No. _____

In the Supreme Court of the United States

DANNY VELOZ,

Petitioner

v.

UNITES STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United State Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whose evidence is a trial judge allowed to consider in making the threshold determination that a defendant has made a substantial preliminary Franks showing? Should a court be limited to reviewing only the materials a defendant submits, or is the court also permitted to consider additional evidence submitted by the government?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner **Danny Veloz** respectfully petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit to review the judgment against him in United States v. Danny Veloz.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, reproduced at Appendix A, is reported at 948 F.3d 418.

JURISDICTION

The court of appeals' judgment was entered on January 24, 2020. A petition for rehearing and suggestion for rehearing en banc was filed on February 22, 2020, and was denied on March 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 3231, which grants exclusive jurisdiction over all offenses against the laws of the United States. The court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction to review all final decisions of the district courts. This petition is timely filed pursuant to Sup. Ct. R. 13, ¶ 3 and this Court's Order dated

March 19, 2020 relating to COVID-19 extending deadlines by 150 days.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides: "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 searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The District Court Proceedings

On July 25, 2012, a federal criminal complaint was filed in the United States District Court of Massachusetts charging Henry Maldonado, Thomas D. Wallace and Jose Guzman with conspiracy to commit kidnapping, in violation of 18 U.S.C. § 1201(c). On August 30, 2012, a federal grand jury sitting in Boston, Massachusetts returned a single-count indictment charging the three men with conspiracy to commit kidnapping. On September 27, 2012, a superseding indictment issued charging Maldonado, Wallace and Guzman, along with Danny Veloz, Luis Reynoso, Gadiel Romero and Jose Matos with conspiracy to commit kidnapping. A4:71.

Veloz filed several motions to suppress, including a motion to suppress evidence seized pursuant to a warrant and request for a Franks hearing, a motion to suppress a warrantless search of his home, a motion to suppress evidence seized after a search of computer storage equipment and cellular telephones, and a motion to suppress information seized from the defendant's email accounts. Veloz also filed motions to suppress identifications made by three cooperating witnesses. Veloz requested evidentiary hearings for each of the motions he filed. The court (Stearns, J.), denied all of the motions to suppress, and denied all requests for evidentiary hearing.

From August 7 to 21, 2017, the indictment was tried to a jury (Stearns, J. presiding). The jury returned a guilty verdict on August 21, 2017. Veloz filed a motion to set aside the verdict, which the Government opposed. The court denied the motion at the sentencing hearing.

On November 16, 2018, Mr. Veloz received a sentence of life imprisonment. Judgment entered on November 17, 2018. The convictions and sentence were affirmed by the First Circuit on January 24, 2020. See United States v. Veloz, 948 F.3d 418 (1st Cir. 2020), Appendix A hereto.

The Court of Appeals Decision

In affirming the district court's rulings, the First Circuit panel held that omitted information from a confidential informant and false statements in an affidavit submitted in support of a search warrant application were not

material to the probable cause calculus, and therefore there was sufficient probable cause to issue the search warrant. The First Circuit also held that it was not error to fail to hold an evidentiary Franks hearing. 948 F.3d at 428.

REASON FOR GRANTING THE PETITION

Certiorari is warranted to resolve a circuit conflict regarding when an evidentiary hearing is required in the context of a Franks motion, where a defendant has made a substantial preliminary showing that a search warrant was procured with deliberate or reckless misrepresentation in the affidavit.

I. The Court Should Grant Certiorari to Provide a Uniform Procedure for Holding a Franks Hearing Where the Defendant Has Made a Substantial Showing that a Search Warrant Affidavit Contains Deliberate or Reckless Misrepresentations

In Franks v. Delaware, 438 U.S. 154 (1978), this Court held that the Fourth Amendment requires a trial court to hold a hearing on the veracity of the contents of a search warrant affidavit "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." 438 U.S. at 155-56. The showing "requires evidence (1) that the warrant contained false information; (2) that the false information was included in the affidavit intentionally or with

reckless disregard for the truth; and (3) that the false information was necessary to find probable cause and issue the warrant." Id. at 511 (citing Franks, 438 U.S. at 155-56). Conclusory allegations are not enough, but it is equally true that the defendant need not come forward with conclusive proof of deliberate or reckless falsity. "Otherwise, there would be no need for a Franks hearing." Id.

It is sometimes difficult to determine whether a defendant has made a preliminary showing under Franks. In United States v. McMurtrey, 704 F.3d 502, 509 (7th Cir. 2013), the Seventh Circuit "attempt[ed] to clarify some issues concerning the procedures a district court may or must use in evaluating a criminal defendant's motion to suppress evidence under Franks." McMurtrey, 704 F.3d at 504. The court explained:

> 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, this procedural improvisation is not without risk, as the sparse case law indicates. In such a pre-Franks hearing, the natural temptation for the court will be to invite and consider a response from the government. However, the court should not give the government an opportunity to present its evidence on the validity of the warrant without converting the hearing into a full evidentiary Franks hearing,

> including full cross-examination of government witnesses. We emphasize that the option to hold such a limited pre-Franks hearing belongs to the district court, not the defendant. If the defendant's initial Franks motion does not make the required "substantial preliminary showing," the court need not hold a pre-Franks hearing to provide the defendant a further opportunity to do so.

Id. at 504-05.

The Seventh Circuit further clarified the procedure in United States v. Glover, 755 F.3d 811 (7th Cir. 2014), holding that,

> to obtain a Franks hearing, the defendant need not overcome the court's 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. See McMurtrey, 704 F.3d at 509. If a defendant falls short of the showing required for a Franks hearing, the district court has discretion to hold a "pre-Franks hearing" for the defendant to supplement his submissions. The government's explanation of discrepancies raised by the defense must wait for the Franks hearing itself, however, where the defendant has the opportunity for full cross-examination. Id. The district court erred

here by offering its own explanation for the omissions and relying on that explanation to deny a Franks hearing.

Id. at 820-821.

The Third, Sixth, and Eighth Circuit Courts of Appeals have considered and applied the Seventh Circuit's precedent, as have district courts in the Fourth, Ninth, and Eleventh circuits. United States v. Wade, 628 Fed. Appx. 144 (3rd Cir. 2015) (distinguished because defendant failed to make initial Franks showing); United States v. Davis, 2016 U.S. Dist. LEXIS 29421 (E.D.N.C. 2016) (distinguishing McMurtrey from the defendant's case); United States v. Brown, 68 F. Supp. 3d 783 (M.D. Tenn. 2014); United States v. Fuller, 2019 U.S. App. LEXIS 222 (6th Cir. 2019) (regardless of officially adopting or rejecting the McMurtrey procedural rule, the court held that any error would be harmless and distinguishes the defendant's facts from McMurtrey); United States v. Miller, 2019 U.S. Dist. LEXIS 221515 (N.D. Iowa 2019) (recognizing the procedure of McMurtrey, but rejecting defendant's challenge because a substantial preliminary showing was not made and the misstatements did not alter the probable cause analysis); United States v. McMillan, 2018 U.S. Dist. LEXIS 87765 (D. Minn. 2018) (recognizing validity of defendant's McMurtrey argument, but holding that defendant failed to carry burden on initial showing); United States v. Arnold, 725 F.3d 896 (8th Cir. 2013) (holding that district court relied

only on original affidavit and defendant's own arguments, not on an unsworn proffer from the Government); United States v. Rodriguez-Castorena, 2017 U.S. Dist. LEXIS 13431 (N.D. Cal. 2017) (rejecting defendant's reliance on McMurtrey because of a lacking presence of "overt contradiction and irreconcilable averments"); United States v. Lewis, 2019 U.S. Dist. LEXIS 103397 (M.D. Fla. 2019) (finding that full Franks hearing was not warranted when defendant was given a "full opportunity to challenge or rebut that evidence" and the alleged misstatements were not material to the probable cause calculation).

The First Circuit has yet to decide whether holding of McMurtrey applies. See, e.g., United States v. Graf, 784 F.3d 1, 6 n.7 (1st Cir. 2015); United States v. Magee, 834 F.3d 30, 33 n.3 (1st Cir. 2016) ("Some courts have held that, in evaluating a Franks motion, courts must limit their review to the materials that the defendant submits.") Similarly, the Second, Fifth and Tenth Circuits have yet to hold that McMurtrey applies.

In Veloz' case, he presented evidence in his motion to suppress and for a Franks hearing that the search warrant affidavit contained both material omissions and false statements, including whether a confidential informant had identified Veloz in a photo array. In its responses to Veloz' motions, the Government acknowledged that a false statement had been made in the affidavit, and provided evolving reasons as to why that came to be, including a new affidavit from the FBI agent who had made the false statement. The

district court then relied upon the post hoc explanations in determining probable cause, despite the fact that the issuing magistrate had been presented with a different set of facts. Veloz did not learn that there was a false statement in the warrant affidavit until after the Government filed a responsive pleading to a separate motion to suppress identification, describing a completely different identification procedure than had been presented to the magistrate who had approved the warrant. Veloz then moved for reconsideration of the original suppression decision.

Under the McMurtrey test, Veloz would have been granted an evidentiary hearing when he showed, using the Government's own pleadings, that there was a false statement in the warrant affidavit. At this hearing he could have cross-examined the witness to fully develop why the false statement had been included in the affidavit. Instead, the First Circuit ignored Veloz' argument that he should have been granted a hearing, and held that, because he had not raised the issue regarding the false statement in his original motion, Veloz was limited to either abuse of discretion or plain error review.

This Court should address whether, when a defendant has been misled by a false statement in a warrant affidavit, and then by Government filings that attempt to explain away this false statement but does not fully disclose the truth, he is to be granted a full evidentiary Franks hearing.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the First Circuit summarily reversed.

Respectfully submitted,

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