No. 18-1554

In the Supreme Court of the United States

LAWRENCE W. BLESSINGER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an investigatory stop of petitioner violated the Fourth Amendment when it was based on reasonable suspicion that he had illegally dumped waste onto private property moments earlier.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. *Blessinger*, No. 16-CR-10017 (Dec. 16, 2016) (report and recommendation)

United States v. *Blessinger*, No. 16-CR-10017 (Feb. 22, 2017)

United States Court of Appeals (11th Cir.):

United States v. *Blessinger*, No. 17-12805 (Oct. 2, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is not published in the Federal Reporter but is reprinted at 752 Fed. Appx. 765. The order of the district court (Pet. App. 13-14) is unreported. The report and recommendation of the magistrate judge (Pet. App. 15-32) is not published in the Federal Supplement but is available at 2016 WL 8309027.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2018. A petition for rehearing was denied on January 15, 2019 (Pet. App. 33-34). On April 4, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 14, 2019, 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 guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of bringing aliens to the United States other than at a designated point of entry, in violation of 8 U.S.C. 1324(a)(2)(B)(iii). Am. Judgment 1. The district court sentenced petitioner to 12 months and one day of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1-12.

1. In December 2014, Sergeant Joel Slough of the Monroe County Sheriff's Office was driving on patrol in the Florida Keys when he saw a black truck parked at the far end of a dead-end street. Pet. App. 2. Slough patrolled the area daily and rarely saw vehicles parked on that street. *Ibid.* He knew that "illegal dumping had occurred recently nearby," *id.* at 11, and he "suspected the truck might be illegally dumping trash or other debris," *id.* at 2. As Officer Slough turned onto the street, the black truck drove away. *Ibid.* When Officer Slough reached the end of the street, he found a six-foot-high pile of green vegetation, in an area surrounded by brown vegetation, that he suspected had been recently cut and dumped onto private property. *Id.* at 2-3. He turned around, activated his lights, and pulled over the truck. *Id.* at 3. Petitioner was driving the truck and had one passenger, Maria Ortega. *Ibid.* Ortega confessed to helping petitioner dump yard waste and briefly indicated that "she might be in the United States illegally." *Ibid.* Officer Slough arrested petitioner for illegal dumping. *Ibid.*

A few months later, Officer Slough learned that petitioner had previously been stopped at sea by U.S. Customs and Border Protection on suspicion of illegally

traveling to Cuba. Pet. App. 3. Based on that information and his encounter with Ortega in petitioner's truck, Officer Slough suspected that petitioner might be involved in human trafficking, and he contacted the U.S. Department of Homeland Security (DHS). *Id.* at 3-4. A DHS agent interviewed Ortega and learned that petitioner had transported her and two others into the United States illegally. *Id.* at 4.

2. A federal grand jury charged petitioner with one count of conspiracy to encourage and induce aliens to come to and reside in the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(v)(I); three counts of encouraging and inducing aliens to come to and reside in the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(iv); and three counts of bringing aliens to the United States other than at a designated point of entry, in violation of 8 U.S.C. 1324(a)(2)(B)(iii). Indictment 1-3.

Petitioner moved to suppress evidence obtained from Ortega's statement to the DHS agent, asserting that Officer Slough's earlier stop of his truck had been unlawful. Pet. App. 4-5, 15. The district court denied petitioner's motion. *Id.* at 13-14. The court first determined that the stop was lawful because Officer Slough had reasonable suspicion to believe that petitioner had committed illegal dumping. *Id.* at 25-28. The court next determined, in the alternative, that the connection between the challenged stop and the incriminating evidence derived from the DHS agent's interview of Ortega was sufficiently attenuated that suppression would not be justified even if the stop had been unlawful. *Id.* at 28-31.

Petitioner entered a conditional guilty plea to two counts of bringing aliens to the United States other than at a designated point of entry, in violation of 8 U.S.C.

1324(a)(2)(B)(iii). Am. Judgment 1. In the plea, he admitted that he had smuggled two aliens into the United States so that they could work as domestic servants in his home, but retained the right to appeal the denial of his motion to suppress. Pet. App. 5. The district court sentenced petitioner to 12 months and one day of imprisonment, to be followed by three years of supervised release. Am. Judgment 2-3.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1-12.

The court of appeals explained that, under *Terry* v. *Ohio*, 392 U.S. 1 (1968), "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot." Pet. App. 9 (quoting *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989)) (citation and internal quotation marks omitted). The court then found that, under the totality of the circumstances, Officer Slough had reasonable suspicion for the stop of petitioner's truck. *Id.* at 11. The court explained that, among other things, Florida law makes it a crime to dump litter on private property without permission; the nature and location of the six-foot-high pile of green vegetation suggested that it had recently been placed there without permission; and the location of petitioner's truck suggested that petitioner had just performed the illegal dumping. *Id.* at 10-11.

Because it determined that the investigatory stop was lawful, the court of appeals did not reach the question whether the evidence from Ortega's interview with the DHS agent was sufficiently attenuated from the stop as to render it admissible regardless of the stop's legality. Pet. App. 12 n.2.

ARGUMENT

Petitioner contends (Pet. 7-16) that the court of appeals erred in upholding a stop under *Terry* v. *Ohio*, 392 U.S. 1 (1968), to investigate a completed misdemeanor. The unpublished decision below correctly upheld the investigatory stop here, and petitioner has not identified any conflict with another court of appeals that warrants the Court's review of that decision. In any event, this case would be a poor vehicle for resolving any conflict because the district court properly denied petitioner's motion to suppress on the alternative ground that the discovery of the dispositive incriminating evidence was significantly attenuated from the challenged stop.

1. As an initial matter, the court of appeals did not address the question that petitioner raises here (Pet. i): whether the investigatory stop was impermissible on the theory that Officer Slough had reasonable suspicion only that petitioner had committed a misdemeanor. Although the briefing below touched on the issue, the unpublished decision below did not mention the felony/misdemeanor distinction that petitioner urges (Pet. 7-8), see Pet. App. 9-11, perhaps because the court did not view this case to involve a "completed" misdemeanor, see pp. 6-7, *infra*. Petitioner does not identify any binding circuit precedent that would have foreclosed consideration of the issue here if the court had deemed it squarely presented. And the court did not even resolve whether Officer Slough had reasonable suspicion only of a misdemeanor or instead of a felony, as the government had contended. See Gov't C.A. Br. 39-41 (contending that the facts available to Officer Slough could have supported reasonable suspicion of a violation of Fla. Stat. § 403.413(6) (2014), under which dumping in excess of 100 cubic feet is a third-

degree felony). Those circumstances alone provide reason to deny review. See *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018) ("[W]e are a court of review, not of first view.") (citation omitted).

2. In any event, even assuming that Officer Slough had reasonable suspicion only that petitioner had committed a misdemeanor, the court of appeals correctly determined that the investigatory stop was consistent with the Fourth Amendment.

In *United States* v. *Hensley*, 469 U.S. 221 (1985), this Court unanimously rejected "an inflexible rule that [would] preclude[] police from stopping persons they suspect of past criminal activity unless they have probable cause for arrest." *Id.* at 227. The Court explained that "[t]he proper way to identify the limits" on stops to investigate past crimes "is to apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes," which involves "balanc[ing] the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *Id.* at 228. The Court observed that "[t]he factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved," *ibid.*, but that, "[p]articularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible," *id.* at 229. Because the crime at issue in *Hensley* was a felony, see *id.* at 223, 225, the Court noted that it "need not and d[id] not decide * * * whether *Terry* stops to investigate all past crimes, however serious, are permitted," *id.* at 229. Rather, the Court determined that "[i]t [wa]s enough to say that, if police have a reasonable suspicion, grounded in specific and

articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." *Ibid.*

The stop of petitioner's truck was consistent with this Court's analysis in *Hensley*, particularly because the suspected crime of dumping could not fairly be deemed "past criminal activity," 469 U.S. at 228. As the Court explained in *Hensley*, a "stop to investigate an already completed crime" may differ from an investigation of ongoing criminal activity in several ways: It "does not necessarily promote the interest of crime prevention as directly"; "the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards"; and "officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop." *Id.* at 228-229. But those factors are largely absent in this case, given the immediacy of the crime that Officer Slough had reasonable suspicion to believe that petitioner had just committed. As the court of appeals recounted, Officer Slough "personally s[aw] [petitioner's] truck parked near the dumping area and watched him leave just moments before" the investigatory stop. Pet. App. 11. At that point, Officer Slough did not even know petitioner's identity, see *id.* at 2-3, and thus lacked the "opportunity to choose the time and circumstances of the stop," *Hensley*, 469 U.S. at 228-229. Rather, when Officer Slough stopped petitioner, petitioner was more akin to someone in the process of violating the law or fleeing from the scene of a crime than "a suspect in a past crime who now appears to be going about his lawful business," *id.* at 228.

3. Petitioner contends (Pet. 8-13) that the court of appeals' decision conflicts with decisions of the Sixth Circuit, which he asserts categorically prohibits investigatory stops based on reasonable suspicion of a completed misdemeanor, and of the Eighth, Ninth, and Tenth Circuits, which he asserts apply *Hensley*'s balancing test. But while the Sixth Circuit has sometimes suggested a per se rule at odds with the *Hensley* framework, that court has recently observed that its precedent is unsettled on this point. Meanwhile, the decisions of the other courts of appeals are consistent with the decision below.

a. Petitioner first asserts (Pet. 8-9) that in the Sixth Circuit an investigatory stop "can never be justified" based on reasonable suspicion of a completed misdemeanor. Pet. 9. But the Sixth Circuit has not adopted a per se rule for non-traffic-related misdemeanors, and that court has repeatedly noted that intra-circuit "confusion" exists in this area that it has not yet resolved. *United States* v. *Collazo*, 818 F.3d 247, 254, cert. denied, 137 S. Ct. 169 (2016) (citations omitted); *United States* v. *Hughes*, 606 F.3d 311, 316 n.8 (2010) (citation omitted).

In *Hughes*, the most recent Sixth Circuit case on which petitioner relies (Pet. 9-10), a police officer stopped the defendant's car in a deserted, high-crime neighborhood after radioing in his belief that the defendant was casing a business. 606 F.3d at 312-313. The district court suppressed evidence found in the car after concluding that no reasonable suspicion existed for the stop. *Id.* at 312-314. On the government's appeal, the court of appeals concluded that the district court had impermissibly based its decision on the officer's subjective intent, and it remanded for consideration of whether

the officer had probable cause to believe that the defendant had violated a traffic law prior to the stop. *Id.* at 313, 320. In determining the appropriate standard to be applied on remand, the court of appeals noted "'a degree of confusion in this circuit over the legal standard governing traffic stops,' and in particular over whether police officers must have reasonable suspicion or probable cause in order to make a valid stop." *Id.* at 316 n.8 (citation omitted). Citing *United States* v. *Sanford*, 476 F.3d 391, 394 (6th Cir. 2007), and *United States* v. *Simpson*, 520 F.3d 531, 541 (6th Cir. 2008), the court stated that officers must have probable cause to conduct a traffic stop for the completed traffic-related misdemeanors or civil traffic infractions at issue in that case. *Hughes* 606 F.3d at 316 n.8. *Hughes* thus does not establish a per se rule regarding investigatory stops following completed non-traffic-related misdemeanors.

Nor do the decisions cited in *Hughes* establish such a rule. In *Simpson*, the court of appeals questioned the soundness of requiring probable cause for completed misdemeanors, noting that prior statements in circuit decisions suggesting such a requirement were dicta. 520 F.3d at 541. The court also expressed "grave doubts" about how "the original 'bedrock rule that reasonable suspicion of a crime justifies a brief stop' had potentially gone awry," observing that intervening Supreme Court and circuit precedent may have "repudiated the implication * * * that only probable cause would suffice," and that "virtually every other circuit court of appeals has held that reasonable suspicion suffices to justify an investigatory stop for a traffic violation." *Id.* at 539-540 (citation and emphasis omitted). The court, however, did not decide the legal standard for completed or non-

traffic-related misdemeanors, as the case before it involved an ongoing misdemeanor traffic violation. *Id.* at 541. *Sanford* likewise involved an ongoing misdemeanor traffic violation and did not reach the issue of investigatory stops for completed or non-traffic-related misdemeanors. 476 F.3d at 395.

Since its decision in *Hughes*, the Sixth Circuit has again noted the "'confusion'" in its own circuit law, reiterating that "the dividing line between when probable cause is required for a traffic stop and when reasonable suspicion is sufficient is in need of greater clarity in this circuit." *Collazo*, 818 F.3d at 254 (citations omitted). Given the Sixth Circuit's repeated recognition that this area of the law remains unsettled, this Court's intervention to resolve a purported circuit conflict would be premature. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").[*]

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[*] Along with Sixth Circuit authorities, petitioner quotes (Pet. 10) a decision of an intermediate state appellate court. That decision, *Blaisdell* v. *Commissioner of Public Safety*, 375 N.W.2d 880 (Minn. Ct. App. 1985), likewise does not conflict with the court of appeals' decision here. In that case, the Minnesota Court of Appeals stated that a "vehicle stop[] to investigate completed misdemeanors violate[s] the [F]ourth [A]mendment," *id.* at 884, but the investigatory stop there occurred two months after the commission of the misdemeanor, and the court emphasized that it did "not decide the difficult question of when an offense becomes a 'completed' crime, since the [misdemeanor] in question occurring two months before the stop was certainly 'completed,'" *id.* at 882 n.2. The court also cautioned that "courts should be hesitant to declare criminal conduct which occurred in the very recent past (such as the same day of the stop) to be 'completed.'" *Ibid.* In any event, the Minnesota Supreme Court affirmed the court of appeals' decision in *Blaisdell* on other grounds, noting that it was "unnecessary for the Court of Appeals to

b. Petitioner also contends (Pet. 10-11) that the decision below conflicts with decisions of the Eighth, Ninth, and Tenth Circuits because, "contrary to the Eleventh Circuit, those courts do not categorically permit *Terry* stops for completed misdemeanors." Pet. 10. But the court of appeals did not announce such a categorical rule in this case—nor could it have, as its decision was unpublished. See Pet. App. 1. Indeed, as noted, the court did not address the misdemeanor/felony distinction in its opinion at all. And the court's determination that the investigatory stop here complied with the Fourth Amendment is consistent with the context-specific balancing approach, for the reasons given above. See pp. 6-7, *supra*.

4. In any event, even if the question presented otherwise warranted review, this case would be an unsuitable vehicle in which to address it because petitioner's motion to suppress would be unavailing for alternative reasons. The conviction does not depend on any evidence found in petitioner's truck during the contested investigatory stop; rather, it involves Ortega's statement to a DHS agent several months after that stop occurred. See Pet. App. 30-31. Because Ortega's testimony about petitioner's human-trafficking crimes was sufficiently attenuated from the traffic stop for illegal dumping, its use did not violate the Fourth Amendment, regardless of whether the traffic stop itself did.

This Court has explained that not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun* v. *United States*, 371 U.S. 471, 487-488

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decide * * * whether all stops to investigate completed misdemeanors are impermissible" and "express[ing] no opinion as to the correctness of the Court of Appeals' holding." *Blaisdell* v. *Commissioner of Pub. Safety*, 381 N.W.2d 849, 849-850 (Minn. 1986).

(1963). "Rather, the more apt question in such a case 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.'" *Id.* at 488 (citation omitted). Here, the district court correctly concluded that the connection between the challenged investigatory stop and the later interview of Ortega was "so attenuated as to dissipate the taint" from any illegal stop. Pet. App. 28 (quoting *Wong Sun*, 371 U.S. at 487). As the court explained, Ortega was interviewed by a DHS agent six months after the search of petitioner's truck, she voluntarily cooperated, and she was questioned about conduct unrelated to the traffic stop. *Id.* at 30. This Court has required a far "closer, more direct link between the illegality and [live-witness] testimony" before excluding that testimony, *United States* v. *Ceccolini*, 435 U.S. 268, 278 (1978). The contested evidence was thus admissible regardless of the resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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