IN THE
SUPREME COURT OF THE UNITED STATES

IGOR GRUSHKO,

LOWER CASE NO. 20-10438-F

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. **WHETHER THE POLICE ENTERING A RESIDENCE TO EXECUTE A SEARCH WARRANT MUST POSSESS PROBABLE CAUSE THAT THE PERSON THEY ARE SEEKING IS INSIDE THE RESIDENCE AND THEIR DECISION WILL BE EVALUATED BASED ON AN OBJECTIVE STANDARD OF REASONABLENESS.**

2. **WHETHER THE SENTENCING GUIDELINE COMMENTARY CONTAINING A CALULATION FOR AMOUNT OF LOSS NOT CONTAINED IN THE TEXT OF THE GUIDELINE COULD NOT BE APPLIED TO PETITIONER'S CASE.**

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INTRODUCTION

Petitioner, **IGOR GRUSHKO**, through counsel, hereby petitions for a Writ of Certiorari from the United States Court of Appeals for the Eleventh Circuit which affirmed the Judgment of the United States District Court for the Southern District of Florida convicting and sentencing him for violations of Federal criminal law.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit issued a published Opinion reversing the District Court's entry of a Judgment of Acquittal and denying him a new trial. *United States v. Grushko*, 50 F.4th 1 (11th Cir. 2022). A copy of that Opinion is included in the Appendix. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on January 20, 2023. A copy of that Opinion is included in the Appendix.

On February 6, 2023, co-Appellant Dennis Grushko filed a Motion to Recall the Mandate and Rehear the Case. Petitioner filed a Motion to Adopt that was granted. On March 27, 2023, the Motion to Recall the Mandate was denied. A copy of the Order is included in the Appendix.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court to hear final judgments or decrees issued by United States Courts of Appeals pursuant to Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS

AMEND. IV, - PROTECTION AGAINST ILLEGAL SEARCHES AND SEIZURES

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.

STATUTORY PROVISIONS

Title 18, U.S.C. Section 1029 – Access Device Fraud

(a) Whoever—

(1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices;

(2) knowingly and with intent to defraud trafficks in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period;

(3) knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices;

(4) knowingly, and with intent to defraud, produces, traffics in, has control or custody of, or possesses device making equipment;

Title 18, U.S.C. Section 1028–Possession of False Identification Document

(a) Whoever, in a circumstance described in subsection (c) of this section--

(1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document;

(2) knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority;

Title 18, U.S.C. Section 1028A -Aggravated Identity Theft

(a) Offenses.--

(1) In general.--Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

STATEMENT OF THE CASE

Petitioner, **Igor Grushko** and his brother, Dennis Grushko, were indicted for Conspiring to Commit Access Device Fraud, in violation of 18 U.S.C. Section 1029(b)(2) Using Unauthorized Access Devices, in violation of 18 U.S.C. Section 1029(a)(1-4), Possession of a False Identification Document, in violation of 18 U.S.C. Section 1028(a)(1), and Aggravated Identity Theft, in violation of 18 U.S.C. Section 1028A(a)(1). They both filed a Motion to Suppress the evidence seized from their residence. After the Motion was denied, they went to trial and were convicted.

At sentencing, the Petitioner challenged the loss amount. The Pre-Sentence Investigation Report (hereinafter "PSI') had added the actual loss amount to a Special Rule amount based on the number of access devices. The Peitioner objected. The Government could not meet its burden to establish the number of devices under the Special Rule and the District Court sustained the Objection. The District Court varied upward to impose a sentence of 121 months plus a 2-year consecutive term of imprisonment for a total amount of 145 months.

On appeal to the Eleventh Circuit Court of Appeals, the Petitioner raised both the suppression and guideline issues. In this Petition, Petitioner is seeking certiorari for only the suppression and guideline issues.

STATEMENT OF PERTINENT FACTS – SUPPRESSION ISSUE

In November 2017, the U.S. Secret Service was contacted by Target Loss Prevention. Target alerted the Government to a scheme whereby merchandise would be purchased from the Target website and picked up by people utilizing various aliases and driving different rental cars. The merchandise purchased would be returned for merchandise return cards, which would in turn be redeemed for high end electronics. Locating the rental car company that had been renting the cars through surveillance video from the stores, the Secret Service were able to identify Petitioner as one of the people renting the cars.

Special Agent Logan Workman testified at the suppression hearing that follow-up investigation identified the Petitioner, Dennis Grushko and a third individual named Vadym Vozniuk as the perpetrators of the fraud. Their residence was obtained and verified through their drivers' licenses, public records and surveillance.

Agent Workman never knowingly observed neither the Grushko brothers nor Vozniuk during any of these surveillances. He did acquire many photographs of them.

After the initial Indictment was returned, arrest warrants were issued. Agent Workman developed an operational plan for executing those warrants. The agents

assigned to serve the arrest warrants were given one old DMV photograph of Petitioner and two photographs, including a DMV photograph of Dennis Grushko. Agent Workman later testified that he purposely did not provide the takedown team with more photographs of the Petitioner because they showed detailed facial features that do not change over time. They were also provided with biographical information on the Grushko brothers, the address at 3222 NW 31st Terrace in Miami, which had been verified as their address and a description of the Cadillac Escalade that the Petitioner was believed to have rented. The takedown team had no other way of identifying the arrestees.

Agent Workman planned for the takedown team to execute the arrest warrants at 6:00 a.m. on November 9, 2018 at the 3222 NW 31st Terrace address. He later testified that the time was chosen because "most people are home at 6:00 a.m. in the morning; especially if their car is in the driveway."

Before the agents arrived, a "pre-surveillance" team of two agents had been dispatched to the address. They reported that the Cadillac Escalade was parked in the driveway. They also reported that two "unidentified" males had exited the target address to smoke cigarettes.

Agent Workman and the team arrived at the residence while the two men were still outside smoking. Wearing marked police vests, the team approached the

two men, announced they were police and put them down to the ground. They were handcuffed. The two men were the Petitioner and his brother, Denis Grushko, the men the police were there to arrest. They were now in custody. Agent Workman claimed that he did not know who they were.

The agents demanded that the two men identify themselves, but they refused. Both men had their wallets with their identification documents on them. They both testified that the agents removed their wallets and knew who they were. Agent Workman denied that he had looked into their wallets before entering the residence.

According to Agent Workman's testimony at the suppression hearing, neither of the brothers had been identified in front of the house. According to the affidavit he later submitted for a search warrant, Denis Grushko had been identified, but Petitioner had not.

Nonetheless, Agent Workman decided to enter the residence. The detainees were unable or unwilling to provide the code to enter the front door. The agents banged on the door to announce their presence. Finally, a woman opened the door. The agents entered the house. They conducted a protective sweep to look for the Petitioner who was already in custody on the front lawn of the house.

While conducting the protective sweep, Agent Workman observed electronic equipment which he believed to be evidence of the alleged fraud. Armed with those observations, he applied for and received a search warrant. In his affidavit, he admitted that Denis Grushko had been identified, but claimed that the agents had entered the house to look for the Petitioner. A full search of the residence seized items which ultimately resulted in additional charges in a Superseding Indictment.

After the protective sweep, agents were able to establish Petitioners identity. Petitioner alleged in his Motion to Suppress that the agents knew or should have known that they already had Petitioner in custody but wanted an excuse to enter the residence to look for evidence.

The District Court agreed with the Government's position. Agent Workman claimed that the DMV photo he had of the Petitioner had longer hair than the person he had in custody. The District Court found him credible concluding that the protective sweep was permissible.

The Eleventh Circuit refused to overturn the credibility choice made by the District Court. *United States v. Grushko*, 50 F.4th 1, 11-12 (11th Cir. 2022). It found that "when a law enforcement officer's testimony is in direct conflict with a defendant's testimony, the 'trial judge's . . . choice of whom to believe is

conclusive on [this Court] unless the judge credits exceedingly improbable testimony.' " *Id.*, quoting *United States v. Ramirez-Chilel,* 289 F.3d 744, 749 (11th Cir. 2002). Ironically, the Court accepted Agent Workman's incredible claim that he would go arrest people he had never seen nor knew what they looked like and then reject the comparison with Petitioners DMV photograph solely on hair length basis. The Court accepted this explanation despite the overwhelming circumstantial evidence that he had to have known that the Petitioner was already in custody outside the residence.

In *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), this Court set the standard for entry into residences based upon an arrest warrant. The Court stated: "[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Id*. at 603, 100 S.Ct. at 1388.

The *Payton* Court did not define the "reason to believe" standard. However, the dissent treated the majority opinion as if it required a showing of probable cause that the suspect was at home. *Payton*, 445 U.S. at 580-81 n. 13, 100 S.Ct. at 1395 n. 13 (White, J., dissenting).

More applicable to the instant case, the Court's decision in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), addressed the permissible scope of a protective sweep incident to an arrest. The Court explained that "[p]ossessing an arrest warrant and probable cause to believe he was in his home, the officers were entitled to enter and search anywhere in the house in which Buie might be found." *Id*. at 332-33, 110 S.Ct. at 1097.

The Court below was bound by the prior Eleventh Circuit case on *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995). It interpreted *Magluta* as teaching that the officers need not be "absolutely certain" that a suspect is at home before entering to execute an arrest warrant. *Grushko*, 50 F.4th at 10. The Court suggested but did not hold that a lesser degree of certainty than probable cause was appropriate.

Magluta wrestled with whether "reason to believe" could be less than probable cause. *Magluta*, 44 F.3d at 1533-37. It concluded that a "common sense" approach that was not described in terms of probable cause would do. *Id.* at 1535-36 citing *United States v. Beck*, 729 F.2d 1329, 1331-32 (11th Cir.), *cert denied,* 469 U.S. 981 (1984); *United States v. De Parias*, 805 F.2d 1447, 1457 (11th Cir. 1986); *United States v. Woods*, 560 F.2d 660, 665 (5th Cir. 1977); *United*

States v. Terry, 702 F.2d 299, 319 (2nd Cir.) *cert. denied* 461 U.S. 931 (1983); *United States v. Litteral*, 910 547, 553-54 (9th Cir. 1990); *United States v. Morehead*, 959 F.2d 1489, 1496 (10th Cir. 1992), *reh'g en banc sub nom.*, *United States v. Hill,* 971 F.2d 1461 (10th Cir. 1992) (en banc). Review of all the cited cases reveals that the information used by law enforcement to conclude that the person they wanted to arrest was in the house rose to the level of probable cause regardless of how "reason to believe" was phrased. There was no explicit abandonment of the probable cause standard.

Counsel has not been able to locate a single case where police officers looking to execute an arrest warrant could have "reason to believe" that their suspect was in the house when he was in custody outside the house. The question raised in the case at bar is the reasonableness of Agent Workman's subjective belief that he did not already have the Petitioner in custody.

The Eleventh Circuit erred in accepting Agent Workman's subjective belief as determinative of whether he had an objective reason to believe the Petitioner was inside the residence. By so doing, the Court neglected to apply an objective reasonableness standard to the determination of a legal issue: Did the police have probable cause to persist in their belief that the Petitioner was in the house when he was in their custody already?

What constitutes probable cause is a question of law, not of fact. *United States v. Tobin,* 923 F.2d 1506, 1510 (11th Cir.) (en banc), *cert. denied* 502 U.S. 907 (1991). Probable cause exists when under the "totality-of-the-circumstances ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). In this case, of course, the probable cause goes to presence of the Petitioner inside the house whether it is labelled "probable cause" or "reason to believe."

This Court should grant certiorari to address the standard to be applied by law enforcement when deciding whether an arrestee is in his house for purposes of entering that house to execute an arrest warrant. The Court must also decide if the subjective opinion of the police should be subject to plenary or *de* novo review.

STATEMENT OF PERTINENT FACTS –LOSS AMOUNT

At sentencing, the District Court calculated the loss amount under U.S.S.G. Section 2B1.1 and its commentary, notes 3(A) and 3(F). The Government had established that the actual loss amount from the Target transactions was $122,383.00. Note (F) states:

> **Special Rules.** - . . . . the following special rules shall be used to assist in determining loss in the cases indicated: . . . . (i) Stolen or

> Counterfeit Credit Cards and Access Devices; . . . In a case involving any . . . counterfeit . . . or unauthorized access device, loss includes any unauthorized charges made with the counterfeit . . . or unauthorized device and shall be not less than $500.00 per access device.

U.S.S.G. Section 2B1.1, comment n.3(F).

Based on Note 3(F), the Government contended that there was an additional loss of $503,500.00 based on its proffer that there were 1,007 unauthorized access devices subject to valuation at $500.00 each. This resulted in a total loss amount of $625,883.00. Pursuant to Section 2B1.1(b)(1)(H), since the loss amount exceeded $550,000.00, 14 points would be added to the offense level.

The Petitioner challenged the application of note (3)(F). The basis of the claim before the District Court was the insufficiency of the proof of the 1,007 unauthorized access devices. The Government on appeal conceded that Agent Workman's testimony was insufficient as to the number of access devices, but argued that under *United States v. Keene*, 470 F.3d 1347, 1349-50 (11th Cir. 2006), since the District Court had indicated that it would have imposed the same sentence regardless of the outcome of the loss amount challenge, that factual failing did not warrant a reversal for re-sentencing. The Eleventh Circuit agreed. *Grushko*, 50 F.4th at 18-19. The Eleventh Circuit went on to declare that any

challenge to the sentence remaining was limited to whether it was substantively reasonable, which it found it was. *Id.* at 19-20.

After the Opinion below had been rendered, the Eleventh Circuit issued its opinion in *United States v. Dupree,* 57 F.4th 1269 (11th Cir. 2023) (en banc). Petitioner requested the Eleventh Circuit recall its mandate in this case to address an alleged change in the law caused by the *Dupree* decision. That request was denied.

By Petitioner's reading, before *Dupree,* Courts were bound by the administrative agencies' interpretations of their own regulations. *Id.* 1275-76 discussing *Stinson v. United States,* 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993). The Eleventh Circuit found that intervening U.S. Supreme Court decisions had limited *Stinson* to the extent that the Guidelines commentary would be accorded the same deference as any other agencies' interpretation of its own regulations.

Dupree concerned whether a defendant could be designated a Career Offender based the Guidelines commentary when he would not have eligible under the plain text of the Guideline itself. The Court determined the defendant could not be a Career Offender pursuant to the commentary alone. *Id.* at 1280.

Applying *Dupree* to the case at bar would preclude the application of note 3(A) and note 3(F) of Section 2B1.1. If that were the case, only the actual loss of $122,383.00 could be applied to the Petitioner. Pursuant to Section 2B1.1(b)(1)(E), only 8 points would be added to his offense level.

The *Keene* rule was applied in this case to a sentencing provision that assumed that $500.00 per access device rule could be applied to Petitioner's amount of loss as a factual matter. The challenge at the District Court level was to the insufficiency of proof of the number of access devices. If the District Court had been precluded by law from adding the Special Rule in note 3(F), then its calculation of the guidelines was incorrect, and the sentence imposed would be substantively unreasonable.

Dupree abrogated prior Eleventh Circuit decisions in *United States v. Weir*, 51 F.3d 1031 (11th Cir. 1995) and *United States v. Smith*, 54 F.3d 690 (11th Cir. 1995). These cases controlled the instant case at the District Court level. *Dupree* should be applied to the case at bar and a new sentencing ordered.

This Court should accept certiorari in order apply its recent decisions limiting the power of the administrative state to the Federal Sentencing Guidelines. *See e.g. Kisor v. Wilkie*, __U.S.__, 139 S.Ct. 2400, 204 L.Ed.2d 841 (2019).

ARGUMENT

ISSUE ONE

THAT POLICE ENTERING A RESIDENCE TO EXECUTE A SEARCH WARRANT MUST POSSESS PROBABLE CAUSE THAT THE PERSON THEY ARE SEEKING IS INSIDE THE RESIDENCE AND THEIR DECISION WILL BE EVALUATED BASED ON AN OBJECTIVE STANDARD OF REASONABLENESS.

The Fourth Amendment provides that people shall have the right to be secure as to their residences and that ". . . 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. The warrant requirement has been applied to the entry into a residence to execute an arrest warrant. *Payton*, 445 U.S. at 603, 100 S.Ct. at 1388. ("[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the subject lives when there is reason to believe the suspect is within."). *Payton* itself addressed the need for a warrant, not the standard of proof sufficient to justify that entry.

The probable cause to issue the arrest warrant does not address where it is to executed. Whether that arrest warrant will be executed inside the suspect's

residence depends on whether the police have reason to believe he is there. Why should that "reason to believe" be evaluated on a probable cause standard? By its plain reading, the Fourth Amendment requires entry into a residence be supported by probable cause. In the case of an arrest warrant, the decision to enter the residence would be based on probable cause as found by the police, not a neutral and detached magistrate. *Tobin*, 923 F.2d at 1510 (quoting *United States v. Hurtado*, 779 F.2d 1467, 1477 (11th Cir. 1985); *United States v. Allison*, 953 F.2d 1346, 1349-51(11th Cir. 1992). Even *Tobin* and *Allison*, two Eleventh Circuit cases that should have been binding precedent on the Court below found that the probable cause determinations of the officers were a legal determination, not a factual finding. *See also, Magluta*, 44 F.3d at 1537.

The Court below waffled on the issue. It articulated the standard as follows.

> [L]aw Enforcement officers may enter a residence to execute an arrest warrant for a resident of the premises if the totality of the facts and circumstances within the officers' knowledge yielded a reasonable belief that: (1) the location to be searched is the suspect's dwelling; and (2) the suspect is within the residence.

United States v. Grushko, 50 F.4th at 10 *citing Magluta,* 44 F.3d at 1535.

The Court qualified the standard as not requiring the officers to be "absolutely certain" that a suspect is at home before entering to execute an arrest warrant. *Id.*

It is conceded that Agent Workman had probable cause to enter the home to serve the arrest warrant when it was issued. The question remains whether probable cause still existed after the suspects were in custody outside the front door? *See e.g. United States v. Delgado-Perez*, 867 F.3d 244 (1st Cir. 2017) (Officers arresting defendant pursuant to arrest warrant lacked reasonable suspicion to conduct protective sweep of defendant's apartment following his surrender outside his home).

Unlike every other reported case found by counsel, Agent Workman and his fellow agents did not know what the suspects looked like. They were relying on the suspects identifying themselves. The Trial Court rewarded their lack of knowledge by allowing it to justify a warrantless entry into the house to find the suspects they already had in custody. But if the agents did not know what the suspects looked like, what were the boundaries on their warrantless search of the home? If they had detained both Grushko's at the front door, would they have been authorized to continue their search? Could they have looked in bathrooms, closets and all the rooms of the house in a futile search for suspects they had

already detained at the front door? *See e.g. Sialoi v. City of San Diego*, 823 F.3d 1223, 1237-38 (9th Cir. 2016) (A warrantless protective sweep of the defendant's apartment not warranted when the suspect had been arrested and all the other occupants had already been detained).

In *United States v. Hassock*, 631 F.3d 79 (2nd Cir. 2011), the Court considered a case where the police were looking for a man known to them as "Basil", who they wanted to "talk" to and "potentially arrest" him. The police appeared at the door of an apartment where they believed "Basil" lived. Upon entering, the police conducted a protective sweep. They found a firearm in a bedroom they later linked to "Basil" who later became known to them as Hassock. The police had justified the protective sweep by citing the danger that "Basil" might pose if he were secreted within the apartment.

The Second Circuit held that the firearm was illegally seized. It determined that the police had no basis for believing that "Basil" was present or a threat to them. Implicit in this holding was the fact that the police did not know who "Basil" was, what he looked like and had no probable cause to arrest him for any crime. *Id.* at 88-89. *See also, United States v. Garza*, 125 Fed.Appx. 927 (10th Cir. 2005) (Warrantless entry into bathroom of motel room which officers had entered

with the consent of the person who rented it was not justified by the protective sweep doctrine, requiring suppression of a firearm and drugs found in the possession of the person in the bathroom. This determination was made even though that person had refused to respond to the officers; sweep was performed incident to an arrest, as the officers had no objectively reasonable belief that the person in the bathroom posed any danger inasmuch as they did not know who the person was and they had not noticed anything suspicious in the motel room).

Although the agents in this case had an arrest warrant, and thus had legal grounds to enter Petitioner's home to effect an arrest, their inability to identify him negated whatever probable cause might have existed to enter his home to execute the arrest warrant. Lack of knowledge by the agents detracted from rather than enhanced that right. When they entered the home, who were they looking for?

An Arrest Warrant that correctly names the person to be arrested generally satisfies the Fourth Amendment's particularity requirement, and no other description of the arrestee need be included in the warrant. *West v. Cabell*, 153 U.S. 78, 14 S.Ct. 752, 38 L.Ed.643 (1894). "John Doe" warrants have been invalidated for failing to adequately describe the person sought to be arrested. *Powe v. City of Chicago*, 664 F.2d 639, 645-46 (7th Cir. 1981) (Collected Cases).

In the instant case, the Petitioner's name was included in the Affidavit for the Arrest Warrant. Not only his name, but a picture was included. The picture was clearly inadequate to permit an identification. Agent Workman, by his own admission, was unable to determine that he had Petitioner under arrest until hours after he was in police custody and only because another officer had extracted the admission from him. Based on Agent Workmen's inability to identify the Petitioner based upon the information contained within the Warrant and other information he had gathered during the investigation, the Warrant failed to describe the person who was to be arrested sufficiently to satisfy the Fourth Amendment.

The Petitioner was also penalized for invoking his Fifth Amendment Right to Remain Silent when he was "arrested" or detained outside his home. His invocation of his rights put the burden of establishing his identity on the agents before they entered his home to look for him. As it turned out, the agents were unable to identify him until a Russian speaking agent was able to convince them to give up his name.

Under the holding of the Court below, the lack of knowledge by the police gave them *carte blanche* to enter Petitioners home to look for someone they could

not identify and conduct a search. If they had known what the Petitioner looked like, they would have executed the arrest warrant outside his residence and no protective sweep would have been necessary. Petitioner's Fourth Amendment rights were thus violated because of police incompetence.

The District Court found that Agent Workman's testimony that he did not recognize Petitioner from his DMV photograph was credible. The Eleventh Circuit found that this subjective view would be accepted as a finding of fact not reviewable on appeal unless clearly erroneous. The Court did not determine whether Agent Workman's ignorance was reasonable. Nor did the Court weigh whether the detention of the Petitioner outside the front door of his residence robbed the agents of any remaining probable cause to enter the premises. The Court reviewed the issue as one of fact and not as one of law. *Grushko*, 50 F.4th at 11-12.

It was objectively unreasonable for the District Court to have concluded that Agent Workman had probable cause to believe Petitioner was inside his residence when he was already in custody. For the District Court and the Eleventh Circuit to determine that his subjective knowledge was determinative of the issue was a violation of the Fourth Amendment. Agent Workman's beliefs were objectively unreasonable and insufficient to justify entry into the Petitioners residence.

ISSUE TWO

THAT SENTENCING GUIDELINE COMMENTARY CONTAINING A CALULATION FOR AMOUNT OF LOSS NOT CONTAINED IN THE TEXT OF THE GUIDELINE COULD NOT BE APPLIED TO PETITIONER'S CASE.

Dupree posed the question of whether commentary could expand the interpretation of unambiguous guidelines. After reviewing the evolution of case authorities emanating from this Court, the Eleventh Circuit, sitting en banc, concluded that it could not. Getting to that point involved analyzing the regulations promulgated by the other Government agencies and the degree to which the Courts can review them.

As recently as April 14, 2023, this Court weighed in on an aspect of this issue in *Axon Enterprises, Inc. v. FTC*, 598 U.S. --, __ S.Ct. __, 2023 WL 2938328 (April 14, 2023). At the heart of the case was whether the FTC and SEC could compel litigants to litigate constitutional issues in agency proceedings pursuant to those agencies' rules as a pre-requisite to going to Court. Other cases have challenged the deference due to an agencies' interpretation of its own rules. *See e.g. Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed.

1700 (1945); *Auer v. Robbins,* 519 U.S. 452, 117 S. Ct. 905, 137 L.Ed.2d 79 (1997); *Kisor v. Wilkie*, __U.S.__, 139 S.Ct. 2400, 204 L.Ed.2d 841 (2019). Prior to *Kisor*, the Courts were bound to give "reflexive" deference to the agencies' interpretation of its own rules.

In *Kisor*, this Court determined that deference to agency interpretations should only be given when the existing regulation was ambiguous. *Kisor*, U.S. at __, 139 S.Ct. at 2415. Even if a regulation was found to be ambiguous, there were additional tests that needed to be made before deciding if deference was warranted. *Kisor*, U.S. at __, 139 S.Ct. at 2416.

Dupree applied *Kisor* to the Sentencing Guidelines albeit the Career Offender section. The same principles should apply to Section 2B1.1 concerning amount of loss.

As noted by Chief Judge William Pryor in his concurring opinion in *Dupree*, while Guideline amendments undergo notice-and-comment procedure, such is not required for commentary. He stated that "the Commission cannot dodge the notice-and-comment and congressional review safeguards by creating

unreasonable "commentary" on its own unambiguous guidelines." *Dupree*, 57 F.4th at 1280-81 (PRYOR,J, concurring).

Section 2B1.1 makes no provision for adding $500.00 per access device on top of the actual loss. It only allows actual or intended loss to be used in calculating the offense level. This is not ambiguous. The per access device amount contained in the commentary is not in the rule and should not be used as a basis for calculating the sentencing guideline range.

CONCLUSION

Upon the arguments and authorities aforementioned, the Petitioner requests this Court accept certiorari in this case.

Respectfully submitted,

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