No. 16-6133

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL MULLET, SR., LESTER M. MILLER, AND KATHRYN MILLER, PETITIONERS

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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QUESTIONS PRESENTED

1. Whether petitioners may challenge their convictions for obstructing justice and making a materially false statement by contending that the criminal statute underlying the investigation they obstructed is unconstitutional, where petitioners failed to challenge the obstruction and false-statement charges before trial or in their initial appeal.

2. Whether the court of appeals correctly upheld application of the federal sentencing guideline for "Kidnapping, Abduction, Unlawful Restraint," Sentencing Guidelines § 2A4.1, when computing the guidelines range on the particular facts of this case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-17) is reported at 822 F.3d 842.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2016. A petition for rehearing was denied on June 28, 2016 (Pet. App. 1). The petition for a writ of certiorari was filed on September 21, 2016. 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 Northern District of Ohio, petitioners Samuel Mullet, Sr., Lester Miller, and Kathryn Miller, and 13 co-defendants were convicted of violating and conspiring to violate 18 U.S.C. 249(a)(2), a provision of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (HCPA), Pub. L. No. 111-84, Div. E, 123 Stat. 2835. They were also convicted of conspiring to obstruct justice, in violation of 18 U.S.C. 371. Mullet was separately convicted of obstructing justice, in violation of 18 U.S.C. 1519, and making a false statement, in violation of 18 U.S.C. 1001. Pet. App. 4-5. On appeal, the court of appeals reversed the Section 249(a)(2)-related convictions, holding that the jury instructions on the causation element of the offense were improper. Id. at 23. On remand, the district court resentenced petitioners on their remaining convictions. Mullet and Lester Miller were sentenced to 129 months and 43 months of imprisonment, respectively. Kathryn Miller was sentenced to time served (12 months and 1 day). Pet. App. 5; 3/2/15 Resentencing Tr. (Resent. Tr.) 13, 84. The court of appeals affirmed. Pet. App. 17.

1. Petitioners are members of a religious community in Bergholz, Ohio, led by Mullet, the Bergholz church's Bishop. Pet. App. 3. Under Mullet's direction, Lester and Kathryn

Miller and 13 other members of the Bergholz community committed a series of attacks over a two-month period in late 2011, forcibly cutting off the beards and hair of members of the Old Order Amish faith. Id. at 22, 25.

In the Amish tradition, men grow their beards and do not cut them after they marry. Their beards are a public symbol of their Amish religious identity and piety. Pet. App. 24. After bishops in other Amish communities challenged Mullet's leadership decisions, Mullet and members of the Bergholz community began a campaign of violent attacks against those outside of their community who they labeled as "Amish hypocrites." Id. at 25. These attacks involved invading the victims' homes, often late at night, or luring the victims to a private location, then forcibly chopping off their beard and head hair with horse shears, scissors, and hair clippers. U.S. Br. at 13, United States v. Miller, 767 F.3d 585 (6th Cir. 2014) (Gov't 1st C.A. Br.). During the attacks, many of the victims were confined in their home, dragged around and held down, or otherwise forcibly restrained. Pet. App. 4, 10-11, 43. Some were left bleeding and bruised. Id. at 42-43.

In the course of local authorities' investigation into the assaults, they requested federal government assistance. Gov't 1st C.A. Br. 55. After the attacks, several of the co-defendants agreed with Mullet to conceal a disposable camera

used to take trophy photographs of the victims. Pet. App. 4. Mullet also made false statements to a federal investigator. Id. at 25.

2. A federal grand jury indicted petitioners and 13 co-defendants with violating and conspiring to violate Section 249(a)(2), and conspiring to obstruct justice and make false statements. In addition, Mullet and several co-defendants were charged with obstructing justice, and Mullet was charged with making a false statement. Pet. App. 4, 25.

The Section 249(a)(2) charges alleged that the assaults included kidnapping. Section 249(a)(2) provides that, if the hate crime includes "kidnapping," the statutory maximum sentence increases from "not more than 10 years" to "any term of years or for life." 18 U.S.C. 249(a)(2)(A)(i) and (ii).[1] Section 249(a)(2) does not define the term "kidnapping." The district court ultimately instructed the jury with its contemporary, generic meaning: That "kidnapping" means "to restrain and confine a person by force, intimidation, or deception, with the intent to terrorize or cause bodily injury to that person, or to restrain a person's liberty in circumstances that create a substantial risk of bodily harm to that person." Pet. App. 11

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[1] Section 249(a)(2) also requires that the government prove, as an element of the offense, a nexus to interstate commerce. See 18 U.S.C. 249(a)(2)(B).

(citation omitted). This definition "embodies the definition and understanding of kidnapping that is used in almost all of the country, including Ohio." 8/20/12 Pretrial Tr. 34; see Pet. App. 11.

In a special verdict form, the jury found that the 16 defendants, including petitioners, violated Section 249(a)(2) based on four of the five attacks alleged. See D. Ct. Doc. 230 (Sept. 20, 2012). The jury specifically found that each of these offenses included kidnapping. Ibid. The jury also determined that defendants conspired to violate Section 249(a)(2) and to obstruct justice, and that Mullet had obstructed justice and made a materially false statement. Ibid.

At sentencing, the district court computed the guidelines ranges. 2/8/13 Sent. Tr. (Sent. Tr.) 7-10. The court explained that the Sentencing Guideline applicable to Section 249 offenses, Sentencing Guidelines § 2H1.1(a)(1), sets a base offense level defined by "the offense guideline applicable to any underlying offense," which includes "the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law." Ibid. & comment. (n.1). Because the jury determined that the Section 249(a)(2) violations included kidnapping, the court applied the guideline for "Kidnapping, Abduction, Unlawful Restraint," Sentencing Guidelines § 2A4.1,

with a base offense level of 32. Id. at § 2A4.1(a). The district court then applied various adjustments, yielding Guideline ranges up to "30 years to life," which the court found "incredibly high." Sent. Tr. 9. The court in turn varied downward for all of the defendants, with the particular sentence imposed varying depending on each individual's particular conduct: The court sentenced Mullet to 180 months of imprisonment, id. at 151-152; Lester Miller to 60 months of imprisonment, id. at 152-153; and Kathryn Miller to a year and a day, id. at 153-154; see Resent. Tr. 12 ("I gave sentences that were way below [the Guidelines range], with the exception of Bishop Mullet.").

3. On appeal, petitioners challenged their Section 249(a)(2)-related convictions; they did not challenge their convictions related to obstruction and false statements. Pet. App. 5. The court of appeals reversed petitioners' Section 249(a)(2)-related convictions and remanded. Id. at 21-43. The court held that the jury was improperly instructed on the causation element of Section 249(a)(2), contrary to this Court's intervening decision in Burrage v. United States, 134 S. Ct. 881 (2014), and that the error was not harmless. Pet. App. 23. The court did not address petitioners' argument that Section 249(a)(2) is unconstitutional. Nor did the court address petitioners' arguments that the jury was improperly instructed

on the kidnapping offense enhancement and that the kidnapping guideline should not have applied to their Section 249(a)(2)-related convictions. Id. at 43.

4. On remand, Mullet filed a motion to dismiss his remaining convictions for conspiracy to obstruct justice, obstruction, and making a false statement. D. Ct. Doc. 607 (Feb. 20, 2015). He argued, for the first time, that the district court lacked jurisdiction over these counts because the HCPA is unconstitutional. The court denied the motion, finding it waived and untimely. D. Ct. Doc. 639 (Feb. 26, 2015) (Order Denying MTD). Federal Rule of Criminal Procedure 12(b)(2) "deals with 'pretrial motions that may be made before trial,'" the court stated, and Mullet had "waived this challenge by never raising it before trial or on direct appeal." Order Denying MTD, at 4 (quoting Fed. R. Crim. P. 12(b)(2)).

The district court also concluded that, even if the challenge were procedurally proper, it "would fail on the merits." Order Denying MTD, at 5. The court explained that Section 249(a)(2) "has never been held unconstitutional," and that even if it were held unconstitutional "at some future date, it would still be a crime for defendants to obstruct the federal investigation that was undertaken pursuant to this statute." Ibid. "If the subject of a criminal investigation believes that he is being targeted for an investigation under an

unconstitutional law, the proper course for challenging the law is through the legal system itself, not by concealing evidence or lying to federal investigators." Id. at 6.

At resentencing, the district court again calculated the Guidelines range. "The advisory Guideline range for obstruction of justice," Sentencing Guidelines § 2J1.2(c)(1), "refers to the advisory range for the substantive crimes that were under investigation," which here were hate crimes involving kidnapping, governed by Section 2A4.1. Resent. Tr. 11. The court noted that "the jury found kidnapping beyond a reasonable doubt," and "I certainly find by a preponderance of the evidence that the kidnapping existed." Id. at 24. The court also stated that it considered kidnapping as "relevant conduct" under Sentencing Guidelines § 1B1.3(a)(1). Resent. Tr. 73; see id. at 74 ("The jury found beyond a reasonable doubt that all the attacks involved kidnapping. And I certainly find by a preponderance of the evidence that they did."). The court ultimately resentenced Mullet to 129 months of imprisonment (down from 180 months), Lester Miller to 43 months of imprisonment (down from 60 months), and Kathryn Miller to time served, as she had completed her sentence. Pet. App. 5; Resent. Tr. 13, 79.

5. The court of appeals affirmed. First, the court held that petitioners "doubl[y] forfeit[ed]" their challenge to their

remaining convictions, because they failed to raise the argument before trial and failed to raise it in their first appeal. Pet. App. 7. "In criminal case after criminal case," the court stated, it had "declined to allow a criminal defendant who fails to challenge part of a conviction in an earlier appeal to raise it in a later appeal." Id. at 5.

The court of appeals further explained that, even if plain error review were available, petitioners would "not remotely meet that standard." Pet. App. 7. Even if the HCPA "is unconstitutional, a point [it] need not decide," the court stated, the unconstitutionality of a statute underlying an investigation would not "obligate the district court to dismiss the obstruction-of-justice charges." Id. at 7-8. "Our legal system provides methods for challenging the Government's right to ask questions," the court stated, and "lying is not one of them." Id. at 8 (quoting Bryson v. United States, 396 U.S. 64, 72 (1969)); see ibid. ("Concealing evidence is not one either.").

Second, the court of appeals affirmed the district court's application of Section 2A4.1. Pet. App. 11-12. That Section sets a base offense level of 32 for an offense involving "[k]idnapping, [a]bduction, [u]nlawful restraint." Sentencing Guidelines § 2A4.1. The court noted that "the jury determined that [petitioners] committed a generic state law form of

kidnapping by restraining their victims in order to cut their beards," which increased the statutory maximum for the hate crimes "from ten years to life." Pet. App. 10-11. The court stated that the district court had used a generic definition of kidnapping because it "embodies the definition and understanding of kidnapping that is used in almost all of the country, including Ohio." Id. at 11 (citation omitted). Anything that qualified as "kidnapping" under this definition, the court concluded, "qualifies as '[k]idnapping, [a]bduction, [u]nlawful restraint' under § 2A4.1 of the guidelines." Ibid. (brackets in original) (quoting Section 2A4.1).

ARGUMENT

Petitioners contend (Pet. 6-22) that this Court should grant review to decide whether, as a defense to federal obstruction and false statement charges, a defendant may challenge the constitutionality of the criminal statute underlying the investigation. That issue is not properly before this Court and does not warrant further review. The court of appeals determined that petitioners had forfeited any challenge to their obstruction and false-statement convictions by failing to raise any such challenge before trial or in their first appeal. Petitioners do not challenge that forfeiture holding, and accordingly review here is foreclosed. In any event, review would at most be for plain error, and petitioners cannot show

that a plain error occurred. Indeed, a long line of binding precedent from this Court establishes that the district court's decision was correct. E.g., Bryson v. United States, 396 U.S. 64, 68-69 (1969) (collecting cases).

Petitioners also contend (Pet. 22-35) that this Court should grant review to determine whether the court of appeals correctly applied Sentencing Guideline § 2A4.1 to the conduct in this case. That challenge presents only a question of Guidelines interpretation that does not merit this Court's review. In any event, the court of appeals' decision is correct and does not conflict with any decision of another court of appeals. The petition should be denied.

1. Petitioners contend (Pet. 7-13) that a criminal defendant may challenge a conviction for obstruction of justice (or making a false statement) by arguing that the thwarted investigation was looking into a violation of a criminal statute that, they allege, is unconstitutional. This issue is not properly before this Court. Petitioners do not challenge the court of appeals' holding that petitioners forfeited any challenge to their obstruction and false-statement convictions by failing to raise such a challenge before trial or again on their first appeal. Pet. App. 7. It is well settled that where an appellant fails to present "an argument [that] could have been raised on an initial appeal, it is inappropriate to

consider that argument on a second appeal following remand." United States v. Henry, 472 F.3d 910, 913 (D.C. Cir.) (citation omitted), cert. denied, 552 U.S. 888 (2007); see Macheca Transp. Co. v. Philadelphia Indem. Ins. Co., 737 F.3d 1188, 1194-1195 (8th Cir. 2013) (describing this as a "well-entrenched part of the law-of-the-case doctrine" applied "[f]or over one hundred years"). Review accordingly is foreclosed here as well.

Furthermore, as the court of appeals explained, even if review were available, "the most [petitioners] could hope for is some form of plain error review" -- but petitioners cannot "remotely meet that standard." Pet. App. 7. Even if Section 249(a)(2) were unconstitutional, that would not "obligate the district court to dismiss the obstruction-of-justice charges." Id. at 7-8. "Our legal system provides methods for challenging the Government's right to ask questions," the court stated, and "lying is not one of them." Id. at 8 (quoting Bryson, 396 U.S. at 72); see Dennis v. United States, 384 U.S. 855, 866 (1966) ("It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective."); see also United States v. Mandujano, 425 U.S. 564, 577 (1976) (opinion of Burger, C.J.) ("[O]ur cases have consistently -- indeed without exception -- allowed sanctions for false statements," even against complaints "that

the Government exceeded its constitutional powers in making the inquiry.").

Petitioners now argue (Pet. 7-13), for the first time, that Bryson and Dennis are wrongly decided and that this Court should grant certiorari to overrule them. But the district court's refusal to vacate petitioners' obstruction and false-statement convictions cannot be a plain error, because controlling precedent from this Court establishes that the district court's decision was correct. For an error to be plain, it must be "'plain' at the time of appellate consideration." Henderson v. United States, 133 S. Ct. 1121, 1130 (2013) (citation omitted). The district court's judgment does not satisfy that demanding standard because it was "the very opposite" of a plain error: "The District Judge should have known that his ruling (at the time he made it) was not error." Id. at 1129. The same is true today. And petitioners cite no authority that a defendant can seek to establish an error that is plain at the time of appellate consideration by asking an appellate court to overrule governing precedent. Accordingly, this case provides no occasion for considering petitioners' claim that Bryson and Dennis should be overruled.

In any event, those decisions are correct and no basis exists for overruling them. While stare decisis "is not an inexorable command," this Court has required "special

justification" to reverse its precedent. Dickerson v. United States, 530 U.S. 428, 443 (2000) (citations omitted). Petitioners contend (Pet. 7, 10) that Bryson and Dennis "were issued for national security reasons" in the "McCarthy-era." But this Court had already established the "governing principle" of those decisions, decades earlier, in cases outside the national security context. Bryson, 396 U.S. at 68 (quoting Dennis, 384 U.S. at 867; citing Kay v. United States, 303 U.S. 1, 6-7 (1938), and United States v. Kapp, 302 U.S. 214, 217-218 (1937)); e.g., Kay, 303 U.S. at 6 ("When one undertakes to cheat the Government or to mislead its officers * * * by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.").

If a defendant believes that she is being targeted for investigation under an unconstitutional statute, the proper course is to challenge the law itself, not to conceal evidence or make false material statements to federal investigators. See Dennis, 384 U.S. at 865 (obstruction is an "effort to circumvent the law and not to challenge it"). Any other conclusion "would defeat the purpose of federal laws prohibiting obstruction, which is to ensure the proper administration of justice." Order Denying MTD, at 5-6; see United States v. Ronda, 455 F.3d 1273, 1286 (11th Cir. 2006) (recognizing that another obstruction

statute, 18 U.S.C. 1512(b)(3), is based on the "federal interest of protecting the integrity of potential federal investigations by ensuring" truthful and unimpeded transfers of information) (citation omitted), cert. denied, 549 U.S. 1212 (2007).

2. Petitioners also urge (Pet. 23) this Court to review the district court's application of the Sentencing Guideline for "Kidnapping, Abduction, Unlawful Restraint," Sentencing Guidelines § 2A4.1, to the facts of this case. That question of Guidelines interpretation does not warrant this Court's review.

a. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines because the Sentencing Commission can amend the Guidelines to eliminate any conflict or correct any error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decision-making. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Review by this Court of Guidelines decisions is particularly unwarranted in light of

Booker, which rendered the Guidelines advisory only. See id. at 245.

b. In any event, the court of appeals' decision is correct and does not warrant further review. Contrary to petitioners' assertion (Pet. 25), the court did not hold that Section 2A4.1 would be triggered by any "de minimis restraint inherent to simple assault." That incorrectly describes both the record and the court's holding. The jury here found that petitioners engaged in kidnapping, not a "de minimis restraint": It unanimously found that petitioners "restrain[ed] and confine[d] a person by force, intimidation, or deception, with the intent to terrorize or cause bodily injury to that person," or "restrain[ed] a person's liberty in circumstances that create a substantial risk of bodily harm to that person." Pet. App. 11. For example, in the first attack (on Marty Miller), the assailants arrived at his home at night, went to his bedroom, grabbed him by the beard, dragged him out into the living room, and threw him into a chair. Several assailants restrained him in the chair and another forcibly held back his wife when she tried to intervene. The assailants yelled at him while one of them chopped off his hair and beard. During this time, Marty struggled unsuccessfully to escape from the chair, while crying and begging for them to stop. See Gov't 1st C.A. Br. 28-30. In light of this evidence, the district court also found, "by a

preponderance of the evidence that the kidnapping existed." Resent. Tr. 24; see id. at 74.

The court of appeals in turn did not hold that Section 2A4.1 reached any "de minimis" restraint. Rather, the court held that conduct satisfying the generic, contemporary definition of "kidnapping" used in almost every State, including Ohio, is sufficient to trigger Section 2A4.1, which reaches "[k]idnapping, [a]bduction, [and] [u]nlawful [r]estraint." Pet. App. 11 (brackets in original). Other courts have similarly relied on the generic definition of "kidnapping" in Guidelines calculations. See, e.g., United States v. Marquez-Lobos, 697 F.3d 759, 764 (9th Cir. 2012) (using generic definition of kidnapping to affirm application of a 16-level enhancement under Sentencing Guidelines § 2L1.2), cert. denied, 133 S. Ct. 2021 (2013); United States v. De Jesus Ventura, 565 F.3d 870, 876-878 (D.C. Cir. 2009) (applying generic definition of kidnapping to reject a Section 2L1.2 enhancement).

c. Petitioners also contend (Pet. 23) that the two-level offense enhancement for "Restraint of Victim" under Sentencing Guidelines § 3A1.3 should have applied here, not Section 2A4.1 for "Kidnapping, Abduction, Unlawful Restraint." But the Guidelines themselves make clear that this argument lacks merit: The "Restraint of Victim" guideline "does not apply to offenses covered by [Section] 2A4.1 (Kidnapping, Abduction, Unlawful

Restraint)." Id. § 3A1.3, comment. (n.2). And here, the relevant offense is "covered by [Section] 2A4.1." Ibid. The Guideline for obstruction of justice, id. § 2J1.2, points a court to the "offense level for the underlying offense," id. § 2X3.1(a)(1). Id. § 2J1.2(c)(1). The hate-crime guideline in turn points to "the offense guideline applicable to any underlying offense," including "the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law." Id. § 2H1.1(a)(1) & comment. (n.1). That leads to Section 2A4.1, because -- as both the jury and the district court found -- the underlying attacks included kidnapping. Pet. App. 10. Accordingly, Section 2A4.1 applies here, not Section 3A1.3.

Petitioners cite no case to the contrary. For example, petitioners assert (Pet. 27-28) that United States v. Rodriguez, 587 F.3d 573 (2d Cir. 2009), rejected application of Section 2A4.1 because the conduct did not involve restraint for an appreciable period of time. But that decision reversed a conviction under 18 U.S.C. 1203 because that statute was interpreted to require confinement "for an appreciable period of time." Rodriguez, 587 F.3d at 580. The court remanded without addressing any Guidelines issues. Id. at 584. And unlike here, the Guidelines for the remaining convictions in Rodriguez were not covered by Section 2A4.1; they were freestanding charges for

transporting (and conspiring to transport) an illegal alien. United States v. Rodriguez, 423 Fed. Appx. 28 (2d Cir.) (affirming after resentencing), cert. denied, 132 S. Ct. 53 (2011); see Sentencing Guidelines § 2L1.1 (guideline for transporting an unlawful alien). The Ninth Circuit's decision in United States v. Old Chief, 571 F.3d 898, cert. denied, 558 U.S. 1016 (2009), is similarly inapposite, because it involves a conviction for an offense (assault with a dangerous weapon) with a freestanding guideline, not one covered by Section 2A.4.1. See id. at 901 (quoting Sentencing Guidelines § 3A1.3 comment. (n.2)).

Petitioners contend (Pet. 29-30) that other circuits limit use of Section 2A4.1 "to conduct involving abduction, asportation, or significant confinement." But as set forth above, the court of appeals' holding is consistent with that rule, because both the jury and the judge found that petitioners engaged in kidnapping itself. In any event, none of the cases petitioners cite impose such a limitation. In two, the scope of Section 2A4.1 was not at issue. See United States v. Ruggiero, 100 F.3d 284, 291-292 (2d Cir. 1996), cert. denied, 522 U.S. 1138 (1998); United States v. Gonzales, 996 F.2d 88, 91 (5th Cir. 1993). The remaining decisions affirmed application of Section 2A4.1, and did not reject its use or otherwise limit its scope. See United States v. Anderson, 608 Fed. Appx. 369, 373-

375 (6th Cir.), cert. denied, 136 S. Ct. 264 (2015); United States v. Pego, 567 Fed. Appx. 323, 329-330 (6th Cir. 2014); United States v. Douglas, 646 F.3d 1134, 1137 (8th Cir. 2011); United States v. Guidry, 456 F.3d 493, 509-511 (5th Cir. 2006), cert. denied, 549 U.S. 1139 (2007); United States v. Hornsby, 88 F.3d 336, 339 (5th Cir. 1996). Indeed, the court of appeals cited Anderson and Pego to support its decision here. Pet. App. 11.

In sum, the court of appeals' interpretation of the Guidelines is correct, does not conflict with the decision of any other court of appeals, and in any event would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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