

No. 19-6901

IN THE SUPREME COURT OF THE UNITED STATES

ALONSO BARRERA-MONTES, 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

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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 an alleged violation of petitioner's rights under the Confrontation Clause of the Sixth Amendment -- the use of statements made to Coast Guard officers by petitioner's co-defendants through a translator who did not himself testify at trial -- constituted harmless error.
2. Whether petitioner was entitled under the Fifth and Sixth Amendments to a jury determination that the vessel at issue was "subject to the jurisdiction of the United States," 46 U.S.C. 70503(e)(1) (Supp. IV 2016), when the MDLEA specifies that the jurisdictional question "is not an element of an offense" but a "preliminary question[] of law to be determined solely by the trial judge," 46 U.S.C. 70504(a).
3. 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 certification of the Secretary of State or his designee, violates the separation of powers.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Barrera-Montes, No. 16-cr-10042 (Sept. 27, 2017)

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

United States v. Garcia-Solar, No. 17-14497 (May 22, 2019)

Supreme Court of the United States:

Garcia-Solar v. United States, No. 19-6938 (Dec. 11, 2019)

Perez-Cruz v. United States, No. 19-7484 (Jan. 22, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is not published in the Federal Reporter but is reprinted at 775 Fed. Appx. 523.

JURISDICTION

The judgment of the court of appeals (Pet. App. A31) was entered on May 22, 2019. A petition for rehearing was denied on September 12, 2019 (Pet. App. A30). The petition for a writ of certiorari was filed on December 5, 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 conspiring to possess 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. 70506(b), and 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). Judgment 1. He was sentenced to 240 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A29.

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. V 2017); 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. V. 2017), "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, in turn, 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. In October 2016, a U.S. Navy aircraft spotted a suspicious fishing vessel in international waters roughly 120 nautical miles south of Mexico. D. Ct. Doc. 329, at 121-129 (Jan. 26, 2018). While the Navy tracked the vessel, the occupants threw packages overboard. Id. at 126; see D. Ct. Doc. 330, at 153-154,

156 (Jan. 26, 2018). The U.S. Coast Guard intercepted the vessel and found seven men, including petitioner, on board. D. Ct. Doc. 330, at 231-232; D. Ct. Doc. 331, at 23, 92 (Jan. 26, 2018). The Coast Guard retrieved the jettisoned packages, which were found to contain 930 one-kilogram bricks of cocaine. D. Ct. Doc. 329, at 160; D. Ct. Doc. 331, at 111, 113-114, 120-121, 159, 321.

A Coast Guard officer spoke to the crew through a Spanish-language interpreter. D. Ct. Doc. 330, at 223, 233-234. The officer asked the crew questions to determine U.S. jurisdiction over the vessel -- for instance, questions about the identity of the captain, the nationality of the vessel and crew, the last and next ports of call, the time for which the vessel had been at sea, and the purpose of the voyage. Id. at 233. The captain identified himself and claimed Mexican nationality for the vessel. Id. at 234, 238. The Mexican government, however, could neither confirm nor deny the vessel's registry. Id. at 248.

3. A grand jury in the Southern District of Florida indicted petitioner and six co-defendants for conspiring to possess 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. 70506(a) (Supp. IV 2016), 46 U.S.C. 70506(b), and 21 U.S.C. 960(b)(1)(B), and 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) (2012), and 18 U.S.C. 2. Indictment 1-2.

Before trial, the government filed a certification from the Department of State that the Government of Mexico had neither confirmed nor denied the vessel's registry or nationality. D. Ct. Doc. 132-1, at 1 (June 20, 2017). The district court then granted, over the defendants' objections, the government's motion for a pretrial determination of jurisdiction under the MDLEA. D. Ct. Doc. 181, at 1-2 (July 3, 2017); D. Ct. Doc. 327, at 13-14 (Jan. 12, 2018).

During petitioner's trial, the government presented the testimony of a Coast Guard officer recounting the statements of the crew made through the interpreter. See D. Ct. Doc. 331, at 6-7. Petitioner made an oral motion for an opportunity to cross-examine the interpreter, invoking the Confrontation Clause of the Sixth Amendment. See ibid. The government opposed the motion on the ground that the testimony went only to jurisdiction, which was not at issue at trial. See D. Ct. Doc. 332, at 227 (Jan. 26, 2018). The district court denied the motion. Id. at 219.

The jury found petitioner and his co-defendants guilty. D. Ct. Doc. 215 (July 15, 2017). The district court sentenced petitioner to 240 months of imprisonment. Judgment 2.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A29.

As relevant here, the court of appeals first denied relief on petitioner's renewed claim that the admission of statements given through the interpreter violated the Confrontation Clause. Pet. App. A7-A9. Citing its previous decision in United States v. Charles, 722 F.3d 1319 (11th Cir. 2013), the court stated that, "[w]hen a law enforcement officer testifies regarding what an interpreter told him that a defendant said, the defendant has a Sixth Amendment right to confront the interpreter." Pet. App. A8; see id. at A9 ("[T]he defendants had the right to confront and cross-examine the interpreter before the officer testified."). The court determined, however, that, "although the district court may have erred in allowing the U.S. Coast Guard officer to testify regarding what the interpreter told him, such error was harmless." Id. at A8.

The court of appeals explained that, in reviewing violations of the Confrontation Clause for harmlessness, relevant factors include "the importance of the hearsay statements to the government's case, whether the statements were cumulative, whether there is evidence to corroborate the hearsay statements, the extent of cross-examination that the court permitted, and the strength of the government's case." Pet. App. A8. Considering such factors, the court found that reversal was "not warranted" because "the government's other evidence against the defendants was very strong"; "the testimony was only relevant to jurisdictional issues, which had already been decided, and to show that the

defendants were not entirely truthful or forthcoming when the Coast Guard first interdicted their boat"; and "although the defendants were not able to cross-examine the interpreter, excluding the limited testimony would not have impacted the outcome of the case." Id. at A9.

The court of appeals also rejected petitioner's contention that the MDLEA violates the Constitution by allowing a judge, rather than a jury, to determine whether the vessel is subject to U.S. jurisdiction. Pet. App. A19-A22. The court observed that it had previously rejected "the argument that a jury must determine jurisdiction under the MDLEA." Id. at A20 (citing United States v. Campbell, 743 F.3d 802, 809 (11th Cir.), cert. denied, 574 U.S. 1025 (2014)). The court similarly rejected petitioner's contention that the MDLEA violates the Constitution by allowing a foreign government's response to a claim of registry to be conclusively proved by a certification from the State Department. Id. at A20-A22. The court explained that "binding precedent forecloses [petitioner's] challenges to the MDLEA based on the use of the State Department Certification." Id. at A22; see id. at A20 (citing United States v. Hernandez, 864 F.3d 1292, 1299 (11th Cir. 2017), cert. denied, 138 S. Ct. 938, 138 S. Ct. 1019, 138 S. Ct. 1025, and 138 S. Ct. 1043 (2018); United States v. Cruickshank, 837 F.3d 1182, 1192 (11th Cir. 2016), cert. denied, 137 S. Ct. 1435 (2017)).

ARGUMENT

Petitioner contends (Pet. 8-19) that the alleged violation of the Confrontation Clause was not harmless, that the MDLEA violates the Fifth and Sixth Amendments by allowing the judge rather than the jury to determine U.S. jurisdiction over a vessel, and that the MDLEA violates the separation of powers by allowing a foreign nation's response to a claim of registry to be proved conclusively by a certification from the State Department. The court of appeals correctly rejected those contentions. Further review is unwarranted.

1. A writ of certiorari is not warranted to review the court of appeals' factbound determination that any error in the introduction of the interpreter's translation of the crewmembers' statements was harmless.

In Chapman v. California, 386 U.S. 18 (1967), this Court held that, in general, a constitutional error in a criminal trial does not warrant reversal if the error "was harmless beyond a reasonable doubt." Id. at 24. The Court has since elaborated that, in Confrontation Clause cases, the "Chapman harmless-error analysis" requires a reviewing court to consider "a host of factors," including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall

strength of the prosecution's case." Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). The court of appeals did not err in applying those principles here, nor would any case-specific error warrant this Court's review.

The court of appeals explained that, "[i]n reviewing [Confrontation Clause] violations for harmless error, [it] consider[s] the importance of the hearsay statements to the government's case, whether the statements were cumulative, whether there is evidence to corroborate the hearsay statements, the extent of cross-examination that the court permitted, and the strength of the government's case." Pet. App. A8. And the court correctly found that, in the particular circumstances of this case, reversal was "not warranted" because "the government's other evidence against the defendants was very strong"; "the testimony was only relevant to jurisdictional issues, which had already been decided, and to show that the defendants were not entirely truthful or forthcoming when the Coast Guard first interdicted their boat"; and "although the defendants were not able to cross-examine the interpreter, excluding the limited testimony would not have impacted the outcome of the case." Id. at A9.

The court of appeals' factbound decision does not conflict with any decision of this Court or of any other court of appeals, and does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly

stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Petitioner suggests (Pet. 12) that this Court should grant review "to resolve disparities in the decisions of the courts of appeal on whether admission of a translator's out-of-court statements constitute a violation of the Confrontation Clause." The decision below, however, does not implicate those asserted disparities. The court of appeals accepted that "the district court may have erred in allowing the U.S. Coast Guard officer to testify regarding what the interpreter told him," and it found that, even if a violation of the Confrontation Clause occurred, that violation was harmless. Pet. App. A8. This case thus does not present the question whether the admission of the testimony violated the Confrontation Clause in the first place, and it provides no occasion for resolving any asserted disparities in the courts of appeals' approaches to that issue.

2. A writ of certiorari also is not warranted to review petitioner's contention (Pet. 13-19) that the MDLEA violates the Fifth and Sixth Amendments by providing that the United States' jurisdiction over a vessel is a "preliminary question[] of law to be determined solely by the trial judge" and "is not an element of an offense." 46 U.S.C. 70504(a). That contention lacks merit, and, despite some disagreement in the courts of appeals, this Court has repeatedly declined to review the question. See Vargas v.

United States, 2020 WL 129689 (Jan. 13, 2020) (No. 19-6039); Valencia v. United States, 2019 WL 6689659 (Dec. 9, 2019) (No. 18-9328); Mejia v. United States, 139 S. Ct. 593 (2018) (No. 18-5702); Carrasquilla-Lombada v. United States, 139 S. Ct. 480 (2018) (No. 18-5534); Cruickshank v. United States, 139 S. Ct. 96 (2018) (No. 17-8953); Campbell v. United States, 574 U.S. 1025 (2014) (No. 13-10246); Tam Fuk Yuk v. United States, 565 U.S. 1203 (2012) (No. 11-6422); Sanchez-Salazar v. United States, 556 U.S. 1185 (2009) (No. 08-8036); Aguilar v. United States, 556 U.S. 1184 (2009) (No. 08-7048); Moreno v. United States, 549 U.S. 1343 (2007) (No. 06-8332); Estupinan v. United States, 549 U.S. 1267 (2007) (No. 06-8104). The Court should follow the same course here.

a. The Constitution affords "a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511 (1995). That principle does not apply here, however, because the MDLEA expressly provides that "[j]urisdiction of the United States with respect to a vessel subject to [the MDLEA] is not an element of an offense" and is instead a "preliminary question[] of law to be determined solely by the trial judge." 46 U.S.C. 70504(a). Because the question whether a vessel is subject to the jurisdiction of the United States is a preliminary question of law and not an element of the offense, a defendant has no constitutional right to have a jury decide that issue. See, e.g., United States v. Vilches-Navarrete, 523 F.3d 1, 20 (1st Cir.)

("This issue is not an element of the crime * * * and may be decided by a judge."), cert. denied, 555 U.S. 897 (2008); United States v. Tinoco, 304 F.3d 1088, 1109-1110 (11th Cir. 2002) ("[The MDLEA's] jurisdictional requirement is not an essential ingredient or an essential element of the MDLEA substantive offense, and, as a result, it does not have to be submitted to the jury for proof beyond a reasonable doubt."), cert. denied, 538 U.S. 909 (2003).

This Court's decision in Ford v. United States, 273 U.S. 593 (1927), confirms that conclusion. In Ford, the defendants were charged with conspiring to violate the National Prohibition Act, ch. 85, 41 Stat. 305, when their British vessel, laden with liquor, was seized "in the high seas off the Farallon Islands, territory of the United States, twenty-five miles west from San Francisco." 273 U.S. at 600. The defendants argued that it was "error * * * to refuse to submit to the jury on the trial the issue as to the place of the [ship's] seizure," but the Court disagreed. Id. at 606. The Court reasoned that a jury trial was not required because "[t]he issue whether the ship was seized within the prescribed [territorial] limit did not affect the question of the defendants' guilt or innocence," but instead "only affected the right of the court to hold [them] for trial." Ibid.

That reasoning applies equally here. The question whether a vessel is subject to the jurisdiction of the United States "does not raise factual questions that traditionally would have been treated as elements of an offense under the common law." Tinoco,

304 F.3d at 1108. As in Ford, whether the United States has jurisdiction over the vessel does not pertain to petitioner's participation in, or blameworthiness for, his drug-related offenses, but instead to the court's authority to try him for those offenses. Id. at 1108-1109 (explaining that the MDLEA's jurisdictional determination "does not go to the *actus reus*, causation, or the *mens rea* of the defendant"; nor does it "affect the defendant's blameworthiness or culpability"). "Congress inserted the requirement that a vessel be subject to the jurisdiction of the United States into the statute as a matter of diplomatic comity," not to define the defendant's culpability. Vilches-Navarrete, 523 F.3d at 22; cf. S. Rep. No. 530, 99th Cong., 2d Sess. 16 (1986) ("In the view of the Committee, only the flag nation of a vessel should have a right to question whether the Coast Guard has boarded that vessel with the required consent. The international law of jurisdiction is an issue between sovereign nations. Drug smuggling is universally recognized criminal behavior, and defendants should not be allowed to inject these collateral issues into their trials.").

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

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

b. As petitioner notes (Pet. 17-18), the courts of appeals have taken different approaches to the submission of jurisdictional issues under the MDLEA to juries. In addition to the court below, the First Circuit has upheld the constitutionality of submitting the jurisdictional issue to the judge. See Vilches-Navarrete, 523 F.3d at 19-23; Tinoco, 304 F.3d at 1107-1112. The Ninth Circuit agrees that the jurisdictional issue may be submitted to a judge when it poses only a question of law, but has concluded that, when the issue depends on a "disputed factual question," that question must be submitted to a jury. United States v. Perlaza, 439 F.3d 1149, 1165 (2006); see id. at 1164-1168; cf. United States v. Zakharov, 468 F.3d 1171, 1176 (9th Cir. 2006) (finding that the jurisdictional issue could be submitted to the judge in that case because there was "no factual question pertaining to statutory jurisdiction for the jury to decide"), cert. denied, 550 U.S. 927 (2007); see also United States v. Prado, 933 F.3d 121, 139 (2d Cir. 2019) (noting "a possible Sixth

Amendment objection to the statute" without deciding the constitutional issue) (citation omitted) (cited at Pet. 18).

This case, however, does not squarely implicate that disagreement. As just noted, the Ninth Circuit has required the submission of the jurisdictional issue to the jury only where the issue depends on the resolution of a "disputed factual question." Perlaza, 439 F.3d at 1165. And the Ninth Circuit applied that requirement in a context where there was conflicting evidence about whether the vehicle at issue was stateless. See id. at 1165-1166. In this case, by contrast, the court of appeals found no conflicting evidence on any issue of material fact. Petitioner does not dispute that the Department of State has certified that the Government of Mexico had informed the United States that it was unable to confirm or deny the registry of the vessel in Mexico. See D. Ct. Doc. 132-1, at 1. That certification made the vessel subject to United States jurisdiction as a vessel without nationality. See 46 U.S.C. 70502(d)(2).

Petitioner contends (Pet. 16-17) that the admission and use of the certification were unconstitutional, see pp. 16-18, infra, but he does not contest any material factual matter about the certification that would clearly have required a jury determination even under the Ninth Circuit's approach. Petitioner suggests (Pet. 15) factual disputes about "the details of the actual information provided to the Mexican government prior to its decision," "the length of time given the Mexican government to

respond," and similar circumstances. The court of appeals, however, noted that "the MDLEA does not require that any particular information be conveyed to the foreign government," and observed that petitioner "ha[d] not explained" how the "discrepancies" he asserts "would undermine the finding of jurisdiction." Pet. App. A21. Accordingly, it is far from clear that any jury determination would have been required even in the Ninth Circuit. Cf. Zakharov, 468 F.3d at 1176 (finding "no factual question pertaining to statutory jurisdiction for the jury to decide").

3. A writ of certiorari similarly is not warranted to review petitioner's contention (Pet. 16-17) that 46 U.S.C. 70502(d) (2) -- which provides that a foreign nation's response to a claim of registry "is proved conclusively" by certification of the Secretary of State or his designee -- violates the separation of powers. The court of appeals correctly rejected petitioner's challenge to the use of the certification, and its decision does not conflict with any decision of this Court or any other court of appeals. This Court has previously declined to review that issue, and should do so again here. See Mejia, supra (No. 18-5702); Tam Fuk Yuk, supra (No. 11-6422); Brant-Epigmelio v. United States, 565 U.S. 1203 (2012) (No. 11-6306).

Contrary to petitioner's contention (Pet. 16), the MDLEA's process for certifying the response of a foreign government to a claim of registry for a vessel does not trench on the judicial power. "[T]he statutory jurisdictional requirement * * * is

meant to bear only on the diplomatic relations between the United States and foreign governments." Tinoco, 304 F.3d at 1109. And the certification process simply provides a way for the Executive Branch to inform courts that, as a matter of international relations, the vessel is one that the relevant countries treat as stateless and that the exercise of United States jurisdiction is therefore appropriate. As the Eleventh Circuit has explained, "[n]egotiation with a foreign nation for permission to impose United States law in that nation's territory is * * * not an inherently judicial function." United States v. Rojas, 53 F.3d 1212, 1215 (1995), cert. denied, 516 U.S. 976 (1995). Although the MDLEA provides that a foreign nation's response to a claim of registry made by the master of a vessel "is 'proved conclusively'" by certification, "nothing in th[at] provision deprives the district court of its power to determine whether the MDLEA's jurisdictional requirements have been met." United States v. Mejia, 734 Fed. Appx. 731, 735 (11th Cir.) (per curiam), cert. denied, 139 S. Ct. 593 (2018).

Petitioner does not cite any decision holding, or suggesting, that Section 70502(c)(2)(B) is unconstitutional as violative of the separation of powers. Indeed, the unpublished decision here -- which did not appear to perceive petitioner to be raising a distinct challenge based on the separation of powers -- does not establish precedent on the issue even within the Eleventh Circuit.

See 11th Cir. R. 36-2 (Dec. 1, 2018). Particularly in the absence of any disagreement, further review in this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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