No. 18-5534

IN THE SUPREME COURT OF THE UNITED STATES

JUAN CARRASQUILLA-LOMBADA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners were convicted of committing drug-related offenses while on board a vessel in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq. The questions presented are:

1. Whether petitioners were entitled under the Sixth Amendment to a jury determination that the vessel at issue was "subject to the jurisdiction of the United States," 46 U.S.C. 70503(e)(1) (Supp. IV 2016), when the MDLEA specifies that its jurisdictional question "is not an element of an offense" but a "preliminary question[ ] of law to be determined solely by the trial judge," 46 U.S.C. 70504(a).

2. Whether 46 U.S.C. 70502(d)(2), which provides that a foreign nation's response to a claim of registry made by the master of a vessel "is proved conclusively by a certification of the Secretary of State" or his designee, violates the Confrontation Clause of the Sixth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-46) is reported at 685 Fed. Appx. 761.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2017. A petition for rehearing was denied on May 9, 2018. The petition for a writ of certiorari was filed on August 6, 2018. 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 Middle District of Florida, petitioners were each convicted of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a), 70506(a) (2012); 46 U.S.C. 70506(b); and 21 U.S.C. 960(b)(1)(B)(ii). Pet. App. 9-11. Five of the seven petitioners here (Barona-Bravo, Ortiz-Cervantes, Otero-Pomares, Torres, and Patino-Villalobos) were also convicted of possession with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a), 70506(a) (2012); 46 U.S.C. 70506(b); and 21 U.S.C. 960(b)(1)(B)(ii). Pet. App. 10-11. Petitioners were each sentenced to 235 months of imprisonment, to be followed by five years of supervised release. Id. at 11. The court of appeals affirmed petitioners' convictions, but vacated their sentences and remanded for resentencing. Id. at 1-46.

1. The Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq., makes it unlawful for any person to possess with the intent to distribute a controlled substance, or to attempt or conspire to do the same, 46 U.S.C. 70503(a) (Supp. IV 2016); 46 U.S.C. 70506(b), on board "a vessel subject to the jurisdiction

of the United States," 46 U.S.C. 70503(e)(1) (Supp. IV 2016).[1] Congress enacted the MDLEA because it found that "trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. 70501(1). Congress accordingly provided that the MDLEA would apply to any "vessel subject to the jurisdiction of the United States," 46 U.S.C. 70503(e)(1) (Supp. IV 2016), "even though the act is committed outside the territorial jurisdiction of the United States," 46 U.S.C. 70503(b).

As relevant here, the MDLEA defines a "vessel subject to the jurisdiction of the United States" to include "a vessel without nationality." 46 U.S.C. 70502(c)(1)(A). A "vessel without nationality" is defined to include "a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed." 46 U.S.C. 70502(d)(1)(A). The MDLEA provides that the foreign nation's "response * * * to a claim of registry * * * may be made by radio, telephone, or similar oral or electronic means, and is proved conclusively by certification of the Secretary of State or

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[1] The MDLEA was amended in February 2016. See Coast Guard Authorization Act of 2015, Pub. L. No. 114-120, Tit. III, § 314(a)-(b), 130 Stat. 59. The amendments, which are not otherwise relevant to this case, moved the phrase "vessel subject to the jurisdiction of the United States" from Section 70503(a)(1) to Section 70503(e)(1). Because the relevant language is unchanged, this brief cites the current version of the statute for simplicity.

the Secretary's designee." 46 U.S.C. 70502(d)(2). The MDLEA further provides that the "[j]urisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge." 46 U.S.C. 70504(a).

2. In September 2014, a U.S. Coast Guard cutter, on patrol in the Southern Caribbean, spied the Borocho -- "a dilapidated cargo vessel" -- in international waters 70 miles off the coast of Panama. Pet. App. 7; see id. at 2. The Borocho "was riding high in the water" (indicating that it was not carrying any cargo) and was not transmitting an electronic signal that is "common for all commercial vessels," prompting the Coast Guard to investigate. Id. at 7. During a right-of-visit boarding, Coast Guard officers spoke with the Borocho's captain and requested the ship's documentation. Ibid. The captain provided a crew list naming 13 crew members and zero passengers, the crew's passports, and a "zarpe," a document that shows, among other items, the ship's name, captain's name, and ports of call. Ibid.

The captain told the Coast Guard officers that the vessel was registered in the West African country of Sao Tome and Principe. Pet. App. 8. Coast Guard personnel also located a vessel registration document that was purportedly issued by the country of Sao Tome and Principe. Ibid. The Coast Guard contacted the U.S. Department of State, which reached out to the government of

Sao Tome and Principe, but that country's government refuted the vessel's claim of registry. Ibid. Consequently, the Coast Guard determined that the Borocho was stateless and proceeded to search it. Ibid. During ensuing searches, the Coast Guard found a total of 640.9 kilograms of cocaine hidden on the vessel. Id. at 9. A search of the crew revealed that nearly all of the crew members had thousands of dollars' worth of U.S. and Colombian currency. Ibid. The Borocho was towed to port in Miami, Florida and the crew were taken to the United States. Ibid.

3. A federal grand jury in the Middle District of Florida indicted petitioners and the other crew members on one count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a), 70506(a) (2012), 46 U.S.C. 70506(b), and 21 U.S.C. 960(b)(1)(B)(ii); and one count of possession with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a), 70506(a) (2012), 18 U.S.C. 2, and 21 U.S.C. 960(b)(1)(B)(ii). Pet. App. 9-10. Prior to trial, two crew members pleaded guilty and agreed to testify against the remaining defendants. Id. at 10. The remaining 11 defendants pleaded not guilty.

In January 2015, approximately six weeks before trial, the government filed with the district court a "Certification for the

Maritime Drug Law Enforcement Act Case Involving Motor Vessel Borocho (Without Nationality) Federal Drug Identification Number (FDIN) -- 2014008289" signed by Coast Guard Commander Gregory Tozzi. Pet. App. 11. Commander Tozzi certified that, on September 7, 2014, the Coast Guard had detected the Borocho "approximately 165 nautical miles northeast of Colon, Panama, in international waters"; that during the Coast Guard's right-of-visit boarding of the vessel, the captain told Coast Guard members, consistent with a registration they found, that the vessel was registered in Sao Tome and Principe; and that the Sao Tome government, when asked, "refut[ed]" the Borocho's claim of registry. Id. at 11-12 (brackets in original). "Accordingly," the certification continued, "the Government of the United States determined the vessel was without nationality in accordance with 46 U.S.C. § 70502(d)(1)(A), rendering the vessel subject to the jurisdiction of the United States Pursuant to 46 U.S.C. § 70502(c)(1)(A)." Id. at 12. Commander Tozzi's declaration was accompanied by a signed statement from a State Department Assistant Authentication Officer on behalf of the Secretary of State averring that Tozzi was the Coast Guard liaison to the State Department and giving full faith and credit to Tozzi's statements. Ibid.

The case proceeded to trial. At the conclusion of the government's case-in-chief, the district court found that the evidence supported Commander Tozzi's declaration and determined that the Borocho was subject to the jurisdiction of the United

States. Pet. App. 12. Counsel for one petitioner objected "for the record" to the admission of the declaration "on confrontation grounds." Id. at 12-13. Also at the close of the government's case in chief, the court granted a motion for judgment of acquittal as to the Borocho's captain, but denied the motions as to all other defendants. Id. at 10. The jury acquitted three defendants of both charges; found petitioners Carrasquilla-Lombada and Tejada-Piedrahita guilty on the conspiracy count but acquitted them on the possession count; and found the five remaining petitioners guilty on both the conspiracy and the possession counts. Id. at 10-11. The court sentenced each petitioner to 235 months of imprisonment. Id. at 11.

4. The court of appeals affirmed petitioners' convictions, but vacated their sentences and remanded for resentencing. Pet. App. 1-46. As relevant here, the court, applying de novo review, rejected petitioners' claim under the Confrontation Clause. Id. at 13. The court observed that its prior decision in United States v. Campbell, 743 F.3d 802, 806-808 (11th Cir.), cert. denied, 135 S. Ct. 704 (2014), foreclosed petitioners' argument that the district court violated their right to a trial by jury when it determined that the Borocho was a vessel subject to the jurisdiction of the United States. Pet. App. 14-15. The court of appeals explained that "the 'stateless nature' of the vessel is not an element of the [MDLEA] offense that must be proved at trial," because it "d[oes] not implicate any guilt or innocence

issue but instead bears only on 'the diplomatic relations between the United States and foreign governments.'" Id. at 14 (quoting Campbell, 743 F.3d at 806-808).

ARGUMENT

Petitioners contend (Pet. 10-22) that the district court's determination that their vessel was within the jurisdiction of the United States violated their Sixth Amendment jury-trial and confrontation rights. Petitioners' Sixth Amendment claims do not warrant this Court's review. This Court has recently and repeatedly declined to review such claims, and it should follow the same course here.[2]

1. Petitioners first contend (Pet. 13-15) that the MDLEA violates the Sixth Amendment by providing that the United States' jurisdiction over a vessel is a "preliminary question[ ] of law to be determined solely by the trial judge" and "is not an element of an offense." 46 U.S.C. 70504(a). In petitioners' view, "[t]he question of jurisdiction must be decided by a jury to satisfy the rights to due process and to a fair trial by jury." Pet. 14. That contention lacks merit, and, despite some disagreement in the courts of appeals, this Court has repeatedly declined to review the question. See Cruickshank v. United States, 2018 WL 2290831 (Oct. 1, 2018) (No. 16-7337); Campbell v. United States,

[2] Similar issues are raised in the petition for a writ of certiorari in Mejia v. United States, No. 18-5702 (filed Aug. 20, 2018).

135 S. Ct. 704 (2014) (No. 13-10246); Tam Fuk Yuk v. United States, 565 U.S. 1203 (2012) (No. 11-6422); Sanchez-Salazar v. United States, 556 U.S. 1185 (2009) (No. 08-8036); Aguilar v. United States, 556 U.S. 1184 (2009) (No. 08-7048); Moreno v. United States, 549 U.S. 1343 (2007) (No. 06-8332); Estupinan v. United States, 549 U.S. 1267 (2007) (No. 06-8104).

a. The Constitution affords "a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511 (1995). That principle does not apply here, however, because the MDLEA expressly provides that "[j]urisdiction of the United States with respect to a vessel subject to [the MDLEA] is not an element of an offense" and is instead a "preliminary question[ ] of law to be determined solely by the trial judge." 46 U.S.C. 70504(a). Because the question whether a vessel is subject to the jurisdiction of the United States is a preliminary question of law and not an element of the offense, a defendant has no constitutional right to have a jury decide that issue. See, e.g., United States v. Vilches-Navarrete, 523 F.3d 1, 20 (1st Cir.) (Lynch, J., opinion of the court in part and concurring in part) ("This issue is not an element of the crime * * * and may be decided by a judge."), cert. denied, 555 U.S. 897 (2008); United States v. Tinoco, 304 F.3d 1088, 1109-1110 (11th Cir. 2002) ("[The MDLEA's] jurisdictional requirement is not an essential ingredient or an essential element of the MDLEA

substantive offense, and, as a result, it does not have to be submitted to the jury for proof beyond a reasonable doubt."), cert. denied, 538 U.S. 909 (2003).

This Court's decision in Ford v. United States, 273 U.S. 593 (1927), is controlling. In Ford, the defendants were charged with conspiring to violate the National Prohibition Act when their British vessel, laden with liquor, was seized "in the high seas off the Farallon Islands, territory of the United States, twenty-five miles west from San Francisco." Id. at 600. The defendants argued that it was "error * * * to refuse to submit to the jury on the trial the issue as to the place of the [ship's] seizure," but the Court disagreed. Id. at 606. The Court reasoned that a jury trial was not required because "[t]he issue whether the ship was seized within the prescribed [territorial] limit did not affect the question of the defendants' guilt or innocence," but instead "only affected the right of the court to hold [them] for trial." Ibid.

That reasoning is equally applicable here. The question whether a vessel is subject to the jurisdiction of the United States "does not raise factual questions that traditionally would have been treated as elements of an offense under the common law." Tinoco, 304 F.3d at 1108. As in Ford, whether the United States has jurisdiction over the vessel does not pertain to petitioners' participation in, or blameworthiness for, their drug-related offenses, but instead to the court's authority to try them for

those offenses. Id. at 1108-1109 (explaining that the MDLEA's jurisdictional determination "does not go to the actus reus, causation, or the mens rea of the defendant"; nor does it "affect the defendant's blameworthiness or culpability"). "Congress inserted the requirement that a vessel be subject to the jurisdiction of the United States into the statute as a matter of diplomatic comity," not to define the defendant's culpability. Vilches-Navarrete, 523 F.3d at 22; see Tinoco, 304 F.3d at 1109 ("[T]he statutory jurisdictional requirement * * * is unique because it is not meant to have any bearing on the individual defendant, but instead is meant to bear only on the diplomatic relations between the United States and foreign governments."); cf. S. Rep. No. 530, 99th Cong., 2d Sess. 16 (1986) ("In the view of the Committee, only the flag nation of a vessel should have a right to question whether the Coast Guard has boarded that vessel with the required consent. The international law of jurisdiction is an issue between sovereign nations. Drug smuggling is universally recognized criminal behavior, and defendants should not be allowed to inject these collateral issues into their trials.").

That result is consistent with this Court's holdings in other contexts that factual issues bearing on a defendant's susceptibility to prosecution may be resolved by the trial judge rather than the jury when they are not elements of the offense. For example, the determination whether a defendant has previously

been placed in jeopardy for the charged offense, has been denied the right to a speedy trial, or has been selected for prosecution on an impermissible basis may all turn in part on findings of historical fact. Those factual questions, however, are routinely entrusted to judicial resolution. See, e.g., Wayte v. United States, 470 U.S. 598, 607-610 (1985); Oregon v. Kennedy, 456 U.S. 667, 669-670, 679 (1982); Barker v. Wingo, 407 U.S. 514, 530-536 (1972).

b. As petitioners note (Pet. 20-22), the courts of appeals have taken different approaches to the submission of jurisdictional issues under the MDLEA to juries. The First and Eleventh Circuits have upheld the constitutionality of having the judge, not the jury, make the jurisdictional determination as provided by Section 70504(a). See, e.g., Vilches-Navarrete, 523 F.3d at 19-23; Tinoco, 304 F.3d at 1107-1112. But the Ninth Circuit has concluded that when the statutory question whether a vessel is "'subject to the jurisdiction of the United States'" depends on a "disputed factual question," the Fifth and Sixth Amendments require the factual issue to be resolved by a jury. United States v. Perlaza, 439 F.3d 1149, 1165, 1168 (2006) (citation omitted); see id. at 1165-1168. To the extent that the jurisdictional inquiry poses only a question of law, however, the Ninth Circuit agrees with the other courts of appeals that it may be resolved by the court. Id. at 1164.

This case would not be an appropriate vehicle in which to address the disagreement in the courts of appeals. As a threshold matter, petitioners did not press their Sixth Amendment jury-trial argument in the lower courts, and those courts did not decide the issue. Consistent with this Court's role as a "court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) the Court's "traditional rule * * * precludes a grant of certiorari" when, as is the case here, the question presented "'was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted).

In any event, this case does not directly implicate the disagreement among the courts of appeals. In Perlaza, there was conflicting evidence about whether the vessel at issue was stateless. See 439 F.3d at 1165-1166. Here, by contrast, no conflicting evidence raised any factual dispute. The government submitted a Department of State certification establishing that the government of Sao Tome and Principe had informed the United States that it rejected the claim of registry for the Borocho, which was sufficient to satisfy "conclusively" the statutory definition of a "vessel without nationality." 46 U.S.C. 70502(d)(1)(A) and (2). Other than a meritless objection "on confrontation grounds," Pet. App. 12-13, petitioners did not object to the authenticity of the State Department certification at trial. Accordingly, it is likely that no jury determination would have been required even in the Ninth Circuit. Cf. United

States v. Zakharov, 468 F.3d 1171, 1176 (9th Cir. 2006) (finding "no factual question pertaining to statutory jurisdiction for the jury to decide"), cert. denied, 550 U.S. 927 (2007).

c. Petitioners further argue (Pet. 14-15) that, notwithstanding the MDLEA's text, the jurisdictional nexus is an "essential element of the charged offense" that is "required" by "Due Process" "because it bears on Congress' power to criminalize and regulate extraterritorial conduct." That contention lacks merit, and no court of appeals has found that a nexus to the United States is required where, as here, the MDLEA is applied to conduct on a stateless vessel in international waters. See, e.g., United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003) (citing cases), cert. denied, 541 U.S. 1035 (2004).[3] Congress explicitly found and declared that "trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. 70501(1).

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[3] The Ninth Circuit has read into the MDLEA a nexus requirement with respect to foreign-registered vessels, not as an element of the substantive offense but as a "judicial gloss" on MDLEA prosecutions even when the flag government consents to the United States' search, arrest, and prosecution. Zakharov, 468 F.3d at 1177 (quoting United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998), cert. denied, 528 U.S. 842 (1999)). But that issue is not implicated here because the Borocho was stateless, and the Ninth Circuit has clarified that, "if a vessel is deemed stateless, there is no requirement that the government demonstrate a nexus between those on board and the United States before exercising jurisdiction over them." Perlaza, 439 F.3d at 1161 (brackets and citation omitted).

This Court has previously declined to review this issue, see, e.g., Cruickshank, supra, No. 16-7337; Campbell, supra, No. 13-10246; Tam Fuk Yuk, supra, No. 11-6422; Mina v. United States, 554 U.S. 905 (2008) (No. 07-9435), and the same result is warranted here.

2. Petitioners separately contend (Pet. 16-18) that, by allowing the statelessness of their vessel to be "proved conclusively" by the certification of the Secretary of State, 46 U.S.C. 70502(d)(2), the MDLEA violated their rights under the Confrontation Clause of the Sixth Amendment. That contention lacks merit, and the Court has previously declined to review that issue as well. See Cruickshank, supra, No. 16-7337; Campbell, supra, No. 13-10246; Tam Fuk Yuk, supra, No. 11-6422; Mina, supra, No. 07-9435).

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. As petitioners recognize (Pet. 17), this Court's decisions have characterized a defendant's right under the Confrontation Clause as "a trial right." Barber v. Page, 390 U.S. 719, 725 (1968); see Crawford v. Washington, 541 U.S. 36, 42-43 (2004) ("One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between.") (citations omitted); Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (plurality opionion) ("The opinions of this Court show that the right to

confrontation is a trial right."). Consequently, as petitioners again recognize (Pet. 17), this right "typically does not attach in pre-trial settings." The Court has held that the Confrontation Clause does not apply at preliminary proceedings such as a probable-cause hearing, see Gerstein v. Pugh, 420 U.S. 103, 120-122 (1975), or a suppression hearing, see McCray v. Illinois, 386 U.S. 300, 305, 313-314 (1967). All of the Court's more recent Confrontation Clause decisions since Crawford have arisen in the context of a trial.[4]

Petitioners present no substantial argument that would justify extending the Confrontation Clause's protections to the

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[4] Crawford held that the Confrontation Clause generally bars the introduction of the "testimonial" statement of an absent witness at a criminal trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine. 541 U.S. at 68. In Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), the Court held that a certificate of forensic analysis, admitted to establish the truth of statements in the certificate, was testimonial and was inadmissible because the analyst was not present at trial and was unavailable for cross-examination. Id. at 310-311. In Bullcoming v. New Mexico, 564 U.S. 647 (2011), the Court applied Melendez-Diaz to hold that the Confrontation Clause did not allow the admission of an analyst's signed, forensic report certifying the results of a blood-alcohol test when offered through the trial testimony of another scientist who "did not sign the certification or perform or observe the test" and who had no "'independent opinion'" about its results. Id. at 652, 662 (citation omitted); see id. at 661-665. In Williams v. Illinois, 567 U.S. 50 (2012), five Members of the Court concluded that the Confrontation Clause was not violated when an expert witness testified at trial that two DNA profiles were a statistical match but acknowledged that she lacked personal knowledge of the analyses that led to the creation of the two profiles. Id. at 70-79, 81-86 (plurality opinion); id. at 109-112 (Thomas, J., concurring in the judgment).

jurisdictional question at issue here. As previously explained (see pp. 8-11, supra), Congress has permissibly specified that the United States' jurisdiction over a vessel for purposes of the MDLEA "is not an element of an offense" but is instead a "preliminary question[ ] of law to be determined solely by the trial judge." 46 U.S.C. 70504(a). Petitioners state (Pet. 17) that "the Government neglected to seek a pretrial determination of jurisdiction and, instead, asked the district court to make its jurisdictional finding just prior to the time it rested its case-in-chief during trial." But as the court of appeals correctly determined, "the timing of the district court's jurisdictional determination * * * has no bearing on whether jurisdiction is an 'element.'" Pet. App. 15. As discussed above, the MDLEA's jurisdictional inquiry does not pertain to a defendant's guilt or innocence and "is not meant to have any bearing on the individual defendant, but instead is meant to bear only on the diplomatic relations between the United States and foreign governments." Tinoco, 304 F.3d at 1109.

Nor do decisions in the courts of appeals support the extension of the Confrontation Clause that would be necessary for petitioners to prevail. Those courts have concluded that the Confrontation Clause is inapplicable to several other non-trial settings.[5] It appears that the First Circuit is the only other

[5] See, e.g., United States v. Henry, 852 F.3d 1204, 1206-1207 (10th Cir. 2017) (Gorsuch, J.) (revocation of supervised

court of appeals, aside from the Eleventh Circuit, to have addressed whether the Confrontation Clause is violated by the MDLEA's certification provision, and the First Circuit reached the same conclusion as the court of appeals in this case. See United States v. Mitchell-Hunter, 663 F.3d 45, 50-51 (1st Cir. 2011) (rejecting such claims "[b]ecause the MDLEA's jurisdiction determination is relegated by statute to a pretrial conclusion of law by the judge, and because the confrontation right has never been extended beyond the context of a trial"); see also United States v. Nueci-Peña, 711 F.3d 191, 199 (1st Cir. 2013) (following Mitchell-Hunter).

Because the Confrontation Clause does not apply in this setting, petitioners' arguments (Pet. 18-20) that the certification at issue here is "testimonial" within the meaning of the Confrontation Clause are not relevant. Particularly in the absence of any disagreement in the courts of appeals, further review of petitioners' Confrontation Clause claim is unwarranted.

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release); United States v. Powell, 650 F.3d 388, 392-393 (4th Cir.) (sentencing), cert. denied, 565 U.S. 922 (2011); United States v. Smith, 79 F.3d 1208, 1210 (D.C. Cir. 1996) (per curiam) (pretrial detention hearing); United States v. Andrus, 775 F.2d 825, 835-836 (7th Cir. 1985) (preliminary hearing to determine admissibility of evidence).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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