No. 20-456

In the Supreme Court of the United States

MICHAEL ELDER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's application of the principle of party presentation in *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020), prevented the court of appeals from relying on the inapplicability of the exclusionary rule in the circumstances of this case to affirm the district court's denial of petitioner's suppression motion.

2. Whether the court of appeals correctly determined that the exclusionary rule did not require suppressing evidence discovered in a search of the residence of a federal supervisee that was the subject of four anonymous tips alleging drug trafficking.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-9a) is not published in the Federal Reporter but is reprinted at 805 Fed. Appx. 19. The order of the district court (Pet. App. 10a-21a) is not published in the Federal Supplement but is available at 2018 WL 833132. The report and recommendation of the magistrate judge (Pet. App. 22a-33a) is not published in the Federal Supplement but is available at 2017 WL 8819909.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2020. A petition for rehearing was denied on May 7, 2020 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 5, 2020 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of possessing with the intent to distribute 28 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. (b)(1)(B) (2012); one count of possessing with the intent to distribute fentanyl, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of maintaining a drug-involved premises, in violation of 21 U.S.C. 856(a)(1) and (b). Judgment 1. The court sentenced petitioner to 210 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 2a-9a.

1. In 2005, petitioner was convicted of multiple offenses involving bank robbery and firearms. Pet. App. 3a. In July 2016, after serving a term of imprisonment, petitioner began serving a five-year term of supervised release. *Id.* at 3a, 10a. One written condition of his supervised release required him to "submit to a search of his person, property, vehicle, place of residence[,] or any other property under his control and permit confiscation of any evidence or contraband discovered." *Id.* at 3a (citation omitted). Although petitioner's probation officer understood that condition to permit searches only with reasonable suspicion, *id.* at 3a n.7, the condition itself does not expressly contain such a limitation, *id.* at 4a. Petitioner indicated by his signature that he consented to that condition. *Id.* at 3a & n.7.

During the term of petitioner's supervised release, the Drug Enforcement Agency (DEA) notified petitioner's probation officer that it had received four anonymous tips stating that petitioner was selling narcotics from his residence. Pet. App. 3a. "These anonymous

tips stated that [petitioner] had expensive vehicles going in and out of the driveway, large packages delivered to the residence containing heroin[,] and drug trafficking going in and out of the house regularly." Presentence Investigation Report (PSR) ¶ 8. On the basis of those tips, petitioner's probation officer and other law-enforcement agents searched petitioner's residence, where they discovered drugs, cash, and drug paraphernalia, including more than 90 grams of cocaine base, more than 100 grams of fentanyl, and more than $23,000. Pet. App. 3a-4a; PSR ¶¶ 9-10.

2. A federal grand jury in the Western District of New York returned an indictment charging petitioner with one count of possessing with the intent to distribute 28 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. (b)(1)(B) (2012); one count of possessing with the intent to distribute fentanyl, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of maintaining a drug-involved premises, in violation of 21 U.S.C. 856(a)(1). Indictment 1-2.

Petitioner moved to suppress the evidence seized during the search of his residence. See Pet. App. 4a. A magistrate judge recommended that the motion be granted. *Id.* at 22a-33a. The district court disagreed and denied the motion. *Id.* at 10a-21a. Although the court considered it "a close question," the court initially agreed with petitioner that the multiple anonymous tips "did not, individually or collectively," establish reasonable suspicion for the search. *Id.* at 12a. The court determined, however, that petitioner's written condition of supervised release authorized a suspicionless search, and that the condition was consistent with the Fourth Amendment. *Id.* at 12a-20a. The court explained that, under this Court's decisions in *United States* v. *Knights*,

534 U.S. 112 (2001), and *Samson* v. *California*, 547 U.S. 843 (2006), a defendant on supervised release, much like a parolee, has a very limited expectation of privacy, and that expectation "is even further reduced where—as in this case—[the] defendant's term of supervised release includes * * * a condition permitting the Probation Officer to search the defendant's home for contraband." Pet. App. 17a; see *id.* at 13a-17a.

The jury found petitioner guilty on all counts. Judgment 1.

3. The court of appeals affirmed in a unanimous, unpublished decision. Pet. App. 2a-9a. The court began by "accept[ing] for the purposes of this appeal" the district court's conclusion that the anonymous tips had not provided reasonable suspicion for the search. *Id.* at 6a-7a. The court of appeals then expressed the view that no binding precedent directly controlled the question of whether a suspicionless search of a supervisee would be permissible in the circumstances of this case. *Id.* at 4a-7a. The court determined, however, that even "assuming a Fourth Amendment violation," exclusion of the evidence from the search "was not warranted in light of the totality of the circumstances," after "[w]eighing the 'incremental deterrent' [effect] of excluding the evidence found in [petitioner's] home against 'the substantial social costs extracted by the exclusionary rule.'" *Id.* at 7a (quoting *Illinois* v. *Krull*, 480 U.S. 340, 352-353 (1987)).

The court of appeals explained that petitioner, "[a]s a supervisee, * * * had a severely diminished expectation of privacy." Pet. App. 7a (citation omitted). And the court recognized that "[t]he government has an 'overwhelming interest' in supervising those on super-

vised release to 'reduce recidivism and thereby promot[e] reintegration and positive citizenship' among supervisees." *Ibid.* (quoting *Samson*, 547 U.S. at 853) (brackets altered). The court "[m]oreover" found that, even if petitioner's probation officer should have conducted further investigation of the anonymous tips to the DEA before searching petitioner's home, the officer's conduct was "not the kind of flagrant or abusive police misconduct that warrants application of the exclusionary rule," which is justified only "where it 'results in appreciable deterrence.'" *Id.* at 7a-8a (quoting *Herring* v. *United States*, 555 U.S. 135, 141 (2009)).

ARGUMENT

Petitioner contends (Pet. 10-17) that this Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration in light of this Court's decision in *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020), because the court of appeals affirmed the district court's decision denying petitioner's suppression motion on a ground that the government itself did not directly advance. Petitioner further contends (Pet. 17-25) that the search of his home violated the Fourth Amendment and that the court of appeals erred in determining that the exclusionary rule should not apply in the particular circumstances of this case. The decision below is correct, is unlike *Sineneng-Smith*, and does not conflict with any other decision of this Court, another federal court of appeals, or a state court of last resort. Further review is unwarranted.

1. Petitioner initially contends (Pet. 10-17) that the court of appeals' decision to affirm the judgment below on exclusionary-rule grounds violates the principle of

party presentation, as recently restated in *Sineneng-Smith*. Petitioner is incorrect.

a. In *Sineneng-Smith*, this Court vacated a court of appeals' decision that had "departed so drastically from the principle of party presentation as to constitute an abuse of discretion," by "radical[ly] transform[ing]" the case presented by the parties. 140 S. Ct. at 1578, 1581-1582. The defendant in *Sineneng-Smith* had challenged her convictions under federal criminal statutes in both the district court and the courts of appeals on the ground that the statutes, "properly construed, did not cover her conduct, and if they did, they violated the Petition and Free Speech Clauses of the First Amendment as applied." *Id.* at 1578. But the appellate panel "moved [the case] onto a different track" by "nam[ing] three *amici* and invit[ing] them to brief and argue issues framed by the panel," including whether the statutes were *facially* overbroad in violation of the First Amendment—an issue the parties had never even tangentially raised and that did not fit the defendant's own theory of the case. *Id.* at 1578, 1581. The appellate panel then relegated counsel for the parties to "a secondary role," *id.* at 1578, and it ultimately held the statute facially unconstitutional based on the overbreadth analysis that it had "interjected" into the case, *id.* at 1581-1582. See *id.* at 1581 (observing that the defendant's arguments "fell by the wayside, for they did not mesh with the panel's overbreadth theory of the case").

This Court emphasized that "[t]he party presentation principle is supple, not ironclad," and "[t]here are no doubt circumstances in which a modest initiating role for a court is appropriate." *Sineneng-Smith*, 140 S. Ct. at 1579. But the Court determined that "[n]o extraordinary circumstances justified the panel's takeover of

the appeal" there, which produced an appellate decision that was both "contrary" to the defendant's own theory of the case and that applied the "'strong medicine'" of "'First Amendment overbreadth'" to "'invalidat[e]'" a federal statute. *Id.* at 1581 (brackets altered; citation omitted).

b. *Sineneng-Smith* does not suggest that the court of appeals in this case abused its discretion by affirming the denial of the district court's suppression order on exclusionary-rule grounds. The court of appeals did not grant relief to an *appellant* on a newly minted ground, let alone invite amici to brief and argue new issues fundamentally dissimilar from those that had been presented by the parties themselves. Nor did the court adopt a theory of the case that was *contrary* to the one advanced by the prevailing party, or issue a broad holding of constitutional law that would control future cases.

Instead, the decision below represents a straightforward application of the well-settled principle that appellate courts generally "have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below." *Upper Skagit Indian Tribe* v. *Lundgren*, 138 S. Ct. 1649, 1654 (2018); see also *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason.") (citation and internal quotation marks omitted).

"The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." *Chenery*, 318 U.S. at 88; see *Brown* v.

City of New York, 862 F.3d 182, 188 (2d Cir. 2017) ("The role of the appellee is to defend the decision of the lower court. This Court has not held that an appellee is required, upon pain of subsequent waiver, to raise every possible alternate ground upon which the lower court could have decided an issue."); *Richison* v. *Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) ("This reluctance to command do-overs in the district court is * * * why we treat arguments for *affirming* the district court differently than arguments for *reversing* it. We have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal.").

This Court in *Sineneng-Smith* did not reject or diminish the settled rule that an appellate court may affirm the judgment below on any ground supported by the record. Petitioner complains (Pet. 12, 15) that the government declined to frame its argument in exclusionary-rule terms and that he did not have an opportunity to brief the exclusionary-rule issue that was the basis for the court of appeals' conclusion affirming the denial of his motion to suppress. But the court's conclusion that the exclusionary rule was not warranted under the circumstances here was based on, and closely related to, the parties' arguments throughout the case regarding the reasonableness of the search. See Pet. App. 7a-8a (considering the response of petitioner's probation officer to the multiple tips alleging drug trafficking at petitioner's residence; the government's interests in supervising petitioner while on supervised release; and petitioner's written consent to searches of his home while on supervised release). And because the proceedings in the court of appeals here looked nothing

like the "[appellate] panel's takeover of the appeal" that occurred in *Sineneng-Smith*, 140 S. Ct. at 1581, a remand based on that decision is unwarranted.

2. On the merits, petitioner contends (Pet. 17-25) that the lower courts erred in declining to suppress the drug evidence found in the search of his residence. No suppression was justifiable here, and the court of appeals' unpublished, fact-bound decision does not warrant this Court's review.

a. The court of appeals correctly determined that, even assuming that the search of petitioner's residence violated the Fourth Amendment, the exclusionary rule does not support suppressing the evidence found in the search. The Fourth Amendment prohibits unreasonable searches and seizures. While "[t]he Amendment says nothing about suppressing evidence obtained in violation of [its] command," this Court has fashioned the exclusionary rule as "a 'prudential doctrine * * * to compel respect for the constitutional guaranty.'" *Davis* v. *United States*, 564 U.S. 229, 236 (2011) (citations omitted). "Exclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Ibid.* (citation and internal quotation marks omitted). Rather, "[t]he rule's sole purpose * * * is to deter future Fourth Amendment violations." *Id.* at 236-237.

This Court's decisions have therefore "limited the [exclusionary] rule's operation to situations in which this purpose is 'thought most efficaciously served.'" *Davis*, 564 U.S. at 237 (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)). Moreover, while "[r]eal deterrent value is a 'necessary condition for exclusion,' * * * it is not 'a sufficient' one." *Ibid.* (quoting *Hudson* v. *Michigan*, 547 U.S. 586, 596 (2006)). The Court has

recognized that the exclusionary rule exacts "'substantial social costs'" because "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Ibid.* (quoting *United States* v. *Leon*, 468 U.S. 897, 907 (1984)). The Court has explained that "society must swallow this bitter pill when necessary, but only as a 'last resort.'" *Ibid.* (quoting *Hudson*, 547 U.S. at 591). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Ibid.*

This Court has therefore held that the "massive remedy of suppressing evidence," *Hudson*, 547 U.S. at 599, is unwarranted where officers reasonably execute a facially valid search warrant, *Leon*, 468 U.S. at 922; conduct a search in reasonable reliance on binding appellate precedent, *Davis*, 564 U.S. at 232; reasonably rely on a state statute later held unconstitutional, *Illinois* v. *Krull*, 480 U.S. 340, 349-350 (1987); or make an unlawful arrest due to a negligent clerical error, *Herring* v. *United States*, 555 U.S. 135, 136-137, 147-148 (2009); see *Arizona* v. *Evans*, 514 U.S. 1, 14-16 (1995). The Court has similarly conducted a "pragmatic analysis of the exclusionary rule's usefulness" in holding that prisoners generally may not obtain habeas relief for Fourth Amendment violations, *Stone* v. *Powell*, 428 U.S. 465, 488 (1976); see *id.* at 494-495, and that the exclusionary rule does not apply in civil-deportation hearings, *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040-1050 (1984), grand-jury proceedings, *Calandra*, 414 U.S. at 347-352, or parole-revocation hearings, *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 364 (1998).

Each of those precedents of this Court reflects the principle that the exclusionary rule should not be reflex-

ively applied anytime a court finds a Fourth Amendment violation; rather, evidence should be suppressed only when suppression's benefits outweigh its costs. The court of appeals applied that principle in this case, by assuming arguendo a Fourth Amendment violation and considering whether the officers' conduct was "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Pet. App. 6a (quoting *Herring*, 555 U.S. at 144).

b. Petitioner does not dispute that the court of appeals applied the correct legal standard; he merely takes issue with the court's application of that standard to the particular facts here. See, *e.g.*, Pet. 17 (arguing that the officers showed "deliberate disregard for [petitioner's] Fourth Amendment rights"); Pet. 21 (describing the search as a "flagrant violation of the Fourth Amendment"); Pet. 25 (asserting a "strong deterrent value in excluding evidence obtained through intentional police misconduct"). Petitioner's arguments lack merit.

Petitioner errs in asserting (Pet. 18-20) that the search in this case violated clearly established Fourth Amendment standards. As the court of appeals observed, the search occurred during petitioner's term of supervised release, after he had agreed to a condition of supervision that required him to a submit to a search of his home and that was not expressly limited to suspicion-based searches. See Pet. App. 5a-7a. That situation is akin to *Samson* v. *California*, 547 U.S. 843 (2006), in which this Court recognized the constitutionality of a suspicionless search of a parolee who had been notified that he could be subject to such a search. *Id.* at 846. At a minimum, whether the suspicionless search

here was lawful was not readily apparent. See Pet. App. 7a.

In addition, the court of appeals determined that the conduct of petitioner's probation officer was not "flagrant or abusive," but was instead "'rationally and reasonably related to the performance of [his] duty.'" Pet. App. 8a (citation omitted; brackets in original). The probation officer knew that petitioner was a federal supervisee with a "severely diminished expectation[] of privacy by virtue of [his] status alone." *Samson*, 547 U.S. at 852; see *United States* v. *Knights*, 534 U.S. 112, 119 (2001) (holding that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled'") (citation omitted); see also Pet. App. 7a. And the officer responded to "four tips over the course of two months" that had been made to the DEA alleging that petitioner was trafficking drugs. Pet. App. 8a. At the very most, the probation officer should have conducted further investigation of the tips before the search, but the court of appeals correctly determined that such an omission does not rise to the level of flagrant conduct in the context of a federal supervisee. *Ibid.*

In light of the overall reasonableness of the officers' conduct, especially when combined with the government's "'overwhelming interest'" in supervising defendants on supervised release in order to "'reduce recidivism'" and "'promot[e] reintegration and positive citizenship' among supervisees," the court of appeals correctly determined that the facts of this case taken together did not warrant suppressing the evidence found during the search. Pet. App. 7a (quoting *Samson*, 547 U.S. at 853) (brackets altered). Petitioner contends (Pet. 24) that the exclusionary rule's "deterrent value reaches its apogee where, as here, the flagrant conduct

involves an invasion or search of the home." But that argument simply repeats the mistaken premise that petitioner's probation officer's conduct was flagrant rather than reasonable, and it disregards the precedent cited by the court of appeals demonstrating that federal supervisees like petitioner have a severely diminished expectation of privacy. See Pet. App. 7a.

c. Although petitioner asserts (Pet. 17) that the decision below creates a "new exception" to the Fourth Amendment, the court of appeals' unpublished decision is instead expressly tied to "the totality of the circumstances" in this case. Pet. App. 7a. And petitioner identifies no decision of any court of appeals that has reached a different result in similar circumstances. He accordingly presents no sound reason for this Court's review of the exclusionary-rule question presented in the petition. Moreover, this case would be an unsuitable vehicle to review that question, because it is unlikely to make a practical difference to the outcome. The district court denied petitioner's suppression motion on the ground that the search of petitioner's residence was reasonable even without suspicion, see *id.* at 12a-20a, and the court of appeals would likely reach the same conclusion if forced to decide the question.*

In *United States* v. *Knights*, *supra*, this Court explained that "[t]he touchstone of the Fourth Amendment is reasonableness" and "the reasonableness of a

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* This Court has repeatedly denied petitions for a writ of certiorari on the related question whether a suspicionless probation search pursuant to a condition of probation violates the Fourth Amendment. See, *e.g.*, *Williams* v. *United States*, 137 S. Ct. 333 (2016) (No. 16-5142); *Tessier* v. *United States*, 137 S. Ct. 333 (2016) (No. 15-9414); *King* v. *United States*, 571 U.S. 1239 (2014) (No. 13-7556).

search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" 534 U.S. at 118-119 (citation omitted). Applying that standard, the Court upheld a warrantless search of a probationer's home, emphasizing that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled,'" and that the probationer there was subject to an express condition permitting warrantless searches. *Id.* at 119-120 (quoting *Griffin* v. *Wisconsin*, 483 U.S. 868, 874 (1987)). The Court found the probationer's privacy interests outweighed by the government's "interest in apprehending violators of the criminal law," especially considering that probationers are "'more likely than the ordinary citizen to violate the law'" and "have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence." *Id.* at 120-121 (citation omitted).

In *Samson* v. *California*, *supra*, this Court similarly held that the Fourth Amendment permitted a suspicionless search of a parolee's person conducted pursuant to a state law requiring consent to such searches as a condition of parole. 547 U.S. at 847-857. The Court explained that parolees "have severely diminished expectations of privacy by virtue of their status alone," and in fact "have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Id.* at 850, 852. The Court also explained that the government "has an 'overwhelming interest' in supervising parolees," and the "ability to conduct suspicionless searches of parolees serves [the government's] interest in reducing recidivism, in a manner that aids * * * the reintegration of

parolees into productive society." *Id.* at 853-854 (citation omitted).

Here, the search of petitioner's residence was constitutionally reasonable under this Court's framework in *Knights* and *Samson*, even if the four anonymous tips accusing petitioner of drug trafficking did not establish reasonable suspicion. Petitioner's supervised release meant that he, like a parolee, had a "severely diminished expectation[] of privacy." *Samson*, 547 U.S. at 852. And that already-limited privacy expectation was "significantly diminished" even further, *Knights*, 534 U.S. at 119-120, by the condition of his supervision stating that he "shall submit to a search of his * * * residence," Pet. App. 3a (citation omitted)—a condition that did not expressly require suspicion. See *id.* at 12a-13a (district court noting that the written condition by its terms authorized suspicionless searches, notwithstanding the probation officer's "incorrect" belief that reasonable suspicion was required).

On the other side of the balance, the search of petitioner's residence served the government's substantial interests in reducing recidivism, preventing the destruction of evidence, and promoting the reintegration of supervisees into society. See *Samson*, 547 U.S. at 853; *Knights*, 534 U.S. at 120-121. Petitioner's status as an offender on supervision for a serious violent offense, see Pet. App. 3a, made those interests even more acute. And, as in *Samson*, the government's ability to conduct "suspicionless searches" was critical to allow it to "address th[o]se concerns *effectively*." 547 U.S. at 854. The government's substantial interests in conducting this search thus significantly outweighed petitioner's diminished expectation of privacy while serving his term of supervised release.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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