranteed by the Sixth Amendment?

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ON PETITION FOR A WRIT OF CERTORARI
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PETITION FOR A WRIT OF CERTIORARI

Nadeer Elhuzayel 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

The Court of Appeals filed an unpublished memorandum opinion on March 18, 2020. A copy of the memorandum opinion is included in the Appendix. App., *infra*, 1a-5a.

JURISDICTION

This petition is timely filed pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

50 U.S.C. § 1806

(c) Notification by United States

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

(e) Motion to suppress

Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that–

(1) the information was unlawfully acquired; or

(2) the surveillance was not made in conformity with an order of authorization or approval. Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (c) or (d), or whenever a motion is made pursuant to subsection (e), or

whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure

is necessary to make an accurate determination of the legality of the surveillance.

STATEMENT

Nadeer Elhuzayel was charged and convicted of conspiracy to provide material support to a designated terrorist organization and attempting to provide material support to a designated terrorist organization. The government built its case against Elhuzayel through surveillance of his telephone conversations, internet communications, and private social media accounts. The surveillance was authorized by warrants issued under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§18011862. And although FISA provides a mechanism for suppression of evidence derived from the electronic surveillance, 50 U.S.C. § 1806(e), the obstacles and burdens imposed by FISA, as currently interpreted, render that a nullity. If the Attorney General files an affidavit stating that disclosure of FISA material would harm national security, the court is effectively prevented from disclosing those material to defense counsel and cannot hold a hearing.

1. In 1978, Congress enacted FISA to regulate government surveillance conducted for foreign intelligence purposes. The statute created

the Foreign Intelligence Surveillance Court ("FISC") and empowered it to grant or deny government applications for surveillance orders in certain foreign intelligence investigations. *See* 50 U.S.C. §§ 1803(a), 1804–1805 (electronic surveillance); *see also id.* §§ 1822–1825 (physical searches). In its current form, FISA prohibits the government from engaging in certain types of "electronic surveillance," *id.* § 1801(f), without first obtaining an individualized order from the FISC. To obtain an order, the government's application must identify or describe the target of the surveillance; explain the government's basis for believing that "the target of the electronic surveillance is a foreign power or an agent of a foreign power"; explain the government's basis for believing that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power"; describe the procedures the government will use to minimize the acquisition, retention, and dissemination of information concerning U.S. persons; describe the nature of the foreign intelligence information sought and the type of communications that will be subject to surveillance; and certify that a "significant purpose" of the surveillance is to obtain "foreign intelli-

gence information." *Id.* § 1804(a). The FISC can issue an order authorizing surveillance only if it finds, inter alia, that there is "probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power," *id.* § 1805(a)(2)(A); and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power," *id.* § 1805(a)(2)(B).

If the government intends to rely on evidence "obtained or derived" from FISA in a criminal prosecution, notice to the defendant is statutorily required. 50 U.S.C. §§ 1806(c). A defendant who is notified of FISA surveillance may move for disclosure of applications, orders, and other materials related to the surveillance, and for suppression of the resulting evidence. *See id.* §§ 1806(e). If the defendant moves for disclosure, the Attorney General must determine whether to file an affidavit asserting that disclosure or an adversary hearing would harm the national security of the United States. *See id.* § 1806(f). If the Attorney General files such an affidavit, the statute directs the district court to review materials relating to the surveillance in camera and ex parte "as may be necessary to determine whether the surveillance of

the aggrieved person was lawfully authorized and conducted." *Id.* § 1806(f).

Although the statute also provides that in some cases, the district court's in camera and ex parte review will not be conclusive and it may be necessary for adversarial process where the court may disclose some FISA materials to the defense, there has been no such disclosure of FISA materials in any case.

2. On June 3, 2015, a federal grand jury in the Central District of California returned an indictment against Nader Elhuzayel and co-defendant Muhanad Badawi. Elhuzayel and Badawi were charged with conspiracy to provide material support to a designated terrorist organization in violation of 18 U.S.C. § 2339B (count one); Elhuzayel was charged individually with attempting to provide support and resources to a designated terrorist organization in violation 18 U.S.C. § 2339B (count two).[1] Five days later, the government filed its notice of intent to use FISA information.

3. Petitioner moved to suppress the evidence obtained under the

[1] A few months later a superseding indictment was filed charging petitioner with an additional twenty-six counts of bank fraud, related to check kiting.

FISA warrant. He argued the FISA application failed to establish probable cause that petitioner was an agent of a foreign power; that probable cause could not be based solely on protected First Amendment activity; that the application may contain intentional or reckless falsehoods; and that the application may not have included the required certifications or may not have implemented the required minimizations. The motion also argued disclosure of the application and other materials to defense counsel was required by due process and to allow the assistance of counsel. Finally, petitioner asserted that failure to allow participation by defense counsel implicated the constitutionality of the statute. ER 88-157.

The district court denied the motion in its entirety. It ruled the electronic surveillance was lawfully conducted and that disclosure was unnecessary because the court was able to determine the legality of the surveillance without disclosure. ER 395-396.

Trial was by jury. The government's case included substantial evidence garnered from the electronic surveillance authorized under FISA. The jury convicted both Elhuzayel and co-defendant Badawi on all counts. ER 2329-32. The court sentenced petitioner to a thirty-year

prison term.

4. Petitioner appealed. He argued, inter alia, that the ex parte, in camera FISA process violated his constitutional rights to due process and the assistance of counsel. The Ninth Circuit Court of Appeals affirmed the conviction and sentence. It held that petitioner's challenge to the in camera, ex parte review process authorized by FISA was foreclosed by its decision in *United States v. Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987). Pet. App. 4a.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

About a thousand times a year, the government obtains orders authorizing electronic surveillance under FISA.[2] When the fruits of that electronic surveillance lead to a criminal prosecution, the defense cannot effectively test the legality of the surveillance nor attack any of the underlying factual and legal basis for the order, because none of it

[2] The Foreign Intelligence Surveillance Courts' Activities issued 7065 orders authorizing electronic surveillance for the last six years (2015 through 2019). *See* Director's Report on Foreign Intelligence Surveillance Courts' Activities, *available at* http://www.uscourts.gov/statistics-reports/analysis-reports/directors-report-foreign-intelligence-surveillance-courts

is available. The suppression proceeding is universally conducted in camera and ex parte; and the defense is denied disclosure to the application and the supporting materials. No further hearing is held. That violates both the Due Process Clause of the Fifth Amendment and the right to the assistance of counsel guaranteed by the Sixth Amendment.

The adversarial process lies at the heart of our criminal justice system, a system "in which the parties contest all issues before a court of law." *United States v. Nixon*, 418 U.S. 683, 709 (1974). Partisan advocacy on both sides of a case promotes the truth-finding function of criminal proceedings, *Herring v. New York*, 422 U.S. 853, 862 (1975) and fundamental fairness. *United States v. Morrison*, 449 U.S. 361, 364 (1981). The defendant's side of the adversarial process is protected by the Sixth Amendment. *United States v. Cronic*, 466 U.S. 648, 656 (1984). The FISA process circumvents this guarantee by effectively eliminating the participation of defense counsel in determining the legality of the secret surveillance.

Without access, the defense cannot challenge the legality of the surveillance. For example, the ex parte, in camera procedure makes a

successful *Franks* challenge an impossibility. In *Franks v. Delaware*, 438 U.S. 154 (1978), this Court held that a defendant is entitled to a hearing where he can make a "substantial preliminary showing" that a search warrant affidavit included a knowing or reckless false statement by the affiant. *Id.* at 155-56. But it is impossible to identify a knowing or reckless false statement where the affidavit is hidden from the defense. *United States v. Daoud*, 755 F.3d 479, 486 (7th Cir. 2014), Rovner, J., concurring ("We must recognize both that the defendant cannot make a viable *Franks* motion without access to the FISA application, and that the court, which does have access to the application, cannot, for the most part, independently evaluate the accuracy of that application on its own without the defendant's knowledge of the underlying facts.").

This is a huge problem. As Judge Rovner observed, "*Franks* serves as an indispensable check on potential abuses of the warrant process, and means must be found to keep *Franks* from becoming a dead letter in the FISA context." *Id.* The potential for abuse is real and ongoing.

In 2001, the FBI instituted a verification protocol, called the Woods Procedures, to minimize factual inaccuracies in FISA applica-

tions, They were necessary because of inaccuracies, including falsely representing that there were no pending criminal investigations of the surveillance target, the omission of information that the target was an informant, and that renewal applications included incorrect information.[3] The establishment of these procedures, however, failed to ensure the accuracy of the FISA applications submitted by the government.

Just a few months ago, the Inspector General for the Department of Justice issued an advisory memorandum to the FBI detailing the preliminary findings of his audit of the bureau's execution of its Woods Procedures for FISA application relating to United States persons.[4] The Inspector General's Office audited a representative sample of 29 applications relating to United States persons from eight field offices over a five-year period for compliance with the Woods procedures. *Management Advisory Memorandum for the Director of the FBI Regarding the*

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[3] S. Hrg. 107-920, Oversight Hearing on Counterterrorism Before the Senate Comm. on the Judiciary, June 6, 2002, Response of Dept. of Justice to questions submitted by Senator Leahy, 197, *available at* https://fas.org/irp/congress/2002_hr/060602transcript.pdf

[4] FISA defines a United States person as a citizen of the United States or an alien lawfully admitted for permanent residence. 50 U.S.C. § 1801(i).

Execution of Woods Procedures for Application Filed with the Foreign Intelligence Surveillance Courts Relating to U.S. Persons, Office of the Inspector General, U.S. Dept. of Justice, Audit Division 2047, March 2020 at 2, *available at* https://oig.justice.gov/reports/2020/a20047.pdf. The Woods Procedures required the maintenance of separate file containing the supporting documentation for every factual assertion in the FISA application. The audit revealed "apparent errors or inadequately supported facts in *all* of the 25 applications" reviewed by the audit. *Id.* at 3, emphasis added. The Inspector General's Office could not review the remaining four applications, because the FBI was unable to locate the supporting Woods files. *Id.* The audit also reviewed 42 of the compliance reports by FBI and the Department of Justice's National Security Division which are required to conduct accuracy reviews of FISA applications from the FBI field offices. Reports covering 39 of the 42 application identified a total of 390 issues, "including unverified, inaccurate, or inadequately supported facts . . . ." *Id.* at 5.

By the government's own account, its FISA applications are rife with errors. The Inspector General's initial review did not judge whether the identified errors were material or whether the potential

errors would have influenced the FISC's decision to approve the government's application. *Id.* at 3. Of course, that is defense counsel's job. The Inspector General's audit makes clear that the participation of counsel is essential to the determination of whether the government's application contains reckless or intentional false statements in support of a surveillance order.

This is also required by the Fifth Amendment's due process clause in tandem with the defendant's Fourth Amendment guarantee against unlawful searches. The "Constitution requires the exclusion of evidence obtained by certain violations of the Fourth Amendment." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006). A *Franks* violation, where the defendant proves that where the affidavit provided in support of the warrant contained deliberate or reckless false statements and the remainder of the affidavit does not establish probable cause, requires exclusion of the fruits of the warrant. *Franks*, 438 U.S. at 155-56.

Under the Fifth Amendment's Due Process Clause, defendants must be afforded a process that permits them to seek the suppression remedy. *See, e.g., United States v. Phillips*, 540 F.2d 319, 325–26 (8th Cir. 1976) (party seeking to suppress fruit of unlawful surveillance

must be given a "full and fair opportunity" to meet prima facie burden of showing that the surveillance was unlawful). While this Court has said that the interests at stake in a suppression hearing are of a "lesser magnitude" than those at stake in a criminal trial, it has concluded that Fifth Amendment due process protections apply in the pretrial suppression context. *United States v. Raddatz*, 447 U.S. 667, 679 (1980). Consistent with this conclusion, circuit courts have held that the government must disclose information to a defendant that could affect the outcome of a suppression hearing. *See, e.g., United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) ("The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."); *Smith v. Black*, 904 F.2d 950, 965–66 (5th Cir. 1990), vacated on other grounds, 503 U.S. 930 (1992) (due process mandates the disclosure of information in the government's possession if nondisclosure would "affect[] the outcome of [a] suppression hearing").

Nonetheless, no circuit court has found any constitutional prob-

lems with the ex parte, in camera procedure locking out the defense. Several have held the procedure does not violate due process. *See, e.g., United States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005); *United States v. El-Mezzain*, 664 F.3d 467, 567 (5th Cir. 2011); *Ott*, 827 F.2d at 476-77. These cases, however, simply assume that the district court's review of the material suffices to protect the rights of the defendant. *El-Mezzain*, 664 F.3d at 567. That assumption elides the critical role of counsel in an adversarial system. A district court—the neutral arbiter—is not a constitutional substitute for counsel.

Evidence mounts that the government routinely commits factual errors, both by misrepresenting facts and by omitting fact, in its applications for surveillance orders under FISA. Yet, when that surveillance leads to criminal prosecution, the defendant has no practical right to a hearing to contest the order's legality and defense counsel—lacking any information about the order, the application submitted by the government to obtain the order, or any of the underlying factual support for the application—cannot meaningfully assist the defendant in challenging its legality. This case presents a vehicle to remedy these violations.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: June 16, 2020

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