No. 20-5064

IN THE SUPREME COURT OF THE UNITED STATES

TONY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts correctly found that, in the particular circumstances of this case, petitioner was not entitled to dismissal of the superseding indictment based on preindictment delay.

2. Whether Congress's extension of the statute of limitations applicable to sexual offenses against minors in 18 U.S.C. 3283 and 3299 applies to offenses for which the limitations period had not yet run at the time of the extension.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

United States v. Pittman, No. 13-cr-4510 (Dec. 21, 2016)

United States Court of Appeals (9th Cir):

United States v. Brown, No. 16-50495 (Jan. 15, 2020)

Supreme Court of the United States:

Banks v. United States, No. 20-5074 (filed July 10, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is not published in the Federal Reporter but is available at 800 Fed. Appx. 455.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2020. A petition for rehearing was denied on April 7, 2020 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on July 6, 2020. 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 California, petitioner was convicted on one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d); one count of transporting a minor to engage in sexual activity, in violation of 18 U.S.C. 2423(a); and three counts of sex trafficking of children by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a) and (b) (2000). 1 C.A. E.R. 2. Petitioner was sentenced to 66 months of imprisonment, to be followed by three years of supervised release. Id. at 3-4. The court of appeals affirmed. Pet. App. A1-A12.

1. In the early 2000s, Petitioner was associated with the Skanless street gang in San Diego, California. Pet. App. A2. The gang's members "engaged in pimping and related unlawful activities." Ibid. In August 2000, petitioner and Robert Banks, III, drove from San Diego to Las Vegas with a 16-year-old girl with the intent to prostitute her. C.A. Supp. E.R. 374-377. Petitioner was arrested and pleaded guilty to pandering in Nevada state court. Id. at 1-4, 423, 432-438.

In March 2001, petitioner and Banks drove from San Diego to Los Angeles with three 15-year-old girls to prostitute them in Hollywood. 1 C.A. E.R. 67; C.A. Supp. E.R. 795-798. While petitioner and one of the girls were at a hotel, Officers Cottle and Scallon of the Los Angeles Police Department stopped Banks's car for a traffic violation. 1 C.A. E.R. 66; C.A. Supp. E.R. 766,

768-770. The two girls with Banks initially told the officers that they were 17, but then admitted that they were 15. 1 C.A. E.R. 66-67; C.A. Supp. E.R. 771. Because Banks had no driver's license and the girls gave changing stories about their age, the officers took them all to the police station, where the girls admitted that they were in Hollywood for prostitution. 1 C.A. E.R. 67; C.A. Supp. E.R. 770-771. Based on information received from the girls, police officers went to the hotel and arrested petitioner. 1 C.A. E.R. 67; C.A. Supp. E.R. 773-775. Officers Cottle and Scallon then conducted a videotaped interview of all three girls, who indicated that they had worked for petitioner as prostitutes, one since the age of 13. 1 C.A. E.R. 67-69; Presentence Investigation Report (PSR) ¶¶ 24-26. The Los Angeles County District Attorney ultimately declined prosecution, and the interview videos were later destroyed. See PSR ¶ 92; C.A. Supp. E.R. 459.

2. Under the default statute of limitations for federal offenses, charges must be brought "within five years" after the offense's commission. 18 U.S.C. 3282(a). But Congress has adopted special statutes of limitations for sexual offenses against minors. See, e.g., 18 U.S.C. 3283. At the time of the conduct in this case, Section 3283 provided that "[n]o statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age

of 25 years." 18 U.S.C. 3283 (2000). In 2003, just three years after the conduct in this case, Congress amended Section 3283 to extend through "the life of the child." 18 U.S.C. 3283 (Supp. III 2003). And in 2006, Congress amended the statute again to apply "during the life of the child, or for ten years after the offense, whichever is longer." 18 U.S.C. 3283 (2006). Also in 2006, Congress enacted Section 3299, which states that "[n]otwithstanding any other law, an indictment may be found * * * at any time without limitation for * * * any felony under chapter * * * 117, or section 1591." 18 U.S.C. 3299. As relevant here, the offense of transporting a minor to engage in sexual activity falls within Chapter 117 of Title 18, see 18 U.S.C. 2423(a), and the offense of sex trafficking a child by force, fraud, or coercion is codified in Section 1591, see 18 U.S.C. 1591(a).

In December 2013, a federal grand jury in the Southern District of California charged petitioner, Banks, and others with conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d). C.A. Supp. E.R. 12-44. A superseding indictment added a count charging petitioner and Banks with transporting a minor to engage in sexual activity, in violation of 18 U.S.C. 2423(a) (Count 2); and three counts charging them with sex trafficking of children by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a) and (b) (Counts 3-5). 3 C.A. E.R. 583-584, 603-605. Count 2 (the transportation count) was based on the August 2000 incident that led to petitioner's Nevada conviction, and Counts 3 through 5 were

based on the March 2001 trip to Los Angeles. Id. at 603-605. The superseding indictment also alleged both incidents as overt acts in furtherance of the racketeering conspiracy. Id. at 585.

Along with his co-defendant Banks, petitioner moved to dismiss the superseding indictment based on preindictment delay, arguing that he was prejudiced by (1) his inability to photograph the minors near the time of the incident; (2) the nonavailability of videotapes of the minor victims' statements to investigators; and (3) his inability to examine Officer Cottle, who had been killed while serving in the United States military. See 1 C.A. E.R. 52. The district court initially granted the motion in part, dismissing Counts 3 through 5 (the sex-trafficking counts) and one of the overt acts alleged in Count 1. Id. at 50-62. The court subsequently granted the government's motion for reconsideration, however, on the ground that Officer Scallon, who was present during the victims' interviews, was available to testify at trial. Id. at 116-118. The court found that petitioner had "not shown actual prejudice with respect to the first prong of the test for pre-indictment delay." Id. at 119 (capitalization omitted).

Petitioner also moved to dismiss Counts 2 through 5 of the superseding indictment based on the statute of limitations. D. Ct. Doc. 558-1 (Jan. 16, 2015). Under the version of Sections 3282 and 3283 in effect at the time of his offense, the statute of limitations was the greater of five years or when the minor victim reached the age of 25. See 18 U.S.C. 3282 (2000), 3283 (2000).

The victims of the offenses alleged in Counts 2 through 5 all turned 25 between 2009 and 2011, before those counts were brought in the superseding indictment. See D. Ct. Doc. 558-1, at 4; C.A. Supp. E.R. 78. Petitioner argued that the 2003 and 2006 amendments to Section 3283 (and the 2006 enactment of Section 3299), which extended the statutes of limitations for the crimes charged in Counts 2 through 5, did not apply to his conduct because Congress did not clearly express an intent for the statutes to apply retroactively. D. Ct. Doc. 558-1, at 5-6.

The district court denied petitioner's motion, relying on United States v. Leo Sure Chief, 438 F.3d 920, 924 (9th Cir. 2006). The district court explained that Sure Chief had held that, "since Congress extended the statute of limitations for sex offenses involving minors during the time the previous statute was still running, the extension was permissible." C.A. Supp. E.R. 79. At trial, a jury found petitioner guilty on all counts. 1 C.A. E.R. 2. The district court sentenced him to 66 months of imprisonment, to be followed by three years of supervised release. Id. at 3-4.

3. The court of appeals affirmed. Pet. App. A1-A12. As relevant here, the court rejected petitioner's and Banks's argument that "the indictment[] should have been dismissed due to prejudicial preindictment delay." Id. at A5. "To prevail on that claim," the court explained, "defendants must demonstrate 'actual, non-speculative prejudice from the delay.'" Id. at A6 (citation omitted). The court found that petitioner and Banks were unable

to do so here, because they had not explained how evidence lost as a result of the delay "would have benefitted either or both of them." Id. at A5. Additionally, the court noted, "the defendants were able to cross-examine * * * Officer Scallon, and the three victims of the incident." Id. at A6. The court accordingly determined that the district court had not abused its discretion in denying the motion to dismiss on the basis of preindictment delay. Ibid.

The court of appeals also rejected petitioner's argument that Counts 2 through 5 were untimely. Pet. App. A7. Citing Sure Chief, 438 F.3d at 924, the court explained that in the 2003 and 2006 amendments "extending the statute under which the defendants were charged," Congress had "evinced a clear intent to extend the statute of limitations for these types of crimes," and that doing so posed no ex post facto problem. Pet. App. A7. The court accordingly determined that "the prosecution was timely." Ibid.

ARGUMENT

Petitioner contends (Pet. 6-11) that the lower courts erred in determining that the preindictment delay in this case did not violate principles of due process. He also contends (Pet. 11-14) that the lower courts erred in applying the 2003 and 2006 extensions of the statutes of limitations for his offenses to his prosecution. The court of appeals' decision was correct on both issues, and petitioner has not identified any decision of this

Court or another court of appeals reaching a contrary result. The petition for a writ of certiorari should be denied.

1. The Due Process Clause plays a "limited role * * * in protecting against oppressive delay" in the filing of an indictment. United States v. Lovasco, 431 U.S. 783, 789 (1977). That limited protection is available only when (1) the defendant has sustained actual prejudice from the delay, and (2) the government's reasons for the delay violate those "fundamental conceptions of justice which lie at the base of our civil and political institutions." Id. at 790 (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam)). Accordingly, while the use of delay as "an intentional device to gain tactical advantage over the accused" would violate due process, United States v. Marion, 404 U.S. 307, 324 (1971), investigative delay does not. See Lovasco, 431 U.S. at 788-796.

The court of appeals correctly determined that petitioner's claim fails at the outset because he established no "actual, non-speculative prejudice" from the preindictment delay in this case. Pet. App. A6 (quoting United States v. Corona-Verbera, 509 F.3d 1105, 1112 (9th Cir. 2007), cert. denied, 555 U.S. 865 (2008)). On appeal, petitioner claimed that he was prejudiced by his inability to cross-examine Officer Cottle or to impeach the sex-trafficking victims at trial with their videotaped statements. Id. at A5. But as the court explained, petitioner was able to cross-examine Officer Scallon, who was also present during the

videotaped interviews, as well as the three victims themselves. Id. at A6. Petitioner did not explain what more he would have obtained from Officer Cottle's testimony or the videotaped statements, instead asking the Ninth Circuit to "assume" that their absence prejudiced him. Ibid. He was not entitled to an assumption in his favor on an issue as to which he bore the burden of proof. See United States v. Gouveia, 467 U.S. 180, 192 (1984).

Petitioner's assertions to this Court are no less speculative than his assertions below. Petitioner contends (Pet. 8) that he was prejudiced because "verbatim witness statements * * * invariably contain[] impeachment material," but he points to nothing in the record suggesting that any material inconsistencies, which would have made a difference at trial, existed between the victims' interview statements and their trial testimony. To the contrary, according to the incident report written by Officer Cottle, two victims said that they had worked for petitioner as prostitutes, and the third said that she was petitioner's former girlfriend and had worked as a prostitute. 1 C.A. E.R. 67-68; see id. at 71 (signed victim statement). That is consistent with the victims' trial testimony, in which they all said that the purpose of the trip to Los Angeles was to engage in prostitution. C.A. Supp. E.R. 795-798; D. Ct. Doc. 1770, at 56-59, 62 (Mar. 20, 2017); D. Ct. Doc. 1771, at 70 (Mar. 20, 2017).

Petitioner also claims (Pet. 8) that he was unable to "impeach the victim-witnesses with contrary facts in the investigating

officer's report, because that would require calling the officer to the witness stand and he was dead." But petitioner has not identified any inconsistencies between the report and the victims' testimony. And if such inconsistencies existed, petitioner could have pursued them at trial through his cross-examination of Officer Scallon, who testified that he was present for the videotaped interviews and that the report that Officer Cottle authored was accurate. C.A. Supp. E.R. 790-791. Alternatively, petitioner could have shown the report to any of the testifying victims to refresh their recollection about their prior statements. Again, he did not. See Gov't C.A. Br. 114. Petitioner also asserts (Pet. 8) that, because the Los Angeles District Attorney declined to prosecute the 2001 case, "[i]t stands to reason" that "there was something on those tapes that resulted in the D.A. deciding not to bring charges." That claim finds no support in the record, and it is contradicted by Officer Scallon's testimony that the incident report accurately reflected the videotaped interviews. C.A. Supp. E.R. 790-791. The District Attorney's decision could have been driven by any number of factors, including that the girls did not actually engage in prostitution during their March 2001 trip to Los Angeles. See id. at 798.

Petitioner additionally argues (Pet. 8-9) that the court of appeals adopted a "viciously circular argument that Petitioner could not show prejudice from the destruction of the tapes without first reviewing the tapes that no longer exist." But this Court

has made clear that the burden of proving prejudice from preindictment delay rests on the defendant. See Gouveia, 467 U.S. at 192 ("[T]he Fifth Amendment requires the dismissal of an indictment * * * if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense."). And the evidence in this case -- including the three victims' testimony, the surviving officer's testimony, and the deceased officer's report -- was consistent and unequivocally supported petitioner's guilt, supporting no inference that the lost evidence was any different. In these circumstances, the court of appeals -- like the district court -- correctly determined that petitioner failed to show prejudice, and that factbound decision does not warrant review.

In any event, even if petitioner were correct that the court of appeals erred in assessing prejudice, his due process claim would still lack merit, because he cannot demonstrate that the government's reasons for the preindictment delay violate those "fundamental conceptions of justice which lie at the base of our civil and political institutions." Lovasco, 431 U.S. at 790 (citation omitted). Trial testimony established that the investigation into the racketeering conspiracy in this case began in March 2012, when San Diego Police Department investigators had their interest piqued by information learned from a recently arrested pimp and prostitutes. 1 C.A. E.R. 170-171. Investigators

then began to "connect all the dots" regarding the scope of Skanless's activities by conducting "law enforcement database searches and social media searches." Id. at 175. That racketeering investigation in 2012 and 2013, in turn, brought to federal prosecutors' attention petitioner's pimping activity in Las Vegas and Los Angeles in 2000 and 2001. And the government brought the original indictment within two years of the investigation's inception. C.A. Supp. E.R. 12-44.

On that record, petitioner cannot demonstrate that the delay in bringing federal charges for the 2000 and 2001 incidents "was caused by the government's culpability" or was "undertaken solely 'to gain tactical advantage over the accused.'" United States v. Sherlock, 962 F.2d 1349, 1354 (9th Cir. 1989) (quoting Lovasco, 431 U.S. at 795)), cert. denied, 506 U.S. 958 (1992). Indeed, petitioner does not attempt to meet that standard. See Pet. 9-10. Instead, petitioner alludes (Pet. 10 n.5) to "a circuit split as to whether a defendant is required to prove affirmative prosecutorial misconduct or a delay taken for tactical reasons." But he does not identify any circuit that would find misconduct in the circumstances here, and none would. Circuits have taken nonuniform approaches to this aspect of the inquiry, with several circuits requiring a defendant to demonstrate that the government intentionally delayed seeking an indictment to obtain tactical

advantage or for a similar bad-faith purpose,* while the Ninth and Fourth Circuits apply a more open-ended balancing test that weighs "the length of the delay * * * against the reasons for the delay." Corona-Verbera, 509 F.3d at 1112; accord Howell v. Barker, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016 (1990). But on the record here, petitioner could not prevail under any circuit's approach, including the more flexible one that his circuit of conviction employs. In any event, the court of appeals did not reach this issue, rendering it particularly inappropriate for this Court's review. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (emphasizing that this is "a court of review, not of first view").

2. The lower courts also correctly applied the extended statutes of limitations adopted by Congress in 2003 and 2006 to

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* See United States v. Wetherald, 636 F.3d 1315, 1324 (11th Cir. 2011), cert. denied, 565 U.S. 926 (2011), 565 U.S. 1116, and 565 U.S. 1202 (2012); United States v. Seale, 600 F.3d 473, 479 (5th Cir.), cert. denied, 562 U.S. 868 (2010); United States v. Schaffer, 586 F.3d 414, 424 (6th Cir. 2009), cert. denied, 559 U.S. 1021 (2010); United States v. Jackson, 446 F.3d 847, 849-850 (8th Cir. 2006); United States v. McMutuary, 217 F.3d 477, 481-482 (7th Cir.), cert. denied, 531 U.S. 1001 (2000); United States v. Beckett, 208 F.3d 140, 150-151 (3d Cir. 2000); United States v. Cornielle, 171 F.3d 748, 752 (2d Cir. 1999); United States v. Engstrom, 965 F.2d 836, 839 (10th Cir. 1992); United States v. Crooks, 766 F.2d 7, 11 (1st Cir.) (Breyer, J.), cert. denied, 474 U.S. 996 (1985). The majority view is consistent with this Court's own description of the standard. See Gouveia, 467 U.S. at 192 ("[T]he Fifth Amendment requires the dismissal of an indictment * * * if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.").

petitioner's conduct. Congress may extend the statute of limitations for any crime whose prosecution is not already time-barred without violating the Ex Post Facto Clause. See Stogner v. California, 539 U.S. 607, 616-618 (2003) (treating extension of unexpired statute of limitations as constitutionally permissible). Similarly, "the presumption against retroactive legislation" discussed in Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994), which is animated by the "same retroactivity concerns," Cruz v. Maypa, 773 F.3d 138, 145 (4th Cir. 2014) (citing Landgraf, 511 U.S. at 266), does not apply in this circumstance. As Landgraf makes clear, a "statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." 511 U.S. at 269. In particular, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." Id. at 275.

In accord with the principles articulated in Landgraf and Stogner, many lower courts have recognized that "Congress may extend the statute of limitations on a criminal statute, and the government may bring charges under such extension, provided that the original statute of limitations had not yet lapsed when the extension went into effect." United States v. Sensi, No. 08-cr-253, 2010 WL 2351484, at *2 (D. Conn. June 7, 2010) (citing cases). As the Fourth Circuit has explained, "[a]s long as the claims were alive at enactment, extending a statute of limitations does not

'increase a party's liability for past conduct' because the party already faced liability under the shorter limitations period." Cruz, 773 F.3d at 145 (quoting Landgraf, 511 U.S. at 280).

As particularly relevant here, multiple lower courts have recognized that in Sections 3283 and 3299, Congress permissibly extended the statute of limitations for offenses for which the previously applicable limitations period had not yet run. See United States v. Sure Chief, 438 F.3d 920, 924 (9th Cir. 2006) (18 U.S.C. 3283 (Supp. III 2003)); United States v. Jeffries, 405 F.3d 682, 685 (8th Cir.), cert. denied, 546 U.S. 1007 (2005) (18 U.S.C. 3509(k), which was re-codified without change as 18 U.S.C. 3283 (Supp. III 2003)); United States v. Nader, 425 F. Supp. 3d 619, 629–630 (E.D. Va. 2019) (18 U.S.C. 3283 (Supp. III 2003), 18 U.S.C. 3283 (2006), and 18 U.S.C. 3299); United States v. Vickers, No. 13-cr-128, 2014 WL 1838255, at *9 (W.D.N.Y. May 8, 2014) (18 U.S.C. 3299); United States v. Shepard, No. 10-cr-415, 2011 WL 3648065, at *3 (N.D. Ohio Aug. 18, 2011) (18 U.S.C. 3299); Sensi, 2010 WL 2351484, at *2 (18 U.S.C. 3283 (Supp. III 2003), 18 U.S.C. 3283 (2006), and 18 U.S.C. 3299). As the Ninth Circuit has explained, "Congress evinced a clear intent to extend, rather than shorten, the statute of limitations applicable to sexual abuse crimes," and applying the extended statutes of limitations in cases where the previous limitations period "had not yet run when the 2003 amendment took effect * * * did not purport to resurrect an

expired criminal charge" and therefore posed "no ex post facto problem." Sure Chief, 438 F.3d at 924.

The court of appeals correctly applied that principle here, where it is undisputed that the statute of limitations had not yet run on petitioner's conduct when Congress extended it, or that the prosecution here was timely under that extension. See Pet. App. A7. Petitioner contends (Pet. 11-14) that the decision below conflicts with United States v. Richardson, 512 F.2d 105, 106 (3d Cir. 1975) (per curiam), which concluded that the Selective Service Act's statute of limitations did not apply retroactively to the defendant's conduct. Richardson, however, was decided before Landgraf and is in some tension with Landgraf's analysis. Specifically, Richardson focused on whether Congress expressed a "clear intention" to overcome the presumption against retroactivity, 512 F.2d at 106, without considering whether the statute "would have retroactive effect," Landgraf, 511 U.S. at 280. Moreover, Richardson addressed a different statute than those at issue here. Petitioner points to no division of authority in the courts that have determined the application of Sections 3283 and 3299, and he has therefore failed to identify any conflict that would warrant review.

In any event, this case would also be a poor vehicle for reviewing the statute-of-limitations question because its resolution here would not affect petitioner's overall sentence. The concurrent sentence that petitioner received on the

racketeering count, which he does not challenge, is equal to the sentence he received on the challenged sexual-offense counts. 1 C.A. E.R. 2-4. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2020