No. 11-235

In the Supreme Court of the United States

JAMES ANTOINE FAULKNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the taint of an illegal traffic stop was sufficiently attenuated by the intervening discovery of an outstanding arrest warrant, such that the evidence discovered in the post-arrest search was admissible at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 636 F.3d 1009.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2011. A petition for rehearing was denied on April 20, 2011 (Pet. App. 40a). On July 11, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 18, 2011, and the petition was filed on that date. 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 Southern District of Iowa, petitioner was convicted of conspiring to manufacture, distribute, and

possess with intent to distribute 50 grams or more of cocaine base and heroin, resulting in serious bodily injury or death, in violation of 21 U.S.C. 846; distributing cocaine base, in violation of 21 U.S.C. 841(a)(1); and possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1). 08-74 Docket entry No. 281, at 1 (S.D. Iowa Jan. 27, 2010). He was sentenced to concurrent terms of life imprisonment on the first count and 360 months of imprisonment on each of the other two counts, to be followed by a total of ten years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1a-25a.

1. At about 10:00 p.m. on October 31, 2008, Lieutenant Steven Stange of the University of Iowa Police Department saw a car driven by petitioner complete a left turn while the traffic light was red. Pet. App. 27a. It was Halloween night, and vehicle and pedestrian traffic was heavy. *Id.* at 37a. The car had entered the intersection as the traffic light was changing from green to yellow, and petitioner had been unable to complete the left turn while other cars were backed up in the intersection. *Id.* at 27a. By the time the car cleared the intersection, the light was red. *Ibid.*

Lieutenant Stange later testified that he stopped the car based on what he considered petitioner's "unsafe activity" in clearing the intersection while the light was red and while heavy traffic would have to "avoid" the car. 08-74 Docket entry No. 324, at 74 (S.D. Iowa May 11, 2010). Lieutenant Stange intended only to warn petitioner about his "unsafe maneuver," not to issue a citation. *Id.* at 77. Lieutenant Stange approached petitioner and asked whether petitioner was aware that he had been stopped for running a red light. *Id.* at 74. Petitioner said yes. *Ibid.*

Lieutenant Stange asked petitioner for his driver's license, and petitioner provided it. Pet. App. 4a, 27a. Lieutenant Stange then ran a records check and discovered that petitioner was wanted on an outstanding federal drug warrant. *Id.* at 27a. Lieutenant Stange called for backup, and when additional officers arrived, petitioner and the car's two passengers were ordered out of the car, and petitioner was arrested. *Id.* at 5a, 27a-28a. The officers searched petitioner and found $2600 in cash. *Ibid.* A drug dog alerted to the presence of controlled substances in the car, and officers found crack cocaine and heroin in a hiding place behind the glove compartment. *Id.* at 5a. After *Miranda* warnings were administered, petitioner told one of the officers that half of the drugs belonged to him and half belonged to one of the passengers. *Ibid.*

2. A grand jury in the United States District Court for the Southern District of Iowa charged petitioner in a second superseding indictment with conspiring to manufacture, distribute, and possess with intent to distribute 50 grams or more of cocaine base, cocaine, and heroin, resulting in death, in violation of 21 U.S.C. 846; distributing cocaine base and heroin, in violation of 21 U.S.C. 841(a)(1); and possessing with intent to distribute cocaine base and heroin, in violation of 21 U.S.C. 841(a)(1). 08-74 Docket entry No. 148, at 1-2, 7 (S.D. Iowa July 7, 2009).

Petitioner moved to suppress evidence, including the drugs and his incriminating statement about them, on Fourth Amendment and other grounds. Pet. App. 26a-27a. The district court held a hearing during which Lieutenant Stange, the other officers, and one of petitioner's passengers testified to the facts described above. 08-74 Docket entry No. 324 (S.D. Iowa May 11,

2010). The district court then denied the motion in a written order. Pet. App. 26a-39a. The district court agreed with petitioner that, because his left turn had been lawful under state law, Lieutenant Stange had lacked reasonable suspicion to stop the car. *Id.* at 31a-33a. But, as relevant here, the court concluded that the discovery of the outstanding federal arrest warrant was an "intervening circumstance" that "purge[d] the 'taint' of the original illegal stop," thereby rendering the exclusionary rule inapplicable. *Id.* at 37a.

Invoking this Court's decision in *United States* v. *Crews*, 445 U.S. 463 (1980), the court of appeals recognized that evidence obtained following an unlawful seizure "may be admissible if the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." Pet. App. 34a-35a (quoting *United States* v. *Simpson*, 439 F.3d 490, 495 (8th Cir. 2006), which in turn quotes *Crews*, 445 U.S. at 470). To determine whether sufficient attenuation existed in this case, the court examined three factors identified by this Court in *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975). Pet. App. 35a. Specifically, the district court considered (1) the time elapsed between the stop and the acquisition of the evidence; (2) the nature of the intervening circumstances; and (3) the purpose of the stop and whether the Fourth Amendment violation was flagrant. *Id.* at 35a-37a.

The district court found that these factors counseled against suppression. Pet. App. 35a-37a. On the third factor, which the court characterized as the "most important," the court determined that "the stop of [petitioner's] vehicle is not the flagrant type misconduct envisioned by the Supreme Court to warrant application of

the exclusionary rule in the presence of an intervening circumstance." *Id.* at 36a-37a (internal quotation marks omitted). The court observed that "traffic was heavy"; "there were may pedestrians in the area"; and the "events transpired quickly without the benefit of hindsight and resort to the records in the quiet of an office." *Id.* at 37a.

A jury thereafter found petitioner guilty on all three counts charged in the indictment. Pet. App. 1a-2a. The district court sentenced him to life imprisonment. *Id.* at 2a.

3. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-25a. As relevant here, the court agreed with the district court that the initial traffic stop was invalid but that, in light of the intervening discovery of the outstanding warrant, the exclusionary rule did not apply. *Id.* at 6a-12a.

In reaching that conclusion, the court of appeals, like the district court, considered the three factors mentioned by this Court in *Brown*. Pet. App. 8a-12a. On the first two factors (time elapsed and nature of the intervening circumstance), the court reasoned that, whatever the length of time between stopping the car and obtaining the evidence, discovery of an outstanding warrant for petitioner's arrest was a particularly "compelling" and "extraordinary" intervening circumstance that would "purge[] much of the taint" of the initial stop. *Id.* at 9a-10a (quoting *Simpson*, 439 F.3d at 495-496).

The court then determined that the third, "most important," factor (purpose and flagrancy of the officer's Fourth Amendment violation) weighed against suppression. Pet. App. 10a-12a (quoting *Simpson*, 439 F.3d at 496). The court observed that "the purpose of the exclusionary rule" is "deterring police misconduct" and

that "application of the rule does not serve its purpose when the police action 'although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights.'" *Id.* at 10a (quoting *Simpson*, 439 F.3d at 496). After reviewing a videotape of the traffic stop (taken by a camera mounted on Lieutenant Stange's patrol car), the court of appeals found no clear error in the district court's determination that "Lieutenant Stange's action in stopping [petitioner] was not flagrant because it was such a close call as to whether [petitioner] violated the law when turning left at the stoplight." *Id.* at 11a. The court of appeals further determined that "[t]here is nothing in the video or in the facts of the case to indicate that Lieutenant Stange's improper conduct was obvious, nothing to signal that it was anything but an honest mistake, nothing to support any contention that Lieutenant Stange knew that his action in stopping [petitioner] was likely unconstitutional but engaged in it nonetheless, nothing to suggest that Lieutenant Stange knew it was [petitioner] who was driving the car, and nothing to intimate that Lieutenant Stange stopped [petitioner] in the hope that something might turn up." *Id.* at 11a-12a.

ARGUMENT

Petitioner contends (Pet. 7-19) that the exclusionary rule required suppression of the evidence uncovered when he was arrested on an outstanding warrant discovered after an illegal stop. The court of appeals correctly rejected that contention. No further review is warranted.

1. a. This Court has long rejected the proposition that "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the ille-

gal actions of the police." *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963). Instead, "but-for causality is only a necessary, not a sufficient, condition for suppression." *Hudson* v. *Michigan*, 547 U.S. 586, 592 (2006). Rather than focusing on but-for causation alone, the Court has recognized that "the more apt question * * * is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 488 (internal quotation marks omitted); see *Hudson*, 547 U.S. at 592.

In *Brown* v. *Illinois*, 422 U.S. 590 (1975), the Court considered whether confessions obtained during an illegal arrest were "the fruit of the illegal arrest, or were admissible because the giving of the *Miranda* warnings sufficiently attenuated the taint of the arrest." *Id.* at 592. The Court concluded that whether a confession was a sufficient act of free will "under *Wong Sun* must be answered on the facts of each case" and that "[n]o single fact is dispositive." *Id.* at 603. *Brown* did, however, identify several factors "relevant" to the attenuation inquiry, including (1) the "temporal proximity" of the violation and the discovery of evidence; (2) "the presence of intervening circumstances"; and (3) "particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603-604.

b. Petitioner himself urged the court of appeals to apply the *Brown* factors to this case, Pet. C.A. Br. 25-29, and he does not appear to contend that the court of appeals erred in adopting that framework. He instead suggests (Pet. 17) that the court of appeals erred by announcing "a rule that declares discovery of an outstand-

ing warrant essentially a *per se* source of attenuation." That suggestion misunderstands the court of appeals' decision, which instead applied the *Brown* factors to the circumstances of petitioner's case.

The court of appeals correctly recognized that because the intervening circumstance at issue was an outstanding arrest warrant, the second *Brown* factor (the nature of the intervening circumstance) weighs heavily against suppression. Pet. App. 10a. An arrest warrant signifies a neutral magistrate's determination that probable cause supports arrest. See, *e.g.*, *Steagald* v. *United States*, 451 U.S. 204, 212-213 (1981). That determination, which was necessarily made some time in the past, is entirely independent of any Fourth Amendment violation that the officer may just have committed. As petitioner himself acknowledged in the court of appeals, "[i]t would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'" Pet. C.A. Br. 29 (quoting *United States* v. *Green*, 111 F.3d 515, 521 (7th Cir.), cert. denied, 522 U.S. 973 (1997)).

The court of appeals also correctly recognized that the first *Brown* factor (the time elapsed since the violation) has limited relevance in cases involving the discovery of an outstanding warrant. Pet. App. 10a. As the Seventh Circuit has explained, considerations of timing are most relevant when the intervening circumstance alleged to have removed the taint of the initial illegality is an apparently voluntary act by the defendant, such as a confession or the grant of consent for a search. *Green*, 111 F.3d at 522. "In these cases, the time between the illegality and the consent is important because the closer

the time period, the more likely the consent was influenced by the illegality, or that the illegality was exploited." *Ibid.* Such concerns are absent when the intervening circumstance is not an act by the defendant himself, but instead the discovery by the police of an outstanding warrant. *Ibid.* Nevertheless, the court of appeals did not foreclose the possibility that the amount of time elapsed since the initial stop could be material in an outstanding-warrant case. Pet. App. 9a-10a.

Finally, the court of appeals determined, based on careful review of the particular facts of this case, that the third *Brown* factor (the purpose and flagrancy of the Fourth Amendment violation) weighed against suppression here. Pet. App. 10a-12a. The court described this as "the most important factor because it is directly tied to the purpose of the exclusionary rule—deterring police misconduct." *Id.* at 10a (internal quotation marks omitted). After independently reviewing the videotape, it affirmed the district court's finding that Lieutenant Stange's conduct was not the sort of flagrant misconduct that would justify application of the exclusionary rule. *Id.* at 11a; see also *Davis* v. *United States*, 131 S. Ct. 2419, 2428-2429 (2011) (stating that "[u]nless the exclusionary rule is to become a strict-liability regime, it can have no application" in a case that does not "involve any 'recurring or systemic negligence' on the part of law enforcement" and in which law enforcement officers did not violate a defendant's Fourth Amendment rights "deliberately, recklessly, or with gross negligence") (quoting *Herring* v. *United States*, 555 U.S. 135, 144 (2009)).[1]

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[1] Although petitioner briefly disputes (Pet. 6 n.3) the factual accuracy of some of the court of appeals' statements, both the court of appeals

c. Contrary to petitioner's suggestion (Pet. 17), the court of appeals did not "essentially" adopt a "*per se* rule" for outstanding-warrant cases. Rather, the court's analysis considered all three *Brown* factors and focused in particular on the degree of culpability associated with the illegal stop. The court of appeals' careful scrutiny of the facts refutes the concern expressed by petitioner and his amici that the court's decision could be taken as an incentive for the police to randomly stop people, in the absence of reasonable suspicion, as a pretext to check for outstanding warrants. See, *e.g.*, Pet. 17-19; Ian Ayres et al. Amicus Br. 4-5.

It is petitioner himself who appears to propose a per se rule for outstanding-warrant cases—one that would automatically require suppression simply because the initial seizure was invalid, without any consideration of whether discovery of the warrant attenuated the taint of the Fourth Amendment violation. See *e.g.*, Pet. 17 ("Where, as here, police officers stop individuals without reasonable suspicion or probable cause, the discovery of an outstanding arrest warrant during a warrants check conducted as part of that stop assuredly does not * * * purge the primary taint.") (quotations and alterations omitted). Any such rule would be inconsistent not only with *Brown*, which forswears "talismanic test[s]" in the

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and the district court determined, after examining the facts, that Lieutenant Stange's Fourth Amendment violation was not flagrant. See Pet. App. 11a-12a, 37a. Further review of any fact-bound contention to the contrary would not be warranted, especially "[i]n view of [the Court's] settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred." *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

attenuation context, 422 U.S. at 603, but also with *Hudson*, which recognizes that, "[q]uite apart" from issues of causation, "the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs," 547 U.S. at 594 (quotation omitted); see also *Davis*, 131 S. Ct. at 2428-2429.

When, as in this case, an officer stops a vehicle in good faith and then discovers an outstanding arrest warrant during the stop, suppression will have greater social costs than deterrence benefits. Cf. *Herring*, 555 U.S. at 144 (suppression unwarranted where officers stopped the defendant and arrested him based on their good-faith but incorrect belief that he faced an outstanding arrest warrant). Any deterrence benefits of applying the exclusionary rule are likely to be minimal. At the same time, imposing the "massive remedy of suppressing evidence of guilt," *Hudson*, 547 U.S. at 599, would come at a considerable cost. Someone who is wanted on an arrest warrant has no legitimate interest in continuing to avoid arrest, and the police and the public have a substantial interest in the execution of the warrant without further delay. As the Seventh Circuit has observed, the appropriate Fourth Amendment rule should not "deter the police from arresting fugitives they discover, or from conducting a search incident to such an arrest." *Green*, 111 F.3d at 523.

2. Contrary to petitioner's contention (Pet. 8-15), the decision below does not implicate any conflict of authority among the federal courts of appeals or state courts of last resort that warrants this Court's review.

a. Petitioner's claim of a conflict relies primarily on the Sixth Circuit's decision in *United States* v. *Gross*, 624 F.3d 309 (2010), amended by No. 08-4051, slip op. 1-30 (June 15, 2011). In *Gross*, a police officer, in the ab-

sence of reasonable suspicion, blocked in the defendant's parked vehicle, started questioning the defendant, and discovered, when running a warrants check, an outstanding warrant for the defendant's arrest. *Gross*, slip op. 3, 7. A divided panel of the Sixth Circuit held that certain evidence discovered after the seizure had to be suppressed. *Id.* at 15; see *id.* at 21 (Gibbons, J., dissenting in part).

The panel's initial opinion concluded that "where an officer engages in an illegal stop and then discovers through his own investigation or prompting that the individual or individuals he has illegally stopped have outstanding warrants, the evidentiary fruits of the subsequent arrest are tainted as fruit of the poisonous tree and must be suppressed." *Gross*, 624 F.3d at 321-322; see *id.* at 320-322 (making similar categorical statements in favor of suppression). After the government petitioned for rehearing en banc, however, the panel amended its opinion to remove the categorical language. Compare 624 F.3d at 320-322 with slip op. 14-16. The amended opinion explains that "the discovery of a warrant during [an invalid] stop may be a relevant factor in the intervening circumstance analysis, but it is not by itself dispositive," slip op. 14, and concludes, after applying the *Brown* factors to the circumstances of the case, that suppression of the evidence was warranted, *id.* at 9-16. The government's renewed petition for rehearing was denied. 08-4051 Docket entry (6th Cir. July 21, 2011).

Although the government's renewed petition for rehearing acknowledged a conflict between the Sixth Circuit's decision in *Gross* and decisions (in cases other than this one) by the Seventh and Eighth Circuits, Gov't Mem. at 3, *Gross*, *supra* (No. 08-4051), that analytical

conflict does not warrant review by this Court at this time. All three circuits apply the same *Brown* factors in cases of this type, and none of the three circuits has announced a categorical rule that either requires or precludes suppression when an outstanding warrant is discovered following an illegal seizure. See Pet. App. 6a-12a; *Gross*, slip. op. 9-16; *Green*, 111 F.3d at 520-523.[2] Although the Sixth Circuit did not embrace the reasoning of the Seventh and Eighth Circuits, it is not clear that the analytical tension among the circuits will produce different outcomes in a significant number of cases. And if the issue recurs with the frequency that petitioner suggests (Pet. 15-17), any outcome-determinative differences among the circuits that might justify this Court's intervention will soon become apparent. At this point, however, certiorari on this heavily fact-dependent issue would be premature. Cf. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977) (recognizing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

b. Certiorari is particularly unwarranted because any conflict is substantially narrower than petitioner asserts. The approach applied by the court of appeals

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[2] Decisions cited by petitioner (Pet. 11) in which state courts of last resort have held that discovery of an outstanding warrant removed the taint of an illegal seizure are similarly non-categorical. All of them allow at least for the possibility that suppression would be appropriate if the Fourth Amendment violation were flagrant. See *People* v. *Brendlin*, 195 P.3d 1074, 1076 (Cal. 2008), cert. denied, 129 S. Ct. 2008 (2009); *State* v. *Frierson*, 926 So. 2d 1139, 1144-1145 (Fla.), cert. denied, 549 U.S. 1082 (2006); *State* v. *Page*, 103 P.3d 454, 459 (Idaho 2004); *State* v. *Martin*, 179 P.3d 457, 463-464 (Kan.), cert. denied, 129 S. Ct. 192 (2008); *State* v. *Hill*, 725 So. 2d 1282, 1287 (La. 1998); *Myers* v. *State*, 909 A.2d 1048, 1066-1067 (Md. 2006); *Jacobs* v. *State*, 128 P.3d 1085, 1089 (Okla. Crim. App. 2006).

here accords with the approach of most of the other courts that have addressed the question presented. See Pet. 10-11; note 2, *supra*. Indeed, aside from *Gross*, none of the decisions of federal courts of appeals or state courts of last resort cited by petitioner (Pet. 11-15) conflicts with the court of appeals' decision here—or even expressly considers the question presented.

In *United States* v. *Luckett*, 484 F.2d 89 (1973) (per curiam), a case predating this Court's decisions in *Brown*, *Crews*, *Hudson*, *Herring*, and *Davis*, the Ninth Circuit held only that officers unreasonably extended the detention of a pedestrian they had stopped for jaywalking. *Id.* at 91. The decision did not address whether discovery of an outstanding warrant eliminated the taint of the Fourth Amendment violation. *Id*. at 90-91.

The Tenth Circuit's decision in *United States* v. *Lopez*, 443 F.3d 1280 (2006), also did not address that attenuation issue. Rather, the court rejected the government's contention that the stop in that case was consensual. *Id*. at 1283-1286. The government, the appellant in the case, did not argue attenuation, see Gov't C.A. Br., *United States* v. *Lopez*, *supra* (No. 05-1323), and the Tenth Circuit accordingly had no cause to consider the issue.

The Supreme Court of Tennessee in *State* v. *Daniel*, 12 S.W.3d 420 (2000), similarly resolved only the issue of whether the encounter in that case was a seizure. *Id.* at 422-428. The court had no need to, and did not, address attenuation because "[t]he State concede[d]," and the court thus "accept[ed] for purposes of [its] decision," that "if a seizure took place, the drugs found in Daniel's pocket must be suppressed as tainted 'fruit of a poisonous tree.'" *Id*. at 422 n.2 (citation omitted); see also *id*. at 428 & n.9.

The Texas Court of Criminal Appeals likewise did not consider attenuation in *St. George* v. *State*, 237 S.W.3d 720 (2007). Although the court listed attenuation as one of the arguments that the State had raised, the court's discretionary review was limited to the question "whether the court of appeals erred in holding that [the defendant] was illegally detained when he was questioned by the deputies once the initial reason for the traffic stop had ended." *Id.* at 721. The discussion section of the opinion addressed only that issue and did not discuss attenuation. *Id*. at 725-727.

Finally, in *Sikes* v. *State*, 448 S.E.2d 560 (1994), the Supreme Court of South Carolina held that the defendant's attorney was ineffective for failing to seek suppression of evidence found as the result of an unlawful traffic stop during which the police learned of an outstanding warrant for the defendant's arrest. *Id*. at 562-563. Although the court stated that because the stop was invalid, the evidence "would have been inadmissible as fruit of the poisonous tree," *id*. at 563, the court did not discuss the attenuation doctrine and did not expressly consider or analyze whether discovery of the outstanding warrant would have eliminated the taint of the illegal seizure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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