No. 18-9263

IN THE SUPREME COURT OF THE UNITED STATES

LUIS FELIPE VALENCIA, PETITIONER

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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Petitioner was 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, in a prosecution under the MDLEA for a drug offense committed on board a vessel in international waters, the Due Process Clause of the Fifth Amendment requires the government to prove a connection between the offense conduct and the United States.

2. Whether 46 U.S.C. 70502(d)(2), which provides that a foreign nation's response to a claim of registry "is proved conclusively" by a certification of the Secretary of State or his designee, violates petitioner's rights under the Confrontation Clause, U.S. Const. Amend. VI.

3. Whether 46 U.S.C. 70502(d)(1)(C), which provides that a vessel may be deemed stateless if "the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality," is void for vagueness.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Valencia, No. 16-cr-10052 (Aug. 4, 2017)

United States Court of Appeals (11th Cir.):

United States v. Valencia, No. 17-13535 (Feb. 12, 2019)

Supreme Court of the United States:

Portocarrero Valencia v. United States, No. 18-9328 (filed May 13, 2019)

Valois v. United States, No. 19-5166 (filed July 10, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-15) is reported at 915 F.3d 717. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2019. The petition for a writ of certiorari was filed on May 9, 2019. 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 Southern District of Florida, petitioner was convicted of conspiracy to possess with the intent to distribute more than five kilograms of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70506(b), and possession with the intent to distribute more than five kilograms of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a) (Supp. IV 2016). Judgment 1. He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1, at 1-15.

1. The Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq., makes it unlawful for any person to possess a controlled substance with the intent to distribute it, or to attempt or conspire to do so, on board "a vessel subject to the jurisdiction of the United States." 46 U.S.C. 70503(a) and (e)(1) (Supp. IV 2016), 46 U.S.C. 70506(b). 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 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(d)(1)(C). 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 the Secretary's designee." 46 U.S.C. 70502(d)(2). The MDLEA further provides that "[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. One morning in November 2016, U.S. Coast Guard personnel encountered a suspicious "go-fast" boat in international waters off the coasts of Panama and Costa Rica. Pet. App. A1, at 7; see 5/8/17 Tr. 111-112. As the Coast Guard pursued the boat, two men on the boat began throwing packages overboard. 5/8/17 Tr. 112.

The Coast Guard caught up to the boat after a brief chase, but by then, no more packages remained on board. Id. at 147. The Coast Guard later retrieved 16 jettisoned packages, which were found to contain approximately 640 kilograms of cocaine. Id. at 112, 115.

The Coast Guard found three men on the boat: Henry Vazquez Valois, Diego Portocarrero Valencia, and petitioner. 5/8/2017 Tr. 110-111. Valois "identified himself as the master of the vessel and claimed Colombian nationality for the vessel," but the vessel "did not display a hailing port and was not flying a national flag," and the Government of Colombia "could neither confirm nor deny the vessel's registry or nationality." D. Ct. Doc. 43, at 2 (Apr. 13, 2017).

3. A grand jury in the Southern District of Florida indicted Valois, Valencia, and petitioner on one count of conspiring to possess with the intent to distribute five kilograms or more of cocaine, in violation of 46 U.S.C. 70506(a) and (b) (2012 & Supp. IV 2016), and 21 U.S.C. 960(b)(1)(B), and one count of possessing with the intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a)(1) (Supp. IV 2016), 21 U.S.C. 960(b)(1)(B), and 18 U.S.C. 2. Indictment 1-2.

In a pretrial order, the district court found that the MDLEA's jurisdictional requirements were satisfied because the go-fast boat was "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." D. Ct. Doc. 43, at 3 (quoting 46 U.S.C. 70502(d)(1)(C)); see id. at 1-6. The court explained that "a certification by the Secretary of State or the Secretary's designee concerning a vessel's registry or lack thereof constitutes rebuttable prima facie evidence of the facts certified." Id. at 3 (quoting United States v. Tinoco, 304 F.3d 1088, 1114 (11th Cir. 2002), cert. denied, 538 U.S. 909 (2003)). And it observed that the government had provided a certification from the Department of State that the Government of Colombia "could neither confirm nor deny the vessel's registry or nationality." Id. at 2.

In the same order, the district court also rejected petitioner's objections to its exercise of jurisdiction. First, citing the Eleventh Circuit's decision in United States v. Campbell, 743 F.3d 802, 810, cert. denied, 135 S. Ct. 704 (2014), it rejected petitioner's contention that the government was required to "establish a jurisdictional nexus" between the conduct at issue and the United States. D. Ct. Doc 43, at 4. Second, citing the Eleventh Circuit's decision in United States v. Tinoco, supra, the court rejected petitioner's contention that the resolution of "a jurisdictional determination under the MDLEA * * * by the district court * * * violat[ed] [petitioner's] constitutional jury trial rights." Id. at 5. Finally, citing Campbell, the court rejected petitioner's contention that "the

admission of a State Department Certification" "without an opportunity for [petitioner] to first cross-examine the declarant" would violate the Confrontation Clause. Ibid.

Following a three-day trial, the jury found petitioner and his co-defendants guilty of the charged offenses. D. Ct. Doc. 63, at 1-5 (May 12, 2017). The district court sentenced petitioner to 120 months of imprisonment. Judgment 2.

4. The court of appeals affirmed. Pet. App. A1, at 1-15. The court rejected four constitutional challenges to the MDLEA, explaining that "each of these arguments is foreclosed by binding [circuit] precedent." Id. at 6. First, relying on its previous decision in Campbell, the court rejected petitioner's contention that "Congress's authority to define and punish felonies on the high seas does not extend to felonies without any connection to the United States." Ibid. Second, relying on its previous decision in United States v. Rendon, 354 F.3d 1320 (11th Cir. 2003), cert. denied, 541 U.S. 1035 (2004), the court rejected petitioner's contention that "due process prohibits the prosecution of foreign nationals for offenses that lack a nexus to the United States." Pet. App. A1, at 6. Third, relying on its previous decision in Tinoco, the court rejected petitioner's contention that "the MDLEA violates the Fifth and Sixth Amendments by removing the determination of jurisdictional facts from the jury," explaining that "the MDLEA jurisdictional requirement" need not be submitted to the jury because it "goes to the subject-

matter jurisdiction of courts and is not an essential element of the MDLEA substantive offense." Ibid. Fourth, relying on Campbell, the court rejected petitioner's contention that "the admission of a certification of the Secretary of State to establish extraterritorial jurisdiction violates the Confrontation Clause," explaining that the jurisdictional requirement "'does not implicate the Confrontation Clause'" because it is "not an element of [the] MDLEA offense to be proved at trial." Ibid. (citation omitted).

ARGUMENT

Petitioner contends (Pet. 4-14) that prosecutions under the MDLEA in the absence of a connection between the offense conduct and the United States violate the Due Process Clause and that the admission of a certification from the Secretary of State to prove jurisdiction under the MDLEA violates the Confrontation Clause. Those contentions lack merit, and this Court has recently and repeatedly declined to review petitions presenting each of those issues. Petitioner also contends (Pet. 14-16) that the MDLEA is void for vagueness. That contention was neither raised nor passed upon below, lacks merit, and is not the subject of any circuit conflict. Further review is unwarranted.*

1. Petitioner principally contends (Pet. 4-8) that the Due Process Clause of the Fifth Amendment requires a connection or

* Similar issues are raised by the petition for a writ of certiorari in Portocarrero Valencia v. United States, No. 18-9328 (May 13, 2019).

"nexus" between the offense conduct and the United States for prosecutions under the MDLEA. That contention lacks merit, and no court of appeals has imposed such a requirement where, as here, the MDLEA is applied to conduct on a stateless vessel in international waters. Although the Ninth Circuit has inferred such a requirement in cases involving foreign-registered vessels, that divergence from other circuits is not at issue here, has not been of practical consequence to date, and does not warrant this Court's review. This Court has repeatedly denied certiorari on the issue. See Cruickshank v. United States, 139 S. Ct. 96 (2018) (No. 17-8953); Wilchcombe v. United States, 137 S. Ct. 2265 (2017); Cruickshank v. United States, 137 S. Ct. 1435 (2017) (No. 16-7337); (No. 16-1063); Persaud v. United States, 136 S. Ct. 534 (2015) (No. 14-10407); Campbell v. United States, 135 S. Ct. 704 (2014) (No. 13-10246); Tam Fuk Yuk v. United States, 565 U.S. 1203 (2012) (No. 11-6422); Brant-Epigmelio v. United States, 565 U.S. 1203 (2012) (No. 11-6306); 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). The same result is warranted here.

Petitioner asserts (Pet. 6) that he should not have been prosecuted in the United States for drug offenses lacking "a United States nexus." Congress explicitly 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). And courts have repeatedly upheld prosecutions under the MDLEA (and its statutory predecessor) even in the absence of evidence that the drug trafficking was directed at the United States. See, e.g., United States v. Campbell, 743 F.3d 802, 810 (11th Cir.), cert. denied, 135 S. Ct. 704 (2014).

With the exception of the Ninth Circuit, every court of appeals to consider the issue has determined that the MDLEA validly applies to vessels on the high seas without any showing of a connection between the offense conduct and the United States. See, e.g., United States v. Cardales, 168 F.3d 548, 552-553 (1st Cir.), cert. denied, 528 U.S. 838 (1999); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 & n.6 (3d Cir. 1993), cert. denied, 510 U.S. 1048 (1994); United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002); United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003), cert. denied, 541 U.S. 1035 (2004).

By contrast, 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 the MDLEA. United States v. Zakharov, 468 F.3d 1171, 1177 (9th Cir. 2006) (quoting United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998), cert. denied, 528 U.S. 842 (1999)), cert. denied, 550 U.S. 927 (2007). The Ninth Circuit has nonetheless 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." United States v. Perlaza, 439 F.3d 1149, 1161 (2006) (brackets and citation omitted). Accordingly, no court of appeals would require the government to show a connection between the offense conduct and the United States where, as here, the MDLEA is applied to an offense committed on a stateless vessel.

Petitioner invokes (Pet. 7) the Fifth Circuit's decision in United States v. Lawrence, 727 F.3d 386 (2013), cert. denied, 571 U.S. 1222 (2014), and the Second Circuit's decision in United States v. Yousef, 327 F.3d 56, cert. denied, 540 U.S. 933, and 540 U.S. 993 (2003). The courts in those cases asserted that the extraterritorial application of criminal law requires a connection between the United States and the criminal conduct abroad, see Lawrence, 727 F.3d at 396; Yousef, 327 F.3d at 111, but neither decision invalidated a conviction on that ground, and neither case involved application of the MDLEA. See Lawrence, 727 F.3d at 388-389, 396 (affirming conviction for conspiracy to possess drugs aboard an aircraft with intent to distribute, in violation of 21 U.S.C. 959(b) and 963); Yousef, 327 F.3d at 84, 111 (affirming conviction for conspiracy to bomb a civil aircraft registered in a foreign country, in violation of 18 U.S.C. 32(b)(3)). They thus presented no questions analogous to those involving a stateless vessel on the high seas, and neither opinion considered the issue in light of explicit congressional findings, like those about drug-trafficking contained in 46 U.S.C. 70501(1). Indeed, the Fifth

Circuit has precedent in accord with the decision below on the application of the MDLEA to stateless vessels. See Suerte, 291 F.3d at 395. The decisions cited by petitioner accordingly do not indicate a conflict on the question presented here.

2. Petitioner also contends (Pet. 9-14) that the admission of a certification from the Department of State to prove a vessel's statelessness, see 46 U.S.C. 70502(d)(2), violates the Confrontation Clause. This Court has previously declined to review similar issues raised in other petitions, and it should follow the same course here. See Cruickshank, supra (No. 17-8953); 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).

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. This Court has described 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) (opinion of Powell, J.) ("The opinions of this Court show that the right to confrontation is a trial right.") (emphasis omitted). 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). And all of the Court's Confrontation Clause decisions since Crawford v. Washington, supra -- which focused the Confrontation Clause inquiry largely on an out-of-court's "testimonial" nature -- have involved trial settings. See Ohio v. Clark, 135 S. Ct. 2173, 2177 (2015); Williams v. Illinois, 567 U.S. 50, 56 (2012) (plurality opinion); Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009).

The United States' jurisdiction over a vessel for purposes of the MDLEA "is not an element of an offense" to be established at trial, but is instead a "preliminary question[] of law to be determined solely by the trial judge." 46 U.S.C. 70504(a); see United States v. Vilches-Navarrete, 523 F.3d 1, 20 (1st Cir.) ("This issue is not an element of the crime."), cert. denied, 555 U.S. 897 (2008); 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."). Petitioner does not contend otherwise. See Pet. 11.

Petitioner does not identify any basis for extending the Confrontation Clause's protections to such a jurisdictional question. The First Circuit, which appears to be the only other court of appeals apart from the court below to have considered the issue, agrees that the Confrontation Clause does not extend to "the MDLEA's jurisdiction determination." United States v. Mitchell-Hunter, 663 F.3d 45, 50-51 (2011). In the absence of any disagreement in the courts of appeals, further review of petitioner's claim under the Confrontation Clause is unwarranted.

3. Finally, petitioner contends that "the MDLEA is void for vagueness because it does not contain a time limit for a foreign nation to confirm whether a vessel is of its nationality." Pet. 14 (capitalization altered); see id. at 14-16. Petitioner did not raise that contention in the court of appeals or the district court, and neither of those courts passed on the issue. This Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and its ordinary practice "precludes a grant of certiorari" where "'the question presented was not pressed or passed upon below,'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted).

Even if petitioner's contention were properly before this Court, it would be subject to review only for plain error. See Fed. R. Crim. P. 52(b). Petitioner cannot satisfy that standard. "[This] Court has invalidated two kinds of criminal laws as 'void for vagueness': laws that define criminal offenses and laws that

fix the permissible sentences for criminal offenses." Beckles v. United States, 137 S. Ct. 886, 892 (2017). And a criminal law is impermissibly vague if it "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." Ibid. (citation omitted). Petitioner identifies no sound basis for extending the vagueness doctrine to the MDLEA's jurisdictional requirement, which, as discussed above, does not set out an element of the offense. Nor does petitioner identify any sound basis for concluding that the MDLEA fails to provide fair notice of the conduct it punishes or that the statute is so standardless that it invites arbitrary enforcement. Petitioner has thus failed to establish any error, much less plain error. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

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