

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13425

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

SILVERIO HENRIQUEZ,

VICTOR MANUEL PENA-ABREU,

a.k.a. Victor Manuel,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:22-cr-20161-DPG-1

Before BRANCH, BRASHER, Circuit Judges, and SNEED,* District Judge.

PER CURIAM:

Codefendants Silverio Henriquez and Victor Pena-Abreu appeal their convictions for drug-related crimes under the Maritime Drug Law Enforcement Act (“MDLEA”). They jointly argue that the district court erred in denying their motion to dismiss the indictment because (1) the MDLEA is unconstitutional as applied to them because their vessel was seized in the Dominican Republic’s Exclusive Economic Zone (“EEZ”), which is not part of the “high Seas,” and is therefore not subject to Congress’s authority; and (2) dismissal was warranted as a sanction for the government’s violation of Federal Rule of Criminal Procedure 5(a) and 5(b). Additionally, Pena-Abreu argues, in the alternative, that the indictment should have been dismissed due to the government’s outrageous conduct. After review, we affirm their convictions. However, we *sua sponte* note a scrivener’s error in their respective judgments, which incorrectly indicate that they entered guilty pleas when in fact they were found guilty following a stipulated bench trial. Accordingly, we remand this case to the district court for the limited purpose of correcting the scrivener’s error in the respective judgments.

* The Honorable Julie Sneed, United States District Judge for the Middle District of Florida, sitting by designation.

23-13425

Opinion of the Court

3

I. Background

On March 30, 2022, a Dutch vessel with a United States Coast Guard team onboard stopped a go-fast vessel bearing no indicia of nationality 140 nautical miles south of the Dominican Republic in the Dominican Republic's EEZ. When the Coast Guard boarded the vessel, no one claimed to be the vessel's master or made any claim of nationality for the vessel, which rendered it a "vessel without nationality" subject to the jurisdiction of the United States under § 70502(d)(1)(B) of the MDLEA. When the Coast Guard searched the vessel, they discovered approximately 500 kilograms of cocaine.

Henriquez and Pena-Abreu, among others on board the go-fast vessel, were then taken into custody by the Coast Guard. A criminal complaint was filed on April 12, 2022, in the Southern District of Florida, charging them with conspiracy to possess with intent to distribute a controlled substance while onboard a vessel subject to the jurisdiction of the United States. Eight days later, a grand jury returned an indictment charging them with conspiracy to possess with intent to distribute and possessing with intent to distribute cocaine onboard a vessel subject to the jurisdiction of the United States.¹ The next day, Henriquez and Pena-Abreu made their initial appearance before a magistrate judge in the Southern District. In total, they spent 22 days at sea and were transferred

¹ A superseding indictment was issued shortly thereafter to correct the names of some of the codefendants.

between multiple vessels before landing in the United States and making their initial appearance.

Following their arraignment, Henriquez and Pena-Abreu jointly moved to dismiss the indictment, advancing two arguments relevant to this appeal. First, they argued that the MDLEA was limited to offenses occurring on the high seas pursuant to Congress's authority under Article I, Section 8, Clause 10 of the United States Constitution to "define and punish . . . Felonies committed on the high Seas," and the high seas under customary international law do not include EEZs. Therefore, they maintained that the statute was unconstitutional as applied to them because their alleged offenses occurred inside the Dominican Republic's EEZ. Second, citing the 12-day delay between their arrest and the filing of a criminal complaint and the 22-day delay between their arrest and their initial appearance before a magistrate judge, they argued that the indictment should be dismissed as a sanction for the government's violation of Rules 5(a) and 5(b) of the Federal Rules of Criminal Procedure² or, in the alternative, based on the outrageous government conduct doctrine.

² Federal Rule of Criminal Procedure 5(a)(1)(B) provides 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." Fed. R. Crim. P. 5(a)(1)(B). Rule 5(b) provides that "[i]f a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed." *Id.* R. 5(b).

23-13425

Opinion of the Court

5

The government opposed the motion, arguing that Congress’s authority to proscribe conduct extends to all waters that are not territorial waters of another sovereign nation—including EEZs. Furthermore, it maintained that there was no violation of Rule 5(a) because there was no unnecessary delay between the arrest of Henriquez and Pena-Abreu and their first appearance. Moreover, the government argued that even if there were a violation of Rule 5(a), dismissal was not the appropriate remedy. Finally, it argued that there was no violation of Rule 5(b) because Rule 5(b) stemmed from the Fourth Amendment and, under this Court’s precedent, the Fourth Amendment did not apply to arrests of aliens in international waters.

A two-day evidentiary hearing on the motion to dismiss was held before a magistrate judge. Lieutenant Nicholas Fujimoto with the Coast Guard testified that he was employed as a staff officer who worked within a specific maritime “district” to coordinate tactical movements of Coast Guard vessels. He explained the general process that occurs when the Coast Guard comes upon a stateless vessel in international waters. If the Coast Guard has probable cause to believe a crime has been committed, they will take custody of the individuals on the stateless vessel and await a notice from headquarters as to where in the United States the matter will be prosecuted. In this case, the Coast Guard took custody of Henriquez and Pena-Abreu on March 30, 2022, and received notice from the Department of Justice on April 6, 2022, that the case would be prosecuted in the Southern District of Florida. Fujimoto explained that, once a district is designated for

prosecution, the Coast Guard “work[s] to get the detainees offloaded and transferred to a case agent as soon as [it] can.” To facilitate this process, the detainees are usually “moved between various vessels because the interdiction usually happens far from the United States,” and different vessels have different designated areas that they must stay in and patrol as part of the vessel’s mission. The vessel’s mission and designated patrol area never changes even if it has detainees onboard. Therefore, the detainees frequently have to be moved between different vessels through the different designated areas to get them to the United States.

Fujimoto explained that he had reviewed the Coast Guard’s records related to Henriquez and Pena-Abreu’s detention and transfer to the Southern District of Florida, and he described their movements as follows. At the time of the interdiction, the go-fast vessel was 140 nautical miles south of the Dominican Republic in the EEZ and 922 nautical miles from the Southern District of Florida. Henriquez and Pena-Abreu were brought aboard the Dutch vessel as detainees on March 30, 2022, after the suspected contraband on the ship field-tested positive for narcotics. However, Dutch vessels are “only allowed to have detainees onboard for 72 hours.” So the very next day, they were transferred to the USS Billings, which is a United States naval vessel. On April 6, they were transferred to the Coast Guard cutter Joseph Tesanos. On April 10, they were transferred back to the USS Billings and

then by helicopter to the USS Wichita.³ On April 11, they were transferred back to the Joseph Tسانos cutter. On April 15, they were transferred to Coast Guard cutter Thetis. The Thetis then took them to the Naval Air Station at Guantanamo Bay, where they landed on April 20, and were transferred into the custody of the Drug Enforcement Administration (“DEA”). The DEA then took Henriquez and Pena-Abreu to Miami. Fujimoto stated that “[t]here [was] nothing in [the] records that suggest[ed] that the Coast Guard delayed the delivery” of Henriquez and Pena-Abreu to the United States.

Fujimoto explained that Henriquez and Pena-Abreu were transferred from the Coast Guard cutter Joseph Tسانos back to the USS Billings on April 10 because the Joseph Tسانos had to go into port in San Juan, Puerto Rico. He explained that Henriquez and Pena-Abreu were not taken to Puerto Rico because “the case was not dispositioned to Puerto Rico, and there were not case agents ready to receive the detainees in Puerto Rico at the time when the transfer occurred.”

On cross-examination, Fujimoto confirmed that it was 355 nautical miles between the interdiction point and Guantanamo Bay. Fujimoto acknowledged that the United States has a Justice

³ On cross-examination, Fujimoto did not know why Henriquez and Pena-Abreu were transferred the same day from the USS Billings to the USS Wichita because the Coast Guard has no involvement with the management of naval vessels, and the Navy would have been the one to make that transfer decision. Fujimoto also had no knowledge of where the USS Billings or the USS Wichita were headed.

Department in Puerto Rico and sometimes cases are designated for prosecution there. Fujimoto reiterated that, at the time the Joseph Tesanos went into port in Puerto Rico, there were no case agents available to receive the detainees, and “the Coast Guard will not bring detainees to land unless they are ready to be received by case agents.” Fujimoto acknowledged that it is possible for case agents to come to Puerto Rick to pick up the detainees and then the case agents can transfer the detainees to another district where they are being prosecuted. He acknowledged that such arrangements could have theoretically been made for Henriquez and Pena-Abreu, but no attempt was made by the Coast Guard to communicate with the Department of Justice to make such arrangements. It was Fujimoto’s understanding that the Coast Guard had to “get the [detainees] to the case agents first” before the detainees appeared before a magistrate judge, but he acknowledged that he “could be understanding something wrong.” He did not know what would have occurred had the Coast Guard delivered the detainees to Puerto Rico without case agents available.

Fujimoto did not know how far off the coast of Puerto Rico the Coast Guard cutter Thetis was when Henriquez and Pena-Abreu were transferred to it, but he explained that it was the Coast Guard’s “common practice[] and procedure[]” to keep detainees “outside of 12 nautical miles” of the coast. When asked why the Coast Guard keeps detainees outside of 12 nautical miles of the coast, Fujimoto stated that it was his understanding that, if the Coast Guard brings detainees within 12 nautical miles of the coast, “it affects the case.” When asked to explain how it affected the

23-13425

Opinion of the Court

9

case, Fujimoto stated that he did not really understand “why that is,” but that he just knew that if the Coast Guard brings detainees into the territorial waters of the United States “that’s when the amendments start playing more of a role in[] the case.” Henriquez’s counsel then asked, “so there is a decision made to keep the ship out of that 12-mile range so that constitutional amendments don’t come into play,” and Fujimoto stated, “Correct.”

DEA Detective Luis Hosch testified that he was the lead officer in the case, and he was assigned to the case on April 6, 2022. He filed the criminal complaint approximately a week later on April 12, but acknowledged that he had all the information needed to file a complaint as of April 6. He picked up Henriquez and Pena-Abreu at Guantanamo Bay and brought them to the Southern District. The DEA had no role in the decision to take Henriquez and Pena-Abreu to Guantanamo Bay or in the timing of their arrival. Rather, the Coast Guard made those decisions. Detective Hosch confirmed that he was available to travel between April 6 and April 20, and that he had at times traveled to Puerto Rico for other cases. He interviewed Henriquez and Pena-Abreu upon their arrival in the United States, and they made their initial appearance before a magistrate judge the very next day.

Following the evidentiary hearing, the magistrate judge issued a report and recommendation (“R&R”), recommending that the motion to dismiss be granted in part and denied in part. First, the magistrate judge concluded that the MDLEA applies within an

EEZ. Second, turning to the alleged Rule 5 violations, the magistrate judge found that there was a federal detention center in Puerto Rico, as well as DEA agents, United States Marshals, and magistrate judges. Therefore, the magistrate judge concluded that, “if the Government wanted to do so, it could have easily brought [the] Defendants before a Judge in Puerto Rico by April 10, 202[2], at the very latest.” However, “the Government made a tactical decision to avoid that potential first appearance because it wanted to give its assigned case agent the opportunity to interrogate Defendants *before* a Judge could advise Defendants of their rights, inform Defendants of the charges against them, and appoint counsel for their defense.” (emphasis in original). The magistrate judge noted that “the Government tried really hard to avoid bringing the Defendants to Puerto Rico. And [it] did so by . . . deploying two Naval warships and one Naval helicopter to keep them in international waters from April 8, 202[2], through April 11, 202[2].” Thus, the magistrate judge focused on Henriquez’s and Pena-Abreu’s last ten days at sea (*i.e.*, from April 11 to April 21) and considered the relevant factors set forth in *United States v. Purvis*, 768 F.2d 1237, 1238–39 (11th Cir. 1985), for determining whether the delay in presentment of Henriquez and Pena-Abreu for their initial appearance before a magistrate judge was unnecessary. After weighing all the factors, the magistrate judge concluded that the delay was unnecessary and violated Rule 5(a)(1)(B), because “the reason for the delay was essentially to acquire additional evidence [for] the prosecution in a manner that strategically evades the protections afforded by our constitution[.]”

23-13425

Opinion of the Court

11

Nevertheless, the magistrate judge determined that the remedy for the violation was not dismissal of the indictment. Rather, the magistrate judge noted that, in *Purvis*, this Court explained that “[t]he purpose of Rule 5(a) is to prevent oppressive police interrogations and other ‘third-degree’ tactics before bringing the accused in front of an officer of the court.” Thus, the appropriate remedy was suppression of the defendants’ April 20, 2022, statements to Detective Hosch that were obtained because of the delay in presentment to the magistrate judge.

Third, the magistrate judge concluded that the record did not support the conclusion that the government’s conduct was “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”

Finally, the magistrate judge concluded that the defendants’ Rule 5(b) arguments were “foreclosed because [d]efendants are neither citizens nor residents of the United States; thus, having been arrested in international waters, controlling precedent provides that they do not have Fourth Amendment rights.”

Accordingly, the magistrate judge recommended that the motion to dismiss be granted in part and the defendants’ April 20, 2022, statements be suppressed, and denied in part as to all other grounds.

Both the government and the defendants filed objections to the R&R, objecting to each of the magistrate judge’s determinations. After reviewing *de novo* the objected-to portions,

the district court adopted the R&R in full and suppressed the defendants' April 20 statements.

Thereafter, Henriquez and Pena-Abreu proceeded to a stipulated bench trial, where they were found guilty as charged. The district court sentenced both Henriquez and Pena-Abreu to 57 months' imprisonment, to be followed by two years' supervised release.⁴ This appeal followed.

II. Standards of Review

"Generally, the district court's denial of a motion to dismiss an indictment is reviewed only for an abuse of discretion." *United States v. Alfonso*, 104 F.4th 815, 820 (11th Cir. 2024), *cert. denied*, 145 S. Ct. 2706 (2025). However, because Henriquez's and Pena-Abreu's constitutional challenge to the MDLEA invokes the district court's subject matter jurisdiction, we review the district court's denial of the motion to dismiss *de novo*. *Id.* We also "review *de novo* a district court's interpretation of a statute and whether a statute is constitutional." *Id.* (quotations omitted).

We review the denial of a motion to dismiss the indictment based on a violation of Rule 5 of the Federal Rules of Criminal Procedure for abuse of discretion because a violation of the Rules of Criminal Procedure does not implicate the court's subject

⁴ We note however that their respective judgments indicate that they pleaded guilty, which is incorrect. Therefore, we will remand this case for correction of this scrivener's error. See *United States v. Reeves*, 742 F.3d 487, 507 n.12 (11th Cir. 2014) ("We may *sua sponte* raise the issue of clerical errors in a judgment and remand with instructions that the district court correct them.").

matter jurisdiction. *See id.*; *United States v. Hurtado*, 89 F.4th 881, 891 (11th Cir. 2023). “A district court abuses its discretion when it applies an incorrect legal standard, relies on clearly erroneous factual findings, or commits a clear error of judgment.” *United States v. \$70,670.00 in U.S. Currency*, 929 F.3d 1293, 1300 (11th Cir. 2019). “[W]e review legal questions concerning the Rules of Criminal Procedure . . . *de novo*.” *United States v. Noel*, 231 F.3d 833, 836 (11th Cir. 2000).

Finally, we review *de novo* the denial of a motion to dismiss based on the outrageous government conduct doctrine. *Hurtado*, 89 F.4th at 891 (“This Court . . . reviews a denial of a motion to dismiss an indictment *de novo* if the asserted ground is outrageous government conduct.”).

III. Discussion

Henriquez and Pena-Abreu jointly argue that the district court erred in denying their motion to dismiss the indictment because (1) the MDLEA is unconstitutional as applied to them because their vessel was seized in the Dominican Republic’s EEZ, which is not part of the high seas, and is therefore not subject to Congress’s authority; and (2) dismissal was warranted as a sanction for the government’s violation of Criminal Procedure Rule 5(a) and 5(b). Additionally, Pena-Abreu argues, in the alternative, that the

indictment should have been dismissed due to the government's outrageous conduct.⁵ We address each argument in turn.

A. Whether the district court erred in concluding that it had subject matter jurisdiction because the EEZ is part of the "high Seas"

Henriquez and Pena-Abreu maintain that the MDLEA is unconstitutional as applied to them because their offenses occurred within the Dominican Republic's EEZ, which they maintain is not part of the high seas under customary international law and

⁵ In his reply brief, Pena-Abreu also argues that the district court erred in denying the motion to dismiss the indictment because the government failed to establish that it "asked the proper questions to identify the master or individual in charge" of the vessel, and therefore the government lacked statutory jurisdiction under 46 U.S.C. § 70502(d). Section 70502(d)(1)(B) provides that a vessel is stateless and subject to the jurisdiction of the United States where "the master or individual in charge fails, on request of an officer of the United States . . . to make a claim of nationality or registry for that vessel." 46 U.S.C. § 70502(d)(1)(B). Although Pena-Abreu raised this issue in his motion to dismiss before the district court, he failed to raise it in his initial brief on appeal. We do not address issues raised for the first time in a reply brief. *United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002); *see also United States v. Fiallo-Jacome*, 874 F.2d 1479, 1481 (11th Cir. 1989) ("An appellant in a criminal case may not raise an issue for the first time in a reply appellate brief."). In any event, his claim fails. At the conclusion of the evidentiary hearing on the motion to dismiss, Henriquez's counsel "concede[d]," on behalf of all the defendants that "based on the testimony that's been presented, . . . the vessel [was] stateless, [and the] defendants did not make a claim of nationality. So we will concede on that issue." Accordingly, the vessel was stateless under 46 U.S.C. § 70502(d)(1)(B), and statutory jurisdiction existed.

therefore Congress lacks constitutional authority to regulate their conduct. The government argues that their constitutional challenge is foreclosed by our binding precedent in *Alfonso* and *United States v. Canario-Vilomar*, 128 F.4th 1374, 1382 (11th Cir. 2025). The government is correct.

The MDLEA makes it a crime to knowingly and intentionally possess a controlled substance with intent to distribute while onboard a vessel subject to the jurisdiction of the United States and to conspire to do the same. 46 U.S.C. §§ 70503(a)(1), (e)(1), 70506(b). The MDLEA “applies even though the act is committed outside the territorial jurisdiction of the United States.” *Id.* § 70503(b). Under the Felonies Clause in Article I, Section 8, Clause 10 of the Constitution, Congress has the power to “define and punish Piracies and Felonies committed on the high Seas.” U.S. Const. art. I, § 8, cl. 10. We have repeatedly held that the MDLEA is constitutional under the Felonies Clause as applied where the subject vessels are found on the high seas. *See, e.g., United States v. Cabezas-Montano*, 949 F.3d 567, 587 (11th Cir. 2020); *United States v. Valois*, 915 F.3d 717, 722 (11th Cir. 2019); *United States v. Cruickshank*, 837 F.3d 1182, 1187–88 (11th Cir. 2016).

Here, Henriquez’s and Pena-Abreu’s argument that the EEZ is not part of the high seas for purposes of the Felonies Clause is foreclosed by binding precedent. *See Alfonso*, 104 F.4th at 823–24, 827; *Canario-Vilomar*, 128 F.4th at 1382. “The EEZ[] [is] a term of relatively modern vintage” that refers to the area of water “just beyond a nation’s territorial waters but within 200 miles of the

coastal baseline.” *Canario-Vilomar*, 128 F.4th at 1382. In *Alfonso*, we held that “the EEZ is part of the ‘high seas’ for purposes of the Felonies Clause in Article I of the Constitution,” rejecting the same arguments that the defendants make here. *See* 104 F.4th at 823–24. We explained that the Founding era concept of high seas began where “territorial waters” ended, without any other “[s]pecial carveout zones.” *See id.* at 823–24. And in doing so, we rejected similar arguments that customary international law limited the scope of Congress’s power under the Felonies Clause. *Id.* at 825–26; *see also Canario-Vilomar*, 128 F.4th at 1382 (“[N]othing about the modern EEZ as defined by customary international law disturbs in any way the Founding era concept of the term ‘high seas’ that informed the original meaning of the Felonies Clause.” (quotations omitted)). We then reaffirmed *Alfonso*’s holdings in *Canario-Vilomar*. 128 F.4th at 1381–82.

Under our prior-panel-precedent rule, we are bound by *Alfonso* and *Canario-Vilomar* unless and until they are “overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting *en banc*.” *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Although Pena-Abreu asserts that we have not addressed the precise arguments that he makes concerning why the EEZ is not part of the high seas, “time and time again, we have categorically rejected an overlooked reason or argument exception to the prior-panel precedent rule.” *Canario-Vilomar*, 128 F.4th at 1381 (quotations omitted). Accordingly, their constitutional challenge is squarely foreclosed by circuit precedent,

23-13425

Opinion of the Court

17

and the district court properly denied their motion to dismiss the indictment on this ground.

B. Whether the district court abused its discretion in declining to dismiss the indictment for the alleged Rule 5 violations

Henriquez and Pena-Abreu argue that once the district court concluded that the government violated Rule 5(a), the appropriate remedy was dismissal of the indictment, not merely suppression of their statements, and that the district court abused its discretion in holding otherwise. Additionally, they argue that the district court incorrectly concluded that they could not claim a Rule 5(b) violation because they do not have Fourth Amendment rights. They contend that the proper remedy for the alleged Rule 5(b) violation is dismissal of the indictment.

The government, in turn, maintains that there was no unnecessary delay in presenting Henriquez and Pena-Abreu to a magistrate judge in the Southern District, and that the alleged delay was similar to other cases in which we have upheld such delays as not unnecessary or otherwise found that dismissal of the indictment was not an appropriate remedy for a violation of the rule. Furthermore, the government contends that Rule 5(a) is focused on unwarranted interrogation and where there is none, or no prejudice results, a violation of the rule does not warrant dismissal of the indictment. Finally, the government contends that the district court properly concluded that Henriquez and Pena-Abreu could not claim a Rule 5(b) violation because the Fourth

Amendment's protection against unreasonable searches and seizures, which Rule 5(b) is designed to safeguard, does not apply to aliens seized on the high seas.

i. Rule 5(a)

We begin with Rule 5(a). Rule 5(a), entitled "Appearance Upon an Arrest," provides 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." Fed. R. Crim. P. 5(a)(1)(B). The text of the Rule does not define what constitutes an "unnecessary delay," nor does it prescribe any particular remedy for a violation of the rule. Accordingly, the Rule 5(a) issue here centers around two questions (1) whether the 22-day delay between the defendants' arrest and their presentment before a magistrate judge was an "unnecessary delay" within the meaning of the rule, and (2) if it was an unnecessary delay, what is the appropriate remedy for that violation.

Here, we need not answer the first question because, even if there were an unnecessary delay and a violation of Rule 5(a), the district court did not abuse its discretion in concluding that dismissal of the indictment was not an appropriate remedy for the delay. As the Supreme Court has explained, the presentment without "unnecessary delay" requirement set forth in Rule 5(a) "is part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement." *Mallory v. United States*, 354 U.S. 449, 453 (1957).

23-13425

Opinion of the Court

19

“[T]he plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to secret interrogation of persons accused of crime.” *Upshaw v. United States*, 335 U.S. 410, 412 (1948) (quotations omitted); *see also Mallory*, 354 U.S. at 451–54 (explaining that Rule 5(a) is designed to prevent oppressive police interrogations and other “third-degree” tactics before bringing the accused in front of an officer of the court). Thus, Rule 5(a) “aims to avoid all the evil implications of secret interrogation of persons accused of crime[s].” *Mallory*, 354 U.S. at 453 (quotations omitted). As a result, the Supreme Court has authorized the remedy of suppression of the evidence obtained as a result of an unnecessary delay in presentment for a Rule 5(a) violation. *See McNabb v. United States*, 318 U.S. 332, 346–47 (1943); *Upshaw*, 335 U.S. at 413–14. Accordingly, the district court did not abuse its discretion in concluding that suppression of Henriquez’s and Pena-Abreu’s statements to Detective Hosch prior to their presentment to the magistrate judge was the appropriate remedy for the Rule 5(a) violation in this case.

The defendants resist this conclusion, arguing that because Rule 5(a) does not specify a remedy, the judicially created remedy for a Rule 5 violation needs to be one that “provide[s] meaningful relief or deterrence of similar future violations.” They maintain that suppression of their statements does not provide them meaningful relief because their statements were “cumulative” to other evidence, and therefore, suppression of their statements does nothing to deter the government’s alleged pattern of unnecessary

delays in MDLEA cases to prevent judicial oversight of the case. We are unpersuaded. As we have repeatedly emphasized in other contexts, absent “demonstrable prejudice, dismissal of an indictment is inappropriate” even in the case of “the most egregious . . . misconduct.” See *United States v. Esformes*, 60 F.4th 621, 633 (11th Cir. 2023) (holding that prosecutorial misconduct in the form of violations of the defendant’s attorney-client privilege did not warrant dismissal of the indictment and that instead the appropriate remedy was exclusion of the evidence); *United States v. Graham*, 80 F.4th 1314, 1317–18 (11th Cir. 2023) (explaining that a violation of the Federal Rule of Criminal Procedure related to grand juries does not warrant dismissal of the indictment absent a showing of prejudice). This general principle applies equally to Rule 5(a) violations, and given the harms that Rule 5(a) was designed to safeguard against, suppression of the evidence obtained because of the unnecessary delay in presentment is the appropriate remedy for a Rule 5(a) violation. Accordingly, after finding a Rule 5(a) violation, the district court did not abuse its discretion in declining to dismiss the indictment and instead opting to suppress Henriquez’s and Pena-Abreu’s statements that were obtained because of the unnecessary delay in presentment.

ii. Rule 5(b)

Now we turn to the defendants’ Rule 5(b) claim. Rule 5(b), entitled “Arrest Without a Warrant,” provides that “[i]f a defendant is arrested without a warrant, a complaint meeting Rule 4(a)’s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.” Fed. R. Crim.

P. 5(b). And as the defendants point out, the Fourth Amendment requires a timely judicial determination of probable cause, generally within 48 hours of arrest. While there was a 13-day delay between the defendants' arrests and the filing of the criminal complaint, the district court correctly determined that Henriquez and Pena-Abreu cannot claim a Rule 5(b) violation. As we explained in *Cabezas-Montano*, "the Fourth Amendment does not apply to searches and seizures (arrests) by the United States of a non-citizen/non-resident alien arrested in international waters or a foreign country." 949 F.3d at 593. Thus, "the correct analytical framework for [Henriquez's and Pena-Abreu's] delay-in-presentment challenge is under Rule 5(a)," which we have addressed. *Id.* at 594.

The defendants assert that our discussion in *Cabezas-Montano* is not controlling because the defendant in that case did not raise a Rule 5(b) claim, and although that defendant made a Fourth Amendment challenge based on the failure to show probable cause within 48-hours, we reviewed the claim for plain error only. These distinctions, however, do not compel a different result here. Our discussion in *Cabezas-Montano* was based on the Supreme Court's holding in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990), that the Fourth Amendment does not apply to search and seizure challenges by aliens who are seized outside of the United States. This holding clearly forecloses Henriquez's and Pena-Abreu's Rule 5(b) violation challenge because, as the defendants acknowledge, Rule 5(b) stems from the Fourth Amendment's protections against unreasonable seizures.

Thus, under the Supreme Court’s holding in *Verdugo-Urquidez*, they cannot claim a Rule 5(b) violation because the Fourth Amendment does not apply to them. See *Verdugo-Urquidez*, 494 U.S. at 274–75.

*C. Whether the district court erred in denying the motion
to dismiss based on the outrageous government
conduct doctrine*

Pena-Abreu argues that the indictment should have been dismissed due to the government’s outrageous conduct because the government’s conduct in “arresting foreign nationals at sea and subjecting them to prolonged detention without access to the courts” violates fundamental fairness and due process.⁶ The government, in turn, argues that the doctrine does not apply in this case because the alleged outrageous conduct occurred after the conclusion of the defendants’ criminal acts. Moreover, the government points out that no court has ever found the doctrine to apply. We agree with the government.

“Outrageous government conduct is a potential defense that focuses on the tactics employed by law enforcement officials to obtain a conviction for conduct beyond the defendant’s predisposition.” *United States v. Cannon*, 987 F.3d 924, 941 (11th Cir. 2021) (quotations omitted). The doctrine “is based on the Supreme

⁶ Henriquez does not discuss the outrageous government conduct doctrine in his initial brief or in his reply. Therefore, we view this argument as a sole challenge by Pena-Abreu. Nevertheless, even if Henriquez also raised the issue, it would fail for the reasons set forth in this opinion.

Court’s recognition of the possibility that law enforcement’s tactics may be so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *Id.* (quotations omitted). The doctrine requires the defendant to show “that law enforcement’s techniques violate fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment.” *Id.* (quotations omitted). Importantly, however, the government’s alleged outrageous conduct “must relate to the . . . underlying or charged criminal acts.” *United States v. Jayyousi*, 657 F.3d 1085, 1111 (11th Cir. 2011). Thus, in *Jayyousi*, for example, we held that, even if the outrageous conduct doctrine existed, it would not apply to a claim “relat[ing] to alleged mistreatment [the defendant] received at the brig after the conclusion of his criminal acts and prior to the indictment on the present charges,” since there was no “government intrusion into his underlying criminal conduct.” *Id.* at 1112. Because the alleged government misconduct here occurred after the conclusion of Henriquez’s and Pena-Abreu’s criminal offenses, the outrageous government conduct doctrine does not apply.⁷ *See id.* Accordingly, the district court did not err

⁷ We note that while we have recognized the defense, albeit largely in *dicta*, it has never succeeded in this Court or the Supreme Court. *Cannon*, 987 F.3d at 942. And “[s]everal of our sister circuits have either rejected this defense completely, or have been sharply critical of the defense.” *Jayyousi*, 657 F.3d at 1111 (collecting cases).

in denying the motion to dismiss based on the outrageous government conduct doctrine.

IV. Conclusion

For the reasons set forth above, we affirm Henriquez's and Pena-Abreu's convictions. However, there is a scrivener's error in each of their respective judgments which reflects that they pleaded guilty when in fact they were convicted following a stipulated bench trial. We therefore remand this case for the limited purpose of correcting the scrivener's error in the respective judgments.

**AFFIRMED. REMANDED IN PART FOR
CORRECTION OF THE JUDGMENTS.**