No. 19-_____

IN THE
Supreme Court of the United States

ELMER MISAEL GARCIA RAMIREZ,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the trial court lacked jurisdiction because neither the U.S. Constitution nor any theory of international law permits jurisdiction to be asserted over a vessel found in international waters, approximately 560 nautical miles south of the Mexico-Guatemala border, with no discernable nexus to the United States. The Government's attempt to impose its authority on foreign actors sailing upon foreign waters is based on a misreading of the text and of the history of the Define and Punish Clause.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the proceedings.

RELATED PROCEEDINGS

The following proceedings are directly related to this Petition:

> *United States v. Ramirez*, No. 1:17-cr-10081-KMM (S.D. Fla.) (Judgment entered July 9, 2018), *aff'd*, *United States v. Ramirez*, No. 18-113035 (11th Cir. September 5, 2019) (unpublished opinion).

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Elmer Misael Garcia Ramirez ("Petitioner") 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 (App. A) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Art. I, cl. 10 of the Constitution. The petition is timely filed. The Eleventh Circuit entered judgment on September 5, 2019.

The Eleventh Circuit Court of Appeals issued a written opinion on September 5, 2019, affirming petitioners' conviction and sentence. App. A. The mandate issued on October 4, 2019 as the judgment in the case. This Court has jurisdiction to review the Eleventh Circuit's judgment under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, §8, cl. 10 of the Constitution: "The Congress shall have Power To… define and punish Piracies and Felonies committed on the high Seas, and offences against the Law of Nations".

INTRODUCTION

Petitioner Elmer Misael Garcia Ramirez respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The United States' claim of jurisdiction over remote international waters, expands jurisdiction beyond what is permissible by the Constitution, International law, or treaties.

COURSE OF PROCEEDINGS

On June 15, 2017, Petitioner Elmer Misael Garcia Ramirez ("Petitioner" or "Ramirez") and co-defendants Robinson Camacho Banguera, Gustavo Rodolfo Cedeno Arteaga, and Pedro Delacruz Rodriguez Quintero, were charged by indictment with: 1) conspiracy to possess with the intent to distribute cocaine while on a vessel, in violation of 46 U.S.C. §70503(a)(1), (b) and 21 U.S.C. §960(b)(1)(B) (Count 1), and 2) possession with intent to distribute a controlled substance, in violation of Title 46 U.S.C. §70506(a)(1), Title 18 U.S.C. §2, and Title 21 U.S.C. §960(b)(1)(B) (Count 2). (Doc 12).

The government filed a motion for pretrial determination of jurisdiction as to Petitioner (Doc 23). Ramirez filed a motion to dismiss the indictment (Doc 29). Ramirez also filed a motion to adopt/join the responses of his co-defendants (Doc 38).

Petitioner pled guilty on May 7, 2018 (Doc 123). He was sentenced to 168 months term of imprisonment to run concurrently, followed by a term of 5 years supervised release (Doc 148).

The Notice of Appeal on behalf of Petitioner Ramirez was timely filed on July 19, 2018 (Doc 151).

STATEMENT OF FACTS

On May 12, 2017, Petitioner, a Guatemalan national, was a crewmember on a go-fast boat interdicted by the United States Coast Guard in international waters, approximately 560 nautical miles south of the Mexico-Guatemala border. App. A.

United States v. Ramirez, No. 18-13035 (11th Cir. September 5, 2019) ("Unpublished Opinion"). The United States Coast Guard stopped Petitioner in international waters in the Pacific Ocean. After having stopped Petitioner and his colleagues, the Coast Guard contacted headquarters and were granted permission to treat the vessel as without nationality, and to complete a full boarding.

The Coast Guard thereafter retrieved 29 bales from the boat's jettison field with a total weight of 760 kilograms of a substance field-tested to be cocaine. Afterwards, the Coast Guard sunk the vessel. The Coast Guardsmen received authorization from headquarters to treat the four crew members on board as detainees.

During its proffer at the jurisdictional hearing the Government stated as follows: "Just to give the Court a background, the interdiction in this case that involved the four defendants before Your Honor happened 500 -- approximately, 560 nautical miles south of Mexico, the Mexican Guatemalan border." According to the Government's proffer, "a go-fast boat was suspected of engaging in drug trafficking" and the Coast Guard Cutter, the *Waesche*, launched its small boats, to intercept the go-fast vessel. (Doc. 161:11). According to the Government, the *Waesche* launched two boats; when the second boat was launched, the go-fast vessel began to jettison bales over the side. (Id.). The second boat that the *Waesche* launched went to retrieve those items that had been thrown overboard by the go-fast vessel (Doc. 161:12), whereas, the first boat was launched to deal specifically with the go-fast vessel itself. (Doc

161:11-12). According to the Government, there was a registration number painted on the hull of the boat. (Id.). The Government told the district court that "[t]he defendant Banguera was the person in charge, and he claimed Colombian nationality for the vessel." (Id.). The Government further represented that the boat was interdicted at the Mexican/Guatemalan border. (Doc. 161: 14).

The Government further alleged that District 11, under the United States and Colombian bilateral agreement, conducted a "forms-exchange" with Colombia to determine the jurisdiction over the go-fast vessel and that Colombia responded that it could neither confirm nor deny the nationality of this particular go-fast vessel. (Doc 161:11-13).

Defense counsel disputed the Government's statement that there was a claim of Colombian registry. (Doc 161:17): "[we] don't agree with that, and our evidence would have been, at trial, or before the Court, if there were a hearing, that aboard the vessel there were two Ecuadorians, one Guatemalan, and one Colombian. And in response to those questions, they stated what their countries of origin are. Based on that information, the Government contacted the Colombian officials, did not contact Guatemalan officials, and did not contact Ecuadorian officials. As a result, Colombia, pursuant to the documents provided by the Government, stated that they could not verify a Colombian registry, even though there's some question as to whether Colombian vessels of this type require a national registry in Colombia, and then went forward and continued their detention and arrest." (Doc. 161:17-18).

The Government presented a certificate that they purported conclusively established jurisdiction: "And, Your Honor, the Government did submit -- as an exhibit to the motion for a pretrial determination -- the certificate that was provided in this case by Commander Francis Del Rosso from the United States Coast Guard, and he is designated to make such certifications. And this certification lays out specifically that there was a claim of Colombian registry made, that the United States reached out to Colombia, that Colombia could neither confirm nor deny the registration associated with this vessel; and as a result, this vessel became a vessel without nationality and a vessel subject to the jurisdiction of the United States."

Significantly, The Government offered no evidence to rebut the defendants' claims that there were a number of nationalities represented on the vessel and the Government failed to check the other countries; the Government simply provided a certification that the vessel was not Colombian (Doc 161:16-17).

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case to address the United States' error in exercising jurisdiction over a foreign actor, sailing upon foreign waters, engaged in conduct in foreign waters that had no discernible nexus to the United States.

Here, the Eleventh Circuit concluded that the district court did not err in determining that it had jurisdiction over Ramirez's case, finding the Colombian

government's response to the crewmembers' claim of registry was proved conclusively by a certification of an officer and thus there was sufficient evidence to determine that his vessel was "without nationality," concluding that the only remaining issue was whether there was sufficient evidence to establish that a claim of Colombian registry was made in the first place. The Eleventh Circuit concluded that the officer involved, Commander Del Rosso, attested that the individual in charge of the go-fast vessel claimed Colombian nationality for the vessel and that Ramirez presented no evidence that this was not the case. However, Ramirez had challenged the Government's assertion that a claim of nationality had been made by the individual in charge. The defendants had argued to the district court that no claim of nationality had been made and that the vessel included citizens of four different countries: "Counsel has stated twice that there was a claim of Colombian registry. We don't agree with that, and our evidence would have been, at trial, or before the Court, if there were a hearing, that aboard the vessel there were two Ecuadorians, one Guatemalan, and one Colombian. And in response to those questions, they stated what their countries of origin are. Based on that information, the Government contacted the Colombian officials, did not contact Guatemalan officials, and did not contact Ecuadorian officials. As a result, Colombia, pursuant to the documents provided by the Government, stated that they could not verify a Colombian registry, even though there's some question as to whether Colombian vessels of this type require a national registry in Colombia, and then went forward and continued their

detention and arrest." (Doc. 161:18). Therefore, the panel incorrectly perceived the facts.

But, more importantly, the panel was incorrect as a matter of law: the Government's attempt to exercise jurisdiction over Petitioner (1) violates fundamental notions of justice and fair dealing concerning a defendant's due process protections against the unconstitutional assertion of jurisdiction over his person, norms that have been a part of American law from before the drafting of the Constitution, and (2) exceeds the authority granted to Congress by the United States Constitution.

a. The United States Does Not Have Authority to Assert Jurisdiction Under Art. I, §8, cl. 10 of the Constitution

The United States seeks to assert jurisdiction under the MDLEA, and by consequence, under Art. I, §8, cl. 10 of the Constitution:

> "The Congress shall have Power To… define and punish Piracies and Felonies committed on the high Seas, and offences against the Law of Nations".

However, the Government's attempt to impose its authority on foreign actors sailing upon far distant waters is inconsistent with accepted theory of international jurisdiction and reflects a misreading of the text and of the history of the Define and Punish Clause.

Federal caselaw has interpreted the MDLEA as deriving its authority from the Define and Punish Clause. *United States v. Suerte*, 291 F.3d 366 (5th Cir. 2002).

However, an application of the Define and Punish Clause that is faithful to the original understanding of the terms of the Clause, and faithful to an understanding of the crime of piracy that has remained consistent throughout the life of the Republic, would demand that American courts have limited jurisdiction over any felony committed upon the high seas that was not properly classified as a piracy.

To give the Define and Punish Clause meaning our courts must determine the distinction between a felony generally and the particular felony of piracy. The distinction, as a brief excursion into the canons of Anglo-American law will show, is entirely jurisdictional, and entirely apposite to the case before the bar. Sir Edward Coke in his Institutes of the Laws of England refers to piracy as an offense at first separate from felonies, and punished instead under the civil law of admiralty:

> piracy, or robbery on the high sea was no felony, whereof the common law took any knowledge… but was only punishable by the civil law

(Third Part of Coke's Institutes of the Laws of England, Cap. 49).

Over time, piracy was subsumed under felonies - by statute during the reign of Henry VIII (*see* 4 Blackstone's Commentaries *71). At the time of the drafting of the American Constitution, the framers understood piracy as a crime distinct from felonies committed on the high seas by virtue of piracy's jurisdictional uniqueness.

Piracy was procedurally *sui generis*: it was the only offense upon which all countries were expected to exercise their jurisdiction, even against foreign ships and foreign actors in foreign waters. *United States v. Smith*, 18 U.S. 153, 162 (1820) (it is the "general practice of all nations, in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever"). Courts up to the present day have recognized piracy as the only felony subject to universal jurisdiction. *United States v. Yousef*, 327 F.3d 56, 104 (2d Cir. 2003) ("the class of crimes subject to universal jurisdiction traditionally included only piracy"), *cert. denied*, 540 U.S. 933 (2003). Emmerich de Vattel, writing contemporaneously during the Revolutionary Era, articulated the accepted understanding of international law: although "the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories," piracy is an established exception, as "we ought to except from this rule those villains [pirates] who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race" *The Law of Nations* §233. Thus, "pirates are sent to the gibbet by the first into whose hands they fall." *Id.*

John Marshall recognized a corollary rule within the law of nations, that "no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself." 10 *Annals of Congress* 598 (1800). Thus, the law of nations clearly distinguished between felonies, over which a country had limited jurisdiction, and piracy, over which countries could extend universal jurisdiction. *United States v. Palmer*, 16 US 610, 620; *United States v. Furlong*, 18 U.S. 184, 196-197 (1820) ("there

exist well-known distinctions between the crimes of piracy and murder", distinctions primarily related to the pirates unique status as subject to universal criminal jurisdiction: "robbery on the seas is considered an offence within the criminal jurisdiction of all nations. It is against all and punished by all."); *see also* Joseph Story's *Commentaries on the Constitution of the U.S.* §1154 (1833) ("the common law, too, recognizes, and punishes piracy not as an offence against its own municipal code, but as an offence against the universal law of a nations, a pirate being deemed an enemy of the human race"). Blackstone, citing Coke, understood a pirate to be *hosti humani generis*: "he has renounced all the benefits of society and government and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community has a right, by the rule of self-defense, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, any invasion of his person or personal property." (4 Blackstone's Commentaries *70).

A correct reading of the Define and Punish Clause would separate felonies – over which Congress has a limited jurisdiction, circumscribed by the traditional understanding of its authority under the law of nations – from piracy, over which the U.S. Government may exert jurisdiction upon any actor in any waters. The MDLEA, not seeking to punish piracy, must be understood to operate under Congress's authority to punish felonies on the high seas, and must therefore only allow the U.S. Government to exert jurisdiction under the statute upon actors whose conduct brings them under the traditional jurisdictional umbrella.

Nor can the United States establish a nexus between the vessel in which Petitioner was found and the United States under any theories of international jurisdiction:

> Jurisdiction will lie where a nexus exists between a foreign vessel and the nation seeking to assert jurisdiction. See *United States v. Petrulla*, 457 F. Supp. 1367, 1371 (M.D.Fla.1978). Thus, under the objective principle, a vessel engaged in illegal activity intended to have an effect in a country is amenable to that country's jurisdiction. Similarly, the protective principle allows nations to assert jurisdiction over foreign vessels on the high seas that threaten their security or governmental functions. Jurisdiction may also be obtained under the passive personality principle over persons or vessels that injure the citizens of another country. Finally, all nations have jurisdiction to board and seize vessels engaged in universally prohibited activities such as the slave trade or piracy.

United States v. Marino-Garcia, 679 F.2d 1373, 1380–82 (11th Cir. 1982). None of the theories of international jurisdiction apply here. Presently, the United States is stopping and seizing vessels in foreign waters, with no connection to the United States, and no evidence that these vessels were either headed to the United States or threaten our security or governmental functions.

b. Due Process: Nexus Requirement

With regard to Petitioner's nexus argument the Eleventh Circuit stated, "Ramirez also argues that the United States does not have jurisdiction over this case because there was not a sufficient nexus between his conduct and the United States. Ramirez correctly acknowledges that this Court has rejected any nexus requirement, *see e.g.*, *United States v. Campbell,* 743 F.3d 802, 809–10 (11th Cir.), *cert. denied*, 135 S.Ct. 704 (2014), so his argument is foreclosed by our binding precedent." Established

principles of jurisdiction prevent American courts from exerting their authority over defendants who lack minimum contacts with the United States. Even circuits that seek to extend their jurisdiction over foreign vessels in foreign waters do so by acknowledging and explaining away the jurisdictional principle of fair notice – the theory that a defendant haled into court must have committed some act that he can be expected to anticipate – would submit him to the jurisdiction of American law. *United States. v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378 (11th Cir. 2011).

Other circuits, however, extend the need for notice as a fundamental jurisdictional due process protection: the Ninth and Second circuits, for example, have held that foreign sailors aboard vessels of confirmed registration cannot be subject to American jurisdiction unless the Government can demonstrate a sufficient nexus between the defendants' conduct and the United States. *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006); *United States v. Greer*, 956 F. Supp. 531, 536 (D. Vt. 1997), *United States v. Yousef*, 327 F.3d 56, 111-112 (2d Cir.), *cert. denied*, 540 U.S. 933 (2003).

Although the aforementioned cases from the Ninth and Second circuits apply a nexus requirement to foreign vessels with confirmed foreign registrations, no convincing reason exists to deny due process protections to a defendant simply on the basis of his having failed to confirm his vessel's registration; to invoke such a rule would make constitutional process contingent upon the vagaries of foreign governments. The Eleventh Circuit has failed to accept this important principle.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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