No. 20-5840

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ROBERT MILLER, 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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QUESTION PRESENTED

Whether the lower courts correctly found that a conflicted prosecutor's involvement in petitioner's case did not rise to a level that necessitated dismissal of the indictment.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Miller, No. 14-cr-471 (Sept. 12, 2017)

United States Court of Appeals (9th Cir.):

United States v. Miller, No. 17-50338 (Mar. 20, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 953 F.3d 1095.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2020. A petition for rehearing was denied on June 26, 2020. The petition for a writ of certiorari was filed on September 22, 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 Central District of California, petitioner was convicted

on five counts of wire fraud, in violation of 18 U.S.C. 1343, and four counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). Judgment 1; Superseding Indictment 2-6. The district court sentenced petitioner to nine months of imprisonment, to be followed by two years of supervised release. Judgment 1. The court of appeals affirmed. Pet. App. A1-A9.

1. a. Petitioner was recruited to work for an online retail platform, MWRC Internet Sales, LLC (MWRC), by the company's founder and petitioner's longtime friend, Russell Lesser. Pet. App. A2. Over time, petitioner's job responsibilities grew to include management of MWRC's finances. Ibid. In 2009, petitioner began writing checks to himself from a MWRC bank account without the knowledge or consent of anyone at MWRC. Ibid. By the end of 2010, he had issued checks to himself totaling around $130,000 and had paid back only about $30,000. Ibid.

In March 2011, petitioner partially admitted to Russell Lesser what he had done, but stated that he had only written himself checks for around $30,000. Pet. App. A2. Petitioner promised that he would stop, but in 2011 and 2012 he wrote himself approximately 50 more checks totaling about $200,000. Ibid. To avoid detection, petitioner often listed the checks in MWRC's ledger as internal transfers between company bank accounts. Ibid. Russell Lesser eventually noticed that the ledger entries did not correspond to actual deposits, and he obtained bank records and canceled checks that confirmed the fraud. Ibid. In total,

petitioner embezzled about $330,000 during the scheme and did not report any of that money as income on his tax returns. Ibid.

b. In November 2012, after Russell Lesser had learned the full scope of petitioner's activities, his son Greg Lesser, an Assistant U.S. Attorney in the Central District of California and a 1.25 percent member of MWRC, noticed that his father was upset. Pet. App. A3; C.A. Supp. E.R. 230. Russell Lesser explained that petitioner had stolen over $300,000 from MWRC and asked for advice. C.A. Supp. E.R. 230-231. Greg Lesser reached out to an FBI agent that he knew, who put him in touch with another agent, who assigned a special agent to open an investigation. Pet. App. A3 & n.2; C.A. E.R. 783-784, 810. Greg Lesser also emailed a colleague to ask for information about petitioner's past work at the Securities and Exchange Commission. C.A. Supp. E.R. 863.

The FBI arranged a meeting at which Russell Lesser obtained admissions from petitioner while wearing a wire. Pet. App. A3. When Greg Lesser learned, roughly three weeks after he first contacted the FBI, that the FBI planned to reach out to the Central District of California about petitioner's conduct, he informed his supervisor about his conflict of interest. Ibid.; C.A. E.R. 805, 818. The supervisor recused the entire office from the matter and turned it over to the U.S. Attorney's Office for the Southern District of California. Pet. App. A3.

2. A federal grand jury in the Central District of California returned a superseding indictment charging petitioner

with five counts of wire fraud, in violation of 18 U.S.C. 1343; and four counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). Superseding Indictment 2-6.

a. After the recusal of the entire Central District, Greg Lesser continued to speak with his father about the investigation, set up a "Google Alert" about the case, and conducted research about a past lawsuit against petitioner. C.A. E.R. 824, 831, 833, 835. Greg Lesser also informed FBI Special Agent Joseph Swanson that petitioner's attorney "would likely not be able to represent [petitioner] much longer" because the attorney "had recently been indicted." Id. at 805.

In January 2013, Greg Lesser contacted Special Agent Swanson "in his capacity as part-owner (or part-shareholder) of MWRC to inquire about the status of the case." C.A. E.R. 805; Pet. App. A5. In addition, after reading about the case in local newspapers, Greg Lesser contacted the Central District of California's press office to suggest that it amend certain information about his recusal. C.A. E.R. 838. He also suggested to his supervisors that petitioner might be trying to make an issue of his involvement in the investigation. Id. at 838, 847. But Greg Lesser never had any contact with the prosecutors in the Southern District of California who were handling the case, and he played no role in decisions that office made with respect to the investigation or prosecution of petitioner. Id. at 805-806; C.A. Supp. E.R. 852, 877.

b. "[W]ell in advance of trial," the government disclosed all of the above information to petitioner. Pet. App. A3. Petitioner moved to dismiss the indictment on due process grounds or under the district court's supervisory powers based on Greg Lesser's role as an "interested prosecutor." Ibid.; C.A. E.R. 657-690. The district court denied the motion. Pet. App. A3; C.A. E.R. 29-38.

The court explained that Greg Lesser's initial involvement in reporting the case to the FBI was not sufficiently "shocking or outrageous" to necessitate dismissal, especially because the Southern District U.S. Attorney had made an independent decision to ask the grand jury to indict petitioner. C.A. E.R. 33-34. And it determined that after the recusal, Greg Lesser had played no substantive role in the investigation or prosecution and that his contacts were "a form of inquiry as to the status of the case." Id. at 35. The court acknowledged that those contacts were "perhaps ill advised," but determined that they likewise did not necessitate dismissal of the indictment. Ibid. The court further determined that, although "one could question the[] advisability" of Greg Lesser's statements to his Central District colleagues in response to local newspaper articles, the statements were "not so outrageous or shocking as to provide a basis for a dismissal." Ibid.; see id. at 675-676.

c. The jury found petitioner guilty on all counts. Pet. App. A1. The district court sentenced petitioner to nine months

of imprisonment, to be followed by two years of supervised release. Judgment 1.

3. The court of appeals affirmed. Pet. App. A1-A9. The court acknowledged that Greg Lesser had acted improperly by "creat[ing] the appearance of having used his personal contacts" in the FBI to begin an investigation, by waiting three weeks to report his conflict of interest, and by continuing to inquire about the case after the Central District was recused. Id. at A5. The court explained, however, that the question was not whether Greg Lesser had acted improperly, but whether his actions "entitle[d] [petitioner] to dismissal of the indictment." Ibid.

Like the district court, the court of appeals determined that the facts did not rise to the level of being "so grossly shocking and so outrageous as to violate the universal sense of justice." Pet. App. A5 (quoting United States v. Restrepo, 930 F.2d 705, 712 (9th Cir. 1991)). The court explained that "the Department of Justice took every step it could reasonably have been expected to take" to avoid any possible taint from Greg Lesser's involvement. Id. at A6. The court emphasized that, "[m]ost significantly," a prosecutor from the Southern District of California took over the case, had no contact whatsoever with Greg Lesser, and independently arrived at a decision on whether and how to charge petitioner. Ibid. The court further emphasized that Greg Lesser's attempts to inquire about the case after the Central District had been recused did not influence the prosecutor and that no evidence showed that

Greg Lesser himself, rather than the FBI, was directing the investigation during the three-week period before he reported the conflict to his office. Ibid.

The court of appeals also rejected petitioner's argument that his case was analogous to Young v. United States, 481 U.S. 787 (1987), where this Court exercised its supervisory power to reverse the contempt convictions of four defendants because the prosecutor who had been appointed by the court "was also serving as counsel to the party that was the beneficiary of the injunction that defendants were being prosecuted for civilly violating." Pet. App. A6 (citing Young, 481 U.S. at 790). The court explained that here, Greg Lesser "was not in any material respect [petitioner's] prosecutor," as all crucial decisions in the investigation and prosecution were made by the FBI and the Southern District prosecutor. Ibid.

ARGUMENT

Petitioner contends (Pet. 8-18) that Greg Lesser's involvement with his case warranted dismissal of the indictment under the Due Process Clause or as an exercise of the district court's supervisory power. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's factbound arguments is unwarranted.

1. In United States v. Russell, 411 U.S. 423 (1973), this Court stated that situations may arise "in which the conduct of

law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Id. at 431-432. But the Court stressed that such conduct would have to violate "fundamental fairness" and be "shocking to the universal sense of justice." Id. at 432 (citation omitted); see United States v. Restrepo, 930 F.2d 705, 712 (9th Cir. 1991). And in Young v. United States, 481 U.S. 787, 790, 802 (1987), this Court reversed a conviction using its supervisory power, where a court-appointed prosecutor served as counsel for a party that was the beneficiary of the court order the defendant was accused of violating. The Court found a "disinterested prosecutor" necessary because "[a] prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity." Id. at 807-808.

The courts of appeals have recognized that situations warranting the application of Russell or Young arise infrequently. The Tenth Circuit, for example, has observed that while defendants often assert that government conduct is "so outrageous" and "shocking to the universal sense of justice,'" that due process

demands dismissal, Russell, 411 U.S. at 431-432 (citation omitted), the claim "is almost never successful." United States v. Gamble, 737 F.2d 853, 857 (1984); see also, e.g., United States v. Jayyousi, 657 F.3d 1085, 1111 (11th Cir. 2011) ("We have never applied the outrageous government conduct defense and have discussed it only in dicta."), cert. denied, 567 U.S. 938, and 567 U.S. 946 (2012); United States v. Jones, 13 F.3d 100, 104 (4th Cir. 1993)) ("[I]n practice, courts have rejected [Russell's] application with almost monotonous regularity.") (citation omitted). And the circuits have likewise observed that the Young decision was "a narrow one," United States v. Kahre, 737 F.3d 554, 574 (9th Cir. 2013), cert. denied, 574 U.S. 830 (2014), that could support an exercise of a court's supervisory powers only for a clear conflict of interest on the part of someone who "actually influenced prosecutorial decisionmaking," United States v. Siegelman, 786 F.3d 1322, 1328 (11th Cir. 2015), cert. denied, 577 U.S. 1092 (2016).

2. Petitioner renews (Pet. 13-16) his case-specific argument that the indictment should have been dismissed because Greg Lesser initiated the FBI's investigation into petitioner's criminal conduct, waited too long to report the conflict to his supervisor, and continued to involve himself in the case after the Central District was recused.[1] The lower courts considered those

[1] Without any citation to the record, petitioner suggests (Pet. 15) that Greg Lesser "gave advice on strategy to pressure [petitioner] to plead guilty" by "suggesting that FBI agents

facts and correctly determined that they were neither "so grossly shocking and so outrageous" as to offend due process, Pet. App. A5 (citation omitted), or require an exercise of supervisory powers, id. at A6. That factbound determination does not warrant this Court's review.

First, the lower courts correctly rejected petitioner's assertion that he was entitled to relief based on Greg Lesser's initial outreach to the FBI. It explained that, "given the blatant evidence" of petitioner's fraud, "it would not have taken much to catch the FBI's attention" if the contact had been initiated by Russell, instead of Greg, Lesser. Pet. App. A6.

Second, the lower courts correctly determined that the three weeks that passed between Greg Lesser's call to the FBI and his reporting of the conflict to his office likewise did not necessitate dismissal. "[T]here [wa]s no evidence that AUSA Lesser * * * was directing the [FBI's] investigation," either during that time or later. Pet. App. A6. Rather, "all the crucial decisions in the investigation" were made by an FBI agent "and the Southern District AUSA who took over the case from the Central District" after that office recused. Ibid.

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interview [petitioner's] son." Petitioner also made this unsupported assertion in the court of appeals, where he cited record evidence reflecting a conversation between Russell Lesser and the case agent, in which Russell Lesser recounted what his son told him -- in general terms -- about the plea bargaining process and suggested that the FBI interview petitioner's son. See C.A. E.R. 831.

Third, the court of appeals correctly determined that Greg Lesser's conduct after the Southern District took over the case also did not necessitate dismissal. The prosecutor from the Southern District "had no contact with Lesser whatsoever," and she "came to an independent decision on whether and how to charge" petitioner. Pet. App. A6. There was "no indication that Lesser in any way influenced" her. Ibid.

Analyzing these facts as whole, the court correctly recognized that due process did not necessitate dismissal because "the prosecutorial improprieties had no material effect on the case," and because the government "took every step it could reasonably have been expected to take to cleanse" the prosecution. Pet. App. A6. The facts also did not warrant dismissal under Young because they established that Greg Lesser "was not in any material respect [petitioner's] prosecutor." Ibid.

2. Petitioner identifies no case where a court dismissed an indictment on due process grounds or under its supervisory power based on facts such as those at issue here. To the contrary, the court of appeals' decision is consistent with the precedent of the other courts of appeals who have addressed comparable situations. See United States v. Luger, 837 F.3d 870, 877 (8th Cir. 2016) (finding no fundamental unfairness despite evidence that a recused U.S. Attorney was still "in some way involved" in the prosecution, where that attorney did not participate in prosecution or trial); United States v. Scrushy, 721 F.3d 1288, 1307-1308 (11th Cir. 2013)

(finding dismissal not warranted under Young where a recused U.S. Attorney who exercised no control over prosecutorial decision-making had some limited involvement in the case), cert. denied, 571 U.S. 1185 (2014); Siegelman, 786 F.3d at 1329.

Petitioner contends (Pet. 9-10) that this Court should nonetheless grant certiorari because the lower courts have been too lax in vindicating a defendant's interest in a disinterested prosecution. But petitioner does not propose an alternate legal standard that courts should apply; instead, he focuses (Pet. 11-18) on a detailed analysis of how the standards should have been applied differently to the facts of his case. This Court does not grant certiorari "to review evidence and discuss specific facts," United States v. Johnston, 268 U.S. 220, 227 (1925). No reason exists to depart from that rule to review the lower courts' determination that Greg Lesser's actions, although ill-advised, did not meet the high bar necessary to justify the extraordinary remedy of dismissing petitioner's indictment.[2]

[2] Petitioner seeks to bolster his case for review by asserting (Pet. 15-17) that he was improperly denied discovery in the district court and by suggesting that his prosecution was tainted by an extra-marital affair between an FBI agent and a prosecutor from the Central District. The court of appeals correctly rejected both factbound arguments, Pet. App. A6-A7; neither issue is included in the question presented; and neither warrants this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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