NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

GABRIEL GARCIA-SOLAR,

***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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70503 *et.* sec., which criminalizes foreign drug trafficking offenses committed aboard vessels on the high seas, without requiring any nexus between the offense and the United States, exceeds Congress' power to "define and punish Felonies committed on the high Seas" under art. I, § 8, cl. 10 of the United States Constitution.

2. Whether a defendant's "decision to go to trial" is "not an improper factor" for the district court to consider in sentencing.

INTERESTED PARTIES AND RELATED PROCEEDINGS

Pursuant to SUP. CT. R. 14.1(b)(i), Mr. Garcia-Solar submits the following list of all parties to the proceeding in the court whose judgment is sought to be reviewed:

Gabriel Garcia-Solar

Alonso Barrera-Montes

Moises Aguilar-Ordonez

Jose Caldelario Perez-Cruz

Jose Fernando Villez-Pico

Martin Vallecillo-Ortiz

Jose Martin Lucas-Franco

United States of America

Pursuant to SUP. CT. R. 14.1(b)(iii), Mr. Garcia-Solar submits the following list of all proceedings directly related to the case before this Court:

United States v. Gabriel Garcia-Solar et. al., 4:16-cr-10042-KMM (S.D. Fl. Sept. 27, 2017) (DE 268 (Final Judgment)).

United States v. Garcia-Solar et. al., No. 17-14497, 775 F. App'x 523 (11th Cir. May 22, 2019), *rehearing denied* (11th Cir. Sept. 12, 2019).

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Gabriel Garcia-Solar respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-14497, in that court on May 22, 2019. *See United States v. Garcia-Solar et. al.,* No. 17-14497, 775 F. App'x 523 (11th Cir. May 22, 2019), *rehearing denied* (11th Cir. Sept. 12, 2019).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on May 22, 2019. Mr. Garcia-Solar timely filed a petition for rehearing, which was denied on September 12, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. CONST. art. I, § 8, cl. 10

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

U.S. CONST. amend. V

> "No person shall be . . .compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

U.S. Const. amend. VI.

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.

Title 46 U.S.C. §§ 70501-70506 are reprinted in the appendix.

STATEMENT OF THE CASE

The charges

On October 18, 2018, Petitioner Gabriel Garcia-Solar was apprehended by the United States Coast Guard, while aboard a vessel on the high seas. (DE 1). Mr. Garcia-Solar identified himself as the master of the vessel, and made a verbal claim of Mexican registry for the vessel. (DE 1). According to a certification later submitted by the United States Department of State (DE 132-1), the Mexican government replied that it could neither confirm nor deny the registry of the vessel. The vessel was therefore treated as one without nationality pursuant to 46 U.S.C. § 70502(d)(1)(C), and rendered subject to the jurisdiction of the United States. (DE 132-1).

On November 16, 2016, Mr. Garcia-Solar was charged by indictment in the Southern District of Florida, with violations of the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70503, *et. sec.*, (hereafter the "MDLEA"). (DE 33). Count one charged that Gabriel Garcia-Solar, Alonso Barrera-Montes, Moises Aguilar-Ordonez, Jose Caldelario Perez-Cruz, Jose Fernando Villez-Pico, Martin Vallecillo-Ortiz, and Jose Martin Lucas-Franco conspired to possess with intent to distribute 5 kilograms or more of cocaine, while on board a vessel subject to the United States, in violation of 46 U.S.C. §§ 70503(a)(1) and 70506(b). Count two charged all seven defendants with a substantive violation of the same offense, in violation of 46 U.S.C. § 70503(a)(1) and 18 U.S.C. § 2. (DE 33). The district court made a pre-trial finding of jurisdiction,

in accordance with statutory procedures, over Mr. Garcia-Solar's objection. (*See* DE 181; DE 188; DE 327:13). All seven defendants proceeded to a jury trial.

The evidence

The evidence showed that on October 18, 2016, a crew of the United States Navy was engaged in a mission "to find illicit activities," in an area of the Eastern Pacific Ocean, off the coast of Mexico. (DE 329:115-117). Commander James Imlah had flown 590 miles west of El Salvador, and spent 30 to 45 minutes searching for suspicious vessels when he observed a "target of interest." (DE 329:122,124). Commander Imlah described the target as a relatively small, flat-bottom fishing vessel, which the Navy referred to as a "panga." (DE 329:128). There appeared to be a tarp covering a portion of the panga, and Imlah believed there were 3 people on board. (*See* DE 330:28). Imlah testified that individuals on the panga jettisoned cargo into the ocean, and then took off at a high rate of speed. (DE 329:130).

Commander Imlah flew over the cargo field and marked the latitude and longitude, so that they could return later and find the cargo. (DE329:131). After marking the debris field, the aircraft flew north looking for the panga.

There were a few minutes when the crew did not have a camera on the panga, because they "wanted to go back and get positive contact with the debris field." (DE 329:141). Imlah testified, however, that they maintained radar contact with the panga. (DE 329:141-45). Imlah testified that they "didn't see any other vessels near this panga," and that, from the point the vessel dropped the drugs, the panga did not change course or change speed. (DE 329:145).

The Coast Guard Cutter *Mellon* had been travelling at about 30 knots trying to catch up with the panga. (DE 330:213-214). When the *Mellon* had gotten "as close as tactically advantageous," it slowed down and lowered a small vessel into the water. (DE 312:214).

At the Coast Guard's request, Commander Imlah took his aircraft down to 200 feet, flew to the starboard side of the vessel, and made a left-hand turn directly in front of the vessel. The panga stopped dead in the water and the Coast Guard intercept vessel caught up with them seconds later. (DE 329:154-155). A second coast guard small boat proceeded south from the cutter's position to the debris field.

Coast Guard Officer Kyle Hadley obtained permission to board the panga. (DE 330:223). Through an interpreter, Hadley asked the men for identification, but none produced any. Hadley then asked who the captain was. Hadley testified that all seven of the men initially claimed to be the captain at the same time but Mr. Garcia-Solar later admitted to being the captain of the vessel. (DE 330:234). Officer Hadley testified that Mr. Garcia-Solar made a claim of Mexican nationality for himself, the rest of the crew, and the vessel itself. (DE 330:238). Hadley testified that he asked for registration information for the vessel, but Garcia-Solar was not able to produce any. (DE 330:241-242).

Hadley testified that Garcia-Solar gave inconsistent versions about the purpose of his voyage. "Initially, he said they're out there for food." But "later he sa[id] they were out at sea to rescue people from a sinking vessel." (DE 330:239).

Eventually Hadley received word that Mexico could not confirm or deny whether the vessel was of Mexican nationality. (DE 330:248). Based on that, Hadley testified that he had "absolute jurisdiction over it as if it were one of our own." (DE 330:249).

The Coast Guard destroyed the panga. Hadley admitted that the panga was seaworthy and that it would have been possible to tow it back to the United States. (DE 300:252, 275). But this was "still early" in the Coast Guard's patrol, and Hadley did not believe it was "feasible" to keep the panga attached to the cutter, to tow it to the United States, or even to bring it aboard. *See* DE 330:252 ("Well, we would have had to rig up some device to get it on board. I just don't see why we would do that."). Therefore, everything was tossed off the boat, and they set the boat ablaze. (DE 330:253).

During the defense case, Mr. Garcia-Solar presented video-taped deposition testimony from his brother, Ramon Garcia Solar (hereafter "Ramon"), and Jesus Cruz Ocana. Ramon testified that he, Mr. Garcia-Solar, and co-defendant Barrera Montes were members the Obreros del Mar fishing cooperative. (DE 217-6:4). In October, 2016, Ramon received a call from Mr. Garcia-Solar asking if he wanted to help rescue people who were lost at sea. (DE 217-6:11-12). He had done this in the past, and had been rewarded. (DE 217-6:12,19).

Mr. Garcia-Solar asked him to get a boat, to go fifty miles off shore, and to sail towards the north. Mr. Garcia-Solar was going to go to Acapulco and sail towards the south, and they were going to meet up. (DE 217-6:12-13). Ramon testified that they

had sailed about thirty-five to forty miles out, when they were caught up in a storm. (DE 217-6:16). After the storm, they did not hear from Mr. Garcia-Solar again and believed he was dead. (DE 217-6:13). Ramon had never known Mr. Garcia-Solar to be involved in any drug operations or illegal activity. (DE 217-6:29).

Mr. Cruz Ocana was another fisherman from the Obreros del Mar cooperative, who lived three blocks away from Mr. Garcia-Solar. (DE 217-7:4-6). Mr. Cruz Ocana testified that on October 13, 2016, Ramon contacted him about going on a mission to look for missing fishermen. (DE 217-7:8). It is customary to receive a reward for rescuing fishermen; therefore, the following day, the men went out. (DE 217-7:8). Mr. Cruz Ocana testified that they were going to go 35 miles out to see to look for Garcia-Solar. (DE 217-7:8). They did not meet up with him, however, because they ran into a nasty storm which lasted all night and part of the following day. After that, they returned to shore out of fear. (DE 217-7:10-11). Mr. Cruz Ocana had also gone on rescue missions in the past. (DE 217-7:11). He was 40 years old and had been a member of Obreros del Mar since he was 17. (DE 217-7:4). In all those years, no member of Obreros del Mar had been accused of transporting drugs. He had never himself been approached and asked to transport drugs. (DE 217-7:11). He had never known Garcia-Solar to be involved in criminal activity. (DE 217-7:-12).

All seven defendants were convicted by the jury. (DE 215).

The sentence

Prior to sentencing, a presentence investigation report ("PSI") was prepared by the United States Probation Office. (DE 253). In the PSI, Mr. Garcia-Solar was deemed responsible for 950 kilograms of cocaine. Therefore, pursuant to U.S.S.G. § 2D1.1(a)(5)(c)(1), Mr. Garcia-Solar's base offense level was 38. (PSI ¶ 13). Two levels were added because Mr. Garcia-Solar acted as the caption of a vessel carrying a controlled substance (PSI ¶ 14), bringing his total offense level to 40. (PSI ¶ 21). He had no prior criminal history, and fell into criminal history category I. (PSI ¶ 24). Therefore, the guideline imprisonment range for Mr. Garcia-Solar's offense was 292 to 365 months. (PSI ¶ 46).

Mr. Garcia-Solar was sentenced on September 26, 2017, in a joint hearing with all co-defendants. (DE 311). Counsel for Garcia-Solar moved the court for a minor role reduction, and argued that the offense involved more than the seven people who had been charged in the case. "We know that there are people on one end, the suppliers, who want to insulate themselves. They hire people under them. Those people hire people under them. And those people then go to individuals who have experience with boats, offer [them] an extraordinary amount of money in order for them to participate in a venture which will cause them to make more money in a week than they would otherwise see in 15 to 20 years of their employment." (DE 331:6). He argued that nobody believed the cocaine originated with Mr. Garcia-Solar, and that the "typical mule" in a case such as this would receive only a "small, small fraction" of the value of the cocaine. (DE 331:8). He asked the court to "look at the overall picture," and

"[n]ot just the people who got caught. . . . They are not the only people associated with and connected with this cocaine." (DE 331:9).

The district court overruled the objection, and added:

> The fact that he comes from a background of a lower standard of living, that matter was presented to the jury for whatever relevance it might have had; but as a matter of liability, it obviously made no impact on the jury and, for sentencing purposes, it shouldn't either as well in the sense that economic necessity is not a justification for engaging in criminal conduct.
> ...
>
> So given his role as the captain or master of this vessel, it's hard to arrive at the conclusion that he should be entitled to a minor role for his participation in this charged conspiracy.

(DE 311:10-11).

Defense counsel then addressed the sentencing factors under 18 U.S.C. § 3553(a), and requested a sentence at or near the ten-year mandatory minimum. (DE 311:24). At the time of sentencing, Mr. Garcia-Solar was 43 years old. He is the father of seven children, and had lived his entire life in Pijijiapan, in the province of Chiapas, Mexico, where he "work[ed] hand to mouth" as a fisherman, earning $55 a month. (DE 311:24). He lived in a home owned by his father (PSI ¶ 32), which he shared with his parents, his wife, and his seven children. (DE311:7). The house did not have an indoor bathroom, but rather a toilet without a seat in the back yard, which one had to flush by bringing a bucket of water from another place. (DE 311:7). Mr. Garcia-Solar had no prior contact with the criminal justice system.

Mr. Garcia-Solar argued that the sentence which was driven by drug quantity, a factor over which he had no control. (DE 311:25). Mr. Garcia-Solar also argued that

a sentence of 10 years would send a strong message to the family-oriented members of Mr. Garcia-Solar's community, who would not want to be separated from their families for extended periods of time. (DE 311:26)

After counsel had finished arguing, the court spoke collectively to all defendants. Responding to co-counsels' arguments regarding the cost of prolonged incarceration, the court stated that Congress and the Sentencing Commissions had addressed the area, "[s]o to the extent that you find the guidelines or these statutes objectionable, I think your argument is really in another forum." (DE 311:33). The court then added:

> Now, having said that, I understand – I will say for the record – that I have discretion and it's up to the district court to make a determination as to whether to exercise that discretion. ***I don't see a justification in this case to exercise that discretion with any of these defendants, and I'll tell you why.*** I mean, everybody has an absolute right, a constitutional right to go to trial. They did. The jury made its determination. But to come in now and then say, we knew going in that these were the likely guideline sentences that we were facing, ***but we wanted to roll the dice and take a shot at getting an acquittal***, but if we don't, then we're going to see if we can get a variance down to the mandatory minimum. You know, that to me sends the absolutely wrong message to these individuals who are willing to be transporters.

(DE 311:34) (emphasis added).

The court addressed general deterrence and stated that it was "upping the ante" on the price individuals would pay to engage in similar conduct. (DE 311:36). The court also stated that it had to consider "domestic safety . . . and trying to protect our own citizens from these kinds of drugs and what they do to our society." (DE 311:36). The court thus ruled that it could not justify a variance from the Guidelines,

and sentenced Mr. Garcia-Solar to 300 months' imprisonment, on both counts, to run concurrently. (DE 311:37).

The Appeal

Mr. Garcia-Solar appealed his conviction and sentence to the United States Court of Appeals for the Eleventh Circuit. In an unpublished opinion dated May 22, 2019, the court of appeals rejected Mr. Garcia-Solar's jurisdictional claim based on circuit precedent. *See United States v. Garcia-Solar*, 775 F App'x 523, 534-535 (11th Cir. May 22, 2019), *rehearing denied* (11th Cir. Sept. 12, 2019). The Eleventh Circuit also held that it was "not improper" and even "appropriate" for the district court to consider Mr. Garcia-Solar's decision to go to trial in sentencing. The court wrote:

> Here, the district court's consideration of Garcia-Solar's decision to go to trial did not render his total sentence substantively unreasonable because that was not an improper factor. Moreover, it is clear that the court referenced the defendants' exercise of their right to trial in the context of the need to deter other would-be drug smugglers, which is also an appropriate factor to consider.

Id. This petition follows.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review whether the prosecution of foreign nationals for trafficking narcotics in international waters exceeds Congress' powers, where there is no connection between the offense and the United States.

A. This case presents a question of exceptional importance which has never been, but should be, decided by the Court.

Petitioner Garcia-Solar, a Mexican citizen who never set foot in the United States prior to his arrest, asks this Court to review what is arguably the most expansive grant of extraterritorial criminal jurisdiction in the United States Code. The Maritime Drug Law Enforcement Act, 46 U.S.C. § 70503 (the "MDLEA"), makes it a crime to "knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board . . . a vessel subject to the jurisdiction of the United States." The statute applies to any individual found aboard a vessel that is broadly defined to be subject to United States law, and is not limited to United States citizens or residents. 46 U.S.C. § 70503(a)(1). The statute expressly extends its reach beyond the territorial jurisdiction of the United States, and requires no proof of a connection between the United States and the offense. *See* 46 U.S.C. § 70503(b). As this case exemplifies, the statute is used to prosecute drug trafficking offenses by foreign actors in international waters, for trafficking drugs that were never intended to reach the United States.

In drafting the MDLEA, Congress omitted any requirement that the prosecution prove a connection between the offense and the United States, removed jurisdictional questions from the jury's consideration, and precluded defendants from

asserting violations of international law as a defense. *See* 46 U.S.C. §§ 70504(a); 70505. The novelty of Congress' jurisdictional grasp alone presents a compelling reason for review. *See National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) ("At the very least, we should 'pause to consider the implication of the Government's arguments' when confronted with such new conceptions of federal power.") (quotation omitted). Perhaps even more compelling is the fact that the presumed constitutional foundation of the MDLEA – Congress' power to "define and punish . . . Felonies committed on the high Seas" under Article I, Section 8, Clause 10 of the United States Constitution – has not been reviewed by this Court in almost 200 years.

Mr. Garcia-Solar's conviction raises substantial questions about the extent of Congress' power under the Felonies Clause, and the limits of the United States' ability to enforce its law on foreign actors abroad. Hence, this petition presents an important question of federal law which has never been, but should be, decided by this Court. *See* SUP. CT. R. 10(c).

B. The Court's most recent authoritative pronouncement on the Felonies Clause is nearly 200 years old and has been overlooked by the courts of appeals.

Article I, Section 8, Clause 10 of the United States Constitution grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. It has generally been agreed, by the Courts of Appeals that have reviewed the

MDLEA, that the statute is an exercise of Congress' power to define and punish Felonies under this clause ("the Felonies Clause"). *See United States v. Moreno-Morillo*, 334 F.3d 819, 824-25 (9th Cir. 2003); *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006).

These court have assumed that the Felonies Clause knows no limit beyond the geography described in the text. Thus, in *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990), the Ninth Circuit resolved the question of Congress' powers with the following syllogism:

> The Constitution gives Congress the power to 'define and punish piracies and felonies on the high seas. . .' U.S. Const. Art. I, sec. 8, cl. 10. The high seas lie seaward of the territorial sea, defined as the three mile belt of sea measured from the low water mark. . . . We therefore find that the Constitution authorized Congress to give extraterritorial effect to the Act.

905 F.2d at 248 (internal citation omitted). If there is any limit on Congress' exterritorial grasp, the Ninth Circuit posited, it resides in the Due Process Clause – not in Article I. See *Davis*, 945 F.2d at 249 ("In this case, Congress explicitly stated that it intended the [MDLEA] to apply extraterritorially. Therefore, the only issue we must consider is whether the application of the [MDLEA] to Davis' conduct would violate due process.").

The Eleventh Circuit similarly merged the Article I inquiry with notions of due process, in *United States v. Estupinan*, 453 F.3d 1336 (11th Cir. 2006), when it disposed of the defendant's Article I challenge as follows:

> The MDLEA was specifically enacted to punish drug trafficking on the high seas, "because drug trafficking aboard vessels (1) 'is a serious international problem and is universally condemned,' and (2) 'presents

> a specific threat to the security and societal well-being of the United States.'" *United States v. Rendon*, 354 F.3d 1320, 1325 n. 2 (11th Cir. 2003) (citation omitted). Moreover, "this circuit and other circuits have not embellished the MDLEA with [the requirement of] a nexus [between a defendant's criminal conduct and the United States]." *Rendon*, 354 F.3d at 1325 . . . Indeed, as the Third Circuit has recognized, "[i]nasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas." *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993). Estupinan directs us to no case in which any court has held that the MDLEA was an unconstitutional exercise of Congressional power. Thus, we readily hold that the district court committed no error in failing to sua sponte rule that Congress exceeded its authority under the Piracies and Felonies Clause in enacting the MDLEA.

453 F.3d at 1338-1339 (citations omitted).

Thus, the courts of appeals have held, either explicitly or implicitly, that the only limitation on the Felonies power – beyond the geographical limitation in the text itself – is the requirement that prosecutions comport with due process. *See id.*; *See also*, *e.g.*, *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (rejecting argument that nexus was required as a matter of due process); *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002) (same).

A dissenting judge from the First Circuit has delved further, however, and recognized that this Court's interpretation of the Felonies Clause provides a contrary view. *See United States v. Angulo-Hernandez*, 576 F.3d 59, 63 (1st Cir. 2009) (Torruella, J., dissenting from denial of en banc review) ("The term 'Felonies' has not been read to include all felonies, but rather only felonies with an adequate jurisdictional nexus to the United States.") (citing *United States v. Furlong*, 18 U.S.

184, 197 (1820)). *See also United States v. Cardales-Luna*, 632 F.3d 731, 738-751 (1st Cir. 2011) (Torruella, J., dissenting).

In *Furlong*, the Court addressed the distinctions between the treatment of Piracy and other "Felonies committed on the high Seas" under Article I, Section 8, Clause 10. After determining that the petitioner had properly been convicted of Piracy, the Court turned to "[t]he question whether murder committed at sea on board a foreign vessel be punishable by the laws of the United States, if committed by a foreigner upon a foreigner." 18 U.S. at 194 (emphasis in original). Although presented as a matter of statutory construction, the Court determined first that it should construe the extent of Congress' powers under Clause 10. *See id.* at 195-96 ("[W]e should test each case by a reference to the punishing powers of the body that enacted it. The reasonable presumption is, that the legislature intended to legislate only on cases within the scope of that power; and general words made use of in that law, ought not, in my opinion, to be restricted so as to exclude any cases within their natural meaning.").

The Court concluded that the murder of a foreigner, by a foreigner, on a foreign ship, could not be prosecuted under a statute declaring murder to be piracy. *Id.* at 196. "[T]here exist well-known distinctions between the crimes of piracy and murder." *Id.* Piracy – the prototypical universal jurisdiction crime – "is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all." *Id.* at 197. The same is not true for murder. *Id.* And, the Court noted, if Congress

had attempted to punish murder under its Piracies power, it would have indefensibly extended its own jurisdiction:

> Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for, in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it.

Furlong, 18 U.S. at 198. The Court concluded by finding that there are offenses on the high seas in which Congress has "no right to interfere":

> If by calling murder piracy, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent. Upon the whole, I am satisfied that Congress neither intended to punish murder in cases with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it.

Id. (emphasis omitted and supplied).

Hence, *Furlong* establishes that Congress' power to prosecute Felonies on the high Seas is more circumscribed than its to prosecute Piracy. *See also United States v. Smith*, 18 U.S. 153 (1820) (recognizing distinctions between Piracies and Felonies under the Clause). This reading comports with the Constitutional text, which includes three "distinct grants of power" in Article I, Section 8, Clause 10: "the power to define and punish piracies, the power to define and punish felonies committed on the high seas, and the power to define and punish offenses against the law of nations." *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2012) (citing *Smith*, 18 U.S. at 158-59). If Congress has plenary authority to define and punish any offense as a felony on the high seas, then the correlative powers to define and

punish "Piracies" and "Offences against the Law of Nations" would be superfluous. This is because every Piracy and every offense against the law of nations can be defined as a felony as well. There must be some distinction among them.

When examined by references to the other powers in Clause 10, at least one such distinction becomes clear: Of the three grants of power in Article I, Section 8, Clause 10, the Piracies Clause is the only one that eliminates concerns of prescriptive jurisdiction over the offense. At the time the Constitution was written, Piracy was *sui generis*. *See Smith*, 18 U.S. at 154 (1820) ("[P]irates being *hostes humani generis*, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all."). Piracy was thus separated from the rest of Clause 10, because it was unique in its jurisdictional aspect. It was the only universal jurisdiction crime. *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 190-205 (2004) (discussing piracy's status as the prototypical universal jurisdiction crime). However, unlike the Piracies Clause, there is no indication that the Framers intended either the Felonies Clause or the Offences Clause to act without traditional jurisdictional restraints. *See Bellaizac-Hurtado*, 700 F.3d at 1258 (Barkett, J., specially concurring) ("[W]hen conduct has no connection to the United States, such as the conduct at issue here, it can only be punished as an 'Offence[] against the Law of Nations' if it is subject to universal jurisdiction").

Both the Court's precedents and the constitutional text thus suggest that the Felonies Clause does not grant Congress unlimited power to prosecute felonies on the

high seas without any nexus to the United States. "Further," as Judge Torruella noted, "no other Article I power saves the MDLEA." *Angulo-Hernandez*, 576 F.3d at 63 (Torruella, J., dissenting from the denial of en banc review) (citing Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1237-51 (April 2009) (explaining inapplicability of treaty power and foreign commerce clause to MDLEA offenses)). *See also Bellaizac-Hurtado*, 700 F.3d 1245 (holding that drug trafficking is not an Offence against the Law of Nations). "Thus, the exercise of Congressional power in enacting the MDLEA is not consistent with the Constitution, which limits Congress's power to proscribe crimes on the high sea to crimes of universal jurisdiction and crimes with a U.S. nexus." *Angulo-Hernandez*, 576 F.3d at 62-63 (Torreulla, J., dissenting from the denial of en banc review) (internal footnotes omitted). "By the enactment of 46 U.S.C. §§ 70503(a)(1) and 70502(c)(1)(C) of the MDLEA, allowing the enforcement of the criminal laws of the United States against persons and/or activities in non-U.S. territory in which there is a lack of any nexus or impact in, or on, the United States, Congress has exceeded its powers under Article I of the Constitution." *Cardales-Luna*, 632 F.3d at 739 (Torruella, J., dissenting).

C. This case presents a recurring question of law which is ripe for review.

Mr. Garcia-Solar is among ***thousands*** of foreign nationals who have been arrested in international waters and prosecuted in the United States for crimes bearing no connection to this country.

> Over the past six years, more than 2,700 men ... have been taken from boats suspected of smuggling Colombian cocaine to Central America, to be carried around the ocean for weeks or months as the American ships continue their patrols. These fishermen-turned-smugglers are caught in international waters, or in foreign seas, and often have little or no understanding of where the drugs aboard their boats are ultimately bound. Yet nearly all of these boatmen are now carted from the Pacific and delivered to the United States to face criminal charges here, in what amounts to a vast extraterritorial exertion of American legal might.

Seth Freed Wessler, *The Coast Guard's 'Floating Guantánamos'*, N.Y. TIMES, Nov. 20, 2017, https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html.

Although there is no actual circuit split on the question presented herein, further development among the circuit courts is unlikely because the MDLEA provides an express forum selection clause. *See* 46 U.S.C. § 70504(b)(2) ("if the offense was begun or committed upon the high seas, or elsewhere outside the jurisdiction of any particular State or district, may be tried in any district."). The government's ability to control the venue of prosecution makes it unlikely that many additional circuits will be asked to review the statute in the future.

The government's ability to select its forum provides another compelling reason to exercise review. Most MDLEA prosecutions have taken place within the Eleventh Circuit, despite the lack of any obvious nexus between the offense and that jurisdiction. *See* Kontorovich, *Beyond the Article I Horizon*, 93 MINN. L. REV. at 1205. Many MDLEA cases that have reached the Eleventh Circuit emanated from the Eastern Pacific Ocean, far closer to the Ninth Circuit than the Eleventh. *See*, *e.g.*, *United States v. Macias*, 654 F. App'x 458, 460 (11th Cir. 2016); *United States v. De*

La Garza, 516 F.3d 1266 (11th Cir. 2008); *United States v. Rendon*, 354 F.3d 1320 (11th Cir. 2003); *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002). The two circuits have generated conflicts over specific applications of the statute. Specifically, the Ninth Circuit has held that Due Process requires a connection between the United States and the offense in cases involving registered vessels, and that disputes over jurisdiction must constitutionally be resolved by the jury. *See United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006). The Eleventh Circuit has rejected both propositions. *See United States v. Wilchcombe*, 838 F.3d 1179 (11th Cir. 2016); *Tinoco*, 304 F.3d at 1107-08 (11th Cir. 2002); *Rendon*, 354 F.3d at 1325 (11th Cir. 2003). As one Coast Guard lawyer bluntly told the New York Times: "We try not to bring these cases to the Ninth Circuit." Wessler, The Coast Guard's 'Floating Guantánamos,' *supra*.

Finally, this case presents an ideal vehicle for certiorari. The issue was properly preserved in the district court and passed on by the court of appeals. There are no issues of waiver or harmlessness which might otherwise preclude a ruling on the merits.

In sum, this petition raises a significant and far-reaching question of constitutional law on which this Court has not spoken in nearly two hundred years. Whether the United States government had authority to prosecute Mr. Garcia-Solar is at best an open question under the law of this Court, and is arguably precluded by the Court's most recent, 199-year old, pronouncement on the issue. Mr. Garcia-Solar

submits that his offense was one in which Congress had "no right to interfere" *Furlong*, 18 U.S. at 198, and he respectfully asks this Court to grant review.

II. The Court should grant certiorari to make clear that a district court may not punish a defendant for exercising his right to trial.

The district court stated -- "for the record" and in unmistakable terms -- the defendants' decision to "roll the dice and take a shot at getting an acquittal" was the sole reason why it would not impose a sentence below the calculated guidelines range. The court stated:

> I will say for the record – that I have discretion and it's up to the district court to make a determination as to whether to exercise that discretion. ***I don't see a justification in this case to exercise that discretion with any of these defendants, and I'll tell you why***. I mean, everybody has an absolute right, a constitutional right to go to trial. They did. The jury made its determination. But to come in now and then say, we knew going in that these were the likely guideline sentences that we were facing, ***but we wanted to roll the dice and take a shot at getting an acquittal***, but if we don't, then we're going to see if we can get a variance down to the mandatory minimum. You know, that to me sends the absolutely wrong message to these individuals who are willing to be transporters.

(DE 311:34) (emphasis added).

In doing so, the district court expressly and unmistakably penalized Garcia-Solar's exercise of his right to trial. The Eleventh Circuit did not hold otherwise. It simply held that such consideration was "not ... improper." *See Garcia-Solar*, 775 F. App'x at 537. And, the court reasoned that the district court "referenced the defendants' exercise of their right to trial in the context of the need to deter other would-be drug smugglers, which is also an appropriate factor to consider." *Garcia-*

Solar, 775 F. App'x at 537. Thus, the Eleventh Circuit reasoned that punishing the defendant's exercise of his right to trial was not only permissible, but even "appropriate," where that punishment had a deterrent effect.

The Eleventh Circuit's holding runs afoul of the maxim that: '[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of 'of the most basic sort.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citation omitted). It is also directly contrary to a published decision of the Ninth Circuit, decided on materially similar facts.

In *United States v. Hernandez*, 894 F.3d 1104, 1109 (9th Cir. 2018), the Ninth Circuit vacated a sentence where the district "appear[ed] to have increased [the Defendant's] sentence or withheld a reduction for acceptance of responsibility" based on the defendant's "decision to go to trial." *See id*. at 1109. The district court's comments in *Hernandez* were very similar to those made in this case. Specifically,

> just before the district court imposed Hernandez' sentence, it declared: 'You decided to roll the dice, and it came up snake eyes. You didn't think she'd testify, and she did. You went – you wanted to go to trial, so you went to trial. And Probation rightly recommends 327 months for that.

Hernandez, 894 at 1110.

The Ninth Circuit recognized that: "[d]eciding 'to roll the dice' could only refer to Hernandez' decision to go to trial – a right enshrined in the constitution and guaranteed to him by the Sixth Amendment." *Id.* (citation omitted). "That the dice 'came up snake eyes' – Hernandez was convicted by the jury – while true, is no reason standing alone to impose a harsher sentence, or to withhold a reduction for acceptance of responsibility." *Id.* Furthermore, instead of praising the deterrent

effect on future trials, the Ninth Circuit wrote that: "Enhancing a sentence solely because a defendant chose to go to trial risks chilling future criminal defendants from exercising their constitutional rights. And imposing a penalty for asserting a constitutional right heightens the risk that future defendants will plead guilty not to accept responsibility, but to escape the sentencing court's wrath." *Id*.

The decision below is directly contrary to the Ninth Circuit's ruling. As the Ninth Circuit recognized, but the Eleventh Circuit did not, a district court's express refusal to impose a lesser sentence based on the defendants' decision to "roll the dice" and go to trial is "patently unconstitutional." *Bordenkircher*, 434 U.S. at 363 (citation omitted). *See also United States v. Evers*, 699 F.3d 645 (6th Cir. 2012) ("A court may not use the sentencing process to punish a defendant ... for exercising his right to receive a full and fair trial.") (quotation omitted); *United States v. Saunders*, 973 F.2d 1354, 1363 (7th Cir. 1992) ("It is well established under the so-called unconstitutional conditions doctrine that a defendant may not be subjected to more severe punishment for exercising his or her constitutional right to stand trial.") (citations omitted); *Oregon v. Hainline*, 437 P.3d 321, 322 (Or. App. 2019) ("A court must impose a sentence based solely on the facts of the case and the defendant's personal history, and not as punishment for pleading not guilty and proceeding to trial.") (quotation omitted); *Ohio v. Scalf*, 710 N.E.2d 1206 (Oh. Ct. App. 1998) ("the augmentation of sentence based upon a defendant's decision to stand on his right to put the government to its proof rather than plead guilty is improper.") (citation omitted). Wherefore, Mr. Garcia-Solar respectfully asks the Court to grant certiorari, to clarify

that a district court may not refuse to "exercise [its] discretion" to consider a non-guidelines sentence, based solely on the defendant's exercise of his right to trial.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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