No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTWONE SANDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the search warrant affidavit in this case failed to establish the requisite nexus to permit a search of a private residence?

II. Whether the panel majority and en banc dissent correctly held the *Leon* good-faith exception does not apply?

III. Whether the discovery rules and due process require disclosure of evidence relied upon by law enforcement to secure a search warrant for a private residence?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Appellant/Defendant – Antwone Sanders

Respondent/Appellee/Plaintiff – United States of America

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CASE NO. _____
SUPREME COURT OF THE UNITED STATES

ANTWONE SANDERS **PETITIONER**

V.

UNITED STATES OF AMERICA **RESPONDENT**

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Antwone Sanders, by court-appointed counsel, respectfully requests that a Writ of Certiorari issue to review the published en banc opinion of the United States Court of Appeals for the Sixth Circuit in the case of *United States v. Antwone Sanders*, No. 21-5945, filed on June 28, 2024 and attached to this Petition as Appendix C.

OPINIONS BELOW

Mr. Sanders's appeal to the Sixth Circuit was taken from the Judgment entered following his convictions for narcotics and firearms offenses. *See* Appendix A. On February 6, 2023, the Sixth Circuit issued a published opinion reversing the district court's order denying Mr. Sanders's motion to suppress and vacating his convictions and sentence. *See* Appendix B. The government subsequently requested rehearing, and the Sixth Circuit issued an en banc opinion affirming the judgment of the district court. *See* Appendix C. This petition for a writ of certiorari now follows.

JURISDICTION

The Sixth Circuit issued a published opinion reversing the district court's denial of Mr. Sanders's motion to suppress and vacating his convictions and sentence on February 6, 2023. *See* Appendix B. The Sixth Circuit granted the government's motion for rehearing and issued a published en banc opinion affirming the district court's judgment on June 28, 2024. *See* Appendix C. Mr. Sanders invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed.R.Crim.P. 16(a)(1)(E):

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or oprtions of any of these items, if the item is within the government's possession, custody, or control and:
>
> (i) the item is material to preparing the defense;
>
> (ii) the government intends to use the item in its case-in-chief at trial; or
>
> (iii) the item was obtained from or belongs to the defendant.

STATEMENT OF THE CASE

In April 2019, officers with the Lexington, Kentucky Police Department (LPD) received information from a confidential informant (CI) that Antwone Sanders was "selling heroin and/or fentanyl" from a residence at 2852 Yellowstone Parkway, Apartment D[.]" [R. 25-2: ATF ROI #1, Page ID # 120]. The CI confirmed Mr. Sanders's identity from a photograph provided by LPD. *Id*. Officers then "utilized a CI on two (2) separate occasions to complete a controlled purchase of heroin/fentanyl" from Mr. Sanders. *Id*.

"The first of these occasions occurred approximately two (2) weeks prior" to law enforcement's search of the Yellowstone Parkway apartment. *Id*. at Page ID # 120. The purchase occurred at an unidentified location away from the apartment, after which Mr. Sanders "was surveilled by LPD officers as he [traveled]…to 2852 Yellowstone Parkway." *Id.* at Page ID # 121.

"The second controlled purchase occurred within two (2) days" of the execution of the search warrant. *Id*. This buy was similar to the first, occurring at an undisclosed location away from the Yellowstone Parkway apartment. *Id*. Prior to the transaction, a single officer allegedly saw Mr. Sanders "exit[] the front door of Apartment D" and travel to the meet location in his vehicle. *Id*. Other officers followed Mr. Sanders after the buy and observed him return to Yellowstone Parkway and "enter Unit D." *Id*.

Law enforcement did no additional investigation about Mr. Sanders, his vehicle, or the target residence. Based on these controlled purchases alone, law enforcement applied for a search warrant for the Yellowstone Parkway apartment, which was executed on April 25, 2019. *See* [R. 25-3: Search Warrant and Affidavit, Page ID # 156-60]. Officers encountered Mr. Sanders and a female in an upstairs bedroom. [R. 25-2: ATF ROI #1, Page ID # 121]. Mr. Sanders directed police to narcotics and a firearm and was placed under arrest. He was subsequently indicted in the Eastern District of Kentucky for possession of narcotics with intent to distribute, possession of a firearm by a convicted felon, and possession of a firearm in furtherance of a drug trafficking crime. *See* [R. 1: Indictment, Page ID # 1-5].

Following arraignment, Mr. Sanders filed formal requests for discovery and other pre-trial disclosures. Mr. Sanders later filed a motion for supplemental discovery requesting "case reports and drug evidence relating to the two controlled buys referenced in the search warrant affidavit[.]" [R. 25: Motion for Supplemental Discovery, Page ID # 63-72]. While the government had disclosed evidence found during the search of the apartment, those materials included no "evidence relating to the…controlled buys[.]" *Id*. at Page ID # 66. The "government indicated that it was unwilling to disclose" those items "because it would not be introducing th[at] evidence at trial." *Id*. at Page ID # 67. The two

controlled buys "constituted the entirety of LPD's investigation into Mr. Sanders's alleged drug activity and were the sole basis for obtaining [the] search warrant[.]" *Id*.

Citing Rule 16 of the Federal Rules of Criminal Procedure, Mr. Sanders noted that the government is obligated to disclose items that are "material to preparing a defense" regardless of whether it intends to introduce them at trial. *Id*. at Page ID # 68 (citing Fed.R.Crim.P. 16(a)(1)(E)(i) and (ii)). Mr. Sanders cited several cases[1] establishing that the "nature of law enforcement's investigation is always relevant to the preparation of a defense." *Id*. Mr. Sanders also pointed out that drug evidence from the controlled buys was a "tangible object" allegedly "obtained from" Mr. Sanders as described in Fed.R.Crim.P. 16(a)(1)(E)(iii). *Id*.

Mr. Sanders argued it would be impossible to "assess the validity of the search warrant…without having access to the case reports and drug evidence relating to the controlled buys that formed the basis for the search." *Id*. at Page ID # 70. He insisted the requested evidence could establish that statements contained within the search warrant affidavit were "deliberately false" or were made with "reckless disregard for the truth[,]" potentially invalidating the search. *Id*. He also noted disclosure and review by the defense was essential "[b]ecause the defendant

[1] *See Kyles v. Whitley*, 514 U.S. 419, 446-47 (1995); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir.1986); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir.1985).

bears the burden of making a preliminary showing that such statements exist within the affidavit in order to trigger a hearing under *Franks v. Delaware*[.]" *Id*.

The government responded that disclosure of the requested materials was not required because the evidence "would not assist [Mr. Sanders] in refuting the charges [for] which he has been indicted[.]" [R. 29: Government Response, Page ID # 168]. The government ignored Mr. Sanders's argument that the drug evidence was allegedly "obtained from" him during the investigation, instead focusing on recordings made by the CI during the controlled buys. *Id*. at Page ID # 170-71. Despite Mr. Sanders making no request for such information, the government repeatedly emphasized its belief that he was only asking for the materials to determine the identity of the CI. *Id*. at Page ID # 167 ("the [g]overnment asserts its privilege to withhold the identity of the confidential informant"); *id*. at Page ID # 169-70 ("Here, the likely reason for the request is to determine the identity of the confidential informant."). The government offered no response to Mr. Sanders's argument that defense review of the materials was necessary because the accused bears the initial burden under *Franks*. *Id*. at Page ID # 170.

In his reply, Mr. Sanders emphasized that he "did not request information about the informant in his motion, nor does he expect the government to disclose the informant's identity[.]" [R. 30: Reply to Response, Page ID # 178]. Mr.

Sanders reiterated that his request "pertains only to case reports and drug evidence from the two controlled buys referenced in the search warrant affidavit[.]" *Id*. (citing [R. 25: Motion for Supplemental Discovery, Page ID # 63-72]). Mr. Sanders noted "[t]he government routinely provides these types of evidence in redacted form without revealing the identities of their informants" and that he was asking for "similar disclosure here, nothing more." *Id*. at Page ID # 178.

Mr. Sanders also said it was "troubling" that the government now acknowledged the existence of recordings of the controlled buys despite prior denials by state prosecutors. *Id*. at Page ID # 179. Regardless, the materiality of the requested items was clear because the two controlled buys were the "entirety" of LPD's investigation and the sole basis for the search warrant. *Id*. at Page ID # 180. Mr. Sanders was "not request[ing] anything out of the ordinary" and emphasized this was "not a fishing expedition about the identity of the confidential informant" or "for materials unrelated to the offenses charged." *Id*. at Page ID # 183. Mr. Sanders was simply "seek[ing] disclosure of case reports and drug evidence from the investigation in this case" to gauge the "caliber of the investigation[,]" "police methods employed in assembling the case[,]" "the environment in which the police secured an alleged confession from Mr. Sanders[,]" and to assess "the sufficiency of the affidavit supporting the search warrant." *Id*. at Page ID # 184 (citations omitted). Mr. Sanders noted "[t]he

government's refusal to disclose the requested materials essentially prohibits" investigation of these issues by the defense. *Id*.

The district court denied Mr. Sanders's motion for supplemental discovery, noting that the Sixth Circuit had "not squarely addressed" whether Rule 16(a)(1)(E) applies to "documents a defendant seeks to discover for the purpose of testing the sufficiency of a search warrant affidavit." [R. 31: Order, Page ID # 192]. The court emphasized "the importance of scrutinizing warrants that lead to searches" of "private residence[s]." *Id*. at n.1. But despite never having reviewed the materials, the court concluded it could not order disclosure because it "would likely reveal the informant's identity" and "it is unlikely there would be much information left for [Mr. Sanders] to use to evaluate the veracity of the affidavit" if "the government redacted all of the information tending to identify" the CI. *Id*. at Page ID # 193. Ignoring the context of his request, the court also found that Mr. Sanders had failed to establish the requested items were material to his defense, only analyzing the issue in terms of potential disclosure of the CI's identity. *See id*. at Page ID # 197 ("The connection between the confidential informant's role in the police investigation and Sanders's defense to the government's case in chief is too attenuated to be material under Rule 16(A)(1)(E)(i)."). Finally, the court dismissed Mr. Sanders's argument that the drugs "obtained from" him during the controlled buys were discoverable under Fed.R.Crim.P. 16(a)(1)(E)(iii). Instead,

the court held only that the drugs themselves could not be returned to him. *Id*. at Page ID # 198-99.

Unable to investigate further, Mr. Sanders filed a motion to suppress. *See* [R. 32: Motion to Suppress, Page ID # 200-18]. He requested an evidentiary hearing and argued that law enforcement's investigation failed to establish the requisite "nexus between the place to be searched and the evidence sought." *Id*. at Page ID # 203. According to the search warrant affidavit, LPD Detective Todd Hart's surveillance during the second controlled buy was "the only instance of law enforcement observing Mr. Sanders driving" from the Yellowstone Parkway apartment "to conduct a drug transaction." *Id*. at Page ID # 205. Mr. Sanders noted also noted the existence of recordings of other LPD personnel describing Hart as "the loosest ethically in the…unit"; saying that it is only "a matter of time until [he] gets jammed up"; and indicating that "it makes you wonder how good of a cope he really is" if he routinely engages in unethical behavior. *Id*. at Page ID # 206.

Mr. Sanders requested a *Franks* hearing to determine "if passages in the affidavit referencing" Detective Hart's "surveillance [were] deliberately false or were made with reckless disregard for the truth[.]" *Id*. In the alternative, Mr. Sanders argued that the search warrant affidavit failed to establish the requisite nexus to the apartment that was searched. *See* [R. 31: Motion to Suppress, Page ID

207-11]. The affidavit said nothing about whether Mr. Sanders lived at that location or stored or sold drugs there. *Id*. at Page ID # 212-15. In his reply, Mr. Sanders reiterated that an evidentiary hearing at this stage would be his only opportunity to question officers about the controlled buys and surveillance leading to the Yellowstone Parkway search.[2] [R. 40: Reply to Response, Page ID # 252-53]. "[A]ny assessment of the validity of the search warrant must come before trial" because Mr. Sanders would have "no recourse to request suppression of evidence" if testimony later revealed the affidavit contained false or misleading information. *Id*. at Page ID # 253.

The district court denied Mr. Sanders's motion to suppress and request for an evidentiary hearing. [R. 41: Order, Page ID # 258-69]. The court determined the nexus requirement was satisfied, and the good faith exception would otherwise apply. *Id*. at Page ID # 265-66; *id*. at Page ID # 266-68.

Mr. Sanders entered a conditional guilty plea to Counts 1-3 of the Indictment reserving the right to challenge the district court's ruling on his motion to suppress and the related supplemental discovery issue. *See* [R. 46: Plea Agreement, Page ID # 281]; [R. 91: Transcript, Rearraignment, Page ID # 508, 511]. The court

[2] Mr. Sanders requested a hearing in part because the district court emphasized in its prior ruling that he would have an opportunity to "evaluate whether the controlled buys and surveillance in this case were legitimate" by "call[ing] the officers who conducted the surveillance to the stand [to testify] about the veracity of the affidavit's statements." [R. 32: Motion to Suppress, Page ID # 206] (citing [R. 31: Order, Page ID # 194, FN. 1]). Given the government's position that the controlled buys were irrelevant to the case as charged, the requested *Franks* hearing would be Mr. Sanders's only chance to question the officers about the affidavit. *Id*.

imposed a sentence of seventy-two months and one day of incarceration. [R. 82: Judgment, Page ID # 383].

On appeal, a divided Sixth Circuit panel issued a published decision on February 6, 2023 reversing the district court's order denying Mr. Sanders's motion to suppress and vacating his convictions and sentence. *See* Appendix B. The panel majority found the search warrant affidavit failed to establish the requisite nexus between Mr. Sanders's drug activity and the Yellowstone Parkway apartment. *Id*. at Pages 5-13. The majority also concluded the affidavit failed to provide the "minimally required nexus" to the apartment required to apply the good faith exception to the exclusionary rule. *Id*. at Pages 13-19. The Sixth Circuit subsequently granted the government's petition for rehearing en banc and issued a divided published opinion affirming the district court's rulings in all respects. *See* Exhibit C.

The en banc vote was significantly split. Nine of the fifteen participating judges joined the majority opinion in full. *See id*. at Page 1. Judge Griffin delivered a separate opinion concurring in the judgment, but not joining a portion of the majority opinion suggesting law enforcement may search the homes of "known drug dealers based solely on a purported inference that evidence is likely to be found where the dealers live." *Id*. at Page 29. To Judge Griffin, this section

was dicta that "is antithetical to our liberties secured by the Fourth Amendment of the Bill of Rights." *Id*. at Page 30.

Judge Mathis delivered his own separate opinion noting his belief that LPD officers "lacked probable cause to search the Yellowstone apartment[,]" but agreeing with the majority that the good faith exception "save[d] the search[.]" *Id*. at Page 31. Judge Davis joined Judge Mathis's opinion in full.

Judges Stranch and Bloomekratz delivered another separate joint opinion concurring in the majority's judgment, but failing to reach the probable cause question because they believed the good faith exception applied. *Id*. at Page 35. They also criticized the majority's suggestion that the supplemental discovery issue was irrelevant, noting the lack of any authority suggesting a district court may "deem[] harmless the failure to disclose, introduce, or admit evidence while blind to its contents." *Id*. at Page 39.

Finally, Judge Clay delivered a dissenting opinion, joined in full by Judge Moore. They concluded the search warrant affidavit failed to establish probable cause and the good faith exception should not apply. *Id*. at Pages 39-57. Given those findings, the dissent said it need not reach the supplemental discovery issue, but noted the "majority's analysis" on that point "bestows an insurmountable burden upon criminal defendants[.]" *Id*. at Page 57. Because defining what satisfies the "materiality" standard under Fed.R.Crim.P. 16 was "relatively

untrodden ground[,]" the dissent insisted courts should rule in favor of defendants "merely seek[ing] relevant information about the case against them[.]" *Id*. at Pages 57-58, 60. By doing the opposite, the majority "misinterprets the Federal Rules of Criminal Procedure, unduly preventing criminal defendants from having a fair opportunity to defend against the charges of the state." *Id*. at Page 60.

REASONS FOR GRANTING THE WRIT

I. The search warrant affidavit in this case failed to establish the requisite nexus to permit a search of a private residence.

This case is about the Fourth Amendment's fundamental purpose—to protect against undue invasions of the home. *See Payton v. New York*, 445 U.S. 573, 585 (1980) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) ("sanctity of private dwellings" is the interest "ordinarily afforded the most stringent Fourth Amendment protection"); *Silverman v. United States*, 368 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to…be free from unreasonable government intrusion"). The Fourth Amendment requires 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." U.S. Const. amend. IV. This language is no mere formality, particularly in the context of searches involving

private residences. In some sense, it is "the very bulwark between citizens and an overzealous, capricious government power." Exhibit C, Page 39.

The divided en banc opinion in this case demonstrates why this Court should grant Mr. Sanders's petition. Nine of the participating judges of the Sixth Circuit held that probable cause supported law enforcement's search of the Yellowstone Parkway Apartment. Four disagreed, while two others never reached the issue because they believed the good faith exception rendered that analysis moot. The majority opinion "contradict[s]" prior precedent and creates "confusion" in a fact-specific area of law. *United States v. Dixon*, 509 U.S. 688, 711 (1993) (citing *Solorio v. United States*, 483 U.S. 435, 439 (1987)). The present outcome is muddled at best and requires significant clarification by this Court.

The en banc majority opinion "violates the well-established principle that a search warrant application must show more than a person connected with a property is suspected of a crime." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). It "would allow governmental intrusion into *any* home that a suspected drug dealer happened to enter following an alleged drug sale." Exhibit C, Page 48. It also "nullifies the distinction between probable cause to arrest a suspect for alleged wrongdoing and the showing required for police to cross the threshold of the home[.]" *Id*. If allowed to stand, the private residences "of friends and family"

will be "vulnerable to the whims of law enforcement once a suspected criminal enters the home." *Id*.

Given how ubiquitous drug-related searches of private residences have become, it is imperative that this Court provide definitive guard rails to eager law enforcement officers engaged in the "often competitive enterprise of ferreting out crime[.]" *Riley v. California*, 573 U.S. 373, 381-82 (2014).

This Court has recognized that the use of illegally seized evidence amounts to "a denial of the constitutional rights of the accused." *Mapp v. Ohio*, 367 U.S. 643, 648 (1961). That is why the Court crafted the exclusionary rule as a "deterrent safeguard" without which "the Fourth Amendment would…be reduced to a form of words." *Id*. These requirements "seek to safeguard citizens from rash and unreasonable interferences with privacy[.]" *Brinegar v. United States*, 338 U.S. 160, 176 (1949). "To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id*.

To protect these interests, courts review affidavits prepared by officers seeking search warrants to ensure they show a likelihood of two things: "first, that the items sought are seizable by virtue of being connected with criminal activity[;]" and second, "that the items will be found in the place to be searched." *Zurcher*, 436 U.S. at 555 n.6 (internal quotation marks omitted). The Fourth Amendment requires a "nexus between the place to be searched and the evidence

sought[,]" and the connection between a private residence and evidence of criminal activity must be specific and concrete, not "vague" or "generalized." *United States v. Carpenter*, 360 F.3d 591, 594-95 (6th Cir.2004) (en banc). Likewise, when an affidavit contains hearsay information from a confidential informant, it must set out the "(1) veracity; (2) reliability; and (3) basis of knowledge" of the informant's tip. Exhibit C, Page 40 (citing *United States v. Gunter*, 551 F.3d 472, 479 (6th Cir.2009)).

Here, police searched a private residence based on a CI's tip without making any effort to confirm the suspect was actually associated with that home and without any criminal activity ever being observed there. The affidavit included "precious few facts" to support "a nexus between the drug evidence" sought and the target home. Appendix C, Page 40. The "lone connection" between "Mr. Sanders's drug activity outside the…apartment and purported drug activity inside" was the CI's tip. *Id*. at Page 41. Yet the tip contained "no statement that the informant had personally bought drugs" from Mr. Sanders, that the affiant had "relied on or worked with the informant on prior occasions, or that the informant had proved reliable in the past." *Id.* Indeed, the affiant "did not assert any belief concerning the reliability of veracity of the informant's tip, let alone provide any factual basis by which the issuing magistrate could assess its reliability or veracity." *Id*. (citing *United States v. Helton*, 314 F.3d 812, 822 (6th Cir.2003)

(explaining that Sixth Circuit precedent requires an affidavit to "contain a statement about some of the underlying circumstances indicating the informant was credible or that his information was reliable"); *United States v. Higgins*, 557 F.3d 381, 390 (6th Cir.2009) (finding insufficient nexus where affidavit did not attest to informant's reliability even though informant was known to the affiant and the issuing magistrate)). Courts simply cannot and "do not accept an affiant's unsupported assertion that an informant is reliable." *United States v. Helton*, 35 F.4th 511, 519 (6th Cir.2022).

Nor does the affidavit in this case set forth the informant's basis of knowledge, "the particular means by which an informant obtained his information." *United States v. Smith*, 182 F.3d 473, 477 (6th Cir.1999) (citing *Illinois v. Gates*, 462 U.S. 213, 228 (1983)). Instead, the affidavit simply states a CI provided a tip that Mr. Sanders was selling drugs from the Yellowstone Parkway apartment. Without any showing of the informant's reliability, and without any statement of the informant's firsthand knowledge about alleged criminal activity at the apartment, the CI's tip necessarily must carry little weight in the probable cause analysis. Exhibit C, Page 42.

To be clear, Mr. Sanders recognizes that an affidavit with these shortcomings may still "support a finding of probable cause, under the totality of the circumstances, if it includes sufficient corroborating information." *United*

States v. Woosley, 361 F.3d 924, 927 (6th Cir.2004). *See also District of Columbia v. Wesby*, 583 U.S. 48, 56-60 (2018) (analyzing probable cause based on totality of the circumstances). But the corroboration in this case "was as deficient as the tip itself." Exhibit C, Page 42. Mr. Sanders entering and exiting the apartment alone provides "no indication of criminal activity within the apartment" particularly when the controlled transactions took place "a driving distance *away* from the apartment[.]" *Id*. (emphasis in original).

The en banc majority cites several cases involving significantly more indicia of probable cause than found in this case. Many of those cases "involved a credible, detailed tip from one or more informants who either observed or engaged in drug activity in the residence to be searched." Exhibit C, Pages 43-44 (citing *United States v. Hines*, 885 F.3d 919, 922 (6th Cir.2018) (two informants had personal knowledge of the defendant storing drugs at the residence to be searched); *United States v. Moore*, 661 F.3d 309, 311-12 (6th Cir.2011) (informant had observed defendant "storing and selling cocaine" at the residence); *United States v. Dyer*, 580 F.3d 386, 388 n.1 (6th Cir.2009) (informant had observed defendant engaging in a drug deal and the storage of large amount of drugs at residence)). Here, however, the CI "provided no specific statements that he or she had personally seen drugs in the apartment or had bought drugs there." *Id*. at Page 44. In fact, "the informant's statement lacks any modicum of evidence that the

informant was ever in the apartment, given its vagueness and law enforcement's contrary observations." *Id*. These cases offer no support for the result here.

The en banc majority also cites cases involving "circumstantial evidence" establishing probable cause. *Id*. at Page 7. Again, however, this case involves no such evidence. "Law enforcement did not establish that Mr. Sanders resided at the Yellowstone Parkway apartment, so officers had no grounds to believe" he might "store evidence there." *Id.* at Page 44 (citing *United States v. Williams*, 544 F.3d 683, 685 (6th Cir.2008); *United States v. Elbe*, 774 F.3d 885, 887 (6th Cir.2014); *United States v. Carney*, 675 F.3d 1007, 1012 (6th Cir.2012); *United States v. Abboud*, 438 F.3d 554, 572 (6th Cir.2006)). Yet the natural consequence of the majority's ruling on this point concerned Judge Griffin to such an extent that he delivered his own separate opinion explicitly rejecting the idea that law enforcement may search the homes of "known drug dealers based solely on a purported inference that evidence is likely to be found where the dealers live." *Id*. at Page 29. Judge Griffin's hesitation is understandable. The majority opinion sweeps too broadly, ignoring prior precedent and making it even more difficult for law enforcement to understand what is required before they may lawfully search a private residence pursuant to the Fourth Amendment.

The en banc majority's opinion "erodes the protections of the Fourth Amendment under the dubious contention of purported application of existing

law." Exhibit C, Page 48. But the Sixth Circuit has never "upheld a similar warrant so lacking in allegations of criminal activity to be found at the place to be searched." *Id*. The panel majority originally considering this case held the search was not supported by probable cause because the affidavit used to obtain the warrant failed to establish the requisite "nexus between the drug evidence officers sought and the Yellowstone Parkway apartment that the officers searched." Appendix B, Page 6. This was the correct result. This Court should grant Mr. Sanders's petition to provide clear guidance to police, prosecutors, and magistrates about what is necessary to permit the kind of search that occurred in this case.

II. The panel majority and en banc dissent correctly held the *Leon* good-faith exception does not apply.

In *United States v. Leon*, 468 U.S. 897, 913 (1984), this Court held that the exclusionary rule does not apply when police officers rely in good faith on a search warrant that is ultimately determined to lack probable cause. In considering whether police acted in good faith, the "inquiry is confined to the objectively ascertainable question [of] whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Id*. at 922, FN.3.

At issue in this case is *Leon*'s third limitation on the good faith exception, which is triggered by a "bare bones" affidavit. *Id*. at 914-23. A bare bones affidavit is one that "states only suspicions, beliefs, or conclusions, without

providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." *United States v. White*, 874 F.3d 490, 496 (6th Cir.2017). An affidavit is not bare bones if it "contain[s] a minimally sufficient nexus between the illegal activity and the place to be searched." *See Carpenter*, 360 F.3d at 596. For the good faith exception to apply, "the officer's reliance on the magistrate's probable cause determination…must be objectively reasonable." *Leon*, 468 U.S. at 922.

As an initial matter, the en banc majority in this case concluded that the search was supported by probable cause, yet it still considered whether the good faith exception should apply. This additional analysis violates the prior precedents of this Court and the Sixth Circuit. The good faith exception is available only in the absence of probable cause. *See United States v. Reed*, 993 F.3d 441, 451 (6th Cir.2021); *Leon*, 468 U.S. at 907 (good faith exception applies to rescue "tangible evidence obtained in reliance on a search warrant…that ultimately is found to be defective). This Court should grant Mr. Sanders's petition to vacate this portion of the majority opinion and to clarify when it is appropriate for reviewing courts to consider potential application of the good faith exception.

Judges Stranch and Bloomekatz were similarly mistaken in bypassing the probable cause analysis entirely and simply concluding that the good faith exception would apply regardless. *See* Exhibit C, Page 35. Their concurrence

exemplifies an approach many judges now take that has transformed the good faith exception into the rule itself. This Court should grant Mr. Sanders's petition to ensure courts do not employ this flawed approach that "never determines whether the warrant is defective[.]" *Id*. at Page 49 n.2. Doing so violates *Leon* and "stymies the development of…probable cause jurisprudence, a disservice to lower courts and parties alike." *Id*.

The officers in this case are narcotics investigators who routinely conduct searches of private residences for evidence of drug activity. Searches like the one occurring at the Yellowstone Parkway apartment are common and prioritized because they often result in the discovery of significant evidence. Given the frequency of these kinds of searches and the important Fourth Amendment principles at stake, suppression is necessary in this case to deter what amounts to "reckless" or "grossly negligent conduct" on behalf of police. *Davis v. United States*, 564 U.S. 229, 237-38 (2011). *See also Herring v. United States*, 555 U.S. 135, 144 (2009).

Even acknowledging the modest bar for warrants to be salvaged under the good faith exception, the search warrant affidavit in this case did not provide the necessary "modicum of evidence" required between the criminal activity at issue and the place to be searched. *Reed*, 993 F.3d at 451. "The mere observation of Mr. Sanders entering a home after a drug deal—along with a deficient tip—is

insufficient." Exhibit C, Page 50. The affiant "gave no indication of the veracity or reliability of the information obtained from the informant, or the factual basis underlying the informant's knowledge." *Id*. Under those circumstances, the dissent is correct that the affiant's reliance "on a deficient tip cannot be deemed reasonable." *Id*.

Worse, the en banc majority applies a lower standard for the good faith exception than dictated by this Court or the Sixth Circuit. Instead of properly analyzing whether the officer's reliance on the warrant was reasonable, the majority requires officers to be on "clear notice" that the affidavit "was so deficient that they acted deliberately, recklessly, or grossly negligent in not second-guessing the judge's decision." *Id*. at Page 16. This is erroneous. As previously discussed, the good faith exception inquiry "is confined" to considering whether "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 FN.23. And when an affidavit fails to "provid[e] some underlying factual circumstances regarding veracity, reliability, and basis of knowledge," then an officer's reliance cannot be deemed reasonable. *White*, 874 F.3d at 496.

"[A] reasonable officer would have known that an unreliable tip merited little, if any, weight…and that [Mr.] Sanders's travel to a residence—which the officers did not know or even suspect to be his—did not establish probable cause

to believe that the residence would contain evidence of a crime." Exhibit C, Page 55. It is "inescapable that officers could have easily corroborated the alleged 'tip' by conducting some independent investigation." *Id*. Yet the affidavit in this case failed to draw any "plausible connection" between Mr. Sanders's drug activity and the apartment. As a result, "the good faith exception cannot apply to save the fruits of this illegal search." *Id*.

Beyond this case, the en banc dissent hints at a much larger issue with the majority's good faith exception analysis:

> Because the majority, and Judge Mathis's concurrence, hold differently, one must wonder what would *not* meet the minimally sufficient nexus, under their ever-lowering standards? The unfortunate truth is that a majority of [the Sixth Circuit] would uphold virtually any search under the good faith exception—no matter how at odds with…precedent, the Fourth Amendment's constitutional mandate, or even the original intent behind *Leon*.

Exhibit C, Page 55. When this Court decided *Leon* in 1984, it thought it was creating an exception to the exclusionary rule that would apply in a limited number of cases. *Leon*, 468 U.S. at 916 n.14 ("[W]e are not convinced that this is a problem of major proportions."). Now, "the seemingly innocuous good faith exception has proven to be an exception that swallows the rule." Exhibit C, Page 55.

Twenty years ago, Sixth Circuit Judge Boyce F. Martin Jr. wrote in dissent that "[r]egrettably, we have descended further down that slippery slope of post-hoc

rationalization, where everything that the police do becomes acceptable when viewed in retrospect." *Carpenter*, 360 F.3d at 604 (Martin J., dissenting). As predicted, this problem has only gotten worse. A recent study analyzing a representative sample of Fourth Amendment suppression cases found that the good faith exception is applied in 77% of federal cases in which it is discussed. *Id*. (citing Matthew J. Tokson & Michael Gentithes, *The Reality of the Good Faith Exception*, 113 Georgetown L.J. (forthcoming 2025)). The en banc majority opinion in this case underscores the fact that courts have effectively lowered the probable cause standard required by the Fourth Amendment to the "minimally sufficient nexus" discussed in *Leon*. This result is at odds with this Court's constitutional jurisprudence and requires its attention.

Rather than limit the good faith exception to cases in which deterrence is allegedly impossible, *Leon* as applied has "created a system in which officers have little incentive to investigate more, to ensure their warrants are supported by probable cause—in other words, to comply with the Constitution." Exhibit C, Page 56. Instead, Justice Brennan's dissent in *Leon* has become reality—Mistakes and misconduct by law enforcement have "virtually no consequence" because illegally-seized evidence will be admitted either way. *Leon*, 468 U.S. at 956. The en banc majority opinion in this case sends a troubling "message to law enforcement that it no longer needs to worry about the sufficiency of a search

warrant affidavit—a nexus can be so minimal as to be non-existent." Exhibit C, Page 56. No matter the circumstances, officers will not be deterred even for obvious violations of the Fourth Amendment.

This Court should grant Mr. Sanders's petition to put an end to the steady erosion of one of our most fundamental rights. The en banc majority opinion "lower[s] the bar for police entry into the most sacred of places: the home." *Id*. As the en banc dissent put it:

> Time and time again, we have seen the disastrous results when police, as in this case, depend on unreliable tips without conducting proper surveillance to confirm a residence's connection with criminal activity….It is little consolation that police found drugs at the Yellowstone Parkway apartment and that, thankfully, no one was hurt. Today's decision makes it easier for law enforcement to enter *anyone's* home, so long as there is a tenuous connection to someone suspected of wrongdoing. Permitting the police, armed with weapons, to cross the threshold of the home is a serious breach of a constitutionally protected area with a potential for violent consequences. But the majority fails to grapple with the fact that its holding makes such grave situations more likely, making today's decision all the more dangerous.

Id. at Pages 56-57 (emphasis in original).[3]

[3] *See, e.g.,* William K. Rashbaum, *Woman Dies after Police Mistakenly Raid Her Apartment*, N.Y. Times (May 17, 2003) (available at: https://www.nytimes.com/2003/05/17/nyregion/woman-dies-after-police-mistakenly-raidher-apartment.html) (police broke down door of 57-year-old woman's apartment based on drug dealer informant's tip that his supplier stored guns and drugs there); Radley Balko*, Still Waiting for Justice after SWAT Team Member Kills Innocent Grandfather*, Wash. Post (Jan. 6, 2015) (available at: https://www.washingtonpost.com/news/the-watch/wp/2015/01/06/still-waiting-for-justiceafter-swat-team-member-kills-innocent-grandfather/) (police shot and killed 68-year-old grandfather during drug raid at his home after two confidential informants alleged they had purchased drugs from grandfather's stepson); Ernie Suggs, *City to Pay Slain Woman's Family $4,9 Million*, Atlanta J-Const. (Aug. 16, 2010) (available at: https://www.ajc.com/news/local/city-pay-slainwoman-family-million/GWqsgDArzmOhvpb7iPY6FI/) (police shot and killed 92-year-old woman while executing warrant on her home based on information provided by informant who claimed to have purchased drugs in her house).

The exclusionary rule exists for precisely these situations, to "deter" law enforcement from "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" leading to violations of the most essential interest protected by the Fourth Amendment. *Herring*, 555 U.S. at 144. The search in this case exemplifies a recurring issue that implicates the Fourth Amendment rights of citizens throughout this country every day. Intervention by this Court is necessary to ensure law enforcement is properly deterred from engaging in the "chief evil" the Fourth Amendment was designed to prohibit. *Payton*, 445 U.S. at 585.

III. The discovery rules and due process require disclosure of evidence relied upon by law enforcement to secure a search warrant for a private residence.

Beyond the warrant itself, this case presents another recurring issue that implicates the fundamental purpose of the Fourth Amendment. Police obtained the search warrant in this case based solely on the two controlled buys involving Mr. Sanders. The search warrant affidavit makes no reference to any other criminal activity and provides no justification for the search other than the controlled buys. *See* Appendix D. Despite acknowledging the existence of case reports and other evidence relating to those transactions, the government refused to disclose anything about them. The district court denied Mr. Sanders's request for discovery

without a hearing and without even reviewing the materials at issue.[4] This decision, affirmed by the en banc majority, "put[s] discovery out of reach for the vast majority of, if not all, criminal defendants" and violates Mr. Sanders's substantial rights.[5] Appendix C, Page 58.

To understand the impact of this issue, it is important to first consider that there is a "presumption of validity with respect to the affidavit supporting [a] search warrant." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). For that reason, the accused bears the initial burden of production to trigger a hearing on potential falsehoods or misleading information included in a search warrant affidavit. *Id*. More generally, "[a]n evidentiary hearing is required" when a motion establishes "that contested issues of fact going to the validity of [a] search are in question." *United States v. Ickes*, 922 F.3d 708 (6th Cir.2019). In either instance, the defendant is required to make a preliminary showing about a contested factual issue impacting the validity of the search.

The most basic method for investigating these issues is reviewing the evidence provided in discovery pursuant to Fed.R.Crim.P. 16. The government

[4] Judges Stranch and Bloomekatz noted in their concurrence that they "are aware of no other context in which" a reviewing court "deems harmless the failure to disclose, introduce, or admit evidence while blind to its contents[,]" and the "majority cites none." Appendix C, Pages 37-38.

[5] The panel dissent recognized the district court "erred in its analysis of Federal Rule of Criminal Procedure 16(a)(1)(E)(iii)" as to the drug evidence from the controlled buys because the Rule requires that a "defendant be allowed to inspect and to photocopy documents or objects that are within the government's control" if "the item was obtained from or belongs to the defendant." Appendix B, Page 31 n.3. Yet the en banc majority entirely ignored this issue, instead erecting a broad prohibition on discovery sought by defendants. This is yet another aspect of the majority opinion requiring the attention of this Court.

routinely discloses case reports, body camera footage, photographs of the scene, and other items related to investigations just like the one at issue in this case. The government does so because those items are necessarily material to the defense. *United States v. Lykins*, 428 Fed.Appx. 621, 624 (6th Cir.2011). But here, the government has taken the position that it is not obligated to disclose anything related to the underlying investigation that led to Mr. Sanders's prosecution.[6] As a result, Mr. Sanders could not assess the circumstances leading to the search of the Yellowstone Parkway apartment, much less meaningfully challenge the validity of the search warrant on those grounds. Not only is this outcome untenable under the Rule 16 and violative of Mr. Sanders's due process rights, it also provides an avenue for prosecutors to shield evidence of police misconduct from disclosure based solely on charging decisions left entirely to their discretion.

The en banc majority misreads this Court's decision in *United States v. Armstrong*, 517 U.S. 456 (1996), as preventing a criminal defendant from seeking discovery related to a search warrant used to seize the evidence being introduced against him. The majority claims *Armstrong* requires this result because Mr.

[6] Mr. Sanders's request for supplemental discovery was triggered in part by recordings of LPD officers referencing Detective Hart as "the loosest ethically in the…unit"; saying that it is only "a matter of time until [he] gets jammed up"; and indicating that "it makes you wonder how good of a cope he really is" if he routinely engages in unethical behavior. [R. 32: Motion to Suppress, Page ID # 206]. Hart was the only officer who allegedly saw Mr. Sanders leave the Yellowstone Parkway apartment to participate in a drug transaction, a significant factor in the totality of the circumstances and nexus analysis. *See* Appendix D, Page 5. This context was ignored by the district court in its materiality analysis. Likewise, the concurring opinion by Judges Stranch and Bloomekatz disregarded this concern based on a misunderstanding of the contents of the search warrant affidavit. *See* Appendix C, Page 37 (suggesting "multiple officers observed the same conduct as" Hart).

Sanders failed to make an adequate showing that the evidence would combat the government's case-in-chief. But *Armstrong* only says that criminal defendants cannot use Rule 16 to seek discovery of evidence to aid a selective prosecution claim. *Armstrong*, 517 U.S. at 462-63. This Court reached this conclusion because Rule 16 can be used only as a "shield" mechanism to attack the government's case-in-chief as opposed to a "sword" to challenge the prosecution's conduct in the case. *Id*.

The type of discovery Mr. Sanders sought fits squarely within the "shield" definition. Appendix C, Page 58. The government relied on the evidence seized at the Yellowstone Parkway apartment to pursue his convictions, thus suppression of that evidence certainly would have harmed the government's case-in-chief. Unlike a selective prosecution claim that is entirely collateral to the case against the defendant, the discovery Mr. Sanders sought "could have vitiated the government's case against him." *Id*. (citing *Armstrong*, 517 U.S. at 462-63).

Beyond this issue, the en banc majority interprets "materiality" in the context of Rule 16 so narrowly that a defendant in Mr. Sanders's position would only be entitled to the requested evidence if he first established that it would prove "he did not possess the guns or narcotics found at the apartment." *Id*. at Page 25. The majority's analysis conflates "material" evidence with "exculpatory" evidence, essentially requiring those accused of crimes to make a preliminary showing of

their factual innocence to be allowed access to any evidence the government says it does not intend to introduce at trial. This holding conflicts with the plain language of Rule 16 and violates Sixth Circuit precedent requiring only "an indication that pre-trial disclosure would…enable[] the defendant to alter the quantum of proof in his favor." *Lykins*, 428 Fed.Appx. at 624. *See also Armstrong*, 517 U.S. at 463 (observing that Rule 16 requires only that a defendant seek "documents material to the preparation of their defense against the [g]overnment's case in chief"); *United States v. Soto-Zuniga*, 837 F.3d 992, 1003 (9th Cir.2016) (quoting *United States v. Hernandez-Meza*, 720 F.3d 760, 768 (9th Cir.2013)) ("Materiality is a 'low threshold; it is satisfied so long as the information…would have helped' to prepare a defense.").

As the en banc dissent correctly recognizes, Mr. Sanders's discovery request easily met the prevailing standards of this Court and the Sixth Circuit. All criminal prosecutions necessarily involve disputes over the admissibility of evidence. For that reason, the method and procedures law enforcement utilized to collect the evidence it intends to rely upon at trial is of "utmost importance" to citizens like Mr. Sanders accused of serious crimes. Appendix C, Page 59. The majority's simplistic dismissal of Mr. Sanders's argument because the requested evidence would not have changed the fact that law enforcement discovered drugs and firearms in the Yellowstone Parkway apartment ignores the obvious—Mr. Sanders

was convicted of multiple criminal offenses based solely on evidence discovered in that apartment pursuant to the warrant at issue. Materiality analysis is not black and white, nor is the standard so high that the evidence requested must prove a defendant is factually innocent. Instead, courts are required to "consider the logical relationship between the information withheld and the issues in the case, as well as the importance of the information in light of the evidence as a whole." *Lykins*, 428 Fed.Appx. at 624. The controlled buy evidence in this case clearly satisfied this requirement.

This Court should grant Mr. Sanders's petition because "the operative definitions of what qualifies as a 'shield' or 'materiality' [were] relatively untrodden ground" for the Sixth Circuit before its decision in this case. Appendix C, Page 60. Without the benefit of any meaningful guidance from this Court, the en banc majority has interpreted Rule 16 so narrowly that "criminal defendants, already vulnerable to the Goliath-like powers of the state in an adverse proceeding" will be unable to seek "relevant information about the case against them[.]" *Id*. The majority implicitly recognizes that "criminal defendants" often "need discovery to show that they need discovery," yet it provides them no means to obtain it. This puts citizens like Mr. Sanders in an impossible situation. Our system is not designed to defer to the government when defendants face a Catch-22 implicating their constitutional rights. The majority's opinion misinterprets the

Federal Rules of Criminal Procedure and unduly prevents criminal defendants from having a fair opportunity to defend against the charges of the state. This Court should intervene to protect the due process rights of Mr. Sanders and all citizens like him.

CONCLUSION

For the foregoing reasons, Mr. Sanders respectfully asks this Court to grant his petition for the issuance of a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jarrod J. Beck, counsel for Petitioner Antwone Sanders, do hereby certify that the original and ten copies of this Petition for Writ of Certiorari were mailed to the Office of the Clerk, Supreme Court of the United States, Washington, DC 20543. I also certify that a copy of this Petition was served by mail with first-class postage prepaid upon Sofia Vickery, United States Department of Justice, Appellate Division, 950 Pennsylvania Avenue NW, Suite 1264, Washington, DC 20530, and Lauren Bradley, Assistant United States Attorney, Eastern District of Kentucky, 260 West Vine Street, Suite 300, Lexington, Kentucky 40507-1612.

This 26th day of September, 2024.

/S/ JARROD J. BECK

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