No. 20-456

IN THE

Supreme Court of the United States

MICHAEL ELDER,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The Second Circuit violated the party presentation principle articulated in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) after it abused its discretion by considering the inapplicability of the exclusionary rule *sua sponte*, despite the government's waiver of the issue.

a. *Sineneng-Smith* reaffirms the principle that courts have discretion to affirm on any ground supported by the record, provided that ground has not been waived. 140 S. Ct. at 1579 (recognizing that "intelligent waiver" prevents a court from raising an issue *sua sponte*); *see also Wood v. Milyard*, 566 U.S. 463, 472–73 (2012) ("It would be an abuse of discretion, we observed, for a court to override a State's deliberate waiver of a limitations defense.") (internal quotation marks omitted); *Burns v. Orthotek, Inc. Emps.' Pension Plan & Trust,* 657 F.3d 571, 575 (7th Cir.2011) (explaining that "[w]e can affirm on any ground that the record fairly supports *and the appellee has not waived*") (emphasis added).

"Waiver is the intentional relinquishment or abandonment of a known right." *Wood*, 566 U.S. at 474 (internal quotation marks omitted). A waiver is intelligent if it is made with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421 (1986); *see also Edwards v. Arizona,* 451 U.S. 477, 482–83 (1981); *Miranda v. Arizona,* 384 U.S. 436, 444 (1966). As this Court recognized in *Greenlaw v. United States,* 554 U.S. 237 (2008), "in both civil and criminal cases, in both the first instance and on appeal, we follow the principle of party presentation," under which "we rely on the

parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* at 243. To allow appellate courts to resurrect, on the government's behalf, an argument the government itself has waived, would mark a sharp departure from this important and enduring tradition.

b. The government does not dispute that it waived the argument concerning the inapplicability of the exclusionary rule, as any such contention is belied by the record. In the district court, the Magistrate Judge explained that, because the government had "made no attempt to satisfy" its "burden to prove that the exclusionary rule is not a proper remedy" for the probation officer's Fourth Amendment violation, he would *not* determine whether the rule was inapplicable. App. 29a. Moreover, he noted that (i) the government would waive "any right to further judicial review of [his] decision if it did not file a timely objection; and (ii) "the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not presented to the magistrate judge in the first instance." App. 32a. Even after prompting from the Magistrate Judge and a warning that the failure to object to the specifics of his recommendation would constitute a waiver, the government still neglected to challenge the applicability of the exclusionary rule. At bottom, the government committed intelligent waiver because it knew it could have argued the inapplicability of the exclusionary rule, yet it chose to refrain from doing so, even after being informed of the consequences of the decision to abandon the argument. *Cf. Thomas v. Arn*, 474 U.S. 140, 142, 155

(1985) (recognizing waiver stemming from the "failure to file objections to the magistrate's report" where the party "was notified in unambiguous terms of the consequences of a failure to file, and deliberately failed to file nevertheless").

c. Even if the argument concerning the inapplicability of the exclusionary was not waived, the Second Circuit's affirmance based on a *forfeited* argument constitutes an abuse of discretion. Although jurists and litigants often use the words waiver and forfeiture interchangeably, in contrast to the waiver definition outlined above, "forfeiture is the failure to make the timely assertion of a right." *United States v. Olano,* 507 U.S. 725,733 (1993) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)); *see also Kontrick v. Ryan,* 540 U.S. 443, 458, n.13 (2004). In any event, "before acting on its own initiative [to raise a forfeited issue], a court must accord the parties fair notice and an opportunity to present their position." *Day v. McDonough*, 547 U.S. 198, 210 (2006). *Day* also instructs that a court must "assure itself that the petitioner is not significantly prejudiced by the delayed focus" on the forfeited issue. *Id.* There is no indication the Second Circuit engaged in any such analysis. And the government does not dispute that Elder was provided neither notice nor an opportunity to be heard on the exclusionary rule issue; it instead makes the wholly meritless suggestion—without citation—that the "parties' arguments throughout the case regarding the reasonableness of the search" might somehow operate as a substitute for notice and an opportunity to be heard. Opp. 8. It is patently obvious, however, that whether a search is reasonable involves very different considerations than

whether the exclusionary rule ought not apply. This case thus stands in stark contrast to *Sineneng-Smith*. Even in the "secondary role" to which counsel for the parties in that case were relegated, Opp. 6, they at least were permitted to "file supplemental briefs" and allocated several minutes for oral argument. *Sineneng-Smith*, 140 S. Ct. at 1581. As this Court explained in *Singleton v. Wulff*: "The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioners having had an opportunity to be heard." 428 U.S. 106, 121 (1976). Because the same analysis obtains here, this Court should grant the petition, vacate the Second Circuit's judgment, and remand for further consideration.

2. On the merits, suppression is warranted in this case because the government knowingly violated the clearly established Fourth Amendment standard that it may not conduct a suspicionless search without supervisee consent or a valid statute, regulation, or court order imposing an unambiguous search condition.

a. The Fourth Amendment protects both supervisees and non-supervisees alike from unreasonable searches and seizures. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). Absent only "a few specifically established and well-delineated exceptions," searches conducted without warrants backed by probable cause are "*per se* unreasonable." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)) (internal quotation marks omitted).

In the context of government supervision, this Court has upheld certain supervisee searches conducted without the typically required probable cause standard. *United States v. Knights*, 534 U.S. 112, 121 (2001). However, this Court has upheld such extraordinary searches *only* when the government either first obtained the supervisee's consent through a clearly expressed search clause in its court ordered supervision agreement or a valid statute or regulation imposing an unambiguous search condition, of which the supervisee is presumed to have knowledge. *See Samson v. California*, 547 U.S. 843, 851–52 (2006); *Knights*, 534 U.S. at 119, 121–22 (2001); *Griffin*, 483 U.S. at 870–71, 880. The government cites no cases to the contrary.

In *Griffin*, for example, because a valid Wisconsin statute and regulation expressly authorized probation officers to search probationers and their homes upon the officer's "reasonable grounds" for suspecting illegal drug possession, a search supported only by reasonable suspicion did not violate the Fourth Amendment. 483 U.S. at 870–72. In *Knights*, a court's probation order mandated consent to a search "with or without a search warrant, warrant of arrest or reasonable suspicion by any probation officer or law enforcement officer." 534 U.S. at 114. The probation order "clearly expressed" the search condition and Knights was "unambiguously informed of it." *Id.* at 119. *Samson* similarly affirmed that a parole officer's suspicionless search did not violate the Fourth Amendment because the parolee had, as required by a California statute, consented in writing to searches "with or without cause." 547 U.S. at 846, 851–52.

Each of those precedents of this Court reflects the principle that unambiguous supervision agreement terms ordered by a court or compelled by statute or regulation define the conditions under which officers may search supervisees with less than probable cause.

b. The probation officer deliberately chose to flout the Fourth Amendment and other legal authority by conducting a suspicionless search. The government does not dispute that the probation officer knew that Elder had not expressly consented to suspicionless searches. Nor does the government dispute that the probation officer admitted that he had interpreted the release conditions as requiring reasonable suspicion to conduct a search but chose to proceed without it. The government does not even deny that the statute defining the terms of federal supervision, 18 U.S.C. § 3583, and pertinent guidance material, U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(d)(7)(C) (2016), mandate that officers must demonstrate reasonable suspicion that the supervisee has violated his terms of release before they may conduct a search under this condition. Nor does the government deny that the sample language for search conditions provided by both the Administrative Office of the U.S. Court and the U.S. Parole Commission also require reasonable suspicion for warrantless searches. *See* Admin. Office of United States Courts Prob. and Pretrial Servs. Office, *Overview of Prob. and Supervised Release Conditions* 78–79 (2016) (explaining that warrantless searches are permitted "only when reasonable suspicion exists"); U.S. PAROLE COMM'N R. & PROC. MAN. § 2.204-18(b)(3) (2010) (requiring that releasee shall submit to searches "based upon reasonable suspicion"), available at

https://www.justice.gov/sites/default/files/uspc/legacy/2010/08/27/uspc-manual111507.pdf; *see also id.* § 2.204-18(b)(2)(ii) ("A special condition *shall* permit searches *only if* the Supervision Officer has a *reasonable belief* that contraband or evidence of a violation of the conditions of release may be found.") (emphases added). Given the clarion call of these instructions, no reasonable officer could believe that Elder had consented to suspicionless searches. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[A] reasonably competent public official should know the law governing his conduct."); *see also Butz v. Economou*, 438 U.S. 478, 506 (1978) ("[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law.").

The exclusionary rule was designed to "deter deliberate, reckless, or grossly negligent conduct"—precisely the type of behavior displayed in this case. *Herring v. United States*, 555 U.S. 135, 144 (2009). Under *Herring*, evidence should be suppressed if it is obtained by a "flagrant or deliberate violation of [Fourth Amendment] rights." 555 U.S. at 143. Conduct is flagrant "if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* (internal quotations omitted). Rather than debate incontrovertible facts, the government's rejoinder rests on the flimsy proposition that the totality of the circumstances renders the search reasonable. The government's argument lacks merit.

First, the government errs in contending that the search in this case is "akin to *Samson*." Opp. 11. Samson's condition of parole stated that he agreed to

"search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." *Samson*, 547 U.S. at 846. Elder agreed to no such explicit terms. Reliance on *Knights* is likewise misplaced. *See, e.g.*, Opp. 14 (analogizing to *Knights'* upholding of a warrantless search of a probationer's home). In *Knights*, a court's probation order mandated consent to a "clearly expressed search condition" Knights was "unambiguously informed of." 534 U.S. at 114, 119. Moreover, the officer in that case actually had reasonable suspicion to search Knights' home. *Id* at 114–16. Unlike in *Knights*, Elder did not consent to a "clearly expressed search condition" permitting suspicionless searches. Nor does the government seriously dispute the Second Circuit's holding that "the anonymous tips did not provide reasonable suspicion for the search." Opp. 4 (citing App. 6a–7a). Indeed, the government concedes that "the probation officer should have conducted further investigation of the tips before the search." Opp. 12.

Second, there is no support in the law for the proposition that an officer's conduct is "rationally and reasonably related to the performance of his duty" when he conducts a warrantless search of a supervisee's home without reasonable suspicion—and absent the supervisee's express consent. *Id.* (quoting App. 8a). Indeed, the government conveniently omits that, in the opinion from which the above quote is taken, the existence of reasonable suspicion *and* a valid parole violation warrant informed the court's assessment of the reasonableness of the officer's actions. *See People v. Huntley*, 371 N.E.2d 794, 796, 797–98 (N.Y. 1977); *see also United States v. Newton*,

369 F.3d 659, 663, 665–66 (2d Cir. 2004) (relying on *Huntley's* "rationally and reasonably related" standard but also recounting the presence of facts that constitute reasonable suspicion.). Neither is present here. Equally baseless is the government's suppositious claim that Elder's status as a supervisee, coupled with the four anonymous, uncorroborated tips, prove dispositive in determining the "overall reasonableness of the officers' conduct." Opp. 12. Although a federal supervisee may have a "severely diminished expectation of privacy by virtue of his status alone," *Samson*, 547 U.S. at 582, it logically cannot be the case that his Fourth Amendment rights are completely abrogated on account of this status. If that were true, there would be no need for court ordered search conditions, or a statute or regulation notifying the supervisee of his forfeited Fourth Amendment rights. The tips in this case should likewise have no bearing in determining the reasonableness of the probation officer's conduct. It is well-established that reasonable suspicion cannot arise from "the bare report of an unknown unaccountable informant." *Florida v. J.L.*, 529 U.S. 266, 271 (2000). That the tips here total four in number does not change the calculus. Nothing plus nothing is still naught.

Third and similarly unfounded is the government's suggestion that Elder had absolutely no expectation of privacy and that whatever the nature of his privacy interests, they were outweighed by "the government's substantial interests in reducing recidivism, preventing the destruction of evidence, and promoting the reintegration of supervisees into society." Opp. 15. In making this claim, the government again cites

Knights for the proposition that Elder's "already-limited privacy expectation was 'significantly diminished' even further by the condition of his supervision." *Id.* (quoting *Knights*, 534 U.S. 119–20). But in *Knights*, that further diminution was based on this Court's finding that "[t]he probation order clearly expressed the search condition and Knights was unambiguously informed of it." *Knights*, 534 U.S. at 119. No such express conditions were present on the face of Elder's release agreement. In any event, "severely diminished" does not mean nonexistent. *See Morrissey v. Brewer,* 408 U.S. 471, 482, (1972) ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty"); *Griffin v. Wisconsin,* 483 U.S. 868, 875 (1987) (the "degree of impingement upon [a probationer's] privacy . . . is not unlimited"). Nor are the government's ever-present interests here dispositive. A contrary finding would reduce the Fourth Amendment to a nullity and eviscerate the deterrent value of the exclusionary rule.

c. Contrary to the government's assertions, Opp. 13, courts of appeals have reached different results under circumstances similar to those present here. *See* Pet. 24–25 (collecting cases where the courts of appeals "have recognized the strong deterrent value in excluding evidence obtained through intentional police misconduct"). Courts have likewise diverged from the Second Circuit within the context of parolee searches where, as here, supervision agreement terms were augmented by some other legal authority. *See United States v. Henley*, 941 F.3d 646, 650 (3d Cir. 2019) (rejecting the government's argument that, pursuant to *Samson*, "the Fourth Amendment

requires no suspicion to justify a warrantless search," even though Pennsylvania law does); *see also id.* at 651 ("In sum, Henley's search required reasonable suspicion because neither a statute nor a condition of parole provides that he was subject to search without suspicion."); *United States v. Baker*, 221 F.3d 438, 448–49 (3d Cir. 2000) (holding that the fruits of a search must be suppressed where a parolee consent form providing for search without a warrant waived the warrant requirement but did not expressly provide for suspicionless searches, and the search was conducted without reasonable suspicion); *United States v. Hill*, 776 F.3d 243, 249 (4th Cir. 2015) (holding that, even if there is reasonable suspicion for a search, "law enforcement officers may not search the home of an individual on supervised release who is not subject to a warrantless search condition unless they have a warrant supported by probable cause."); *United States v. Henry*, 429 F.3d 603, 620 (6th Cir. 2005) (reversing the district court's denial of appellant's motion to suppress where, although a Kentucky statute augmented the conditions of release to permit a "warrantless search upon reasonable suspicion that the probationer has violated any condition of probation," the government failed to establish the requisite reasonable suspicion). As demonstrated by the divergent cases among the courts of appeals, the proper application of the exclusionary rule is a question that arises frequently and is extremely important. This Court should resolve this conflict of authority.*

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* This Court's prior denials of petitions for a writ of certiorari on the related question whether a suspicionless probation search pursuant to a condition of probation violates the Fourth

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Amendment do *not* counsel against granting the petition in this case. *Cf.* Opp. 13 n.*. None of those prior cases involves a situation where the probation officer conducting the search knew that at least reasonable suspicion was required but deliberately disregarded that requirement and conducted the search anyway. Moreover, unlike in this case, each of the prior petitions involves a circumstance where the defendant expressly agreed to a warrantless search condition.