No. 18-1554

In The
Supreme Court of the United States

LAWRENCE BLESSINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY

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REPLY

Fifty years ago, the Court carved out an exception to the Fourth Amendment's warrant requirement to allow the police to take "swift action" to investigate an imminent armed robbery by briefly detaining and frisking the suspects for "guns, knives, clubs, or other hidden instruments" based on their "suspicious behavior" that fell short of the "probable cause" required for a search or seizure. *Terry v. Ohio*, 392 U.S. 1, 20, 28-29 (1968). In the years since *Terry*, the Court "has been careful to maintain its narrow scope." *Dunaway v. New York*, 442 U.S. 200, 210 (1979). In *United States v. Hensley*, the Court extended the rationale of *Terry* to allow an investigative detention "if police have a reasonable suspicion . . . that a person they encounter was involved in or is wanted in connection with a *completed felony*." 469 U.S. 221, 229 (1985) (emphasis added). The Court explicitly reserved ruling on "whether *Terry* stops to investigate all past crimes, however serious, are permitted." *Id*. If the Court is inclined to resolve that important Fourth Amendment question, this case is an excellent vehicle for doing so.

1. The Fourth Amendment issue was squarely presented and rejected in the court below. In the court below (Pet. C.A. Br. at 38), petitioner challenged the legality of the warrantless stop, arguing that reasonable suspicion of a *completed* misdemeanor—as opposed to a completed *felony*—is an insufficient basis to justify a warrantless stop. That is the question presented in the petition and, as the Government acknowledges, a question that this Court

specifically reserved ruling in *Hensley*. BIO at 6 ("Because the crime at issue in *Hensley* was a felony, *see id*. at 223, 225, the Court noted that it 'need not and did not decide * * * whether *Terry* stops to investigate all past crimes, however serious, are permitted.' ") (citations omitted).

Although the Government is correct that "the unpublished decision below did not mention the felony/misdemeanor distinction that petitioner urge[d]," BIO at 5, the court of appeals explicitly relied on, and quoted from, one of its own published decisions, *United States v. Espinosa-Guerra*, 805 F.2d 1502, 1506 (11th Cir. 1986), for the proposition that "[t]o justify an investigatory stop, the officer must 'show a reasonable, articulable suspicion that the person has committed or is about to commit *a crime*.' " App. 9 (emphasis added). *Espinosa-Guerra* involved a stop to investigate the ongoing commission of a serious felony (cocaine trafficking), not a completed misdemeanor. 805 F.2d at 1506. Thus, the Government is correct that, until the unpublished decision in petitioner's case, there was no "binding circuit precedent that would have foreclosed consideration of the issue here." BIO at 5. Still, the panel rejected petitioner's challenge to the reasonable suspicion standard for completed misdemeanors, declined to rehear the case, and the entire court denied *en banc* review on this singular issue. Thus, petitioner's challenge was squarely presented to, but rejected by, the court of appeals.

2. The facts are undisputed, captured *in toto* on the police officer's dashboard video camera. Positing that the court of appeals may have thought that "the suspected crime of dumping could not fairly be deemed 'past criminal activity' " as defined in *Hensley*, the Government prefers to describe the events as "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.' " BIO at 7 (quoting *Hensley*, 469 U.S. at 228) (emphasis added). But the video footage of the stop belies the Government's effort to recharacterize the encounter as something other than an investigation of a *completed* misdemeanor.

Looking 400 yards down a dead-end street, a law enforcement officer observed a black pick-up truck lawfully parked at the end of the road. Twenty-seven seconds later, the officer began driving in the direction of the pick-up, which by then was proceeding on its way out of the cul-de-sac at a lawful rate of speed. As the vehicles passed one another, the driver of the pick-up politely waved at the officer. The officer continued driving until he observed a pile of green vegetation on the vacant, "heavily wooded" private property at the end of the road, causing no obstruction, no nuisance, no threat to the environment, situated precisely where the unidentified owner of the property could have lawfully placed those tree trimmings at any time. The dashboard video camera captured these images (and more) of what the officer saw:

Suppression Hearing Exhibit 10 (Dash Cam Video) at 10:41:14 a.m.

Suppression Hearing Exhibit 10 (Dash Cam Video) at 10:41:30 a.m.

Suppression Hearing Exhibit 10 (Dash Cam Video) at 10:51:54 a.m.

The officer observed no one "*in the process of* violating the law" and no one "*fleeing* from the scene of a crime." BIO at 7 (emphasis added). The dashboard video camera captured someone who "appear[ed] to be going about his lawful business," BIO at 7—driving at a lawful speed—in the vicinity of biodegradable tree trimmings. The officer observed nothing more that would support his "hunch" (as the officer himself described it, Hearing Transcript at 58, 127) that the driver of the pick-up had dumped those tree trimmings and had done so without consent of the property owner (whom the officer did not know), in violation of Florida's "litter" law.

If that is all it takes to justify detaining someone for investigation and interrogation, then there is much about which the Court should be concerned. Given the

ubiquity of litter, police might feel emboldened by the Eleventh Circuit's decision to detain for questioning a gum-chewing teen, blowing bubbles only steps away from a crumbled wrapper; or a twitchy, chain-smoking tourist seated on a bus bench only a flick away from a discarded cigarette butt. And given the proliferation of petty misdemeanor statutes (3,176 in Florida alone), "the purported reasons for detaining an individual are effectively limitless." *See* Brief Amicus Curiae FACDL-Miami at 14.

3. This Court's guidance regarding the scope of warrantless seizures to investigate completed misdemeanors is overdue, not premature. From the founding until 1967, a police officer required a warrant before seizing a person in the course of investigating potential criminal behavior. In *Terry*, however, the Court found that a "proper balance . . . has to be struck" where a police officer on the beat "has reason to believe that he is dealing with an armed and dangerous individual," allowing the officer to exercise "a narrowly drawn authority to permit a reasonable search for weapons for [his] protection" without the need for a warrant. 392 U.S. at 27.

Now, fifty years after *Terry*, the Eleventh Circuit has dispensed with the requirement that a warrantless seizure must achieve a "proper balance" between officer safety and individual rights, and that the authority to conduct warrantless investigatory detentions must be "narrowly drawn." In every meaningful way, the facts of this case are the *opposite* of those presented in *Terry*, and yet the result is somehow the

same. Today, at least in the Eleventh Circuit, leaving the scene of litter constitutes "sufficient justification" for a warrantless detention "in accordance with *Terry*." App. 11 (citing *Espinosa-Guerra*, 805 F.2d at 1506). In the Eleventh Circuit today, there is no need to undertake any consideration whatsoever of the privacy interests of the individual subject to a "public detention" that can "resemble a full-fledged arrest," *Bailey v. United States*, 568 U.S. 186, 200 (2013), even when that person is suspected only of having discarded a gum wrapper, a cigarette butt, or—as in this case—a pile of tree trimmings.

No wonder the lower courts are in disarray. "[I]nvestigating completed episodes of crime goes beyond the appropriately limited purview of the brief *Terry*-style seizure." *United States v. Sokolow*, 490 U.S. 1, 16 (1989) (Marshall, J., dissenting). The Court authorized a limited extension of *Terry*-style seizures "to investigate past crimes" by requiring the lower courts to strike a "balance" between "the nature and quality of the intrusion on personal security" and "the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 U.S. at 228. But the limiting principles have not stood the test of time. The circuits have proven unable to apply the balancing test consistently, while the Eleventh Circuit has given up entirely, not applying any balancing test at all. *See* App. 11 (authorizing warrantless seizure so long as the police officer "reasonably suspect[ed] that a crime had been committed and that Blessinger was the person who committed it").

The Government describes those Sixth Circuit decisions imposing a blanket rule against detentions for completed misdemeanor offenses as being "at odds with the *Hensley* framework." BIO at 8. The Government insists that it "would be premature" to answer the Sixth Circuit's call for "'greater clarity'" on how to properly conduct the balancing test. BIO at 10. Insofar as the Sixth Circuit has "repeated[ly] recogni[zed] that this area of the law remains unsettled," *id*. at 10, all the more reason for granting a writ. To be sure, a future Sixth Circuit panel may be faced with a choice between "two separate tests to determine the constitutional validity" of a warrantless seizure. *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008). But regardless of which path it follows, it will still diverge from the Eleventh Circuit's rule that a warrantless seizure is permitted to investigate *any* completed crime—no matter how insignificant, without any need to justify the seizure based on the safety of the officer or the community, and without any consideration of the individual liberty interests at stake—placing the Eleventh Circuit squarely in conflict with the Eighth, Ninth, and Tenth Circuits. *See*, *e.g.*, *United States v. Moran*, 503 F.3d 1135, 1141, 1143 (10th Cir. 2007) ("We note that this is a matter of first impression in our Circuit and that the Sixth and Ninth Circuits have split on the issue. . . . We do not suggest that all investigatory stops based on completed misdemeanors are reasonable.").

4. The court of appeals did not reach the Government's attenuation argument, so that unresolved, alternative ground for affirmance is no obstacle to this Court's review. The Government argues that "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." BIO at 5. But only the *district court* was persuaded by the Government's attenuation argument; the *court of appeals* explicitly declined to address it. App. 12 n.2 ("Because we conclude there was no Fourth Amendment violation, we need not address Blessinger's arguments on whether later-discovered evidence was sufficiently attenuated from the traffic stop.").

So, if this Court were to grant the writ and find that the stop was unlawful, the case would be remanded to the court of appeals to consider the Government's alternative theory for affirmance.[1] The district

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[1] *See*, *e.g.*, *Rosemond v. United States*, 572 U.S. 65, 83 (2014) ("[T]he Government argues that any error in the court's aiding and abetting instruction was harmless, because the jury must have found (based on another part of its verdict, not discussed here) that Rosemond himself fired the gun. Those claims were not raised or addressed below, and we see no special reason to decide them in the first instance. . . . Accordingly, we vacate the judgment below and remand the case for further proceedings consistent with this opinion."); *Neder v. United States*, 527 U.S. 1, 25 (1999) ("Accordingly, we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes. Consistent with our normal practice where the court below

court's view of the alternative ground for denying suppression is therefore no impediment to certiorari review.[2]

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has not yet passed on the harmlessness of any error, . . . we remand this case to the Court of Appeals for it to consider in the first instance whether the jury-instruction error was harmless."); *United States v. Davila*, 569 U.S. 597, 612 (2013) ("Having explained why automatic vacatur of a guilty plea is incompatible with Rule 11(h), . . . we leave all remaining issues to be addressed by the Court of Appeals on remand."); *United States v. Sotelo*, 436 U.S. 268, 273 (1978) ("Respondents raised their homestead exemption argument . . . in the Court of Appeals, but that court believed that it did not have to reach the issue in view of its holding that the entire § 6672 liability was dischargeable. . . . In view of our holding that the § 6672 liability is not dischargeable, we need not address this contention. On remand, of course, the Court of Appeals may consider respondents' argument that some or all of the homestead exemption belongs to Naomi Sotelo."); *see also United States v. Brims*, 272 U.S. 549, 551, 553 (1926) ("The Circuit Court of Appeals reviewed and reversed the judgment of conviction upon the sole ground of fatal variance. . . . To explore the record and pass upon all other assignments of error presented to the court below would require unreasonable consumption of our time. We may properly require its view in respect of them.").

[2] On remand, the Government would struggle to explain how the alien-smuggling charges were not derived as a direct consequence of Sgt. Slough stopping petitioner's vehicle and identifying the passenger, Ms. Ortega, as an undocumented alien. Until the stop, Ms. Ortega was off the grid—unknown to law enforcement. Had Sgt. Slough not stopped petitioner's truck, Sgt. Slough never would have encountered Ms. Ortega in the passenger seat; Sgt. Slough never would have obtained her identity; Sgt. Slough never would have learned that she was an undocumented alien; and Sgt. Slough never would have suggested to DHS that she be interviewed six months later—during which she incriminated petitioner in alien-smuggling activities. Ms. Ortega was the proverbial fruit of the "poisonous" stop; petitioner's convictions for

5. The question presented is important. This Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry" in analyzing Fourth Amendment searches and seizures. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). This case represents an extreme application of the Eleventh Circuit's bright-line rule that an officer's suspicion that a person committed *any* crime in the past—no matter how insignificant—will *always* justify a warrantless seizure of that person. *See Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) ("[W]e must evaluate the search or seizure under traditional standards of reasonableness 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."). Other lower courts, by contrast, continue to faithfully apply a balancing test that would have prohibited Sgt. Slough from effectuating a warrantless seizure of petitioner to investigate whether he committed a suspected misdemeanor violation of the Florida litter law by placing tree trimmings on heavily-wooded, private property, that posed no nuisance, no danger to police and no risk of harm to the public. Indeed, even if Sgt. Slough had developed probable cause that petitioner had committed the misdemeanor littering offense, under Florida law Sgt. Slough would have been required to obtain a warrant to effectuate petitioner's arrest for this completed misdemeanor offense.

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alien-smuggling depended entirely on the evidence (Ms. Ortega's identity) derived from the challenged stop.

See Brief Amicus Curiae FACDL-Miami at 6 ("By our count, twenty-seven (27) of the states and the District of Columbia have enacted statutes prohibiting warrantless arrests for misdemeanors not committed in the officer's presence.").

The Court has already agreed to hear a case this Term that presents a question about the reasonableness of stopping a vehicle to investigate an *ongoing* traffic offense. *See Kansas v. Glover*, 18-556 (granting certiorari to address whether officers may rely on a "bright-line, owner-is-the-driver presumption," Pet. App. 18, to justify the stop of a moving vehicle to investigate whether the registered owner of that vehicle, whose license has been revoked, is the person presently driving it).[3] Petitioner's case is the appropriate vehicle to address the equally important question—explicitly reserved by the Court in *Hensley*—about the reasonableness of stopping a vehicle to investigate a *past* misdemeanor offense, a question that "has been answered inconsistently by federal circuit and state courts." Kletter, *Permissibility Under Fourth Amendment of Terry Stop to Investigate Completed Misdemeanor*, 78 A.L.R. 6th 599 (2012) (collecting cases).[4]

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[3] Whatever the outcome in *Glover*, it likely will not resolve whether an officer, informed that the vehicle was being operated *in the past* while the registered owner's driver's license was suspended, could *today* stop that vehicle, knowing that the registered owner had already had his driving privileges restored.

[4] *See also* Lohse, *Returning to Reasonableness*, 2010 U. Ill. L. Rev. 1629 (2010) (arguing "the Supreme Court must address the

CONCLUSION

The petition should be granted.

Respectfully submitted,

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circuit split by adopting a bright-line rule that searches and seizures for completed misdemeanors with less than probable cause are unreasonable" because "*Terry* is meant to be narrowly applied"); Alito, *Unreasonable Differences: The Dispute Regarding the Application of Terry Stops to Completed Misdemeanor Crimes*, 83 St. John's L. Rev. 945 (2009) (proposing that *Terry* stops conducted to investigate completed misdemeanors "are presumptively unreasonable unless the police officer can point to specific facts that 'would lead a reasonable officer, in his position, to conclude that failure to take immediate action would result in physical harm, either to himself or to a member of the general public.' "); Weiss, *Defining the Contours of United States v. Hensley: Limiting the Use of Terry Stops for Completed Misdemeanors*, 94 Cornell L. Rev. 1321 (2009) (arguing "that, with the exception of the most dangerous driving violations qualifying as misdemeanors, courts should not extend the *Hensley* decision to warrantless *Terry* stops for completed misdemeanors.").