No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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OMAR ERNESTO HERNANDEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in determining that there was reasonable suspicion for an investigatory stop, the district court and Ninth Circuit erred by relying on factually unsupported, conclusory statements in a law enforcement database stating that Petitioner and his car were suspected of being involved in human smuggling?

STATEMENT OF RELATED CASES

United States v. Omar Ernesto Hernandez, No. 5:17-cr-0166-PSG-1, United States District Court for the Central District of California. District court proceeding in which Petitioner was convicted of offense related to this petition. Judgment was entered on August 27, 2018.

United States v. Omar Ernesto Hernandez, No. 18-50305, United States Court of Appeals for the Ninth Circuit. Direct appeal deciding issue raised in this petition. Judgment was entered on November 12, 2019.

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ORDER AND OPINION BELOW

On April 30, 2018, the district court denied Petitioner Omar Hernandez's motion to suppress the fruits of an unlawful investigatory stop. *See* 4/30/18 Order (attached in appendix).

On November 12, 2019, a Ninth Circuit panel filed an unpublished opinion affirming the district court's order. *See United States v. Hernandez*, 784 Fed. App'x 525 (9th Cir. 2019) (attached in appendix).

JURISDICTION

The Ninth Circuit opinion that is the focus of this petition was filed on November 12, 2019. Accordingly, this Petition is timely, and jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

STATEMENT OF THE CASE

I. District Court Proceedings

Omar Hernandez was charged with three counts of alien smuggling under 8 U.S.C. §1324. In a pretrial motion, he moved to suppress fruits of an unlawful Border Patrol investigatory stop, which the government opposed. *See* ER 3-26.[1] Following a (non-evidentiary) hearing, the district court took the motion under submission based on the parties' written submissions, including the declaration of Border Patrol Agent Richard Hagan. The court then issued a written order denying

[1] ER denotes the Excerpts of Record that Hernandez filed in the Ninth Circuit, in case number 18-50305, at docket #15.

the motion. Below, Hernandez sets out the district court's fact findings related to the stop, and discusses its basis for denying the motion.

A. Facts Related To The Investigatory Stop

Hernandez's argument on appeal was directed solely at the district court's legal conclusion that factually unsupported suspicions stated in a computer database called "TECS" may provide the critical support for finding reasonable suspicion for an investigatory stop. Because Hernandez did not challenge the district court's fact findings, he sets them out here verbatim, as they are stated in the court's order denying his motion:

> On July 26, 2017, Border Patrol Agents Juan Aguayo and Richard Hagan were patrolling the Interstate-15 highway ("the I-15") in a fully marked Ford Explorer when they received an alert from an internal system regarding a car bearing the license plate number 6CKV924. *Opp*. 2:11–19; *see also Declaration of Richard Hagan*, Dkt. # 66-1 ("Hagan Decl."), ¶ 5.1. The alert indicated that the car was suspected of being involved in alien smuggling. *Opp*. 2:19–21; *Hagan Decl*. ¶ 5. Approximately 30 minutes later, Agents Aguayo and Hagan were parked on the shoulder of the I-15 near Murrieta Hot Springs Road when they spotted a black BMW with the license plate number 6CKV924. *Opp*. 2:24–3:1; *Hagan Decl*. ¶ 6. As the BMW passed the agents' patrol car, it "slowed down significantly," which Agent Hagan later attested was suspicious "because the motoring public in the Murrieta area generally knows that Border Patrol agents do not issue citations for traffic violations." *Opp*. 3:4–10; *Hagan Decl*. ¶ 7. Based on the alert and the reduction in speed, Agents Aguayo and Hagan decided to follow the BMW "to conduct further investigation." *Opp*. 3:10–14; *Hagan Decl*. ¶ 7.
>
> As they followed the BMW, the agents' suspicions mounted due to two factors: the behavior of the BMW and additional information that they gleaned through their internal system. As to the BMW, the agents noticed that as they approached, the vehicle continued to travel at a reduced speed, estimated at about ten miles per hour below the posted speed limit. *Opp*. 3:17–22; *Hagan Decl*. ¶ 8. As the patrol car passed next to the BMW, Agent Hagan observed four occupants inside, including the driver. *Opp*. 3:22–24; Hagan Decl. ¶ 9. He noticed that "none of the occupants would look in [their] direction," which, in his experience, "was abnormal and showed they may have been trying to avoid [the agents], as most people look over when a law enforcement vehicle pulls up next to them." *Opp*. 3:24–28; *Hagan Decl*. ¶ 9. The vehicle also began veering in its lane, which suggested to Agent Hagan that "the driver may have been looking in his mirrors or over his shoulder in an attempt to monitor what [the agents] were doing." *Opp*. 6:2–5; *Hagan Decl*. ¶ 14.

Additionally, as the agents followed the BMW, Agent Hagan queried the vehicle's license plate number in the Automated Targeting System ("ATS"), which is an internal Department of Homeland Security program that was installed in the agents' patrol car. *Opp*. 4:3–6; *Hagan Decl*. ¶ 10. The ATS program provides information such as a vehicle's registered owner and its international border crossing history. *Opp*. 4:6–10; *Hagan Decl*. ¶ 10. If a vehicle has crossed an international border and entered the United States, the ATS report provides information about the date and time of crossing, the number of occupants in the car at the time of crossing, and the names of any occupants. *Opp*. 4:10–13; *Hagan Decl*. ¶ 10. The ATS program also indicates whether any travelers associated with the vehicle have a record in the Treasury Enforcement Communications System ("TECS"), which might be the result of a number of scenarios, from losing a passport to being suspected of human or narcotics smuggling. *Opp*. 4:13–19; *Hagan Decl*. ¶ 10.

Having input the BMW into the ATS, Agent Hagan learned the following:

- that Defendant was the registered owner of the BMW;

- that the BMW had crossed the international border from Mexico to the United States earlier that same day, and that at the time of crossing, Defendant was the sole occupant of the vehicle;

- and that both Defendant and the BMW had TECS alerts, with the BMW's TECS record stating that the vehicle was involved in a "possible smuggling conveyance" and Defendant's TECS record stating that he was the subject of a current human trafficking investigation.

Opp. 4:20–5:10; *Hagan Decl*. ¶¶ 11–13, Ex. 1.

Based on these circumstances – "[D]efendant's irregular driving behavior, his border crossing history, the increas[ed] number of people in [D]efendant's [vehicle] compared to when he crossed into the United States earlier that day, and the fact that both [D]efendant and his vehicle had TECS alerts indicating they might be involved in human smuggling" – Agents Aguayo and Hagan "decided to conduct a traffic stop of the BMW to investigate whether [D]efendant was presently attempting to smuggle humans into the United States." *Opp*. 6:8–15; *Hagan Decl*. ¶ 15. The three passengers in the BMW eventually admitted that they were being smuggled by Defendant, who was placed under arrest. *Opp*. 6:18–7:2; *Hagan Decl*. ¶ 16.

ER 40-42 (brackets in original).

Some additional points bear making, with respect to the "internal system" alert and "TECS alerts" referenced in the district court's order.

In its pretrial submissions, the government didn't provide details about the "internal system" alert related to the license plate number on Hernandez's car, other than Agent Hagan's declaration that the alert "indicated that the car was suspected of being involved in alien smuggling." *See* ER 28. At trial, Agent Hagan provided a bit more information, which is appropriately considered when assessing the stop issue on appeal. *See United States v. Thomas*, 211 F.3d 1186, 1192 (9th Cir. 2000). Agent Hagan testified that while patrolling, agents will receive "license plate reader alerts" that "are put into the system by someone that is targeting a certain vehicle . . . and typically they'll put in there what they are targeting that vehicle for." ER 58-59. When asked what kind of information is contained in those alerts, Agent Hagan replied, "It all depends what the person that inputted it in put into the notes on that particular vehicle. Some people are really thorough and they'll put whatever they have, and other people kind of leave it general." ER 59. Agent Hagan also said that he did not mention the license plate reader alert for Hernandez in his related report because "[w]e were given the directive that that was not be included in our report because we still have to develop our reasonable suspicion. And it's a law enforcement sensitive tool that is not to be given out and divulged at that time." ER 65.

With respect to the TECS records the Agents reviewed prior to the stop, the government attached those to its opposition to Hernandez's motion. Those records stated that the car was a "[p]ossible smuggling conveyance," and that the registered owner of the car, Hernandez, was the "[s]ubject of [a] current investigation" for "human smuggling/trafficking." ER 31, 38-39.

Although the record is unclear, it seems likely the "license plate reader alert" (*i.e.*, what the district court's order referred to as an "internal system" alert) and the TECS records are connected.

Specifically, the "internal system" alert was probably generated that day (July 26, 2017) when an automated license plate reader along Hernandez's route read his plate and then triggered the alert because of the TECS record for his car. *See* Department of Homeland Security, *Privacy Impact Assessment for CBP License Plate Reader Technology, DHS/CBP/PIA-049*, at 2-3, 5-8 (December 11, 2017) (describing locations of Border Patrol license plate readers and indicating that information gathered is transferred to central server where "hot lists" are generated for "local license plates of interest"). Thus, it appears the "internal system" alert and TECS record for the car are the same, from the perspective of establishing reasonable suspicion for the investigatory stop.

Hernandez now turns to the district court's reasons for denying his suppression motion.

B. The District Court's Reasons For Denying The Suppression Motion

One of the things the government relied on to support the stop was that Hernandez slowed his car when he evidently saw the Agents' patrol car. Agent Hagan claimed that was suspicious because, according to him, the motoring public knows Border Patrol agents don't have authority to issue traffic citations. At the hearing on the suppression motion, the district court rejected that argument, stating:

> No, I disagree. Because if I'm driving along I-15, which I've driven on I-15 whether going to San Diego or Temecula, and I disagree that people don't believe that some segment of law enforcement is going to give you a ticket. So it would not be unusual for me to slow down.

ER 52. The court also rejected the government's argument that Hernandez's failure to make eye contact with the agents was probative, stating:

> I slow down, and I pay attention. And the fact that I don't look over and make eye contact to me is perfectly normal because I just want to act like I'm a saint going straight and narrow.

ER 52.

The court then homed in on the significance of the "alerts," stating that they "make the case" and "mean everything." ER 52. The court began, however, by noting its initial skepticism that the alerts were entitled to any weight, stating:

> [W]hen I was reading the papers in a typical setting, I just felt, generically speaking, before I read the cases, that there wasn't reasonable suspicion. Then I read the cases, and it seems the [Ninth] Circuit treats the alerts quite differently than I expected, especially the *en banc* decision where I guess my tentative thinking was more akin to Judge Smith's dissent in that case. [*See United States v. Cotterman*, 709 F.3d 952, 990-92 (9th Cir. 2013) (*en banc*) (Smith, J., dissenting).] But the fact that the law is in the circuit that there seems to be great weight given to these types of alerts.

ER 49. The court went on to say that it believed the TECS record stating "the suspicion of being involved in alien smuggling, it seems that is the most specific and strongest alert." ER 57. The court concluded, "But you have the alerts, and you have the earlier crossing with the five hours. That puts us in a different place. And I think the circuit tells me I'm in a different place." ER 53. The court then took the issue under submission. *See id.*

The court subsequently issued a written order consistent with its remarks at the hearing. It began by stating that it was "not particularly persuaded by the" government's arguments based on the "agents' observations of the BMW's activity and the behavior of the occupants inside," because "[a]ny motorist on the I-15, whether she be a potential criminal or a perfectly law-abiding citizen, might be prone to slowing down upon seeing the telltale signs of a patrol vehicle parked alongside the highway." ER 43 (order also attached in appendix); *see also Navarette v. California*, 572 U.S. 393, 403 (2014) ("[i]t is hardly surprising that the appearance of a marked police car . . . would inspire more careful driving"). The court also found irrelevant that "neither Defendant nor the other occupants made eye contact with the agents after they pulled alongside the BMW," stating that "it might have been more suspicious had the passengers engaged with the agents in some way." *Id.*

(citing *United States v. Arvizu*, 534 U.S. 266, 276–77 (2002) (holding that passengers' odd waving at Border Patrol agents was entitled to consideration as part of the reasonable suspicion analysis)).

The court therefore concluded that the "motion ultimately c[ame] down to the weight that should be afforded to the TECS alerts . . . ." ER 43. In this regard, the court said:

> The Ninth Circuit has generally accepted the accuracy of such reports and found them to be particularly persuasive in similar contexts. *See, e.g., United States v. Perez*, 603 F. App'x 620, 621-22 (9th Cir. 2015) (determining that a TECS alert "is relevant and highly probative to the reasonable suspicion calculus"); *United States v. Cotterman*, 709 F.3d 952, 968-69 (9th Cir. 2013) (*en banc*) (finding that the existence of a TECS alert indicating defendant's prior criminal activities and potential involvement with "child sex tourism" was a factor giving rise to reasonable suspicion). Affording a similar degree of weight here, the Court concludes that the TECS alerts were compelling grounds for a finding of reasonable suspicion. Defendant's alert did not merely suggest a past history of criminal conduct, but that he was the subject of a current criminal investigation. In addition, the BMW itself was flagged for possible involvement with human smuggling. These alerts, combined with other relevant considerations – the location of the I-15 corridor, the level of smuggling activity generally observed there, and the fact that more occupants were in the BMW at the time of the stop than when it crossed the border earlier that day – suggest that, when "filtered through the lens of the agents' training and experience," they "had a reasonable, particularized basis" for stopping the BMW.

ER 43. Accordingly, the district court denied the motion to suppress based on its view that the TECS alerts "make the case" and "mean everything." ER 52.

The case proceeded to trial and Hernandez was convicted on the three counts charged. The bulk of the government's trial evidence was fruit of the investigatory stop. *See, e.g., United States v. Thomas*, 211 F.3d 1186, 1192 (9th Cir. 2000) (holding that physical evidence seized following unlawful investigatory stopped should have been suppressed); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989) (holding that aliens' testimony should have been suppressed because it was fruit of Fourth Amendment violation).

II. Ninth Circuit Opinion

On appeal, the Ninth Circuit affirmed the district court's denial of Hernandez's suppression motion, relying in large part on its prior holdings that "the existence of an active TECS alert . . . coupled with other indicia of criminality, may give rise to reasonable suspicion," and thus support an investigatory stop. *Hernandez*, 784 Fed. App'x at 526.

REASONS FOR GRANTING THE PETITION

The question presented is whether the TECS alerts could tip the reasonable suspicion scale in the government's favor. The district court's initial – and correct – assumption was that the answer is no. However, based on two Ninth Circuit cases – *Cotterman* and *Perez* – the district court changed its mind and concluded that there was reasonable suspicion for the investigatory stop, and the Ninth Circuit affirmed that reasoning. That is contrary to this Court's precedent, because the statements in the TECS records were conclusory, and thus did not add anything to the reasonable suspicion calculus. This is an issue of exceptional importance because the Ninth Circuit's reasoning allows investigatory stops based on less than particularized, reasonable suspicion – specifically, an officer may rely on a bare statement of suspicion found in a law enforcement database to establish reasonable suspicion for an investigatory stop.

The Fourth Amendment's prohibition against unreasonable searches and seizures requires that an officer have reasonable suspicion for an investigatory stop of a car. *See Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). Reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, 572 U.S. 393, 396-97 (2014). Accordingly, to justify an investigatory stop after the fact an "officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed]" the stop. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). An

"unparticularized suspicion" is not sufficient. *Id.* at 27; *see also United States v. Chavez-Valenzuela*, 268 F.3d 719, 724 (9th Cir. 2001) ("an inchoate and unparticularized suspicion or 'hunch' cannot withstand scrutiny under the Fourth Amendment") (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

Notably, that principle drove the outcome in *United States v. Thomas*, 211 F.3d 1186 (9th Cir. 2000). In that case, Sheriff's Detective Janikowski began surveillance after he was told by FBI agents that he "'might want to pay particular attention to a certain house' in Tucson because there was 'a suspicion that there was a possibility that there might be some narcotics' there." *Id.* at 1188. After seeing several people come and go from the house, and a car in the garage being loaded with something heavy that he suspected was marijuana, Detective Janikowski ordered officers to stop the car when it left the house. *See id.* When the officers stopped and approached the car they could smell marijuana, and a subsequent search of the car uncovered 60 pounds of marijuana and a shotgun. In response to the defendant's motion to suppress, the government argued that the FBI tip supported a finding of reasonable suspicion for the stop. The Ninth Circuit panel disagreed, stating that the information provided to Detective Janikowski by the FBI was "conclusory" and "devoid of specifics," and thus "too vague and generalized to play any part in the reasonable suspicion calculus." *Id.* at 1190.

That same logic is embedded in this Court's cases requiring a particularized showing of reasonable suspicion, and dictates the outcome here. The TECS alerts relied on by the Border Patrol Agents state that the BMW was a "[p]ossible smuggling conveyance," and the registered owner of the car, Hernandez, was the "[s]ubject of [a] current investigation" related to "human smuggling/trafficking." ER 31, 38-39. At best these amount to conclusory statements that the car and its owner are suspected of being involved in alien smuggling. There are no facts provided to

support those suspicions. This is akin to the FBI's "tip" in *Thomas* that it was suspected narcotics activity was occurring at a specific house. Thus, the TECS records, like the FBI's "tip," are "too vague and generalized to play any part in the reasonable suspicion calculus." *Thomas*, 211 F.3d at 1190.

The Ninth Circuit in *Thomas* pointed to an important practical reason supporting its holding, which applies equally here. Given the lack of specificity about the basis for the FBI tip, it was possible it came from an informant. If so, the district court was required to assess the reliability of the informant to determine what, if any, weight the tip should given in the reasonable suspicion calculus. *See id.*; *see also, e.g., Florida v. J.L.*, 529 U.S. 266 (2000). Lacking any specifics about the tip, the district court in *Thomas* couldn't do that analysis. Similarly in this case, the assertion in the TECS records that the BMW and Hernandez were "possibly" involved with alien smuggling could have originated with an informant. But without any information about the facts underlying the claimed suspicion, it is impossible to know its origin or basis, much less to assess the reliability of any informant and determine the weight to give to his/her claim. Furthermore, without specifics as to why the BMW and Hernandez were suspected of being involved with alien smuggling, it is impossible to assess whether that suspicion was based on an improper or unconstitutional consideration, such as ethnicity. *See, e.g., United States v. Montero-Camargo*, 208 F.3d 1122, 1131-35 (9th Cir. 2000) (*en banc*).

There is a related practical point. Suppose that Agent Hagan's declaration had said (or that he had testified), "I pulled over the BMW because I believed that it was possibly a smuggling conveyance and I was investigating the registered owner of the BMW for human smuggling." That is, of course, the substance of the TECS alerts. The district court undoubtedly would have responded that Agent Hagan needed to provide facts to support his suspicions, because without those the court

cannot fulfill its constitutional duty to assess whether (1) the facts known to the Agent supported a reasonable suspicion, and (2) the stop was otherwise constitutional. *Cf. United States v. Underwood*, 725 F.3d 1076, 1081, 1084 (9th Cir. 2013) (holding that warrant application "must recite underlying facts so that the issuing judge can" "evaluate an officer's reasoning or . . . draw his or her own inferences").

The result cannot be any different merely because Agent Hagan recited a bare suspicion that someone else input into TECS – typing the suspicion into TECS doesn't give the suspicion talismanic significance. To the contrary, Agent Hagan's recitation of a bare suspicion stated in TECS is more problematic than his testifying to his own bare suspicion, because with the TECS statement there is no way to discern its source, much less examine that source to determine whether (1) the suspicion is supported by adequate facts, (2) those facts come from a reliable source, and (3) the stop was otherwise constitutional (*e.g.*, because it was not driven by an unconstitutional motive). Notably, Agent Hagan himself recognized the limitations of the TECS records when he testified during trial that he didn't mention the license plate reader alert for Hernandez in his report because "[w]e were given the directive that that was not be included in our report because we still have to develop our reasonable suspicion." ER 65.

As the district court correctly concluded, Hernandez's suppression "motion ultimately c[ame] down to the weight that should be afforded to the TECS alerts . . . ." ER 43. For the reasons given above, those alerts shouldn't be given any weight in the reasonable suspicion calculus. Accordingly, the Ninth Circuit erred when it affirmed the district court's denial of Hernandez's motion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Todd W. Burns

Date: January 23, 2020

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