No. 22-6473

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DEWAYNE DENNIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated by law-enforcement use of video cameras, placed on utility poles on public property, which showed only views of petitioner's home exposed to public observation.

2. Whether petitioner was entitled to presentencing discovery of the drug-quantity determinations in his coconspirators' Presentence Investigation Reports.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Dennis, No. 18-CR-1199 (Mar. 23, 2021)

United States Court of Appeals (5th Cir.):

United States v. Dennis, No. 19-50855 (July 27, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 41 F.4th 732. The order of the district court (Pet. App. 26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2022. A petition for rehearing was denied on September 30, 2022 (Pet. App. 17a). The petition for a writ of certiorari was filed on December 29, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to possess with intent to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. 846. Pet. App. 18a. He was sentenced to 216 months of imprisonment, to be followed by five years of supervised release. Id. at 19a-20a.

1. The Department of Homeland Security (DHS) began investigating petitioner after several cooperating witnesses admitted to delivering marijuana to him. Pet. App. 1a. As part of their investigation, DHS agents "installed pole cameras directed at the front and back of [petitioner's] properties in Houston, Texas." Id. at 1a-2a. The cameras, which were installed on public property, did not capture activities inside the home. See id. at 27a, 30a. Although petitioner had fencing around his property, passersby could "see through [petitioner's] fence," and the cameras captured only "what was open to public view from the street." Id. at 5a; see id. at 30a-31a, 35a.

The cameras, which operated for less than three months, viewed deliveries similar to those described by the cooperating witnesses. Pet. App. 1a-2a. For example, "the video showed boxes being unloaded from pickup trucks into the garage, [petitioner] going from the garage to his house and returning with a bag, trucks departing, and [petitioner] moving the boxes from the garage to his house." Id. at 2a. The video also twice showed someone

delivering boxes to the garage; when Houston police officers stopped the deliverer after he left petitioner's property, they "seiz[ed] approximately $5,000 and thirty pounds of marijuana." Ibid.

A federal grand jury in the Western District of Texas indicted petitioner for conspiring to possess with intent to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. 841(a) and (b)(1)(B), and 846. Indictment 1; see Pet. App. 2a. Agents subsequently attempted to execute an arrest warrant and search warrant at petitioner's home. See Pet. App. 2a; Presentence Investigation Report (PSR) ¶ 29. Although the agents repeatedly identified themselves as law enforcement, petitioner aimed an assault rifle at them and ignored orders to drop it. PSR ¶ 30. The agents then discharged their firearms, with one shot hitting petitioner in the abdomen. Ibid. After being struck, petitioner went into his bedroom, where he retrieved an automatic weapon. PSR ¶ 31. Petitioner eventually surrendered and was taken into custody. Ibid. During the search of petitioner's home, officers found an AR-15 rifle, an AK-47-type pistol, 111.85 kilograms of marijuana, 19 guns, $197,313 in cash, and other evidence of drug trafficking activities. Pet. App. 2a.

2. The district court set September 16, 2018, as the deadline by which all pretrial motions were to be filed. Pet. App. 3a. Petitioner did not move to suppress any evidence. Id. at 2a. On August 29, 2019 -- nearly a year after the court's

deadline, and approximately 12 days before trial was set to begin -- petitioner moved to suppress the video surveillance and the evidence recovered pursuant to the subsequent, warrant-authorized search of his property. Id. at 3a. A few days later, he separately moved for leave to file his untimely suppression motions. Ibid.

The district court denied petitioner's motion for leave to file his untimely suppression motions. Pet. App. 26a; see id. at 2a-3a. The court subsequently heard argument from counsel about the merits of petitioner's motion to suppress pole-camera evidence, when addressing the admissibility of witness testimony. See 9/11/19 Tr. 20-42; Pet. App. 27a-39a. The court adhered to its denial of the motion as untimely and did not issue a ruling on the merits. See 9/11/19 Tr. 22-23; see also id. at 30, 42; Pet. App. 27a, 39a. Following a two-day trial, a jury found petitioner guilty. Pet. App. 2a.

The Probation Office's presentence report calculated a base offense level of 34, based on a finding that petitioner was responsible for 11,194.37 kilograms of marijuana. PSR ¶¶ 37, 43; see Sentencing Guidelines § 2D1.1(a)(5) (2018). It then added a two-level enhancement for possession of a firearm, see Sentencing Guidelines § 2D1.1(b)(1) (2018); a two-level enhancement for threatening or directing the use of violence, see Sentencing Guidelines § 2D1.1(b)(2); a two-level enhancement for maintaining a drug premises, see Sentencing Guidelines § 2D1.1(b)(12); and a four-level enhancement for acting as an organizer or leader of the

criminal activity, see Sentencing Guidelines § 3B1.1(a). See PSR ¶¶ 44-48. The resulting total offense level of 44 (reduced to the maximum 43), combined with a criminal history category II, resulted in an advisory Guidelines sentence of life imprisonment, reduced to the statutory maximum of 480 months. PSR ¶¶ 49, 52, 60, 90.

Petitioner subsequently moved for discovery of the drug quantities outlined in his coconspirators' presentence reports. See D. Ct. Doc. 192, at 1-7 (Dec. 17, 2020). He argued that discovery was warranted because if the coconspirators were not held responsible for at least as much marijuana as he was, "then there is an unfair disparity in treatment of co-defendants that is relevant to [petitioner's] sentencing." Id. at 2. The district court denied the discovery motion. 3/17/21 Tr. 27-34.

The district court explained that "what probation found in terms of relevant conduct or what the government was asking for in those cases is not relevant for this" and stated that what matters in assessing disparity is the "amount of the sentence" similarly situated defendants received, not particular drug quantity determinations in their presentence reports. 3/17/21 Tr. 28-29; see id. at 30. The court also observed that petitioner's coconspirators had testified about drug quantity at petitioner's trial. See id. at 28-34.

The district court adopted the Guidelines calculations set forth in the presentence report, with the exception that the court applied a two-level role enhancement rather than the PSR's four-

level enhancement, and calculated a total offense level of 42, a criminal history category II, and a resulting advisory Guidelines sentencing range of 360 months to life, reduced to 360 to 480 months in light of the 40-year statutory maximum. 3/17/21 Tr. 134, 141-142. The court imposed a below-Guidelines sentence of 216 months, to be followed by five years of supervised release. Id. at 180-181.

3. The court of appeals affirmed. Pet. App. 1a-16a.

a. In addressing the motion to suppress the pole-camera evidence, the court of appeals first determined -- and petitioner does not dispute in this Court -- that the district court acted within its discretion in denying the motion as untimely. Pet. App. 3a-4a. The court of appeals then reviewed the merits of petitioner's untimely motion only for plain error and found none. Id. at 5a-7a.

The court of appeals explained that "a defendant cannot assert a privacy interest in information which he 'voluntarily conveyed to anyone who wanted to look.'" Pet. App. 5a (quoting Carpenter v. United States, 138 S. Ct. 2206, 2215 (2018)). It rejected petitioner's argument citing the court's prior decision in United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987), for the proposition that "the fencing around his property established his privacy interest." Pet. App. 5a. "[G]iven that one can see through [petitioner's] fence and that the cameras captured what was open to public view from the street," the court explained that

Cuevas-Sanchez did not "clear[ly] or obvious[ly]" require suppression here. Ibid. The court also reasoned that, in the absence of "invasion of the property itself," and given observation only of "information subject to the daily view of strollers and the community," "[t]he legal issues here are not so clear that any error would be plain or obvious." Id. at 6a; see id. at 5a n.14 (citing cases from various circuits that have rejected similar Fourth Amendment claims).

b. With respect to sentencing discovery motion, the court of appeals observed that "[t]here is a general presumption that courts will not grant third parties access to the presentence reports of other individuals," which the third party must show "a compelling, particularized need for disclosure" to overcome. Pet. App. 9a (citation and internal quotation marks omitted). The court explained that the "presumption is supported by powerful policy considerations, including the defendant's privacy interest; maintaining confidential information about informants, investigations, and grand jury proceedings; and not chilling the transmission of information by the defendants." Ibid. (internal quotation marks omitted).

The court of appeals found that the district court had not abused its discretion in determining that petitioner failed to make a particularized showing of a need to investigate an unwarranted sentencing disparity. Pet. App. 9a-10a. The court of appeals explained that petitioner was not similarly situated to

his codefendants both because he worked with multiple people to distribute marijuana while the codefendants "were responsible only for what they distributed," id. at 10a; see id. at 9a-10a, and because he did not cooperate with the investigation, id. at 10a.

ARGUMENT

Petitioner renews his contention (Pet. 10-24) that he is entitled to suppression of evidence on the theory that federal agents violated his Fourth Amendment rights by placing pole cameras on public property that could provide the same information about the exterior of his home that was available to ordinary passersby. He also renews his contention (Pet. 24-33) that the district court improperly denied his request for discovery of parts of his codefendants' presentence reports. The court of appeals correctly rejected both contentions and its decision does not conflict with any decision of this court, another court of appeals, or a state court of last resort. In addition, this case would be an unsuitable vehicle for addressing either issue. The Court has recently denied petitions for writs of certiorari in cases presenting similar contentions about pole cameras, see Tuggle v. United States, 142 S. Ct. 1107 (2022) (No. 21-541); May-Shaw v. United States, 141 S. Ct. 2763 (2021) (No. 20-6905), and should follow the same course here.*

* The suppression question has also been raised in the pending petition in Moore v. United States, No. 22-481 (filed Nov. 18, 2022).

1. a. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. Where, as here, action challenged under the Fourth Amendment does not involve a trespass or physical intrusion, a search occurs only "when the government violates a subjective expectation of privacy that society recognizes as reasonable." Kyllo v. United States, 533 U.S. 27, 33 (2001); see United States v. Jones, 565 U.S. 400, 405-406 (2012); Katz v. United States, 389 U.S. 347, 360-361 (1967) (Harlan, J., concurring).

The court of appeals correctly recognized that the video cameras here -- which were placed on utility poles on public property to capture the same views available to an ordinary passerby -- did not intrude on any reasonable expectation of privacy. Pet. App. 6a. This Court has repeatedly explained that activities that a person "knowingly exposes to the public" are "not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351. The prohibition on unreasonable searches "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." California v. Ciraolo, 476 U.S. 207, 213 (1986). Instead, surveillance of activities that are "clearly visible" "from a public vantage point" does not violate any expectation of privacy "that society is prepared to honor" as "reasonable." Id. at 213-214.

Even as this Court has held that the use of other observation techniques, such as thermal imaging, may constitute a search, the

Court has reaffirmed "the lawfulness of warrantless visual surveillance of a home." Kyllo, 533 U.S. at 32; see Jones, 565 U.S. at 412 ("This Court has to date not deviated from the understanding that mere visual observation does not constitute a search."). In California v. Ciraolo, for example, the Court held that a flyover from 1000 feet in the air to observe marijuana plants in a home's fenced-in backyard did not constitute a Fourth Amendment search because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." 476 U.S. at 213-214. The Court later applied Ciraolo to uphold the warrantless use of a helicopter flying at 400 feet to observe a partially covered greenhouse in a residential backyard. Florida v. Riley, 488 U.S. 445, 448-450 (1989) (plurality opinion); see id. at 453-455 (O'Connor, J., concurring in the judgment). And the Court has also upheld the warrantless use of an aerial mapping camera to photograph a company's 2000-acre manufacturing complex, even though that technology provided "more detailed information than naked-eye views." Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986). In line with those decisions, the use of the pole cameras to video record areas visible from a public street did not constitute a warrantless search prohibited by the Fourth Amendment. See Pet. App. 6a.

b. Petitioner errs in suggesting (Pet. 18-19, 23) that the court of appeals' decision is inconsistent with this Court's

decisions in Jones, supra, and Carpenter v. United States, 138 S. Ct. 2206 (2018). Pole-camera observation of publicly visible areas is meaningfully different -- and less intrusive -- than the technological monitoring at issue in Jones and Carpenter.

In Jones, this Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'" based on the government's "physical intrusion" into and "occup[ation of] private property for the purpose of obtaining information." 565 U.S. at 404 (footnote omitted). Four Justices would have deemed use of a GPS tracking device a Fourth Amendment search under the reasonable-expectation-of-privacy test. See id. at 418-431 (Alito, J., concurring in the judgment); see also id. at 430 (finding it significant that by using a GPS device, "law enforcement agents tracked every movement that [the defendant] made in the vehicle he was driving"). While raising (without resolving) questions regarding the degree of intrusion produced by GPS monitoring under that test, Justice Sotomayor noted "unique attributes of GPS surveillance," including its ability to "generate[] a precise, comprehensive record of a person's public movements." Id. at 415 (Sotomayor, J., concurring).

In Carpenter, a decision that expressly declined to "call into question conventional surveillance techniques and tools, such as security cameras," the Court concluded that an individual has a "legitimate expectation of privacy in the record of his physical

movements as captured through" cell-site location information (CSLI), such that "accessing seven days of [such information] constitutes a Fourth Amendment search." 138 S. Ct. at 2217 & n.3, 2220. In reaching that conclusion, the Court emphasized "the unique nature of cell phone location records" and that cell-site location information is generated by "modern cell phones" in "increasingly vast amounts of [an] increasingly precise" nature, and can yield "a comprehensive chronicle of the user's past movements." Id. at 2211-2212, 2217.

The pole cameras used here are not analogous to the technologies this Court considered in Jones and Carpenter. Unlike GPS tracking or historical cell-site location information, a camera affixed to a stationary utility pole cannot track a person's location -- or in any way capture a person's activities -- outside the camera's field of vision. Furthermore, the pole cameras here were not -- and could not have been -- used to peer into the unexposed interior of petitioner's home or otherwise uncover intimate details of his private life. See Pet. App. 6a. Far from "generat[ing] a precise, comprehensive record of a person's public movements that reflects a wealth of detail" about places visited, Jones, 565 U.S. at 415 (Sotomayor, J., concurring), or constructing "an all-encompassing record of [a cell-phone] holder's whereabouts" akin to "attach[ing] an ankle monitor to the phone's user," Carpenter, 138 S. Ct. at 2217-2218, the pole cameras instead

viewed only information, at fixed locations, that was "subject to the daily view of strollers and the community," Pet. App. 6a.

Nor does the use of cameras installed on a public way that see what is already in open view represent a "[d]ramatic technological change" that might violate reasonable expectations of privacy. Jones, 565 U.S. at 427 (Alito, J., concurring in the judgment). Cameras "clearly qualify as a conventional surveillance technique." United States v. Tuggle, 4 F.4th 505, 526 (7th Cir. 2021) (brackets, citation, and internal quotation marks omitted), cert. denied, 142 S. Ct. 1107 (2022); see Carpenter, 138 S. Ct. at 2220 (decision did not "call into question conventional surveillance techniques and tools, such as security cameras"). Thus, as the courts of appeals have correctly recognized for decades, "[t]he use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment." United States v. Jackson, 213 F.3d 1269, 1280 (10th Cir.), judgment vacated and remanded on other grounds, 531 U.S. 1033 (2000), cert. denied, 531 U.S. 1038 (2000); see United States v. Vankesteren, 553 F.3d 286, 291 (4th Cir.), cert. denied, 556 U.S. 1269 (2009); United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991). To the contrary, technological developments have only undermined the case for a reasonable expectation of privacy in such footage because "[m]illions of people" have now "equipped their front doors with cameras," United States v. Moore-Bush, 36 F.4th 320, 372 (1st Cir. 2022) (Lynch,

Howard, and Gelpí, JJs., concurring), petition for cert. pending, No. 22-481 (filed Nov. 18, 2022), which often capture neighbors' curtilage, such that the viewing of curtilage by another's camera has itself become a routine occurrence.

Petitioner's factbound assertion (e.g., Pet. 9) that the courts below erred in finding that the cameras in this case viewed only areas and activities exposed to the public does not warrant this Court's review. This Court has repeatedly upheld surveillance from elevated vantage points. See p. 10, supra. In any event, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; see, e.g., United States v. Johnston, 268 U.S. 220, 227 (1925) (explaining that the Court ordinarily does not "grant * * * certiorari to review evidence and discuss specific facts"). And under what the Court "ha[s] called the 'two-court rule,' the policy has been applied with particular rigor" where, as here, the "district court and court of appeals are in agreement as to what conclusion the record requires." Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting); see Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949).

c. Petitioner identifies no conflict in the lower courts that would warrant this Court's review. As the court of appeals recognized, "[o]ther circuits have held that similar surveillance does not violate the Fourth Amendment." Pet. App. 6a n.14. In

fact, "no federal circuit has found a Fourth Amendment search based on long-term use of pole cameras on public property to view plainly visible areas of a person's home." Tuggle, 4 F.4th at 522.

The Seventh Circuit recently upheld the warrantless use of three pole cameras capturing 18 months of footage, because that footage "did not paint the type of exhaustive picture of [the defendant's] every movement that the Supreme Court has frowned upon." Tuggle, 4 F.4th at 524. The court observed that "[i]f the facts and concurrences of Jones and Carpenter set the benchmarks," then pole-camera surveillance "pales in comparison." Ibid. The Sixth Circuit reached the same result. See United States v. May-Shaw, 955 F.3d 563 (2020), cert. denied, 141 S. Ct. 2763 (2021). The court explained that "the cameras observed only what 'was possible for any member of the public to have observed during the surveillance period.'" Id. at 568-569 (quoting United States v. Houston, 813 F.3d 282, 290 (6th Cir.), cert. denied, 137 S. Ct. 567 (2016)) (ellipsis omitted); see United States v. Trice, 966 F.3d 506, 509-510 (6th Cir. 2020), cert. denied, 141 S. Ct. 1395 (2021) (applying similar principles to find no Fourth Amendment violation resulting from the warrantless use of a camera installed in a common hallway in an unlocked apartment building).

The Tenth Circuit has likewise rejected a Fourth Amendment challenge to the warrantless use of pole cameras overlooking a residence, recognizing that "[t]he use of video equipment and cameras to record activity visible to the naked eye does not

ordinarily violate the Fourth Amendment." Jackson, 213 F.3d at 1280. And the First Circuit has upheld the warrantless use of a pole camera to surveil the front of a defendant's home, reasoning that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public." United States v. Bucci, 582 F.3d 108, 117 (2009); see Moore-Bush, 36 F.4th at 320 (en banc) (per curiam) (reversing a district court's grant of a motion to suppress in a pole-camera case without revisiting Bucci).

As the Seventh Circuit has observed, several other circuits' analyses of similar issues accord with that understanding. See Tuggle, 4 F.4th at 520-523 (discussing cases). The Ninth Circuit, for example, has explained that "[v]ideo surveillance does not in itself violate a reasonable expectation of privacy" and that "the police may record what they normally may view with the naked eye." United States v. Gonzalez, 328 F.3d 543, 548 (2003) (quoting Taketa, 923 F.2d at 677) (brackets in original). And it has applied that principle to reject a defendant's assertion of "a temporary zone of privacy" within a "quasi-public mailroom at a public hospital," where the court determined that "the defendant had no objectively reasonable expectation of privacy that would preclude video surveillance of activities already visible to the public." Id. at 547-548; see Vankesteren, 553 F.3d at 292 (rejecting claim that camera surveillance of open-field property was Fourth Amendment search).

In asserting a "division of authority" on this question, Pet. 10, petitioner invokes only one federal case: the Fifth Circuit's own decades-old decision in United States v. Cuevas-Sanchez, 821 F.2d 248 (1987), see Pet. 14. But any intracircuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, and as the court of appeals specifically found, Pet. App. 5a, its decision Cuevas-Sanchez is not inconsistent with its decision in this case. See ibid. (recognizing that any inconsistency was not "clear or obvious"). In Cuevas-Sanchez, the Fifth Circuit rejected a Fourth Amendment challenge to the government's use of a pole camera, concluding that "the government followed the proper procedures in obtaining a court order for video surveillance." 821 F.2d at 252. And, although the court stated that the use of the camera qualified as a search, id. at 251, the defendant in Cuevas-Sanchez erected a ten-foot-high fence around his backyard, which "screen[ed] the activity within from views of casual observers." Ibid. In petitioner's case, in contrast, "one can see through his fence," meaning that the pole cameras only "captured what was open to public view from the street." Pet. App. 5a; see Tuggle, 4 F.4th at 513 (observing that Cuevas-Sanchez presented "the more challenging situation in which the government intentionally places cameras to see over a fence to observe a

private residence in a manner unavailable to a ground-level passerby").

Petitioner also cites (Pet. 16) People v. Tafoya, 494 P.3d 613, 615 (2021) (en banc), in which the Colorado Supreme Court concluded that law enforcement's use of a pole camera to record activity inside a defendant's fenced-in backyard was a search. There, however, the court found that the defendant had a subjective and reasonable expectation of privacy in his backyard, which was surrounded by a "six-foot-high privacy fence" and not visible to "a person standing on the street." Id. at 622; see id. at 623 (finding that any public exposure of the backyard due to gaps in the fence or neighboring properties was "limited" and "fleeting"). The pole camera's "elevated position" allowed it to view over the fence and record three months of activities inside the "fenced-in," backyard curtilage "not usually visible to members of the public." Id. at 615 & n.2. Based on those "specific facts," the Colorado Supreme Court deemed the pole-camera recording a search under the Fourth Amendment. Id. at 623. And it specifically distinguished "the facts in" the Seventh Circuit's recent decision, id. at 621 n.6, which as in this case, involved cameras that viewed only areas that were "continuously visible to * * * strollers and the community," Pet. App. 6a.

Petitioner's reliance (Pet. 14-16) on State v. Jones, 903 N.W.2d 101 (S.D. 2017), cert. denied, 138 S. Ct. 1011 (2018), is likewise misplaced. There, a bare majority of the South Dakota

Supreme Court took the view that the "amassed nature of [the] surveillance" of the defendant's activities violated his subjective and reasonable expectation of privacy, id. at 111, but nevertheless affirmed the denial of the defendant's suppression motion based on the good-faith exception to the exclusionary rule, id. at 115. To the extent that its analysis was based on this Court's 2012 decision in United States v. Jones, supra, see State v. Jones, 903 N.W.2d at 107, it lacked the benefit of this Court's subsequent opinion in Carpenter, which made clear that the Court was not "call[ing] into question conventional surveillance techniques and tools, such as security cameras," 138 S. Ct. at 2220. Any distinction between a surveillance camera and a security camera -- which might likewise be placed, without someone's knowledge, somewhere with an open view into his property -- is tenuous at best. And, at a minimum, any review of this Court would be premature in the absence of a more up-to-date decision that, unlike the one cited by petitioner, actually suppresses evidence.

d. In any event, this case would be an unsuitable vehicle for this Court's review of the pole-camera question because of its plain-error posture. The petition for a writ of certiorari does not challenge the lower courts' determination (Pet. App. 3a-4a) that petitioner's motion to suppress was untimely, nor does it dispute the court of appeals' application of plain-error review (id. at 5a); see Pet. 10-23. And to establish plain error, he would be required to show (1) "an error"; (2) that was "clear or

obvious"; (3) that "affected [petitioner's] substantial rights"; (4) and that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Puckett v. United States, 556 U.S. 129, 135 (2009) (citation omitted).

Petitioner cannot make that showing here. As the court of appeals recognized, see Pet. App. 5a-6a, any error in the denial of his suppression motion is neither "clear" nor "obvious" in light of the substantial authority recognizing that use of a pole camera in the circumstances like those at issue here does not constitute a Fourth Amendment search and the absence of any contrary controlling authority. See, e.g., United States v. McGavitt, 28 F.4th 571, 577 (5th Cir.) (explaining that "[i]n this circuit, a lack of binding authority is often dispositive in the plain error context") (citation and internal quotation marks omitted), cert. denied, 143 S. Ct. 282 (2022); see also Puckett, 556 U.S. at 135.

2. Certiorari is also unwarranted with respect to petitioner's argument concerning the denial of his motion for discovery of the drug-quantity determinations in other defendants' presentence reports. Petitioner does not assert that the court of appeals' decision conflicts with any decision of this Court or any other court of appeals. See Pet. 24-33. Instead, his argument is that the lower courts misapplied the settled legal standard to the facts of his case. See ibid. That factbound contention does not warrant this Court's review. See Sup. Ct. R. 10.

In any event, the lower courts were correct to reject petitioner's argument. As this Court observed in United States Dep't of Justice v. Julian, 486 U.S. 1, 12 (1988), "in both civil and criminal cases the courts have been very reluctant to give third parties access to the presentence investigation report prepared for some other individual or individuals." The presumption that courts will not grant third parties access to the presentence reports of other individuals is both well-established and supported by "powerful policy considerations." Pet. App. 9a (citation omitted). For instance, such disclosure could "have a chilling effect on the willingness of various individuals to contribute information that will be incorporated into the report"; furthermore, there is a "need to protect the confidentiality of the information contained in the report." Julian, 486 U.S. at 12. "Accordingly, 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." Ibid.; see Pet. App. 9a-10a.

The court of appeals correctly found that petitioner had not shown any such particularized special need. See Pet. App. 9a-10a. As the lower courts found, petitioner -- who had a different role in the trafficking operation and did not cooperate with law enforcement -- was not similarly situated to the coconspirators whose presentencing information he sought. See ibid.; see also United States v. Guillermo Balleza, 613 F.3d 432, 435 (5th Cir.) (per curiam) (explaining that 18 U.S.C. 3553(a)(6) "does not

require the district court to avoid sentencing disparities between co-defendants who might not be similarly situated"), cert. denied, 562 U.S. 1076 (2010).

Discovery of coconspirators' presentencing information was particularly unwarranted in the circumstances here. The coconspirators testified at trial about, and were subject to cross-examination concerning, issues relating to drug quantities. See, e.g., Pet. App. 42a (Court: "[M]y point is, these folks testified; they were subject to cross-examination on amounts and relevant conduct."); see also 3/17/21 Tr. 31 (Court: "I don't need that information. I'm the -- I'm the sentencing person in this particular case. I don't need to look at those * * * co-conspirators' presentence reports. They testified. I heard the testimony. * * * Why do I need to dig into a presentence report when I have testimony under oath and on the record?"). Petitioner does not explain why this did not suffice to obviate any disparity concerns.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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