No. 03-309

In the Supreme Court of the United States

THOMAS L. BLACKBURN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a state trooper's reliance on the fact that petitioner's vehicle exceeded the posted speed limit provided a valid basis to stop petitioner's vehicle.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 03-309

THOMAS L. BLACKBURN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the *Federal Reporter* but is *reprinted in* 64 Fed. Appx. 190. The order of the district court (Pet. App. 12-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2003. The petition for a writ of certiorari was filed on August 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a conditional guilty plea in the United States District Court for the Northern District of Oklahoma to one count of possessing marijuana with

intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 66 months of imprisonment, to be followed by five years of supervised release, and was fined $200,000. The court of appeals affirmed. Pet. App. 1-11.

1. On May 12, 2000, Oklahoma Highway Patrol Trooper Gene Hise was operating a radar post on the Will Rogers Turnpike. The authorized legal speed limit for the portion of turnpike in question was 75 miles per hour. Pet. App. 3 n.4. A sign, however, set the maximum speed limit at 45 miles per hour for this stretch of turnpike. Trooper Hise observed petitioner traveling eastbound at a speed of 52 miles per hour in a construction zone and decided to stop petitioner for exceeding the posted speed limit. See Okla. Stat. Ann. tit. 47, § 11-1401(K) (West Supp. 2003) ("All vehicles traveling on a turnpike shall comply at all times with signs placed on the turnpike regulating traffic thereon.").

Under state law two entities were required to jointly authorize changes to the speed limit—the Oklahoma Transportation Authority, which delegated some of its authority to the Oklahoma Turnpike Authority, prescribes speed limits which are only effective upon approval by the Oklahoma Commissioner of Public Safety, Pet. App. 3 n.3—and neither had lowered the speed limit from 75 miles per hour. See Okla. Stat. Ann. tit. 47, § 11-1401(I) (West Supp. 2003). At the time of the stop, Trooper Hise was unaware that neither the Oklahoma Turnpike Authority nor the Oklahoma Commissioner of Public Safety had authorized the posting of the 45 mile per hour speed limit sign, and that the legal speed limit, therefore, was actually 75 miles per hour. Pet. App. 3.

2. After stopping petitioner, Trooper Hise informed petitioner that he had been stopped for speeding. Trooper Hise asked petitioner to accompany him to his squad car and then issued him a warning citation. Before petitioner returned to his truck, Trooper Hise asked for, and received, permission to search petitioner's truck. In the rear of the truck, Trooper Hise found what was later determined to be in excess of 1000 pounds of marijuana. Pet. App. 5. Trooper Hise arrested petitioner. *Ibid.*

3. Petitioner was indicted in the United States District Court for the Northern District of Oklahoma and entered a conditional guilty plea to one count of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner filed a motion to suppress, arguing that because the authorized speed limit was 75 miles per hour, rather than 45 miles per hour, petitioner was not speeding and Trooper Hise's stop was illegal. Finding that Trooper Hise made a mistake of fact on whether the mandatory procedure for reducing the speed limit had been followed, Pet. App. 19, and that petitioner violated Oklahoma law requiring vehicles to comply with signs placed on the turnpike, *id.* at 16 n.1, the district court denied petitioner's motion to suppress. *Id.* at 12-23.

4. The court of appeals affirmed the district court's decision. It explained that the traffic stop was constitutional because "Trooper Hise had objectively reasonable, articulable suspicion that [petitioner's] speed exceeded the posted legal maximum speed for the area in question, in violation of Oklahoma law. * * * Although the *posted* legal maximum speed did not reflect the *actual* legal maximum speed, [Trooper Hise's] actions were still reasonable, insofar as he was unaware of the discrepancy." Pet. App. 7. The court of appeals

accordingly held that Trooper Hise's stop of petitioner satisfied the requirements of the Fourth Amendment. *Id.* at 7-8.[1]

ARGUMENT

Petitioner contends that the court of appeals' decision conflicts with the holding of three courts of appeals that a "law enforcement officer's mistaken belief that a motorist is in violation of state law is insufficient to justify a stop of a vehicle." Pet. 7. Petitioner is incorrect. The decision below is entirely consistent with other courts of appeals, and in any case, there is no conflict among the circuits. The petition should, therefore, be denied.

In *United States* v. *Chanthasouxat*, 342 F.3d 1271 (11th Cir. 2003), the court of appeals reasoned that "[a]n officer's mistake of fact may provide the objective basis for reasonable suspicion or probable cause under the Fourth Amendment because of the intensely fact-sensitive nature of reasonable suspicion and probable cause determinations." *Id.* at 1276. In contrast, a mistake of law, the court stated, "cannot provide the objective grounds for reasonable suspicion or probable cause required to justify a traffic stop," *id.* at 1277, because "law enforcement officers [have] broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justifications for their actions," and "the flip side of that leeway is

[1] The court of appeals also held that the trooper's questioning of petitioner during the investigative detention was "within the legitimate scope of the traffic stop." Pet. App. 9. The court of appeals further agreed with the district court that petitioner had consented to a search of his truck, and that the scope of the search was reasonable. *Id.* at 9-11. Petitioner does not challenge those rulings here.

that the legal justification must be objectively grounded," *id.* at 1279 (quoting *United States* v. *Miller*, 146 F.3d 274, 279 (5th Cir. 1998)).

The court of appeals treated the officer's mistake in this case as one of fact, not one of law. The court of appeals held that the officer had probable cause to believe that petitioner violated state law by driving in excess of the 45 mile per hour posted speed limit. Pet. App. 7. In response to petitioner's argument that the 45 mile per hour sign was not posted in compliance with state law, that the authorized speed limit was 75 miles per hour, and that Trooper Hise therefore made a mistake of law, the court explained that Trooper Hise "was simply unaware that, on May 12, 2000, the Oklahoma Turnpike Authority had not changed the official speed limit for the area in question, in accordance with applicable procedures under Oklahoma law. Trooper Hise should not have been required to anticipate this fact." *Id.* at 7 n.11. In other words, Trooper Hise understood the applicable law—drivers must comply with turnpike signage—but made a mistake of fact about whether the Oklahoma Turnpike Authority authorized the posting of the 45 mile per hour sign. That mistake of fact, however, does not mean that Trooper Hise lacked probable cause to stop petitioner for violating Oklahoma law requiring compliance with signs posted on the turnpike.

The cases cited by petitioner—which permit mistakes of fact, but not mistakes of law, to justify a probable cause determination—are not to the contrary. For example, in *United States* v. *Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999), a mistake of law case, an officer stopped the defendant's car in part because a taillight had a hole in its lens cover, thereby emitting both red and white light. *Id.* at 285. The court held that the officer lacked an objective basis for believing that the defendant had

committed a traffic violation, because, according to a ten year old state supreme court ruling, a cracked taillight did not constitute a traffic violation under state law. *Id.* at 288. To the same effect is *United States* v. *King*, 244 F.3d 736 (9th Cir. 2001), where a police officer stopped a car because it had a disabled-persons parking placard hanging from its rear view mirror. The officer mistakenly thought that having the placard hanging from the rear view mirror was a violation of a municipal ordinance. *Id.* at 737-738. Because the officer was mistaken in his belief that an ordinance prohibited the defendant's conduct, the court held that the stop was invalid. *Id.* at 741-742. The court of appeals' decision is not inconsistent with either of these decisions.[2]

Petitioner contends that *United States* v. *Cashman*, 216 F.3d 582 (7th Cir. 2000), might conflict with the

---

[2] Petitioner also relies on two other Fifth Circuit cases, *United States* v. *Granado*, 302 F.3d 421 (2002), and *United States* v. *Miller*, 146 F.3d 274 (1998), which likewise involved stops based on what officers thought were traffic offenses but turned out not to be so. In *Granado*, the officer stopped a driver based on the mistaken belief that Texas law required vehicles to have a front license plate and prohibited anything that obstructs the rear license plate. 302 F.3d at 422-424. In *Miller*, the officer stopped a driver based on the mistaken belief that defendant violated state law by driving with a turn signal on while failing to turn or change lanes. 146 F.3d at 276, 277-278. Like *Lopez-Valdez* and *King*, both *Miller* and *Granado* involved mistakes of law, and, therefore, do not conflict with the decision below. These mistake of law decisions are also consistent with the Eleventh Circuit's decision in *Chanthasouxat* holding that an officer's mistaken belief that a city code required vehicles to have inside rear-view mirrors did not justify a traffic stop. 342 F.3d 1271. *United States* v. *Whitfield*, 939 F.2d 1071 (D.C. Cir. 1991), on which petitioner also relies, involved the question whether the defendant's mother had authority to consent to a search of his bedroom. As such, that case has no bearing on the issue involved here.

decisions of the Fifth, Ninth, and District of Columbia Circuits. Pet. 11-12. But *Cashman*, like the present case, is distinguishable from *Lopez-Valdez* and *King* because it involved a mistake of fact rather than a mistake of law. The *Cashman* court held that an officer had probable cause to stop a car with a seven to ten inch crack in the windshield under a state law that required that no vehicle's windshield be excessively cracked or damaged, even though the crack was not "excessive" as defined by the Wisconsin Code. The court explained that even if "[c]areful measurement after the fact * * * reveal[ed] that the crack" was not excessive, the officer still had probable cause to stop the suspect because "the Fourth Amendment requires only a reasonable assessment of the facts, not a perfectly accurate one." *Cashman*, 216 F.3d at 587. Thus, because the officer in *Cashman* made a mistake of fact, rather than a mistake of law, there is no disagreement among the circuits on when an officer's mistaken belief can serve as probable cause to justify a traffic stop.

Finally, petitioner's attempt to characterize this case as a mistake-of-law case lacks merit. Pet. 12-13. First, unlike the mistake of law cases petitioner cites, this case does not require an inquiry into Trooper Hise's subjective intentions. The presence of the 45 mile per hour speed limit sign and the Oklahoma law requiring compliance with turnpike signs constituted an "*objective* basis for probable cause justifying the stop." *Lopez-Valdez*, 178 F.3d at 288 (emphasis added). Second, petitioner's argument would turn virtually every mistake of fact into a mistake of law. For example, applying petitioner's analysis to *Cashman* would convert it into a mistake of law case which would make the officer's stop illegal: the officer mistakenly believed that the law prohibited windshields with seven to ten

inch cracks. Petitioner's interpretation, which has not been adopted by any court of appeals, would require law enforcement officers to act only when their assessment of facts is "perfectly accurate," as opposed to the constitutionally prescribed standard of reasonable conduct.[3] *Cashman*, 216 F.3d at 587.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
LOUIS M. FISCHER
Attorney

OCTOBER 2003

[3] Petitioner's concern that the court of appeals' decision would lead to "absurd results" by requiring "compliance" with "any sign on the turnpike, regardless of who placed it there, and regardless of whether the sign was legally posted in compliance with the authorization process," is misplaced. Pet. 13. The decision below holds only that a driver's failure to comply with a sign posted on a turnpike, possibly by a construction company, Pet. App. 2 n.2, can provide an officer with probable cause to make a traffic stop where the officer was unaware that the sign was not posted in compliance with state law; nothing in the decision requires compliance with signs "placed on the turnpike by kids as a prank," *ibid*, or permits prosecution of drivers who fail to heed such fraudulent signs.