No. 06-1692

In the Supreme Court of the United States

PAUL KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the search of petitioner's home was reasonable under the Fourth Amendment, where petitioner was on probation; his probation was conditioned on his submitting to visits and searches by his probation officers; and, during one such visit, the officers developed a reasonable suspicion that petitioner had violated the terms of his release and was engaged in further criminal activity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rule:

Statutes and rule: Page

In the Supreme Court of the United States

No. 06-1692

PAUL KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted in 228 Fed. Appx. 787.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2007. The petition for a writ of certiorari was filed on June 19, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Nevada, petitioner was convicted of possessing machine guns, in violation of 18 U.S.C. 922(*o*)(1), and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2).

He was sentenced to 70 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-3.

1. In March 2002, petitioner was convicted and sentenced in the United States District Court for the Central District of California on one count of possessing counterfeit currency. Pet. App. 5. The district court in that case did not sentence petitioner to imprisonment, C.A. E.R. 30-33, 85-86, but rather ordered that he "be placed on supervised release for a term of three years" on conditions that, *inter alia*, he (a) "participate for a period of 4 months in a home detention program," (b) "permit a probation officer to visit him * * * at any time at home or elsewhere and * * * permit confiscation of any contraband observed in plain view," and (c) "not possess a firearm or other dangerous weapon." Pet. App. 5, 11.

Petitioner moved his residence to Nevada, and in April 2002 he met with his new probation officer there. C.A. E.R. 89-90. The officer told petitioner that the Nevada probation office requires, as a condition of release, that the probationer submit to warrantless searches by probation officers to ensure compliance with all release conditions. *Ibid.*; see *id.* at 72. Petitioner agreed to the modification and signed a written waiver of his rights to a hearing and assistance of counsel on the modification. *Ibid.*

In May 2002, petitioner and the government further stipulated that the California district court had "inadvertently stated that it sentenced [petitioner] to three years 'supervised release' with four months home detention, rather than stating that it sentenced [petitioner] to three years probation with a special condition of four months home detention." Pet. App. 14. The parties

asked the court to delete from its judgment the reference to supervised release and to replace it with language sentencing petitioner "to three years probation with a special condition of four months home detention." *Ibid.* The parties further noted that petitioner had moved from the Central District of California to the District of Nevada, and that "[i]n order for the probation officer in this district to transfer [petitioner's] case to a probation officer in the District of Nevada[,] the judgment * * * must accurately reflect a sentence to three years probation rather than supervised release." *Ibid.* Soon after the parties signed the stipulation, the court issued the requested order. *Id.* at 15.

In July 2003, Nevada probation officers, without a warrant, visited petitioner at his new Nevada home and asked him for a tour of the residence. He agreed to the tour and took them into the master bedroom. There, the officers saw a large sword near petitioner's bed. The officers reminded petitioner that his release conditions prohibited him from possessing dangerous weapons, and they asked him repeatedly if he had any other weapons in the house. Petitioner did not respond to their questioning; instead, he made "furtive," "worried" glances around the room. Concerned about his mannerisms and his failure to respond, the officers opened a dresser drawer near where petitioner was standing. The drawer contained a firearm magazine loaded with ammunition. The officers detained petitioner and conducted a search of the bedroom. In different drawers, they found three firearms, including an assault rifle and a machine pistol. A subsequent search of the house, conducted pursuant to a warrant, yielded 34 additional firearms, including seven fully automatic machine guns, a sawed–off shot-

gun, and a silencer. C.A. E.R. 85, 91-93, 125-127, 193-194.

2. In May 2004, petitioner was charged in the United States District Court for the District of Nevada with possessing machine guns, in violation of 18 U.S.C. 922(*o*)(1); possessing an unlawful silencer, in violation of 26 U.S.C. 5841, 5861(d), and 5871; possessing an unregistered sawed-off shotgun, in violation of 26 U.S.C. 5841, 5861(d), and 5871; and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). C.A. E.R. 1-6.

a. After he was indicted in the District of Nevada, petitioner filed in the Central District of California a motion for a writ of coram nobis or for relief pursuant to 28 U.S.C. 2255, challenging the legality of his probation. The motion argued that the California district court had lacked jurisdiction to correct his sentence of "supervised release," such that he should be permitted to withdraw his guilty plea to the 2002 counterfeiting charge. Concluding that a writ of coram nobis was unwarranted and that relief under Section 2255 was time barred, the California district court denied the motion. Supp. C.A. E.R. 1-4.

b. At the same time, petitioner moved in the District of Nevada to suppress all of the evidence that was seized as a result of the probation officers' home visit. He argued once again that the California district court had lacked jurisdiction to correct his sentence of "supervised release," and he further claimed that no search condition was ever included as part of that sentence because the Nevada probation office had "coerced" his consent to the search-condition modification. C.A. E.R. 15-18.

A magistrate judge in the District of Nevada conducted an evidentiary hearing that disclosed the facts

described above. C.A. E.R. 142-269. The magistrate judge ultimately issued a report recommending denial of the motion to suppress, finding that (1) petitioner could not collaterally attack the validity of the search condition, particularly because the California district court had already denied his motion for a writ of coram nobis and for relief under Section 2255, *id.* at 96-97; (2) in any event, petitioner had knowingly and voluntarily agreed to the search-condition modification and waived his rights to counsel and a hearing, *id.* at 99-102; and (3) the probation officers' search was valid under *United States* v. *Knights*, 534 U.S. 112 (2001), because (a) upon seeing the sword in petitioner's bedroom, the officers had "probable cause to believe [petitioner] was in violation of the condition that he not possess a dangerous weapon," and (b) in light of petitioner's "furtive gestures" and refusal to answer questions, the officers had a "reasonable suspicion that [petitioner] was engaged in [further] criminal activity." C.A. E.R. 102; see *id.* at 97-99.

The district court adopted the magistrate judge's findings without qualification and denied the motion to suppress. C.A. E.R. 117. Petitioner conditionally pleaded guilty to possessing machine guns and possessing a firearm as a felon, reserving his right to appeal the Fourth Amendment issue. *Id.* at 118, 122.

3. The court of appeals affirmed. Pet. App. 1-3. At the outset (*id.* at 2 n.1), the court rejected petitioner's "collateral attack" on the California district court's correction of his sentence and on the search-condition modification. The court found no statutory authority for a collateral challenge, *ibid.* (citing *Custis* v. *United States*, 511 U.S. 485, 490-497 (1994)), and it determined that petitioner had in any event "knowingly and volun-

tarily agreed to [the search] condition and waived any statutory right to a hearing and assistance of counsel before it was imposed." *Ibid.* (citing *Beckwith* v. *United States*, 425 U.S. 341, 348 (1976)). Reasoning that petitioner was thus "subject to a valid warrantless search condition," the court concluded that the probation officers' search was consistent with the Fourth Amendment:

> [T]he probation officers who conducted the search did so based on a reasonable suspicion that [petitioner was] engaged in criminal activity. *United States* v. *Knights*, 534 U.S. 112, 121 (2001). The probation officers had reasonable suspicion that [petitioner] was violating the terms of his probation because they saw a sword in plain view next to his bed, and [petitioner] was prohibited from possessing dangerous weapons. When one of the officers asked [petitioner] whether he had any other dangerous weapons in the house, [petitioner] became evasive and did not respond.

Pet. App. 2 (internal quotation marks and ellipses omitted).

ARGUMENT

Petitioner renews his claim (Pet. 11-15) that the probation officers' search violated the Fourth Amendment because the search condition attached to his probation was invalid. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's fact-bound argument is not warranted. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

1. Petitioner argues that the seized evidence should have been suppressed because the search condition that was added to his probation upon his arrival in Nevada was not validly imposed. More specifically, he argues (Pet. 11-14) that the condition was not properly made part of his initial sentence of "supervised release" because the California district court lacked jurisdiction to correct that sentence beyond the seven-day window prescribed by Rule 35 of the Federal Rules of Criminal Procedure.[1]

As an initial matter, the court of appeals correctly concluded (Pet. App. 2 n.1) that petitioner could not collaterally attack the validity of the search condition through his motion to suppress. Gov't C.A. App. 1-4. This Court has made clear that, generally, "[c]hallenges to the lawfulness of confinement or to particulars affecting its duration are the province of habeas corpus." *Hill* v. *McDonough*, 126 S. Ct. 2096, 2101 (2006). A district court in California has already considered and denied petitioner's motion for the equivalent of habeas relief available to federal prisoners under Section 2255. And this Court's decisions foreclose petitioner from making a second collateral attack on his sentence through a motion to suppress in a Nevada district court. See *Daniels* v. *United States*, 532 U.S. 374, 382 (2001) ("If * * * a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse."); *Custis* v. *United States*, 511 U.S. 485, 490-497

[1] As mentioned, petitioner argued in the courts below that the Nevada probation office had "coerced" him into agreeing to the search condition. He does not renew that argument in this Court.

(1994) (holding that petitioner had no statutory or constitutional right "to collaterally attack prior convictions" in the course of his subsequent sentencing proceeding).

Promoting the finality of judgments is a "core purpose[]" of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, generally, and of Section 2255 specifically. See *Johnson* v. *United States*, 544 U.S. 295, 309 (2005) ("[T]he United States has an interest in the finality of sentences imposed by its own courts; § 2255 is, after all, concerned directly with federal cases."). Moreover, Section 2255 promotes the efficiency of the administration of collateral attacks by requiring that a prisoner "move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. 2255. Allowing petitioner to commence a second collateral attack on his sentence in a different court after his Section 2255 motion has already failed would circumvent the procedural requirements mandated by Congress and the policies that underlie the AEDPA. Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-492 (1973) (holding that allowing an inmate to attack the "constitutionality of his physical confinement itself" through a motion pursuant to 42 U.S.C. 1983, rather than a petition for habeas corpus, would undermine the policies underlying the habeas corpus remedy). Rather, in a case such as this where petitioner has already collaterally attacked his sentence and lost, "[t]he presumption of validity that attached to the prior conviction at the time of sentencing is conclusive." *Daniels*, 532 U.S. at 382.

Thus, as the case comes to this Court, the search condition must be presumed valid, particularly where both courts below found that petitioner "knowingly and voluntarily agreed to [the search] condition and waived any

* * * right to a hearing and assistance of counsel before it was imposed." Pet. App. 2 n.1; see C.A. E.R. 99-102, 117.

2. Because the condition is valid, *United States* v. *Knights*, 534 U.S. 112 (2001), is controlling. The court of appeals correctly held that, under that case, petitioner is not entitled to suppression. In *Knights*, this Court upheld the search of a home, despite the absence of a warrant or probable cause, because the target of the search was not an ordinary citizen but a probationer subject to a probation condition requiring submission to a search "at anytime." *Id.* at 114. The Court explained that "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a 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." *Id.* at 118-119 (internal quotation marks and citation omitted). The Court reasoned that because probationers have a substantially diminished expectation of privacy, and because the government has a strong "interest in apprehending violators of the criminal law," the government may "justifiably focus on probationers," who have a high rate of recidivism, "in a way that it does not on the ordinary citizen." *Id.* at 121; see *Griffin* v. *Wisconsin*, 483 U.S. 868, 880 (1987). In light of these considerations, the Court held that the search of the probationer's home—which was supported not only by the search con-

dition but by reasonable suspicion—was constitutional.[2] See *Knights*, 534 U.S. at 120-122.

The court of appeals correctly held that, under *Knights*, the search of petitioner's home in this case did not run afoul of the Fourth Amendment. The search condition attached to petitioner's probation allowed officers to search his residence at any time, and the officers at a minimum had a reasonable suspicion that petitioner was in violation of his probation. As the court of appeals recognized, a search in such a circumstance was legal under *Knights* because petitioner, as a probationer, had a diminished expectation of privacy. Pet. App. 2. Petitioner does not contend that the court of appeals misstated *Knights*'s holding or reasoning. Nor does he dispute that the probation officers searched his house pursuant to the conditions of his probation or that they had a reasonable suspicion that he was engaged in criminal activity. Instead, he seeks to distinguish *Knights* on the ground that the search condition in this case was invalid, even though every court to have considered the issue has upheld the validity of his sentence.

3. Even if the search condition had been invalid, however, petitioner would not be entitled to suppression. Wholly apart from that condition, petitioner's initial sentence of "supervised release" included a condition re-

[2] The Court did "not decide whether the probation condition so diminished, or completely eliminated, [the probationer's] reasonable expectation of privacy * * * that a search by a law enforcement officer without *any* individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Knights*, 534 U.S. at 120 n.6 (emphasis added). In *Samson* v. *California*, 126 S. Ct. 2193 (2006), the Court "answer[ed] * * * in the affirmative" a "variation of the question this Court left open in * * * *Knights*," holding that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at 2196 & n.1, 2202.

quiring him to "permit a probation officer to visit him * * * at any time at home or elsewhere" and to "permit confiscation of any contraband observed in plain view." Pet. App. 9, 11. Petitioner did not challenge that condition in his motion to suppress.[3] Under that condition, the probation officers were lawfully present in petitioner's home when they saw the sword and discerned the furtive behavior that gave rise to their reasonable suspicion. The subsequent search was therefore valid under the *Knights* totality-of-the-circumstances approach even if the officers' actions were justified at the outset only by the visitation condition. In addition, the search of the drawers in petitioner's room was valid as a search incident to his arrest for violation of his probation conditions (*i.e.*, by possessing the sword). See *Rawlings* v. *Kentucky*, 448 U.S. 98, 109 (1980); Gov't C.A. Br. 16-18.[4]

---

[3] Although petitioner now contends (Pet. 12-13) that "[t]he sentence of supervised release was in and of itself an illegal sentence," such that *any* warrantless search conducted pursuant to any condition thereof "was unlawful," he did not make that argument in his motion to suppress. C.A. E.R. 11-18. To the contrary, he cited *United States* v. *Penna*, 319 F.3d 509 (9th Cir. 2003), for the proposition that "the sentence imposed by the court" in March 2002 "is the only enforceable sentence against [petitioner]," such that the term of "supervised release" had to be "reinstate[d]." C.A. E.R. 16 (internal quotation and citation omitted). It is not surprising, then, that the court of appeals did not address the issue. Pet. App. 1-3. There is no reason for this Court to depart in this instance from its usual practice of declining to entertain a claim that was neither properly preserved nor passed upon below, see, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977), especially because the validity *vel non* of petitioner's initial sentence presents no issue of enduring legal significance.

[4] Even if the initial search had not been legal, the evidence still would have been admissible under an exception to the exclusionary rule because it "ultimately or inevitably would have been discovered by

4. Contrary to petitioner's contention (Pet. 11, 14-15), nothing in the decision below remotely conflicts with the Second Circuit's decision in *United States* v. *Thomas*, 135 F.3d 873 (1998). *Thomas* did not address the legality of a probationary search, and so it had no occasion to discuss the Fourth Amendment, let alone this Court's decision in *Knights*. Rather, *Thomas* merely held that the district court had erred in (a) imposing a sentence of supervised release without also imposing an initial period of imprisonment, and (b) attempting to correct that error after the seven-day window prescribed by Federal Rule of Criminal Procedure 35. *Id*. at 875. That holding does not assist petitioner's motion to suppress. *Thomas* vacated the sentence at issue on *direct review*; it did not hold that a defendant like petitioner could collaterally attack a condition of a prior sentence, or a modification of that sentence, in a motion to suppress evidence. And even if *Thomas* could somehow be construed to permit a collateral attack—and its holding thus allowed petitioner to challenge the search condition in this case—petitioner's motion to suppress would fail in any event. As discussed, petitioner's very status as a probationer, along with the visitation condition to which he was subject, made the officers' reasonable suspicion sufficient to support the search. The search was also valid as a search incident to a lawful arrest. And even if the search were invalid, the exclusionary rule would be inapplicable to this case. See note 4, *supra*.

---

lawful means." *Nix* v. *Williams*, 467 U.S. 431, 444 (1984). Here, the officers would have discovered the guns during their execution of the search warrant, which was supported by probable cause to believe that petitioner was in violation of his probation as evidenced by the sword in plain view and petitioner's evasive behavior.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney

SEPTEMBER 2007