No. 23-40

In The Supreme Court of the United States

BRENDA BELLAY,

Petitioner,

v.

OFFICER TYLER SHUE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that Petitioner abandoned her appeal where Petitioner completely failed to address the bases for the dismissal sanction in her initial brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

A. Factual Background

Each of the alleged causes of action in Bellay's Complaint arise out of her arrest that occurred on or about September 13, 2015. The crux of Bellay's claims was that there was an absence of probable cause for her arrest, which was retaliatory in nature, and that Shue used excessive force to effect her arrest. From these bases, Bellay asserted her § 1983 claims of false arrest, excessive force, and First Amendment Retaliation, together with common law claims of false arrest and battery.

When Bellay commenced her suit against Shue and the City, she was by then a seasoned litigant in the courts of this state. The district court set forth her pertinent litigation history:

> Beyond her instant arrest in 2015, which resulted in a nolle prosequi dismissal of her charges, *State v. Bellay*, No. 15-CM-14112 (Fla. Hillsborough County Ct. 2015), [Bellay] has been involved in several other cases. [Bellay]'s record includes a 1986 arrest in Indian River, Florida, for driving under the influence ("DUI"), to which [Bellay] pled no contest. Dkt. 28-5 at 50–51. In 2005, [Bellay] was arrested for obstructing or opposing law enforcement, and her case was dismissed by a nolle prosequi. *State v. Bellay*, No. 05-CM-8488 (Fla. 13th Cir. Ct. 2005). After her 2005 charge was nolle prossed, she successfully sued the City of

> Tampa for false arrest, prevailing at trial and on appeal to the Second District Court of Appeal. *Bellay v. City of Tampa*, No. 08-CA-2934, 2010 WL 9067343 (Fla. 13th Cir. Ct.), *aff'd by* 52 So. 3d 664 (Fla. 2d DCA 2010) (per curiam). In 2006, she was arrested for leaving the scene of an accident with property damage. Dkt. 28-5 at 51. In 2019, she was summonsed to defend a misdemeanor charge of criminal mischief, for which her present attorneys achieved a nolle prosequi dismissal. *State v. Bellay*, No. 19-CM-5869 (Fla. Hillsborough County Ct. 2019).

Pet. App. at 5, FN 1.

That list, incomplete as it may be, is demonstrative of the knowledge that Bellay held of matters related to litigation including, and most significantly for purposes of the district court's order, the duty to preserve evidence—evidence she created for the very purpose of recording the events of September 13, 2015. Doc. 1 at ¶ 18.

At all times material hereto, Shue was employed by the City of Tampa as a law enforcement officer. Doc. 1 at ¶ 7. At all times material hereto, Shue was in the performance of his discretionary duties as a Tampa Police officer and was acting under color of law. Doc. 1 at ¶¶ 7 & 9. At all times material hereto, Officer Mark Barry ("Barry") was also employed by the City of Tampa as a law enforcement officer. Doc. 28-3 at 3:12-15. Shue and Barry were assigned to the "SoHo" area (a residential district in the City), with Shue working

the evening shift and Barry working the midnight shift. Doc. 28-2 at 32:10-14. On September 13, 2015, Bellay and a friend, Paige Davis ("Davis") went out to celebrate Davis's birthday. Doc. 28-6 at 7:18. The two met at the Australian Surf Shop and then proceeded to Ducky's; however, they did not enter Ducky's nor did they have any alcoholic beverages there. *Id*. at 26:4-10. They then took an Uber to Ciccio's where they ate dinner and consumed alcoholic beverages. *Id*. at 8:22-9:14. Bellay and Davis left Ciccio's and began walking on Howard Avenue; they entered another establishment and consumed additional alcoholic beverages. *Id*. at 10:22-11:5.

They continued walking along Howard Avenue when they stopped at a food truck (located near the entertainment stage) on the property of MacDinton's Irish Pub and Restaurant ("MacDinton's"). Doc. 28-4 at 11:1; Doc. 1 at ¶ 11. Davis ordered sweet potato French fries and a bottle of water, paid for and received those items, and attempted to find a place to consume same, but instead got into a dispute with MacDinton's security personnel. Doc. 28-6 at 12:11-13:11. After Davis's dispute with security personnel from MacDinton's began, Police officers from Tampa Police Department were summoned to the scene by the security personnel. Doc. 28-4 at 7:10. Barry was dispatched to MacDinton's for a disturbance involving a female fighting with security. Doc. 28-3, 6:3-4. Barry arrived on scene first followed within a couple minutes by Shue. Doc. 28-3 at 8:1; Doc. 1 at ¶ 17. Barry and Shue spoke with MacDinton's security. *Id*. During Barry's interaction with

Davis, Davis became hysterical. Doc. 1 at ¶ 18. Davis struck Barry in the chest thereby committing the crime of battery on a law enforcement officer. Doc. 28-3 at 10:9-23.

Bellay began videotaping, or attempting to videotape, after Barry arrived on scene. Doc. 28-5 at 125:6-7; Doc. 1 at ¶ 18. Shue told Bellay to back up or step back. Doc. 28-5 at 61:21; Doc. 28-2 at 22:10-11. During the officers' interaction with Davis, Bellay was standing right beside Davis. Doc. 28-6 at 18:6. As Barry and Shue were attempting to physically take Davis into custody, Bellay was "coming up on" Shue. Doc. 28-2 at 22:17-21. As Barry was attempting to handcuff Davis, he expected that Shue would be looking for anyone else in the area that might be around and acting as a second set of eyes while Barry's back was turned. Doc. 28-3 at 21:5-8. Anyone who approaches the officers should be a concern from an officer-safety standpoint. Doc. 28-2 at 43:3-6.

Moreover, most of the people in the area were intoxicated, which heightened the danger to the officers. Doc. 28-3 at 20:20-21:2. Among other risks to officer safety, John Holland ("Holland"), MacDinton's Head of Security, recognized that friends of arrestees will often physically seek to stop officers from making an arrest. Doc. 28-4 at 13:3-8. While Bellay was trying to help Davis, she was asked by the officers to back up, but she was not backing up. Doc. 28-4 at 23:7-9. Bellay was trying to stop Barry and Shue from arresting Davis. *Id*. at 18:7-8. Additionally, the officers told Bellay, "You have to leave," and, "Go, you're being asked to leave";

however, Bellay refused to leave. Doc. 28-2 at 17:5-9. Shue was forced to push Bellay back and away several times. Doc. 28-2 at 15:18-19. Bellay did not follow Shue's instruction to back away. *Id*.

Other than Bellay, Shue did not need to tell anyone to back away because no one else came towards him while he and Barry were arresting Davis. Doc. 28-2 at 43:15-18. Shue took Bellay into custody because of her refusal to back away, her refusal to follow lawful commands and because she resisted Shue's attempts to take her into custody. Doc. 28-2 at 15:18-25. Shue instructed Bellay to drop her phone so she could be taken into custody; however, she resisted his efforts and she said, "No, I'm not going to." Doc. 28-2 at 51:14; Doc. 28-5 at 62:2-4.

After taking Davis into custody, Bellay was moved from MacDinton's to the parking lot of a dry-cleaning business opposite MacDinton's, where he and Barry completed the Criminal Report Affidavits ("CRAs") for Bellay. Doc. 28-2 at 15:18-25.

When it appeared to Shue that Bellay might be suffering from a seizure, or other medical condition, medical assistance was summoned to the empty parking lot for Bellay. Doc. 28-2 at 54:7-8. Tampa Fire Rescue checked out Bellay, determined that she was intoxicated, but did not provide her any care that Shue could recall. Doc. 28-2 at 55:4-8. After Tampa Fire Rescue left, Shue explained to Bellay the notice to appear process, which would have allowed Bellay to avoid

being transported to jail; however, Bellay refused to provide consent for the process. Doc. 28-2 at 55:15-23.

Additionally, while in Barry's police cruiser, Bellay began slamming her head against the vehicle, which forced the officers to place her in a Total Appendage Restraint ("TARP"). Doc. 28-3 at 56:3-9. Barry transported Bellay to jail. Doc. 28-3 at 55:11. Davis eventually secured Bellay's release from jail by obtaining bail. Doc. 28-5 at 88:5-8.

As the record demonstrates, Bellay was neither violently nor wrongfully arrested. At each step, Bellay ignored the lawful commands of Shue and Barry. Bellay was not arrested for filming the scene; to the contrary, she was arrested for her refusal to vacate the premises pursuant to a lawful order. She repeatedly ignored commands to back up. She was never instructed to stop filming, only to drop it when she was being handcuffed. No right guaranteed by the US Constitution permits an arrestee to hold their phone while being handcuffed, which Bellay unlawfully sought to do in this case. Bellay was not assaulted nor was she injured during the course of her arrest. At most, the force employed by Shue was incidental to Bellay's arrest.

Ultimately, the State Attorney's Office entered a *nolle prosequi* on May 10, 2016, dismissing the criminal charges against Bellay. Doc. 1 at ¶ 33.

During pretrial discovery in the instant case, Bellay produced five video clips that she claimed to have filmed on her iPhone 5s during the MacDinton's incident. Doc. 116, p. 5. As produced by Bellay, these clips

were labeled "untitled (1).MOV," "untitled 2.MOV," "untitled 3.MOV," "untitled 4.MOV," and "untitled 5.MOV." Doc. 34. These five video clips are very short and nonconsecutive depictions of the incident. *Id*.

In one of the videos, Davis is seen striking Officer Shue's fellow officer on the chest with her open hand while loudly cursing at him. Doc. 34 (untitled 4.MOV); Doc. 28-5 at 61. The strike was plainly what one would call a battery. Doc. 34 (untitled 4.MOV); *see also* Doc. 28-3 at 10. In other video clips, the friend is seen on her knees in the parking lot with the same officer standing nearby. Doc. 34 (untitled 1.MOV & untitled 3.MOV). Another video depicts the friend's arrest, during which Shue can be heard telling Bellay to "Back up. Back up." *Id*. (untitled 5.MOV); Doc. 28-5 at 61, 129; Doc. 113 at 170 (Plaintiff testified, "He was yelling at me, back up, back up.").

In another video, Shue is attempting to handcuff Bellay while sternly saying, "Drop the phone or I'm going to break it." Doc. 34 (Untitled 2.MOV); Dkt. 28-2 at 51. Bellay replies, "No, I'm not going to," whereupon an immediate scuffle ensues. Doc. 34 (untitled 2.MOV); Doc. 28-5 at 62. During the scuffle, which cannot be clearly seen on the video, Bellay drops her phone, and Shue physically takes Bellay to the ground. Doc. 28-5 at 62, 118.

On the record created by the parties' testimony, the witnesses' testimony, and the five videos produced by Bellay, Shue moved for summary judgment, noting that no other competent evidence existed regarding Plaintiff's physical arrest beyond the parties' opposing

narratives. Doc. 28. The district court denied Shue's motion, pointing to the parties' contradicting versions of events surrounding Plaintiff's arrest. Doc. 54. The district court noted that the facts outlined above were "disputed and somewhat murky," emphasizing that "[e]xactly what happened is 'choppy' on this record." Doc. 54 at 4-5.

Concerning the five videos produced to that juncture, and which were available to the district court at the summary judgment proceeding, the district court ultimately gave Plaintiff the benefit of the doubt as to the honesty and bona fides of these recordings, stating:

> Plaintiff sought to record the incident with her phone but was unsuccessful in completing a full recording; we have only a few fairly incomprehensible snippets . . . [yielding] an incomplete recording of the incident[.]"

Doc. 54 at 4. The district court ultimately credited Plaintiff's claim that she calmly attempted to film the incident and backed up when instructed. Doc. 54 at 12.

The district court nevertheless recognized that the five videos contradicted much of Bellay's testimony, including that regarding the timing of when Shue ordered her to drop her phone. Doc. 116 at 10. For example, one of the videos showed Shue directing Bellay to drop her phone before the takedown—not after. Doc. 54 at 7; Doc. 116 at 10. Importantly, the district court also noted that the evidence was disputed as to whether Bellay was crowding the officers when they were arresting her friend. Doc. 54 at 10; Doc. 116 at 10.

Following the denial of summary judgment, the matter was set for jury trial. Doc. 68. The district court summonsed a large venire due to potential COVID-19 issues. Doc. 116. The parties picked the jury on Friday, July 9, 2021, with the trial set to begin the following Monday, July 12th. Doc. 82.

On Saturday, July 10th, Bellay's counsel informed Appellees' counsel that Bellay had produced a new video that she claimed to have filmed during the MacDinton's incident. Doc. 93-3. The never-before-produced video file bore the suspicious name of "IMG_1781.TRIM.MOV." Doc. 91. The video also began unusually—as it commences, it does so with a repeated, frozen frame image of Bellay's friend facing the camera. *Id*. The frozen frame image is depicted for around 25 frames. *Id*. The video then jumps from this still frame image of the friend, Davis, to video footage of the officers' attempts to handcuff the friend as she vigorously resists. *Id*. The district court was informed of the last-minute production at the outset of the proceedings on July 12th.

The district court determined that footage from the newly-produced "TRIM" video appeared to chronologically follow that of the earlier-produced untitled 4.MOV tape, which showed the friend's battery of Barry. *Id*.; Doc. 34 (untitled 4.MOV); Doc. 116 at 12. Significantly, as the district court noted, review of the "TRIM" video revealed that Bellay clearly added to the level of disturbance caused by her friend. Doc. 116 at 12. The video clearly showed Bellay was not backing up as instructed and was "standing much closer—dangerously closer—" to Shue's back and weapons than

Bellay represented in pretrial discovery. Doc. 91; Doc. 116 at 12. The district court recognized that the "TRIM" video supported the defense theory of the case. Doc. 116 at 12.

Additionally, the district court expressed concern regarding the "TRIM" video's naming convention, which was unlike those of the other five videos produced by Plaintiff in terms of both capitalization and wording. Doc. 91; Doc. 34; Doc. 116 at 12. The wording present in this video's title—specifically the term "TRIM"—made clear that the video had been edited. Doc. 116 at 12. Worse still, the video's metadata revealed that the video had been created on October 15, 2015, a month after Bellay's arrest.[1]

Recognizing the importance of the case to the parties and that the result could bear significantly on Shue's law enforcement career, the district court granted a defense motion for mistrial, discharged the jury, and permitted discovery into the background of the video excerpts. Doc. 84 & 85. Shue and the City deposed Bellay on the issue, obtained forensic images of her laptop and (current) iPhone XS, and retained a digital forensics expert. Doc. 93, 93-1, & 93-2.

With the results of those discovery efforts, Shue and the City moved for sanctions against Bellay, and asserted that Bellay gave false testimony, committed spoliation, and engaged in litigation misconduct. Doc. 93. In its review of the Motion to Dismiss and for

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[1] When one views the "properties" panel of the late-produced video, the video's metadata listed under "Origin" states "media created 10/15/2015 11:52 AM." [Doc. 91 (video's EXIF data)].

Sanctions, the district court considered several pertinent filings submitted by the parties. Doc. 97, 111, 112, & 115. The district court also held an evidentiary hearing on the matter. Doc. 113. Both Bellay and the Appellees' digital forensic expert testified at that hearing, with the expert also providing a detailed affidavit with exhibits. Doc. 93-1 & 113.

The district court ultimately found the defense expert to be qualified and determined that his affidavit and testimony made sense, were internally consistent, and were worthy of full credit. Doc. 116 at 13. Notably, although Bellay consulted a digital forensic expert prior to the hearing, *see* Doc. 113, p. 162, Bellay did not call an expert to testify or provide a rebuttal affidavit. Doc. 116 at 13. Additionally, the district court found that, throughout the hearing, Appellees' expert's testimony was contradicted only by Bellay's testimony, "which did not make sense, was internally inconsistent, and was not worthy of credit." Doc. 116 at 13.

The district court further found that Bellay brought the action against Shue and the City, yet failed to preserve original, unedited videos of the night in question. Doc. 116 at 30. Despite Bellay's experience in litigation, the district court correctly determined that she ignored this duty. *Id*. No original videos of the MacDinton's incident exist, and the only videos that remain have been tampered with and post-date the night in question by roughly one month. *Id*. Contrary to Bellay's false testimony at the evidentiary hearing, the videos' titles (i.e., "untitled" or "TRIM") were not the product of Apple software. The district court also correctly determined that no other explanation exists for

the videos' titles and late creation dates other than the hand of Plaintiff or her agent. Doc. 116 at 29-30.

The district delivered its findings as follows:

> [Bellay]'s late production of the ["TRIM"] video hindered the fair processing of this case. It also caused a large COVID-wary venire to be summoned, and a jury to be selected for naught, with the considerable expenditure of public funds, the parties, and the jurors themselves. Moreover, [Bellay]'s spoliation acutely impaired the Court's earlier consideration of Officer Shue's summary judgment motion. The spotty record cited by the Court likely dissuaded Officer Shue from seeking interlocutory appeal based on qualified immunity. Now, years later, if the Court were to deny Defendants' present Motion to Dismiss, Defendants should in all fairness be afforded a chance to reassert their summary judgment motions due to [Bellay's] withheld evidence and, if still unsuccessful, reassess their interlocutory rights to appeal on qualified immunity. Yet [Bellay]'s spoliation was greatly exacerbated by the disingenuous testimony she offered at her subsequent deposition and the evidentiary hearing. [Bellay] has ultimately injured the Court, the defense, and the public through her spoliation.

Doc. 116 at 31.

Ultimately, the district court, having determined that the standard for the sanction of dismissal with prejudice has been met by clear and convincing

evidence in this case, and that Bellay engaged in a clear pattern of willful contempt by tampering with critical evidence, which impaired the district court's prior summary judgment ruling and prejudiced the defense, determined that no lesser sanction than dismissal would suffice. Doc. 116 at 33.

B. Procedural Background

On or about January 25, 2019, Bellay filed her Complaint and Request for Jury Trial in the United States District Court, Middle District of Florida (Tampa Division), alleging federal and common law claims against Shue, in his individual capacity, and the City. Specifically, Bellay's Complaint alleged federal and common law claims of false arrest and excessive force/battery against Shue and common law claims of false arrest and battery against the City. Bellay's Complaint also alleged a federal claim of the violation of Bellay's First Amendment rights.

Each of the alleged causes of action also arise out of, or are related to, the arrest of Bellay that occurred on or about September 13, 2015. Following service of process, Shue and the City filed their Answers and Affirmative Defenses. On April 19, 2019, Bellay served Shue and the City with her Initial Disclosures; amongst her disclosures, Bellay identified and provided five (5) "untitled" videos, identified in the Disclosures as "4. Cell Phone Videos taken by Brenda Bellay," pursuant to Rule 26(a)(1)(B). The videos, capture only snippets of the interaction between Bellay, her friend Paige Davis, MacDinton's security, Officer Mark Barry, and Shue.

Following the close of discovery, Shue sought summary judgment as to all claims against him, and after hearing oral argument on the motion, the district court denied Shue's motion. The case was set for a jury trial commencing on July 12, 2021. Bellay subsequently submitted her Exhibit List, which listed the five videos as exhibits. Bellay thereafter submitted an Amended Exhibit List, and Second Amended Exhibit List, which both listed the same five videos of the interaction.

Jury selection was held on July 9, 2021 and, after a jury was selected, the Court adjourned for the day. On July 10, 2021, counsel for Bellay provided counsel for Defendants with a new, never-before-disclosed video of the interaction with an aim toward using said video as an exhibit at trial. Counsel for Shue brought the tardy disclosure to the district court's attention, as well as the fact that the video's filename made clear it was a trimmed version of the original recording, so the district court declared a mistrial. Furthermore, the district court, in acknowledging both the significance of the new video to issues central to the case, and the general significance of the case to Shue's career, ordered that "[t]he defense may take Plaintiff's deposition concerning the taping, authenticity of the tapes, chain of custody, *etc*. Also any issue suggested by the content of the just-produced tape may be inquired of. If the defense wishes, it may conduct a forensic examination of the devices involved."

As allowed by the District Court Appellees deposed Bellay concerning the late produced video and related matters. Appellees also hired an expert to

conduct a forensic examination of the devices (iPhone, Macbook, iCloud, Apple privacy data), and email account involved. Based upon the record, and the findings and conclusions of Appellees' expert, it was apparent that Bellay defiled the judicial system and attempted to perpetrate a fraud on the district court and the judicial system. Appellees filed their Motion to Dismiss and for Sanctions and Incorporated Memorandum of Law. Also, with leave from the district court, Shue also filed a Second Motion for Final Summary Judgment and Incorporated Memorandum of Law, which was supported, in part, by the newly disclosed trimmed video. Bellay opposed both motions.

The district court held an evidentiary hearing on the motion to dismiss on February 25, 2022. Bellay testified at the hearing as did Defendants' digital forensic expert, with the expert also providing a detailed affidavit with exhibits. Bellay and Defendants submitted written closing arguments on March 2, 2022.

The district court entered its Order Dismissing Case on August 8, 2022 and, in light of its Order Dismissing Case, the district court terminated Shue's Second Motion for Final Summary Judgment. The district court entered Final Judgment in favor of Defendants.

Bellay appealed the Order dismissing her case. Bellay "completely" failed to address the bases for dismissal in her initial brief. Passing references to the dismissal sanction in the initial brief's "Statement of the Case" and "Summary of Argument" were not enough to the raise the issue. For the first time, Bellay made

some arguments about the sanction in her reply brief. However, those arguments came too late and Bellay abandoned any argument about the basis for the district court's dismissal of her case. Accordingly, on March 1, 2023, the court of appeals determined that Bellay abandoned her appeal and that the district court's dismissal order was due to be affirmed.

Bellay did not file a Petition for Rehearing *En Banc*; instead, Bellay filed a Petition for Panel Rehearing on March 21, 2023. On April 13, 2023, the Petition for Panel Rehearing was denied. On April 21, 2023, the appellate court issued its mandate. On July 11, 2023, Bellay filed a Petition for Writ of Certiorari in this Court.

REASONS THE PETITION SHOULD BE DENIED

I. Bellay Seeks Review on a Question Not Presented by This Case.

Bellay seeks review on the question of whether the Eleventh Circuit should "uphold the dismissal of a case with prejudice due to the spoilation of evidence when there are less severe sanctions available[]" in light of the standards set forth in *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005), 126 S. Ct. 2967 (2006). Pet. at i. This case does not present that question; accordingly, it is not a suitable vehicle for the Court's review.

First, the Eleventh Circuit correctly concluded that Bellay abandoned her appeal. The appellate court determined that "Bellay made some arguments about the sanction for the first time in her reply brief after the appellees pointed out the abandonment in their response brief[ ]" but those were made too late. Pet. App. at 3. Contrary to Bellay's post-mandate contention, *see* Pet. at 8, Bellay acknowledged in her Reply Brief that, "[i]mportantly, Appellant's Initial Brief does not abandon the appeal, but rather focuses on the merits of the case." Accordingly, answering the question on which Bellay seeks review, *see* Pet. at i, would have no effect on the outcome of this case unless the Court were to first determine that the Eleventh Circuit "improperly applied Appellate review standards" by deeming her appeal abandoned. *See* Pet. at 9-10.

The petition makes no assertion that Eleventh Circuit "entered a decision in conflict with the decision of another United States court of appeals on the same important matter"; nor does the petition assert that the Eleventh Circuit "decided an important federal question in a way that conflicts with a decision by a state court of last resort[.]" S. Ct. R. 10. While the petition ultimately seeks the employment of the Court's supervisory power, this case is not one where the Eleventh Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court," to warrant use of such power. To the contrary, the Eleventh Circuit's opinion did not sanction any alleged departure by the district court; instead, it only determined that the

district court's order was due to be affirmed because "Bellay [ ] abandoned any argument about the basis for the district court's dismissal of her case." Pet. App. at 10.

To the extent Bellay seeks to revisit the Eleventh Circuit's assessment of the sufficiency of the argument presented to it on appeal, the petition does not present a compelling reason for granting certiorari. As this Court's rules make clear, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10.

Second, and although it is not the question presented by Bellay, it is apparent that the Eleventh Circuit did not depart from the accepted and usual course of judicial proceedings, as it correctly determined that Bellay forfeited her appeal.

Bellay contended in her initial brief that "Appellee did not present any evidence of any behavior by Bellay to support the need to aggressively seize Appellant and cause physical injury without a warrant, resistance, or threats to safety." Although the record below defied her argument, it was irrelevant to the issue before the Eleventh Circuit: whether or not the district court abused its discretion by dismissing Bellay's claims as a sanction.

Bellay made no argument that the district court, in dismissing her claims as a sanction for spoliation, abused its discretion. Instead, Bellay simply asserted that Shue and the City violated her clearly established

rights and that the district court erred because a reasonable jury could find in Bellay's favor with regard to her claims against Shue and City. Had Shue and the City moved to dismiss Bellay's claims for failure to state a cause of action, Bellay's argument might have been pertinent. Based upon all of the argument in her initial brief, Bellay attempted only to appeal an order granting a Rule 12(b)(6) motion to dismiss that was neither sought nor obtained by Shue or the City. By failing to raise any argument in opposition to the district court's exercise of its broad discretion, the Eleventh Circuit correctly determined that Bellay abandoned her appeal.

Since the Eleventh Circuit's establishment, it has deemed appellants' claims not raised in the initial brief as abandoned on appeal. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 n.4 (11th Cir. 1981) (*en banc*). Issues not raised in the initial brief on appeal are deemed abandoned. *United States v. Levy*, 379 F.3d 1241, 1242-45 (11th Cir. 2004).

As is the case in the Eleventh Circuit, this Court's precedent governs that, where a party fails to raise an argument in the courts below, that argument has been forfeited. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016) (explaining that when a party "fail[s] to raise [an] argument" the Supreme Court "normally decline[s] to entertain" as it is "forfeited"); *see also* 16AA Charles Alan Wright et al., Federal Practice and Procedure § 3974.3 (5th ed. Apr. 2021 update) ("[I]ssues omitted from the party's principal brief are ordinarily deemed forfeited."); *id*.

§ 3974.1 ("[T]here are many cases finding forfeiture where the contention was omitted from the brief. . . ."); *id*. § 3974.2 ("An appellee who fails to include and properly argue a contention in the appellee's brief takes the risk that the court will view the contention as forfeited.").

Consequently, Bellay cannot present a legitimate claim that the Eleventh Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. Ct. R. 10.

To be clear, the Eleventh Circuit followed the accepted and usual course of judicial proceedings. Pursuant to the party presentation principle, this land's courts function in an "adversarial system of adjudication" whereby the courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Thus, the system is "designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (quotation omitted). Therefore, it is inappropriate for a court, including and in particular an appellate court, to raise an issue *sua sponte* in most situations. *United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022).

Bellay presented no exceptional circumstances to warrant departure from the long-established party presentation principle. Bellay ignored the issue on appeal not through error or oversight but because the record on appeal cannot serve as a basis for any argument that she is entitled to the relief she seeks. "[I]f a party affirmatively and intentionally relinquishes an issue, then courts must respect that decision." *Id*.

In her petition, Bellay incorrectly claims that her initial brief made "multiple references to this argument, including in the statement of the case and summary of the argument section." Pet. at 8. While Bellay's Statement of the Case in her initial brief outlined the procedural mechanism by which her case was disposed, it made no argument regarding the propriety of the order. Furthermore, her initial brief's Summary of Argument only referenced the alleged error as follows: "[t]he trial court erred in determining that the claim should be dismissed due to spoilation of the evidence." Moreover, the Summary of Argument closed by summarizing the true crux of her argument presented: "[b]ecause a reasonable jury could find in Plaintiffs' [sic] favor with regard to her claims against Defendants, the trial court erred in dismissing the Plaintiff's case." The true thrust of the initial brief's statement of issues on appeal asserted just one issue: "[w]hether the District Court erred in dismissing Appellant's Excessive Force claim where the arrest was a violation of the Appellant's constitutional rights." So *significant* was the district court's alleged abuse of discretion under the standard in *Flury*, that Bellay did not cite *Flury* or

its standard in her initial brief. Also absent from the entirety of her initial brief was any argument as to how the district court allegedly erred by dismissing her case as a sanction. Bellay, at most, made passing reference to the dismissal of her case as a sanction, opting instead to argue the merits of her claims. Passing references to a claim raised without supporting arguments or authority abandons that claim as the Eleventh Circuit correctly determined. Pet. App. at 2 (citing *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014)).

Because Bellay made no argument that the district court abused its discretion by dismissing the Complaint as a sanction, which was the sole issue on appeal, Bellay abandoned her appeal and the Eleventh Circuit's determination that her appeal was forfeited should not be disturbed by this Court and certiorari should be denied.

II. The Petition Should be Denied Because the District Court Properly Dismissed Bellay's Claims as a Sanction.

Even if Bellay's abandonment of her appeal is ignored, her petition should be denied because Defendants would have prevailed on alternative grounds not reached by the court of appeals. The district court properly dismissed Bellay's claims as a sanction for Bellay's discovery violations as it correctly concluded that the standard for the sanction of dismissal with prejudice was met by clear and convincing evidence in

this case, given Bellay's willful tampering with critical evidence. As the district ultimately concluded, Bellay caused injury to the district court, the defense, and the public; as such, dismissal with prejudice was warranted as no lesser sanction would have sufficed. However, because Bellay abandoned her appeal by completely failing to argue that the district court's sanction was an abuse of discretion, the Eleventh Circuit did not reach the question Bellay suggests is presented by this case. Had the Eleventh Circuit needed to reach the question, the district court's order would have been affirmed and Defendants would have prevailed.

Nevertheless, Bellay now contends that the Eleventh Circuit "erroneously decided to dismiss the Appellant's argument that attacked the basis for dismissal, the Appeals court failed analyze whether the alleged spoilation of evidence met the standard for dismissal." Pet. at 10. To the contrary, the record below demonstrated that, had the Eleventh Circuit examined the record for an abuse of discretion, the district court's order would not have been disturbed.

Bellay contends that the defense was not prejudiced by the exclusion of evidence deemed to be spoiled. However, after setting out the background, Pet. App. at 5-15, findings of fact, Pet. App. at 16-32, and conclusions of law, Pet. App. at 32-35, the district court determined that the defense was prejudiced by Bellay's spoliation. Pet. App. at 35.

Bellay also asserted that the evidence labeled as spoiled was not essential to try the case. Again, the district court reached a contrary conclusion, finding that Bellay "engaged in a clear pattern of willful contempt by tampering with critical evidence, thereby impairing the Court's prior summary judgment ruling and prejudicing the defense." Pet. App. at 35.

Bellay also now contends that there was not sufficient evidence presented that she operated in bad faith. As support for this claim, Bellay asserts that Apple, Inc., the manufacturer of Petitioner's phone found that the video was not edited and there were no editing apps downloaded on the phone. This fallacy, asserted by Bellay during the evidentiary hearing was definitively disproved by the record and Bellay's own testimony. Pet. App. at 27-29. The claim is evidence that Bellay continues to operate in bad faith. Further, Bellay's claim to the contrary is not grounds for reversal but for admonishment for attempting to distort the record in this case.

While not an exhaustive review of the record before it, the district court's order outlined the context of how the spoliation occurred, Pet. App. at 5-15, the overwhelming evidence demonstrating that spoliation occurred, Pet. App. at 16-32, and the district court's well-supported conclusion of law that, in accordance with applicable law, Bellay's spoliation of evidence prejudiced Shue and the City (as Shue could not effectively assert his defense of qualified immunity), the prejudice could not be cured (the spoliated videos could not be recovered), the practical importance of the evidence

(particularly to Shue's qualified immunity defense), and that Bellay acted in bad faith. Pet. App. at 32-35. That Bellay merely disagrees with the district court's sanction of dismissal does not make the sanction an abuse of discretion.

In sum, it is apparent from the district court's order that the *Flury* factors were considered in their totality, and the district court correctly determined that dismissal of the case was appropriate. More of than a majority of the factors in *Flury* were proven; in fact, each of the *Flury* factors were proven, subsequently considered by the district court, and the district court's order was due to be affirmed had Bellay not abandoned her appeal.

Finally, the district court's findings regarding Bellay's spoliation of critical evidence obviated the need for additional grounds for dismissal of her claims as a sanction; nevertheless, it can be inferred from the district court's findings that Bellay perpetrated a fraud upon the court and, as such, dismissal of her claims as a sanction for same would be equally appropriate.

The federal district courts of this nation possess the inherent power to regulate litigation and to sanction litigants for abusive practices. *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126 (S.D. Fla. 1987); *see also Aoude v. Mobil Oil Corporation*, 892 F.2d 1115, 1118 (1st Cir. 1989) (district court possesses the inherent power to deny court's processes to one "who defiles the judicial system by committing a fraud on the court"); *Sun World, Inc. v. Lizarazu Olivarria*, 144

F.R.D. 384, 389 (E.D. Cal. 1992) (district court has inherent power to impose the sanction of dismissal). Deeply rooted in the common law tradition, the court has the power to manage its own affairs, which necessarily includes the authority to impose reasonable and appropriate sanctions on the parties to litigation before it. *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1545-46 (11th Cir. 1993), cert. denied, 114 S. Ct. 181, 126 L. Ed. 2d 140 (1993).

> Dismissal is appropriate where:
>
> > a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.

See Aoude, 892 F.2d at 1118 (cause of action dismissed for "fraud on the court" where plaintiff attached a sham agreement to the complaint).

Within a month of creating the evidence Bellay alleged demonstrated the violation of her constitutional rights by Defendants, she began curating, editing and altering evidence to suit her purpose. In doing so, she intentionally set into action a scheme with a purpose to benefit herself and her claims and to harm Shue and the City and their defenses. For her part, Bellay has by definition been selective: Bellay saved evidence she believed to be favorable to her and, conversely, destroyed evidence favorable to Shue and the City.

The record in this matter supported a finding that Bellay directed a fraud upon the court and, as such, dismissal of her claims as a sanction for would not be an abuse of discretion.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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