No. 18-9263

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IN THE SUPREME COURT OF THE UNITED STATES

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LUIS FELIPE VALENCIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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# PETITIONER VALENCIA'S REPLY BRIEF

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Martin A. Feigenbaum, Esq.
Florida Bar No. 705144
P.O. Box 545960
Surfside, Florida 33154
Telephone: (305) 323-4595
Facsimile: (844) 274-0862
Email: innering@aol.com

Attorney for Petitioner
Luis Felipe Valencia

## ARGUMENT AND CITATIONS OF AUTHORITY

Issue I (Due Process / Minimum Contacts).

This case involves three foreign nationals on board a small boat traveling in international waters of the Eastern Pacific. Neither the individuals nor the vessel had any connection to the United States. Respondent United States of America's ("Government") brief in response to Luis Felipe Valencia's ("Valencia") first issue is two-fold: a) this Court never has granted certiorari review in a Title 46[1] case; and b) precedent of several courts of appeals does not support relief. Precedent is good for predictability about the legal consequences of interaction among governmental, non-governmental, and individual actors. Our sacred Bill of Rights provides individuals with protections from governmental overreach regardless of their origin, celebrity, or station in life. Precedent is the glue which binds an impartial and just legal structure. But precedent is not super-glue. If it were, then this Court would not have been able to issue watershed decisions grounded in the Bill of Rights. *See*, *e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966), *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *United States v. Booker,* 543 U.S. 220 (2005). In its brief, the Government reminds this Court that it has not *so far* granted a certiorari petition in a Title 46

[1] Title 46 codifies the Maritime Drug Law Enforcement Act ("MDLEA").

case. It is an observation but not a reason why this Court should deny the petition.

The Government never meets head on why there should be no "minimum contacts" required to support an MDLEA prosecution. *See* IB:24-28.[2] Instead, the Government relies on a tautology: the MDELA defines a "covered vessel," Valencia was found on board a "covered vessel," therefore, Valencia lawfully was prosecuted in a United States court. Valencia argued in the Eleventh Circuit there existed a good-faith basis for modifying its precedent to require a United States nexus, citing Supreme Court precedent in civil cases sufficiently analogous to justify such a modification for an MDLEA case. *See* IB:25 (citing *J. McIntyre Mach., LTD. V. Nicastro,* 564 U.S. 873, 879 (2011)(plurality op.)("Due Process Clause protects an individual's right to be deprived of life, liberty, or property *only* by the exercise of lawful power.")(emphasis supplied).

Because the Supreme Court teaches there must exist "minimum contacts" in civil litigation, there is no rational basis to excuse a "nexus" requirement in an MDLEA case. Ironically, in a civil case, a defendant stands only to lose money or property not freedom. That there not be the same Due Process protection for an

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[2] Valencia denotes references to his initial brief in the Eleventh Circuit by "IB:" followed by the page number(s). He shall denote references to the Government's response to the petition by "Resp." followed by the page number(s).

MDLEA defendant turns fundamental notions of justice on its head: a person's liberty interest is deserving of *less* constitutional protection than his money or property interest. This Court has the power to repair that illogical result by holding what is good for the civil goose also must be good for the criminal gander.

This troublesome state of affairs exists only because this Court has not yet addressed whether the same Due Process protections apply to the MDLEA as they do in civil and criminal cases. There are other criminal statutes, like the MDLEA, enacted in response to serious concerns about extraterritorial conduct impacting the United States. However, those other statutes have nexus requirements missing in the MDLEA. *See*, *e.g.*, 18 U.S.C. §1203(a)(b), the "Hostage Taking Act."[3] "Congress passed the Act because it believed that kidnapping involving foreign nationals has serious international ramifications, which are Congress's unique responsibility." *United States v. Ferreira*, 275 F.3d 1020, 1027 (11th Cir. 2001). In sum, the MDLEA is an extraterritorial outlier statute by not containing a United States nexus requirement, either for the vessel or the individuals on board it, thereby resulting in a violation of the Fifth Amendment's Due Process Clause.

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[3] Under 18 U.S.C. §1203(b)(1): "It is *not* an offense...if the conduct required for the offense occurred *outside* the United States *unless* (A) the offender or the person seized or detained is a *national* of the United States; (B) the offender is *found* in the United States; or (C) the governmental organization sought to be compelled *is* the Government of the United States. (emphasis supplied).

2. Issue II (Confrontation Clause / Department of State Certification).

The Government does not squarely address Valencia's Sixth Amendment argument under *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Rather, it invokes *United States v. Campbell,* 743 F.3d 802 (11th Cir. 2014), as sufficient authority to reject a Confrontation Clause violation. Valencia maintains that *Crawford*, *supra*, bars the admission of the hearsay statements in the Certification[4] because he was deprived of his right to confront the declarant's out-of-court statements. Those statements are essential for the Government to prove "judicial jurisdiction" rather than "prescriptive jurisdiction"[5]

A case Valencia relied on in his petition, but that the Government failed to address in its response, is *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 329 (2009). In that case, the Supreme Court held the Sixth Amendment does not allow the prosecution to prove its case "via ex parte out-of-court affidavits." Yet, the Certification is precisely that, an "ex parte out-of-court" declaration and, therefore,

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[4] *See* 46 U.S.C. §70502(d)(2).

[5] The former "raises the question whether a case comes within the power of the court, so that the court possesses the legal power to adjudicate the case." On the other hand, "prescriptive jurisdiction" concerns itself with the reach of a nation's (or any political entity's) laws. *See United States v. Prado*, 933 F.3d 121, 133 (2d Cir. 2019)(vacating judgments of conviction and dismissing indictment in Title 46 case; Government failed to show vessel subject to jurisdiction of the United States at pretrial hearing).

its use to establish "judicial jurisdiction" violates the Confrontation Clause. The Government does not cite to any other type of prosecution where such a procedure is excused under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).[6] As the Second Circuit recently observed in United *States v. Prado*, 933 F.3d 121, 137 (2d Cir. 2019): "The MDLEA thus makes clear in what circumstances vessels are covered by the statute's prohibition. If the vessel falls outside the prescribed coverage, it is not a "covered vessel," and the prohibition specified in §70503 does not apply to it."

Valencia was denied his Sixth Amendment right of confrontation in relation to the author of the Certification. That person made a declaration of facts to prove an essential element of the crime: Valencia's vessel was "without nationality," a

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[6] Apart from the Sixth Amendment violation, requiring the Government to produce a competent witness at trial with knowledge of the communications between the United States and the foreign government would not be any more burdensome than calling, for example, a Coast Guard boarding team fact witness. At trial Valencia would have been able to confront the "covered vessel" fact witness: What foreign official did a United States official contact to verify information? What information was relayed by the United States to the foreign official? What action did the foreign official take to verify the information? Did the foreign official need additional time to complete the verification process? Did the foreign official provide a written response? If the Government failed to prove that it had complied with §70502(d)(1)(C), §70502(d)(2), then jurisdiction would not have been established. *See*, *e.g.*, *United States v. Prado*, 933 F.3d 121 (2d Cir. 2019)(vacating conviction and dismissing indictment where Government failed to satisfy statutory prescription to establish judicial jurisdiction).

"covered vessel," and, thus, subject to the jurisdiction of the United States. *See* 46 U.S.C. §70502(C)(1)(A), §70502(d) (1)(C), §70502(d)(2). Without facts proving that Valencia's vessel was "covered" under Title 46, the Government could not prove his guilt for the high-seas drug trafficking crimes with which he was charged. The declarant who executed the Certification clearly was one of Valencia's accusers. He made out-of-court statements prohibited by *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez v. Massachusetts*, 537 U.S. 305 (2009). In other words, but for the Certification establishing facts that Valencia's vessel was "covered" as a "vessel without nationality," there would have been no "judicial jurisdiction" to adjudicate the case. Consequently, the Certification is an element of the offense which then triggers Confrontation Clause rights.

In an October 1, 2019 opinion, *United States v. Guerro*, 2019 WL 4805150 (11th Cir. October 1, 2019), the Eleventh Circuit vacated the convictions of the undersigned's client with directions to the district court to dismiss the indictment. Writing for the *Guerro* Court, Judge Martin noted the MDLEA "is a sweeping federal criminal statute. The Act establishes the framework for the United States to prosecute citizens of any country for drug crimes committed in international waters. And these prosecutions occur without regard for whether the drug trafficking activity will have any impact on the United States." Judge Martin

reiterated that Congress's grant of authority under the MDLEA was not "without limit." There "are strict requirements for establishing jurisdiction over the vessels and people the government seeks to prosecute. When the government fails to follow these requirements, the MDLEA provides courts with no jurisdiction over prosecutions under its terms." *United States v. Guerro*, 2019 WL 4805150 (11th Cir. October 1, 2019) at *1.

There is no rational basis for the courts to enforce the "strict requirements" under the MDLEA prescription for "judicial jurisdiction" and at the same time be able to ignore superior constitutional guarantees under the Fifth and Sixth Amendments. Therefore, appellate precedent, which turns its back on constitutional guarantees in MDLEA cases, cannot be countenanced. The current Certification scheme, as set forth in §70502(d)(2), simply makes no provision for a defendant's right to confront his accuser as to threshold adjudicatory facts.[7] A

[7] These "elements facts" could be analogized to the following scenario: in a kidnapping case, a witness claims the defendant crossed state lines with the victim before he was apprehended, thus providing a factual basis for federal jurisdiction. Otherwise, this case would have to be prosecuted in state court. The defendant disputes this essential material fact. The law provides for this class of witness to submit a sworn statement instead of appearing for in-court testimony in a pretrial hearing. Under this framework, the defendant is denied his right confront this accuser in that kidnapping case. Of course, this scenario could not pass constitutional scrutiny but, under the MDLEA, it *is* the current state of affairs.

defendant is denied the right to test the veracity of the accuser's assertion the vessel was "without nationality" as defined in §70502(c)(1). The defendant must be given the opportunity to challenge the factual assertions in the Certification which the Government then uses to establish "judicial jurisdiction." Without "judicial jurisdiction" the district court has no power to adjudicate the case. *See Bullcoming v. United States*, 546 U.S. 647, 662 (2011)(Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts; the Confrontation "Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."); *United States v. Prado*, 933 F.3d 121, 132-33, 137 (2d Cir. 2019). To deny an MDLEA defendant that opportunity cannot be glossed over because it is a direct violation of the Confrontation Clause.

3. Issue III (Void for Vagueness Doctrine).

The Government maintains that Valencia is not entitled to raise a "void for vagueness" argument because he "did not raise that intention in the Court of Appeals or the district court, and neither of those courts passed on the issue." Resp. at p.13. The Government's reliance on *United States v. Williams,* 504 U.S. 36 (1992), in fact supports the grant of this petition. "Our traditional rule...

precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992).[8] The Government goes on to state that "even if Petitioner's contention were properly before this Court, it would be subject to review only for plain error." Its reasoning is that the Supreme Court only invalidates two kinds of criminal laws as "void for vagueness": laws that define criminal offenses and laws that fix the permissible sentence for criminal offenses, citing *Beckles v. United States,* 137 S. Ct. 886, 892 (2017). Resp. at 13-14.

A criminal law is impermissibly vague if it "fails to give ordinary people fair notice of the conduct it punishes, *or* [is] so standarless that it invites arbitrary enforcement." *Beckles*, *supra*, at 892. (emphasis supplied). The Government is wrong as to the reasons it proffers to deny this Court's review for vagueness. First, Valencia specifically raised the issue of vagueness in the Eleventh Circuit in Issue III in his initial brief, that is, that the Certification procedure under Title 46 is unconstitutional because it denies Due Process where an act of foreign omission can substitute for the Government's burden of proof. IB:40-42.

Under this Issue III, in his initial brief, Valencia argued that the Government

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[8] The *Williams* Court held that "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon..." *Id*. at 41.

had no burden of proof as to any facts revealing how the officials from the Government and Colombia communicated and what information was exchanged. The Government was allowed to prosecute Valencia without him ever having the opportunity to examine the specific information the United States transmitted to their counterpart Colombian officials nor their response. The Certification provision simply dispenses with the accused's Sixth Amendment right to confront these most crucial witnesses, those who hold the keys to the courthouse where he shall be subjected to the deprivation of his liberty." IB:41.

In his initial brief in the Eleventh Circuit, Valencia further argued that, if the Certification procedure passed constitutional scrutiny, "it still violates Due Process because it relieves the Government from its burden of proof to establish jurisdiction even if the foreign country is guilty of omission or negligence. If a foreign country completely fails to respond, or seeks more time to either confirm or deny the vessels' nationality, a district court still would be obligated to find jurisdiction exists if the Government has a Certification." IB:41-42. In his initial brief, at page 42, fn. 12, Valencia stated: "Under the MDLEA, the Government has no obligation to turn over to the defense all of its communications with the foreign country. Nor does the MDLEA provide for *any time frame regarding* how long the Government has to wait for a response from the foreign country before

arresting a defendant and going forward with his prosecution." IB:41-42 fn. 12. Therefore, the Government's argument that this issue was not preserved for harmless error review is erroneous. This Court is fully authorized to review this issue of the "void for vagueness" doctrine. *See*, *e.g.*, United States v. Williams, 504 U.S. 36, 41 (1992).

In its published opinion for this case, *United States v. Valois,* 915 F.3d 717 (11th Cir. 2019), the Eleventh Circuit did not address the "void for vagueness" issue. In his initial brief, Valencia cited to *Delaware v. Van Arsdell,* 475 U.S. 673, 678 (1986), and *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974), in support of his position that material facts the Government recites in its Certification never are "tested in the heated crucible of cross-examination in violation of bedrock Supreme Court precedent." *See* IB:41. In sum, Valencia has demonstrated why this Court should review Issue III in his petition: there is a complete absence of standards which the Government must follow to establish judicial jurisdiction under the Certification procedure.[9] *See* §§70502(d)(1)(A)(C), 70502(d)(2).

[9] For example, there are no standards as to how long U.S. officials must wait for a response from the foreign nation before declaring the subject vessel "without nationality" and then arresting and prosecuting a defendant in federal court. As things stand now, the Government can wait only a few minutes before making that declaration. Nor are there any standards for the information the Certification must contain (e.g. name(s) of foreign official(s) contacted, time elapsed from initial contact through response, whether response was oral or in writing.)

## CONCLUSION

It again respectfully is requested that this Honorable Court grant the petition for a writ of certiorari for each of the three Issues Luis Felipe Valencia has raised in his petition.

Respectfully submitted,

/ s / Martin A. Feigenbaum
Florida Bar No. 705144
P.O. Box 545960
Surfside, Florida 33154
Telephone: (305) 323-4595
Facsimile: (844) 274-0862
Email: innering@aol.com

Attorney for Petitioner
Luis Felipe Valencia

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