

No. 17-6596

IN THE SUPREME COURT OF THE UNITED STATES

LARUN E. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's purportedly "outrageous" conduct, inducing petitioner to continue communicating with a fictitious 14-year-old girl against whom he had already committed sex crimes, barred the government from prosecuting him for those crimes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-12a) is not published in the Federal Reporter but is available at 696 Fed. Appx. 696.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2017. A petition for rehearing was denied on August 2, 2017 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 30, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of attempting to coerce or entice a minor into engaging in prostitution or unlawful sexual activity, in violation of 18 U.S.C. 2422(b); attempting to coerce or entice a minor into creating child pornography, in violation of 18 U.S.C. 2251(a) and (e); failing to register as a sex offender, in violation of 18 U.S.C. 2250(a); and committing a felony sex offense involving a minor while being required to register as a sex offender, in violation of 18 U.S.C. 2260A. Pet. App. 13a. The district court sentenced petitioner to 540 months of imprisonment, to be followed by a lifetime of supervised release. Id. at 14a-15a. The court of appeals affirmed. Id. at 4a-12a.

1. Petitioner is a serial sex offender. In 1991, he broke into a woman's home and bound and raped her. Presentence Investigation Report (PSR) ¶ 55. In 2005, after serving a state sentence for the 1991 crime, petitioner was caught in a sting operation attempting to persuade a fictitious single mother he met on the internet to let him have sex with her 14-year-old daughter. PSR ¶ 59. Petitioner was arrested at the airport on his way to meet them. Ibid.

In May 2014, less than a year after being released from prison for the 2005 offense, petitioner logged into an online chat room under the name "seekingyounger75" from his home in Ohio. Pet.

App. 5a; see 1/26/2016 Tr. 349. There, he interacted with investigators from the state district attorney's office, who were pretending to be a 14-year-old girl living in Colorado. Pet. App. 5a. Over the next several days, petitioner and the fictitious 14-year-old exchanged hundreds of messages, mostly sexual, and discussed what sexual acts they would perform when petitioner visited the girl. Ibid.; Gov't C.A. Br. 4-5 (providing further details). Petitioner also asked the 14-year-old to send him pornographic pictures of herself and suggested that they make their own pornography once they met in person. Pet. App. 4a-5a.

On the fourth day of these conversations, petitioner stopped responding to messages from the fictitious 14-year-old for about 14 hours, from approximately 2 p.m. on May 31, 2014, until 4:30 a.m. on the morning of June 1, 2014 -- the day on which the two had discussed meeting in person. Pet. App. 5a-6a. Investigators attempted to resume communications with petitioner in order to determine whether "he was really coming." 1/25/2016 Tr. 137-138. At approximately 4 a.m., the investigators, acting as the victim, sent the following email to petitioner:

I guess you like to play games and were messing with me, huh? Fuck this. I will take care of my lousy fucking life and how people fuck with me and I will leave this worthless world and put my note how you pushed me over the edge. Maybe some fucking show like 20/20 or something will show how fuck heads who play games who push people over the edge. It's the last game I will play. And game on. I'm ending this game and me.

Pet. App. 5a-6a. A short time later petitioner sent a text message saying that he had "stopped in Indiana and f[allen] asleep." Id.

at 6a. At approximately 6 a.m., petitioner sent another text message, stating "hey I got your email quit it I'm not like everybody else." Ibid. Petitioner then followed up with a phone call five minutes later, in which he chastised the 14-year-old for threatening suicide and told her that he was trying to finish something for his boss in Indiana. 1/25/2016 Tr. 145-146. He said he had taken the work assignment to get closer to her in Colorado. Id. at 145. And he explained that he had not figured out yet when he would get to Colorado, but she "better have a bag of [her] panties and skirts and shorts with [her]" when he arrived. Id. at 146. They then discussed having sex in her mother's bed. Id. at 146-147.

The two continued to exchange messages over the next two days until petitioner was arrested in Ohio on June 3, 2014. Pet. App. 6a. He had never actually left home. Ibid.

2. A grand jury in the Northern District of Ohio returned an indictment charging petitioner with attempting to coerce or entice a minor into engaging in prostitution or unlawful sexual activity, in violation of 18 U.S.C. 2422(b); attempting to coerce or entice a minor into creating child pornography, in violation of 18 U.S.C. 2251(a) and (e); failing to register as a sex offender, in violation of 18 U.S.C. 2250(a) and (c); and committing a felony sex offense involving a minor while being required to register as a sex offender, in violation of 18 U.S.C. 2260A. Superseding

Indictment 1-4. Petitioner waived his right to a jury trial and was tried before the district court. Pet. App. 7a.

At the close of the government's case, petitioner orally moved to dismiss the indictment "based on due process violations," citing the June 1, 2014 email as being "so outrageous" that it required dismissal of all charges. 1/26/2016 Tr. 427. The district court denied the motion the following day. 1/27/2016 Tr. 449-453. The court observed that petitioner's argument was "basically" an entrapment argument, but confirmed that petitioner was not raising such a defense. Id. at 449, 451. The court expressed doubt as to whether a distinct, inducement-based due process defense was "viable" under Sixth Circuit precedent. Id. at 451. But the district court found that dismissal "would not be appropriate" even if such a defense existed, given that the government had "nothing to do with [petitioner's] initial conduct" of logging into the chat room and initiating sexual conversations with someone he believed to be a 14-year-old girl and that, "but-for a little blip," the email did not change petitioner's criminal conduct. Id. at 449-451; see also Pet. App. 30a n.1 (explaining in the final written decision that the court "doubts such a defense exists," but that "even if it was a proper defense, the facts would not support it in this case").

3. The court of appeals affirmed. Pet. App. 4a-12a. The court had previously reasoned in United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994), cert. denied, 514 U.S. 1049 (1995), that "a

defendant whose defense sounds in inducement is, by congressional intent and Supreme Court precedent, limited to the defense of entrapment and its key element of predisposition." Id. at 1428. Relying on that decision here, the court found "no authority in this circuit holding that the 'government's conduct in inducing the commission of a crime, if "outrageous" enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment.'" Pet. App. 8a (quoting Tucker, 28 F.3d at 1424). Accordingly, although the court viewed the use of a fictitious suicide threat during a sting operation to be "concerning," it determined that petitioner's due process defense failed "regardless of the propriety of the government action in this case." Ibid.

ARGUMENT

Petitioner contends (Pet. 5-12) that the lower courts erred in rejecting his due process defense based on allegedly "outrageous government conduct" inducing him to commit a crime. That contention does not warrant this Court's review. The courts below correctly rejected petitioner's due process claim, and the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Although the courts of appeals have expressed different views on whether an otherwise predisposed defendant could ever assert a defense to prosecution based on "outrageous government conduct," the facts of this case would not fall within the extremely narrow category of cases in

which courts have said such a defense might be appropriate. In any event, this case would be an unsuitable vehicle for addressing the question presented because the purportedly outrageous conduct did not prejudice petitioner, who had already committed his crimes before the conduct occurred. Further review is not warranted.

1. This Court has never held that a defendant who was otherwise predisposed to commit an offense can avoid conviction by claiming that the government induced him to commit that offense through "outrageous" conduct. Rather, to establish the defense of entrapment, a defendant must assert both that the government induced him to commit a crime and that he was not already predisposed to commit such a crime. See Mathews v. United States, 485 U.S. 58, 62-63 (1988). The Court has described the predisposition element as the "principal element in the defense of entrapment," id. at 63 (quoting United States v. Russell, 411 U.S. 423, 433 (1973)), focusing the jury "upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime," ibid. (quoting Sherman v. United States, 356 U.S. 369, 372 (1958)). And the Court has repeatedly rejected the so-called "objective" theory of entrapment, which would focus only on the government's conduct. See Russell, 411 U.S. at 433-434; Sherman, 356 U.S. at 376-377; Sorrells v. United States, 287 U.S. 435, 451 (1932).

The entrapment defense "is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels have been 'overzealous law enforcement,' but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government." Russell, 411 U.S. at 435. In other words, the defense is "not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it d[oes] not approve." Ibid.; see United States v. Miller, 891 F.2d 1265, 1271-1272 (7th Cir. 1989) (Easterbrook, J., concurring) (explaining that it is "enough to support punishment that this person committed this offense" and "leaving to other institutions the redirection of investigative or prosecutorial resources"). Petitioner has never argued that he was not predisposed to commit the offenses for which he was convicted (cf. supra pp. 5-6), and he therefore cannot assert a viable entrapment defense.

In Russell, the Court left open the possibility that conduct of law enforcement officials may be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" of an otherwise predisposed defendant. 411 U.S. at 431-432. The Court included a "cf." citation, id. at 432, of Rochin v. California, 342 U.S. 165 (1952), in which the Court reversed a drug conviction based on drug evidence that the police had obtained by forcibly pumping the

defendant's stomach "against his will," id. at 166; see id. at 174. The Court there focused on the unconstitutionality of "force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record," and explicitly "put to one side" various other "modern methods and devices for discovering wrongdoers and bringing them to book." Id. at 174. And the Court's subsequent decisions indicate that, if any outrageous government conduct defense exists as to non-violent investigative tactics, it is exceedingly narrow in scope.

In Hampton v. United States, 425 U.S. 484 (1976), the plurality would have rejected any due process defense when a defendant is predisposed to engage in the crime. Id. at 488-491 (plurality opinion). Justice Powell, joined by Justice Blackmun, concurred in the judgment and did not wish to foreclose all possibility of a due process defense, but "emphasize[d] that the cases, if any, in which proof of predisposition is not dispositive will be rare." Id. at 495 n.7. And in United States v. Payner, 447 U.S. 727 (1980), the Court cast further doubt on a due process defense based on purportedly outrageous conduct. See id. at 737 n.9 ("[T]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the defendant.") (quoting Hampton, 425 U.S. at 490 (plurality opinion)).

2. Petitioner contends (Pet. 5-8) that the court of appeals' rejection of an outrageous government conduct defense in

these circumstances conflicts with the decisions of other courts of appeals. Although the Sixth Circuit has gone further than some other courts of appeals by explicitly foreclosing an outrageous government conduct defense that relies solely on an objective challenge to the government's investigative tactics, its decision in this case is consistent with the results reached by those other courts. No court of appeals has held that a predisposed defendant may establish a violation of due process in circumstances analogous to those presented here.

Although most courts of appeals recognize the possibility of an outrageous government conduct defense in theory, petitioner himself acknowledges that the defense is "often found not to apply." Pet. 7. Indeed, as petitioner highlights, the First Circuit has labeled the doctrine as "moribund." United States v. Capelton, 350 F.3d 231, 243 n.5 (2003). The Fourth Circuit has recognized the same, explaining that, "in practice, courts have rejected its application with almost monotonous regularity." United States v. Jones, 13 F.3d 100, 104 (1993)) (citation omitted). And 20 years ago, the Third Circuit described the doctrine as "hanging by a thread." United States v. Nolan-Cooper, 155 F.3d 221, 230 (1998); see also 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 (2012).

Petitioner identifies (Pet. 6) only two cases where courts of appeals have ordered or affirmed dismissals of criminal charges on "grounds of outrageousness" -- United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), and Greene v. United States, 454 F.2d 783 (9th Cir. 1971). Neither provides any basis for further review here. The Third Circuit has not relied on Twigg since that case was decided four decades ago. Three circuit judges have expressly called for the decision to be overruled, see United States v. Jannotti, 673 F.2d 578, 610 n.17 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982), and others have expressed doubt whether it was correctly decided, see United States v. Beverly, 723 F.2d 11, 12 (3d Cir. 1983); see also United States v. Fattah, 858 F.3d 801, 813 (3d Cir. 2017) ("Since Twigg was decided, this Court has repeatedly distinguished, and even questioned, its holding.") (footnote omitted).

Greene was decided even longer ago, before this Court's decisions in Russell, Hampton, and Payner, and the Ninth Circuit has similarly declined to rely on it to require dismissal of any criminal charges since. See, e.g., United States v. Black, 733 F.3d 294, 302 (2013) ("Dismissing an indictment for outrageous government conduct * * * is 'limited to extreme cases' in which the defendant can demonstrate that the government's conduct 'violates fundamental fairness' and is 'so grossly shocking and so outrageous as to violate the universal sense of justice.'" (citations omitted)), cert. denied, 135 S. Ct. 267 (2014); United

States v. Simpson, 813 F.2d 1462, 1465-1466 (holding that a government agent's "use of sex to * * * lure him into selling heroin" did not warrant dismissal), cert. denied, 484 U.S. 898 (1987).

In any event, the facts of those cases differ substantially from the facts here. In Twigg, a divided panel of the Third Circuit reversed convictions where government agents had supplied the defendants -- who had previously been "lawfully and peacefully minding [their] own affairs," 588 F.2d at 381; see also id. at 382 -- with the chemicals, the laboratory, and the expertise necessary for them to manufacture methamphetamine. The Third Circuit described the case as one in which the crime was "conceived and contrived by government agents." Id. at 378. Similarly, in Greene, the government agent initiated contact with the defendants after they had been arrested for bootlegging alcohol and for two-and-a-half years after the defendants were released from prison for the first offense, the agent was heavily involved in re-establishing and sustaining the defendants' bootlegging operations -- providing equipment and ingredients and serving as the defendants' sole customer. 454 F.2d at 786-787. The Ninth Circuit reasoned that the government may not "involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators." Id. at 787.

Here, by contrast, the district court found that petitioner signed on to the chat room under the name "seekingyounger75" and "initiated the contact with someone whose persona was that of a minor" on his own accord. Pet. App. 5a; 1/27/2016 Tr. 450. The government had "nothing to do with his initial conduct" and the email that petitioner argues constituted outrageous government conduct came "well into the conversation." 1/27/2016 Tr. 450. Other than re-initiating contact with petitioner in an attempt to determine his travel plans, the email did not change the content or tenor of the conversation in any way. See id. at 450-451 ("So there really wasn't much change at all in the [petitioner's] conduct, conduct that he had initiated and didn't require any encouragement from the government to commit."); see supra, pp. 3-4. The district court accordingly determined that even if petitioner's proposed defense were available, "the facts would not support it in this case." Pet. App. 30a n.1. No indication exists that any other court of appeals would find the facts of this case required the outright dismissal of the charges against petitioner.

3. Finally, this case would be an unsuitable vehicle for addressing the viability of an outrageous government conduct defense in any event. Except for a "very limited" category of structural errors, even a constitutional violation warrants reversing a conviction only if it prejudiced the defendant. Neder v. United States, 527 U.S. 1, 8 (1999) (citation omitted); see United States v. Gonzalez-Lopez, 548 U.S. 140, 148-149 (2006).

Accordingly, "a district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant." Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988). In this case, even if the June 1, 2014 email violated defendant's rights, the error was harmless. As the district court found, petitioner's crimes "had already been committed" when the email was sent. Pet. App. 27a; see id. at 30a n.1. Accordingly, petitioner would not be entitled to relief even if this Court decided in his favor the issue he presents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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