No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERRELLE GLADDEN,

Petitioner,

vs.

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

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QUESTIONS PRESENTED

In federal criminal trials around the country, defense witnesses regularly are excluded because they will "plead the Fifth." In the Eleventh Circuit, such witnesses may be excluded entirely if they will refuse to answer *essentially all* — but not absolutely all — relevant questions. Conversely, other circuits, such as the Fourth Circuit, hold that a witness may be excluded entirely only if he will refuse to answer *any and all* relevant questions. This Court has not opined on the rule, and it must be refined. In practice, the rule as expressed by the Eleventh Circuit violates a defendant's Sixth Amendment right to call witnesses for his own defense. As this case shows, just one question could elicit an answer that would create reasonable doubt. The first question presented therefore is:

> May a district court exclude a defense witness when he will invoke the Fifth Amendment in response to certain questions but undisputedly will answer at least one relevant and highly probative question?

Petitioner also wishes to present the following additional questions: The second question presented is whether an affidavit in support of a search warrant based on a confidential informant is sufficient under the Fourth Amendment when it fails to adequately demonstrate the informant's reliability? The third question presented is whether a marijuana conviction in a state like Alabama may properly serve as the basis for the application of the career offender enhancement under the Sentencing Guidelines? And the fourth question presented is whether the Sixth Amendment guarantee of the assistance of counsel protects a defendant's right to participate, in collaboration with his lawyer, in questioning and argument?

PARTIES TO THE CASE

Jerrelle Quintez Gladden, who was the defendant-appellant below, is the Petitioner. The United States of America, which was the plaintiff-appellee below, is the Respondent.

DIRECTLY RELATED PROCEEDINGS

There are no proceedings "directly related" to this case. *See* Sup. Ct. R. 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jerrelle Gladden respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit.

OPINIONS BELOW

The district court entered judgment against Mr. Gladden, finding him guilty of three crimes: possession, with intent to distribute, of 5 grams or more of methamphetamine (in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)); possession of a firearm in furtherance of a drug trafficking crime (in violation of 18 U.S.C. § 924(c)(1)(A)(i)); and possession of a firearm following a felony conviction (in violation of 18 U.S.C. § 922(g)(1)). The district court's judgment is in Appendix C at App. 040.

The Eleventh Circuit's unpublished opinion in this case is available at 2024 BL 236218 and 2024 WL 3373702 (11th Cir. July 11, 2024). The opinion and judgment are in Appendix B at App. 005.

The Eleventh Circuit denied a timely petition for rehearing on September 5, 2024. The denial of the petition for rehearing is in Appendix A at App. 003.

JURISDICTIONAL STATEMENT

This Petition is being filed within 90 days of the date on which the Eleventh Circuit issued its denial of the petition for rehearing. [App. A at App. 003.] This Petition therefore is timely. *See* Sup. Ct. 13.3

RELEVANT CONSTITUTIONAL PROVISIONS

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

U.S. Const. amend. IV.

> 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 offence 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.

U.S. Const. amend. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

Rashad Forbes was a key witness in the prosecution of Jerrelle Gladden. Forbes was Mr. Gladden's cousin, and he had access to their grandmother's house, where law enforcement located the methamphetamine and firearms that resulted in Mr. Gladden's convictions in this case. He also lived nearby. And while he was free at the time of the crime, he was in prison for methamphetamine crimes at the time of trial. Mr. Gladden had a Sixth Amendment right to call Forbes to the stand to testify to these facts, none of which is incriminating for Fifth Amendment purposes. And as the proffer shows, he would have freely testified to those facts, which undisputedly would have been relevant to Mr. Gladden's theory of defense that someone other than Mr. Gladden had possession of the contraband. The district court subjected him to a blanket exclusion, however, because he would have asserted his Fifth Amendment rights in response to certain other incriminating questions asked by the government, such as "did you have methamphetamine at your grandmother's house?" His missing testimony was momentous. After deliberating for less than half an hour, the jury sent out a question: "Was Rashad in prison in January of 2020?"

The Eleventh Circuit affirmed that decision on the basis that Forbes refused to answer "essentially all relevant questions," which is an amorphous and unfair standard that contrasts with the rule applied in other Circuits.

Mr. Gladden also wishes to present issues regarding the Fourth Amendment search and seizure, the district court's denial of his right to a "hybrid defense," and the sentencing disparity created by his previous marijuana conviction.

I. Facts and Proceedings at Trial

A. The District Court Excluded a Key Defense Witness

At trial, the relevance of putting Forbes on the stand was apparent. Mr. Gladden established that other people had access to the home where law enforcement found the drugs and the guns.[1] Various drugs were found throughout the home.[2] Around ten people either lived at the house or had previously been known to live at the address, including Forbes. Any individual who knew the birthday of the homeowner could access the house, as the birthday was the passcode to a keypad to enter the home.[3] This back-and-forth with Mr. Gladden's sister is indicative of the kind of access to the home that someone like Forbes would have had:

> **Q**: Who is Rashad Forbes?
>
> . . . .
>
> **A**: My cousin.
>
> **Q**: Your cousin. Did he ever stay at your grandmother's house?
>
> **A**: . . . [S]ometimes when his girlfriend and him got into it, they all come back to my grandmama's house sometimes. So they used to be in and out, not specifically there all the time. So they are, like, in and out as they please.[4]

Striving to show that the government could not prove the elements of the crime beyond a reasonable doubt, Mr. Gladden called Forbes to testify. Because Forbes

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[1] Trial Tr., Vol. III, at 363–66.
[2] Trial Tr., Vol. II, at 201.
[3] Trial Tr., Vol. III, at 364.
[4] Trial Tr., Vol. III, at 364–64.

planned to invoke the Fifth Amendment to some questions, the district court held a proffer.

During the proffer, without invoking the Fifth Amendment, Forbes testified to the following: (1) his name; (2) the fact that his grandmother lived at the address in question; (3) the fact that he is in custody for methamphetamine distribution; (4) the fact that he lived nearby the scene of the crime at the time of the search of the house and arrest of Mr. Gladden; and (5) the fact that he went into custody for those charges in December 2021.[5] Those answers demonstrated that Forbes is presently incarcerated for distributing methamphetamine but that he was not incarcerated in January 2020, when law enforcement found the methamphetamine and arrested Mr. Gladden. These are highly material facts in light of the jury's duty to decide whether it was Mr. Gladden who possessed the methamphetamine. And Mr. Gladden's counsel did not wish to go any farther:

> **Defense Counsel**: I don't want the Court to allow him to invoke in front of the jury. I think the Court -- we can, outside the presence of the jury, say, hey, this is what is going to be permitted as far as the questioning of this witness. You will ask him this, and that's it.[6]

Despite the obvious importance of this testimony to Gladden's defense, and despite the district court's initial remarks about the testimony of Forbes, the district court refused to allow Forbes to testify in front of the jury because he invoked the Fifth Amendment privilege during later questioning. True enough, he pleaded the Fifth Amendment when the government asked if he was there at the scene of crime,

[5] Trial Tr., Vol. III, at 395–96.
[6] Trial Tr., Vol. III, at 406.

if he possessed the methamphetamine, and if distributed the methamphetamine.[7] But none of that was material to the line of questioning that did *not* prompt the invocation of the Fifth Amendment. Nevertheless, the district court rationalized its ruling thus: "Neither side has the right to benefit from any inferences the jury may draw simply from the witness's assertion of the privilege, either alone or in conjunction with questions that have been put to him."[8]

Due to the district court's refusal, the jury did not hear the timeline of Forbes's criminal activity combined with his access to the residence, which likely would have created reasonable doubt. In fact, because of the lack of direct testimony on Forbes's potential access to the home, the jury was seemingly conflicted during deliberations. After deliberating for less than half an hour, the jury asked the district court a question: "Was Rashad in prison in January of 2020?"[9] The district court instructed the jury to "consider only the evidence that's been admitted in this case." And that, of course, did not include Forbes's testimony, which would have unmistakably established that he — a convicted methamphetamine dealer who had access to the house in question — was not prison in January 2020.

Thus, the jury did not hear evidence that likely would have changed the outcome of the verdict. And several hours after the district court's answer to the jury's question, the jury found Mr. Gladden guilty on all three counts.

[7] Trial Tr., Vol. III, at 396–98.
[8] Trial Tr., Vol. III, at 405.
[9] Trial Tr., Vol. III, at 504.

B. The District Court Failed to Exclude Evidence Obtained Pursuant to a Deficient Search Warrant

Before all this, there was a deficient search warrant that led to Mr. Gladden's arrest and these charges. In the affidavit submitted in support of the search, the officer stated that, "[w]ithin the past 24 hours," he had "spoken with a confidential and reliant informant [(the "CI")], who stated that within the past 72 hours he/she was at [the residence] and witnessed a person possessing an amount of alprazolam (xanax) inside of the residence."[10] The alleged CI claimed that the "pills were packaged in a clear plastic bag," but no other information was provided about these particular pills — not even a description of the "amount" or a specific averment that the prescription drug was possessed otherwise than pursuant to a prescription. The CI also apparently claimed to have "observed several firearms throughout the house," but again, the affidavit was devoid of particulars.[11] It did not provide any details about the circumstances of the presence of firearms. According to the attesting officer, the CI was "considered reliable as his/her information and assistance has led to the delivery of controlled substance [sic] in the past" and was "familiar with alprazolam (xanax) and the way in which it is packaged and sold for profit." But all this was based on the observation of an undisputedly legal drug — alprazolam.

On the basis of these facts, law enforcement officers executed a search warrant at a residence in Anniston, Alabama. The search produced several grams of methamphetamine and two firearms. Law enforcement officials arrested Mr.

[10] Motion to Suppress, Doc. 48, Attachment 1, Affidavit, ¶ 4.
[11] Motion to Suppress, Doc. 48, Attachment 1, Affidavit, ¶ 5.

Gladden and charged him with controlled substances and firearms crimes. Before trial, the district court denied Mr. Gladden's motion to suppress.[12]

C. The District Court Denied Mr. Gladden's Request to Represent Himself in a Hybrid Manner

Also before trial, Mr. Gladden requested permission to actively participate in his defense in collaboration with his trial counsel, including the right to question witnesses and argue points of law directly, but the district court refused that request.[13] Mr. Gladden sees this as "hybrid" between self-representation and outside representation and contends that the district court's refusal violated his Sixth Amendment right to represent himself under Faretta *v. California*, 422 U.S. 806 (1975).

D. The District Court Used a Marijuana Conviction to Support the Application of the Career Offender Guidelines

At sentencing, the district court applied a career offender enhancement based only a marijuana possession "for other than personal use" charge. The PSR stated that this previous conviction was based on these facts: "The vehicle was searched, and officers found a plastic bag contained several smaller plastic bags containing marijuana. Several hollowed-out blunt cigars were also discovered . . . ."[14] Under the Sentencing Guidelines § 4B1.1(a), the career offender provisions apply only if the "defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." And the term "controlled substance offense" means an

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[12] Report and Recommendation, Doc. 82; Order Adopting Report and Recommendation, Doc. 85.
[13] Motion for Hybrid Defense, Doc. 109; Pre-Trial Hearing Tr. at 4.
[14] PSR, ¶ 54.

offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits . . . the possession of a controlled substance (or a counterfeit substance) *with intent to manufacture, import, export, distribute, or dispense*." § 4B1.2(b) (emphasis added). The marijuana possession statute under which Mr. Gladden was convicted, however, prohibited "possess[ing] marihuana for other than personal use." Ala. Code § 12A-11-213(a)(1). Not only do other states not criminalize marijuana possession, which creates an unfair disparity, but the Alabama statute itself does not establish manufacturing, importing, exporting, distributing, or dispensing, so the career offender provisions never should have been applied.

The district court then sentenced Mr. Gladden to 330 months in prison.

II. The Appeal at the Eleventh Circuit

The Eleventh Circuit affirmed. [App. B, at App. 005.] As for the key question about Forbes, the court cited key binding precedent: "While a blanket assertion of the privilege without inquiry by the court is unacceptable, a witness may be excused if the court finds that he could 'legitimately refuse to answer essentially all relevant questions.'" [Opinion, App. B, at App. 031.] But the court brushed aside Forbes's willingness to answer those important questions identified above by stating only that "Forbes would answer basic questions such as his name." [Opinion, App. B, at App. 032.] The court also ignored the jury's question about Forbes.

The court affirmed on all other issues.

REASONS FOR GRANTING THE WRIT

If the Sixth Amendment guarantee of "compulsory process for obtaining witnesses in his favor" means anything, it must mean that Mr. Gladden can ask a key witness a question that does not trigger the right to remain silent. This is especially true where, as here, the answer is something that the jury clearly wanted to know. The Eleventh Circuit, however, appears to be applying what amounts to a squishy balancing test: If the witness will plead the Fifth to some questions but answer others, then the testimony should be excluded. Indeed, in the Fifth and Eleventh Circuits, a "witness may be totally excused only if the court finds that he could legitimately *refuse to answer essentially all relevant questions*." *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980) (emphasis added); *see also United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974) ("If it appears that a witness intends to *claim the privilege as to essentially all questions*, the court may, in its discretion, refuse to allow him to take the stand." (emphasis added)). The Rule is the same in the Ninth Circuit. *See United States v. Tsui*, 646 F.2d 365, 368 (9th Cir. 1981) ("A trial court may sustain a claimed right to refuse to testify if the court, based on its knowledge of the case and of the testimony expected from the witness, can conclude that the witness could 'legitimately refuse to answer essentially all relevant questions.'").

The case law, however, ***does not expand on the meaning of*** "***essentially all***," which is what caused the problem in Mr. Gladden's case. Mr. Gladden was fully prepared to answer several key questions, even though he would have asserted the

Fifth Amendment in response to the rest. But the Eleventh Circuit found that the ones to which he pleaded the Fifth constituted "essentially all" of the questions.

The D.C., First, and Fourth Circuits, however, appear to follow a stricter rule. *See, e.g.*, *United States v. Thornton*, 733 F.2d 121, 126–27 (D.C. Cir. 1984) ("[I]f the defense counsel had ***proffered a particular line of questioning***, supported by reasons to believe that the witness would not invoke his fifth amendment privilege as to those questions, the district judge might have permitted such questioning." (emphasis added)); *United States v. Fletcher*, 56 F.4th 179, 184 (1st Cir. 2022) ("[O]ur case law prefers that the trial court conduct a 'particularized inquiry' to see ***whether there are specific questions*** that are outside the scope of the privilege and can be explored by both parties without unfairness." (emphasis added)); *Gaskins v. McKellar*, 916 F.2d 941, 950 (4th Cir. 1990) ("A witness may be totally excused only if the court finds that he could legitimately ***refuse to answer any and all relevant questions***." (emphasis added)). If this absolute rule were followed, Mr. Gladden would have been able to call Forbes to the stand.

This Court should take this case for the purpose of setting down a clear rule that eliminates the murkiness of the "essentially all" standard and provides that a witness may be excluded only if there are *no* relevant questions that are outside the scope of the privilege.

I. This Case Is the Right Vehicle for This Court to Once and for All Announce the Rule Governing the Exclusion of Witnesses Who Plead the Fifth Amendment

A. Mr. Gladden Had the Right to Elicit Relevant Testimony That Undisputedly Would Not Have Triggered the Invocation of the Fifth Amendment

1. The Eleventh Circuit's Rule Allows District Courts to Exclude Witnesses Who Would Answer *Some* Relevant Questions

The rule should be that a witness may be excluded only if he invokes the Fifth Amendment privilege in response to "all questions" and does not answer any substantive questions. The Former Fifth Circuit's cases provided the right context for this rule. In *Lacouture*, border officials arrested the defendant for attempting to bring hallucinogenic drugs into the United States. *Lacouture*, 495 F.2d at 1239. When coming into the country, the defendant drove another person's car. *Id.* At trial, the defense sought testimony from the owner of the car. *Id.* Outside the jury's presence, each side questioned the car owner. *Id.* The owner's attorney advised the parties that she planned to invoke her Fifth Amendment privilege. *Id.* After the car owner stated her name and address, she invoked her privilege and ***refused to answer any questions***. *Id.* The court held she could not testify in front of the jury. S*ee id.* at 1240. The court reasoned the inferences drawn by the jury because of her silence would be improper because the witness planned to invoke the privilege to "essentially all" questions. *See id.* So here, the "essentially all" standard really meant "all."

The Former Fifth Circuit reiterated this principle in even starker terms a few years later in *United States v. Goodwin*: "The witness may be totally excused only if the court finds that he could legitimately refuse to answer essentially *all* relevant

questions." 625 F.2d at 701 (emphasis added). The *Goodwin* court then stated: "The convictions of all three defendants must be reversed because the trial judge allowed the two witnesses to make blanket assertions of their Fifth Amendment rights regardless of the questions to be asked by defense counsel." *Id.* Indeed, exclusion is appropriate only if there is a "***finding that every question would tend to incriminate*** [the witness]." *Id.* (emphasis added).

Forbes did not refuse to answer all questions asked, making this a clear-cut case. But because of the squishy standard calling for exclusion if the witness will refuse to answer "essentially all" questions, the Eleventh Circuit has liberalized the rule such that Forbes was excluded just because he would have refused to answer *some* questions. This was all made possible only because the legal standard — *essentially all* — is inherently ambiguous, as demonstrated here:

> [T]he court properly found that Forbes validly asserted his Fifth Amendment right against self-incrimination when he did not answer questions about his connection to the residence or about whether the drugs at the residence were his. While Forbes would answer basic questions such as his name, the court determined that he legitimately refused to answer essentially all relevant questions relating to the key issues at Gladden's trial.

[App. B at 032.] Those other basic questions, of course, were immensely important. Forbes would have answered several questions on different topics: his relationship to the person who owned the home where law enforcement executed the search warrant (grandson-grandmother), where he lived at the time of the search (nearby his grandmother's home), and his history with drug distribution (a conviction and current imprisonment for methamphetamine-related crimes). Forbes also provided the date he was incarcerated for distributing methamphetamine. Forbes thus answered

questions relevant to the investigation and charges filed against Gladden. Nevertheless

The Ninth Circuit follows the same flawed rule. *See United States v. Tsui*, 646 F.2d 365, 368 (9th Cir. 1981) ("A trial court may sustain a claimed right to refuse to testify if the court, based on its knowledge of the case and of the testimony expected from the witness, can conclude that the witness could 'legitimately refuse to answer essentially all relevant questions.'").

2. The Better Rule Is an Absolute Rule Providing That a Witness May Be Excluded Only If He Will Refuse to Answer Any Relevant Questions

To avoid the injustice that was created in this case, this Court should side with the courts in the D.C., First, and Fourth Circuits, which have a more absolute rule. *See United States v. Thornton*, 733 F.2d 121, 126–27 (D.C. Cir. 1984) ("[I]f the defense counsel had ***proffered a particular line of questioning***, supported by reasons to believe that the witness would not invoke his fifth amendment privilege as to those questions, the district judge might have permitted such questioning." (emphasis added)); *United States v. Fletcher*, 56 F.4th 179, 184 (1st Cir. 2022) ("[O]ur case law prefers that the trial court conduct a 'particularized inquiry' to see ***whether there are specific questions*** that are outside the scope of the privilege and can be explored by both parties without unfairness." (emphasis added)); *Gaskins v. McKellar*, 916 F.2d 941, 950 (4th Cir. 1990) ("A witness may be totally excused only if the court finds that he could legitimately ***refuse to answer any and all relevant questions***." (emphasis added))

Under such a rule, Forbes's testimony would have been admitted because he would have provided answers to multiple questions related to his potential involvement with the events in January 2020. His testimony during the proffer outlined that he was not incarcerated at the time of the search and lived in Anniston, Alabama. Furthermore, he detailed that he is currently incarcerated because he was convicted for methamphetamine distribution — the same substance found in the home. This obviously would have allowed Mr. Gladden to argue in closing that it was Forbes — not Mr. Gladden —who was responsible for the contraband. Importantly, Forbes only invoked the Fifth Amendment when asked direct, incriminating questions.

This Court has never opined on the correct standard for excluding witnesses who will invoke the Fifth Amendment. Because Forbes invoked it for some but not all questions, this case is the perfect vehicle for this Court to announce a rule that witnesses should be excluded only if they will refuse to answer *all* relevant questions.

B. Mr. Gladden Did Not Call Forbes to the Stand for the Purpose of Making Him Invoke the Fifth Amendment

It is widely accepted that a defendant cannot call a witness to the stand for the purpose of making the witness invoke. *See, e.g., Lacouture*, 495 F.2d at 1240; *United States v. George*, 778 F.2d 556, 562–36 (10th Cir. 1985); *United States v. Vandetti*, 623 F.2d 1144, 1147–49 (6th Cir. 1980); *United States v. Trejo–Zambrano*, 582 F.2d 460, 464 (9th Cir. 1978); *Royal v. Maryland*, 529 F.2d 1280, 1281 (4th Cir. 1976); *United States v. Harris*, 542 F.2d 1283, 1298 (7th Cir. 1976). But Mr. Gladden did not call Forbes to use Fifth Amendment silence against Forbes and benefit from him

invoking the Fifth Amendment privilege. Mr. Gladden knew that Forbes would answer key, substantive questions that were crucial to Mr. Gladden's defense. These included the timeline of when law enforcement officials indicted and incarcerated Forbes, as well as the fact that he had access to the house and had a history of methamphetamine convictions. And none of that required the invocation of the Fifth Amendment. Thus, that issue is not implicated in this case.

II. The Affidavit in Support of the Search Warrant Was Insufficient to Establish Probable Cause, and this Court Should Refine *Gates* to Prevent Search Warrant Affidavits Based on the Observation of *Legal* Items

The task of the magistrate issuing a warrant is "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there exists a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238 (1983). If that determination cannot be made, the search is unreasonable, and evidence seized as the result of an illegal search may not be used by the government in a subsequent criminal prosecution. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978). The exclusionary rule, as it is known, is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

This Court should refine *Gates* and hold that the affidavit here was insufficient. At the core of the affidavit are two undisputedly *legal* activities: Possessing alprazolam and possessing firearms. According to a 2018 analysis,

"[a]lprazolam is not only the most commonly prescribed benzodiazepine, but it is the *most commonly prescribed psychotropic medication in the United States*, accounting for *more than 48 million prescriptions* dispensed in 2013." "A Review of Alprazolam Use, Misuse, and Withdrawal" J. Addict. Med. 2018, *available at* National Library of Medicine, National Institutes of Health (emphasis added).[15] That's 48 million legal prescriptions for a legal drug. Nor is the presence of guns rare, let alone illegal — at least half of Alabamians live in a house with a firearm. *See* "Gun Ownership in America," RAND Corporation.[16] But the district court dismissed the reality that these activities are legal because "[t]aken together," it appeared that "Xanax was present at the house in a manner consistent with its sale for profit, and that firearms were located throughout the house consistent with Officer Thompson's experience concerning drug dealers." And the Eleventh Circuit endorsed this reasoning. [App. B, at App. 027.]

Simply put, this is a bridge too far. How did the officer decide they were drug dealers? It is beyond the pale to suggest that anyone with prescription pills in *one* bag —the affidavit conspicuously uses the singular, not the plural — and guns in the house is a drug dealer. The affidavit says nothing about these pills actually being sold

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[15] The cited article is available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5846112/#:~:text=Alprazolam%20is%20not%20only%20the,2013%20(Grohol%2C%202016). This information is provided for contextual purposes only and was not before the district court.

[16] The cited article is available at https://www.rand.org/research/gun-policy/gun-ownership.html. This information is provided for contextual purposes only and was not before the district court.

or actually being packaged for sale, any other accessories used to package and sell pills such as scales or ledgers, how many pills there were, whether anyone had a prescription for the pills, when the CI saw the pills, whether the pills were near the firearms, how many firearms there were, who owned the firearms, whether the firearms were possessed legally, how many times the CI was there, whom the CI talked to while there, how recently the CI had been there, why the CI was there in the first place, or whether there was anything illegal going on at the home. And that is the crux of the Fourth Amendment case law on this subject: The warrant is sufficient only if "there exists a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates,* 462 U.S. at 238. Here, wild speculation about drug dealers based solely on pills and firearms does not pass muster, and this Court should use this case as a vehicle to place guardrails around *Gates* to make it clear that law enforcement officers cannot secure warrants to go wherever they want just by identifying *legal* items in a place to be searched.[17]

III. This Court Should Take This Case to Announce That the Sixth Amendment Guarantees a Criminal Defendant's Right to Participate in a "Hybrid" Defense

Mr. Gladden urges this Court to hold that the Sixth Amendment protects a defendant's right to participate, in collaboration with his lawyer, in questioning and argument, not unlike the way in which two lawyers might divide trial responsibilities. Although the Eleventh Circuit has held that there is no right to hybrid

[17] And, by extension, the court's conclusion that *Leon*'s good-faith exception saves the affidavit is based on the same fundamental error: Without sufficient information regarding the informant, a law enforcement officer should not be provided a pass based on *Leon*'s good-faith exception for "reasonable reliance."

representation, *see Cross v. United States*, 893 F.2d 1287 (11th Cir. 1990), this Court has not passed judgment on the question. The Sixth Amendment guarantees the right to "have the Assistance of Counsel for his defence" — it does not say that counsel must control the entire defence. Thus, this Court should grant the petition to consider whether and to what extent there is a constitutional right to a "hybrid" representation.

IV. Amidst a Changing Landscape, This Court Should Consider Whether a Marijuana Conviction in Alabama May Properly Be Used to Apply the Career Offender Enhancement

Mr. Gladden's prior marijuana conviction was based on the discovery of "a plastic bag contained several smaller plastic bags containing marijuana," and "[s]everal hollowed-out blunt cigars were also discovered." Under § 4B1.1(a), the career offender provisions apply only if the "defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." And the term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits . . . the possession of a controlled substance (or a counterfeit substance) *with intent to manufacture, import, export, distribute, or dispense*." § 4B1.2(b) (emphasis added). The marijuana possession statute under which Mr. Gladden was convicted, however, prohibited "possess[ing] marihuana for other than personal use." Ala. Code § 12A-11-213(a)(1). The Eleventh Circuit previously had held that "upon review of the state statute, we conclude § 13A–12–213(a)(1) covers distribution offenses." *United States v. Robinson*, 583 F.3d 1292, 1295–96 (11th Cir. 2009). But this Court should grant

the petition to determine whether this statute is sufficient to satisfy the definition of "controlled substance offense."

Additionally, according to a recent report, twenty-two states and Washington, D.C., and Guam have acted to legalize recreational marijuana, including Missouri, Virginia, Montana, and Arizona, among many others. *A Guide to Marijuana Legalization*, "Where is Marijuana Legal?" U.S. News & World Report, *available at* https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization. This means that in those twenty-four jurisdictions, the possession of a few "smaller plastic bags" likely would no longer carry the punishment handed to Mr. Gladden on that charge. True enough, possession of marijuana remains criminal in Alabama, but to punish Mr. Gladden so harshly for something that is criminal in Alabama but not criminal in half the country would defeat the point of the Guidelines: to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." § 4B1.1, App. Note 4. This Court therefore should grant the petition to consider this question.

CONCLUSION

For these reasons, this Court should grant the petition and hear the case.

s/Charles W. Prueter
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