No. _____

In The
Supreme Court of the United States

_____

IGOR POLSHYN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Petitioner Igor Polshyn's case presents the following questions:

1. Whether preventing a defendant from testifying on the sole disputed element of an offense, his subjective intent, amounts to structural constitutional error requiring reversal?

2. Whether prosecution under the Maritime Drug Law Enforcement Act ("MDLEA") of a foreign citizen who was traveling on a vessel in international waters and whose offense had no nexus to the United States violates the Due Process Clause of the Fifth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Igor Polshyn, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion, *United States v. Oleksii Tsurkan, Igor Polshyn*, No. 17-10248, __Fed. Appx.__, 2018 WL 3408261, is unpublished and is provided in the appendix.

JURISDICTION

The Eleventh Circuit issued its opinion on July 12, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. § 70501 *et seq.*, is attached hereto in the appendix.

STATEMENT OF THE CASE

1. On November 7, 2015, the United States Coast Guard (USCG) intercepted a sailing vessel approximately 60 nautical miles south of the Dominican Republic. Doc. 72 at 2. Petitioner Igor Polshyn and Mr. Oleksii Tsurkan, both Ukrainian nationals, were operating the sailboat, which flew under a Spanish flag. After an initial interdiction, the USCG got permission from Spain to verify the boat's registration and board the boat. Upon conducting a safety sweep, the USCG encountered contraband and arrested both individuals. The Petitioner was thereafter brought before the district court and charged pursuant to the MDLEA, 46 U.S.C. § 70503, with conspiring to possess and distribute cocaine, and possessing with intent to distribute five or more kilograms of cocaine, while on board a vessel subject to jurisdiction of the United States.

2. Prior to trial, Petitioner contested the United States' authority to prosecute him under the MDLEA. Doc. 72. Petitioner maintained his innocence and proceeded to a jury trial. *See* Docs. 93, 94. At the trial, the district court allowed the government to introduce a State Department Certification saying that Petitioner was subject to the jurisdiction of the United States. Doc. 245 at 9-12; *see* Doc. 87-Govt. Exh. 12. The State Department Certification declarant did not testify at Petitioner's trial. The district court explained that Spain waived any jurisdictional claims over the boat, and therefore it was "a vessel without nationality" and "subject to the jurisdiction of the United States" under § 70502(d)(1)(C) and (c)(1)(A). *Id.*[1] At the conclusion of trial, the district court instructed the jury that this element was proven. *See* Doc. 249 at 21

[1] The MDLEA defines a "vessel subject to the jurisdiction of the United States" to include a "vessel without nationality," including "a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality." 46 U.S.C. § 70502(c)(1)(A), (d)(1)(C).

(instructing that it had been "previously determined as a matter of law that Julianin II is a vessel subject to the jurisdiction of the United States.").

3. Following a week-long trial, the jury could not reach a unanimous verdict and the district court declared a mistrial. Doc. 106; Doc. 249 at 80-85. One month later, the government pursued the same charges against Petitioner and Mr. Tsurkan in a second trial. Doc. 149; Doc. 229.

At the second trial, the parties did not dispute that a certain quantity of contraband cocaine was found on Petitioner's vessel. Also, when charging the jury, the district court informed that it had "determined as a matter of law that the Julianin II is a vessel subject to the jurisdiction of the United States." Doc. 233 at 119. Thus, the sole element for the jury to determine was whether Petitioner possessed the requisite mental state, if he "knowingly possessed cocaine" and "intended to distribute" that cocaine, for both the conspiracy and substantive MDLEA offenses. *See* Doc. 8; Doc. 170 at 13; 46 U.S.C. § 70503, § 70506.

Petitioner testified, seeking to explain that his brother had died of a drug overdose. The government objected. Defense counsel explained that this testimony regarding Petitioner's personal background would establish that he had no intent to sell the drugs for profit. Doc. 232 at 43, 79. The district court denied Petitioner's request to testify on this topic on grounds that the testimony was not relevant and more prejudicial than probative. Doc. 232 at 74, 79. When the government cross-examined Petitioner, it was permitted to ask extensive questions about his personal life, including his relationship with his wife, her career, earnings, their children and living expenses. *See* Doc. 232 at 128-150.

At the conclusion of trial, the district court instructed the jury that the Petitioner could only be found guilty if he "knowingly possessed cocaine" and "intended to distribute that cocaine," for

both the conspiracy and substantive MDLEA counts. *See* Doc. 170 at 13; 46 U.S.C. § 70503, § 70506. After this second trial, the jury found Petitioner guilty of both MDLEA counts. Doc. 170 at 177-80; Doc. 171. Thereafter, the district court sentenced Petitioner to 300 months' imprisonment. Doc. 202.

4. On appeal, Petitioner challenged his conviction and sentence. He raised three constitutional objections to the district court's exercise of jurisdiction:

(a) that the question of whether the boat was "subject to the jurisdiction of the United States" constitutes an element of the offense that must be proved to a jury beyond a reasonable doubt;

(b) Congress has no constitutional authority to punish activities in international waters without a nexus to the United States; and

(c) the government's exercise of jurisdiction over Defendants without first establishing such a nexus violated Defendants' due process rights. [2]

Petitioner also challenged the district court's exclusion of his own testimony as a violation of his Fifth and Sixth Amendment right to present his own defense. He argued that the district court's exclusion of this testimony impeded his ability to explain his subjective intent, and thus to disprove the only disputed element of MDLEA before the jury. *See* Initial Brief of Appellant, *United States v. Polshyn*, No. 17-10248-JJ (July 31, 2017).

Without the benefit of oral argument, the Eleventh Circuit affirmed Petitioner's convictions and sentence. The Eleventh Circuit relied on circuit precedent in dismissing Petitioner's jurisdictional challenges to MDLEA without discussion. *See* App. A. at 3 (relying upon *United*

[2] The Court has recently considered petitions that raise this and other constitutional challenges to the United States' exercise of jurisdiction pursuant to the MDLEA. *See Cruickshank v. United States* (No. 17-8953) (Cert. Denied October 1, 2018).

States v. Campbell, 743 F.3d 802 (11th Cir. 2014) and *United States v. Cruickshank*, 837 F.3d 1182 (11th Cir. 2016)).

With respect to Petitioner's evidentiary issue, the Eleventh Circuit "suspect[ed] that the district court erred in excluding Polshyn's proposed testimony." App. A at 5. The Eleventh Circuit recognized that Petitioner had a constitutional right to present a defense bearing on a formal element of the charged offense, and that the excluded testimony was relevant to his intent, which "was the only issue in this case." *Id.* (citing *United States v. Hurn*, 368 F.3d 1359, 1364 (11th Cir. 2004)).

Assuming without deciding that the district court violated Petitioner's constitutional rights by excluding his proposed testimony, the Eleventh Circuit applied the harmless error analysis articulated in *Chapman v. California*, reviewing the evidence at Petitioner's trial to see if there was "a reasonable possibility that the evidence complained of might have contributed to the conviction." 386 U.S. 18, 23-24 (1967). After reviewing the evidence from Petitioner's trial, the Eleventh Circuit determined that there was sufficient evidence of Petitioner's intent to be "convinced that the exclusion of the proposed testimony about Polshyn's brother contributed in no way to Defendants' convictions." App. A at 8.

REASONS FOR GRANTING THE WRIT

I. THERE IS A TENSION AMONG THE CIRCUITS ABOUT WHAT CONSTITUTES STRUCTURAL ERROR REQUIRING REVERSAL AND WHERE *CHAPMAN*'S HARMLESS ERROR ANALYSIS SUFFICES.

This Court has consistently held that constitutional error occurs when a district court's evidentiary rulings deprive a defendant of his right to present a defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973). The Sixth Amendment guarantees a defendant the right to have "compulsory process for obtaining witnesses in his favor." *U.S. Const., amend. VI.*

Implicit in this Sixth Amendment right, as well as in the basic notion of due process of law, is the fact that criminal defendants are given the opportunity to present evidence in their favor. *U.S. Const., amend. V*; *see Specht v. Patterson*, 386 U.S. 605, 610 (1967) ("Due process ... requires that [the defendant] ... have an opportunity to be heard ... and to offer evidence of his own."). As the Eleventh Circuit has recognized, the practical application of these constitutional guarantees means that a defendant has the right to present evidence that has a direct bearing on a formal element of the offence, and also evidence that "makes the existence or non-existence of some collateral matter somewhat more or less likely, where that collateral matter bears a sufficiently close relationship to an element of the offense." *United States v. Hurn*, 368 F.3d 1359, 1364 (11th Cir. 2004); *see Washington v. Texas*, 388 U.S. 14, 23 (1967).

In addition, criminal defendants have a fundamental right to testify in their defense. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987) (grounding this right in the Due Process clause, the Sixth Amendment's Compulsory Process Clause and right to self-representation, and as "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony."). Indeed, a defense attorney violates this fundamental right by either refusing to accept a defendant's decision to testify or by failing to inform the defendant of this right. *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992).

In Petitioner's case, the Eleventh Circuit recognized that his precluded testimony, that he lost a close family member to drug addiction and overdose, "could – 'through a reasonable chain of inferences' – make it less likely that that person possessed the requisite intent to engage in a drug trafficking offense." App. A at 6 (citing *Hurn*, 368 F.3d at 1363). The appellate court also recognized that "[a]s a practical matter, intent was the only issue in this case." *Id.* at 5. Assuming without deciding that the district court deprived Petitioner of his constitutional right to present his

own defense on a matter relevant to the sole disputed element, the Eleventh Circuit applied the harmless error analysis from *Chapman v. California*, concluding that there was no "reasonable possibility that the evidence complained of might have contributed to the conviction." 386 U.S. as 23.

In *Chapman*, this Court rejected the argument that all federal constitutional errors, regardless of their nature of the circumstances of the case, require the reversal of a conviction. Before a federal constitutional error can be held harmless, however, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. Although it has applied the *Chapman* harmless error analysis to many constitutional errors, this Court recognizes that there are certain "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Such structural errors, constitutional errors that are not subject to harmless error test, include, for example, the right to self-representation at trial. *See McKaskle v. Wiggins*, 465 U.S. 168, 177-78, n.8 (1984). Structural constitutional errors are not simply an error in the trial process, but are so fundamental as to affect the framework of the trial. Specifically, where Petitioner's subjective intent was the sole disputed element before the jury, and Petitioner's own testimony was the only manner in which he could provide an alternative to the government's theory, application of the harmless error standard subverted his constitutional rights to a fair jury trial, and to testify on his own behalf.

In the decades since *Chapman*, this Court has frequently permitted an otherwise valid conviction to stand when a reviewing court concludes that the constitutional errors were harmless beyond a reasonable doubt. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 683 (1986) (improper denial of a defendant's opportunity to impeach a witness, like other confrontation clause errors, is subject to harmless-error analysis); *Moore v. Illinois*, 434 U.S. 220, 232 (1977)

(admission of identification obtained in violation of the right to counsel). Despite the common application of *Chapman*'s harmless error analysis, extensive disagreement remains about which constitutional errors are amenable to that analysis, and how to conduct the analysis itself when it is applicable.[3] Academics and practitioners repeatedly criticize the "harmless error" analysis as applied to constitutional trial errors. *See, e.g.*, Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L & Criminology 421 (1980); *see also* James Edward Wicht III, *There Is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal*, 12 BYU J. PUB. L. 73 (1997). Some argue that a constitutional trial error can never be harmless, and others accept the concept, but argue that *Chapman* harmless error analysis is too generously applied.[4]

Critically, the circuits are in tension regarding when *Chapman's* harmless error standard is applied to constitutional trial errors. *See, e.g., United States v. Roy*, 855 F.3d 1133, 1178-88 (11th Cir. 2017) (*en banc*) (holding that defense counsel's absence during a portion of trial where inculpatory evidence was introduced was harmless error); *United States v. Blankenship*, 846 F.3d 663, 670 (4th Cir. 2016) (assuming that the trial court violated Confrontation Clause by denying opportunity for recross-examination but finding any error was harmless); *Van v. Jones*, 475 F.3d 292, 312 (6th Cir. 2007) (reviewing varying decisions on what constitutes a critical stage of trial

[3] *See, e.g.*, Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117 (June 2018) (summarizing many of the academic critiques of the *Chapman* harmless error standard); John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 Hous. L. Rev. 59 (2016); Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 N.W. U. L. REV. 1053 (2005).

[4] Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1181 n.52 (1995); Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. Rev. 15 (1976).

where the absence of counsel amounts to structural error, stating it "would welcome a comprehensive and final one-line definition of 'critical-stage'").

II. PREVENTING PETITIONER FROM TESTIFYING ON THE SOLE DISPUTED ELEMENT OF THE OFFENSE AMOUNTED TO STRUCTURAL CONSTITUTIONAL ERROR, AND COULD NOT BE SUBJECT TO *CHAPMAN* HARMLESS ERROR ANALYSIS.

In this case, because the Eleventh Circuit did not deem the district court's error to be so fundamental as to require a new trial, it applied *Chapman* harmless error analysis and reviewed the evidence at Petitioner's trial, concluding that the evidence negated any constitutional deprivation. *See* App. A at 5-9. Petitioner respectfully argues that in the context of his case, the district court unduly burdened his Fifth and Sixth Amendment rights in a structural manner requiring reversal. Specifically, where Petitioner's subjective intent was the sole disputed element before the jury, and Petitioner's own testimony was the only manner in which he could provide an alternative to the government's theory, application of the harmless error standard subverted his constitutional rights to a fair jury trial and to testify on his own behalf.

After assuming without deciding that the district court had violated Petitioner's Sixth Amendment rights, the Eleventh Circuit reviewed the evidence presented during Petitioner's second trial, and concluded, based on its review, that the wrongly excluded evidence would not have changed the jury's conclusion because there was "objective evidence" contradicting Petitioner's version of events. App. A at 6-8. Specifically, the Eleventh Circuit relied on: (1) circuit precedent that evidence of intent can be inferred at least partially from the large quantity of cocaine found in a defendant's possession. (citing *United States v. Tinoco*, 304 F.3d 1088, 1123) (11th Cir. 2002)); (2) its own finding that the vessel's GPS data contradicted Petitioner's testimony about what transpired over several days; (3) the absence of damage to the vessel that the government argued should have been present. *Id.* Petitioner fervently disagrees with the Eleventh

Circuit's analysis and conclusion that the wrongly concluded testimony "contributed in no way to Defendants' convictions." *Id.* at 8. The evidence that Petitioner possessed the intent required for a conviction was purely circumstantial. Indeed, following the government's first presentation of its case, after two days of deliberation, the jury could not come to a unanimous decision on Petitioner's required subjective intent – the sole dispute element of the offense. Doc. 106. Even after the district court provided a modified *Allen*[5] charge, the jury could not agree on Petitioner's guilt and the district court declared a mistrial. Doc. 249 ad 80-85. It seems implausible to conclude, upon review of the government's second, extremely similar presentation of evidence, that it was "overwhelming evidence of Defendant's guilt." App. A at 8.

Critically, the Eleventh Circuit's determination that the evidence at trial sufficed to render the unconstitutionally excluded testimony "harmless beyond a reasonable doubt" effectively transformed the appellate court into Petitioner's third jury. By reviewing the trial record and weighing circumstantial evidence of Petitioner's intent in order to determine whether excluded testimony affected the jury's conclusion, an appellate court "sits as a jury and makes a guilt determination based upon an amount of evidence upon which no jury has passed." *Goldberg, Harmless Error,* 71 J. Crim. L. & Criminology at 436. In this context, the Eleventh Circuit's harmless error analysis improperly violated Petitioner's Sixth Amendment right to a jury. *See* U.S. Const. amend. VI. After Petitioner's first trial, the jury was unable to unanimously find that he possessed the requisite intent. During his second trial, the government presented nine fact witnesses and one rebuttal witness, all to provide support for this one disputed element. *See* Docs. 229, 231, 230, 233. Petitioner, however, was prevented from testifying about his own life experience, and providing the only alternative narrative to the government's case-in-chief. In this

[5] *Allen v. United States*, 164 U.S. 492 (1896).

context, the Eleventh Circuit made a determination of Petitioner's guilt based on a totality of evidence that was never before his actual jury.

In addition, the application of *Chapman*'s harmless error test under these circumstances impeded Petitioner's right to testify on his own behalf. By denying Petitioner the ability to testify fully about his subjective intent and give context to his version of events, the district court infringed upon his fundamental right to testify in his defense. It is well established that a defendant has the right to testify on his own behalf, a right deriving from the Compulsory Process Clause of the Sixth Amendment and implicit in his Fifth Amendment rights, which guarantee that no one shall be deprived of liberty without due process of law. *Rock*, 483 U.S. 44 (1987); *see Faretta v. California*, 422 U.S. 806, 819 (1975). Here, the sole disputed element for the jury to decide was Petitioner's subjective intent to distribute cocaine, and the government conceded that it only presented "circumstantial evidence of Tsurkan's and Polshyn's intentional participation in the smuggling venture." Appellee Response Brief, *United States v. Polshyn*, No. 17-10248-JJ (December 12, 2017) at 36-37; *see* App. A at 7; *see* 46 U.S.C. § 70503. In light of the circumstances of this particular trial, the district court's constitutional error is transformed from a "trial error" to the "structural defect" of denying him the right to testify on his own behalf. *Fulminante*, 499 U.S. at 309-10.

Furthermore, because Petitioner chose to testify, the jury was free to believe or disbelieve his testimony, and he was hindered on appeal from arguing that the government's evidence was insufficient. *See United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995). Accordingly, by depriving him of the right to fully testify about his life experience and motivations, the Eleventh Circuit doubly taxed his decision to testify. A defendant's choice regarding whether or not to testify in his own defense is vital. *See Rock*, 483 U.S. at 52 (explaining that the "choice" of whether

to testify is central because of the competing considerations comprising the Fifth Amendment right to remain silent and absolute right of the accused to testify on his own behalf); *In re Oliver*, 333 U.S. 237, 273 (1948) (a defendant's right to testify on his own behalf is essential to the adversary system); *Riggins v. Nevada*, 504 U.S. 127 (1992) (finding there was a strong probability that the trial court's error of forcibly medicating the defendant before he testified impaired his constitutionally protected rights); *see United States v. Hung Thien Ly*, 646 F.3d 1307 (11th Cir. 2011) (concluding, in light of the "fundamental nature of a defendant's right to testify" that a district court was constitutionally required to correct a *pro se* defendant's misunderstanding about his right to testify).

Under these particular circumstances, the district court's exclusion of Petitioner's own testimony on the sole disputed element of the offense, when he was the only source that could provide an alternative account for subjective intent, was not a typical trial error amenable to *Chapman*'s harmless error analysis. 386 U.S. at 23-24. Instead, the district court's constitutional error compromised Petitioner's right to present his own defense, to a jury trial, and his right to testify so severely that it was akin to a structural error requiring reversal. *See Fulminante*, 499 U.S. at 309.

As discussed, the harmless error doctrine has long been a source of confusion and debate, even in this Court. *See Fulminante*, 499 U.S. at 289 (White, J., dissenting) (critiquing the "meaningless dichotomy" between "trial errors" and "structural defects" with respect to application of the harmless error standard).[6] Petitioner recognizes that the harmless error rule is meant to promote judicial finality, and also public respect for the criminal process "by focusing on

[6] *See* Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error To Coerced Confessions*, 105 Harv. L. Rev. 152 (November 1991); *See* Epps, *supra* n.4, at 2133-37.

the underlying fairness of the trial." *Neder v. United States*, 527 U.S. 1, 18 (1999). Nevertheless, this Court requires a reviewing court to apply the harmless error analysis "in the setting of a particular case." *Chapman*, 386 U.S. at 22. For the reasons described above, the setting of Petitioner's "particular case" made the harmless error analysis inappropriate. *Id.*

Petitioner's case presents an ideal opportunity for this Court to hold that where a trial court prevents a defendant from testifying on the sole disputed element of the charges against him, and that testimony is not provided from another source, the defendant's rights have been fundamentally compromised such that reversal is required.

III. THIS COURT SHOULD ADDRESS THE CONSTITUTIONAL QUESTIONS AND CIRCUIT CONFLICT REGARDING THE MDLEA'S JURISDICTIONAL REACH.

The USCG intercepted Petitioner, a Ukrainian citizen, in international waters south of the Dominican Republic, on a vessel with a Spanish flag. After several hours, Spain waived any jurisdiction over the boat. The USCG then brought Petitioner to Tampa, Florida, where he was prosecuted and convicted in federal court under the MDLEA. Petitioner was sentenced to 25 years of incarceration, though no showing was made to establish any nexus between his conduct and the United States.

Through the MDLEA, Congress has asserted that certain vessels are "subject to the jurisdiction of the United States," including "a vessel aboard which the master or individual in charge makes claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality." 46 U.S.C. § 70502(c)(1)(A), (d)(1)(C). In response to Petitioner's challenge to the court's jurisdiction, the district court concluded at his first jury trial that *either* Spain waived its jurisdiction *or* it was a stateless vessel. Doc. 245 at 10-11. Following the hung jury and mistrial, the district court simply instructed the

jury at Petitioner's second trial that the district court had jurisdiction to prosecute Petitioner pursuant to MDLEA. Doc. 233 at 119.

This Court's intervention is needed to address three constitutional questions concerning Congress's authority, under Article I and the Due Process Clause, to reach such criminal conduct having no connection to the United States. This Court's review is also needed to address whether Congress may deny defendants – involuntarily brought from international waters to face trial in the United States – the right to confront and have a jury finding concerning the jurisdictional facts that subject them to prosecution under the MDLEA.

Petitioner objected to the district court, rather than the jury, making the jurisdictional findings. *See* Doc. 72, 84. The circuits are split on this question, with the Ninth Circuit requiring the government to prove disputed facts concerning jurisdiction over a vessel to a jury, whereas the First and Eleventh Circuits do not. Petitioner's preserved claim provides an excellent opportunity to resolve the following constitutional challenges.

A. The Circuits Are Divided on Whether the MDLEA Violates the Fifth and Sixth Amendments Because it Removes the Jurisdictional Element from the Jury.

The number of MDLEA prosecutions is increasing rapidly, with an estimated 477 percent increase in the past five years. *See* Petition for Certiorari, *Cruickshank v. United States*, (No. 17-8953) (Cert. denied October 1, 2018). MDLEA prosecutions result in a significant cost to the American taxpayer, including the high cost of incarcerating foreign citizens in U.S. prisons. Given the significant constitutional issues presented by the prosecution of foreign citizens having no connection to the United States, and the resulting costs, Petitioner respectfully seeks this Court's review.

The courts of appeal are divided on whether the MDLEA's statutory jurisdictional requirement – that the defendant must be on board a "vessel subject to the jurisdiction of the United States" – must be proven to a jury. In the Eleventh Circuit, where Petitioner was prosecuted, the court has decided that the MDLEA's "jurisdictional requirement [should] be treated only as a question of subject matter jurisdiction for the court to decide." *Tinoco*, 304 F.3d at 1106. The Eleventh Circuit has rejected the argument that the MDLEA violates the Fifth and Sixth Amendments. *United States v. Cruickshank*, 721 F. App'x 909, 913 (11th Cir. 2018). The Ninth Circuit has expressly disagreed with the Eleventh Circuit, concluding that disputed facts pertaining to whether a vessel is subject to the jurisdiction of the United States, such as where the vessel was intercepted or whether it is stateless, should be resolved by a jury. *United States v. Perlaza*, 439 F.3d 1149, 1165-67 (9th Cir. 2006).

This circuit split warrants the Court's review. Because the MDLEA provides for venue in "the district at which the person enters the United States," 46 U.S.C. § 70504(b)(1), the U.S controls the jurisdiction in which a defendant is prosecuted. The majority of cases are brought within the Eleventh Circuit's geographic jurisdiction, which does not require that the jurisdictional facts be proven to a jury. *See* Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes*, 93 Minn. L. Rev. 1191, 1205 (2009) (noting that the Eleventh Circuit "gets most MDLEA cases"). Petitioner, who was subjected to prosecution in the Middle District of Florida, objected before the district court and court of appeals that the jury should have to find the jurisdictional facts that were necessary for his prosecution under the MDLEA. Doc. 72; *See* Initial Brief of Appellant, *United States v. Polshyn*, No. 17-10248-JJ (July 31, 2017), at 35-44.

This Court has recently reaffirmed that the elements of the offense, including facts that increase the punishment, must be proven to a jury beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 103-08 (2013). Because the MDLEA jurisdictional requirement is necessary to convict a defendant in every case, it is an element that must be proven to a jury beyond a reasonable doubt. *Id.* at 107; *Perlaza*, 439 F.3d at 1166-67. Given the importance of defining the "elements" of the MDLEA offense that must be proven to a jury beyond a reasonable doubt, and the circuit split on this issue, Petitioner seeks this Court's review.

B. The MDLEA Exceeds Congress's Article I Powers Under the Piracies and Felonies Clause.

The Constitution provides Congress the power to "define and punish Piracies and Felonies committed on the high Seas." U.S. Const. art. I, § 8, cl. 10. This petition raises an important question relating to the scope of Congress's power under the Piracies and Felonies Clause to define and punish offenses committed on international waters with no nexus to the United States. Because of the divergent views on the constitutionality of the MDLEA, Petitioner respectfully seeks this Court's review.

For over two decades, the Ninth Circuit has required the government to establish a sufficient nexus between the criminal conduct and the United States to accord with due process in cases involving foreign-flagged vessels. *See* Seth Freed Wessler, "The Coast Guard's 'Floating Guantánamos,'" *The New York Times Magazine* (Nov. 20, 2017), *available at* https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html (last visited October 6, 2018); *Perlaza*, 439 F.3d at 1160-61. Other circuits, including the Eleventh Circuit, do not impose this requirement. Here, the government brought Petitioner to Tampa where it did not have to prove to the jury that the vessel was actually stateless. The government's ability

to choose the location of prosecution – with an express preference of bringing cases in the Eleventh Circuit, rather than in the Ninth – only makes the need for this Court's review more pressing.

The Eleventh Circuit has held that Congress can reach extraterritorial drug activity, through its Piracies and Felonies Clause power, even though it has no nexus to the United States. *Campbell*, 743 F.3d at 810. Congress may reach this activity because drug trafficking is "condemned universally by law-abiding nations." *Id.*; *see United States v. Gonzalez*, 776 F.2d 931, 938-39 (11th Cir. 1985). Some judges and scholars, however, disagree. *See United States v. Angulo-Hernandez*, 576 F.3d 59, 62-63 (1st Cir. 2009) (Torruella, J., dissenting from denial of rehearing en banc); *United States v. Cardales-Luna*, 632 F.3d 731, 739-51 (1st Cir. 2011) (Torruella, J., dissenting); *United States v. Trinidad*, 839 F.3d 112, 116 (1st Cir. 2016) (Torruella, J., dissenting) ("I can no longer support the approach taken by this and our sister circuits in embracing the sweeping powers asserted by Congress and the Executive under the [MDLEA], and I am of the view that the district court acted without jurisdiction over appellant.").

Hundreds of foreign citizens, including Petitioner, are incarcerated in American prisons based on Congress's exertion of criminal authority over conduct on the high seas. *See Beyond the Article I Horizon*, 93 Minn. L. Rev. at 1195. Because of the importance of this issue, and the need for this Court's guidance, Petitioner respectfully seeks this Court's review.

C. The Due Process Clause of the Fifth Amendment Requires a Nexus Between the Offense Conduct and the United States for Prosecutions Under the MDLEA.

As discussed, the circuits are split on whether the Due Process Clause of the Fifth Amendment requires the government to establish a nexus to the United States in cases prosecuted under the MDLEA. The Ninth Circuit has held that, in cases involving foreign-registered vessels outside the territory of the United States, "due process requires the Government to demonstrate

that there exists 'a sufficient nexus between the conduct condemned and the United States' such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant." *Perlaza*, 439 F.3d at 1160;[7] *see United States v. Zakharov*, 468 F.3d 1171, 1177 (9th Cir. 2006) ("To accord with due process, we require a sufficient nexus between the United States and the defendant's activities before exerting jurisdiction over foreign vessels.").[8] Other circuits, including the Eleventh, reject the argument that the Due Process Clause requires a showing of a nexus to the United States to prosecute a foreign citizen under the MDLEA. *See Cruickshank*, 837 F.3d at 1188; *United States v. Cardales*, 168 F.3d 548, 552-53 (1st Cir. 1999); *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002); *United States v. Suerte*, 291 F.3d 366, 372-77 (5th Cir. 2002).

In this case, Petitioner was pulled from international waters, prosecuted in the United States for drug offenses having no connection to the United States, and is serving a 25 year sentence in federal prison. To be consistent with the Fifth Amendment, the MDLEA should require a showing between the criminal activity and the United States before a foreign citizen is prosecuted and imprisoned in the United States. Petitioner therefore respectfully seeks this Court's review.

[7] The Ninth Circuit has termed this "constitutional" jurisdiction, which must be established in addition to the MDLEA's "statutory" jurisdiction. *See id.* at 1160-61.

[8] The Second Circuit has likewise required a nexus between a foreign citizen's extraterritorial conduct and the United States. *See United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003) ("The Ninth Circuit has held that '[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.' We agree.") (citation omitted).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Appendix A

2018 WL 3408261
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Oleksii TSURKAN, Igor Polshyn,
Defendants-Appellants.

No. 17-10248
|
Non-Argument Calendar
|
(July 12, 2018)

Appeals from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:15-cr-00480-SCB-JSS-2

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Before WILSON, JORDAN, and EDMONDSON, Circuit Judges.

Opinion

PER CURIAM:

***1** Defendants Igor Polshyn and Oleksii Tsurkan appeal their convictions and 300-month sentences for conspiracy to possess with intent to distribute—and for possession 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), (b), 18 U.S.C. § 2, and 21 U.S.C. § 960(b)(1)(B)(ii). No reversible error has been shown; we affirm.

Briefly stated, Defendants were arrested after United States Coast Guard ("USCG") officers found them in possession of 370 kilograms of cocaine while on a sailboat in international waters south of the Dominican Republic. At trial, Defendants asserted that, while sailing at night on the open sea, their rented sailboat became ensnared in rogue ropes. In attempting to disentangle the sailboat, Defendants discovered that the ropes were attached to several wrapped packages, which Defendants decided to bring onboard. Suspecting that the packages contained illegal drugs, Defendants say they intended to deliver the packages to authorities when they returned to the Dominican Republic.

I.

On appeal, Defendants challenge the constitutionality of their convictions under the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501, et seq. ("MDLEA"). In particular, Defendants assert these arguments: (1) the question of whether the sailboat was "subject to the jurisdiction of the United States" constitutes an element of the offense that must be proved to a jury beyond a reasonable doubt; (2) Congress has no constitutional authority to punish offenses on the high seas without a nexus to the United States; and (3) the government's exercise of jurisdiction over Defendants without first establishing such a nexus violated Defendants' due process rights.

Defendants acknowledge that their arguments about the MDLEA have been foreclosed by our binding precedent in United States v. Campbell, 743 F.3d 802 (11th Cir. 2014), and in United States v. Cruickshank, 837 F.3d 1182 (11th Cir. 2016). "Under the prior precedent rule, we are bound to follow a prior binding precedent unless and until it is overruled by this court en banc or by the Supreme Court." United States v. Vega-Castillo, 540 F.3d 1235, 1236 (11th Cir. 2008) (quotations omitted).

II.

We next address Defendants' challenges to the district court's evidentiary rulings. Polshyn argues that the district court deprived him of his Fifth and Sixth Amendment rights to present a defense by excluding his testimony about his brother's death due to a drug overdose. "Whether the exclusion of evidence violated a constitutional guarantee is a legal question reviewed de novo." United States v. Sarras, 575 F.3d 1191, 1209 n.24 (11th Cir. 2009).

The Sixth Amendment guarantees a defendant the right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI. "Implicit in this right—as well as in the basic notion of 'due process of law' in general—is the idea that criminal defendants must be afforded the opportunity to present evidence in their favor." United States v. Hurn, 368 F.3d 1359, 1362 (11th Cir. 2004) (citation omitted).

***2** During trial, Polshyn testified that he and Tsurkan suspected the packages contained illegal drugs and that they "were too worried to throw it away because we didn't think it was a good idea for it to end up in somebody else's hands." Polshyn then added, "We do have a special relationship with drugs, meaning my younger brother actually died of drugs." The government objected; and the district court instructed the jury to disregard the statement about Polshyn's brother. Tsurkan's lawyer later sought to question Polshyn about his brother's death, asserting that the testimony would establish that Defendants had no intent to sell the drugs. The district court denied the request on grounds that the testimony was not relevant and was more prejudicial than probative.

We suspect that the district court erred in excluding Polshyn's proposed testimony. We question the district court's determination that the testimony was excludable as irrelevant or as unduly prejudicial. As a practical matter, intent was the only issue in this case. Because the proposed testimony had some tendency to make more probable Polshyn's assertion that he had no intent to sell the drugs, the testimony was "relevant" within the meaning of Fed. R. Evid. 401. Moreover, although the testimony might have elicited with the jury some sympathy for Polshyn, we doubt that the testimony's probative value for the main issue was "substantially outweighed" by the risk of unfair prejudice. See Fed. R. Evid. 403.

Generally speaking, a defendant has a constitutional right "to present evidence that has a direct bearing on a formal element of the charged offense." Hurn, 368 F.3d at 1363. A defendant also "has the right to introduce evidence that is not directly relevant to an element of the offense, but that makes the existence or non-existence of some collateral matter somewhat more or less likely, where that collateral matter bears a sufficiently close relationship to an element of the offense." Id. at 1364.

Evidence of Polshyn's brother's death seems to fall within this second category: it constitutes evidence of a collateral matter that bears at least some relationship to the intent element of the charged offense. Evidence that a person has lost a close family member to a drug overdose could—"through a reasonable chain of inferences"—make it less likely that that person possessed the requisite intent to engage in a drug trafficking offense. See id. at 1363. We avoid deciding constitutional questions when we can; so we will just assume for purposes of this appeal that the district court made a constitutional error in excluding Polshyn's proposed testimony. See Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944) (stressing that courts "ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable").

Our focus today is on whether the supposed constitutional error was "harmless beyond a reasonable doubt." See Hurn, 368 F.3d at 1362-63. In deciding whether constitutional error is harmless, we ask "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Our determination about whether reversal is warranted "must be based on our own reading of the record and on what seems to us to have been the probable impact of [the constitutional error] on the minds of an average jury." Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). In some cases, a constitutional error may be deemed harmless beyond a reasonable doubt when the evidence of the defendant's guilt is "so overwhelming." Id.

Based on our review of the record in this case, we conclude that the district court's assumed error in excluding the proposed testimony was harmless beyond a reasonable doubt. Defendants were found traveling on a sailboat displaying a fraudulent registration number and in an

area known for drug trafficking. Defendants were in possession of 370 kilograms of cocaine, which was stashed throughout the vessel's stowage compartments. The only element in dispute at trial was whether Defendants possessed the requisite intent to distribute the drugs found onboard. Intent can be inferred based on the large quantity of cocaine found within Defendants' possession. See United States v. Tinoco, 304 F.3d 1088, 1123 (11th Cir. 2002).

***3** About intent, Polshyn testified at length about his version of the events, including that he had no intention of selling the accidentally-discovered drugs and, instead, intended to turn the drugs over to authorities. Although testimony about Polshyn's brother's death might have lent some support to Polshyn's assertion that he lacked the requisite intent, powerful objective evidence in the record contradicted expressly Polshyn's version of the events leading up to his being in possession of the cocaine. In particular, data from the sailboat's global positioning system ("GPS") clashed with Polshyn's inconsistent testimony about Defendants' direction of travel and his testimony that the sailboat remained stationary for at least an hour while Defendants purportedly untangled the sailboat from the ropes and hauled the packages on board. Expert testimony and photographic evidence also demonstrated that the sailboat's hull and rudder showed no signs of damage: this evidence conflicted with Defendants' testimony about the sailboat having been entangled in ropes. Defendants also took no steps to report the suspected contraband to the USCG officers —even when the USCG officers boarded the sailboat— despite Defendants' asserted intention to turn the drugs over to authorities.

In the light of the overwhelming evidence of Defendants' guilt—including strong evidence contradicting directly Polshyn's version of the events—we are convinced that the exclusion of the proposed testimony about Polshyn's brother contributed in no way to Defendants' convictions. Having concluded that the district court's assumed constitutional error was harmless beyond a reasonable doubt, no reversal is warranted.

III.

We next address Tsurkan's argument that the district court abused its discretion by excluding expert testimony from Captain John Timmel. In pertinent part, Captain Timmel's proffered testimony would have run this way: it is not uncommon for sailboats to become entangled in rogue ropes or netting while at sea. Following a hearing, the district court determined that Captain Timmel's testimony was inadmissible under Federal Rule of Evidence 702.

We review the district court's ruling about the admissibility of expert testimony under an abuse-of-discretion standard. United States v. Frazier, 387 F.3d 1244, 1258 (11th Cir. 2004). Under this standard, we will not reverse the district court's decision "unless the ruling is manifestly erroneous." Id.

In determining whether an expert's testimony is admissible under Rule 702, we consider three factors: (1) whether the expert is qualified to testify competently; (2) whether the expert has used sufficiently reliable methodology in reaching his conclusions; and (3) whether the testimony will assist the trier of fact. Id. at 1260. When a witness relies primarily on his experience to qualify him as an expert, "the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Id. at 1261.

The district court abused no discretion by excluding Captain Timmel's proffered testimony. Captain Timmel's curriculum vitae showed that Captain Timmel is an experienced harbor pilot who has worked chiefly in the Tampa Bay area and with motorboats. Nothing demonstrated that Captain Timmel had specialized knowledge or experience sufficient to qualify him as an expert either in the frequency with which sailboats become ensnared in rogue ropes or nets at sea or in the sailing conditions south of the Dominican Republic. The testimony was, thus, excluded properly under Rule 702.

We are also unpersuaded that the exclusion of the proffered testimony deprived Tsurkan of his Fifth and Sixth Amendment rights. Captain Timmel's proffered testimony had no "direct bearing on a formal element of the charged offense." See Hurn, 368 F.3d at 1363. Nor would the proffered testimony have had "a substantial impact on the credibility of an important government witness." See id. Testimony about the general likelihood of a sailboat becoming entangled in ropes at sea would not rebut or cast doubt on the USCG investigator's testimony

about the condition of the sailboat in this case. Tsurkan has thus demonstrated no constitutional violation.

IV.

***4** Polshyn next challenges the district court's application of a two-level obstruction-of-justice enhancement—pursuant to U.S.S.G. § 3C1.1—for testifying falsely at trial. We review for clear error the district court's factual findings and review de novo the court's application of the guidelines to those facts. United States v. Doe, 661 F.3d 550, 565 (11th Cir. 2011). "Under the clearly erroneous standard, we must affirm the district court unless review of the entire record leaves us with the definite and firm conviction that a mistake has been committed." United States v. McPhee, 336 F.3d 1269, 1275 (11th Cir. 2003) (quotation omitted).

In pertinent part, section 3C1.1 provides for a two-level increase to the defendant's base offense level if "(1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing" of his offense of conviction, and "(2) the obstructive conduct related to ... the defendant's offense of conviction and any relevant conduct." U.S.S.G. § 3C1.1. The Application Notes to section 3C1.1 list examples of conduct warranting the enhancement, including "committing, suborning, or attempting to suborn perjury." Id. § 3C1.1, comment. (n.4(B)).

A defendant's testimony constitutes perjury when the testimony: (1) is made under oath; (2) is false; (3) is material; and (4) is given "with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." United States v. Dunnigan, 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993). For purposes of section 3C1.1, "material ... means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1, comment. (n.6).

The record supports the district court's factual determination that Polshyn committed perjury during trial. Polshyn's testimony that he intended to turn the cocaine over to authorities was inconsistent with evidence that neither he nor Tsurkan took steps to notify the USCG agents that Defendants suspected contraband was aboard the sailboat. Moreover, the sailboat's GPS data contradicted Polshyn's testimony (1) that Defendants had been traveling toward Grenada and (2) that the sailboat had been stationary for at least an hour while Defendants worked to free the sailboat from the ropes and to load the cocaine-filled packages onboard. A USCG investigator who examined the sailboat also testified that he observed no disturbance in the marine growth or other damage to the hull or rudder that would be consistent with Polshyn's version of the events.

Viewing the record as a whole, we are not left "with the definite and firm conviction" that the district court committed a mistake in determining that Polshyn testified falsely. The district court committed no clear error in determining that Polshyn perjured himself and, thus, applied properly a two-level enhancement under section 3C1.1.

V.

Tsurkan challenges the district court's application of a two-level role enhancement, pursuant to U.S.S.G. § 2D1.1(b)(3), for acting as a pilot or copilot of a vessel carrying a controlled substance.

The Sentencing Guidelines provide for a two-level increase to a defendant's base offense level if he "acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance." U.S.S.G. § 2D1.1(b)(3)(C). We have said that a defendant need not have formal training or licensure to qualify as a "pilot" or "copilot" for purposes of a section 2D1.1(b)(3) enhancement. United States v. Cartwright, 413 F.3d 1295, 1298-99 (11th Cir. 2005). Nor must the defendant have been in "position of authority" for the enhancement to apply. Id. (concluding that the district court committed no clear error in applying the enhancement to a defendant who took turns driving the boat, and who followed instructions on where to steer the boat).

***5** Polshyn and Tsurkan each testified that, at night, they took two-hour shifts at the helm while the other would sleep. Based on this evidence, the district court committed no clear error in determining that Tsurkan acted as a pilot or copilot for purposes of the section 2D1.1(b)(3) enhancement. That Tsurkan lacked

specialized training or knowledge about sailing and was following Polshyn's instructions does not preclude application of the enhancement. See id.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2018 WL 3408261

Appendix B

TITLE 46
SHIPPING

SUBTITLE VII—SECURITY AND DRUG ENFORCEMENT

CHAPTER 705—MARITIME DRUG LAW ENFORCEMENT

Sec.

§ 70501. Findings and declarations

Congress finds and declares that (1) 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 and (2) operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States.

(Pub.L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1685; Pub.L. 110–407, Title II, § 201, Oct. 13, 2008, 122 Stat. 4299.)

§ 70502. Definitions

(a) Application of other definitions.—The definitions in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) apply to this chapter.

(b) Vessel of the United States.—In this chapter, the term "vessel of the United States" means—

(1) a vessel documented under chapter 121 of this title or numbered as provided in chapter 123 of this title;

(2) a vessel owned in any part by an individual who is a citizen of the United States, the United States Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the United States or of a State, unless—

(A) the vessel has been granted the nationality of a foreign nation under article 5 of the 1958 Convention on the High Seas; and

(B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States who is authorized to enforce applicable provisions of United States law; and

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was sold to a person not a citizen of the United States, placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation.

(c) Vessel subject to the jurisdiction of the United States.—

(1) In general.—In this chapter, the term "vessel subject to the jurisdiction of the United States" includes—

(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel in the customs waters of the United States;

(E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and

(F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that—

(i) is entering the United States;

(ii) has departed the United States; or

(iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

(2) Consent or waiver of objection.—Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under paragraph (1)(C) or (E)—

(A) may be obtained by radio, telephone, or similar oral or electronic means; and

(B) is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(d) Vessel without nationality.—

(1) In general.—In this chapter, the term "vessel without nationality" includes—

(A) 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;

(B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed

nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

(2) Response to claim of registry.—The response of a foreign nation to a claim of registry under paragraph (1)(A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(e) Claim of nationality or registry.—A claim of nationality or registry under this section includes only—

(1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas;

(2) flying its nation's ensign or flag; or

(3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.

(f) Semi-submersible vessel; submersible vessel.—In this chapter:

(1) Semi-submersible vessel.—The term "semi-submersible vessel" means any watercraft constructed or adapted to be capable of operating with most of its hull and bulk under the surface of the water, including both manned and unmanned watercraft.

(2) Submersible vessel.—The term "submersible vessel" means a vessel that is capable of operating completely below the surface of the water, including both manned and unmanned watercraft.

(Pub.L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1685; Pub.L. 109–241, Title III, § 303, July 11, 2006, 120 Stat. 527; Pub.L. 110–181, Div. C, Title XXXV, § 3525(a)(6), (b), Jan. 28, 2008, 122 Stat. 601; Pub.L. 110–407, Title II, § 203, Oct. 13, 2008, 122 Stat. 4300.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in subsec. (a), is Pub.L. 91–513, Title II, § 102, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified to 21 U.S.C.A. § 802.

Chapter 121 of this title, referred to in subsec. (b)(1), is Documentation of Vessels, 46 U.S.C.A. § 12101 et seq.

Chapter 123 of this title, referred to in subsec. (b)(1), is Numbering Undocumented Vessels, 46 U.S.C.A. § 12301 et seq.

Presidential Proclamation 7219 of September 2, 1999, referred to in subsec. (c)(1)(F), probably means Proc. No. 7219, Aug. 2, 1999, 64 FR 48701, which is set out as a note under 43 U.S.C.A. § 1331.

Section 401 of the Tariff Act of 1930, referred to in subsec. (c)(1)(F)(iii), is Act June 17, 1930, c. 497, Title IV, § 401, 46 Stat. 708, which is classified to 19 U.S.C.A. § 1401.

Codifications

Pub.L. 109–304, Oct. 6, 2006, 120 Stat. 1485, which completed the codification of T. 46, Shipping, as positive law directed that if a law enacted after April 30, 2005, amends or repeals a provision replaced by Pub.L. 109–304, that law is deemed to amend or repeal the corresponding provision enacted by Pub.L. 109–304. See Pub.L. 109–304, § 18(a), Oct. 6, 2006, 120 Stat. 1709, set out as a note provision preceding 46 U.S.C.A. § 101. Pub.L. 109–241, Title III, § 303, July 11, 2006, 120 Stat. 527, amended former 46 App. U.S.C.A. § 1903(c)(2), from which this section was derived, by striking the last two sentences and inserting: "The response of a foreign nation to a claim of registry under subparagraph (A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is conclusively proved by certification of the Secretary of State or the Secretary's designee.", and was subsequently repealed by Pub.L. 110–181, Div. C, Title XXXV, § 3525(b), Jan. 28, 2008, 122 Stat. 601.

§ 70503. Prohibited acts

(a) Prohibitions.—While on board a covered vessel, an individual may not knowingly or intentionally—

(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;

(2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or

(3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

(b) Extension beyond territorial jurisdiction.—Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.

(c) Nonapplication.—

(1) In general.—Subject to paragraph (2), subsection (a) does not apply to—

(A) a common or contract carrier or an employee of the carrier who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business; or

(B) a public vessel of the United States or an individual on board the vessel who possesses or distributes a controlled substance in the lawful course of the individual's duties.

(2) Entered in manifest.—Paragraph (1) applies only if the controlled substance is part of the cargo entered in the vessel's manifest and is intended to be imported lawfully into the country of destination for scientific, medical, or other lawful purposes.

(d) Burden of proof.—The United States Government is not required to negative a defense provided by subsection (c) in a complaint, information, indictment, or other pleading or in a trial or other proceeding. The burden of going forward with the evidence supporting the defense is on the person claiming its benefit.

(e) Covered vessel defined.—In this section the term "covered vessel" means—

(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States.

(Pub.L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1687; Pub.L. 114–120, Title III, § 314(a), (b), (e)(1), Feb. 8, 2016, 130 Stat. 59.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in subsec. (a)(2), is Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1236, as amended, which is classified principally to chapter 13 of Title

21, 21 U.S.C.A. § 801 et seq. Section 511 of the Act is classified to 21 U.S.C.A. § 881. For complete classification, see Short Title note set out under 21 U.S.C.A. § 801 and Tables.

§ 70504. Jurisdiction and venue

(a) **Jurisdiction.**—Jurisdiction 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.

(b) **Venue.**—A person violating section 70503 or 70508 of this title shall be tried in the district court of the United States for—

(1) the district at which the person enters the United States; or

(2) the District of Columbia.

(Pub.L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub.L. 110–407, Title II, § 202(b)(2), Oct. 13, 2008, 122 Stat. 4300.)

§ 70505. Failure to comply with international law as a defense

A person charged with violating section 70503 of this title, or against whom a civil enforcement proceeding is brought under section 70508, does not have standing to raise a claim of failure to comply with international law as a basis for a defense. A claim of failure to comply with international law in the enforcement of this chapter may be made only by a foreign nation. A failure to comply with international law does not divest a court of jurisdiction and is not a defense to a proceeding under this chapter.

(Pub.L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub.L. 110–407, Title II, § 202(b)(3), Oct. 13, 2008, 122 Stat. 4300.)

§ 70506. Penalties

(a) **Violations.**—A person violating paragraph (1) of section 70503(a) of this title shall be punished as provided in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960). However, if the offense is a second or subsequent offense as provided in section 1012(b) of that Act (21 U.S.C. 962(b)), the person shall be punished as provided in section 1012 of that Act (21 U.S.C. 962).

(b) **Attempts and conspiracies.**—A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503.

(c) **Simple possession.**—

(1) **In general.**—Any individual on a vessel subject to the jurisdiction of the United States who is found by the Secretary, after notice and an opportunity for a hearing, to have knowingly or intentionally possessed a controlled substance within the meaning of the Controlled Substances Act (21 U.S.C. 812) shall be liable to the United States for a civil penalty of not to exceed $5,000 for each violation. The Secretary shall notify the individual in writing of the amount of the civil penalty.

(2) **Determination of amount.**—In determining the amount of the penalty, the Secretary shall consider the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters that justice requires.

(3) **Treatment of civil penalty assessment.**—Assessment of a civil penalty under this subsection shall not be considered a conviction for purposes of State or Federal law but may be considered proof of possession if such a determination is relevant.

(d) **Penalty.**—A person violating paragraph (2) or (3) of section 70503(a) shall be fined in accordance with section 3571 of title 18, imprisoned not more than 15 years, or both.

(Pub.L. 109–304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub.L. 111–281, Title III, § 302, Oct. 15, 2010, 124 Stat. 2923; Pub.L. 114–120, Title III, § 314(c), Feb. 8, 2016, 130 Stat. 59.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Controlled Substances Act, referred to in subsec. (c)(1), is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I of chapter 13 of Title 21, 21 U.S.C.A. § 801. For complete classification, see Short Title note set out under 21 U.S.C.A. § 801 and Tables.

§ 70507. Forfeitures

(a) **In general.**—Property described in section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)) that is used or intended for use to commit, or to facilitate the commission of, an offense under section 70503 or 70508 of this title may be seized and forfeited in the same manner that similar property may be seized and forfeited under section 511 of that Act (21 U.S.C. 881).

(b) **Prima facie evidence of violation.**—Practices commonly recognized as smuggling tactics may provide prima facie evidence of intent to use a vessel to commit, or to facilitate the commission of, an offense under section 70503 of this title, and may support seizure and forfeiture of the vessel, even in the absence of controlled substances aboard the vessel. The following indicia, among others, may be considered, in the totality of the circumstances, to be prima facie evidence that a vessel is intended to be used to commit, or to facilitate the commission of, such an offense:

(1) The construction or adaptation of the vessel in a manner that facilitates smuggling, including—

(A) the configuration of the vessel to ride low in the water or present a low hull profile to avoid being detected visually or by radar;

(B) the presence of any compartment or equipment that is built or fitted out for smuggling, not including items such as a safe or lock-box reasonably used for the storage of personal valuables;

(C) the presence of an auxiliary tank not installed in accordance with applicable law or installed in such a manner as to enhance the vessel's smuggling capability;

(D) the presence of engines that are excessively overpowered in relation to the design and size of the vessel;

(E) the presence of materials used to reduce or alter the heat or radar signature of the vessel and avoid detection;

(F) the presence of a camouflaging paint scheme, or of materials used to camouflage the vessel, to avoid detection; or