IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

No. _____

BASILIO HERNANEZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

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March 28, 2024

QUESTIONS PRESENTED

Did the court err in finding that the good faith exception to the exclusionary rule applied?

Should the docket sheet reflect all pleadings filed in a case, to alert the defense to the fact that the government has filed documents under seal, and to give the defense a sense of the nature of those documents, so that the defense can make a reasoned argument why it should have access to those sealed documents?

List of All Proceedings

1. United States District Court, W.D.N.Y. (Rochester), Docket No. 18-cr-06126-FPG-MJP-1; judgment entered 3/2/22.

2. United States Court of Appeals for the Second Circuit, Docket No. 22-471-cr; judgment entered 1/4/24.

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TABLE OF AUTHORITIES

Petitioner, Basilio Hernandez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit Court of Appeals entered in this proceeding on January 4, 2024.

OPINION BELOW

The decision of the Second Circuit, United States v. Hernandez, 2024 WL 47666 (2d Cir. 2024), appears in the Appendix hereto.

JURISDICTION

The judgment of the Second Circuit was entered on January 4, 2024. This petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constit., Amend. IV: 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.

U.S. Constit., Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner, Basilio Hernandez [hereinafter "Hernandez"], was convicted of conspiracy to possess with intent to distribute heroin, fentanyl, and cocaine, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(B), 841(b)(1)(C), and 846.

Hernandez moved pretrial to suppress evidence seized from his car pursuant to a search warrant. The trial court held that the driveway where the car was parked was part of the curtilage of Hernandez's home, and the use of a drug-sniffing dog to sniff the outside of the car in that driveway was a warrantless search. The government conceded that the lifting of a tarp on the car to reveal the VIN (which led to other information concerning the car) was an illegal warrantless search.

After hearing, the court concluded, once the illegally obtained information was removed from the supporting affidavit, the warrant lacked probable cause. However, it found that the good faith exception to the exclusionary rule applied. It found that the officers acted in reasonable reliance on precedent existing at the time of the search, and that the misstatements and inconsistencies in the affidavit were merely negligent or innocent mistakes.

After the conclusion of trial, the defense learned that the government had previously submitted to the court, ex parte and under seal, certain

documents. The defense moved to have access to those records, and the court denied the motion.

The evidence at trial showed that, on the morning of September 21, 2017, the police received a tip from paid informant Jose Figueroa. Figueroa, who worked at 41 Geneva Street in Rochester packaging and selling cocaine and heroin, had a string of prior convictions and was a heroin addict in need of a fix. He said that he had just accompanied a woman named Cookie to a white BMW parked next door to 41 Geneva Street, where she placed the drugs in the trunk. Figueroa said the car belonged to Hernandez who, according to Figueroa, was paid $200 weekly for the use of the trunk to store drugs.

The police obtained a search warrant for a white BMW parked in the driveway of 35 Geneva Street. After prying open the trunk, they found inside a quantity of packaged heroin, heroin cut with fentanyl, and cocaine, as well as packaging material such as wrappers, vials and a kilo press. The street value of the drugs was estimated at $200,000.

Some five months later, the police spoke with Hernandez. Hernandez said that he owned the BMW, which was not operational. Hernandez said he was scared that, if he told them how the drugs got into the trunk, the people involved would hurt him and his family.

REASONS FOR GRANTING THE PETITION

This case presents important questions of federal law that have not been, but should be, settled by this Court:

I. Where police entered a driveway without a warrant to search a car parked therein, did the good faith exception to the exclusionary rule apply when (1) under then-existing law, the police still needed probable cause to search a car, and (2) the misstatements in the later affidavit could not be justified by a 'rush to complete the warrant package,' since officers were stationed by the car while the warrant was sought?

Although the court correctly found that the search warrant for Hernandez's car was not supported by probable cause, the court nonetheless held that the good faith exception applied and so denied the suppression motion. The court's conclusion that the actions by the police in entering the driveway, lifting the tarp off the car, and obtaining the VIN, and in conducting a canine sniff search, were done in reasonable reliance on appellate precedent is wrong, because at the time of this illegal entry and search, the police needed probable cause – although not necessarily a warrant – to search a motor vehicle, wherever located. The court's finding that the affiant was merely negligent in the wording of his affidavit is clear error, because the number and significance of the misrepresentations and omissions show gross negligence at the least, and actually rise to the level recklessness or deliberate deception.

The government conceded that the VIN (included in the search warrant affidavit) was not provided by the CI, but rather was discovered

through an illegal search when a police officer went onto the driveway prior to the issuance of the search warrant, and lifted a tarp covering the BMW. The court found that the driveway was part of the curtilage of Hernandez's home, and that bringing a drug-sniffing dog onto the driveway to sniff the car was an illegal search. Accordingly, the VIN, the model year of the BMW (found using the VIN), and the results of the dog-sniff were excised from the affidavit for the purposes of determining whether probable cause existed, and the court found that the remainder of the affidavit was insufficient to support probable cause.

Since the police lacked probable cause to enter the driveway and search the car, the fact that Collins v. Virginia, 138 S.Ct. 1663 (2018) had not yet been decided at the time of this search is irrelevant. The law has long been that probable cause is needed in order to search a motor vehicle, even if in some circumstances, no warrant is required. Carroll v. United States, 267 U.S. 132, 160-62 (1925). Here, as the district court found, the police lacked probable cause at the time they lifted the tarp on the car and got a dog to sniff it for drugs. Accordingly, there was no reasonable reliance on legal precedent here.

Nor were the numerous misstatements in the search warrant affidavit minor or the result of simple negligence. The district court's conclusion, affirmed on appeal, that the misstatements were likely the result of the

affiant "rushing to complete the warrant package" in order "to ensure that law enforcement could act quickly before the narcotics were moved or hidden" has absolutely no support in the record. The evidence was that multiple officers were stationed to guard the car while the warrant was sought.

This Court should grant this Petition for Writ of Certiorari to clarify that findings sufficient to support the good faith exception to the warrant requirement must be grounded in fact, and not unfounded supposition. Where, as here, the number and significance of the misstatements and omissions in the search warrant affidavit show the affiant's gross negligence and reckless disregard for the truth, and for Hernandez's Fourth Amendment rights, the good faith exception cannot apply. Davis v. United States, 564 U.S. 229, 238 (2011)(where police exhibit deliberate, reckless or grossly negligent disregard for Fourth Amendment rights, deterrent value of exclusion is strong).

II. Whether the docket sheet must reflect all pleadings filed in a case, to alert the defense to the fact that the government has filed documents under seal, and to give the defense a sense of the nature of those documents, so that the defense can make a reasoned argument why it should have access to those sealed documents.

Where there is a question as to the relevance or materiality of documents concerning testifying government witnesses, the government may submit those to the court for independent in camera review. Contreras v. Artus, 778 F.3d 97, 114 (2d Cir. 2015). A defendant is not entitled to access

to the documents unless and until the court so determines. Id. However, where, as here, the record reflects a pattern of police misstatements, contradictions, and omissions, the court should have allowed defense counsel at the very least an opportunity to participate in that decision if those documents pertained to law enforcement witnesses. Here, defense counsel was kept in the dark until after trial about the very fact that these documents had been submitted to the court for a disclosure determination.

The defense moved at the get-go for release of Brady and Giglio materials. This included a specific request for disclosure of "[p]rior acts of misconduct of any witness," "[m]aterials relating to the character of any government witness, including all law enforcement memoranda, reports, documents, etc., critical of the witness or her credibility," "[e]vidence that a government witness was the target of any criminal or civil investigation," and "[a]ll material which tends to impeach any government witness."

After trial, in its response to the defense motion for a new trial, the government revealed for the first time that it had previously submitted to the court the disciplinary records of two of the officers who testified at the trial for in camera review. It averred that the court had previously determined that these submissions were neither material nor relevant, and had entered a sealed protective order reflecting that determination.

This was news to the defense. Although the defense has no entitlement to participate in the court's in camera review of documents, at the very least the defense should be informed what is going on. Here, the docket sheet did not reflect the three submissions made by the government, nor the court's order. It showed that three numbers were missing. It did not show that there were sealed submissions, much less what they concerned.

The court agreed that the docket sheet should have reflected the government's applications for in camera review of documents.[1] From the docket sheet, it was impossible to tell – except by speculating from missing docket entries – whether ex parte motions were filed, and if so, by whom. There are several missing docket entries.

Moreover, even if defense counsel had been contemporaneously informed that the government had filed an ex parte motion, without any further information concerning the subject matter, counsel could not effectively challenge that motion. "The value of a judicial proceeding … is substantially diluted where the process is ex parte because the court does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties may participate." Carroll v. Princess Anne, 393 U.S. 175, 183 (1968).

[1] The docket sheet has since been amended, at the direction of the appellate court, to reflect the existence of the government's sealed submissions.

By having the docket sheet simply omit any reference to ex parte filings, appellate rights are compromised as well. If on appeal the defense does not know (because it was kept secret) that the government made ex parte submissions to the court, it cannot challenge those. The fact that the documents at issue were filed with the court, so that appellate review can occur, is rendered utterly meaningless if appellate counsel does not know about them and cannot request such review.

Moreover, even if the fact of ex parte filings is ultimately revealed to the defense, without more information, the defendant is still denied the benefit of "counsel's examination into the record, research of the law, and marshalling of arguments on [client's] behalf." Douglas v. California, 372 U.S. 353, 358 (1963)(Sixth Amendment right to assistance of counsel on appeal). Here, for example, without more information, all counsel can do is to request appellate review of the trial court's determination that the documents submitted by the government were not relevant or material.

The right to effective assistance of counsel is denied where, as here, counsel can only bring this issue to the appellate court's attention rather than make reasoned arguments that the trial court abused its discretion. An appellate attorney "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claims." Evitts v. Lucey, 469 U.S. 387, 394 (1985). Of course, on the record

accessible to the defense, appellate counsel here could not even assist in a detached evaluation of the claims, much less argue on defendant's behalf.

In the circumstances of this case – where the court expressly found inconsistencies, inaccuracies, contradictory testimony, and a lack of clarity in the testimony of the lead investigator – the court should have taken steps to inform the defense of the ex parte submissions, and allow its participation in the process. For example, in Contreras, 778 F.3d at 114, the government submitted a document so the court could determine whether the government had a duty to disclose it. The court invited defense counsel to review the document and to examine the witness about its nature and relevance.

Even in cases where it was held that the defense was not entitled to be privy to in camera review of documents submitted ex parte, the defense has been provided with more information than that given to defense counsel here. For example, in United States v. Kiszewski, 877 F.2d 210, 215-16 (2d Cir. 1989), the government disclosed the substance of complaints against an FBI agent, and how those were resolved. The Second Circuit held that, notwithstanding this disclosure, the trial court should have conducted its own in camera review of the agent's file.

In United States v. Rozic, 104 F.3d 351 (2d Cir. 1996)(unpublished), the defense knew that the co-defendant had participated in a proffer session, and requested the proffer notes. The court properly declined to release those

notes after its review. Here, Hernandez was not informed that anything had been submitted for review, much less what those documents were.

This is not an all or nothing proposition. There are several ways in which the court could have conducted in camera inspection while involving defense counsel. It could have ordered the government to furnish to the defense a summary of Giglio materials, United States v. Jackson, 2020 WL 6558215 (E.D.N.Y. 2020), or a "broad outline" of the material it was submitting. United States v. Paulus, 952 F.3d 717, 724 (6th Cir. 2020). It could have sought the defense's input about its theory of the case to provide context for the court's analysis. Id. Hernandez should have been afforded:

> a chance to be heard as to either the need for in camera inspection, or factors that might bear on the Court's materiality determination pursuant to its in camera review, once the government has identified (at a level of generality that will not disclose the information it contends must remain secret) the records as to which such review is sought.

United States v. Sittenfeld, 2022 WL 1555105 (S.D. Ohio 2022).

The whole process here has a whiff of the Star Chamber about it. This Court should grant this Petition to evaluate the fairness of making decisions that impact a person's liberty without even alerting the defense that the court is conduction in camera review, much less without allowing the participation of defense counsel.

Conclusion

For the foregoing reasons, Petitioner Basilio Hernandez respectfully requests that this Petition for Writ of Certiorari be granted.

March 28, 2024

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