No. 11-296

In the Supreme Court of the United States

SCOTT GUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause required dismissal of charges that petitioner assaulted and attempted to murder a fellow inmate who was a member of a rival gang because prison officials placed the victim in the same eight-person cell as petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 642 F.3d 573.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2011. The petition for a writ of certiorari was filed on September 6, 2011. 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 Illinois, petitioner was convicted of assault with intent to commit murder, in violation of 18 U.S.C. 113(a)(1); assault with a dangerous weapon, in violation of 18 U.S.C. 113(a)(3); and two counts of possessing a prohibited object (a shank) in

prison, in violation of 18 U.S.C. 1791(a)(2) and (b)(3). Pet. App. 9a-10a. He was sentenced to life imprisonment on each of the assault counts, to run concurrently with a term of 60 months of imprisonment on each of the prohibited-object counts. *Id.* at 11a. The court of appeals affirmed. *Id.* at 1a-8a.

1. In November 2008, while serving a sentence for a prior offense, petitioner was transferred to a federal prison in Pekin, Illinois, and placed in an isolation cell for processing. Gov't C.A. Br. 5. A few days later, while petitioner was still housed in an isolation cell, an incident occurred in the prison's general population during which a member of the Sureños street gang assaulted a member of the Norteños street gang. *Id.* at 5-7. Although at times members of the two gangs related peacefully in the Pekin prison, the Sureños and Norteños were rivals, and the Norteños generally followed an "on-sight code" requiring members to assault a rival gang member upon seeing such a person in an area of rivalry. *Ibid.* The Norteños also followed a code that required its members to retaliate when someone committed an act of violence against one of its members. *Id.* at 6.

Petitioner was affiliated with the Norteños and with some of the inmates involved in the aforementioned incident.[1] Gov't C.A. Br. 7. Accordingly, before releasing him from isolation, prison officials sought assurances from him that he would not cause problems if released into the general prison population. *Id.* at 7-8. As one official would later testify, petitioner indicated that if no

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[1] More specifically, petitioner was a member of the Nuestra Familia gang, which in turn had an alliance with the Norteños. Gov't C.A. Br. 6 n.2; Pet. App. 4a.

one started anything with him—if "nothing came his way"—he would not create any problems. *Id.* at 8.

In mid-December, after holding extensive meetings with the inmate population in an effort to stave off any further gang-related disturbances, prison officials released petitioner from isolation and moved him into an eight-person cell within a larger general-population housing unit. Gov't C.A. Br. 8. Approximately two weeks later, another prison official assigned Nicholas Padilla—a Sureño who had not been at the prison during the November incident—to the same eight-person cell in which petitioner was housed. *Id.* at 9. This official knew that Padilla was a Sureño but did not know that petitioner was assigned to the same cell. *Id.* at 9-10. Because the prison was releasing Padilla and several other members of the Sureño gang into the general population, guards strip-searched petitioner before his release. *Id.* at 9.

Shortly after Padilla was assigned to the cell, petitioner stabbed him several times with a homemade shank while in one of the common areas of the housing unit. Gov't C.A. Br. 10-11; Pet. App. 1a. Petitioner tried to kill Padilla, but because his shank bent when he stabbed Padilla's head, Padilla survived. Gov't C.A. Br. 10-11.

2. A grand jury in the United States District Court for the Central District of Illinois charged petitioner with assault with intent to commit murder, in violation of 18 U.S.C. 113(a)(1); assault with a dangerous weapon, in violation of 18 U.S.C. 113(a)(3); assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6); and two counts of possessing a prohibited object (a shank) in prison, in violation of 18 U.S.C. 1791(a)(2) and

(b)(3). Gov't C.A. Br. 2.[2] The government would later dismiss the charge of assault resulting in serious bodily injury. *Id.* at 3. Petitioner did not move to dismiss the remaining charges on grounds of outrageous government conduct or otherwise. See generally 1:09-cr-10019-MJR Docket entry Nos. 1-194 (C.D. Ill.).

At petitioner's jury trial, petitioner's defense was that he had been misidentified as the culprit. See Gov't C.A. Br. 13-14; Pet. App. 1a. He did not claim that prison officials had engaged in outrageous conduct by assigning Padilla to the same cell to which he himself was assigned. See Gov't C.A. Br. 21; Pet. C.A. Br. 10.

The jury convicted petitioner on all counts. Pet. App. 9a-10a. Petitioner then filed a motion for a new trial, but again did not allege that the government had engaged in outrageous conduct. Docket entry No. 144, at 1-2. The district court denied the motion, Pet. App. 14a-22a, and later sentenced petitioner to life imprisonment on each of the assault counts, to run concurrently with 60 months of imprisonment on each of the prohibited-object counts, *id.* at 11a.

3. The court of appeals affirmed. Pet. App. 1a-8a. The court rejected petitioner's contention (Pet. C.A. Br. 23-27)—raised for the first time on appeal—that he was entitled to outright dismissal of the assault charges under the Fifth Amendment's Due Process Clause because the prison officials had engaged in outrageous conduct by assigning Padilla to the cell in which petitioner was

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[2] The second charge of possessing a prohibited item in prison arose from petitioner's possession of a second shank while awaiting trial on the four original charges associated with his assault of Padilla. Gov't C.A. Br. 2.

housed.[3] *Id.* at 2a, 7a-8a. The court held that the "'outrageous governmental conduct' * * * defense * * * is not one this circuit recognizes." *Id.* at 2a (citing *United States* v. *Van Engel*, 15 F.3d 623, 631-632 (7th Cir. 1993), cert. denied, 511 U.S. 1142 (1994); *United States* v. *Olson*, 978 F.2d 1472 (7th Cir. 1992), cert. denied, 507 U.S. 997 (1993)). Nevertheless, in the course of rejecting petitioner's claim that the court should have required counsel to present an entrapment defense, the court made clear that any claim that "the guards' conduct was 'outrageous'" could not succeed. *Id.* at 7a. The court explained, as a factual matter, that the warden had believed that "a truce was in place" between the rival gangs and that guards had also received petitioner's assurance beforehand that he would "remain peaceable" if a member of the rival gang was placed in his cell and that petitioner "broke that promise." *Id.* at 6a. In any case, the court reasoned, "[s]omeone who commits a crime willingly, [even] when the opportunity is extended on a silver platter, must pay the penalty." *Id.* at 8a. Just as "[a] kidnapper who kills his victim when the ransom is not paid is guilty of premeditated murder," petitioner could not excuse his crime by arguing that the guards caused it by "plac[ing] the victim in [petitioner's] cell." *Ibid.*

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[3] Petitioner challenged only his two assault convictions on this ground; he did not appeal his two convictions for possessing a prohibited object. Pet. C.A. Br. 10 n.7. Petitioner also challenged the assault convictions on the ground that the district court plainly erred in failing to instruct the jury on entrapment. *Id.* at 12-23. The court of appeals rejected that contention, Pet. App. 2a-8a, and petitioner does not renew it in his petition for a writ of certiorari.

ARGUMENT

Petitioner renews his contention (Pet. 2-13) that the Due Process Clause requires dismissal of the charges against him for assault and attempted murder because Pekin prison officials engaged in outrageous conduct by assigning Padilla, a rival gang member, to the same cell as petitioner. Review of that argument is not warranted because petitioner waived it by not raising it in the district court. In addition, review is not warranted because the court of appeals correctly rejected petitioner's argument and that decision does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioner argues (see Pet. 4-5, 12-13) that the government engaged in conduct that is sufficiently outrageous to warrant barring the government from pursuing a criminal prosecution of petitioner for assault and attempted murder. Review of that claim is not warranted, however, because petitioner waived that argument by failing to raise it in a motion to dismiss in the district court. Rule 12 of the Federal Rules of Criminal Procedure provides, in pertinent part, that "a motion alleging a defect in instituting the prosecution" "must be raised before trial." Fed. R. Crim. P. 12(b)(3)(A). A party who fails to comply with that requirement "waives any [such] defense, objection, or request." Fed. R. Crim. P. 12(e). Courts of appeals agree that, to the extent a defendant may raise a defense of outrageous government conduct, he may not seek relief on appeal on that basis if he did not comply with the requirements of Rule 12 by filing a motion to dismiss before trial. See, *e.g.*, *United States* v. *Nunez-Rios*, 622 F.2d 1093, 1098-1099 (2d Cir. 1980) (quoting what is now Fed. R. Crim. P. 12(b)(3)(A) and underscoring the importance of raising the outrageous conduct issue before trial "so that the

trial court can conduct a hearing with respect to any disputed issues of fact"); *United States* v. *Pitt*, 193 F.3d 751, 760 (3d Cir. 1999) ("[T]he defense of outrageous government conduct is based on an alleged defect in the institution of the prosecution itself and, as a consequence, is covered by [what is now Rule 12(b)(3)(A)]."); *United States* v. *Henderson-Durand*, 985 F.2d 970, 973 (8th Cir.) (same), cert. denied, 510 U.S. 856 (1993); *United States* v. *Mausali*, 590 F.3d 1077, 1080-1081 (9th Cir.) (same), cert. denied, 131 S. Ct. 342 (2010).

Although an appellate court may excuse a waiver "[f]or good cause," Fed. R. Crim. P. 12(e), petitioner has neither alleged nor attempted to establish good cause. For example, he does not contend that he lacked a sufficient understanding of the factual basis for his claim when he would have had to file a motion to dismiss the assault charges. See *Mausali*, 590 F.3d at 1081 (court of appeals refused to excuse waiver of outrageous government conduct defense because "[d]efendant knew of the factual basis supporting his claim at least six months before trial began, when the indictment issued"). Nor could he have claimed such unawareness because the very basis of his claim—the prison officials' placement of Padilla, a rival gang member, in the same cell as him—is something petitioner knew not only before any motions deadline, but before he attacked and attempted to murder Padilla.

Even if petitioner had not waived his outrageous government conduct claim, it would be forfeited and subject to plain-error review under Federal Rule of Criminal Procedure 52(b). See generally *United States* v. *Olano*, 507 U.S. 725 (1993). To establish plain error, a defendant must show that (1) there was an error; (2) it was "obvious"; and (3) it affected his substantial rights. See,

e.g., *Jones* v. *United States*, 527 U.S. 373, 388-389 (1999). And even when a defendant establishes those prerequisites, a reviewing court should exercise discretion to correct the error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *Jones*, 527 U.S. at 388-389. A case in which a defendant would have to satisfy all four of those requirements to gain relief would not be an appropriate vehicle for resolution of the claim petitioner advances. Not only does petitioner's claim lack merit, but he fails to cite any authority that recognizes an outrageous conduct claim on even remotely similar facts. Petitioner cites no authority for his contention (Pet. 13) that prison officials "effectively coerce[d him] into committing criminal acts" by assigning a member of a rival gang to his prison cell after securing petitioner's assurances that he would not start trouble and after searching petitioner for weapons. Thus, any error, even if it occurred, would not constitute "obvious" error, and petitioner therefore would not be entitled to relief for that reason alone.

2. Petitioner contends (Pet. 5-8) that the Court should grant further review to settle a disagreement between some courts of appeals and this Court, and among the courts of appeals, about whether a defendant may ever assert a defense of outrageous government conduct. Review of that issue is not warranted.

a. This Court has stated that it "may some day be presented with a situation in which the conduct of law enforcement is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973). But *Russell* also admonished that the judiciary should not exert "a 'chan-

cellor's foot' veto over law enforcement practices of which it [does] not approve." *Id.* at 435. The Court rejected the due process claim of conscience-shocking conduct on the facts of that case, which involved a government agent's provision of an ingredient used to illegally manufacture methamphetamine. *Id.* at 431-432. And since *Russell*, the Court has never found a case that justified dismissal of an indictment for outrageous government conduct.

Only a few years after *Russell*, the Court in *Hampton* v. *United States*, 425 U.S. 484, 490 (1976), again rejected a defendant's outrageous government conduct defense. In *Hampton*, as here, the defendant admitted that he could not prevail on a defense of entrapment because he was predisposed to commit the contraband offense in question. *Id.* at 488-489 (plurality opinion). The defendant nevertheless argued that the government's encouragement of his criminal tendencies qualified as the type of outrageous conduct mentioned in *Russell* and required dismissal of the charges against him. *Id.* at 485-489. The Court rejected that argument. The plurality stated that "[t]he remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies *solely* in the defense of entrapment." *Id.* at 490 (emphasis added). Any remedy for the alleged "illegal activity" undertaken by the police, the Court stated, would lay "not in freeing the equally culpable defendant * * * but in prosecuting the police under the applicable provisions of state or federal law." *Ibid.* Justice Powell, joined by Justice Blackmun, concurred in the judgment, believing that the case was controlled by *Russell* and declining to address the question reserved there whether due process could ever bar a conviction of a

predisposed defendant based on the outrageousness of the police inducement to engage in illegal narcotics activity. *Id.* at 491-495.

Because this Court has never upheld an outrageous conduct defense, the court of appeals' decision that the defense does not exist does not conflict with any decision of this Court.[4]

b. Relying in part on the plurality opinion in *Hampton*, the Sixth and Seventh Circuits have declined to recognize a defense of outrageous government conduct that is independent of the entrapment doctrine and have held that such a defense therefore does not provide a basis for dismissal (or any other relief) when the defendant was predisposed to commit the offense at issue. See Pet. App. 2a; *United States* v. *Tucker*, 28 F.3d 1420, 1422-1427 (6th Cir. 1994), cert. denied, 514 U.S. 1049 (1995); *United States* v. *Boyd*, 55 F.3d 239, 241 (7th Cir. 1995); *United States* v. *Olson*, 978 F.2d 1472, 1481 (7th Cir. 1992), cert. denied, 507 U.S. 997 (1993).

Some other courts of appeals have not categorically ruled out the possibility that a defendant may be entitled to dismissal of an indictment based on a non-entrap-

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[4] Petitioner's reliance (Pet. 6, 8-10) on *Rochin* v. *California*, 342 U.S. 165 (1952), is misplaced. In that case, the Court held that police officers' conduct in procuring evidence against a defendant "shock[ed] the conscience," violated the guarantees of the Due Process Clause, and barred prosecution of the defendant. *Id.* at 172-174. But that case did not involve an allegation that officers somehow caused the defendant to commit the crimes in question. See *id.* at 166 (officers forcibly entered defendant's room without a warrant, used force to attempt to prevent defendant from swallowing two capsules, and had defendant's stomach pumped against his will to extract the swallowed capsules). The holding of that case is therefore not relevant to petitioner's allegation that prison officials' conduct induced petitioner to attack and attempt to murder Padilla.

ment outrageous-conduct claim. See, *e.g.*, *United States* v. *Santana*, 6 F.3d 1, 4 (1st Cir. 1993); *United States* v. *Berkovich*, 168 F.3d 64, 68-69 (2d Cir.), cert. denied, 528 U.S. 849 (1999); *United States* v. *Barbosa*, 271 F.3d 438, 469 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002); *United States* v. *Daniel*, 3 F.3d 775, 779 (4th Cir. 1993), cert. denied, 510 U.S. 1130 (1994); *United States* v. *Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003), cert. denied, 541 U.S. 1074 (2004); *United States* v. *Nguyen*, 250 F.3d 643, 645-646 (8th Cir. 2001); *United States* v. *Simpson*, 813 F.2d 1462, 1464-1465 (9th Cir.), cert. denied, 484 U.S. 898 (1987); *United States* v. *Mosley*, 965 F.2d 906, 909 (10th Cir. 1992); *United States* v. *Capo*, 693 F.2d 1330, 1336 (11th Cir. 1982), cert. denied, 460 U.S. 1092 (1983); *United States* v. *Gaviria*, 116 F.3d 1498, 1533-1534 (D.C. Cir. 1997) (per curiam), cert. denied, 522 U.S. 1082 (1998). But that does not provide a basis for granting further review in this case.

Those courts of appeals have emphasized that an outrageous government conduct defense would be available only in the "rare[st]," *Daniel*, 3 F.3d at 779, and "most egregious," *Barbosa*, 271 F.3d at 469, cases in which a defendant had only a "passive role" in the offense, *Gutierrez*, 343 F.3d at 421, and in which the government undertook "coerci[ve]" or "brutal[ ]" measures, *Gaviria*, 116 F.3d at 1534, that "shock the conscience," *Nguyen*, 250 F.3d at 646; see *Mosley*, 965 F.2d at 910, under a "totality of the circumstances" analysis, *Capo*, 693 F.2d at 1336; see *Mosley*, 965 F.2d at 910. This case, involving a violent assault on a cellmate after petitioner assured prison officials that the sharing of a cell would not be problematic, cannot plausibly be described as involving conscience-shocking government conduct that victimized a passive defendant. Petitioner specifically

assured the officials ahead of time that he would not create any problems if no one initiated an altercation with him. Gov't C.A. Br. 7-8; see Pet. App. 6a. That "pledge[ ] to remain peaceable," Pet. App. 6a, together with the fact that the particular official who assigned Padilla to petitioner's eight-person cell did not know petitioner was already housed there, see Gov't C.A. Br. 10, refutes any suggestion that prison officials deliberately incited petitioner's assault on Padilla. In addition, as the court of appeals explained in rejecting petitioner's entrapment defense, the supposition that "the guard's conduct was 'outrageous' because they know how members of gangs behave, and that the guards compelled [petitioner] to attack by placing him near a member of a rival gang * * * is not a legal argument." Pet. App. 7a. A defendant cannot hold the government accountable for his decision to attempt murder. "If [petitioner] feared that his cellmate would attack him," or that his failure to attack his cellmate would expose him to reprisal from his own gang, "he should have raised the subject with the guards." *Ibid.*

Petitioner cites (Pet. 7) only two cases in which courts of appeals have dismissed criminal charges based on outrageous government conduct, neither of which considered the defense under a plain-error standard of review. In the first, *Greene* v. *United States*, 454 F.2d 783 (1971), the Ninth Circuit dismissed criminal charges based on the "unique" misconduct there, *id.* at 786-787 (discussing the government's extensive years-long engagement with bootlegging defendants)—but it did so before a plurality of this Court stated in *Hampton* that "[t]he remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the de-

fense of entrapment." 425 U.S. at 490. The Ninth Circuit itself has since recognized (albeit in an unpublished decision) that *Greene* may no longer be viable after *Hampton*. *United States* v. *Haas*, 141 F.3d 1181 (table), 1998 WL 88550, at *1 (9th Cir. Mar. 3, 1998) ("*Green[e]* predates *Russell* and *Hampton*, so does not reflect the current law of the circuit on outrageous government conduct."). Although the second case, *United States* v. *Twigg*, 588 F.2d 373, 380-382 (3d Cir. 1978), post-dates *Hampton*, that case has also been called into question because it relied on circuit precedent that pre-dated and was later undermined by the decision in *Hampton*. See *United States* v. *Beverly*, 723 F.2d 11, 12 (3d Cir. 1983) (per curiam). Even if that case remained good law, its result does not conflict with the result here because it did not involve an allegation of misconduct in the prison context, let alone conclude that prison officials acted so outrageously in assigning members of rival gangs to the same prison cell as to bar a prosecution for a violent and unprovoked attack on a cellmate that was intended to result in his death.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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