

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2020

BRANDON CORDELL BENNETT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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SUBMITTED: January 20, 2021

QUESTION PRESENTED

WHETHER OMITTED INFORMATION FROM A SEARCH WARRANT APPLICATION MUST NEGATE OR CONTRADICT ALLEGED FACTS SUPPORTING PROBABLE CAUSE IN ORDER TO BE MATERIAL AND JUSTIFY SUPPRESSION OF EVIDENCE.

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Petitioner, Brandon Cordell Bennett, 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

1. The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. Bennett*, 806 Fed.Appx. 605 (9th Cir. 2020) and the Court's order denying rehearing are unreported. A copy of those decisions is attached in the Addendum to this petition at pages 1-3.

2. The decisions of the federal district court denying Petitioner's suppression motion are unreported and are also attached along with a copy of the search warrant application under review (Addendum pages 4-62).

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition was filed on May 28, 2020. Petitioner filed a timely petition for rehearing, which was denied, on August 26, 2020 (Addendum page 3). This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on January 20, 2021, within the 150 days for filing under the Rules of this Court (*see Rule 13, ¶1 as amended* by the Court's March 19, 2020 order.

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 search, and the persons or things to be seized.

U.S. Const. amend. IV.

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STATEMENT OF THE CASE AND FACTS

(A) Overview.

1. Petitioner was charged with federal child pornography offenses after his cell phone was searched with a state court search warrant. About two weeks before the cell phone search Petitioner stood trial in state court for committing sexual abuse against his then eight-year-old stepdaughter. Petitioner was acquitted of those charges. However in the search warrant application for the cell phone the state court judge who issued the warrant was not advised of Petitioner's acquittal and other material information relevant to issuance of the warrant. The warrant application (set forth in the Addendum in its entirety, pages 59-62) stated in part as follows:

On August 23, 2016 GFPD Detective Price received a call from child counselor Robin Castle. Castle had been seeing 9 year old Jane Doe in relation to sexual abuse by her step-father Brandon Bennett. Castle informed Price that Doe had disclosed that Bennett had taken pictures of Doe naked with his cell phone while making her pose in certain positions. Castle informed Doe's mother and Doe's mother brought the cell phone to Castle's office.

Detective Price met with Castel and Doe's mother at Castle's office. Doe's mother informed Detective Price that the phone belonged to Bennett and that she tried to get into the phone herself to look at it but that she did not know the passcode. Doe's mother provided the phone to Detective Price and a forensic interview was scheduled for Doe.

On August 24, 2016, Detective Noah Scott performed a forensic interview with Doe. Doe disclosed that Bennett "hurt her." Bennett took pictures of Doe "down there" referring to her vaginal area. Bennett also took pictures of her chest. All of these pictures were taken with Bennett's phone. Doe also reported that Bennett touched her in the

vaginal and chest area. She stated that he touched under her clothes with his “little willy thingy” and took pictures with his phone while touching her. Doe reported that this all occurred at their house in her mom’s room.

Doe disclosed that when Bennett took the pictures he made Doe spread her legs and lift her legs up while she laid on her back. Doe felt scared when this happened and reported that only she and Bennett were in the room while he did this and while he took the pictures.

After the interview, Detective Price spoke with Doe’s mother. Doe’s mother reported that this was Bennett’s only phone and that he had used it for at least a year prior to him being arrested in October 2015. Doe’s mother stated that after he was arrested she tried to get into the phone as she was (sic) suspected that Bennett looked at child pornography, however she could not access the phone as it was protected by a passcode.”

(Addendum at pages 59-60).

2. Specifically the search warrant application for the cell phone alleged that Petitioner had taken compromising pictures of the child (the alleged victim in the state court sexual abuse case) an allegation that never surfaced in the context of the state court prosecution. Importantly, *after the cell phone was searched* no compromising pictures of the stepdaughter were found on the cell phone.

3. In his federal case Petitioner brought a motion to suppress arguing that the search warrant applicant deliberately omitted material information from the search warrant application. After conducting a hearing the district court issues two orders: an original order denying the motion to suppress; and an amended order denying the motion to suppress. (Addendum at pages 4-58).

4. The original order was amended on the government's motion because the government objected that the search warrant applicant (a detective) should not have to bear a permanent "career ending" stain on his credibility for trying to manipulate the search warrant judge where he (the detective) was only relying on advice he received from the State County Attorney's Office which prosecuted Petitioner's sexual abuse case. In any case, Petitioner's suppression motion based on material omissions from the search warrant application was denied. (Addendum page 57).

(B) The Ninth Circuit's decision.

5. The Ninth Circuit affirms the district court. In its decision the Court rules that "even if all of the omissions identified [by Petitioner] had been included in the warrant application [such] does not negate any of the 'facts necessary to the finding of probable cause.'" (Addendum at page 1 *citations omitted*). Before reaching this "alternative ground" resolution, however, the Ninth Circuit determined that the district court clearly erred in not recognizing that it was the lead prosecutor from Petitioner's state court case who should have been held accountable for the omissions from the warrant application. *Id.*

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REASONS FOR GRANTING THE WRIT

The Panel’s decision in this case conflicts with this Court’s decision in *Murray v. United States*, 487 U.S. 533, 539 (1988) (in the context of a suppression motion “it is the function of the District Court rather than the Court of Appeals to determine the facts”). Since the Ninth Circuit determined that the state court prosecutor was legally responsible for omitting material information from the warrant application Petitioner contends under *Murray* it was the district court’s role to re-determine probable cause in the first instance—not the Ninth Circuit’s. Furthermore, the Ninth Circuit’s decision employs a new standard for determining probable cause after having assumed that all of the omissions from the warrant application identified by Petitioner should have been included. Neither *Cameron v. Craig*, 713 F.3d 1012, 1020 (9th Cir. 2013)—the case cited by the Ninth Circuit—nor any other decision of this Court endorses a test which requires the material omitted from the warrant application to “negate . . . the ‘facts necessary to the finding of probable cause.’” (Addendum at page 1).

The critical contention of the search warrant application in this case was that Petitioner had taken compromising pictures of the alleged state court case abuse victim. However forensic examination of Petitioner’s cell phone revealed no such images. While in the vast majority of cases seized evidence cannot be rendered untrustworthy (*see, e.g., Stone v. Powell*, 428 U.S. 465, 490 (1976)); that is not the

situation here. On the contrary, forensic examination of the seized evidence (the cell phone) reflected that Petitioner never took the pictures the warrant application accused Petitioner of taking. That fact, in turn, increased the probative value of the material that was omitted from the warrant application, while at the same time substantially diminishing the allegations of picture taking included in the warrant application.

Unfortunately rather than remanding the case to allow the district court to complete its necessary fact-finding the Ninth Circuit (1) found error at the first step of the *Franks v. Delaware*, 438 U.S. 154 (1978)¹ analysis; and then (2) resolved the ultimate probable cause issue as an “alternative ground.” This holding runs contrary to *Murray* and other well-established precedent of this Court. In other words, the district court’s failure to recognize that the state county prosecutor should have been held the accountable actor in the *Franks* hearing context warranted reversal by the Ninth Circuit and remand to the district court. *Cf. Anderson v. Bessemer City*, 470 U.S. 564, 575-575 (1985). It is the district court’s role to sort through what the state court prosecutor knew or did not know and to weigh the possible inferences that his knowledge or lack of knowledge inspired under the warrant application.

¹ The first step of the *Franks* analysis centers on the defendant being given the opportunity to show, among other things, that (1) there were false statements or omissions; (2) that such were deliberately or recklessly made; and (3) that the challenged statements were necessary to find probable cause.

In addition the Ninth Circuit relied on a test which requires the omitted material to negate or contradict the allegations in the warrant application, which supposedly supported probable cause. That test is narrower than what the Ninth Circuit has previously announced and no decision of this Court endorses this view. Moreover, in *United States v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985), the Ninth Circuit envisioned a situation where “the government omits an entire set of facts and it is unclear that they contradict any single statement in the affidavit but rather call the entire affidavit into doubt”, which is the situation here. *Ippolito*, 774 F.2d at 1487, n.1.

When facts are omitted from a warrant application the broader question is whether inclusion of those facts would have led the issuing judge to a finding of no probable cause generally, not whether those facts contradicted the supporting allegations. Put another way, with material false statements the inquiry is whether the false statements led to a positive finding on probable cause. Here, as an alternative ground, the Ninth Circuit found that because Petitioner’s state court acquittal did not contradict facts set forth in the warrant application there was no error. Nevertheless, the Ninth Circuit recognizes those facts could have led the issuing judge to “an inference that Jane Doe’s mother coaxed Jane into accusing [Petitioner] of taking the photos so that law enforcement would have justification for accessing [Petitioner’s] phone.” (Addendum at page 1). Which is likely what

happened. Considering that no photos of Jane Doe were found on Petitioner's cell phone it should not be the test that the omitted facts must negate or contradict allegations which supposedly supported the issuing judge's probable cause finding, as held by the Ninth Circuit. Rhetorically speaking the question is whether one can negate or contradict an allegation that proved untrue from its inception.

CONCLUSION

WHEREFORE, the Court should grant this petition and set the case down for full briefing.

RESPECTFULLY SUBMITTED this 20th day of January, 2021.

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