No. 22-6461

IN THE SUPREME COURT OF THE UNITED STATES

SEGUNDO MARCIAL DOMINGUEZ-CAICEDO AND ADRIAN ANDRES CORTEZ-QUINONEZ, PETITIONERS

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 clearly erred in finding that petitioners were taken before a magistrate judge "without unnecessary delay," Fed. R. Crim. P. 5(a)(1)(B), following their apprehension on the high seas.

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:

Chichande v. United States, petition for cert. pending, No. 22-6409 (filed Dec. 20, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A27[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 27, 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, petitioners were 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). Cortez-Quinonez Judgment 1; Dominguez-Caicedo Judgment 1. Petitioner Dominguez-Caicedo was sentenced to 216 months of imprisonment, to be followed by five years of supervised release. Dominguez-Caicedo Judgment 2-3. Petitioner Cortez-Quinonez was sentenced to 228 months of imprisonment, to be followed by five years of supervised release. Cortez-Quinonez Judgment 2-3. The court of appeals affirmed. Pet. App. A8.

1. The Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq., makes it unlawful for any person "on board a covered vessel" to possess a controlled substance with the intent to distribute it, or to conspire to do so. 46 U.S.C. 70503(a), 70506(b). The MDLEA defines "covered vessel" to include any "vessel subject to the jurisdiction of the United States," 46 U.S.C. 70503(e)(1), which is in turn defined to include "a vessel

without nationality," 46 U.S.C. 70502(c)(1)(A). If a violation of the MDLEA "was begun or committed upon the high seas," the defendant "may be tried in any district." 46 U.S.C. 70504(b).

On December 31, 2017, the United States Coast Guard encountered petitioners and a co-defendant near the Galapagos Islands in a 30- to 40-foot panga boat that bore no indication of nationality. Pet. App. A8. 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 9; see C.A. E.R. 807-815, 968-971, 1003.

Given the size of the Coast Guard cutter and the location where petitioners were apprehended, it was not possible to transport them by aircraft to the United States for prosecution. C.A. E.R. 1906-1908. Petitioners were initially detained for two days on one Coast Guard vessel, the Stratton; on January 2, 2018, they were transferred to another vessel, the Northland. Pet. App. A9. On January 3, petitioners were transferred to the Mohawk, which was heading for Florida, based on the Coast Guard's belief that the Department of Justice would prosecute the case in Florida. Ibid.

On January 4, the Coast Guard learned that the Department of Justice had designated the Southern District of California as the prosecuting district, C.A. E.R. 1185, 1902-1903, and on January 8, petitioners were transferred back to the Stratton, Pet. App. A10. Had petitioners remained on the Mohawk, they would have arrived in

Florida on January 17, and could have been arraigned before a magistrate judge there. Id. at A10, A13. But the Coast Guard had determined that petitioners would have been delayed in Florida, because no Drug Enforcement Administration (DEA) aircraft would be available to promptly fly petitioners from Florida to California, where they were to be prosecuted. Id. at A10; see C.A. E.R. 1672-1674.

On January 16, petitioners were transferred from the Stratton to their final cutter, the Active. Pet. App. A10. The Coast Guard had intended to land the Active in San Diego on January 21, but bad weather prevented the landing. Ibid.; see C.A. E.R. 1185. The next day (January 22), the Active landed in Long Beach, where a DEA agent met the ship and took custody of petitioners. Pet. App. A10. Petitioners then signed waivers that allowed them to be transferred to San Diego instead of appearing before a magistrate judge in Long Beach. Ibid. And after being advised of his Miranda rights in Spanish and signing a Miranda waiver, petitioner Cortez-Quinonez made incriminating statements that suggested he knew that he was transporting drugs. Ibid. The next morning (January 23), petitioners were arraigned before a magistrate judge in the Southern District of California. Id. at A14.

In order to prevent detainees on the cutters from jumping off, while on board, each detainee was shackled to an 18-inch chain attached to a cable that ran the length of the deck. Pet. App. A9; 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. A9. 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 A9-A10. Although the temperatures largely remained in the 70s and 80s, petitioners 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. A9-A10. Petitioners were provided with blankets and (on at least two of the cutters) sleeping pads. Pet. App. A9-A10. They had constant access to drinking water and received three meals a day. Ibid. On some of the cutters, petitioners received items like eggs, chicken, fruit, pasta, and potatoes; at other times, they received rice and beans. Ibid.; see C.A. E.R. 1189, 1869, 1969, 2021, 2029. Petitioners received periodic showers and were provided with toiletries, dominoes, cards, and Spanish-language Bibles. Pet. App. A9.

2. A grand jury in the Southern District of California charged petitioners 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. Petitioners and their co-defendant moved to dismiss the indictment on the theory (inter alia) that their detention on the Coast Guard cutters

violated Federal Rule of Criminal Procedure 5(a)(1)(B), which requires that a "person making an arrest outside the United States * * * take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise." See Pet. App. A11. Petitioner Cortez-Quinonez alternatively sought to suppress his pre-arraignment statements on the basis of that asserted Rule 5 violation. See id. at A15; C.A. E.R. 1183.

After a five-day evidentiary hearing, see C.A. E.R. 1331-2038, the district court denied the motions, finding that the 23 days between petitioners' arrest and arraignment was reasonable under the circumstances, id. at 1184; see id. at 1184-1188. The court observed that "[o]n average, it takes 20 days to transport a detained individual from the Eastern Pacific" to the United States. Id. at 1184. The court also observed that the Coast Guard did not learn that the defendants' case would be assigned to the Southern District of California until January 4. Id. at 1185. The court recognized that, at that point, the Coast Guard had "considered several options, including a shore-based transfer to Guatemala or Panama, and transportation to Key West with air[borne] transportation to the Southern District of California," but that "[e]ach of these options had drawbacks, including problems getting diplomatic clearance and aircraft to transport." Ibid. And the court recognized that the Coast Guard's resulting plan of transporting petitioners to San Diego by sea was unavoidably delayed by an extra day when landing in San Diego became "unsafe

because of the weather" and the Active was rerouted to Long Beach. Ibid.

Based on its factual findings -- as well as petitioners' waiver of any right to be arraigned in Long Beach on January 22 -- the district court found that petitioners had been "br[ought] * * * before a magistrate judge without unnecessary delay." C.A. E.R. 1187. The court additionally observed that "generally, the way a defendant is brought to court does not result in a dismissal unless it is * * * so grossly shocking and so outrageous as to violate the universal sense of justice," ibid.; the court determined, as an alternative basis for denying petitioners' Rule 5 motion, that their case did not meet that standard, in part because the government had not "deliberately delayed" in bringing petitioners before a magistrate, ibid.; see id. at 1187-1188. The court also denied Cortez-Quinonez's motion to suppress for unnecessary delay, finding "absolutely no evidence that any delay was accomplished in order to encourage the defendants to make a statement." Id. at 1188.

4. The court of appeals affirmed, finding dismissal of the indictment to be unwarranted because "the Government did not violate Rule 5 in this case." Pet. App. A12.

Although the court of appeals noted that the Second and Eighth Circuits "have outright rejected dismissal of the indictment as a remedy for violation of Rule 5," Pet. App. A13 (citing cases), the court considered itself bound by circuit precedent suggesting that

"dismissal could be a remedy for particularly egregious violations of Rule 5 where no other relief is available," ibid. But the court observed that it "appear[s] never to have granted that remedy in any prior case," and it declined to do so here. Id. at A12.[2]

The court of appeals explained that the district court's Rule 5 determination was reviewable only for clear error, Pet. App. A10, and emphasized that "[w]hether or not undue delay occurred . . . must be determined upon the individual facts of each case," id. at A13 (citation omitted). And after recounting the district court's findings, ibid., the court of appeals found that "[t]he district court did not clearly err in its determination that twenty-three days was not an unnecessary delay, given that the Coast Guard needed to transport [petitioners] from near the Galapagos Islands to San Diego," id. at A14; see ibid. (noting that petitioners did "not contend that twenty-three days was an unreasonable amount of time to reach California").

In so holding, the court of appeals rejected petitioners' contention that any delay "caused by the [government's] choice to transport [them] directly to the prosecuting district" in California, rather than the closest magistrate judge in Florida, necessarily constituted an "'unnecessary' delay for Rule 5

[2] The court of appeals did not explicitly address petitioner Cortez-Quinonez's alternative proposed remedy of suppressing his post-arrest statement. But the court indicated its awareness of that alternative argument; found no Rule 5 violation to begin with; and also separately upheld the district court's determination that the statement was voluntary. Pet. App. A12, A15-A16.

purposes." Pet. App. A13. Drawing on the analogous context of Fourth Amendment seizures and this Court's decision in County of Riverside v. McLaughlin, 500 U.S. 44 (1991), the court of appeals reasoned that "[e]xamples of unreasonable delay [in presentment] are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." Pet. App. A14 (quoting McLaughlin, 500 U.S. at 56) (brackets in original). The court of appeals also observed that, in McLaughlin, this Court "specifically cited the 'often unavoidable delays in transporting arrested persons from one facility to another' as a 'practical reality' that would not qualify as unreasonable." Ibid. (quoting McLaughlin, 500 U.S. at 57)) (brackets omitted).

The court of appeals found additional support in the Eleventh Circuit's decision in United States v. Cabezas-Montano, 949 F.3d 567, cert. denied, 141 S. Ct. 162, and 141 S. Ct. 814 (2020). Pet. App. A14. In Cabezas-Montano, an MDLEA defendant had been arrested on the high seas in the Eastern Pacific and then transported to Florida for prosecution, which took seven weeks. 949 F.3d at 590. The court of appeals here observed that in addressing the defendant's claim of unnecessary delay, the Eleventh Circuit had stated that "'the issue * * * [was] not where the defendant was taken, but why it took the government 49 days to present the defendant arrested outside the United States before a magistrate judge in the United States for a probable cause hearing.'" Pet.

App. A14 (quoting Cabezas-Montano, 949 F.3d at 591). And the court below reasoned, "[l]ike the Eleventh Circuit," that "the proper inquiry is whether transportation to the United States as a whole was unnecessarily delayed" -- which petitioners had not shown -- "rather than whether there was some other district in the United States in which the defendant could have been brought before a magistrate judge more quickly." Ibid.

ARGUMENT

Petitioners renew their contention (Pet. 16-18) that the district court clearly erred in finding that petitioners were taken before a magistrate judge "without unnecessary delay," Fed. R. Crim. P. 5(a)(1)(B), following their apprehension on the high seas. The court of appeals' fact-bound determination was correct and does not conflict with a decision of this Court or any other court of appeals. No further review is warranted.[3]

1. Federal Rule of Criminal Procedure 5(a)(1)(B) states that "[a] person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise." As the court of appeals observed, what constitutes "unnecessary delay" under Rule 5 "must be determined upon the individual facts of each case."

[3] In a separate petition, petitioners' co-defendant seeks review of the court of appeals' determination that the conditions of their detention in Coast Guard custody during transport did not violate due process. See Chichande v. United States, No. 22-6409 (filed Dec. 20, 2022). Petitioners have not joined that petition or otherwise raised that issue in this Court.

Pet. App. A13 (citation omitted). Consistent with this fact-bound and case-specific inquiry, district courts' unnecessary-delay determinations are reviewed deferentially on appeal. See, e.g., id. at A10; United States v. Garcia-Zavala, 919 F.3d 108, 111-112 (1st Cir. 2019).

The court of appeals correctly rejected petitioners' Rule 5 challenge to the 23-day transportation period here. As the lower courts explained, "[o]n average, it takes 20 days to transport a detained individual from the Eastern Pacific," where petitioners were apprehended, to the United States. Pet. App. A13; see C.A. E.R. 1184. Here, once the Coast Guard learned that the defendants would be prosecuted in the Southern District of California, it weighed the competing "drawbacks" of the available options for transporting them there, and decided that proceeding by sea would be "the most expeditious way." Pet. App. A13-A14; see C.A. E.R. 1185. And petitioners "do not contend that twenty-three days was an unreasonable amount of time to reach California" from their location of apprehension near the Galapagos Islands. Pet. App. A14.

Petitioners instead contend (Pet. 16) that the court of appeals "was wrong in failing to consider the resulting delay from the Government's decision to change course and bring Petitioners to California." But the court did not hold that circumstance to be legally irrelevant; instead, the court simply declined to deem it dispositive. See Pet. App. A13-A14. The court explained that

the inquiry is "whether transportation to the United States as a whole was unnecessarily delayed." Id. at A14 (emphasis added). Petitioners' argument that Rule 5 always requires transport to the most proximate magistrate -- no matter how disruptive that may be -- relies on the pre-2002 version of the Rule, which required presentment to the "nearest available" magistrate, as well as an Advisory Committee note accompanying the amendment. Fed. R. Crim. P. 5(a) (2000); see Pet. 16-17. But the Advisory Committee's indication that it did not intend a "change in practice" from the prior application of the Rule, Fed. R. Crim. P. 5 advisory committee's note (2002 Amendments), does not justify restoring to the Rule a textual requirement that was removed. Among other things, Rule 5 did not previously have any subprovision that expressly applied to defendants apprehended outside the United States. See Fed. R. Crim. P. 5 (2000).

2. Petitioners err in asserting (Pet. 11-14) that the decision below conflicts with the Eleventh Circuit's decision in United States v. Cabezas-Montano, 949 F.3d 567 (2020). As they acknowledge (Pet. 11, 13), the court of appeals expressly relied on Cabezas-Montano in support of its holding. See Pet. App. A14. Accordingly, petitioners must assert that the court "clearly misread[]" Cabezas-Montano. Pet. 13. That is incorrect.

In Cabezas-Montano, the Eleventh Circuit considered a Rule 5 unnecessary-delay claim raised by an MDLEA defendant whose transportation by sea from the Eastern Pacific to Florida took

seven weeks. 949 F.3d at 590. The defendant argued on appeal that the government "deliberately and tactically" "delayed his presentment to a magistrate judge" by "transport[ing] him to Florida" -- "rather than bringing him promptly before a magistrate judge in California, the closest U.S. state" -- "in order to forum shop." Ibid. Applying plain-error review, the Eleventh Circuit rejected that argument. Id. at 590-593.

As the court below observed (Pet. App. A14), the Eleventh Circuit determined that, because the MDLEA authorizes prosecution "in any district," the question is "not where the defendant was taken, but why it took the government 49 days to present the defendant arrested outside the United States before a magistrate judge in the United States for a probable cause hearing." Cabezas-Montano, 949 F.3d at 591. And as opposed to deeming the location of the arraignment dispositive, the Eleventh Circuit instead applied a four-factor balancing test to decide whether the delay was unnecessary. Ibid. That test considers "the distance between the location of the defendant's arrest in international waters and the U.S. port he was brought to," "the time between the defendant's arrival at the U.S. port and his presentment to the magistrate judge," "any evidence of mistreatment or improper interrogation during the delay," and "any reason for the delay, like exigent circumstances or emergencies." Ibid.

To the extent that petitioners are contending that the court of appeals should have adopted the Eleventh Circuit's specific

four-part test (see Pet. 13-14), they forfeited that argument by failing to press it below. And petitioners err in suggesting (Pet. 12-13) that the Eleventh Circuit's approach invariably requires arraignment before the nearest magistrate judge. Although the Eleventh Circuit in Cabezas-Montano reserved decision on whether and how an "allegation that the government deliberately and tactically delayed in order to forum shop" with sufficient factual support might affect analysis of the fourth factor, see 949 F.3d at 592 & n.20, nothing in its decision affirming the denial of Rule 5 relief indicates that it would require relief in the circumstances here.

3. Further review in this case is unwarranted for the additional reason that petitioners would not be entitled to relief even if Rule 5 had been violated. As the court of appeals observed, "[t]he Second and Eighth Circuits have outright rejected dismissal of the indictment as a remedy for violation of Rule 5, with holdings that appear to foreclose dismissal even in egregious circumstances." Pet. App. A13 (citing United States v. Peeples, 962 F.3d 677, 687–688 (2d Cir. 2020), cert. denied, 141 S. Ct. 1279 (2021); United States v. Cooke, 853 F.3d 464, 471 (8th Cir. 2017)). Those decisions are correct. Indeed, notwithstanding its own prior statements, the Ninth Circuit itself "appear[s] never to have granted that remedy in any prior case." Id. at A12. And any Rule 5 violation here, resulting in less than a week of delay between the possible timing of a Florida arraignment and

petitioners' arrival in California (where they waived arraignment in Long Beach), was not the sort of "particularly egregious violation[]," id. at A13, that the Ninth Circuit would require. See C.A. E.R. 1187-1188 (district court's alternative finding that any Rule 5 violation "wasn't sufficiently outrageous to result in a dismissal").

Nor would petitioner Cortez-Quinonez's alternative request for suppression of his Mirandized, pre-arraignment statement affect the result. The district court correctly rejected his suppression argument, finding "absolutely no evidence that any delay was accomplished in order to encourage the defendants to make a statement," C.A. E.R. 1188, and he does not identify any defect in that case-specific determination. In any event, any error in the introduction of Cortez-Quinonez's statement at trial would have been harmless. See Fed. R. Crim. P. 52(a). Those statements did not amount to a full confession, see Pet. App. A10, and the jury separately heard evidence that Cortez-Quinonez professed to be the "master of the vessel," that he was found in the open ocean with over a ton of cocaine (worth $28 million), that he was at the helm when the panga boat attempted to outrun the Coast Guard helicopter, and that he helped toss the cocaine overboard. C.A. E.R. 475, 803-805, 814-818, 911-912, 923, 1003.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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