No. 22-7474

IN THE SUPREME COURT OF THE UNITED STATES

QUINTON MARKIS CUTHBERTSON, AKA QUINTON MARQUIS CUTHBERTSON,
PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney
General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether police officers violated the Fourth Amendment when they stopped petitioner's car for speeding.

2. Whether the court of appeals correctly rejected, on plain-error review, petitioner's due-process and spoilation claims based on the unavailability of evidence related to the traffic stop.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 2023 WL 34171.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2023. A petition for rehearing was denied on February 7, 2023 (Pet. App. 12a). The petition for a writ of certiorari was filed on May 3, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of North Carolina, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). C.A. App. 291. The court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Id. at 292-293. The court of appeals affirmed. Pet. App. 1a-4a.

1. On September 30, 2019, Corporal Nicholas Goughnour, a member of the Greensboro Police Department, was on patrol in an unmarked car as part of the Greensboro Tactical Narcotics Team. C.A. App. 44-47, 50. Corporal Goughnour observed a white Kia parked on the street and watched a man exit the vehicle and enter a house; Corporal Goughnour looked up the registration for the Kia and found that it was registered to a woman who had been charged with a narcotics offense. Id. at 51-53, 158-159. Corporal Goughnour then ran the case number for the narcotics offense through a law-enforcement database and learned that petitioner -- whom Corporal Goughnour identified as the man who had exited the Kia and entered the house -- had also been charged in the narcotics offense. Id. at 53-54, 158-159.

About 20 minutes later, petitioner and the Kia's owner left the house, and petitioner drove them away in the Kia. C.A. App. 32, 53-55, 159. Corporal Goughnour informed other officers on

patrol with the Tactical Narcotics Team that he was going to follow petitioner. Id. at 56; see id. at 50-51. Petitioner drove onto the interstate, accelerated to at least 89 miles per hour, and weaved in and out of traffic; the speed limit for that section of the interstate was 60 miles per hour. Id. at 58-59, 159. Corporal Goughnour was unable to keep up with petitioner, so he radioed the other officers for assistance. Id. at 59, 159.

Officer Daniel Kroh and another officer, who were in an unmarked vehicle, were able to keep up with petitioner; they decided to pull ahead of petitioner to force him to slow down before they made a traffic stop. C.A. App. 84-90, 95, 160. When petitioner accelerated instead of slowing down, Officer Kroh activated his blue lights, and petitioner stopped. Id. at 90, 94, 160. None of the officers involved in petitioner's pursuit turned on their body cameras until Officer Kroh activated his blue lights. Id. at 160.

Officer Kroh observed that, just before petitioner stopped, two small items were thrown out of the passenger-side window. C.A. App. 93-94. The officers found two bags of suspected cocaine and crack cocaine on the side of the road. Id. at 32. The officers also found a semiautomatic handgun and cocaine in the Kia. Id. at 32-33.

2. A federal grand jury in the Middle District of North Carolina returned a superseding indictment charging petitioner with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). C.A. App. 27-28.

a. Petitioner filed a pretrial motion to suppress the evidence seized during the traffic stop, alleging that the officers violated his Fourth Amendment rights by intentionally causing him to speed up. C.A. App. 11-26. Although as part of that argument petitioner asserted that the officers violated Greensboro policy by failing to activate their body cameras until Officer Kroh turned on his blue lights, id. at 18-20, petitioner did not raise a due-process or spoilation claim, see generally id. at 11-26.

Following an evidentiary hearing at which six officers and petitioner testified, see C.A. App. 44-158, the district court denied the motion to suppress, id. at 158-163. Based on testimony from the officers, the court found that petitioner began driving above 89 miles per hour while he was ahead of Corporal Goughnour and Officer Kroh. Id. at 159. The court also found that, after petitioner was already speeding, Officer

Kroh attempted to pass the Kia "so he could be in front of the Kia when the traffic stop was initiated, but he was unable to go fast enough to do that." Id. at 160. And the court found that Officer Kroh "did get even with the Kia at some point, and then the Kia pulled on ahead and Officer Kroh" initiated the traffic stop. Ibid. In making those findings, the court rejected petitioner's version of events, in which petitioner did not begin speeding until Officer Kroh began to closely follow him and attempted to pass him. See id. at 138-144, 146-147; see also id. at 161 (finding that the officers' speeding to follow petitioner "happened fairly late in the driving down the interstate").

The district court determined that the officers had "probable cause to stop the Kia based on [petitioner's] speeding for several miles, well above the speed limit." C.A. App. 163. The court also noted that "it doesn't look to me like [the officers] violated the [Greensboro body-camera] policy" by not initiating recording until petitioner was signaled to pull over, "but even if they did, that [did not] make" the stop "unreasonable or unconstitutional" because the officers stopped petitioner "based on the speeding." Ibid. The court also observed that "you could see from the part" of the video that was available that if the officers had "turned on their body-

worn camera[s]" earlier, "you wouldn't have seen anything but the steering wheel or front of the dashboard." Ibid.

b. Petitioner conditionally pleaded guilty, pursuant to a plea agreement in which he reserved his right to challenge the denial of his motion to suppress, to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). C.A. App. 174-184, 222.

Before sentencing, petitioner, who was represented by new counsel, filed a motion to withdraw his guilty plea. C.A. App. 238-255. Although petitioner did not allege that his previous attorney was ineffective, see id. at 262, 272-273, petitioner argued that his previous attorney should have filed a motion to dismiss under Brady v. Maryland, 373 U.S. 83 (1963), or asked the district court to adopt an evidentiary inference in petitioner's favor, based on the officers' not activating their body cameras before turning on their blue lights and not preserving communications among themselves while they were pursuing petitioner. C.A. App. 247-250. Following a hearing, the court denied the motion, id. at 283-286; in doing so, the court noted that it had previously ruled on "the factual underpinnings" of the additional motions that petitioner proposed and found that it was "highly unlikely that" petitioner's new "legal arguments would be successful," id. at 285.

The district court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. C.A. App. 292-293.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-4a. The court found that the officers had probable cause to stop petitioner's car for a traffic violation because "[t]he evidence the district court credited established that [petitioner's] vehicle was driven on the Interstate at speeds well over the posted limit." Id. at 2a. The court of appeals rejected the "inducement and justification theory" underlying petitioner's argument against probable cause, observing that he "offer[ed] no argument on appeal grounded in North Carolina state law" in support of it. Id. at 3a. And the court found that "even if the district court erred in finding no violation of the [Greensboro body camera] policy, [petitioner] proffers neither argument nor supporting legal authority connecting any such violation standing alone with the remedy of suppression." Ibid.

The court of appeals also reviewed for plain error petitioner's claim on appeal that a due-process violation or spoliation occurred, which was premised on the assertion that "computer assisted dispatch records, police radio recordings, and full body worn camera recordings were not preserved and produced." Pet. App. 3a; see id. at 3a-4a. The court

"discern[ed] no error qualifying as plain in the district court's failure to find a due process violation or spoilation." Id. at 4a.

ARGUMENT

Petitioner contends (Pet. 6-10) that the officers lacked probable cause to stop him because they provoked his speeding. Petitioner also contends (Pet. 11-17) that the court of appeals erred in denying relief on his due-process and spoilation claims. The court correctly rejected those contentions, and its unpublished decision does not conflict with any decision of this Court or implicate any disagreement among the courts of appeals. Further review of that nonprecedential and fact-bound decision is unwarranted.

1. a. Traffic stops based on probable cause that a traffic violation has occurred are reasonable under the Fourth Amendment. See Whren v. United States, 517 U.S. 806, 810 (1996). Here, after hearing from multiple officers (who testified that petitioner began speeding before the officers began closely following him), and from petitioner (who testified that he did not begin speeding until one of the officers began to closely follow him and attempted to pass him), see pp. 4-5, supra, the district court permissibly credited the officers' version of events and found "probable cause to stop the Kia based on [petitioner's] speeding for several miles, well above

the speed limit," C.A. App. 163. And the court of appeals correctly found that the district court did not err in its determination. Pet. App. 2a.

Petitioner asserts (Pet. 9) that the officers violated his Fourth Amendment rights by following him in an unsafe manner and "frighten[ing] him" into "flee[ing] to escape the danger." But the district court appropriately rejected the factual premise of that argument, finding that that petitioner began speeding before the officers began speeding to keep up with him. See C.A. App. 159-162; pp. 4-5, supra. And the court of appeals did not disturb that finding.

Petitioner's case-specific challenge to that factual determination (Pet. 3-4) does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Adherence to that practice is particularly warranted because the court of appeals and the district court were in agreement. See Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949) (noting that the Court "cannot undertake to review concurrent findings of fact by

two courts below in the absence of a very obvious and exceptional showing of error").

b. Petitioner errs in asserting (Pet. 7-10) that the decision below conflicts with the decisions of other circuits. Even assuming that a nonprecedential decision could create an intercircuit conflict, all but one of the cases that petitioner identifies (Pet. 8) found that suspects' flights were not caused by provocative police conduct -- just as the courts below found based on the facts here. See United States v. Jeter, 721 F.3d 746, 753-755 (6th Cir.), cert. denied, 571 U.S. 1031 (2013); United States v. Franklin, 323 F.3d 1298, 1302-1303 (11th Cir.), cert. denied, 540 U.S. 860 (2003). And even further assuming that the speeding here was in response to the officers' conduct, petitioner errs in comparing it to Marshall ex rel. Gossens v. Teske, 284 F.3d 765 (7th Cir. 2002), which concerned the distinct circumstance of a suspect's flight.

This Court has recognized that "unprovoked flight upon noticing the police" can support reasonable suspicion of criminal activity, because while it is "not necessarily indicative of wrongdoing, * * * it is certainly suggestive of such." Illinois v. Wardlow, 528 U.S. 119, 124 (2000). In Marshall, the Seventh Circuit concluded that officers lacked probable cause to arrest an individual for knowingly resisting or obstructing officers when the individual fled from undercover

officers and ran toward uniformed officers, saying that he was being chased by robbers. 284 F.3d at 767-769, 771. The Seventh Circuit reasoned that "trying to get to the 'police' as fast as he could" when "he saw masked men with guns running toward him" was neither particularly indicative of preexisting criminal activity nor, in the absence of knowledge that he was running from the police, itself unlawful. Id. at 771.

This case, however, does not involve an inference of criminal activity based on flight, or a crime of "knowingly running away from" police. 284 F.3d at 771. Petitioner's speeding was in itself against the law. See Pet. App. 3a. The Seventh Circuit's decision in Marshall did not suggest that a police stop would have been impermissible had the individual responded to the apparent robbers by doing something independently unlawful -- e.g., pulling out a gun and shooting at them. The court of appeals' determination here -- that, in the absence of any apparent state-law defense to speeding in circumstances where the driver thinks he is being chased, petitioner's speeding justified a traffic stop, see ibid. -- was thus fully consistent with Marshall.

2. Petitioner separately contends (Pet. 11-17) that he is entitled to relief on due-process or spoliation grounds because the police did not activate body cameras at an earlier time or retain records of the communications among the officers while

they were pursuing petitioner. The court of appeals correctly reviewed that claim for plain error and found no such error, and further review of petitioner's factbound claim is unwarranted.

As a threshold matter, unobstructed review of the merits of petitioner's claim would require agreeing with him that the court of appeals erred in applying plain-error review. And petitioner has not only failed to establish plain error, see Pet. App. 4a, but any error at all. To prove a due process violation under Brady v. Maryland, 373 U.S. 83 (1963), a defendant must show, inter alia, that the non-disclosed evidence was favorable to the defendant and material. Id. at 87. And under the court of appeals' spoilation doctrine, a criminal defendant could potentially be entitled to an adverse inference instruction against the government if, among other things, the government's willful conduct resulted in the loss of evidence. United States v. Johnson, 996 F.3d 200, 206 (4th Cir. 2021). Petitioner has made none of those showings.

Petitioner first asserts (Pet. 11-12) that the officers should have activated their body cameras earlier in the pursuit. He fails, however, to cite any decisions applying Brady or the spoliation doctrine to evidence that was never created in the first place. Nor, in any event, is there any indication that the officers engaged in willful misconduct or that had they activated their body cameras earlier, it would have resulted in

evidence material to the case or favorable to petitioner. To the contrary, the district court observed that earlier activation of the body cameras would have revealed nothing "but the steering wheel or front of the dashboard." C.A. App. 163.

Petitioner also asserts (Pet. 12) that the officers should have retained records of communications among the officers while they were pursuing petitioner. But petitioner has not clearly identified any records that the officers made, should have retained, but lost due to willful conduct. Nor has he demonstrated that any such records would have been favorable to him or met the Brady materiality standard of a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280 (1999) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

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