No. 22-6409

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR GASPAR CHICHANDE, 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 district court erred in declining to dismiss the indictment based on petitioner's allegations of outrageous government conduct in his detention on a Coast Guard ship while he was transported to the United States for prosecution.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Cortez-Quinonez, No. 18-cr-421-1 (Aug. 23, 2019)

United States v. Dominguez-Caicedo, No. 18-cr-421-2 (Aug. 19, 2019)

United States v. Chichande, No. 18-cr-421-3 (Aug. 23, 2019)

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

United States v. Dominguez-Caicedo, No. 19-50268 (July 18, 2022)

United States Supreme Court:

Dominguez-Caicedo v. United States, petition for cert. pending, No. 22-6461 (filed Dec. 27, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A58[1]) is reported at 40 F.4th 938.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2022. A petition for rehearing was denied on September 27, 2022 (Pet. App. B1-B2). The petition for a writ of certiorari was filed

[1] The petition has two unnumbered appendices; this brief refers to the pages of the appendix containing the court of appeals' decision as "Pet. App. A_," and to the other appendix as "Pet. App. B_."

on December 20, 2022. 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 possessing five kilograms or more of cocaine with intent to distribute on a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503 and 18 U.S.C. 2, and one count of conspiring to possess with intent to distribute five kilograms or more of cocaine on a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503 and 70506(b). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A58.

1. On December 31, 2017, the United States Coast Guard encountered petitioner and two co-defendants near the Galapagos Islands in a 30- to 40-foot panga boat that bore no indication of nationality. Pet. App. A10. The boat's occupants did not heed warnings to stop and threw 1230 kilograms -- well over a ton -- of cocaine, along with a GPS buoy, overboard before they were apprehended. Id. at A11; C.A. E.R. 807-815, 968-971, 1003.

Given the size of the Coast Guard cutter and the location where petitioner and his co-defendants were apprehended, it was not possible to transport them by aircraft to the United States

for prosecution. C.A. E.R. 1906-1908. Consequently, petitioner spent roughly three weeks on board four Coast Guard cutters headed for the United States, ultimately arriving in Long Beach, California on January 22, 2018. Pet. App. A11-A15.

In order to prevent detainees on the cutters from jumping off, each detainee was shackled to an 18-inch chain attached to a cable that ran the length of the deck. Pet. App. A12; see C.A. E.R. 1190. The detainees were unshackled for an hour of exercise each day and when they asked to use the restroom. Pet. App. A12. On one cutter, the detainees were under the cover of an enclosed helicopter hangar; on the others, they were under a tent or canvas tarp. Id. at A12-A14. Although the temperatures largely remained in the 70s and 80s, the detainees were at times exposed to rain and a wet deck, and (for three nights) to temperatures around 50 degrees. C.A. E.R. 1190; see Pet. App. A13-A14.

The detainees were provided with blankets and (on at least two of the cutters) sleeping pads. Pet. App. A12-A13. They had constant access to drinking water and received three meals a day. Ibid. On some of the cutters, the detainees received items like eggs, chicken, fruit, pasta, and potatoes; at other times, they received rice and beans, which petitioner alleges were often undercooked. Ibid.; see C.A. E.R. 1189, 1869, 1969, 2021, 2029. The detainees received periodic showers and were provided with toiletries, dominoes, cards, and Spanish-language Bibles. Pet. App. A13.

2. A grand jury in the Southern District of California charged petitioner with one count of possessing five kilograms or more of cocaine with intent to distribute on a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503 and 18 U.S.C. 2, and one count of conspiring to possess with intent to distribute five kilograms or more of cocaine on a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503 and 70506(b). C.A. E.R. 19-20.

Petitioner and his co-defendants moved to dismiss the indictment on the theory (inter alia) that the conditions of their detention on board the Coast Guard cutters constituted outrageous government conduct violating due process. Pet. App. A17. The district court convened a five-day evidentiary hearing at which the defendants and ten other witnesses testified. C.A. E.R. 1331-2038. The court excluded the testimony of one proffered expert witness, a former Bureau of Prisons employee, because "her opinions go way beyond her area of expertise," and testimony comparing the "apples and oranges" of custodial conditions in a federal prison and custodial conditions on board an ocean vessel during transport was not "probative or helpful." Id. at 1340-1341. Following the evidentiary hearing, the court denied the motion to dismiss, finding no outrageous government conduct. Id. at 1188-1192.

The district court observed that the length of petitioner's 23-day transport was commensurate with the average of "20 days" that it takes "to transport a detained individual from the Eastern

Pacific to the U.S." C.A. E.R. 1184. The court found that, during their transport, the detainees "were given regular use of the restroom and occasional showers"; had "access to water at all times"; "were supplied with toiletries, including soap, toothpaste, toothbrush, and towels," as well as "a blanket"; and "would have been supplied with additional blankets if they had asked for them." Id. at 1189. And the court explained that while the detainees were shackled to the deck railing for most of the day, "the shackling was such that it allowed them to stand up, sit down, move around in a small, confined area," and "the shackles were loosened" in response to complaints. Id. at 1189-1190.

The district court also examined the vessels' temperature logs and observed that for most of the journey the temperature was in the 70s and 80s -- except for one day when it ranged between the 60s and 70s -- until the last three days, when "temperatures dipped to the low 50s at night and up to 60s during the day." C.A. E.R. 1190. The court explained that the detainees "were moved from the windy front of the ship to the more protected back of the ship as the temperatures dropped," and found "no evidence that the temperature, either the heat or the cold, was life-threatening or was in any way dangerous to the defendants' health." Id. at 1190-1191.

The district court also explained that while "there were numerous periodic rain squalls resulting in a wet deck" during "one three-day period," that was "a period where the temperatures

were warmer" and "[t]he [C]oast [G]uard security watch standers experienced the same conditions." C.A. E.R. 1191. And although the court faulted the government for not providing more information to the detainees about where they were going and how long the journey was going to take, see id. at 1192, the court rejected the contention that the absence of such information "constitute[d] outrageous governmental misconduct such that the indictment should be dismissed," ibid.

3. The court of appeals affirmed. Pet. App. A1-A58. The court observed that "to show outrageous government conduct, defendants must show conduct that violates due process in such a way that * * * is 'so grossly shocking and so outrageous as to violate the universal sense of justice.'" Id. at A17 (quoting United States v. Stinson, 647 F.3d 1196, 1209 (9th Cir. 2011), cert. denied, 565 U.S. 1271, and 565 U.S. 1272 (2012)). And the court explained that to secure dismissal of an indictment, "a defendant must show a nexus between the [allegedly outrageous] conduct and either 'securing the indictment or [] procuring the conviction.'" Id. at A17-A18 (quoting United States v. Nickerson, 731 F.3d 1009, 1015 (9th Cir. 2013) (brackets in original), cert. denied 572 U.S. 1062 (2014)).

The court of appeals found the nexus proffered by petitioner and his co-defendants -- that "if the Coast Guard had chosen to treat [them] and other detainees humanely, they simply couldn't have conducted their Pacific operations" -- to be "not the type of

nexus that we generally consider sufficient." Pet. App. A18. The court noted that accepting such an argument could imply "that all police actions have a nexus within the meaning of the outrageous government conduct doctrine." Id. at A19. And the court explained that the "type of nexus at issue" in its only precedential decision dismissing an indictment for outrageous government conduct -- "'suppl[ying] the equipment and raw material for a bootlegging operation and [acting as] the defendant's sole customer'" -- "[wa]s not present in this case." Ibid. (quoting United States v. Mayer, 503 F.3d 740, 754 (9th Cir. 2007), and citing Greene v. United States, 454 F.2d 783 (9th Cir. 1971)).

The court of appeals also rejected other challenges to petitioner's convictions, Pet. App. A20-A37, but vacated his sentence based on a Guidelines error and remanded for resentencing, id. at A48-A52, A58. That resentencing took place on February 6, 2023, see D. Ct. Doc. 249 (Feb. 6, 2023), and petitioner has appealed, see D. Ct. Doc. 252 (Feb. 23, 2023).

ARGUMENT

Petitioner renews his contention (Pet. 11-12) that the district court should have dismissed the indictment on the ground that petitioner's treatment while being transported to the United States for prosecution was "'outrageous' and violated due process."[2] The interlocutory posture of the petition, however,

[2] In a separate petition, petitioner's co-defendants seek review of a different determination by the court of appeals applying Federal Rule of Criminal Procedure 5(a)(1)(B). See

makes this case an inappropriate vehicle for resolving that question. In any event, the court of appeals' fact-bound determination that no violation of petitioner's due process rights occurred does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. As a threshold matter, this case is in an interlocutory posture because the court of appeals vacated petitioner's sentence and remanded for resentencing, Pet. App. A58, and petitioner's appeal of his new sentence is pending before the court of appeals, see D. Ct. Doc. 252. The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to the district court "is not yet ripe for review by this Court"); see also Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

Consistent with that general rule, this Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., Supreme Court Practice 4-55 n.72 (11th ed. 2019). That practice promotes judicial efficiency because, among other things, it enables issues raised at different stages of lower-

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Dominguez-Caicedo v. United States, No. 22-6461 (filed Dec. 27, 2022). Petitioner has not joined that petition or otherwise raised that issue in this Court.

court proceedings to be consolidated into a single petition. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). Petitioner offers no reason to deviate from that practice here.

2. Even aside from the interlocutory posture of the case, the court of appeals' fact-bound application of the Due Process Clause would not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a [writ of] certiorari to review evidence and discuss specific facts."); see also Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in Johnston] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

a. In United States v. Russell, 411 U.S. 423 (1973), this Court stated that it "may some day be presented with a situation 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).

Accordingly, although most courts of appeals accept the possibility of an outrageous-government-conduct defense in theory, "in practice, courts have rejected its application with almost monotonous regularity." United States v. Jones, 13 F.3d 100, 104 (4th Cir. 1993) (citation omitted). The First Circuit has described the defense as "moribund." United States v. Capelton, 350 F.3d 231, 243 n.5 (2003) (citation omitted), cert. denied, 541 U.S. 1092, and 543 U.S. 890 (2004). The Tenth Circuit has similarly observed that the defense "is often raised but is almost never successful." United States v. Gamble, 737 F.2d 853, 857 (1984). And 25 years ago, the Third Circuit described it as "hanging by a thread." United States v. Nolan-Cooper, 155 F.3d 221, 230 (1998); see 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. 946, and 567 U.S. 938 (2012).

Indeed, "only two reported court of appeals decisions -- both from the 1970s -- * * * have deemed the government's conduct so outrageous as to violate due process." United States v. Combs, 827 F.3d 790, 795 (8th Cir. 2016) (citing United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), and Greene v. United States, 454 F.2d 783 (9th Cir. 1971)). "In both cases the outrageous misconduct was, in effect, the generation by police of new crimes merely for

the sake of pressing criminal charges against the defendant." United States v. Ramirez, 710 F.2d 535, 540 (9th Cir. 1983). And the courts that decided those cases have since narrowed those decisions further. The Ninth Circuit -- from which this case arises -- has emphasized that its decision in Greene has "only limited application." United States v. Wiley, 794 F.2d 514, 516 (1986). And the Third Circuit "has repeatedly distinguished, and even questioned," its prior decision in Twigg. United States v. Fattah, 858 F.3d 801, 813 (2017) (footnote omitted).

b. The government conduct at issue in this case involved neither the "creation and maintenance of criminal operations," Greene, 454 F.2d at 787, nor the "generat[ion] [of] new crimes by the defendant merely for the sake of pressing criminal charges against him," Twigg, 588 F.2d at 381. And it did not occur in either the investigation or the prosecution of petitioner's criminal case. Instead, the conduct at issue occurred in the process of transporting petitioner from the high seas to the United States for prosecution, and thus, like other claims that courts of appeals have rejected, "served no investigatory purpose." Nolan-Cooper, 155 F.3d at 234.

Indeed, as the court of appeals observed, "the development of the outrageous government conduct concept suggests that it does not even apply to conditions of pre-trial detention." Pet. App. A19; see Jayyousi, 657 F.3d at 1112 (reasoning that the concept "does not apply" to a defendant's "mistreatment * * * after the

conclusion of his criminal acts and prior to the indictment"). For instance, this Court has rejected a due process challenge where officers allegedly "forcibly seized, handcuffed, [and] blackjacked" the defendant in Illinois "and took him to Michigan" for prosecution. Frisbie v. Collins, 342 U.S. 519, 520, 522 (1952).

In addition, even if petitioner could show a sufficient nexus between his treatment in Coast Guard custody and his indictment or conviction, he does not identify a sound basis for disturbing the district court's determination that the conditions of his transportation do not shock the conscience (an issue that the court of appeals had no need to address). See C.A. E.R. 1188-1192. The district court found that the Coast Guard detainees "were fed three meals a day"; had "access to water at all times"; "were supplied with toiletries, including soap, toothpaste, toothbrush, and towels"; "were given Bibles, playing cards, [and] dominoes"; had "a foam pad for sleeping" and "a blanket"; and "would have been supplied with additional blankets if they had asked for them." Id. at 1189. The court also found that the detainees "were given regular medical care" and "regular use of the restroom and occasional showers." Ibid. And the court determined that the detainees were not exposed to temperatures that were "in any way dangerous to [their] health." Id. at 1191; see id. at 1190-1191.

The district court further observed that, while petitioner and the other detainees were shackled for most of the day, that

measure was necessary because "they were detained on a small boat," "often" with "several prisoners being detained at once," and "there was no other method of restraining the [detainees] that could keep them from jumping off the boat." C.A. E.R. 1190. Moreover, "the shackling was such that it allowed them to stand up, sit down, [and] move around in a small, confined area," and "the shackles were loosened" when the detainees complained. Id. at 1189-1190. These conditions of temporary detention during transport on the high seas did not require dismissal of petitioner's indictment for smuggling drugs on the high seas.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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