No. _____

IN THE

Supreme Court of the United States

TROY KENDRICK, JR.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CLAUDE J. KELLY
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA

SAMANTHA J. KUHN
COUNSEL OF RECORD

500 POYDRAS STREET, SUITE 318
HALE BOGGS FEDERAL BUILDING
NEW ORLEANS, LOUISIANA 70130
(504) 589-7930
SAMANTHA_KUHN@FD.ORG

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

This case involves a wiretap that was authorized based on falsified evidence. A federal agent presented a magistrate judge with undisputedly false and misleading transcriptions of a prior wiretap and other undisputedly false evidence to establish the requisite probable cause. The Fifth Circuit nonetheless upheld the fraudulently obtained wiretap under *Franks* by finding that probable cause "still exists" based on the agent's "interpretations" of the very evidence he falsified and misrepresented. Thus, the first questions presented is:

> (1) When a law enforcement agent falsifies and misrepresents wiretap evidence to establish probable cause for a second wiretap, can a reviewing court rely on the agent's subjective beliefs about the misrepresented evidence to find probable cause and uphold its validity under *Franks v. Delaware*, 438 U.S. 154 (1978)?

Additionally, Mr. Kendrick presents the following question for the Court's review:

> (2) Can courts defer to Sentencing Guidelines commentary without first determining that the underlying Guideline is genuinely ambiguous, in particular, where the Sentencing Commission uses the commentary to rewrite a Guideline that applies to "prohibit[ions]" on the "distribution" of drugs, U.S.S.G. § 4B1.2, to capture conspiracies to distribute drugs?[1]

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[1] The second question is the same as the questions presented in *United States v. Tabb*, No. 20-579, in which a petition for writ of certiorari is currently pending. If the Court grants certiorari in *Tabb* and determines that review of Mr. Kendrick's first question presented is unwarranted, it should hold Mr. Kendrick's petition pending resolution of *Tabb*.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Troy Kendrick, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

The Fifth Circuit Court of Appeals issued a published decision in this case on July 24, 2020, available at 967 F.3d 487. Mr. Kendrick filed a timely petition for panel rehearing, and the panel withdrew its opinion and issued a superseding opinion on September 14, 2020, available at 975 F.3d 458. Mr. Kendrick then filed a timely petition for rehearing en banc, and the panel again withdrew its opinion and issued a final, superseding opinion on November 3, 2020, available at 980 F.3d 432. All three opinions are attached to this petition as an Appendix.

JURISDICTION

On November 3, 2020, the Fifth Circuit Court of Appeals issued its final decision on Mr. Kendrick's appeal (following the withdrawal and substitution of two previous opinions) and simultaneously denied his timely-filed petition for rehearing en banc. Mr. Kendrick's petition for a writ of certiorari is timely filed pursuant to Supreme Court Rule 13, as modified by this Court's Order dated March 19, 2020, because it is being filed within 150 days from the date of that Fifth Circuit judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the Constitution provides, in relevant part:

> [N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . .

FEDERAL STATUTES INVOLVED

18 U.S.C. § 2518 provides, in relevant part:

> (1)(b) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction . . . [and] shall include . . . a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued . . . .
>
> . . .
>
> (3) Upon such application the judge may enter an ex parte order . . . authorizing or approving interception of wire, oral, or electronic communications . . . if the judge determines on the basis of the facts submitted by the applicant that—
>
> > (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense . . .; [and]
> >
> > (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception . . . .

21 U.S.C. § 994(h)(1) provides, in relevant part:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant … has been convicted of a felony that is (A) a crime of violence; or (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46 . . . .

SENTENCING GUIDELINES INVOLVED

U.S.S.G. § 4B1.1(a) provides:

> A defendant is a career offender if
>
> > (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
> >
> > (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
> >
> > (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.2(b) provides, in relevant part:

> The term "controlled substance offense" means an offense . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 in the commentary to § 4B1.2 provides, in relevant part:

> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

STATEMENT OF THE CASE

In 2018, a jury convicted Troy Kendrick of participating in a drug conspiracy and unlawfully possessing a firearm. Most of the evidence presented at trial was obtained directly or indirectly through a wiretap of his phone beginning in June 2016 (hereinafter referred to as the "Kendrick Wiretap"). The DEA obtained a warrant for the wiretap during its investigation of drug dealing activity by Mr. Kendrick's next-door neighbor, Garrick Jones, whose phone was subject to a prior wiretap in May 2016 (hereinafter referred to as the "Jones Wiretap"). After intercepting calls and texts from Mr. Jones's phone for a month, DEA Special Agent Scott Arseneaux applied for the Kendrick Wiretap, claiming that the DEA had probable cause to believe Mr. Kendrick was Mr. Jones's drug supplier and was using his phone to commit drug trafficking offenses.

But, as discussed below, the "facts and circumstances" that SA Arseneaux provided to establish probable cause for the wiretap contained numerous falsehoods and material omissions. Because that "evidence" was located in wiretap records containing thousands of calls and texts, the magistrate had to rely on law enforcement to summarize and repackage the relevant information for its analysis. This enabled SA Arseneaux to falsify and misrepresent several critical pieces of information, making probable cause ultimately turn on his own subjective views. And, on appeal, the Fifth Circuit struggled to determine what information to excise and what information to consider in applying the *Franks* probable cause standard to evaluate the legality of a warrant based on misrepresented wiretap transcripts.

While SA Arseneaux's specific misrepresentations are discussed below for context, they are inconsequential to the broader issue implicated by this petition: how to properly apply *Franks* to warrants that issue based on falsified wiretap evidence. The use of wiretap evidence in warrant applications presents an important Fourth Amendment issue that has not been addressed by this Court but is becoming more prevalent with the ever-growing use of wiretaps and cell phones. In this case, the Fifth Circuit decided to simply defer to the agent's interpretations of wiretap evidence he personally falsified and misrepresented, creating dangerous precedent that effectively eviscerates the warrant requirement and threatens fundamental, constitutionally-protected privacy rights.

The Kendrick Wiretap Affidavit

In this case, SA Arseneaux presented two categories of information to justify his claimed belief that probable cause existed for the Kendrick Wiretap: (1) allegations by a confidential source ("CS") that Mr. Kendrick was involved in two controlled drug buys arranged between the CS and Mr. Jones in January and February 2016; and (2) three sets of intercepted communications from the Jones Wiretap that SA Arseneaux claimed showed Mr. Jones contacting Mr. Kendrick when he needed drugs to sell. With respect to the first category, SA Arseneaux attested to the reliability of the CS, stating that the CS had "been providing reliable information to [local police] since June 2015 and the DEA since January 2016," that the CS's information had "been corroborated by surveillance and continued investigation," and that the CS's information had "not been found to be false or

misleading." With respect to the second category, none of the quoted calls and texts between Mr. Kendrick and Mr. Jones mentioned drugs, but SA Arseneaux provided other contextual information from the Jones Wiretap to justify his purported belief that they were drug-related.

As it turns out, SA Arseneaux misrepresented the entire factual basis for his assertion of probable cause, falsifying and omitting material information to make the "facts and circumstances" support his claimed belief that Mr. Kendrick was involved in Mr. Jones's drug dealing. Those misrepresentations included: perpetuating the CS's false identification of Mr. Kendrick as the supplier at the January drug deal; falsely attesting to the CS's history of providing accurate and truthful information; omitting material information that contradicted the CS's implication of Mr. Kendrick in the February transaction; providing inaccurate descriptions and transcriptions of the intercepted calls between Mr. Jones and Mr. Kendrick; and omitting exculpatory context that showed their calls and texts were not drug-related. Each of these misrepresentations is summarized briefly below.

1. <u>False Statements Regarding the CS's Allegations</u>

The only "facts" in the affidavit that implicated Mr. Kendrick in an actual drug transaction were the CS's allegations that Mr. Kendrick supplied the drugs for the CS's controlled buys with Mr. Jones in January and February. The January transaction occurred in front of Mr. Jones's house, and the CS claimed that Mr. Kendrick was present and handed the drugs to Mr. Jones in front of him. The February transaction took place inside Mr. Jones's home, and while the CS was there,

surveillance units observed Mr. Jones walk to the garage area of Mr. Kendrick's house next door, meet with "an unknown individual," return to his own house, and talk to another "unknown individual" outside. After the CS left Mr. Jones's house, he/she told officers that Mr. Jones said he had to get the drugs from Mr. Kendrick.

SA Arseneaux presented both of these allegations as true in his affidavit and attested to the reliability of the CS's information, stating that it had "not been found to be false or misleading." But law enforcement had already determined that the CS lied about the January transaction. The investigation report for that controlled buy stated that while the CS reported that he "visually observed" Mr. Kendrick hand the drugs to Mr. Jones, the case agent determined that the person "identified as Troy Kendrick, was in fact Travis Carter"—Mr. Jones's cousin and another target of the investigation. Thus, not only was the allegation about Mr. Kendrick's involvement in that transaction untrue, but SA Arseneaux's claims about the CS's proven reliability were false as well.

Removing the false statements about the CS's reliability eliminated any basis for a magistrate to rely on the CS's allegations about the February transaction. Additionally, however, SA Arseneaux omitted evidence from that controlled buy that contradicted the CS's claim. As noted in the affidavit, the CS was wearing a recording device during the transaction, which did not capture the statement he/she claimed that Mr. Jones made. Indeed, Mr. Jones told the CS prior to their meeting that he

already had the drugs on him. SA Arseneaux excluded the contradictory content of that recording from his affidavit as well.[2]

2. False Statements and Material Omissions Regarding the Jones Wiretap

The focus of the probable cause section of the Kendrick Wiretap affidavit was evidence collected from the Jones Wiretap, which was necessary to establish probable cause that evidence of drug offenses would be found through a wiretap of Mr. Kendrick's phone. *See* 18 U.S.C. § 2518(3). SA Arseneaux presented three series of intercepted calls and texts from the Jones Wiretap, which he claimed showed Mr. Jones contacting Mr. Kendrick when he needed a drug supply. None of the communications between Mr. Kendrick and Mr. Jones actually mentioned drugs, so SA Arseneaux presented additional "context" from the Jones Wiretap that he claimed supported his conclusions that the calls and texts with Mr. Kendrick were drug-related. But, as with the previous allegations, these "facts" were infected with material misrepresentations.

For two of the three sets of communications, which occurred on May 12 and 17, SA Arseneaux claimed that the Jones Wiretap evidence showed that Mr. Jones "immediately called" or texted Mr. Kendrick after drug customers called Mr. Jones asking about his drug supply. That was plainly false with respect to the May 17 calls. As the government conceded on appeal, it was Mr. Kendrick who called Mr. Jones

[2] Notably, while the government initially charged Mr. Kendrick and Mr. Jones with a substantive distribution offense based on the February transaction, that charge was dropped against Mr. Kendrick before his trial, signaling the government's realization that he was not, in fact, involved in that controlled buy.

minutes after Mr. Jones spoke with someone else about drugs, thereby destroying the only support for SA Arseneaux's claim of a causal connection. What's more, while SA Arseneaux quoted only a brief exchange in which Mr. Jones told Mr. Kendrick that he would "need [him] till tomorrow," that exchange actually occurred in the middle of a four-minute social call during a lull in the conversation, when Mr. Kendrick casually asked Mr. Jones about his plans for the day. In other words, nothing about the actual call—either its direction or content—suggested it was drug-related.

With respect to the May 12 call series, SA Arseneaux similarly omitted context showing that Mr. Jones's text to Mr. Kendrick was not drug-related. SA Arseneaux's description of the series began with an unidentified female calling Mr. Jones in the afternoon and asking for drugs, which Jones told the caller he had on him. A minute later, Mr. Jones texted Mr. Kendrick asking where he was. Mr. Kendrick responded 11 minutes later telling Mr. Jones that he was leaving Home Depot, to which Mr. Jones replied, "holla when ya get back." While SA Arseneaux claimed that this series showed Mr. Jones contacting Mr. Kendrick to get drugs to sell to the customer who requested a dime, earlier calls from the Jones Wiretap revealed that Mr. Jones told Mr. Kendrick that morning—long before he received the call about narcotics—to "hit me up when you step outside," with Mr. Kendrick telling Mr. Jones that he would "holla at [him] later." During that morning call, they chatted for about five minutes about various topics, including Mr. Kendrick's night out and a new music CD. Their

only other communication between the morning call and the afternoon texts was a brief text exchange about a new movie that came out.

Importantly, SA Arseneaux not only misrepresented critical details about these two calls. He also omitted material information from the entire Jones Wiretap that contradicted his claim that Mr. Jones contacted Mr. Kendrick when he needed drugs. The month-long Jones Wiretap revealed that Mr. Jones communicated daily (and explicitly) with countless other individuals about drugs, and he routinely contacted Mr. Carter and Michael Sanders (another target of the investigation)—not Mr. Kendrick—to get drugs requested by his customers. Moreover, the Jones Wiretap revealed countless other calls and texts between Mr. Jones and Mr. Kendrick that illustrated the social nature of their relationship. They spoke frequently about television, movies, relationships, work schedules, neighborhood gossip, and other innocuous topics, and Mr. Jones regularly called or texted Mr. Kendrick to ask where he was. Indeed, later in the night on May 12—the same day as the "dime" call—Mr. Jones texted "Wya" ("where you at") to Mr. Kendrick, and they talked about going out for a drink because Mr. Kendrick could not sleep. All of this material information was plainly relevant to the probable cause analysis—which relied on *reasonable* inferences about the meaning of facially innocuous communications between Mr. Kendrick and Mr. Jones—but was excluded from the affidavit.

The third and final series of communications that SA Arseneaux claimed to be drug-related occurred on May 20. According to SA Arseneaux, that series showed that Mr. Kendrick "agreed to meet JONES at the Valero" where Mr. Jones was known to

conduct drug transactions. That was false. The call series actually reflected Mr. Kendrick calling Mr. Jones to ask where he was, and Mr. Jones telling Mr. Kendrick that *he* was in his truck at the Valero with Travis Carter. Thus, the factual basis for SA Arseneaux's claim that they were meeting at Mr. Jones's drug dealing location for a drug transaction was false. Mr. Kendrick was at home while Mr. Jones was with Mr. Carter, his actual drug dealing accomplice, at the Valero.

SA Arseneaux's several, undisputedly false statements and material omissions infected the entire factual basis for probable cause. He misrepresented three isolated exchanges between Mr. Kendrick and Mr. Jones to justify his claimed belief that Mr. Kendrick was Mr. Jones's drug supplier and was using his phone to commit drug trafficking offenses. Combined with the false and uncorroborated allegations by the unreliable CS that Mr. Kendrick was involved in controlled drug buys, SA Arseneaux was able to obtain a highly intrusive wiretap of Mr. Kendrick's phone based on a fabricated narrative of criminal conduct.

The Fifth Circuit's Rulings

Before trial, Mr. Kendrick moved to suppress all evidence obtained directly or indirectly from the wiretap of his phone based on the false statements and material omissions in the affidavit, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). Unfortunately, his trial counsel only identified the false statements about the CS's allegations and reliability, so the district court was unaware of the numerous misrepresentations in SA Arseneaux's descriptions of the "facts" obtained from the Jones Wiretap. The district court denied a *Franks* hearing, finding that probable

cause still existed based on SA Arseneaux's descriptions of the intercepted communications, even if the CS's allegations were ignored.

On appeal, Mr. Kendrick challenged the district court's ruling and identified all of the false statements and misrepresentations cited above to the Fifth Circuit, including those related to the Jones Wiretap evidence. Mr. Kendrick argued that removal of the false statements alone eliminated the factual basis for SA Arseneaux's incriminatory conclusions and assertion of probable cause—even more clearly so when the material omissions were inserted. The government did not dispute the existence of the false statements and omissions identified by Mr. Kendrick but summarily dismissed each one as "immaterial" to the probable cause finding.

Following oral argument, the Fifth Circuit affirmed the denial of Mr. Kendrick's motion to suppress, agreeing with the government that "[p]robable cause still exists even if the allegedly false statements are excised." Published Opinion, *United States v. Kendrick*, No. 19-30375, at 9 (5th Cir. July 24, 2020) ("*Kendrick I*").[3] Importantly, the panel subsequently withdrew and substituted its own opinion twice in response to petitions for rehearing and rehearing en banc. In each substituted opinion, the panel revised its descriptions of the falsehoods, omissions, and unchallenged affidavit content—implicitly acknowledging its

[3] This opinion is included as part of the Appendix and is also available at *United States v. Kendrick*, 967 F.3d 487 (5th Cir. 2020), *withdrawn and superseded by United States v. Kendrick*, 975 F.3d 458 (5th Cir. 2020), *withdrawn and superseded by United States v. Kendrick*, 980 F.3d 432 (5th Cir. 2020).

erroneous assessments of the facts—while always maintaining that the facts were still sufficient to establish probable cause.

In its first opinion, the panel summarized the "unchallenged affidavit content" as including: (1) the CS's identification of Mr. Kendrick as the supplier for the February transaction; (2) the three series of calls and texts from May, with the inaccurate parts of the descriptions removed; and (3) phone record data allegedly showing that Mr. Kendrick and Mr. Jones exchanged 8,340 calls and 6,017 texts during a three-week period in May. *Id.* at 9-10. The panel then explained:

> The remaining *unchallenged* affidavit content sets out events that SA Arseneaux believed indicated that trafficking offenses had been committed, including Jones selling crack cocaine and Kendrick distributing crack cocaine to local dealers like Jones. Indeed, the affidavit's contents undoubtedly confirm that Jones sold drugs to the informant on one occasion where he met with Kendrick amidst completing the drug transaction; and when Jones needed to make local drug sales, he contacted Kendrick about resupplying him and they made efforts to meet. Coupling this with the sheer number of communications exchanged between them, we find that the totality of the circumstance supports a probable cause finding.

Id. at 10 (internal citation omitted) (emphasis in original).

Mr. Kendrick filed a petition for panel rehearing, notifying the panel that the phone record data upon which it relied—which neither party had discussed in its briefing—was erroneous. *See* Petition for Panel Reh'g, *United States v. Kendrick*, No. 19-30375 (5th Cir. Aug. 21, 2020). The thousands of calls and texts exchanged with Mr. Kendrick's phone were with *all* other numbers, not Mr. Jones. Mr. Kendrick argued that panel rehearing was warranted because, among other reasons, the panel expressly relied on this mistake of fact to "find that the totality of the circumstances

supports a probable cause finding." *Id.* at 3. Mr. Kendrick also urged that the panel's probable cause analysis was erroneous, reminding the court that "Agent Arseneaux's mere 'belief' that Jones was calling and texting Mr. Kendrick about drugs is insufficient—the affidavit had to set forth 'particular facts and circumstances' permitting an 'independent evaluation' by the magistrate.'" *Id.* at 12 (citing *Franks*, 438 U.S. at 165).

The panel denied Mr. Kendrick's request for panel rehearing but withdrew its previous opinion, substituting it with a new opinion and judgment. Published Opinion, *United States v. Kendrick*, No. 19-30375 (5th Cir. Sept. 14, 2020) ("*Kendrick II*").[4] In the new opinion, the panel simply removed the inaccurate phone record information from its statement of facts and probable cause analysis, while maintaining the same conclusion. The revised probable cause finding read as follows:

> The remaining *unchallenged* affidavit content sets out events that SA Arseneaux believed indicated that trafficking offenses had been committed, including Jones selling crack cocaine and Kendrick distributing crack cocaine to local dealers like Jones. Indeed, the affidavit's contents undoubtedly confirm that Jones sold drugs to the informant on one occasion where he met with Kendrick amidst completing the drug transaction; and when Jones needed to make local drug sales, he contacted Kendrick about resupplying him and they made efforts to meet. ~~Coupling this with the sheer number of communications exchanged between them,~~ Consequently, we find that the totality of the circumstances supports a probable cause finding.

Id. at 10 (citation omitted) (emphasis in original).

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[4] This opinion is included as part of the Appendix and is also available at *United States v. Kendrick*, 975 F.3d 458 (5th Cir. 2020), *withdrawn and superseded by United States v. Kendrick*, 980 F.3d 432 (5th Cir. 2020).

Following the panel's second opinion, Mr. Kendrick filed a petition for rehearing en banc. *See* Petition for Reh'g En Banc, *United States v. Kendrick*, No. 19-30375 (5th Cir. Sept. 28, 2020). He argued that en banc rehearing was appropriate because the panel's probable cause finding conflicted with Supreme Court and Fifth Circuit precedent. *Id.* at 12–18. Mr. Kendrick asserted, among other errors, that the panel's decision conflicted with *Franks* because the court continued to rely on the May 17 and May 20 call series from the Jones Wiretap—and, specifically, SA Arseneaux's interpretations of that misrepresented evidence—despite the so-called "facts" serving as the basis for those interpretations being undisputedly false. *See id.* at 13–14; *see also id.* at 16–17. As Mr. Kendrick explained, "correction of Agent Arseneaux's misrepresentations about the wiretap evidence eliminates the factual basis from which a magistrate could independently conclude that Jones was contacting Mr. Kendrick for drugs." *Id.* at 16. Thus, "[t]he panel opinion suggests that Agent Arseneaux's mere subjective belief that Mr. Kendrick was Jones's drug supplier is sufficient to establish probable cause, relying on his now-unsupported conclusions that their calls were about drugs." *Id.* at 17.

Mr. Kendrick's petition for rehearing en banc was denied, but the panel once again withdrew and substituted its previous opinion. *See* Published Opinion, *United States v. Kendrick*, No. 19-30375 (5th Cir. Nov. 3, 2020) ("*Kendrick III*").[5] The revised

[5] This opinion is included as part of the Appendix and is also available at *United States v. Kendrick*, 980 F.3d 432 (5th Cir. 2020).

discussion added generic references to the wiretap evidence and "improperly omitted context" while, again, leaving the ultimate probable cause finding unchanged:

> The remaining *unchallenged* affidavit content, *i.e.*, the February 17 transaction, the May 12 events, the May 17 exchange and the May 20 text message, along with the insertion of the improperly omitted context of the May 12 and May 17 calls, sets out events that SA Arseneaux believed indicated that trafficking offenses had been committed~~, including~~. These included Jones selling crack cocaine and Kendrick distributing crack cocaine to local dealers like Jones. Indeed, the affidavit's contents undoubtedly confirm that Jones sold drugs to the informant on one occasion where he met with Kendrick amidst completing the drug transaction; and when Jones needed to make local drug sales, he contacted Kendrick about resupplying him and they made efforts to meet. Consequently, we find that the totality of the circumstances supports a probable cause finding.

Id. at 11 (citation omitted) (emphasis in original). Thus, the panel continued to rely on SA Arseneaux's subjective beliefs and interpretations of the falsified and misrepresented calls and texts from the Jones Wiretap for its probable cause finding.

Below is the court's table summary of the "alleged falsehoods and omissions" versus the "unchallenged affidavit content." While it does not accurately reflect the "unchallenged" content, as Mr. Kendrick repeatedly argued that the CS's allegations about the February transaction and the misrepresented wiretap evidence should have been excluded in their entirety, it illustrates the pervasive nature of SA Arseneaux's misrepresentations of the "facts and circumstances" that he claimed supported his probable cause assertion.

Alleged Falsehoods and Omissions	Unchallenged Affidavit Content
• Misidentifying Kendrick as the individual involved in the January 2016 transaction with Jones and the confidential informant, when it was in fact Carter; • Omitting context from the May 12 call that Jones and Kendrick had already spoken that day about meeting up before Jones received a request for narcotics, suggesting that the two had a legitimate reason for the call unrelated to drugs; • Misclassifying a May 17, 2016 call as *outgoing* from Jones to Kendrick, when in fact it was *incoming* from Kendrick to Jones; • Omitting exculpatory context from the same May 17 call in which Kendrick and Jones discussed non-drug-related topics including a basketball game for approximately four minutes after Kendrick asked Jones what he had going on during a lull in the conversation; • May 20 call misclassifying Kendrick as the person near the Valero gas station, when in fact it was Jones; and • Omitting social calls between Kendrick and Jones that support the assertion that they had non-drug-related communications.	• February 17 transaction where the informant identified Kendrick as the supplier that Jones meets with during the drug deal; • May 12 events in which an unidentified individual contacted Jones for a dime and a minute later, Jones contacted Kendrick to determine his location; • May 17 exchange between Jones and Kendrick in which Jones said he needed Kendrick which occurred five minutes after a caller asked Jones if he resupplied his drug inventory; and • May 20 text message from Jones to Kendrick stating "Bring me 1" followed by them coordinating a meetup location.

Id. at 10–11. This chart changed with each new opinion, but the panel's probable cause determination always remained the same. Thus, regardless of the number and nature of the agent's pervasive misrepresentations of fact, the Fifth Circuit insisted that his belief was justified and sufficient to establish probable cause.

Mr. Kendrick's Career Offender Enhancement

In addition to the suppression error in this case, Mr. Kendrick seeks review of the career offender enhancement that was erroneously applied to him at sentencing. Following his conviction, the district court determined that Mr. Kendrick qualified as a career offender based on his prior drug convictions and instant conspiracy conviction, resulting in an offense level of 34 and criminal history category VI. The court also found that, even without the career offender enhancement, other applicable sentencing enhancements would generate the same offense level. However, without the career offender enhancement, Mr. Kendrick's criminal history category would have been IV rather than VI. Accordingly, while Mr. Kendrick was sentenced based on a career offender Guidelines range of 262 to 327 months, he would have faced a significantly lower range of, at most, 210 to 262 without the enhancement.

Mr. Kendrick challenged the application of the career offender enhancement on appeal on the ground that his offense of conviction—conspiracy to distribute cocaine base—was not a "controlled substance offense," as defined by U.S.S.G. § 4B1.2(b). He argued that the Sentencing Commission's effort to capture conspiracy offenses within the meaning of "controlled substance offense" through the use of commentary exceeds its constitutionally permissible authority and violates longstanding Supreme Court precedent. *See* Appellant's Brief, *United States v. Kendrick*, No. 19-30375, at 61–65 (5th Cir. Nov. 18, 2019).

The Fifth Circuit rejected Mr. Kendrick's challenge to his career offender enhancement. *See Kendrick III*, at 15–16. Without addressing this Court's precedent

or the merits of his arguments, the panel deferred to prior circuit precedent holding that the Commission "lawfully included drug conspiracies in the category of crimes triggering classification as a career offender under § 4B1.1 of the Sentencing Guidelines." *Id.* at 16 (quoting *United States v. Lightbourn*, 115 F.3d 291, 292 (5th Cir. 1997)). Finding that *United States v. Lightbourn* "remains binding," the court concluded that Mr. Kendrick's conspiracy conviction qualifies as a controlled substance offense. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Court should grant certiorari on the first question presented.

A DEA agent obtained a highly intrusive wiretap of Mr. Kendrick's phone by falsifying and misrepresenting records from a prior wiretap to create probable cause. He altered critical facts to support his claimed belief that Mr. Jones was contacting Mr. Kendrick when he needed drugs to sell, while omitting all evidence that contradicted his claims. But despite numerous, undisputed falsehoods and material omissions in the facts used to establish probable cause for the wiretap, the Fifth Circuit determined that the warrant remained valid because it "set[] out events *that SA Arseneaux believed indicated* that trafficking offenses had been committed"—specifically, the falsifying agent's purported belief that "when Jones need to make local drug sales, he contacted Kendrick about resupplying him and they made efforts to meet." *Kendrick III*, at 11 (emphasis added).

Certiorari should be granted on the first question presented because it raises an important question of federal law that has not been addressed by this Court regarding the proper application of *Franks* to falsified wiretap evidence used to obtain subsequent wiretaps. Additionally, the Fifth Circuit's ruling conflicts with relevant decisions from this Court and fundamental principles of Fourth Amendment law, further warranting certiorari. Indeed, the dangerous precedent set by this case promises to erode the constitutional privacy rights of countless citizens, sanctioning wiretaps obtained by blatant misrepresentations, based on mere suspicion and association. This Court's intervention is desperately needed, and Mr. Kendrick's case is a perfect vehicle to address this important issue, warranting a grant of certiorari.

A. The Fifth Circuit has decided an important question of federal law that has not been addressed by this Court.

In *Franks v. Delaware*, this Court addressed "an important and longstanding issue of Fourth Amendment law"—whether criminal defendants ever have "the right … to challenge the truthfulness of factual statements made in an affidavit supporting [a search] warrant[.]" 438 U.S. at 155. The Court held that they do and explained the applicable standard for those challenges: If a defendant establishes by a preponderance of the evidence that the affiant "knowingly and intentionally, or with reckless disregard for the truth," presented false material in the affidavit, it is set aside. *Id.* If "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.*

The reasoning behind the Court's holding was entrenched in longstanding Fourth Amendment principles. As the Court explained:

> The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search. In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." Judge Frankel … put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing."

Id. at 164–65 (citations omitted) (emphasis in original). Of course, "[i]t is established law that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make *an*

independent evaluation of the matter." *Id.* at 165 (emphasis added) (citations omitted). "Because it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment." *Id.* (citations omitted).

This Court has not revisited the *Franks* framework in the over 40 years since that case was decided, much less addressed its application to false wiretap evidence used to obtain a subsequent wiretap or warrant. Nor has the Court explained how the *Franks* probable cause analysis should apply when the affiant uses a "factual" narrative to infer criminal activity, while misrepresenting critical parts of that narrative. In *Franks*, the false material at issue consisted of two, discrete witness statements that were easily removable from the affidavit. *See Franks*, 438 U.S. at 157–58. In contrast, SA Arseneaux's affidavit presented various pieces of information from the Jones Wiretap that he claimed were interrelated, while falsifying and misrepresenting material aspects of that information to support his claims. As reflected by the Fifth Circuit's confusing and repeatedly revised opinion in this case, that strategy injected a complication into the probable cause analysis that is not directly answered by *Franks*. Mr. Kendrick urged that the entire narratives should be removed, along with the agent's "interpretations," due to the falsification of the factual basis for his probable cause assertions, but the Fifth Circuit decided that it could simply write out the falsehoods while retaining the agent's speculative and now-unsupported criminal conclusions.

This Court's guidance on how *Franks* should apply to affidavits that rely on law enforcement analyses and interpretations of wiretap evidence is desperately needed to prevent further erosion of Fourth Amendment protections. As the use of cell phones has exponentially increased, so has the use of wiretaps in criminal investigations. "Where law enforcement agencies conducted a few hundred wiretaps in 1968, they now conduct thousands of wiretaps each year."[6] From 2000 to 2010 alone, there was a 168% increase in the number of authorized wiretaps, and the total number of wiretaps has exceeded 3,000 in nearly every year since—with the vast majority being used to intercept cell phones.[7] And while drug offenses have been "the most prevalent type of criminal offenses investigated using reported wiretaps,"[8] the increasing use of wiretaps in white collar investigations has raised concerns in recent years.[9] Thus, it is clear that the use of wiretaps in investigations and warrant practice will only become more common and widespread in the future.

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[6] Jennifer S. Granick et al., *Mission Creep and Wiretap Act 'Super Warrants': A Cautionary Tale*, 52 LOY. L.A. L. REV. 431, 443 (2019).

[7] *See* Wiretap Report 2010, Admin. Office of the U.S. Courts, at 9–10 (June 2011), https://www.uscourts.gov/sites/default/files/2010wiretapreport.pdf.

[8] *See id.* at 8. The reports for every subsequent year similarly reflect that the majority of wiretaps have been used for cell phones and in drug investigations. *See* Wiretap Reports, Admin. Office of the U.S. Courts, https://www.uscourts.gov/statistics-reports/analysis-reports/wiretap-reports.

[9] *See, e.g.*, Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. Ill. L. Rev. 925, 946–47 (2018) (highlighting the "increased use of wiretaps in white collar cases, most noticeably in the insider trading area" and describing wiretaps as "an aggressive government practice" that has raised "significant legal issues" in the white collar context); Richard Marmaro, *Recent Trends in Gov't Enforcement in White Collar Defense Cases*, Managing White Collar Legal Issues, Aspatore, 2014 WL 10493, at *8 (Jan. 2014) (describing the "increased use of wiretaps in securities fraud investigations" and the expectation that such investigative activity "will certainty continue" in light of the Second Circuit's affirmance of their use in a high-profile securities fraud case); *see also United States v. Rajaratnam*, 719 F.3d 139, 147–49 (2d Cir. 2013) (finding multiple misstatements and omissions in a wiretap of a cell phone obtained in a securities fraud investigation immaterial under *Franks*).

Notably, it is not just the number of authorized wiretaps that has increased over the years. It is also, unsurprisingly, the number of *communications* intercepted through those wiretaps that has exponentially increased. In 1977, "the average number of communications intercepted [through a wiretap] was 658."[10] "By 2007 and 2017, those numbers had increased to 3,106 and 5,989 respectively."[11] "[A]ccording to data published by the U.S. courts, a single wiretap today can sweep in millions of communications."[12]

This explosion in the amount of data collected through wiretaps has unquestionably contributed to the problem raised by this case. The vast (and growing) amount of information that law enforcement has at its disposal makes it easy to selectively present, manipulate, and edit isolated exchanges to fit any narrative, with little concern that the deception will be discovered by the magistrate. Indeed, no one would expect a magistrate to review raw wiretap evidence to evaluate probable cause for subsequent wiretaps, especially considering the time-sensitive nature of most warrant applications and the no doubt voluminous nature of the underlying material. Instead, judges must rely on the applicants to accurately describe all evidence necessary for them to make complete, totality-of-the-circumstances assessments. It is thus incumbent on courts to enforce Fourth Amendment protections in a manner that deters manipulations and misrepresentations of facts.

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[10] *See supra* note 6, at 445.
[11] *Id.*
[12] *Id.* at 443.

As wiretaps have become more prevalent and more robust, law enforcement agencies have increasingly relied on wiretap evidence to obtain subsequent wiretaps and warrants, as the agent did here. *See, e.g.*, *United States v. Jenkins*, 659 F. App'x 327, 331–32 (6th Cir. 2016) (describing successive wiretap applications obtained based on information intercepted from previous wiretaps); *United States v. Najera-Perez*, No. 1:12-CR-232-2-CAP, 2014 WL 888651, at *7–10 (N.D. Ga. Mar. 6, 2014) (reviewing the validity of wiretaps that issued based on affiant's descriptions and interpretations of evidence from prior wiretaps); *United States v. Mayorquin*, No. 12-1076-CAS, 2013 WL 5405704, at *3 (C.D. Cal. Sept. 20, 2013) (same); *United States v. Rivera-Miranda*, No. 07-166(2)-JNE/AJB, 2009 WL 605812, at *2 (D. Minn. Mar. 9, 2009) (same); *United States v. Dadanovic*, No. 09-63-ART, 2010 WL 3620251, at *7–8 (E.D. Ky. Sept. 10, 2010) (same). This practice, of course, is not unreasonable, but it poses a unique and significant threat to Fourth Amendment protections. Because the presentation of relevant wiretap evidence necessarily involves some degree of discretion and interpretation by the affiant, the use of wiretap evidence in this context makes it difficult to separate the factual basis for probable cause from the affiant's subjective beliefs. Moreover, as successive wiretap applications build upon earlier wiretaps, a single Fourth Amendment violation has the potential to quickly generate additional violations impacting the rights of countless others.

In sum, the Fifth Circuit's ruling sets a dangerous precedent for private citizens and endorses abusive police practices. Given the sheer amount of data collected from wiretaps, an officer can easily manipulate wiretap evidence to support

a believed narrative. In this case, SA Arseneaux believed that Mr. Kendrick's was committing crimes with his neighbor, so he falsified and selectively quoted excerpts from a few of their conversations to support his belief. His numerous false statements and material omissions went directly to the facts that rendered his belief reasonable—*e.g.*, misstating the direction of a call that was necessary to establish a causal connection, misattributing a statement to Mr. Kendrick that falsely indicated he was meeting Mr. Jones at a known drug dealing location, etc.—thereby eviscerating the support for his probable cause assertion. By finding that probable cause "still exists" based on SA Arseneaux's mere belief that the materially misrepresented evidence showed Mr. Jones contacting Mr. Kendrick for drugs, the Fifth Circuit rendered the warrant requirement meaningless.

It is widely recognized that wiretaps "are among the most intrusive of investigative tools." *United States v. Landeros-Lopez*, 718 F. Supp. 2d 1058, 1069 (D. Ariz. 2010). They invade not only the privacy and individual liberty of the target, but of "every other person whom that person may call or who may call him." *Yanez v. Keane*, 16 F. Supp. 2d 364, 373 (S.D.N.Y. 1998) (citation omitted). As a result, wiretaps "have been subjected to a high level of scrutiny under the Fourth Amendment and the wiretap statute[.]" *United States v. Wells*, 739 F.3d 511, 518 (10th Cir. 2014). The Fifth Circuit's ruling strays from that well-founded practice and effectively authorizes the use of wiretaps based on mere association and suspicion by an officer, regardless of the officer's blatant fabrication of the factual basis supporting

his suspicion. This precedent nullifies the probable cause requirement, and this Court's intervention is needed to correct course.

B. The Fifth Circuit's precedential ruling conflicts with relevant decisions from this Court.

This Court long has held that warrants cannot be based on "purely conclusory" affidavits that state "only the affiant's … belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based." *United States v. Ventresca*, 380 U.S. 102, 108–09 (1965). Instead, "[a]n affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause," not mere "conclusory statements" about the affiant's beliefs. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983). To allow otherwise would render the court "merely as a rubber stamp for the police." *See Ventresca*, 380 U.S. at 109; *see also Gates*, 462 U.S. at 239 (stating that the magistrate's action "cannot be a mere ratification of the bare conclusions of others"). "In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Gates*, 462 U.S. at 239.

The Fifth Circuit's ruling in this case conflicts with this longstanding precedent because it effectively "rubber stamped" SA Arseneaux's bare conclusions. As discussed, the false statements and material omissions in the affidavit went directly to the factual basis for SA Arseneaux's allegations of criminal conduct by Mr. Kendrick. Once those facts are corrected and his falsehoods removed, SA Arseneaux's assertions become bare, unsupported conclusions. Thus, the Fifth

Circuit's reliance on them to find probable cause in the reconstructed affidavit betrays this Court's well-established precedent. *See Ventresca*, 380 U.S. at 109; *Gates*, 462 U.S. at 239; *see also, e.g.*, *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *United States v. Cordero-Rosario*, 786 F.3d 64, 71 (1st Cir. 2015) (explaining that an affidavit that "was conclusory as to all the key points concerning nexus" was "plainly not sufficient to establish the necessary probable cause"); *Williams v. Aguirre*, 965 F.3d 1147, 1166–67 (11th Cir. 2020) (finding a misstatement "necessary to establish probable cause . . . because it was the only fact in the affidavit supporting probable cause for [the alleged crime]"); *Bowden v. Meinberg*, 807 F.3d 877, 881 (8th Cir. 2015) (explaining that an affiant's "subjective belief is irrelevant to whether his affidavit included sufficient facts to establish probable cause"); *Craig v. Singletary*, 127 F.3d 1030, 1042 (11th Cir. 1997) ("Probable cause issues are to be decided on an objective basis by courts without regard to the subjective beliefs of law enforcement officers, whatever those beliefs may have been.").

As this Court cautioned in *Franks*:

> [A] flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning. The requirement that a warrant not issue 'but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile.

Id. (citation omitted). The Fifth Circuit's ruling in this case does just that—it "denude[s] the probable cause requirement of all real meaning." *See id.* By relying on

SA Arseneaux's purported belief of criminal conduct, regardless of degree to which he falsified and misrepresented facts supporting that purported belief, the Fifth Circuit has reduced the warrant requirement to a nullity. Under this new precedent, officers can falsify and manipulate vast amounts of wiretap evidence to fit their probable cause narrative and "remain confident that the ploy [will be] worthwhile" since their purported, subjective "interpretations" of the evidence will suffice to protect the validity of the warrant after the fact. *See id.*

Accordingly, certiorari is warranted in this case because the Fifth Circuit's decision conflicts with basic and longstanding Fourth Amendment principles established by this Court's precedent.

C. This case is a perfect vehicle for addressing the question presented.

Finally, certiorari is warranted here because Mr. Kendrick's case presents the perfect vehicle for addressing the question presented. It is undisputed that SA Arseneaux made several false statements and omitted material information in describing the wiretap evidence that he relied on to establish probable cause. The entire factual basis for the warrant was infected by his pervasive misrepresentations. Thus, in order to affirm the suppression ruling, the Fifth Circuit had to—and did—rely on the agent's subjective conclusions about the fabricated and misrepresented wiretap evidence to find probable cause. As a result, this case cleanly presents the question of whether such reliance is permissible.

Mr. Kendrick's case is also the perfect vehicle to address this question because the suppression ruling was case-dispositive. Most of the evidence presented against him at trial was derived directly or indirectly from the wiretap of his phone. For

example, a search warrant for his house was obtained based on the same falsified information in the wiretap affidavit as well as evidence obtained from the unlawful wiretap. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (requiring suppression of evidence obtained through the "exploitation" of the illegally obtained evidence). It was only through the execution of that search warrant that law enforcement discovered the gun that served as the basis for Mr. Kendrick's § 922(g) conviction. Accordingly, this case presents an ideal vehicle for addressing the question presented because favorable resolution will necessarily affect the outcome.

II. The Court should grant certiorari on the second question presented, or, if certiorari is granted in *United States v. Tabb*, No. 20-579, hold this petition pending resolution of that case.

If the Court does not find certiorari appropriate on the first question presented, Mr. Kendrick respectfully requests that the Court grant certiorari on the second question presented. Alternatively, if the Court grants certiorari in *Tabb*, it should hold Mr. Kendrick's petition pending resolution of that case.

The district court applied the career offender enhancement to Mr. Kendrick's Guidelines range based on two prior drug distribution convictions and the drug conspiracy conviction in this case. *See* U.S.S.G. § 4B1.1(a)(2), (3). While the plain and unambiguous text of U.S.S.G. § 4B1.2(b) limits the definition of "controlled substance offense" to offenses that "*prohibit[]* the manufacture, import, export, distribution, or dispensing of a controlled substance," the Sentencing Commission used the commentary to expand that definition to capture conspiracies and attempts. *See* U.S.S.G. § 4B1.2 cmt. n.1 (2018). This use of the commentary exceeds the Sentencing Commission's constitutionally permissible authority, and judicial deference to that

commentary violates this Court's precedent. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (explaining that "the possibility of deference [to an agency's interpretation of its own regulation] can arise only if [the] regulation is *genuinely ambiguous* . . . even after a court has resorted to all the standard tools of interpretation" (emphasis added)); *Stinson v. United States*, 508 U.S. 36, 38 (1993) (holding that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline"); *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (explaining that if commentary "is at odds with § 994(h)'s plain language, it must give way"); *see also* 21 U.S.C. § 994(h) (explicitly limiting the career offender directive to offenses "described in" 21 U.S.C. § 841 and the importation statutes—*i.e.*, substantive drug offenses).

As discussed in the *Tabb* petition, a circuit split has developed over whether courts should defer to the commentary in applying the career offender enhancement. *Compare United States v. Winstead*, 890 F.3d 1082, 1089–92 (D.C. Cir. 2018), *United States v. Havis*, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc), and *United States v. Nasir*, 982 F.3d 144, 158, 160 (2020), *with United States v. Crum*, 934 F.3d 963, 966–67 (9th Cir. 2019), *United States v. Adams*, 934 F.3d 720, 728–29 (7th Cir. 2019), and *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020). Notably, many of the courts that have deferred to the commentary have done so based on binding circuit precedent—not an independent finding that such deference is warranted. *See, e.g.*, *Crum*, 934 F.3d at 966–67 (agreeing with *Winstead* and *Havis* but finding itself

compelled to reject their view based on a prior circuit decision from 1993); *Adams*, 934 F.3d at 728–29 (noting the circuit split and determining that the court's holding was governed by a prior decision); *Tabb*, 949 F.3d at 87 (finding that circuit precedent from 1995 "precludes [the] argument that Application Note 1 is invalid"). Indeed, while the Fifth Circuit has repeatedly deferred to its precedent in *Lightbourn*, one panel recently noted that it "would be inclined to agree with the Third Circuit" ruling in *Nasir* if it "were not constrained by *Lightbourn*." *United States v. Goodin*, 835 F. App'x 771, 782 n.1 (5th Cir. 2021).

Mr. Kendrick challenged his career offender enhancement on appeal, and the Fifth Circuit affirmed based on its determination that *Lightbourn* was binding. That decision violates this Court's precedent, and the circuit split over this issue has created unwarranted sentencing disparities across the federal system. This issue is ripe for this Court's review, and certiorari therefore should be granted.

CONCLUSION

For the foregoing reasons, Mr. Kendrick's petition for writ of certiorari should be granted on the first question presented. Alternatively, his petition should be granted on the second question or held pending resolution of *United States v. Tabb*.

Respectfully submitted,

CLAUDE J. KELLY
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA

/s/ Samantha Kuhn
SAMANTHA J. KUHN
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record
500 Poydras Street, Suite 318
Hale Boggs Federal Building
New Orleans, Louisiana 70130
(504) 589-7930
samantha_kuhn@fd.org

Counsel for Petitioner

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