

No. 25-7142

IN THE
Supreme Court of the United States

JARON MCCREE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

It is undisputed that the Fifth Circuit affirmed Petitioner’s sentence on an “alternative ground” that the government never argued on appeal (or, for that matter, in the district court). BIO 5 (“The court noted the government’s argument . . . [b]ut the court affirmed on [an] alternative ground[.]”). That alone calls for summary reversal, because there is no question the court violated the party presentation principle. *See* Pet. 14–17. Indeed, this Court recently summarily reversed two judgments for this very reason. *Clark v. Sweeney*, 607 U.S. 7, 10 (2025) (per curiam); *Margolin v. Nat’l Ass’n of Immigration Judges*, 146 S. Ct. 1285, 1289 (2026) (per curiam). Petitioner’s case prevents an even stronger case for summary reversal, because the Fifth Circuit *also* engaged in impermissible appellate fact finding and affirmed the district court’s judgment on a ground that the government waived—or, at the very least, forfeited—in the district court. *See* Pet. 17–23.

The government opposes reversal by this Court but fails to explain how the Fifth Circuit’s decision complies with the party presentation principle. Nor could it. This Court’s precedent is clear: A court “violate[s] the party-presentation principle when it decide[s] a case different from the one [respondent] advanced.” *Margolin*, 146 S. Ct. at 1288 (quotation marks and citation omitted).

That is what happened here. The government advanced a single argument on appeal: that the district court did not clearly err in finding that Petitioner possessed a firearm “in connection with possession of crack.” Appellee’s Br., *United States v. McCree*, No. 23-30218, 2025 WL 50570, at *6–7, 26–29 (5th Cir. Jan. 2, 2025); *see also*

BIO 5; Pet. App. 9a. The government never argued what the panel majority held—*i.e.*, that the district court “*could have* plausibly found that [Petitioner] *intended to sell* the crack cocaine” he possessed, which “*would have* automatically triggered the application of” the enhancement. Pet. App. 10a (emphases added). On the contrary, the government recognized that “no evidence [was] presented that [Petitioner was] a trafficker,” providing the following legal framework on appeal:

“When the other offense is *possession of a user quantity of drugs* and *no evidence is presented that the defendant is a trafficker*, [the Guideline commentary] requires the [sic] evidence to support a finding that the firearm facilitated or had the potential to facilitate the drug possession.

Appellee’s Br., *McCree*, 2025 WL 50570, at *26 (emphases added). And its argument consisted entirely of attempting to distinguish Petitioner’s case from other drug possession cases in which the Fifth Circuit reversed the enhancement. *Id.* at *27–28. The government even relied on Petitioner’s personal use and severe addiction to crack to argue that the gun “embolden[ed]” his possession of it, never even hinting at a theory that he intended to sell the 1.1 grams of crack. *Id.* at *27–28.

In response to the government’s argument, the Fifth Circuit observed that Petitioner’s case “bears resemblance to the records in past decisions in which this court has found the § 2K2.1(b)(6) enhancement inapplicable.” Pet. App. 9a; *see also* Pet. App. 19a (Graves, J., dissenting). In other words, the Fifth Circuit recognized that it previously found similar facts *legally insufficient* to support the enhancement. But, “[u]nsatisfied with rejecting” the government’s argument for affirmance, the majority injected its own theory. *See Margolin*, 146 S. Ct. at 1288. “And the court did so without giving either side a chance to address its theory.” *Id.*

This Court should grant the petition for writ of certiorari and summarily reverse the Fifth Circuit’s judgment for violating the party presentation principle. Regardless of whether the government waived or forfeited the drug trafficking argument *in the district court*, the Fifth Circuit was not permitted to take “a turn at bat,” *see Clark*, 607 U.S. at 9, and resolve this case on a ground no party argued *on appeal*, especially without providing Petitioner notice and an opportunity to be heard. “That drastic departure from the principle of party presentation constituted an abuse of discretion.” *Margolin*, 146 S. Ct. at 1288 (cleaned up). Alternatively, this Court should grant plenary review of the important questions presented, which implicate fundamental due process rights and the role of appellate courts in our justice system.

ARGUMENT

I. The government does not attempt to reconcile the Fifth Circuit’s decision with the party presentation principle.

As explained in the Petition, the Fifth Circuit’s decision “violates the party presentation principle” and “*also* conflicts with decades of precedent” dictating when courts may affirm judgments on “alternative grounds.” Pet. 17 (emphasis added). Those are two independent (and fatal) flaws in the Fifth Circuit’s judgment, based on related but distinct legal principles and lines of precedent. *See* Pet. 14–22. Yet the government does not grapple with the party presentation principle in its response. Instead, it glosses over that issue, insisting that the record contains evidence that could support the Fifth Circuit’s new factual finding and denying that the government waived the issue *in the district court*, while ignoring its undisputed failure to raise the issue *on appeal*. BIO 6–10.

In doing so, the government fails to reconcile the Fifth Circuit’s judgment with the “longstanding principle of party presentation,” *Astellas Pharma, Inc. v. Sandoz Inc.*, 117 F.4th 1371, 1377 (Fed. Cir. 2024), which is “a core principle of our adversarial system.” *In re Chrysler Pacifica Fire Recall Products Liability Litigation*, 143 F.4th 718, 726 (6th Cir. 2025). The government even seems to suggest that party presentation rules do not apply if the lower court is affirmed rather than reversed. BIO 7. But there is no basis in law for conditioning party presentation principles on a case’s ultimate disposition. “Party presentation of the facts and legal arguments in a dispute is a central tenet of the adversarial system of justice[.]” Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447, 495 (2009). “Indeed, our adversarial 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.’” *In re Chrysler*, 143 F.4th at 726 (quoting *United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020)). The government cites no authority to the contrary, nor could it. In all cases, party presentation is critical to maintaining the judiciary’s “role of neutral arbiter,” *Greenlaw v. United States*, 554 U.S. 237, 244 (2008), which is compromised when a court decides a case on an issue neither litigant raised.

In summarily reversing another appellate court for violating the party presentation principle, this Court recently reiterated its centrality to our justice system. *See Margolin*, 146 S. Ct. at 1288. “That principle—the ‘rule that points not argued will not be considered’—distinguishes our adversarial system of justice from an inquisitorial one.” *Id.* (quoting *United States v. Burke*, 504 U.S. 229, 246 (1992))

(Scalia, J., concurring in judgment)). “Because courts are ‘essentially passive instruments of government,’ [they] rely on the parties to ‘frame the issues for decision’ and decide ‘only the questions presented.’” *Id.* (quoting *Sineneng-Smith*, 590 U.S. at 375–376). “To put it plainly, courts call balls and strikes; they don’t get a turn at bat.” *Clark*, 607 U.S. at 9 (quotation marks and citation omitted); *see also Trump v. Illinois*, 146 S. Ct. 432, 437 (2025) (Alito, J., dissenting) (“If a party passes up what seems to us a promising argument, we do not assume the role of advocate.”).

Ignoring this precedent, the government argues that the Fifth Circuit could affirm on its alternative ground because the government did not waive that argument *in district court*. *See* BIO 8–9. As explained in the Petition, that is incorrect—the argument was waived. Pet. 21.¹ Regardless, that dispute is inconsequential because the government had to raise the alternative ground *on appeal* for the Fifth Circuit to properly consider and rely on it. *See Dandridge v. Williams*, 397 U.S. 471, 1156 n.6 (1970) (“The prevailing party may, of course, *assert in a reviewing court* any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.” (emphasis added)); *see also Glaxo Grp. Ltd. v. TorPharm, Inc.*, 153 F.3d 1366, 1371 (Fed. Cir. 1998) (explaining that if “the [forfeited] ground urged is one of law, *and that issue has been fully vetted by the parties on appeal*, an appellate court may choose to decide the issue even if not passed

¹ The record does not support the government’s claim that it “endorse[d]” the argument. *Compare* BIO 9, *with* Pet. App. 36a–28a. Instead, the record shows that the government made a conscious choice to forgo any argument that Petitioner committed a drug trafficking crime, confirming that “the underlying basis for [the] enhancement [was] the belief that the possession of the gun was to facilitate possession of the drugs[.]” Pet. App. 36a–37a.

on by the trial court” (emphasis added)). The government did not do so.

A court “violate[s] the party-presentation principle when it decide[s] a case different from the one [respondent] advanced.” *Margolin*, 146 S. Ct. at 1288; *see also*, *e.g.*, *In re Chrysler*, 143 F.4th at 725 (“A court transcends its limited role as neutral arbiter in this system if it proceeds to act as a ‘self-directed board[] of legal inquiry’ and decide issues that the parties never presented.” (citation omitted)); *Astellas Pharma*, 117 F.4th at 1377 (“By rendering its decision on a ground not raised by any party at any stage of the proceedings, . . . the district court disregarded the longstanding principle of party presentation and, in doing so, abused its discretion.”).

That is precisely what happened in Petitioner’s appeal. The parties “confined their arguments to the narrow question” of whether the district court correctly found that Petitioner possessed a firearm in connection with the crime of drug possession. *See Margolin*, 146 S. Ct. at 1288. The Fifth Circuit suggested that it would be compelled by precedent to “reject[] the [government’s] arguments on that question[.]” *See id.*; *see also* Pet. App. 9a (“We recognize that the record in this case bears resemblance to the records in past decisions in which this court has found the § 2K2.1(b)(6) enhancement inapplicable.” (citing cases)); Pet. App. 19a (Judge Graves stating that the record did not support the district court’s finding and that “[t]he majority concedes as much”). “Unsatisfied” with doing so, the Fifth Circuit identified its *own* theory to justify the district court’s application of the enhancement—a theory that the district court did not adopt, and the government did not argue, either at sentencing or on appeal. “And the court did so without giving either side a chance to

address its theory.” *See Margolin*, 146 S. Ct. at 1288. “That drastic departure from the principle of party presentation constituted an abuse of discretion” and necessitates summary reversal. *Id.* (cleaned up).²

II. The cases cited by the government further illustrate why summary reversal is appropriate.

The government suggests other circuits have followed “the same course as the [Fifth Circuit] here.” BIO 11. That is not so. In none of the government’s cited cases did an appellate court raise an alternative ground for affirmance *sua sponte*. Rather, in each case, the appellate court affirmed a sentencing enhancement on a ground the government raised on appeal and the parties, therefore, “fully briefed and argued[.]” *United States v. Gallegos*, No. 22-2107, 2023 WL 8802687, at *4 n.6 (10th Cir. 2023) (quoting *United States v. Chavez*, 976 F.3d 1178, 1203 n.17 (10th Cir. 2020)).³

² Of course, the principle is “not ironclad.” *Sineneng-Smith*, 590 U.S. at 376. For example, this Court has recognized, as a rare exception to the rule, that courts may “raise a forfeited timeliness defense [to a habeas petition] on their own initiative” but “should reserve that authority for use in exceptional cases.” *Wood v. Milyard*, 566 U.S. 463, 471–73 (2012); *see also Day v. McDonough*, 547 U.S. 198, 209–10 (2006). “But this case scarcely fits that bill.” *Sineneng-Smith*, 590 U.S. at 376. In *Wood* and *Day*, this Court made clear that the exception was grounded in the recognition that AEDPA’s statute of limitations “implicates values beyond the concerns of the parties,” *Wood*, 566 U.S. at 472; that a court nevertheless cannot raise the issue *sua sponte* if the government made a “deliberate decision” to forgo the argument, *id.* at 472–73; and that a court “must accord the parties fair notice and an opportunity to present their positions” before “acting on its own initiative” to raise the issue, *Day*, 547 U.S. at 210. Here, by contrast, the issue on appeal was a fact-based sentencing enhancement that does not “implicate[] values beyond the concerns of the parties”; the government was explicitly asked about drug trafficking at sentencing and made a “deliberate decision” to forgo that argument, both at sentencing and on appeal; and the Fifth Circuit did not provide Petitioner with notice or an opportunity to be heard before “acting on its own initiative.” Thus, this Court’s decisions in *Wood* and *Day*—which the government ignores—underscore the impropriety of the Fifth Circuit’s ruling here.

³ *See also United States v. Nieves-Díaz*, 99 F.4th 1, 9 (1st Cir. 2024) (“The government does argue, in the alternative, that we may affirm the enhancement’s application based on the presence of the ‘chip.’”); *United States v. Defelice*, 576 F. App’x 56, 58 (2d Cir. 2014) (citing the government’s brief for the alternative ground); *United States v. Stanford*, 75 F.4th 309, 316, 321 (3d Cir. 2023) (identifying the government’s two grounds for affirmance and adopting one); *United States v. Henry*, 132 F.4th 1063, 1064–65 (8th Cir. 2025) (adopting the government’s argument); *United States v. Munoz*, 57 F.4th 683, 686 (9th Cir. 2023) (“agree[ing] with the government” that the enhancement was proper on an alternative legal ground); *Appellee’s Br.*, *United States v. Dennings*, No. 18-4261, 2018 WL 5310014, at *19 (4th Cir. Oct. 17, 2018) (government’s brief arguing the position adopted by the court); *Appellee’s*

Moreover, in only one of the government’s cited cases (*Defelice*) did an appellate court make a factual finding that the district court did not itself make.⁴ But, in *Defelice*, the government had at least argued at sentencing for the alternative factual finding that the appellate court ultimately adopted, meaning, the defendant had full opportunity to present evidence rebutting it. See Appellee’s Br., *United States v. Zrallack et al.*, No. 13-927, 2014 WL 1745159, at *40–41 (2d Cir. Apr. 23, 2014). This single, unpublished, and materially distinguishable circuit case from twelve years ago cannot support the government’s argument that the Fifth Circuit’s independent fact-finding was permissible here, particularly in light of the vast precedent from this Court precluding such action.

The Fifth Circuit affirmed Petitioner’s enhancement based on an alternative factual finding—*i.e.*, that he intended to distribute the crack he possessed—that was never found or argued in the district court, without providing him notice or an opportunity to be heard. Nor did Petitioner have a fair opportunity to rebut the new

Br., *United States v. Brown*, No. 23-1212, 2023 WL 4289655, at *36–42 (6th Cir. June 23, 2023) (same); Appellee’s Br., *United States v. Melega*, No. 24-2298, 2025 WL 1352189, at *23–28 (7th Cir. May 2, 2025) (same); Appellee’s Br., *United States v. Munoz*, No. 21-10360, 2022 WL 3569569, at *17–19 (9th Cir. Aug. 12, 2022) (same); Appellee’s Br., *United States v. McKinley*, No. 12-14655-BB, 2013 WL 1088009, at *13–14 (11th Cir. Mar. 6, 2013) (same); Appellee’s Br., *United States v. Miller*, No. 17-3001, 2017 WL 4224360, at *29–36 (D.C. Cir. Sept. 22, 2017) (same).

⁴ In several of the cases, the appellate courts affirmed on a purely *legal* ground. See *Nieves-Díaz*, 99 F.4th at 9–10 (whether a machinegun conversion device meets the definition of a “firearm”); *Stanford*, 75 F.4th at 315–21 (whether a state offense legally qualified as a “crime of violence”); *United States v. Brown*, 86 F.4th 1164, 1166–68 (6th Cir. 2023) (whether fraudulently purchased firearms satisfy the legal definition of “stolen” as used in the Sentencing Guidelines); *Munoz*, 57 F.4th at 686–88 (whether a “ghost gun” qualifies as a “firearm” under California law). In the other cases, the appellate court affirmed the district court’s specific factual finding and, at most, cited additional record evidence that supported the district court’s finding. See *United States v. Dennings*, 922 F.3d 232, 237 n.3 (4th Cir. 2019); *United States v. Melega*, 173 F.4th 907, 911–12 (7th Cir. 2026); *Henry*, 132 F.4th at 1064; *United States v. Miller*, 890 F.3d 317, 328–31 (D.C. Cir. 2018); *Gallegos*, 2023 WL 8802687, at *4 n.6; *United States v. McKinley*, 732 F.3d 1291, 1297–98 (11th Cir. 2013).

finding prior to the Fifth Circuit’s ruling. In the district court, the government—which bore the burden of proof—chose not to argue (or submit evidence) that Petitioner was engaged in drug trafficking, instead relying solely on a theory of drug possession. So, there was no need for Petitioner to submit rebuttal evidence or argument that he was not in fact a drug dealer. The government cites no case in which an appellate court affirmed a sentencing enhancement on a factual finding that the district court did not make, and that the government waived or, at the very least, forfeited in both the district court and on appeal.

As this Court has explained, “waiver and forfeiture rules” help “ensure that parties can determine when an issue is out of the case,” thereby promoting the “orderly progression” of litigation. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008). “[L]itigation is a ‘winnowing process,’ and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.” *Id.* (citation omitted). Here, the district court explicitly asked the government about both drug possession and drug trafficking. The government argued possession, and the district court made a possession finding. “The District Court’s sensible efforts to impose order upon the issues in play . . . deserve[s] our respect.” *Id.* On appeal, the government again chose not to argue drug trafficking as an alternative ground, nor did the appellate court request supplemental briefing on the argument. Thus, Petitioner was not given notice or an opportunity to respond on the dispositive issue.

The Fifth Circuit clearly abused its discretion by deciding Petitioner’s appeal

on a twice waived (or forfeited), fact-based argument that the appellate court raised *sua sponte*, with no notice to the parties. This Court should summarily reverse.

III. The Fifth Circuit’s affirmance required additional fact-finding, as Judge Graves recognized in his dissent.

The government recognizes that the sentencing enhancement at issue is a “fact-bound” inquiry and asserts that “[t]he district court said nothing about drug trafficking.” BIO 10, 12. In the same breath, the government claims that the appellate court “did not make new factual findings” when it relied on a drug trafficking finding to affirm Petitioner’s enhancement. BIO 10. That position is untenable.

A district court must make two factual findings to apply the sentencing enhancement for possessing a firearm “in connection with another felony offense.” *First*, the court must find by a preponderance of the evidence that the defendant committed “another felony offense” while in possession of a firearm. *Second*, the court must find by a preponderance of the evidence that the defendant possessed the firearm “in connection with” the other felony offense, meaning, that the firearm “facilitated, or had the potential of facilitating” the other crime. *See* U.S.S.G. § 2K2.1 cmt. n.14(A) (2021); *see also, e.g. United States v. Anderson*, 559 F.3d 348, 357 (5th Cir. 2009), *abrogated on other grounds by United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024).

Importantly, the evidence required to satisfy the “in connection with” element is different depending on what other felony offense the defendant committed. If the court finds that the defendant was committing a drug trafficking offense, then simultaneous possession of a firearm and drugs alone triggers the enhancement. *See*

U.S.S.G. § 2K2.1 cmt. n.14(B) (2021); *see also United States v. Jeffries*, 587 F.3d 690, 692 (5th Cir. 2009) (stating that the “the enhancement automatically applies” in that scenario). “By contrast,” if the other offense is mere drug *possession*, “[t]he nexus cannot simply be presumed[.]” *Jeffries*, 587 F.3d at 693–94. Instead, the government must present affirmative, reliable evidence proving that the gun “emboldened” the drug possession or “served to protect” the defendant’s drugs. *Id.* at 695.

At sentencing, the government exclusively argued—and the district court specifically found—that Petitioner possessed a firearm in connection with *possessing* crack cocaine. *See* Pet. App. 36a–37a (Court: “[I]sn’t the underlying basis for enhancement the belief that the possession of the gun was to facilitate possession of the drugs?” Prosecutor: “Yes, sir.”); *id.* at 37a (Court: “Is there any reliance from the government that the police officer suspected drug activity by [Petitioner]? Is there anything in the record to show why they had that suspicion?” Prosecutor: “There wasn’t anything in the record.”); *id.* at 38a (prosecutor attempting to distinguish *Jeffries* on the ground that “this is actual” rather than constructive drug possession but not arguing drug trafficking); *id.* at 53a (district court finding that Petitioner possessed the firearm “to facilitate the possession of those five rocks of crack cocaine”). “The district court did *not* find that [Petitioner] was intending to distribute” the crack. Pet. App. 20a (Graves, J., dissenting) (emphasis added). Yet the Fifth Circuit purported to rely on that very finding to affirm.⁵

⁵ The government incorrectly asserts that the “undisputed facts show” Petitioner’s “*attempted sale of [cocaine]*.” BIO 12 (emphasis added). The Fifth Circuit did not make that finding. The alleged “drug trafficking” offense at issue was “possess[ion] . . . with the intent to distribute.” Pet. App. at 10a.

“[T]he Court of Appeals was mistaken to engage in such factfinding.” *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). “If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the [enhancement], it should have remanded to the District Court to make those findings.” *Id.* at 714. “But it should not simply have made factual findings on its own.” *Id.* The absence of a factual finding “is no excuse for the Court of Appeals to ignore the dictates of [clear error review] and engage in impermissible appellate factfinding.” *See Amadeo v. Zant*, 486 U.S. 214, 228 (1988).

Contrary to the government’s suggestion, BIO 10, the questions presented to this Court—and the flaws in the Fifth Circuit’s ruling—are procedural, not factual. Petitioner is simply asking this Court to enforce longstanding and fundamental principles of due process and orderly appellate review. The Fifth Circuit relied on a finding of fact that the government never argued, and the district court never made. Pet. App. 20a. In doing so, it transgressed the party presentation principle, exceeded the clearly established bounds of appellate review, and violated Petitioner’s due process rights by depriving him of notice and the opportunity to present evidence and argument on the Fifth Circuit’s new fact-based theory raised *sua sponte*. Summary reversal is appropriate and necessary to correct this grievous error made by the Fifth Circuit in a published decision.

CONCLUSION

The Court should grant the petition for writ of certiorari, summarily reverse the Fifth Circuit's judgment, and remand for further proceedings. Alternatively, the Court should grant plenary review of the questions presented.

Respectfully submitted,

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SEPTEMBER 2026