No. 21-6770

IN THE SUPREME COURT OF THE UNITED STATES

DAVE ELYSEE, 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 the court of appeals erred in stating, in the course of explaining the particular arguments and record in this case, that a police officer's alleged failure to reasonably investigate a third party's purported confession is not an affirmative defense to criminal liability.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-83a) is reported at 993 F.3d 1309.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2021. A petition for rehearing was denied on October 6, 2021 (Pet. App. 84a). The petition for a writ of certiorari was filed on December 30, 2021. 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 Florida, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. The court imposed a sentence of 235 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-83a.

1. Early on March 4, 2018, Officers Dwayne Ireland and Chris Wilson of the Homestead, Florida Police Department were working undercover as part of an investigation of the recent theft of copper wires from the city's utilities. Pet. App. 171a-172a, 192a. Officer Ireland was on a bicycle on the sidewalk, positioned in a well-lit area near city light fixtures. Id. at 192a-194a. Officer Wilson was in an unmarked pickup truck in a nearby field, providing security for Officer Ireland. Id. at 172a.

Officer Ireland heard the squeal of tires and saw a white Kia Optima run a nearby stop sign at high speed and then pull over. Pet. App. 193a. A dark-colored Ford Mustang, driving at normal speed, followed the Kia. Ibid. Officer Ireland saw the Kia's passenger exit the car and point a firearm at the Mustang. Id. at 193a-194a. Officer Ireland recognized the man as petitioner, whom he had previously arrested, and who was wearing the same distinctive clothing: a blue and yellow shirt, blue and yellow pants, and yellow sneakers. Id. at 193a.

The Mustang fled, and the Kia's driver, who was wearing all black, opened the door and directed petitioner to get back in the vehicle. Pet. App. 194a. Over the police radio, Officer Ireland advised that the Kia was leaving the area. Ibid. Two nearby officers in marked police vehicles attempted to stop the Kia, but the Kia fled and led officers on a pursuit for ten to 15 minutes, reaching speeds of 80 to 85 miles per hour. Id. at 163a-164a. Eventually, the Kia drove into a field around a church, over several parking stop blocks, and struck a light post, which fell onto and disabled the car. Id. at 155a.

Officer Carlos Garcia, who was by then following closest to the Kia, positioned his vehicle about six to ten feet behind and to the right of Kia's passenger side. Pet. App. 155a. Officer Garcia had activated all of his vehicle's lights and had directed them toward the Kia, including the high beams, a spotlight, and "takedown lights" that illuminated the area in front of his vehicle. Ibid. As the Kia rolled to a stop, Officer Garcia saw petitioner exit the Kia's passenger seat while "holding a black firearm with both hands." Ibid. He saw petitioner's face and observed that petitioner was wearing "a yellow and blue" t-shirt. Id. at 155a-156a. Officer Wilson (who had also pursued the Kia) was 20 feet away and likewise observed petitioner's distinctive "navy blue and yellow shirt" and "yellow shoes," which "stood out." Id. at 174a-175a.

Petitioner dropped the firearm and began running into a nearby neighborhood; Officers Garcia and Wilson pursued him on foot. Pet. App. 156a-157a, 174a. Eventually, Officer Wilson found petitioner in the fetal position on the driver's-side floorboard of a parked car. Id. at 157a, 175a.

2. A federal grand jury in the Southern District of Florida indicted petitioner for possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Indictment 1.

At trial, petitioner contended that he was the Kia's driver, not the passenger. Pet. App. 151a. During opening statements, petitioner's counsel asserted that "a couple of days" after petitioner's arrest, a man named Darius "went into the Homestead Police Department * * * to admit" that he was the Kia's passenger with the gun. Id. at 151a-152a. Counsel told the jury that it would "hear exactly what the officers * * * did with that information." Id. at 152a. The district court, however, had not yet decided any issues with respect to the admission of evidence on that issue.

On the second day of trial, petitioner's counsel notified the district court of his intent to recall a government witness, Detective Raul Cabrera, as a defense witness and to question Cabrera about the statement by an "individual named Darius Deen" that counsel referenced in his opening. Pet. App. 171a. Counsel suggested that it would be more efficient to elicit the testimony

while Detective Cabrera was present for the government's case. Ibid. Asked by the court whether any exception to the hearsay rule would permit the testimony's admission, petitioner's counsel argued the statement was "not hearsay" because "[i]t goes to the effect on the listener" and shows "materially exculpating information which a reasonable officer would have relied upon." Ibid. Petitioner's ounsel further asserted that the evidence was probative of "who actually had the gun" and of the "officer[s'] credibility." Ibid. The government responded that Deen's statement had "no effect on the listener," because petitioner's jail calls showed that he had orchestrated "to have someone come in and lie" about being the passenger, and opposed the admission of "hearsay which we know is false." Ibid. Concluding that the testimony would be "offered for the truth," the court declined to permit it. Ibid.

Later that day, anticipating a need to refute petitioner's opening-statement claim about Deen's alleged confession, the prosecution played for the district court, outside the jury's presence, a call that petitioner had made from jail to an unidentified person in which petitioner described a plan to have a third person claim ownership of the gun. Pet. App. 177a-178a. During discussions with counsel, the court suggested that the government's effort to offer that jail call might "open[] the door" to questioning about police response to the alleged confession, under petitioner's theory "that the police failed to investigate

because they were committed to the position that the defendant was the person with the gun no matter what." Id. at 178a. Subsequently, at the next break in testimony, the court stated that the government's proposal to admit evidence of the jail call appeared "premature," because the evidence would be relevant only if the court allowed the defense to elicit Deen's alleged confession; thus, the jail call would "most logically be offered to rebut" the defense case. Id. at 182a.

The district court proposed allowing the defense to elicit testimony that Deen visited the Homestead Police Department "[a]nd offered to confess," without allowing direct questioning about what Deen "said about what he was doing that night," which the court continued to construe as hearsay. Pet. App. 184a-186a. In addition, the court suggested that Deen could "come and testify" that he "was the passenger in the car." Id. at 186a. Petitioner's counsel then reiterated his argument that the statement could be admitted "based on [its] effect on the listener," but the court stated that it had "not heard enough to persuade [it]" that petitioner's proposal "would be a legitimate way to get [Deen's] hearsay statements in[to evidence]." Ibid. However, the court added that, in continuing to consider petitioner's argument, it would be "happy to hear the officer's testimony outside the presence of the jury" -- a request petitioner's counsel conceded was "very reasonable." Id. at 187a.

After a recess, the government informed the district court that it intended to play only a single segment of the jail call unrelated to Deen's alleged confession, and the defense withdrew a rule-of-completeness objection that it had raised seeking to have other portions of the call admitted. Pet. App. 187a-188a. The defense did not seek to question Detective Cabrera outside the jury's presence, as the court had invited, id. at 189a, and the defense rested without presenting evidence, id. at 198a. The jury found petitioner guilty. Id. at 213a; Jury Verdict 1.

3. The court of appeals affirmed, rejecting petitioner's assertion that the district court had reversibly erred in purportedly preventing petitioner from eliciting testimony about Deen's alleged confession through questioning of Detective Cabrera. Pet. App. 1a-83a.

The court of appeals explained that petitioner's argument was "based on two largely unexamined assumptions that are not clearly supported by the record": first, that the district court had definitively precluded petitioner from eliciting Detective Cabrera's testimony, and, second, that the district court had done so on hearsay grounds. Pet. App. 9a. The court of appeals "assume[d] arguendo" that those premises were "supported by the record" and determined that petitioner's challenge nevertheless "fails on the merits." Id. at 56a; see id. at 57a-73a.

After conducting "a painstaking examination of the trial transcript," the court of appeals observed that petitioner had

offered several distinct theories for admitting Detective Cabrera's prospective testimony regarding Deen's alleged confession. Pet. App. 9a; see id. at 15a. First, petitioner had asserted that the anticipated testimony would show that Deen, and not petitioner, "actually had the gun." Id. at 16a. The court of appeals explained that the district court had correctly recognized that using the testimony for that purpose would amount to offering it "for the truth" and would be impermissible given that petitioner had not identified any applicable exception to the hearsay rule. Ibid.; see id. at 43a, 55a n.63. Second, petitioner had referenced the prospect of admitting testimony regarding Deen's alleged confession to challenge the credibility of the police officers involved in the investigation. Id. at 16a. The court of appeals found that theory likewise inapplicable because petitioner did not seek to use Deen's alleged confession to impeach any officer's testimony. Id. at 16a-17a, 43a.

Third, and of primary relevance here, petitioner had attempted to justify the admission of testimony about Deen's statement to show its "effect on the listener." Pet. App. 17a. The court of appeals understood that theory to be premised on a contention that Detective Cabrera failed "to perform as a reasonable officer" would have performed when presented with Deen's alleged confession, which would purportedly constitute a "breach of [Detective Cabrera's] obligation to the public" and "a defense, in itself, against the charge for which [petitioner] was

standing trial." Id. at 18a-19a. "In essence," the court explained, "defense counsel were presenting Cabrera's failure to satisfy the reasonable officer standard as" an "affirmative defense[]." Id. at 19a; see id. at 57a-58a, 61a.

The court of appeals found that such a theory did not implicate the hearsay rule but that the district court nevertheless had not abused its discretion by excluding the evidence. Pet. App. 57a. The court of appeals rejected the proposition that a defendant may legitimately raise an "affirmative defense based on the purported failure" of officers to conduct an "investigation consistent with the reasonable officer standard." Id. at 58a; see, e.g., id. at 61a (explaining that the precedent cited by petitioner did not "even hint[]" at "an affirmative defense based on the failure of the police to conduct a reasonably thorough investigation"). In the alternative, the court held that petitioner's third theory did not support admission of the evidence of Deen's alleged confession under Federal Rule of Evidence 403. Id. at 65a-73a. The court explained that, even if the jury had been instructed that it could consider the evidence only for what it understood to be petitioner's proffered purpose, the risk that the jury would consider Deen's alleged confession for its truth presented an "enormous" danger of unfair prejudice. Id. at 68a. The court observed that admission of the evidence would "precipitate a trial within a trial on the adequacy of" the officers' investigation and unnecessarily "focus[] the jury on the

conduct of the [officers], not [petitioner]'s guilt or innocence." Id. at 68a, 72a.

ARGUMENT

Petitioner contends (Pet. 2, 7-21) that the court of appeals improperly precluded him from introducing evidence of an insufficient police investigation as part of his effort to demonstrate reasonable doubt. That contention misconstrues the decision below. After "a painstaking examination of the trial transcript," the court of appeals stated that petitioner could not introduce the evidence in question to support an "affirmative defense" under which a showing that the police did not conduct a "reasonably thorough investigation" would necessitate acquittal. Pet. App. 9a, 61a. Petitioner does not identify any court that has endorsed such a defense, and he himself appears (Pet. 6, 19) to renounce it. The court of appeals' statement about the absence of such an affirmative defense accordingly does not implicate any conflict in lower courts or present any other basis for this Court's review. This case, moreover, would be a poor vehicle for considering the issues petitioner raises because it presents a procedurally convoluted backdrop, the court of appeals affirmed on one alternative ground (Federal Rule of Evidence 403), and the decision below could be supported on multiple additional grounds.

1. As relevant here, the court of appeals addressed a narrow and apparently now undisputed issue when it stated that petitioner could not mount "an affirmative defense based on the failure of

the police to conduct a reasonably thorough investigation." Pet. App. 61a; see id. at 18a-19a (framing the issue as whether an inadequate police investigation is "a defense, in itself, against the charge for which [petitioner] was standing trial"); id. at 54a, 57a-58a, 65a (similarly describing the issue and the court's resolution). That statement is correct, and petitioner does not identify any decision suggesting otherwise. See, e.g., Morris v. Burnett, 319 F.3d 1254, 1272 (10th Cir.) (explaining that, "[i]n the abstract," whether "the government conducted a thorough, professional investigation is not relevant," and "[j]uries are not instructed to acquit the defendant if the government's investigation was superficial"), cert. denied, 540 U.S. 909 (2003). Indeed, petitioner acknowledges (Pet. 6, 19) that arguments that law enforcement conducted an inadequate investigation are "not a standalone 'affirmative defense' to the crime" and that "showing an inadequate investigation would not otherwise mandate an acquittal."

Petitioner attempts (e.g., Pet. 2, 7, 19) to recast the court of appeals' decision as addressing not the existence of an affirmative defense of unreasonable police investigation, but instead whether a defendant may attempt to raise reasonable doubt about his guilt by contesting the efficacy of a police investigation or arguing that law enforcement failed to investigate a particular suspect. The court of appeals, however, did not address that latter issue, and nothing in its analysis

would preclude a defendant from raising such points in an effort to undermine the government's case. Petitioner is thus incorrect in contending (Pet. 13) that the decision below will "categorically prevent criminal defendants from mounting a trial defense based on an inadequate police investigation"; indeed, petitioner was permitted to pursue such a defense at trial. His counsel emphasized the lack of dashboard-camera or body-camera footage to corroborate the officers' testimony, Pet. App. 160a, 176a; pointed out that officers did not include key descriptors (like petitioner's distinctive clothing) contemporaneously in radio transmissions, id. at 161a-162a, 176a; questioned the government's fingerprint expert about the lack of fingerprints recovered from the gun and his failure to test for fingerprints on a holster or sunglasses found in the passenger seat, id. at 181a; and questioned officers about their failure to follow the Mustang or interview the putative victims of petitioner's assault, id. at 195a; see id. at 202a-203a (closing argument).

In addition, to the extent that petitioner wanted to undermine the government's case by highlighting Deen's statements, he could have attempted to call Deen himself to testify about them. Pet. App. 24a & n.30; see id. at 178a. Indeed, petitioner identified Deen as a defense witness, D. Ct. Doc. 24 (June 26, 2018), and petitioner's counsel represented during trial that the defense was "considering trying to bring [Deen] in, if available" to testify, Pet. App. 186a. Petitioner ultimately did not do so, however,

possibly because Deen's testimony would have allowed the government to introduce petitioner's jail calls establishing that petitioner had manufactured Deen's purported confession. Id. at 14a, 171a; see id. at 24a n.39 (noting that offering Deen's testimony might have exposed defense counsel to a risk of suborning perjury). Alternatively, even without Deen's direct testimony, petitioner could have accepted the district court's offer to elicit testimony from Detective Cabrera about Deen's alleged confession outside the jury's presence, made clear the potential relevance of that testimony to creating reasonable doubt, and sought its admission on that basis. Id. at 186a-187a. Again, he did not do so. Id. at 50a. Petitioner was entitled to make those strategic decisions, but they undermine his claim that the courts below impaired his ability to use Deen's alleged confession to create reasonable doubt.

2. Because the decision below does not foreclose defendants from seeking to create reasonable doubt by questioning law enforcement investigations, the decision is not in tension with decisions petitioner identifies (Pet. 7-14) of this Court, other circuits, and state courts of last resort.

Many of the decisions cited by petitioner, including this Court's decision in Kyles v. Whitley, 514 U.S. 419 (1995), address whether evidence withheld was material to the defense, in violation of Brady v. Maryland, 373 U.S. 83 (1963). See Kyles, 514 U.S. at 432-441. This Court explained in Kyles that evidence may be

material where it could "raise[] opportunities to attack * * * the thoroughness and even good faith of [an] investigation." Id. at 443. The Eleventh Circuit has properly applied that standard, including by expressly endorsing a decision of the Tenth Circuit upon which petitioner relies (Pet. 7). See Stano v. Dugger, 901 F.2d 898, 903 n.28 (11th Cir. 1990) (acknowledging that withheld evidence may "raise[] serious questions about the manner, quality, and thoroughness of the investigation") (quoting Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir.), cert. denied, 479 U.S. 962 (1986)); see also, e.g., Guzman v. Secretary, Dep't of Corr., 663 F.3d 1336, 1352-1354 & n.20 (11th Cir. 2011). None of the cases petitioner identifies purports to endorse a claim that a defendant may advance, as an affirmative defense to excuse his criminal conduct, a claim that officers failed to satisfy a "reasonable officer" standard of performance.

For the same reason, the decision below is not tension with decisions of the highest state courts in Massachusetts and Connecticut. Those courts have recognized that "[a] defendant may rely on the deficiencies or lapses in police investigations to raise the specter of reasonable doubt." Commonwealth v. Moore, 109 N.E.3d 484, 497 (Mass. 2018); see, e.g., State v. Wright, 140 A.3d 939, 945-946 (Conn. 2016). At the same time, the Connecticut Supreme Court (relying on the Tenth Circuit decision's in Morris v. Burnett, supra) has acknowledged that juries "are not instructed to acquit the defendant if the government's investigation was

superficial" because "whether the government conducted a thorough, professional investigation" is not relevant to the jury's determination of the defendant's guilt "[i]n the abstract." State v. Collins, 10 A.3d 1005, 1025 (quoting Morris, 319 F.3d at 1272), cert. denied, 565 U.S. 908 (2011). The court of appeals' decision here was in line with that consensus view.

3. To the extent that petitioner contends that the argument he was raising below was addressed to reasonable doubt as such, rather than an affirmative defense, that factbound argument does not warrant this Court's review. See Sup. Ct. R. 10. The court of appeals made a painstaking effort to address the procedurally convoluted context in which the disputed issues arose. See Pet. App. 9a-55a. And even if the court misunderstood petitioner's argument, the result was not a decision adopting a legal rule of the sort that he asks this Court to review. See pp. 11-13, supra.

In any event, this case would be a poor vehicle for considering the question presented for multiple reasons. First, the question presented is not outcome-determinative because the court of appeals affirmed on the alternative ground that testimony from Detective Cabrera about Deen's alleged confession was excludable under Federal Rule of Evidence 403 because its "probative value [wa]s substantially outweighed by a danger of * * * unfair prejudice." See Pet. App. 65a-73a. The court correctly determined that admission of such testimony presented an "enormous" danger of unfair prejudice to the government given that

the jury would likely have difficulty not considering Deen's alleged confession for its truth. Id. at 68a. The court also correctly reasoned that introduction of the evidence would "precipitate a trial within a trial on the adequacy of" the officers' investigation and unnecessarily "focus[] the jury on the conduct of the [officers], not [petitioner]'s guilt or innocence." Id. at 68a, 72a.

Second, the decision below can be affirmed on additional alternative grounds identified but not directly resolved by the court of appeals. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) (noting that a prevailing party may rely on an alternative ground to support the judgment). As the court of appeals recognized, the district court declined to rule definitively on the admissibility of Detective Cabrera's testimony to show its effect on the listener unless the defense first provided Cabrera's testimony to the court outside the jury's presence. Pet. App. 13a n.14. But petitioner failed to elicit that testimony, and accordingly failed to obtain a "definitive" ruling on the evidence's admissibility, thereby forfeiting a claim on appeal. Id. at 56a n.64; see Fed. R. Evid. 103(b). Similarly, petitioner's failure to provide an offer of proof "of [the evidence's] substance" through Detective Cabrera's testimony would also impede appellate review. Fed. R. Evid. 103(a)(2); see United States v. Baptista-Rodriguez, 17 F.3d 1354, 1372 n.27 (11th Cir. 1994) (explaining that courts of appeals will "not even consider

the propriety of the decision to exclude the evidence at issue" without an offer of proof) (citation omitted). Absent testimony about Detective Cabrera's actions in response to Deen's alleged confession, the courts below and this Court cannot evaluate the effect the alleged confession had on Detective Cabrera.

Finally, any error was not prejudicial. The evidence against petitioner was overwhelming, and the jury would have found beyond a reasonable doubt that petitioner possessed the firearm even if he had introduced the evidence at issue. Officers Ireland, Wilson, and Garcia all identified petitioner at trial as having possessed the firearm, with each describing their respective vantage points and testifying to having observed petitioner wearing distinctive clothing (a yellow and blue t-shirt and yellow sneakers). Pet. App. 155a-156a, 174a-175a, 192a-194a. Officer Ireland further testified that he specifically recognized petitioner from a prior arrest and that the Kia's driver, in contrast to petitioner's distinctive garb, was wearing all black. Id. at 193a-194a. The government also introduced photographs of the clothing and sneakers petitioner was wearing when arrested. D. Ct. Doc. 45-1, at 78-79 (July 20, 2018). And had evidence of Deen's alleged confession been admitted, the government undoubtedly would have entered the evidence -- discussed at length with the district court -- demonstrating that petitioner manufactured Deen's alleged confession, thereby undercutting the evidence's impact and further inculpating petitioner. Pet. App. 178a; see id. at 22a-27a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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