NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

DENIS GRUSHKO,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Margaret Y. Foldes
Assistant Federal Public Defender
Counsel for Petitioner
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTIONS PRESENTED FOR REVIEW

Issue I

In *Payton v. New York*, 445 U.S. 573 (1980), the Court held that officers may only enter a suspect's home to execute an arrest warrant when they have "reason to believe" the suspect is within the residence. There is a spit among the Circuits as to whether "reason to believe" is equivalent to probable cause or something less. The Third, Fourth, and Ninth circuits hold that "reason to believe" requires a showing of probable cause, while the Second, Tenth, and D.C. Circuits have found that something less than probable cause is sufficient to satisfy the standard. The Eleventh Circuit has failed to adopt an explicit standard for evaluating law enforcement action of entering a home to execute an arrest warrant. Because of its nebulous and vacillating treatment of this issue, courts from both sides of the split have cited to Eleventh Circuit law in support of their respective positions. The confusion in this area of the law has continued for at least a decade, and it has spilled over into state courts and also has created inter-jurisdictional conflicts in some locations across the country. The confusion leads to arbitrariness, abuse, and error, which has a corrosive effect on the protections guaranteed under the Fourth Amendment. Accordingly, the first question presented for review is:

> Whether the "reason to believe" standard in *Payton v. New York*, 445 U.S. 573 (1980) requires a showing of probable cause that a suspect is within the premises at the time of the arrest?

Issue II

After *United States v. Booker*, 543 U.S. 220 (2005), the federal sentencing guidelines became advisory, but this Court affirmed that the guidelines continued to play a central role in all federal sentencing proceedings. Errors in guideline calculations, however, are subject to harmless error review. The circuit courts disagree on how to apply harmless error review to a guidelines sentence when the sentencing court makes a blanket statement that it would have imposed the same sentence even if there was a guideline error in its calculations. The Eleventh and Eighth Circuits rely on such statements to avoid a merits review of guidelines errors. The Second, Third, Fifth, Seventh, Ninth, and Tenth circuits, do not accept such a statement by the district court as obviating the need for a conventional harmless error review. Accordingly, the second question presented for review is:

> Whether errors in calculating the Sentencing Guidelines are rendered categorically harmless by a district court's assertion that it would have imposed the same sentence regardless of any guideline error?

Issue III

This case also presents an important federal issue that has not been, but should be decided by this Court concerning the operation of the fraud loss guidelines, U.S.S.G. §2B1.1, in the aftermath of *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). The third question presented for review is:

> Whether *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) precludes deference to the fraud loss guideline commentary U.S.S.G. §2B1.1, commentary, n. 3(A) and 3(F)?

INTERESTED PARTIES

Petitioner is Denis Grushko ("Denis"). He had two co-defendants in the district court case, his brother Igor Grushko ("Igor") and a third party, Vadym Vozniuk ("Vozniuk"). Denis and Igor had consolidated cases before the Eleventh Circuit Court of Appeals. Mr. Vozniuk appealed his case separately. The United States prosecuted the case before the district court and was Appellee in the court of appeals. There are no other interested parties.

RELATED PROCEEDINGS

United States Supreme Court

Igor Grushko filed a Petition for Writ of Certiorari before this Court: *Igor Grushko v. United States of America*, S.Ct. No. 22-7379 (April 26, 2023).

Eleventh Circuit

The Eleventh Circuit Court of Appeals consolidated Igor's and Denis' appellate proceedings: *United States v. Igor Grushko and Denis Grushko,* No. 20-10438.

Vadym Vozniuk had separate appellate proceedings: *United States v. Vadym Vozniuk*, No. 20-10301.

The United States District Court for the Southern District of Florida

The defendants were prosecuted in the same case before the district court: *United States v. Vadym Vozniuk, Igor Grushko, and Denis Grushko,* No. 20-10438-CR-SMITH.

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

No:

DENIS GRUSHKO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Denis Grushko respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 20-10438 in that court on September 23, 2022, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida was published and can be found: *United States v. Igor Grushko and Denis Grushko*, 50 F.4th 1 (2022). It is also contained in the Appendix (A-1). A copy of the Order of the United States Court of Appeals for the Eleventh Circuit which denied the Petition for Rehearing is contained in the Appendix (A-2). A copy of the Order of the United States Court of Appeals for the Eleventh Circuit which denied the Motion to Recall the Mandate is contained in the Appendix (A-3).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on September 23, 2022. The Petition for Rehearing was denied on January 20, 2023. The Motion to Recall the Mandate was denied on March 27, 2023. This Court granted a 30-day extension to the filing of Mr. Grushko's petition. The petition is timely pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

United States Constitution, Amend. 4.

> 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.

Fed. R. Crim. P. 52

> (a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

U.S.S.G. §2B1.1 (guideline text, commentary n. 3(A), 3(F)).

> (1) If the loss exceeded $6,500, increase the offense level as follows:
>
> Loss (apply the greatest)
>
> * * *
>
> (E) More than $95,000 . . . . . add 8
> (F) More than $150,000 . . . . . add 10
> (G) More than $250,000 . . . . . add 12
> (H) More than $550,000 . . . . . add 14
> (I) More than $1,500,000 . . . . . .add 16

U.S.S.G. §2B1.1, comm. n. 3(A)

General Rule. — . . . . loss is the greater of actual loss or intended loss.

U.S.S.G. §2B1.1, comm. n. 3(F)

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 access device and shall be not less than $500 per access device.

STATEMENT OF THE CASE

This case involves three important issues of federal law, two of which involve circuit splits which should be resolved by this Court.

The first issue concerns a longstanding split regarding the meaning of *Payton v. New York*, 445 U.S. 573, 590 (1980). Specifically, it involves the unsettled question of what standard of suspicion permits law enforcement to enter a home to execute an arrest warrant. This question arises in the context of Petitioner's case where a SWAT team arrived at the house at 6:00 am to execute arrest warrants for Petitioner and his co-defendant brother Igor Grushko on charges of fraud. Both Petitioner and his brother were up early that morning, and they were already outside the front door of the house smoking cigarettes. When the SWAT team arrived, both Grushkos were thrown to the ground, laid prone, and handcuffed. The Grushkos did not state their names or give any statements at that time. Law enforcement stated that they were entitled to enter the house because Igor had longer hair then was depicted in the takedown briefing picture, and thus, they had a reasonable belief that Igor was still in the house. Because the door was locked, police attempted to knock it down with a battering ram, and when that was unsuccessful, they opened the door with a pry bar. When they entered the house, they searched and allegedly found "in plain view" items which formed the basis for additional fraud charges. Petitioner submits that probable cause should have governed whether agents were allowed to enter the house. He submits that probable cause was not present because both he and his brother were

already secured, in custody on the front lawn, and thus, law enforcement had no probable cause to believe that either one of them were in the house. The standard of suspicion required to execute an arrest warrant is a frequently occurring question that arises in both federal and state courts, and is the subject of a very deep circuit split which this court should resolve.

This case also involves a circuit split on the important issue of how harmless error review operates in federal sentencing proceedings. The question is whether a sentencing court can insulate from appellate review its guideline errors – by making a general statement that it would impose the same sentence whether or not its guideline calculations were correct. In Petitioner's case, the uncorrected guideline error is a loss calculation that substantially increased the sentence by 33% - 50%. The government conceded the error during the direct appeal, and further acknowledged that the error was significant. Nonetheless, the error was not reviewed on the merits or corrected because the district court made statements in connection with another guideline enhancement indicating that it would impose the same sentence regardless of the error. Petitioner asserts that this categorical rule of avoiding conventional harmless error review due to the district court's general statement is not a proper application of the harmless error rule. The majority of circuit courts of appeals that have considered the issue agree with Petitioner's position. This court should intervene and adopt the majority rule.

The third issue that arises in this case is whether the fraud loss guideline

commentary assessing a fictional $500 loss figure to alleged access devices that were not shown to be associated with any actual loss, could be used in this case to increase the sentence. The commentary is found in U.S.S.G. §2B1.1, notes 3(A)and 3(F). Petitioner states that this was not permissible because it violated this court's case *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). Although some circuits have already applied *Kisor* to the fraud loss commentary, it is an issue of first impression for the Eleventh Circuit. The court should intervene to make clear that *Kisor* applies and precludes deference to this commentary.

Statement of Facts

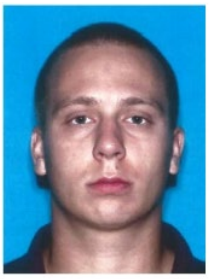
This case involves a fraudulent scheme that was conducted with various access devices to obtain merchandise at Target. The scheme involved purchasing certain standard items from target using false credit cards, returning those items and getting the refund credited to Target gift cards. The gift cards were then used to purchase more expensive items such as high end electronics.

Petitioner became identified as a subject of this investigation, when Target security cameras captured the tag number of his brother Igor's car. The tag was traced back through a car rental agency, which led to the identification of Igor, Denis, and their friend Vadym Vozniuk. The investigation also led to an identification of Petitioner's residence, where he resided with his brother Igor. At that time Vozniuk lived next door to the Grushkos.

For approximately one year, lead agent Logan Workman, from Secret Service,

conducted periodic surveillance on the Grushkos' home. During that time, Workman monitored Igor Grushko's cars, and also became familiar with the neighborhood where the Grushkos lived, including the fact that it was a gated community restricting residents' entry through a passcard or numerical code.

He also observed still photographs and videos of Denis and Igor that he obtained from Target's security force, the rental car agency, and his own investigation through the Department of Motor Vehicles and social media. Target provided him with still photographs and security video feeds from the relevant stores. A small sample of the photos Workman reviewed of Igor included the following:



These pictures also include a couple of photos from when Igor was arrested. The picture on the right was the picture that Workman used in his takedown plan.

It was an old driver's license. The photo on the bottom right corner of the collage is a picture of Igor the day he was arrested. The point of this collage is that these are a small sampling of what Workman reviewed, and they constituted part of the collective information that law enforcement had (through Workman) as the day of the arrest approached. Additionally, Workman was present at the arrest.

When a grand jury approved an indictment for access device fraud, Workman set out to make the arrests. To that end, he organized a SWAT team, and he compiled a takedown plan. He also conducted additional research on the defendants and he discerned that Vozniuk had most likely moved as he was receiving mail at a new address. In that plan, Workman included photographs of Denis and Igor. The photo he provided of Igor showed Igor with short hair. Agent Workman said he selected that picture because it was a driver's license that had a good shot of Igor's facial features, and he made the point that the facial features is what he was focusing on because they do not change over time.

On the morning of the arrest, his SWAT team assembled at a nearby Home Depot at 5:30 am., and the takedown plan was distributed. Workman sent two agents ahead to conduct pre-surveillance. They reported back that Igor's car was in the overflow parking, and two men were smoking cigarettes a few feet from the front door of the takedown residence.

The SWAT team arrived at the Grushkos' residence at 6:00 am. Workman

explained that agents were in clearly marked law enforcement gear. This is how Workman described their approach:

> WORKMAN: Police. Police. Let me see your hands. Police. Get on the ground. And then the two unknown males began to laugh. As they were laughing, they were taken into custody on the ground. They were asked over and over again what their names were: Who are you? Identify yourself. Are you Igor Grushko? Are you Denis Grushko?"
>
> * * *
>
> WORKMAN: [Y]ou're approaching with police markings and a shield, this is serious, and you're approaching: Police. Put your hands up. And then they do not comply, and then -- and then this is all very fluid. Right? So then they're taken into custody and then they're asked questions about their identity because we have the arrest warrants. We're only there to serve arrest warrants, ...
>
> * * *
>
> Q. Did you observe that takedown?
>
> A. WORKMAN: I observed agents take him into custody, yes, on both -- both of them into custody.
>
> Q. And you would agree they were taken into custody? They were arrested?
>
> A. WORKMAN: They were detained. . . . .
>
> * * *
>
> Q. How many agents approached Denis Grushko?
>
> A. WORKMAN: A couple.
>
> Q. A couple?
>
> A. WORKMAN: They were standing next to each other, so.
>
> Q. "A couple" being two or three?

> A. WORKMAN: A couple go to take him into custody -- detention. . . . .
>
> * * *
>
> WORKMAN: A. I can't say I heard specifically these two agents and these two agents yell to get down. We know approaching that we gave the commands: Let me see your hands. This is police, as I've already testified to. And then they refused, so they were taken into custody. . . . .
>
> * * *
>
> WORKMAN: I told you they were not responding to our commands. I would probably say no, until they were taken into custody by those two agents. . . . .

As indicated in Workman's testimony, the Grushkos very quickly thrown to the ground. Agents then laid them prone in front of the house and put them in handcuffs. When Denis was handcuffed, agents used force on his back and he sustained a broken rib.

Workman stated that since the defendants did not identify themselves, the agents proceeded to the front door to continue executing the arrest warrants. Since there was a combination lock on the door, the agents asked defendants for the combination, but neither defendant provided them with this information. Workman stated that he did not recognize Igor or Denis from their pictures, he had never spoken with them before, and they were uncooperative and would not tell who they were, and that's the reason why they could not be identified out front. His statement at the June 24, 2019, suppression hearing concerning Denis contradicted his under oath

statement in the search warrant affidavit (executed November 9, 2018) and the government's response to the motion to suppress (dated May 30, 2019) which Workman reviewed and approved. The search warrant affidavit and government pleadings stated that Denis had been positively identified when agents first arrived at the Grushko home, but that Igor had not.

Workman represented that agents at the door of the home, "knocked and announced" their presence. He stated that agents at the front of the team reported hearing "voices and noise." Workman acknowledged that the team used a battering ram to break the door down, and that agents eventually pried the door open with a pry bar. Once the door was forced open, agents came into contact with a female who was in the doorway who they "moved to the side." The agents went in and did an initial search of the residence allegedly to look for Igor. During the sweep, they entered a bedroom on the second floor. Workman stated that in this bedroom in "plain view" was electronic equipment which he believed was evidence of fraud.

Workman testified that he obtained the Grushkos' identities after the initial search of the house through a Russian interpreter.

Workman subsequently obtained a search warrant, returned to the house, conducted a full search of the house and seized many items which eventually became the basis for new charges in a superseding indictment.

Under the proper legal standards, this case does not depend on what Workman

said he believed, or what he subjectively believed. The ultimate issue is whether Workman had an objective belief amounting to probable cause that Igor was in the house. The objective record evidence overwhelmingly establishes that no such probable cause existed. The law enforcement team made its way to the known address, and what they saw was two men who fit the general description of who they were looking for. These two men were smoking cigarettes a few feet from the front door of the residence at 6:00 am. According to the government's own story, they knew that one of the men was Denis. Not only did the team arrive at a very early hour, but the facts about the Grushko residence and gated neighborhood also were known and made it highly unlikely that anyone but the Grushkos would be in such close proximity to the front door of the house at 6:00 am. The house was not on a busy street, it was a residential street within a gated community which restricted traffic from non-*residents*. Although Igor's hairstyle differed from the picture that many team members viewed, Workman had additional knowledge from his own investigation, and it was undisputed that the two men fit the general description for who they were looking for. The most probable explanation was that Denis and Igor were standing next to each other because they were brothers and they both lived in the house. They came out to smoke cigarettes at 6:00 am. on the stoop of their house in their gated community neighborhood. Under the totality of the circumstances, common sense, and normal life, the agents could not show that they had probable cause to believe that Igor was in the house.

Proceedings Before the District Court

After the arrest, the government superseded the indictment to add access device equipment charges and aggravated identity theft charges.

The magistrate judge held a hearing and issued a Report & Recommendation, (R&R), finding that the motion should be denied. The R&R credited Workman's testimony that Igor Grushko could not be identified before agents' entry into the house because Igor looked different than the pictures Workman had seen, Workman had never met Igor in person, and Igor refused to identify himself. The R&R found that Workman and the agents had a reasonable belief that Igor was in the house, and therefore, they had lawful authority to enter the home to execute the arrest warrant of Igor.

The R&R further found that the first search of the house by agents resulted in plain view sighting of criminal contraband. The R&R concluded that absent a Fourth Amendment violation, there was no basis to suppress any evidence under *Wong Sun*, 371 U.S. at 484. Thus, the R&R recommended denial of the motion to suppress.

The defendants objected to the findings of the R&R. The government argued to uphold the R&R. The district court affirmed the R&R, and denied the motion to suppress. After the motion was denied, the defendants proceeded to trial.

The trial lasted for three days. The government's presented the testimony of a Target employee, a Sixt employee, three law enforcement agents from the Secret

Service, and four credit card fraud victims. The government also presented photos and videos from Target and evidence seized from the Grushko home. The defense had a standing objection to all the evidence obtained through the search of the Grushko house. The defendants did not present any witnesses, but made Rule 29 motions which were denied. The jury rendered a verdict of guilty on all counts. The defendants filed post-trial motions for judgments of acquittals and for new trials.

The Sentence

A Presentence Investigation Report ("PSR") calculated the sentence under U.S.S.G. §2B1.1, to have a total offense level of 32, criminal history category I, for a range of 121-151 months. This included a 14-point enhancement for loss. Counts 7-9 added a 24-month consecutive sentence to the guideline range. Denis and Igor filed objections and requests for a downward variance.

At sentencing, the government called Workman to testify about the loss amount. Workman said that there were 1007 access devices total that were found on the hard drive of a laptop computer seized from the Grushkos' apartment. Workman stated that the 1007 access devices consisted of credit card numbers, driver's license numbers, "accounts," and "means to identify other victims," although he did not elaborate about or quantify the items in each category. He also stated that 330 of these items had been identified with Target purchases.

The parties agreed that one, 2-point enhancement did not apply. The district court overruled all the other objections the defendants made. Accordingly, the total

guideline level was 30, with a criminal history category of I, for a range of 97-121 months imprisonment. The court denied the requests for downward variance. The court then sentenced Denis and Igor to 121 months plus a two-year consecutive term of imprisonment which resulted in a total amount of 145 months. Additionally, the court sentenced Denis to 3 years' of supervised release. The court imposed restitution in the amount of $122,383.36.

After the sentence was imposed, defense counsel restated his earlier objections and also objected based on inadequate explanation by the court as to why the defendants' objections and requests were denied. The court did not address any specific objection or requests, but stated generally that its decision was because the evidence was "overwhelming," the defendant was caught "red-handed," and that defendant had victimized "over 1,000 plus individuals." The court further indicated that Denis' immigration status had no relevance, and then the court stated its erroneous belief that it had given Denis the low end of the guidelines, and had also given Denis a break on the restitution by only requiring him to pay $122,000, rather than the total 2B1.1 loss amount of $625,000. Later when the government called to the court's attention that the sentence was actually the high end of the applicable guidelines, the court simply stated that it did not matter, that the sentence would remain the same. The government invoked the case of *United States v. Keene*, and the court stated that it agreed.

The Appeal

Denis timely appealed. As pertinent to this petition, Denis challenged the denial of his motion to suppress, and he challenged the loss figure that the court had calculated. The government conceded error on the loss amount, and it further conceded that the error was significant, increasing the guidelines by 33% - 50%. However the government defended the sentence based on *Keene*. After full briefing and oral argument, this Court issued a decision, *United States v. Grushko*, 50 F.4th 1 (11th Cir. 2022), which affirmed Denis' convictions and sentence.

The Eleventh Circuit's Decision

A. The Fourth Amendment Ruling

The Eleventh Circuit was "unpersuaded by the claim that law enforcement officers violated the Fourth Amendment by illegally entering the Grushkos' locked house after arresting the brothers outside in the front yard of the home. *Grushko*, 50 F.4th at 10. The Eleventh Circuit relied heavily on *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995) for its rationale. It did not go beyond Magluta's wording or further define the quantum of suspicion that was necessary to enter the home, except to say that, "officers need not be 'absolutely certain' that a suspect is in the home before entering to execute an arrest warrant." *Grushko*, 50 F.4th at 10, *citing Magluta* 44 F.3d at 1538. The court further stated that law enforcement's reasonable beliefs could be gauged through common sense factors, inferences, and presumptions. *Grushko*, 50 F.4th at 10. It further stated that upon a reasonable belief, law

enforcement could search "the entire premises of a residence, until the suspect is found." *Grushko*, 50 F.4th at 10-11, *citing United States v. Williams*, 871 F.3d 1197, 1201 (11th Cir. 2017).

The court then shifted to a discussion of warrants under the Fourth Amendment, and for the first time mentioned the necessity of probable cause in relation to the issuance of warrants. *Grushko*, 50 F.4th at 11. It noted that the probable cause standard for warrants required facts demonstrating a high likelihood that an agent's beliefs about the existence and location of criminal activity and contraband were true. *Grushko*, 50 F.4th at 11, *citing United States v. Martin*, 297 F.3d 1308, 1314 (11th Cir. 2002).

The Court then framed Grushko's Fourth Amendment *Payton* issue, in terms of a search conducted under the authority of a warrant, and it de-emphasized the initial warrantless entry into the *Grushko* home that gave law enforcement new facts which it used to support its request for the later warrant. *Grushko*, 50 F.4th at 11. Under this frame, and as part of the "totality of the circumstances," the court stated that law enforcement had a reasonable belief that Igor was in the house, justifying law enforcement's warrantless entry. It reasoned that although Workman had observed multiple pictures and videos of Igor Grushko over the course of a year and supplied a picture of Igor to his SWAT team, neither he (who was present at the arrest) nor anyone on the SWAT team were personally familiar with Igor, and they

had no reason to believe that Igor was one of the men who had been thrown to the ground, laid prone, and handcuffed in the front yard of the house at 6:00 am. The opinion also credited the testimony of Workman about his subjective intent as to whether he believed Denis and Igor were in custody or just in a lesser detention when the SWAT team agents threw them to the ground, laid them prone, and handcuffed them in the front yard of the house at 6:00 am. *Grushko*, 50 F.4th at 11-12.

The court's final words on the subject were: "credibility issues did not require any different decision," and the court below "did not err in concluding that agents reasonably believed that Igor was inside [the house]." *Grushko*, 50 F.4th at 12. Likewise, the court upheld the search warrant, finding that it was properly based on probable cause. *Grushko*, 50 F.3d at 12-13.

B. The Sentencing Ruling

The Court also denied all of the Grushko's sentencing challenges. However, it failed to rule on the merits of the loss calculations. It avoided ruling on loss in spite of the fact that the government had conceded on appeal that there was a six-point error in the loss calculations. The Court stated that it did not need to reach the merits of these issues because they were harmless error pursuant to *United States v. Keene*, 470 F.3d 1347 (11th Cir. 2006). *Id.* at 18-19. The court then determined that Denis' sentence was substantively reasonable. *Id.* at 19.

The parties petitioned for rehearing, and the Eleventh Circuit denied that request. The parties also filed a Motion to Recall the mandate due to a new intervening case *United States v. Dupree*, 57 F.4th 1269 (11th Cir. Jan. 18, 2023), which raised an issue about the guidelines based on *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). This too was denied.

REASON FOR GRANTING THE WRIT

Introduction

I. This Court Should Determine that Probable Cause is Necessary for Law Enforcement to Enter a Home to Execute an Arrest Warrant, and Thereby Resolve a Deep Circuit Split on the Issue.

The Fourth Amendment protects:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . , 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.

Entry into the home is the chief evil against which the Fourth Amendment is directed. *Payton v. New York*, 445 U.S. 573, 586-87, 590, 100 S. Ct. 1371, 1380-81 (1980). In no setting is the Fourth Amendment's protections "more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses shall not be violated." *McClish v. Nugent,* 483 F.3d 1231, 1240 (11th Cir. 2007). "In terms that apply equally to seizures of property

and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house." *Payton,* 445 U.S. at 590, 100 S. Ct. at 1382. That line is "not only firm but also bright." *Kyllo v. United States*, 533 U.S. 27, 41, 121 S. Ct. 2038, 2046 (2001). Accordingly, searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton,* 445 U.S. at 587.

Under the Fourth Amendment:

> [A]n 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.
> *Payton v. New York*, 445 U.S. 573, 603 (1980).

The courts have determined that this is a two-pronged inquiry: (1) law enforcement must have a reasonable belief that the house where the defendant is to be arrested is his residence, and (2) law enforcement must have a reasonable belief that the arrestee is within the residence at the time the arrest warrant is executed. *Magluta*, 44 F.3d at 1533, 1535. In this case, the Grushkos never disputed that they lived in the house where their arrest warrants were executed. Therefore, the Fourth Amendment issue in this case hinged entirely on whether law enforcement had a reasonable belief within the meaning of *Payton*, that the Grushkos were in the house at the time the arrest warrant was executed. If the objective facts established that there was no reasonable belief that the Grushkos were inside at the time of the arrest, then the initial entry into the house and all the searches, and the subsequent search warrant were invalid.

In his appeal before the Eleventh Circuit, Petitioner took the position that a reasonable belief under *Payton* was akin to probable cause. (Denis br. at 35-37). He noted that, while *Magluta* did not adopt an explicit standard, it drew heavy comparisons to cases discussing probable cause. (Denis br. at 35-37, *citing Magluta*, 44 F.3d at 1534-1535, which quoted *United States v. Woods*, 560 F.2d 660, 665 (5th Cir. 1977) (recognizing the right to enter a residence to execute an arrest warrant the court stated: "The test is properly framed in terms of reasonable belief. Probable cause is essentially a concept of reasonableness, ... Reasonable belief embodies the same standards of reasonableness [as probable cause]"). And *Magluta* continued with citations to *Hill v. California*, 401 U.S. 797, 804, 91 S.Ct. 1106-1110 -1111 (1971) (probable cause); *United States v. Allison*, 953 F.2d 1346, 1350 (11th Cir. 1992) (probable cause); and *United States v. Gonzalez*, 969 F.2d 999, 1002-03 (11th Cir. 1992) (probable cause), and other probable cause cases. *Magluta*, 44 F.3d at 1536-1537.

The standard relied on is important as this Court has instructed:

> Reasonable suspicion is a less demanding standard than probable cause[,] not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable case, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Alabama v. White, 496 U.S. 325, 330 (1990). Thus, probable cause gives a more critical eye to the factors and inferences that a reasonable agent would make. It recognizes that agents can and do sometimes lose sight of a suspect's constitutional rights, and the more watered down the standard, the more watered down the right

will become. Probable cause deals in *likely probabilities*, while lower standards of reasonableness, such as "reasonable suspicion" allow for farther-reaching, *possibilities*. Accordingly, the standard is important and frequently case determinative.

In the instant case, the Eleventh Circuit's decision did not clarify the standard that the court was using; rather, it merely quoted the "reasonable belief" and "reason to believe" language of *Payton* and *Magluta*. Petitioner asserts that the undefined standard in the Eleventh Circuit should be clarified by this Court, and that such clarification would be determinative here because under the record of this case, any potential belief by law enforcement that the Grushkos were in the house would not comply with objective reasonableness under a probable cause standard. The police had already arrested, thrown to the ground, lain prone, and handcuffed both Grushkos on the front lawn of the locked house.

Petitioner further asserts that the standard should be clarified because the Eleventh Circuit is not alone in its confused state on this important area of the law. Rather, the issue is part of a very deep and very wide split across the country. In the federal courts, the Third, Fourth, and Ninth Circuits require police to have probable cause that the arrestee resides in the home and will be found inside the home at the time the arrest warrant is executed. *United States v. Algarin*, 821 F.3d 467, 477 (3d Cir. 2016); *United States v. Brinkley*, 980 F.3d 377, 385 (4th Cr. 2020); *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002). In contrast, the

Second, Tenth, and D.C. circuits require a lower standard than probable cause. *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995); *Valdez v. McPheters*, 172 F.3d 1220, 1225 (10th Cir. 1999); *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005), *on reh'g in part*, 179 Fed. Appx. 60 (D.C. Cir. 2006). The Fifth and Eighth Circuits join the Eleventh Circuit in utilizing nebulous or vacillating standards. Compare *United States Clifford*, 664 F.2d 1090, 1093 (8th Cir. 1981) *with United States v. Risse*, 83 F.3d 212, 216 (8th Cir. 1996); *see also United States v. Barrera*, 464 F.3d 496, 501 & n.5. (5th Cir. 2006).

Within this split, the Eleventh Circuit appears to be the most confused in its law. Its confusion has prompted courts to cite to Eleventh Circuit law in support of their respective positions, even though such courts are on opposite sides of the split. Compare *United States v. Thabit*, 56 F.4th 1145, 1151 (8TH Cir. 2023) *with Thomas*, 429 F.3d at 286.

The split is even deeper, however, because the confused state of the law has found its way into state law. And in some jurisdictions, the federal and state courts diverge so that Fourth Amendment rights will depend on whether the charges are brought in federal or state court. The impact on the state courts and the consequent inter-jurisdictional conflicts is more fully discussed in a cert petition pending before this Court in *Pennington v. Virginia*, S.Ct. No. 22-747, 2023 WL 1880954 (U.S. Feb. 7, 2023). The situation is worse than a patchwork quilt, it is utter chaos.

The massive confusion in this area of the law leads to arbitrariness, error, and

abuse that the Fourth Amendment was intended to protect against. *See Vasquez-Algarin*, 821 F.3d at 473. Petitioner's case, in particular, presents the exact dangers of an arrest warrant possibly serving "as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *See Steagald v. United States*, 461 U.S. 204, 215 (1981). The record evidence in this case shows that the government could not meet a probable cause standard to enter the house on the assertion that they had "reason to believe" that the Grushkos were in the house, because they had already arrested and secured the Grushkos outside, on the front lawn of the locked house. After the defendants were handcuffed and lying prone on the ground, the agents used a battering ram to try to get in the house, and when that failed they used a pry bar to force the door open. The forceful breaching of the home's entrance was done without probable cause to believe that the Grushkos were inside, but once law enforcement gained entrance, they obtained new information through "plain view" that they then used to develop probable cause that did not otherwise exist so they could obtain a search warrant they could not otherwise obtain.

Moreover, the scope of such dangers is broad, as there are many types of warrants and writs that allow for arrests in criminal, quasi-criminal, and even civil matters. *See, e.g., United States v. Phillips*, 834 F.3d 1176 (11th Cir. 2016) (arrest under civil writ of bodily attachment for unpaid child support issued under Florida law was warrant for purposes of Fourth Amendment); *United States v. Collins*, 359

Fed.Appx. 639 (6th Cir. 2010) (applying *Payton* to arrest based on family court bench warrant for misdemeanor contempt for failure to obtain mental health evaluation).

To secure the fundamental Fourth Amendment right to be secure in the home, this Court should intervene and establish probable cause as the requisite quantum of suspicion necessary for entering a house to execute an arrest warrant. The home is explicitly protected in the text of the Fourth Amendment, and thus, it should be jealously guarded. Furthermore, this Court and other courts have long equated terms such as "reasonable belief" or "reason to believe" with probable cause. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("reasonable ground for belief"); *Maryland v. Buie*, 494 U.S. 325, 332-333 (1990) (equating *Payton's* "reason to believe" with probable cause); *Magluta*, 44 F.3d at 1534-1535, *citing Woods*, 560 F.2d at 665 (stating that "probable cause" and "reasonable belief" "embod[y] the same standards of reasonableness . . . .). This Court's intervention is necessary to establish a consistent standard in this important matter of Fourth Amendment law. This Court should grant Mr. Grushko's Petition for Writ of Certiorari.

II. This Court Should Resolve an Important Circuit Split Regarding the Proper Application of Harmless Error Review in Federal Sentencing Proceedings.

This case also involves a circuit split on the important issue of how harmless error review operates in federal sentencing proceedings.

The question is whether a sentencing court can insulate from appellate review

any and all guideline errors it made -- or might have made – by making a prophylactic blanket statement that it would have imposed the same sentence even if there was a guideline error in its calculations. And further, whether the appellate courts can avoid having to review even substantial guideline errors because the sentencing court made such a blanket statement.

The Eleventh Circuit stated its rule (often referred to as the "Keene" rule based on *United States v. Keene*, 470 F.3d 1347 (11th Cir. 2006)):

> Under our precedent, we need not review a sentencing issue when (1) the district court states it would have imposed the same sentence, even absent an alleged error, and (2) the sentence is substantively reasonable.

Grushko at 18 (cleaned up). Under this rule a district court's blanket statement at sentencing -- that it would impose the same sentence regardless of guideline errors -- insulates all guideline errors -- whether the error was something that the court focused on at sentencing which gave the court pause -- or whether it was a latent error lurking in the sentence that did not appear to be erroneous at the time. *See e.g., United States v. Grady*, 18 F.4th 1275 (11th Cir. 2021); *United States v. Henry*, 1 F.4th 1315 (11th Cir. 2021).

The rule's reflexive, categorical nature is clear from its application in this case. Below, the government pointed out an error that the court had made relating to a specific two-point guideline enhancement. The error resulted in the court sentencing the defendant at the high end of what it believed was the properly

calculated guideline range, even though it stated it was sentencing at the low end. When the government brought the issue to the court's attention, it also tagged onto the discussion, whether or not the error would be harmless under *Keene*, 470 F.3d 1347. The Court responded, "Correct. Whether the enhancement was in favor or not, my sentence will remain the same." However at the time of the sentencing, neither the government nor the court were discussing the possibility of other major guideline errors lurking in the sentence. And specifically, they were not discussing whether the loss figure that the court had determined was in error. Although the defendants had filed PSI objections challenging the sufficiency of trial evidence to establish loss, the government presented an additional witness at the sentencing who testified about loss. After that testimony, there was no more discussion about insufficiency of the evidence for loss. Further, the government never suggested when it raised *Keene*, that the loss figure should be ear-marked as an issue that the court would find irrelevant to its final sentence.

As it turned out, there was a latent error in the loss amount based on the additional witness' testimony at sentencing. Once this error was raised on appeal, the government conceded the issue. (Govt' br. at 49). It also conceded that the error resulted in a significant drop in the guidelines, by approximately six points. (Gov't br. at 50-51). The government further calculated out the difference to a range of 51-63 months, plus the 24-month consecutive. (Govt br. at 50). The government agreed that this represented a "significant" upward variance of 57 months. (Gov't

br. at 50). If at sentencing, the government had clearly stated that the loss amount was erroneous as it indicated in its appellate brief, it is doubtful that the district court would have looked at its final sentence through the same lens. Rather, the court would have realized that it was, in reality, imposing a large upward variance, and it would have had to consider whether it was willing to go that far. Here the district court could not have properly assessed whether it would have "reached the same result," because it did not recognize that there was a six-point loss error lurking in the sentence. And at the sentencing, the court did not abandon the guidelines because it noted that the guideline sentence of 121 months was still within the advisory guideline range. It repeated this assertion when it imposed the identical sentence on co-defendant Igor at the joint sentencing hearing. At a minimum, the situation presented a serious question which prevented the government from meeting its burden to prove harmlessness.

Although the Eleventh Circuit's *Keene* rule concludes with a general review for substantive reasonableness, this does not remedy the problem because the rule effectively reverses the burden of proof in harmless error cases. Under the Eleventh Circuit's *Keene* rule – the government no longer has the burden to prove harmlessness. Instead, the defendant has the burden to prove that the sentence is substantively unreasonable. Moreover, the rule is determinative in most cases because harmless error questions often turn on who has the burden of proof.

Allowing such a sentence to be insulated from review diverges from this Court's

and Congress' requirements under the current advisory guideline system. Under both the guideline provisions and the 18 U.S.C. §3553(a) statutory sentencing factors, the district court *must* (shall) consider the sentencing guidelines. 18 U.S.C. §3553(a)(4) ("The court, in determining the particular sentence to be imposed, shall consider-- . . . . **(4)** the kinds of sentence and the sentencing range established for -- **(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-- . . . . [which] are in effect on the date the defendant is sentenced."). Therefore, if the court miscalculates the guidelines, it not only gets the guidelines wrong, but it also fails in its mandatory statutory duty to properly consider the guidelines as a factor. *Id*.

This Court, moreover, has repeatedly affirmed the sentencing guidelines' centrality to the sentencing process. *See e.g, Peugh,* 569 U.S. at 544 (recognizing the guidelines as the lodestone of sentencing.); *Gall*, 552 U.S. at 49 (recognizing the guidelines as the initial starting point and benchmark).

So central to sentencing are the Guidelines that "[w]hen a defendant is sentenced under an incorrect Guidelines range – whether or not the defendant's ultimate sentence falls within the correct range – the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 578 U.S. 189, 203 (2016); *accord Rosales-Mireles*, 138 S.Ct. 1897, 1903 (2018) (holding a plain Guidelines error "in the ordinary case" warrants a remand for a new sentencing hearing because "it seriously affect[s]

the fairness, integrity, or public reputation of the judicial proceedings.").

Accordingly, this Court has made clear that "[D]istrict courts must begin their analyses with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall,* 552 U.S. at 50 n.6. "Even if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*." *Peugh*, 569 U.S. at 542 (emphasis in original). And when reviewing a sentence on appeal, "the appellate court must "first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . . or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51.

Moreover, the Eleventh Circuit's *Keene* rule diverges from the majority of other circuits that have considered the issue, which includes the Second, Third, Fifth, Seventh, Ninth and Tenth circuits. *See United States v. Seabrook*, 968 F.3d 224, 233-234 (2d Cir. 2020); *United States v. Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011); *United States v. United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017); *United States v. Asbury*, 27 F.4th 576, 581 (7th Cir. 2022); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021); *United States v. Gieswein*, 887 F.3d 1054, 1062-1063 (10th Cir. 2018). This majority requires a more substantive review of whether the district court actually intended to impose a sentence without regard to any and all potential

guideline errors. As the Seventh Circuit in *Asbury* explained, the district court's discretion to vary from the guidelines does not "permit the judge to nullify the guidelines by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence." *Asbury*, 27 F.4th at 581. Rather, the courts at both the district and appellate levels were required to assess sentencing decisions by reference to the appropriate guidelines calculations, and thus, "a conclusory comment tossed in for good measure [was] not enough to make a guidelines error harmless." *Asbury*, 27 F.4th at 581. The Seventh Circuit further explained that permitting such conclusory assertions to insulate sentencing errors from appellate review would circumvent the need for the judge in every case to correctly calculate a baseline Guidelines sentencing range and explain sentencing decisions departing from that range, and therefore would be fundamentally inconsistent with Guidelines sentencing. "There are no magic words in sentencing." *Asbury*, 27 F.4th at 581.

To remedy the problem, the majority presents a simple and fair approach for applying harmless error review to sentencing proceedings. It requires sentencing courts to specify which potential sentencing errors are harmless, and it requires them to explain why. *Asbury*, 27 F.4th at 581. This avoids the common situation in which the sentencing court, based on its understanding at the time, believes it has come to a proper sentence for the defendant, but later discovers additional factors which demonstratively impact the sentence.

Significantly, the majority rule accomplishes the same goals that the Eleventh Circuit aspires to: "to avoid pointless reversals and unnecessary do-overs of sentence proceedings." *Grushko*, at *18. But it does so with more accuracy. And it complies with this Court's and Congress' requirements for an advisory guideline system.

This Court should intervene and adopt the majority rule for harmless error in federal sentencing proceedings.

III. This Court Should Decide an Important Federal Question That Has Not Been, But Should Be Resolved By This Court: Whether Its Holding In *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) Precludes Deference to Fraud Loss Guideline Commentary, Notes 3(A) and 3(F).

This case also presents an important federal issue that has not been, but should be decided by this Court concerning the operation of the fraud loss guidelines in the aftermath of *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).

The fraud loss guideline applicable to access device fraud is found in U.S.S.G. §2B1.1. That guideline has a fraud loss table which states:

> (1) If the loss exceeded $6,500, increase the offense level as follows:
>
> **Loss (apply the greatest)**
>
> ***** ***** *****
>
> (E) More than $95,000 . . . . . add 8
> (F) More than $150,000 . . . . . add 10
> (G) More than $250,000 . . . . . add 12
> (H) More than $550,000 . . . . . add 14
> (I) More than $1,500,000 . . . . . add 16

There are two commentary notes which also apply to access device fraud cases.

They are §2B1.1, comm. n. 3(A) which states, "**General Rule.** — . . . . loss is the greater of actual loss or intended loss." And note 3(F) which 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 access device and shall be not less than $500 per access device.

U.S.S.G. §2B1.1, comment n.3(F).

The guideline and above notes were applied in Petitioner's case. Under the text of the guideline alone, the loss amount would have totaled $122,383. With the commentary, however, the loss increased to $625,883, due to note 3(A)'s attributing a loss amount of $500 to an alleged 1007 access devices that had not been shown to have been associated with any type of actual loss. This substantially increased Petitioner's sentence.

However, under this Court's *Kisor* case, notes 3(A) and 3(F) should not have been utilized to calculate loss. *Kisor* changed the law with respect to the level of deference accorded to agency interpretations of their own regulations. Guideline commentary has been treated as analogous by this court. *Stinson v. United States*, 508 U.S. 36 (1993). *Kisor* determined that the law had drifted into according agency interpretations too much deference so that the law had become "a caricature" of proper deference, as deference to agency interpretations had become "reflexive." *Kisor,* 139 S.Ct. at 2415.

Kisor changed this practice, making clear that deference to agency interpretations of regulations should not be granted unless the regulation at issue was genuinely ambiguous. To make that determination, "a court [had to] exhaust all the 'traditional tools' of construction." *Kisor*, 139 S.Ct. at 2415, citing *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). If after employing these tools, "uncertainty d[id] not exist, there [wa]s no plausible reason for deference. The regulation then just mean[t] what it mean[t] – and the court must give it effect, as the court would any law." *Kisor*, 139 S.Ct. at 2415. If the court found a regulation to be genuinely ambiguous, the court had to employ additional tests to determine if deference was appropriate under those circumstances. If all these tests were met, then deference was appropriate.

Because the deference doctrine had been applied to guideline commentary in previous precedent, circuit courts began to apply *Kisor* to guideline commentary. *See e.g., United States v. Dupree*, 57 F.4th 1269 (11th Cir. Jan. 18, 2023) (applying *Kisor* to U.S.S.G. §4B1.2's commentary and precluding deference to the commentary that deemed inchoate offenses to be controlled substance offenses). Petitioner asserts that the rule set out in *Kisor* also applies to the fraud loss commentary under guideline 2B1.1. In particular, Petitioner states that no deference can be given to 2B1.1, notes 3(A) and 3(F). That the text of 2B1.1 was unambiguous and that 3(A) and 3(F) are not supported by the text. Other circuit courts have found that *Kisor* applies to notes 3(A) and 3(F). *See United States v. Banks*, 55 F.4th 246, 257-58 (3d

Cir. 2022) (applying *Kisor* to §2B1.1 note (3)(A), the court found, "The Guideline does not mention 'actual' versus 'intended' loss; that distinction appears only in the commentary. . . . The ordinary meaning of loss in the context of §2B1.1 [an enhancement for basic economic offenses] is 'actual loss.' This result is confirmed by dictionary definitions of 'loss.'"); *United States v. Riccardi*, 989 F.3d 476,486 (6th Cir. 2021) (applying *Kisor* to §2B1.1 note (3)(F) where gift cards averaging $35 each were deemed to cause a $500 loss each, the court found, "Commentary may only interpret the guideline. And a $500 mandatory minimum cannot be described as an interpretation of the word 'loss.' Rather, it is a substantive legislative rule that belongs in the guideline itself to have force."). Under *Kisor*, Notes 3(A) and 3(F) are illegal expansions of the guideline, and thus, they could not be utilized to calculate loss under 2B1.1.

This issue implicates questions of great impact across the country regarding the proper application of the federal fraud guideline. Accordingly, this court should grant Mr. Grushko's petition, and find that *Kisor* prohibits deference to U.S.S.G. §2B1.1, notes 3(A) and 3(F).

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Margaret Foldes*
Margaret Foldes
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
May 22, 2023