NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL DEWAYNE DENNIS, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question No. One

Whether long-term police use of a surveillance camera targeted at a person's home and curtilage is a Fourth Amendment search.

Question No. 2

Whether the Due Process Clause of the Fifth Amendment provides sufficient grounds to justify discrete discovery of certain relevant conduct information in Presentence Reports of a Co-Defendant/Co-Actor to protect against disparate sentencing

PARTIES TO THE PROCEEDING

The Petitioner is Michael Dewayne Dennis, the defendant and defendant-appellant in the courts below. The Respondent is the United States of America, the plaintiff and plaintiff-appellee in the courts below

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Petitioner Michael Dewayne Dennis respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 41 F. 4th 732 (5th Cir. 2022). App. 001A.

JURISDICTION

The Court of Appeals entered its judgment on July 27, 2022. App. 001A. Petitioner timely filed a Petition for Rehearing En Banc in the Court of Appeals on

August 10, 2022. The Court of Appeals entered an Order denying the Petition for Rehearing on September 30, 2022. App. 017A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment 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. U.S. Const. amend. IV. App. 049A.

The Fifth Amendment provides in relevant part:

> No person shall…be deprived of life, liberty, or property, without due process of law. U.S. Const. amend. V. App. 050A.

STATEMENT OF THE CASE

1. Statement of Facts

Petitioner Michael Dennis lived at his home in Southwest Houston, Harris County, Texas. He lived on property shared with his mother and stepfather and his sister. Their corner lot included three homes and a large garage that had served as a tire shop. App. 052-53A.

Law enforcement began to investigate Petitioner's activities at his homestead after certain members of what was referred to as the Michoacan Drug Trafficking Organization, who transported marijuana imported from Mexico into southwest Texas near Del Rio, Texas, were apprehended and began to cooperate with

authorities and identified Petitioner as a person who received deliveries of large amounts of marijuana. App. 001A. There were two separate facets of the Government's case:

1. Historical allegations made by cooperating witnesses claiming that they participated in receiving marijuana imported from Mexico into the area around Sanderson, Texas, and the distribution of that marijuana to persons, including Petitioner, over a multi-year period from 2013 to 2017. Petitioner challenged the veracity of these allegations;

2. Surveillance by law enforcement of Petitioner's home beginning in April 2018 showing activity the Government claimed was the receipt of large quantities of marijuana. App. 001-2A. This included video from pole cameras showing people and trucks coming to the property; boxes being offloaded and related activity; a traffic stop and seizure of 13 kilograms of marijuana from Ray Alaniz on June 12, 2018 after his vehicle departed Petitioner's property, ROA.959; and the execution of search and arrest warrants at Petitioner's home on July 11, 2018 and the seizure of marijuana, cash and other items at Petitioner's home. App.001-2A.

The Government installed two pole cameras beginning in late April, 2018, App. 001A, to surveil the properties and curtilage located at 6110 Grapevine and 6118 Grapevine in Houston, Texas (collectively, the "Grapevine Properties"). App. 052-53A. 6118 Grapevine included Mr. Dennis's private home, and 6110 Grapevine

was a tire shop that Mr. Dennis inherited from his grandfather. App. 053A. The tire shop was no longer open to the public and, instead, was utilized by Mr. Dennis as a private workshop for repairing and reselling vehicles and other mechanical equipment. App. 053A. One pole camera was directed over an iron fence and trees at the two garage doors of the 6010 Grapevine workshop. App. 053A. See Figure 1. The second camera was directed over a wood privacy fence at the back of the 6018 Grapevine home. App. 053-54A. See Figure 2. The first pole camera continuously recorded activities associated with Mr. Dennis's private life for more than three (3) months, App. 053A, and the second for over a month. App. 053A. When being monitored, the pole camera had the ability to pan and to zoom in on residents, visitors, vehicles, service providers – anyone and everyone who was connected in any way to Mr. Dennis's home. App. 053A. No judicial authorization was obtained for the use of the camera, and the Government obtained information from the pole camera that was used for and included in a search warrant for the Grapevine Properties. App. 053A. The information was also used in the trial of this case.

The testimony of the cooperating witnesses alleging marijuana deliveries up to 2017 were largely uncorroborated. There was not testimony from law enforcement to support their allegations. The witnesses, Rey Trevino, and Ausencio Garcia-Herrera, as co-defendants/co-actors, had motivation to fabricate their testimony. App.011A. Petitioner objected to and challenged the credibility of the information

of the earlier activity that was presented through the witnesses Trevino and Garcia-Herrera. Witness Rey Trevino alleged that over an almost three-year period, he made deliveries on a monthly basis to Petitioner of approximately 200 kilograms of marijuana from 2013 to September 2016 (when Trevino was arrested). App. 011A (9000 kg based on Trevino's testimony). Auscencio Garcia-Herrera testified that he transported marijuana from Sanderson to Houston, Texas. He stated that he met with Petitioner 9 or 10 times, delivering 200 kilograms of marijuana each time. App. 011A (1896.07 kg based on Garcia-Herrera's testimony and Ibarra-Gonzalez' statement). Petitioner objected to and challenged this the uncorroborated testimony from these cooperating informant witnesses.

2. Statement of Jurisdiction in Court of First Instance

The district court had jurisdiction of this criminal proceeding for offenses against the laws of the United States under 18 U.S.C. § 3231.

3. Proceedings Below

Petitioner filed a Motion to Suppress Evidence objecting to the warrantless use of pole cameras to surveil his home. App. 052A The motion was denied as untimely filed. App. 026A. The district court also addressed the merits of the Motion to Suppress and concluded that a Fourth Amendment violation had not been established. App. 027-39A. The case was tried before a jury. App. 018A On September 12, 2019, the jury returned a verdict of guilty on the single count in the

Indictment. App. 018A. Petitioner was sentenced by the district court to two hundred and sixteen months. App. 18A. The "Judgment in a Criminal Case" was signed on March 23, 2021. App. 018A. The Judgment was a final decision of the district court disposing of all issues and parties in the case. Federal Rule of Appellate Procedure 4(b)(A)(1) requires that the Notice of Appeal be filed within 14 days of the entry of judgment. Notice of appeal was timely filed on September 13, 2019. The Court of Appeals had jurisdiction of the appeal from a final judgment of the District Court under 28 U.S.C. § 1291 and to review the sentence imposed by the district court under 18 U.S.C. § 3742.

Petitioner raised his complaint about the Fourth Amendment Violation on appeal. App. 5-6. The opinion of the court of appeals sustained the District Court's denial of leave to untimely file the motion the suppress and the denial of the motion to suppress as untimely filed. App. 004A. The Court then addressed the merits of the motion to suppress pole camera evidence under the plain error standard of review. App. 005A.

The opinion recognized Petitioner's argument that the pole cameras were an unreasonable intrusion into his privacy under the Fourth Amendment. App.005A. The opinion relied on its finding that the pole cameras in this case captured only what was within the public view. App.005A. The opinion states "a defendant cannot assert a privacy interest in information which 'he voluntarily conveyed to anyone

who wanted to look.'" App.005A. As such, the opinion concluded, Petitioner had not established a Fourth Amendment violation under the plain error standard. App.006A. The opinion distinguished the prior opinion of the Fifth Circuit in *United States v. Cuevas-Sanchez*. 821 F. 2d 248, 250-51 (5th Cir. 1987), stating: "given that one can see through his fence and that the cameras captured what was open to public view from the street, this is not a clear or obvious application of out precedent." App. 005A. The court then cited a number of authorities in footnote 14, App. 005-6A, including:

a. *Cuevas-Sanchez*: cited for its reference to the *Katz* reasonable expectation of privacy standard: "That analysis uses a two part inquiry: 'first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?...We do not doubt that Cuevas manifested the subjective expectation of privacy in his backyard necessary to satisfy the first part of the inquiry: he erected fences around his backyard, screening the activity within from views of casual observers. In addition, *the area monitored by the camera fell within the curtilage of his home, an area protected by traditional fourth amendment analysis*." 821 F. 2d at 250-251. (emphasis added).

The referenced passage does not defeat Petitioner's Fourth Amendment claim. (1) Despite the court's finding that the cameras captured what was open to public view from the street, the facts showed that the cameras were placed in an elevated position (thus the term "pole camera") and were able to look into areas that would reasonably be considered private, including the backyard area, App. 053-54A; (2) The *Cuevas-Sanchez* opinion recognizes that the curtilage of the home is an area protected by the fourth amendment. The pole cameras in this case were focused on Petitioner's home and surrounding property, including the curtilage of the home. *Florida v. Jardines*, 569 U.S. 1, 6 (2013)(the area "immediately surrounding and associated with the home" is the curtilage).

b. *United States v. Beene*, 818 F. 3d 157, 162 (5th Cir. 2016) (no reasonable expectation of privacy in vehicle parked in driveway of home). Under

the facts in *Beene*, the court concluded that the driveway was not part of the curtilage of the home and analyzed the dog sniff search of a vehicle under the open fields doctrine. *Id*. at 162-163.

c. *United States v. Moffitt*, 233 Fed. App'x 409, 411 (5th Cir. 2007)(per curiam). Like *Beene*, the court in *Moffitt* found that a driveway was not part of the curtilage of the home. *Id*. The instant case is different, the pole cameras were not focused solely on a driveway or some specific area of the property but focused on the home and surrounding areas, including the curtilage. *United States v. Dunn*, 480 U.S. 294, 301 (1987)("curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.").

d. *Moore-Bush, Tuggle*, and *Houston*, decisions of the 1st, 7th and 6th Circuits, respectively, holding that the use of pole cameras did not constitute a search. These opinions are discussed more thoroughly below.

e. *United States v. Vankesteren*, 553 F. 3d 286, 290 (4th Cir. 2009)(placement of a camera in defendant's open fields did not implicate fourth amendment). Petitioner's home and curtilage are not an open field.

Then the court of appeals turned to Petitioner's complaint about the nature of the surveillance, that is the months long continuous video surveillance of his home and surrounding property. App. 006A. The court attempted to distinguish this Court's decision in *Carpenter* stating: "although the Supreme Court addressed a form of continuous surveillance in *Carpenter*, unlike cell-site location information, there is nothing inherent in the use of security cameras to cast doubt on their validity." App. 006A. The court then concluded that no privacy interest of Petitioner was invaded because the activities at the property could be observed by passers by. App.006A This analysis did not actually address the primary concern raised in this

Petition, that continuous long-term surveillance is an invasion of privacy. There is no suggestion that law enforcement would position an agent on top of a pole for a long-term period to gather information about activities at Petitioner's home. It is only the availability of remote video technology that allows the government to accomplish such an intrusive examination of the activities of a citizen's daily life.

Petitioner respectfully disagrees with the opinion's conclusion that, factually, the pole camera surveillance in this case allowed observation of no more than what a passerby on the street would be able to see, "information subject to the daily of view of strollers and the community". App. 006A. In this case, the pole cameras were situated in an elevated position and so could see more than one passing by in the public street or walkway. App. 053-54A. However, this distinction is not material to the question of whether the constant warrantless pole camera surveillance of Petitioner's home and curtilage constituted a violation of the Fourth Amendment.

Petitioner also raised his complaint about his request for disclosure of discrete information from presentence reports of co-actors on appeal. The court of appeals concluded that Petitioner had not overcome the presumption of privacy given such information. App. 009A.

REASONS FOR GRANTING THE WRIT

I. Fourth Amendment Issue

There is a division of authority among Federal courts of appeal and state supreme courts on whether long term continuous surveillance using pole cameras constitutes a search under the Fourth Amendment. This is an important question that should be addressed and settled by this Court. The Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

a. Federal and State Court Decisions on Surveillance Issue

There are a number of decisions addressing the question of warrantless, long-term surveillance using pole cameras. They demonstrate a division of authority as discussed below.

1. Cases Finding No Fourth Amendment Violation

In *United States v. Jackson*, 213 F.3d 1269 (10th Cir. 2000), the Tenth Circuit held that use of a pole camera was not a search, but did not address long-term pole-camera surveillance. And in *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009), the Fourth Circuit permitted warrantless pole-camera surveillance of open fields, without addressing what protections might apply to surveillance of a home.

In United States v. Bucci, 582 F.3d 108 (1st Cir. 2009), which like this case involved a pole camera's long term (eight-month) recording of activity in front of

the defendant's house, the court found no Fourth Amendment violation. The court concluded simply that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public" and "[t]hat legal principle is dispositive here." *Id.* at 116–17. The court did not consider whether the duration of surveillance or the Fourth Amendment's special concern for the privacy of the home and its curtilage affected the analysis.

In *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016), the defendant was convicted of being a felon in possession of a firearm based largely on footage of him handling firearms on his rural Tennessee farm. The government amassed that footage through ten weeks of warrantless pole-camera surveillance of buildings and curtilage on the property. On appeal, a divided panel held that the defendant had "no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads." *Id.* at 287–88. Although the court recognized that ten weeks of in-person surveillance would have been impractical, including because agents had testified that their "vehicles '[stuck] out like a sore thumb' at the rural property," *id.* at 286 (alteration in original), it concluded that the pole-camera surveillance did not impinge a reasonable expectation of privacy because "the ATF *theoretically* could have staffed an agent disguised as a construction worker to sit atop the pole . . . for ten weeks." *Id.* at 289 (emphasis added). The panel majority

held that the duration of the surveillance did not matter because "it was possible for any member of the public to have observed the defendant's activities during the surveillance period." *Id.* at 290. One judge disagreed, explaining both that long-term video surveillance of a home raises serious privacy concerns, and that the use of technology to enable previously impossible types of invasive surveillance implicates exactly the concerns outlined in the opinions of five members of this Court in *Jones*, 565 U.S. 400. 813 F.3d at 296 (Rose, D.J., concurring on harmless error grounds).

In subsequent cases, the Sixth Circuit has concluded that any argument that long-term pole camera surveillance implicates the Fourth Amendment is foreclosed by *Houston*, notwithstanding this Court's subsequent opinion in *Carpenter*. *United States v. May-Shaw*, 955 F.3d 563, 567 (6th Cir. 2020); *United States v. Trice*, 966 F.3d 506, 518 (6th Cir. 2020).

In *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1107 (2022), the Seventh Circuit reached the same result. *Tuggle* involved 18 months of continuous surveillance by three pole cameras directed at the defendant's home. While expressing "unease about the implications of [long term pole-camera] surveillance for future cases," *id.* at 526, the court concluded that the Fourth Amendment was not violated because, while the cameras "captured an important sliver of Tuggle's life, . . . they did not paint the type of exhaustive picture of his every movement that the Supreme Court has frowned upon" in *Carpenter* and *Jones*.

Id. at 524. Disagreeing with the Sixth Circuit's reasoning in *Houston*, however, the Seventh Circuit stressed that its decision did "not rest on the premise that the government *could have*—in theory—obtained the same surveillance by stationing an agent atop the utility poles outside Tuggle's home" because "[t]o assume that the government would, or even could, allocate thousands of hours of labor and thousands of dollars to station agents atop three telephone poles to constantly monitor Tuggle's home for eighteen months defies the reasonable limits of human nature and finite resources." *Id.* at 526.

United States v. Moore-Bush, 36 F. 4th 320 (1st Cir. 2022). The First Circuit reversed a district court order granting a motion to suppress evidence collected by a pole camera placed outside of a defendant's home. Similar to the Fifth Circuit's decision in this case, the court in *Moore-Bush* found that the comparison to this Court's decision in Carpenter was inappropriate, stating in a concurring opinion, that that the Supreme Court in *Carpenter* acknowledged that its holding was "narrow" and did not "call into question conventional surveillance techniques and tools." The Supreme Court specifically stated that one of these "conventional surveillance techniques and tools" is security cameras, which the First Circuit equated with pole cameras. *Id.* at 373.

2. Cases Finding a Fourth Amendment Violation

In *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987), the Fifth Circuit held that nearly two months of pole-camera surveillance of the defendant's fenced-in backyard and driveway was a Fourth Amendment search. The government had argued that there was no reasonable expectation of privacy because the property could have been observed by passersby or a "power company lineman on top of the pole." *Id.* at 250. The court disagreed. Distinguishing fleeting observation of publicly visible portions of a person's property, the court explained that using "a video camera that allowed [police] to record *all* activity in [the] backyard" was a categorically greater intrusion than a passing observation. *Id.* at 251 (emphasis added). The court also emphasized that "the area monitored by the camera fell within the curtilage of [the defendant's] home, an area protected by traditional fourth amendment analysis." *Id.* The "indiscriminate video surveillance" at issue, the court warned, "raises the spectre of the Orwellian state." *Id.*

The South Dakota Supreme Court reached the same conclusion in *State v. Jones*, 903 N.W.2d 101 (S.D. 2017). There, a police pole camera "continuously recorded activity outside of [the defendant's] residence" for nearly two months to gather evidence of marijuana sales. *Id.* at 104. As here, the camera had a remotely operated zoom function. And the footage could be viewed live or played back in real time or fast enough to allow police to "review a day's worth of activity in

approximately 10 to 11 minutes." *Id.* Expressly disagreeing with the First and Sixth Circuits in *Bucci* and *Houston*, *id.* at 107–08, 111–12, the South Dakota Supreme Court concluded that long term pole-camera surveillance of a home is a Fourth Amendment search. The court rejected the government's argument that because the defendant's property was visible from the street, police should be able to surveil it with a pole camera for a prolonged period. The court distinguished *California v. Ciraolo*, 476 U.S. 207 (1986), which involved short-term observation of areas exposed to public view. Citing the concurring opinions from this Court in *United States v. Jones*, 565 U.S. 400 (2012), the court explained that, unlike in *Ciraolo*, the pole camera at issue allowed the government to "capture[] something not actually exposed to public view—the aggregate of all of [the defendant's] coming and going from the home, all of his visitors," and more. *Id.* at 111 (alterations in original) (citation omitted). Because long-term pole-camera surveillance is "markedly different" than the kinds of short-term visual observation that this Court has permitted without a warrant, the Fourth Amendment's warrant requirement applies. *Id.*

The court warned that ruling otherwise would allow law enforcement "to place a video camera at any public location and film the activity outside any residence, for any reason, for any length of time, all while monitoring the residence from a remote location by computer or phone." *Id.* at 113. Echoing the Fifth Circuit

in *Cuevas-Sanchez*, the court noted that such surveillance "raises the specter of an Orwellian state and unlocks the gate to a true surveillance society."
Id. at 112.

Most recently, in *People v. Tafoya*, 494 P.3d 613 (Colo. 2021) (en banc), the Colorado Supreme Court unanimously held that more than three months of warrantless pole-camera surveillance of the defendant's home and curtilage violated the Fourth Amendment. The pole camera could be remotely operated to "pan left and right, tilt up and down, and zoom in and out." *Id.* at 622. Police could view the feed live, and "indefinitely stored the footage for later review." *Id.* at 614.

This Court's decisions in *Carpenter* and *Jones*, the Colorado Supreme Court reasoned, had "clarified that public exposure is not dispositive" on the question whether technology-aided police surveillance is a search, and had suggested that when the government uses technology to conduct "continuous, long-term surveillance, it implicates a reasonable expectation of privacy." *Id.* at 619, 620. Much like prolonged location tracking, long-term monitoring of activities around one's home "'reflects a wealth of detail' about [the resident] and his associations." *Id.* at 622 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). And the "cheap and surreptitious" nature of such surveillance contravenes traditional expectations of privacy because it gives police a power they never could have

previously exercised; "if a police officer had manned the utility pole for three continuous months, obviously [the defendant] would have noticed." *Id.* at 623.

The court rejected the government's argument that because the defendant's curtilage was "visible through gaps in [his] fence" and from a neighboring apartment building, he had forfeited any expectation of privacy in the sum total of his activities on his property. The court identified as "most significant[]" the fact that "the surveillance occurred continuously over a long period of time; the pole camera not only could see into the backyard, but it also recorded the activities of [the defendant's] backyard all day, every day for over three months." *Id.* For that reason, "this surveillance 'involved a degree of intrusion that a reasonable person would not have anticipated.'" *Id.* (quoting *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment)).

The cases finding no Fourth Amendment violation have focused on the traditional view of a reasonable expectation of privacy. If the subject of the pole camera search did not take steps to protect his home and curtilage from view, they reason, there is not a reasonable expectation of privacy recognized by society and the use of pole cameras to conduct surveillance does not implicate the Fourth Amendment. The cases finding a Fourth Amendment violation take a more expansive view of the reasonable expectation of privacy as this Court has done in recent decisions assessing objections to the use of new technologies to surveil a

person's movements and activities. This Court held in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), that citizens have a reasonable expectation of privacy in the whole of their long-term movements in public. Id. at 2217 (*citing Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment)). The Fourth Amendment protects citizens against a "too permeating police surveillance. Id. at 2214.

b. Recent Petitions filed in this Court Raising Question Presented

In October 2021, the defendant/petitioner in *United States v Tuggle*, cited above, filed a Petition for Writ of Certiorari in this Court raising the same types of issues addressed in this Petition, specifically, that long term surveillance of a home and curtilage by pole cameras constituted a search under the Fourth Amendment. That petition was denied. *Tuggle v. United States*, 142 S.Ct. 1107 (2022). More recently, in November 2022, one of the defendants in the *Moore Bush* case from the First Circuit has filed a petition addressing the same question. That petition remains pending. Docket No. 22-481, *Moore v. United States*.

c. *Jones* and *Carpenter*: Application of the Fourth Amendment to Advanced Technology Available to Law Enforcement

In *United States v. Jones*, 565 U.S. 400 (2012), this Court held that warrantless GPS monitoring of a car traveling on public streets violates the Fourth Amendment. The majority decided the case on a trespass rationale, but five Justices found a Fourth Amendment violation under *Katz*. Justice Alito (writing for four Justices acknowledged that "relatively short-term monitoring of a person's movements on

public streets accords with expectations of privacy that our society has recognized as reasonable." *Id*. at 430 (Alito J., concurring in judgment). But Justice Alito concluded that "longer term GPS monitoring…impinges on expectations of privacy," because society expects that law enforcement would not and cannot catalogue a vehicle's every movement "for a very long period." *Id*. Justice Sotomayor agreed. *See id*. at 415 (Sotomayor, J. concurring).

In *Carpenter v. United States*, 138 S.Ct. 2206 (2018), this Court found that government collection of 127 days of historical cell-site location information constituted a search under the Fourth Amendment. The Court recognized that individuals do not surrender all Fourth Amendment protection by venturing into the public sphere. *Id.* at 2217. The Fourth Amendment "protects people, not places"; thus, violations may occur even where the Government does not physically intrude on a constitutionally protected area. *Carpenter*, 138 S.Ct. at 2213 (*citing United States v. Jones*, 565 U.S. 400 (2012), *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also Kyllo v. United States*, 533 U.S. 27, 31 (2001)("The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass.) *See United States v. Tuggle*, 2018 U.S. Dist. LEXIS 127333 *6 (C.D. Ill. 2018).

d. Two Approaches to Addressing the Reasonable Expectation of Privacy

The decisions concluding that pole camera surveillance did not constitute a search have relied on a case by case approach and reviewed the facts of the placement of the pole camera and the extent to which the surveillance was able to capture images that the defendant had tried to obscure from public view. In these cases, if the home and curtilage were open to the passing observer, there was no reasonable expectation of privacy and no search. These cases rely on the principle that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public". *See e.g., United States v. Bucci,* 582 F. 3d 108 (1st Cir. 2009).

The cases finding a Fourth Amendment violation take a broader view of the right to privacy and the interests protected by the Fourth Amendment. Those cases take into consideration the inherent intrusiveness of constant video surveillance. That, coupled with the heightened privacy interest a person enjoys in their home, justifies application of the Fourth Amendment. Distinguishing fleeting observation of publicly visible portions of a person's property, the decision of the Fifth Circuit in *Cuevas-Sanchez* explained that using "a video camera that allowed [police] to record all activity in [the] backyard" was a categorically greater intrusion than a passing observation. *Cuevas-Sanchez* at 251.

As the petitioner in *Moore v. United States* has stated, there is a division on the issue of long-term surveillance of the home and its curtilage. Docket No. 22-481,

Moore v. United States, cert petition at 19. Resolving that division is an important step in this Court's ongoing effort to reconcile enduring Fourth Amendment principles with police use of modern technologies to monitor activity that people have long reasonably expected to be private. *Id.*

The mosaic theory of the Fourth Amendment, which the Seventh Circuit addressed in the *Tuggle* decision, is a useful device for analysis of Petitioner's Fourth Amendment claim. That theory captures how the "government can learn more from a given slice of information if it can put that information in the context of a broader pattern, a mosaic. *Tuggle*, 4, F.4th at 517 (quoting Matthew B. Kugler & Lior Jacob Strahilevitz, Actual Expectations of Privacy, Fourth Amendment Doctrine and the Mosaic Theory, 2015 SUP. CT. REV. 205, 205). The theory suggests that assembling a mosaic could be a search even if obtaining any piece of it was not-that "the whole is greater than the sum of its parts. *Id*. (quoting Kugler & Strahilevitz, at 205). In *United States v. Jones*, a case involving prolonged surveillance, five Justices of this Court joined concurrences that utilized mosaic reasoning. 565 U.S. 400, 430 (2012)(Alito, J. concurring in the judgment)(joined by Justices Ginsburg, Breyer, and Kagan); *id.* at 415 (Sotomayor, J., concurring). The court in *Tuggle* stated that this Court had not explicitly embraced the theory nor had it bound lower courts to apply it. *Tuggle*, 4 F. 4th at 517. *See* Note, *Fourth Amendment: United States v. Tuggle*, 135 Harv. L. Rev. 928 (Jan. 10, 2022).

The mosaic theory offers a novel approach for delineating searches under the Fourth Amendment that addresses the traditional method's shortcomings when assessing long-term surveillance. 135 Harvard L. Rev. 928. Under the conventional approach, courts assess each step of the government's conduct sequentially to determine whether the target's privacy expectations were invaded at any point. *See* Orrin S. Kerr, The Mosaic Theory of the Fourth Amendment, 111 MICH L. REV. 311, 315-17 (2012). An action may also constitute a search if it is a physical intrusion. *Tuggle*, 4 F. 4th at 512. With this approach, only two principles limit the government's surveillance power: the privacy expectations of society, *Katz v. United States*, 389 U.S. 347, 361 (1967)(Harlan, J., concurring) and the practical constraints imposed by limited resources and capabilities. *See United States v. Jones*, 565 U.S. 400, 429 (2012)(Alito, J., concurring in the judgment)(explaining that precomputer privacy was primarily protected by "practical" constraints because prolonged surveillance "was difficult and costly and therefore rarely undertaken"). New technologies are simultaneously eroding both limits. First, the respect for expectations of privacy are receding as surveillance proliferates and people are increasingly tracked, *see e.g.*, Mary Madden & Lee Rainie, PEW RSCH. CTR., AMERICANS ATTITUDES ABOUT PRIVACY, SECURITY AND SURVEILLANCE 7 (2015), https://www.pewresearch.org/internet/wpcontent/uploads/sites/9/2015/Privacy-

andSecurity-Attitudes-5.9.15 FINAL.pdf[https://perma.cc/EX59-9ENX]; second, new technology and lower prices make it easier to surveil at scale. *See e.g.*, Trenholm, History of Digital Cameras: From '70s Prototypes to iPhone and Galaxy's Everyday Wonders, CNET (May 31, 2021, 5:00 AM) , https://www.cnet.com/tech/computing/history-of-digital-cameras-from-70s-prototypes-to-iphone-and-galaxys-everyday-wonders [https://perma.cc/NQ73-K3RF]. [https://perma.cc/EX59-9ENX], meaning the Fourth Amendment will become increasingly worthless against some of the most comprehensive forms of surveillance unless courts employ a more expansive approach. Courts and commentators have offered the mosaic theory as one possibility. Even if a single data point-whether a photograph, cell phone ping, GPS signal, or license plate scan-can be obtained without a search, *see e.g., Tuggle*, 4 F. 4th at 513 (addressing isolated use of pole cameras), mosaic theory posits that aggregation so fundamentally changes the level of insight the government can obtain that Fourth Amendment protections must be applied.

e. Conclusion on First Question Presented Regarding Pole Camera Surveillance

This Court should continue to apply the reasoning from *Jones* and *Carpenter* recognizing the Fourth Amendment Implications of comprehensive surveillance techniques and hold that continuous, long-term surveillance of a constitutionally

protected home constitutes a search subject to the protections of the Fourth Amendment.

II. Discovery of PreSentence Report Information of Co-Actors to Protect Against Disparate Sentencing

a. Equal Protection

The Fifth Amendment guarantees equal protection of the law. *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."). The Fifth Amendment's guarantee of due process embodies within it the concept of equal justice under the law. *Hampton v. Wong*, 426 U.S. 88, 100 (1976).

b. Drug Quantity as Relevant Conduct was a Contested Issue

The most significant objections asserted by Petitioner to the PSR were to the determination of drug quantity as relevant conduct in determining offense level. The PSR concluded that Petitioner was responsible for 11,947.37 kilograms of marijuana as relevant conduct. App. 011A. There were a number of co-Defendants/Co-Actors referenced in the PSR. Information from and/or about each of the Co-Defendants/Co-Actors, listed below, was relied upon in the PSR in its finding that Mr. Dennis was responsible as relevant conduct for 11,947.37 kilograms of marijuana. App. 011A.

Party and case number	Paragraph of Dennis PSR where party is referenced	Quantity of marijuana assigned to Dennis associated with party
Alex Perez-Orozco 2:16-CR-136-AM	Para. 11, 17,48,	Identified in para. 48 of PSR as working with Garcia Nunez in attempting to deliver marijuana to Dennis, but intercepted by law enforcement. ROA.2284.
Ausencio Garcia-Herrera 2:16-CR-00739-AM	Para. 12,18,21,22,26,36,48	1800 kg, included within Trevino's 9000kg per para. 36. ROA.2282.
Rey Alexander Trevino 2:16-CR-01211-AM	Para. 13,20,21,27,35,36,37,48	9000 kg per para. 37. ROA.2282.
Jesus Ibarra-Gonzalez 2:17-CR-00860(1)-AM	Para. 14,18,21,22,24,26,36,37,48	1896.07 kg per para. 37 (Garcia Herrera quantity) ROA.2282.
Hermilio Garcia Nunez 2:17-CR-00860(2)-AM	Para. 15,21,22,23,24,25,48	Driver for Ibarra-Gonzalez-his quantity would be involved in that related to Ibarra-Gonzalez per para. 24. ROA.2277.

Without regard to their ultimate sentences, the relevant conduct quantity assessment was required to be made for each of the above named individuals. That amount would be based on that person's conduct and involvement as determined under U.S.S.G. § 1B1.1(a). If the co-actors were not held responsible in their presentence investigation reports for at least the amount of marijuana as they were responsible for in Petitioner's PSR, then there was an unfair disparity in treatment of co-defendants that would be relevant to Petitioner's sentencing. 18 U.S.C §

3553(a). Such disparity would call into question the fairness of the sentencing proceeding in this matter. The quantity of marijuana was a benchmark item in beginning the sentencing determination as it was essential in determining the Guideline sentencing range-the first step the Court must undertake under the dictates of *United States v. Booker*, 543 U.S. 220 (2005). If the quantity is not determined and assessed in a fair manner then the entire sentencing process would be tainted.

Petitioner requested limited discovery of the Presentence Investigation Reports of each of the listed individuals. App. 040A. The disclosure sought was limited to the total quantities of marijuana assessed as relevant conduct for each individual with respect to their involvement with Petitioner. This would not require the disclosure of confidential information or statements made by each individual. Petitioner stated that he would maintain the confidentiality of any information disclosed and would not use it outside of this case. The district court denied the request. App. 046-048.

c. Court of Appeals Decision

In its opinion, the Fifth Circuit Court of Appeals rejected Petitioner's complaint about the district court's refusal to permit this limited discovery, finding that Petitioner had failed to establish a compelling, particularized need for such disclosure. App. 009A.

"Dennis argues that the need to avoid an unwarranted disparity between his and other defendants' sentences justifies disclosure. The rub is that a defendant's drug quantity extends only to criminal activity 'he was directly involved [in] or that was reasonably foreseeable to him'. *Dennis worked with all of the other defendants to distribute marijuana, while they were responsible only for what they distributed.* And unlike the others, Dennis did not cooperate with the investigation. The cooperating defendants were not similarly situated to Dennis. The district court did not abuse its discretion in denying Dennis's request for sentencing information." App. 009-10A. (emphasis added).

d. Presentence Investigation Reports may be Disclosed to Third Parties Upon a Showing of Need

In *United States v. Corbitt*, 879 F. 2d 224, 239 (7th Cir. 1989), the court of appeals stated that only where a compelling, particularized need for disclosure is shown should the district court disclose a presentence investigation report. *Id*. However, the court should limit disclosure to those portions of the report which are directly relevant to the demonstrated need. *Id.* Here, Petitioner showed a compelling and particularized need and was requesting only that the Court disclose those portions of the reports directly relevant to the issue in his case. This Court, in speaking to the confidentiality of the presentence report, cited the *Corbitt* decision and restated the compelling need standard for disclosure. *United States v. Huckaby*, 43 F. 3d 135, 138 (5th Cir. 1995).

In *United States Department of Justice v. Julian*, 486 U.S.1 (1988), this Court recognized that "the courts have typically required some showing of special need before they will allow a third party to obtain a copy of a presentence report. *Id.* at 12. The reasons stated by the courts for maintaining confidentiality of presentence investigation reports are discussed in the Fifth Circuit decision in *Huckaby*:

1. Privacy rights of defendants. *Huckaby*, 43 F. 3d at 138.

2. Protection of Confidential Informants. *Huckaby*, 43 F. 3d at 138.

3. Encouraging full disclosure of information by defendants and third parties. *Huckaby*, 43 F. 3d at 138.

None of the three factors discussed above is impacted by the limited disclosure sought by Petitioner. Revealing the drug quantity found as relevant conduct does not: (1) disclose personal information about the defendant; (2) reveal the identity of informants; and (3) discourage defendants and others from providing full disclosure to the Probation Office.

e. Need to Avoid Unwarranted Sentencing Disparities Justifies Disclosure

The sentencing statute requires courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6) (emphasis added). While district courts must avoid unwarranted sentencing disparities between similarly situated defendants, warranted disparities are permissible. *United States v.*

Guillermo Balleza, 613 F.3d 432, 435 (5th Cir.), *cert. denied*, 562 U.S. 1076 (2010). The "disparity factor requires the district court to avoid only unwarranted disparities between similarly situated defendants nationwide, and it does not require the district court to avoid sentencing disparities between co-defendants who might not be similarly situated." *Id.* In this case Petitioner was concerned over disparities in a matter-assessment of quantity-on which the various co-actors were similarly situated. The question Petitioner asked was whether they were treated as such. Although an "appellant cannot challenge his sentence based solely on the lesser sentence given to his co-defendants," *United States v. McKinney*, 53 F.3d 664, 678 (5th Cir.), *cert. denied*, 516 U.S. 901 (1995), due process requires that similarly situated individuals be treated in a similar manner. The issue here is whether several defendants charged with participating in the same conspiracy (although in different criminal actions) should be judged on different facts. Specifically, if Defendants A and B participate in a transaction involving 5 kilograms of marijuana, is it procedurally and substantively reasonable, for Defendant A to be assessed relevant conduct of 5 kilograms while Defendant B, is assessed only 1 kilogram as relevant conduct? From a due process perspective and from an 18 U.S.C. § 3553(a)(6) perspective (recognizing the need to avoid disparate sentencing) it is not. The relevant conduct determination should start with all co-actors on an even footing.

USSG §1B1.3, entitled "Relevant Conduct (Factors that Determine the Guideline Range)" provides in paragraph (a)(1):

(a) CHAPTERS TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

So, in making the initial determination of base offense level, the Sentencing Guidelines direct that all criminal activity be accounted for in the determination of relevant conduct. The court of appeals presumed that the co-actors were held "responsible for what they distributed". App. 009-10A. However, that is not clear in the record and is what Petitioner sought with his limited, discrete request for PSR information. If the co-actors were truly assigned relevant conduct consistent with the determination made as to Petitioner, then, for example, co-actor and government

witness Ray Alexander Trevino would have been assigned 9000 kilograms of marijuana based on what he himself testified that he delivered to Petitioner. It is highly unlikely that Mr. Trevino's PSR made a relevant conduct determination anywhere near 9000 kilograms. And the fact that he may have earned certain favorable sentencing considerations because of his status as a witness and because he entered into a plea agreement does not change what his relevant conduct determination would be. That is the starting point and all of the co-actors should have been treated equally in that determination. Thereafter, other factors will affect sentences in accordance with sentencing guideline adjustments, the provisions of 18 U.S.C. §3553 and other considerations. Petitioner would not have expected to end up with the same favorable considerations that may have been given to other co-actors, but as a matter of due process, he should have started out on the same basis of relevant conduct. The sentencing guidelines sought to eliminate disparate sentences among similar offenders. "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." United States Sentencing Commission, Guidelines Manual § 1.2 (1991). *Chapman v. United States*, 500 U.S. 453, 473 (1991)(Stevens , J., dissenting). "Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public. Justice Stevens referenced the legislative history:

A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public." S. Rep. No. 98-225, pp. 45-46 (1983). "The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently." *Id.*, at 51. "A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity." *Id.*, at 52 (footnote omitted).
See S. Rep. No. 97-307, pp. 963, 968 (1981) (same). *Chapman*, 500 U.S. at 473, n. 10 (Stevens, J., dissenting).

Under *United States v. Booker*, 543 U.S. 220 (2005) the district court is required to calculate the guideline range and consider it advisory. *United States v. Mares*, 402 F. 3d 511, 518-19 (5th Cir. 2005)("Even in the discretionary sentencing system established by [*Booker*], a sentencing court must still carefully consider the detailed statutory scheme created by the [Sentencing Reform Act] and the Guidelines which are designed to guide the judge toward a fair sentence while avoiding sentence disparity….This duty to 'consider' the Guidelines will ordinarily require the sentencing judge to determine the applicable Guidelines range even though the judge is not required to sentence within that range."). At the outset, in order to ensure a reasonable sentence is imposed, the court must correctly calculate the appropriate Guideline range. The calculation of that range cannot be reasonable or appropriate, if it is stained with disparate treatment. If two or more persons involved in jointly undertaken criminal activity are assessed different quantities of drugs as relevant conduct, the sentencing process is unreasonable. It commences with an unjustified disparity and remains infected with that stain throughout the

process. The result is a sentence that is both procedurally and substantively unreasonable.

f. Conclusion on Equal Protection Sentencing Issue

In order to ensure that Petitioner had the full right and ability to advocate for and be heard in support of a sentence that was procedurally and substantively reasonable and to be able to preserve any objection to the unreasonableness of his sentence and his due process rights, Petitioner needed the relevant conduct quantity information from the presentence investigation reports of the co-actors/co-defendants identified in his PSR and listed in his Motion. The denial of Petitioner's request for this information was error which requires a new sentencing hearing. The information should be disclosed so that it may be considered in determining an appropriate sentence in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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