

No. 20-_____

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020**

STEFAN VAN DER END,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the Fifth and Sixth Amendments are violated by the provision of the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70504(a), precluding jury consideration of factual disputes about a vessel's nationality – and therefore whether its occupants are subject to the jurisdiction of the United States – because the statute deems these matters “preliminary questions of law to be determined solely by the trial judge.” The Second Circuit concluded below that this provision does not violate the constitution, which is in conflict with the holding of the Ninth Circuit.

2. Whether the Due Process Clause permits a foreign national to be criminally prosecuted in this country for conduct occurring abroad without any nexus between the conduct and the United States.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	<u>Page</u>
	<u>Page</u>
QUESTION PRESENTED.....	i
PARTIES.....	ii
TABLE OF AUTHORITIES.....	iii
PETITION FOR WRIT OF CERTORARI.....	1
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
Background.....	3
The District Court’s Decision.....	4
The Guilty Plea.....	5
The Court of Appeals’ Decision.....	6
REASON FOR GRANTING CERTIORARI.....	8
ARGUMENT.....	8
I. The Second Circuit erred when it held that the jurisdictional requirement – the question of the vessel’s nationality – is not an element of the offense.....	8
A. The jurisdictional inquiry is an element of the offense. Factual disputes concerning the vessel’s nationality must be submitted to a jury to resolve.....	8

B. The Second Circuit erred in holding that the jurisdictional question is not an element of the offense.....	15
II. The Second Circuit erred by concluding that a foreign national may be prosecuted for conduct occurring entirely abroad without any nexus between the charged conduct and the United States.....	17
CONCLUSION.....	20

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Alleyne v. United States</i> , 570 U.S. 99 (2013).....	10, 17
<i>Bradshaw v. Stumpf</i> , 545 U.S. 175 (2005).....	15, 16
<i>Brady v. United States</i> , 397 U.S. 742 (1970).....	15
<i>Exxon Corp. v. Wisconsin Dep’t of Revenue</i> , 447 U.S. 207 (1980).....	18
<i>Henderson v. Morgan</i> , 426 U.S. 637 (1976).....	15
<i>In re Winship</i> , 397 U.S. 358 (1970).....	11
<i>Morrison v. Nat’l Australia Bank Ltd.</i> , 561 U.S. 247 (2010).....	10, 14
<i>United States v. Al Kassar</i> , 660 F.3d 108 (2011).....	17, 18, 19
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	13, 17
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995).....	13, 14
<i>United States v. Gonzalez</i> , 311 F.3d 440 (1st Cir. 2002).....	9, 12, 13, 16
<i>United States v. Greer</i> , 285 F.3d 158 (2d Cir. 2002).....	10
<i>United States v. Guerrero</i> , 114 F.3d 332 (1st Cir. 1997).....	11
<i>United States v. Mandell</i> , 752 F.3d 544 (2d Cir. 2014).....	10
<i>United States v. Miranda</i> , 780 F.3d 1185 (D.C. Cir. 2015).....	9, 11-13, 16
<i>United States v. O’Brien</i> , 560 U.S. 218 (2010).....	10

<i>United States v. Perlaza</i> , 439 F.3d 1149 (9th Cir. 2006).....	8, 11, 13, 16
<i>United States v. Prado</i> , 933 F.3d 121 (2d Cir. 2019).....	12, 16
<i>United States v. Rendon</i> , 354 F.3d 1320 (11th Cir. 2003).....	11
<i>United States v. Van Der End</i> , 943 F.3d 98 (2d Cir. 2019).....	1, 12, 15
<i>United States v. Yousef</i> , 327 F.3d 56 (2003).....	17, 18, 19
<i>United States v. Zakharov</i> , 468 F.3d 1171 (9th Cir. 2006).....	17, 18

Statutes

46 U.S.C. § 70501.....	3
46 U.S.C. § 70502(c).....	4, 8, 9 13
46 U.S.C. § 70502(d)(1).....	5, 9
46 U.S.C. § 70504(a).....	i, 2, 8, 9, 11, 12, 15

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioner Stefan Van Der End respectfully petitions this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Second Circuit entered on November 14, 2019. Mr. Van Der End's motion for panel rehearing was denied on January 22, 2020.

OPINION BELOW

On November 14, 2019, a panel of the Second Circuit affirmed Petitioner's conviction. *United States v. Van Der End*, No. 17-2926cr, 943 F.3d 98 (2d Cir. 2019). A. 1-18. Mr. Van Der End's motion for panel rehearing was denied by an Order of the Second Circuit dated January 22, 2020. A. 19.

JURISDICTION

The Court of Appeals' judgment affirming Petitioner's sentence was entered on November 14, 2019. Mr. Van Der End's motion for panel rehearing was denied on January 22, 2020. Following a 150-day period for filing, including the ordinary 90-day filing period plus the 60-day additional time provided by administrative order relating to the COVID-19 pandemic,

this Petition for Certiorari would have expired on June 20, 2020. The petition is being filed by postmark on or before that date. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 46, Section 70504(a) provides:

Jurisdiction 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.

The Fifth Amendment provides in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

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 defense.

STATEMENT OF THE CASE

This case presents the open and frequently litigated questions of whether (a) in a prosecution under the Maritime Drug Law Enforcement Act (“MDLEA”), 46 U.S.C. § 70501, *et seq.*, the Fifth and Sixth Amendments require that the question of the vessel’s nationality, and therefore whether the vessel is subject to the jurisdiction of the United States, be treated as an element of the offense decided by a jury notwithstanding the statute’s directive that is it to be treated as a “preliminary question[] of law to be determined solely by the trial judge,” and (b) the Due Process Clause requires some nexus, however slight, between the charged conduct and the United States before an individual can be brought to this country and prosecuted in our courts.

Petitioner is a foreign national prosecuted for conduct occurring on the high seas, outside of the United States’ territorial waters, and this case is about the statutory and constitutional requirements for such a prosecution.

Background

Petitioner Stefan Van Der End, a citizen of the Netherlands, was taken into custody on the high seas by the United States Coast Guard (the “Coast Guard”) while aboard a sailboat named the *Sunshine* with two other foreign nationals that was sailing from Grenada to Canada with a cargo of more than

1,000 kilograms of cocaine. The *Sunshine* never entered United States territorial waters and was not destined for the United States.

The Coast Guard brought Mr. Van Der End to Guantanamo Bay and then to the Southern District of New York, where he moved to dismiss the indictment for lack of statutory jurisdiction and because prosecution of him in our country violates the Due Process Clause of the Fifth Amendment. In response, the government pointed to a certification from a designee of the Secretary of State, Coast Guard Commander Gregory M. Tozzi, dated July 8, 2016 (the “Tozzi Affidavit”). The Tozzi Affidavit stated that on May 25, 2016 – one day after the *Sunshine* was boarded – the Coast Guard learned from the government of Saint Vincent and the Grenadines (“SVG”) that the *Sunshine*’s registration had lapsed. In reliance on the Tozzi Affidavit, the government argued that the *Sunshine* was “without nationality” and therefore “a vessel subject to the jurisdiction of the United States” within the meaning of the MDLEA, 46 U.S.C. § 70502(c).

The District Court’s Decision

The district court denied Mr. Van Der End’s motion to dismiss the indictment. It relied upon the certification from the United States Department of State, which consists of the Tozzi Affidavit with an official seal, to determine that the *Sunshine* was stateless and therefore subject to the

jurisdiction of the United States. A. 28-29. The district court noted that § 70502(d)(2) provides that the rejection of the nation whose nationality is claimed by a boat's captain "is proved conclusively by certification of the Secretary of State or the Secretary's designee." A. 24. The district court rejected Mr. Van Der End's objection that § 70502(d)(2) violates the Confrontation Clause because testimonial hearsay cannot be used to determine a jurisdictional element of an offense. A. 28-29. The district court determined that the question of statutory jurisdiction is to be decided by the trial judge as a matter of law and therefore does not implicate the Sixth Amendment's Confrontation Clause. A. 43 at 27.

The district court denied Mr. Van Der End's request to have the factual dispute concerning the *Sunshine's* nationality submitted to a jury and denied his objection that relying on the Tozzi Affidavit to resolve the factual dispute violated the Confrontation Clause of the Sixth Amendment. A. 43. The district court also rejected Mr. Van Der End's contention that prosecution of him in this country violates due process. A. 29-30.

The Guilty Plea

The district court's rulings denied Mr. Van Der End his only defense: that the vessel was not subject to the jurisdiction of the United States. Mr. Van Der End therefore entered an unconditional guilty plea to the two-count

indictment.

Thus, at the time that he pled guilty, Mr. Van Der End had just been advised by the district court that the question of the vessel's nationality (or absence of nationality) was not an element of the offense that a jury would be permitted to decide. *See* A. 58. During the change of plea hearing, the Assistant United States Attorney omitted the vessel's nationality when reciting elements of a MDLEA offense. *Id.*

Mr. Van Der End – a foreign national who was apprehended on the high seas without intending to enter this country – was sentenced to 25 years in a United States prison.

The Court of Appeals' Decision

The United States Court of Appeals for the Second Circuit affirmed Mr. Van Der End's conviction in an opinion dated November 12, 2019.

The Second Circuit concluded that Mr. Van Der End waived his challenge to the "trial right" of contesting the nationality of the vessel and, by extension, the district court's jurisdiction, when he entered an unconditional guilty plea. A. 12-13. The Second Circuit found Mr. Van Der End's waiver of this "trial right" knowing and voluntary because Mr. Van Der End pled guilty, even though, just before the change of plea colloquy,

the district court advised him that the vessel's nationality was *not* an element of the offense. *See* A. 58.

The Second Circuit found no due process violation, even though there was no evidence of any nexus between either the vessel or the charged conduct and the United States. A. 13-17. The Second Circuit held that if the defendant was “trafficking drugs on board stateless vessels because such prosecutions are not arbitrary, since any nation may exercise jurisdiction over stateless vessels, and they are not unfair, since persons who traffic drugs may be charged with knowledge that such activity is illegal and may be prosecuted somewhere.” A. 17.

The panel denied a motion for rehearing by order dated January 22, 2020.

REASON FOR GRANTING CERTIORARI

ARGUMENT

This Petition presents an opportunity for the Court to clarify whether (a) in a MDLEA case, determination of the jurisdictional element – the question of whether the vessel is “without nationality” and therefore “subject to the jurisdiction of the United States” within the meaning of 46 U.S.C. § 70502(c) – is an element of the offense that must be submitted to a jury to decide and (b) the defendant’s conduct must have some nexus, however slight, to the United States before she can be brought to this country for prosecution in our courts. The Second Circuit erred by answering each of these questions in the negative.

I. The Second Circuit erred when it held that the jurisdictional requirement – the question of the vessel’s nationality – is not an element of the offense.

**A. The jurisdictional inquiry is an element of the offense.
Factual disputes concerning the vessel’s nationality must be submitted to a jury to resolve.**

The question here is whether § 70504(a)’s instruction that factual disputes over jurisdiction be decided by a judge, rather than by a jury, contravenes the Fifth and Sixth Amendments, as held by the Ninth Circuit, *United States v. Perlaza*, 439 F.3d 1149, 1166-67 (9th Cir. 2006), and as has been suggested in dicta by Chief Judge Srinivasan of the District of

Columbia Circuit and Judge Boudin of the First Circuit. *United States v. Miranda*, 780 F.3d 1185, 1195-96 (D.C. Cir. 2015); *United States v. Gonzalez*, 311 F.3d 440, 444 (1st Cir. 2002).

The MDLEA only allows prosecution for narcotics offenses on the high seas, outside of the United States, if the vessel is “subject to the jurisdiction of the United States.” 46 U.S.C. § 70502(c). The statute includes within this definition any vessel “without nationality.” *Id.* § 70502(c)(1)(A). The statute sets forth several factual scenarios that can result in a finding that a vessel is “without nationality,” including a vessel whose master does not make a claim of registry or who makes a claim of registry that is denied by the nation whose registry is claimed. *Id.* § 70502(d)(1).

The MDLEA provides that “[j]urisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense” and that “[a]ll 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). Thus, the statute instructs, contrary to the Fifth and Sixth Amendments, that factual questions about the jurisdictional element of the offense be determined by the trial judge rather than by a jury.

“The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an ‘element’

or ‘ingredient’ of the charged offense.” *Alleyne v. United States*, 570 U.S. 99 (2013) (quoting *United States v. O’Brien*, 560 U.S. 218 (2010)).

This Court has not resolved whether disputed issues of fact as to jurisdiction in a MDLEA case should be determined by a judge or a jury; the Courts of Appeal are split on the question.

Prior to 1996, there was consensus among the circuits that the jurisdictional element of a MDLEA prosecution was an element of the crime charged and therefore properly submitted to the jury to decide. *E.g.*, *United States v. Greer*, 285 F.3d 158, 174-75 (2d Cir. 2002) (reviewing jury instruction for MDLEA jurisdictional element). This approach was consistent with how extraterritoriality is handled in cases arising under Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”). *See Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (“[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.”). In Section 10(b) cases, the jury determines whether a transaction was sufficiently domestic to be punishable in the United States as securities fraud. *E.g.*, *United States v. Mandell*, 752 F.3d 544, 549 (2d Cir. 2014).

In 1996, the MDLEA was amended to add a provision stating that “[j]urisdiction of the United States with respect to vessels subject to this

chapter is not an element of any offense” and that “[a]ll 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). As has been widely observed, this provision injected a Sixth Amendment concern.

The Ninth Circuit avoids the constitutional concern by interpreting Section 70504(a) “to apply to only purely legal questions while reserving factual questions for the jury.” *Perlaza*, 439 F.3d at 1164. The Ninth Circuit explained that reading § 70504(a) to apply to factual disputes would violate the Due Process Clause of the Fifth Amendment and the trial right in the Sixth Amendment, which require submission to a jury of every element of a criminal offense. *Id.* at 1166-67; *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

Three Courts of Appeals hold that factual questions dispositive to the resolution of MDLEA jurisdiction do not need to be submitted to a jury to decide – at least not to comply with the terms of the statute. *United States v. Miranda*, 780 F.3d 1185, 1193 (D.C. Cir. 2015); *United States v. Rendon*, 354 F.3d 1320, 1328 (11th Cir. 2003); *United States v. Guerrero*, 114 F.3d 332, 340 (1st Cir. 1997). Notably, however, the D.C. Circuit’s *Miranda*

decision and the First Circuit in a subsequent decision, *Gonzalez*, 311 F.3d at 444, both *sua sponte* recognized that the potential for a Sixth Amendment challenge to Section 70504(a) exists, but declined to address the issue as it was not properly before their courts. *Miranda*, 780 F.3d at 1195-96 (“To be sure, allocation of the issue to the court rather than the jury gives rise to a possible Sixth Amendment claim (regardless of whether the issue goes to subject-matter jurisdiction), but appellants raise no such claim here.”) (Srinivasan, J.) (internal citation omitted) ; *Gonzalez*, 311 F.3d at 444 (“Certainly by providing for a judge to decide the vessel issue rather than jury, Congress has introduced a possible Sixth Amendment objection to the statute.”) (Boudin, J.).

The Second Circuit admonishes that “district courts would be well advised ‘to submit the issue of jurisdiction over the vessel to the jury ‘notwithstanding the statutory word ‘solely’ . . . after making the preliminary determination required by § 70504(a) so that trial may proceed.’” *United States v. Van Der End*, 943 F.3d 98, 104 (2d Cir. 2019) (quoting *United States v. Prado*, 933 F.3d 121, 139 n.9 (2d Cir. 2019)). But the Second Circuit has sought to leave the advice precatory; it has declined explicitly to state that the question of jurisdiction is an element of the offense that must be resolved by a jury.

Moreover, as discussed below, the Second Circuit’s resolution of this case necessarily held that the jurisdictional dispute is *not* an element of the offense – in conflict with the Ninth Circuit’s holding in *Perlaza*, Chief Judge Srinivasan’s observation in *Miranda*, and Judge Boudin’s observations in *Gonzalez*.

Here, the district court erred by failing to leave to the jury the disputed question of the *Sunshine*’s nationality. The district court’s factual determination that the *Sunshine* was stateless was a necessary prerequisite to conviction of Mr. Van Der End. Without it, Mr. Van Der End would not have been aboard a vessel subject to the United States for purposes of § 70502(c) and could not have been criminally punished here.

The factual determination as to the *Sunshine*’s nationality should have been left to a jury to decide. *See United States v. Booker*, 543 U.S. 220, 230 (2005) (“It is equally clear that the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime which he is charged.”) (quoting *United States v. Gaudin*, 515 U.S. 506, 511 (1995)).

This case presents the question squarely: Mr. Van Der End actively contested the jurisdictional element below. The government claimed the *Sunshine* was “without a nationality,” or “stateless,” and Mr. Van Der End

contended otherwise. It was not until after the district court stated that it would refuse to submit this factual dispute to the jury that Mr. Van Der End, left without a defense, entered an unconditional guilty plea to the indictment. A. 43-45, 49, 54.

By failing to treat the MDLEA's jurisdictional prong as an element of the offense that must be submitted to the jury, the district court committed the same error identified by the Supreme Court in *Morrison*. In *Morrison*, which addressed extraterritoriality under Section 10(b) of the Exchange Act, this Court rejected the Second Circuit's framing of the extraterritoriality inquiry as one of "subject matter jurisdiction," reasoning instead that "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question." *Id.* at 254. Thus, the issue of extraterritoriality in a Section 10(b) case ought be analyzed as an element of the claim. *Id.*

The same analysis should apply here. The question of subject matter jurisdiction under the MDLEA, just like under Section 10(b), is a question of what the MDLEA "reaches" and therefore a question of "what conduct" the MDLEA "prohibits." *Morrison*, 561 U.S. at 2. Factual questions informing this jurisdictional determination should be submitted to a jury to resolve. *Gaudin*, 515 U.S. at 511 ("The Constitution gives 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.”). The Ninth Circuit was correct when it concluded that the Sixth Amendment would be violated by any reading of § 70504(a) that would allow *factual* disputes to be resolved by the trial court alone and not by a jury.

B. The Second Circuit erred in holding that the jurisdictional question is not an element of the offense.

The Second Circuit purported to avoid definitively resolving, in this case, the question of whether jurisdiction is an element of the offense to be submitted to a jury because it found that Petitioner waived this argument by entering an unconditional guilty plea to the two-count indictment. *Van Der End*, 943 F.3d at 104.

But a guilty is only knowing and voluntary if a defendant was accurately advised about the elements of the offense to which he is waiving trial. *Id.* at 184-85; *see also Henderson v. Morgan*, 426 U.S. 637, 647 (1976); *see also Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (guilty plea “is valid only if done voluntarily, knowingly, and intelligently, ‘with sufficient awareness of the relevant circumstances and likely consequences.’” (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))).

The only way that Mr. Van Der End’s waiver of his dispute concerning the vessel’s nationality was knowing and voluntary is if the question of the vessel’s nationality is *not* an element of the offense. Mr. Van

Der End decided to plea guilty immediately after the district court advised him that it would decide the jurisdictional element of the offense against him and withhold the question from the jury's consideration. That was at a pretrial conference in the morning. A. 43-45. In the afternoon of the same day, Mr. Van Der End entered an unconditional guilty plea – after the prosecutor purported to list the elements of the offense without including the jurisdictional element. A. 54. Thus, if the question of jurisdiction is an element, then Mr. Van Der End's guilty plea was, as a matter of law, unknowing and involuntary. *See Bradshaw*, 545 U.S. at 183.

The Second Circuit therefore now holds that the question of the vessel's nationality – that is, the jurisdictional element of MDLEA offenses – can consistent with the Sixth Amendment be decided outside of the presence of a jury. This holding is contrary to dicta from other Second Circuit decisions, *e.g.*, *Prado*, 933 F.3d at 139 n.9, and the decision of the Ninth Circuit in *Perlaza*. It also raises the Sixth Amendment concerns recognized by Judge Srinivasan in *Miranda*¹ and Judge Boudin in *Gonzalez*.²

¹ 780 F.3d at 1193.

² 311 F.3d at 444.

The Second Circuit's holding that a judge may decide factual disputes over whether a vessel was "without nationality" and therefore "subject to the jurisdiction of the United States" is inconsistent with the Fifth and Sixth Amendments as construed by this Court in *Alleyne* and *Booker*. The Circuits are split on this question and this case presents an opportunity for this Court to settle the question of whether the jurisdictional element of a MDLEA offense must be resolved by a trial jury.

II. The Second Circuit erred by concluding that a foreign national may be prosecuted for conduct occurring entirely abroad without any nexus between the charged conduct and the United States.

Prosecuting Mr. Van Der End under the MDLEA violates the Due Process Clause of the Fifth Amendment. "[I]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." *United States v. Yousef*, 327 F.3d 56, 111-12 (2003); *United States v. Al Kassar*, 660 F.3d 108, 118 (2011) ("For non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that

activity is to cause harm inside the United States or to U.S. citizens or interests.”); *see also United States v. Zakharov*, 468 F.3d 1171, 1177 (9th Cir. 2006) (“Unlike statutory jurisdiction, the constitutional nexus requirement is not an express element of the crime but is instead a judicial gloss applied to ensure that a defendant is not improperly haled before a court for trial.”) (internal quotation marks omitted).

A due process analysis must be performed even though the MDLEA, 46 U.S.C. § 70503(b), explicitly applies to extraterritorial conduct. *See Yousef*, 327 F.3d at 111-12. That is because while the statute may constitutionally be applied extraterritorially, due process cabins its reach to conduct that has a United States nexus. *Al Kassir*, 660 F.3d at 118 (“When Congress so intends, we apply a statute extraterritorially as long as doing so does not violate due process.”); *see also Zakharov*, 468 F.3d at 1177 (“Due process requires a district court to find sufficient nexus” in a MDLEA case “even when the flag nation has consented to the application of United States law.”).³

³ The nexus to the United States required before extraterritorial conduct can be prosecuted in our courts is not dissimilar to this Court’s analysis of the principles that undergird state taxation of the income of a business operating in interstate commerce. “The Due Process Clause of the Fourteenth Amendment imposes two requirements for such state taxation: a minimal connection or nexus between the interstate activities and the taxing States, and a rational relationship between the income attributed to the States

There is no evidence that Mr. Van Der End or the other two men on the *Sunshine* (who were Canadian and Dutch) intended to cause harm inside the United States, or to United States citizens or interests. Mr. Van Der End, a Dutch national, was travelling from Grenada to Canada and had no intention of entering the United States. The sailboat he was aboard never entered the United States' territorial waters, and the government has never asserted that its cargo was destined for this country. Because there is no evidence that Mr. Van Der End intended to travel to the United States, bring narcotics into the United States, or cause the importation of narcotics into the United States, there is no nexus between his conduct and the United States. Prosecution of him here therefore violates the Due Process Clause of the Fifth Amendment. *Yousef*, 327 F.3d at 111-12; *Al Kassar*, 660 F.3d at 118.

The danger of the Second Circuit's rule is amply demonstrated by the consequences should other countries follow suit. American fishermen in international waters with one marijuana cigarette aboard could find themselves being prosecuted for narcotics violations in countries such as the People's Republic of China where those convicted of drug offenses may be subject to execution. Interests of comity – in addition to fairness and

and the intrastate values of the enterprise.” *Exxon Corp. v. Wisconsin Dep’t*

substantial justice as embodied in the Due Process Clause – warrant reversal of the Second Circuit’s decision.

CONCLUSION

The petition for certiorari should be granted.

Dated: New York, New York
June 18, 2020

Respectfully submitted,

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of Revenue, 447 U.S. 207, 219-20 (1980).

APPENDIX TABLE OF CONTENTS

	<u>Page</u>
Opinion of the United States Court of Appeals for the Second Circuit in <i>United States v. Van Der End</i> , 17-2926cr.....	1
Order of the United States Court of Appeals for the Second Circuit in <i>United States v. Van Der End</i> , 17-2926cr.....	19
Opinion and Order of the United States District Court for the Southern District of N.Y. in <i>United States v. Van Der End</i> , 16 Cr. 453.....	20
Transcript of Proceedings and Oral Ruling United States District Court for the Southern District of N.Y. <i>United States v. Van Der End</i> , 16 Cr. 453.....	37
Transcript of Proceedings United States District Court for the Southern District of N.Y. <i>United States v. Van Der End</i> , 16 Cr. 453.....	54

17-2926

United States v. Van Der End

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4
5 August Term, 2018
6

7 (Argued: August 13, 2018

Decided: November 14, 2019)

8
9 Docket No. 17-2926
10

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12
13 UNITED STATES OF AMERICA,
14

15 *Appellee,*
16

17 v.
18

19 STEFAN VAN DER END, AKA STEFAN VAN
20 DAM EASEL,
21

22 *Defendant-Appellant.*¹
23
24

25
26 Before: NEWMAN and POOLER, *Circuit Judges*, and COTE, *District Judge.*²
27

¹ The Clerk of the Court is directed to amend the caption as above.

² Denise Cote, United States District Court for the Southern District of New York, sitting by designation.

1 Appeal from United States District Court for the Southern District of New
2 York (Richard J. Sullivan, *J.*), convicting defendant Stefan Van Der End, after a
3 plea of guilty, of engaging in drug trafficking activity, and conspiring to do so, in
4 violation of the Maritime Drug Law Enforcement Act (the “MDLEA”), 46 U.S.C.
5 §§ 70501 et seq. Because Van Der End has waived his Confrontation Clause and
6 jury trial right challenges to his conviction by pleading guilty, and because the
7 Due Process Clause does not require a nexus between the United States and
8 MDLEA violations that transpire on a vessel without nationality, we affirm the
9 conviction.

10 Affirmed.

11
12 _____
13 BENJAMIN SILVERMAN, Patel & Shellow LLP, New
14 York, N.Y., *for Defendant-Appellant.*

15 Jill R. Shellow, New York, N.Y., *for Defendant-Appellant*
16 *(on the brief).*

17
18 AMANDA L. HOULE, Assistant United States Attorney
19 (Jason M. Swergold, Karl Metzner, Assistant United
20 States Attorneys, *on the brief*), *for* Geoffrey S. Berman,
21 United States Attorney for the Southern District of New
22 York, New York, N.Y., *for Appellee.*
23

1 POOLER, *Circuit Judge*:

2 Defendant-Appellant Stefan Van Der End appeals from a judgment of the
3 United States District Court for the Southern District of New York (Richard J.
4 Sullivan, *J.*), convicting him, after a plea of guilty, of engaging in drug trafficking
5 activity, and conspiring to do so, in violation of the Maritime Drug Law
6 Enforcement Act (the “MDLEA”), 46 U.S.C. §§ 70501 et seq. Because Van Der
7 End has waived his Confrontation Clause and jury trial right challenges to his
8 conviction by pleading guilty, and because the Due Process Clause does not
9 require a nexus between the United States and MDLEA violations that transpire
10 on a vessel without nationality, we affirm the conviction.

11 BACKGROUND

12 I. Factual Background

13 Stefan Van Der End, a citizen of the Netherlands, was one of three foreign
14 nationals on board the *Sunshine*, carrying more than 1,000 kilograms of cocaine
15 from Grenada to Canada when it was stopped by the United States Coast Guard
16 on May 23, 2016. Richard Dow, the master of the *Sunshine*, told the Coast Guard
17 that the boat was registered in St. Vincent and the Grenadines (“SVG”) and
18 provided the vessel’s registration information. The next morning, Coast Guard

1 officers boarded the boat—subject to the authority granted them by a treaty with
2 SVG—and found more than 600 kilograms of cocaine below deck. The vessel
3 began to sink after one of the crewmembers attempted to scuttle it, so the
4 government was unable to recover all of the cocaine; however, the government
5 subsequently learned that there were another 640 kilograms hidden on the
6 *Sunshine*. Coast Guard officers detained Van Der End and the other members of
7 the crew.

8 Coast Guard officers then inquired with SVG authorities about the
9 *Sunshine's* registration. SVG authorities disclosed that the *Sunshine's* registration
10 had expired on February 25, 2016, and that SVG did not consider the *Sunshine* to
11 be subject to the SVG's jurisdiction. Van Der End and the other crewmembers
12 who were on board the *Sunshine* were then brought to New York and
13 subsequently arrested on June 3, 2016.

14 II. Procedural History

15 In an indictment filed on June 30, 2016, a grand jury indicted Van Der End
16 and the other crewmembers with one count of manufacture and distribution, and
17 possession with intent to manufacture and distribute, five kilograms and more of
18 mixtures and substances containing a detectable amount of cocaine while aboard

1 a vessel subject to the jurisdiction of the United States in violation of the MDLEA,
2 46 U.S.C. §§ 70503(a)(1), 70504(b)(1), 70506(a); 18 U.S.C. §§ 3238 & 2; 21 U.S.C.
3 § 960(b)(1)(B), and one count of conspiracy to engage in the above-described
4 drug trafficking activity in violation of the MDLEA, 46 U.S.C. §§ 70503, 70506(b),
5 70504(b)(1); 18 U.S.C. § 3238; 21 U.S.C. § 960(b)(1)(B).³

6 On April 24, 2017, Van Der End filed a motion to dismiss the indictment
7 for lack of subject matter jurisdiction. He also challenged the constitutionality of
8 the MDLEA as applied to him on due process grounds and raised a Sixth
9 Amendment challenge to his prosecution based on the government's alleged
10 forum shopping. The same day, the government filed a motion in limine in
11 which it argued that the defendants should be precluded from arguing to a jury
12 that the *Sunshine* was not subject to the jurisdiction of the United States.

13 At a May 4, 2017, hearing, the district court orally ruled in favor of the
14 government on all issues. The district court also ruled that it would permit the
15 government to enter into evidence documents from the SVG government
16 regarding ownership of the *Sunshine*. After the district court's rulings, Van Der

³ The text of some of the MDLEA's provisions have since changed in ways that are immaterial for purposes of this appeal.

1 End stated that he intended to enter a guilty plea. The district court scheduled a
2 plea hearing for that same afternoon, during which Van Der End pled guilty to
3 both counts of the indictment without a plea agreement or otherwise reserving
4 any rights to challenge his conviction on appeal. The district court later
5 published an opinion and order formally announcing its ruling on subject matter
6 jurisdiction, statelessness, and the other challenges to the indictment Van Der
7 End and one of his codefendants had raised. *United States v. Suarez*, 16-cr-453
8 (RJS), 2017 WL 2417016, at *1 (S.D.N.Y. June 1, 2017).

9 On September 8, 2017, the district court sentenced Van Der End to 25 years
10 of imprisonment and five years of supervised release, and entered judgment the
11 same day. This appeal followed.

12 DISCUSSION

13 On appeal, Van Der End primarily argues that the district court erred by
14 denying his motion to dismiss the indictment because (1) the government
15 presented insufficient evidence that the *Sunshine* was a vessel subject to the
16 jurisdiction of the United States, (2) the Fifth and Sixth Amendments required
17 the district court to submit that question to a jury rather than decide it for itself,
18 and (3) his conduct lacked the nexus to the United States that due process

1 requires. In reviewing the denial of a motion to dismiss an indictment, we review
2 the district court's findings of fact for clear error and its conclusions of law de
3 novo. *United States v. Bout*, 731 F.3d 233, 237-38 (2d Cir. 2013).

4 I. Evidence of Statelessness

5 A. The MDLEA's Requirements

6 As presently drafted, the MDLEA makes it a federal crime to engage in
7 certain specified drug trafficking activity "[w]hile on board a covered vessel." 46
8 U.S.C. § 70503(a). A "covered vessel" includes, as relevant here, "a vessel subject
9 to the jurisdiction of the United States." *Id.* § 70503(e)(1). A vessel may be subject
10 to the jurisdiction of the United States if, inter alia, it is "a vessel without
11 nationality." *Id.* § 70502(c)(1)(A). For present purposes, a vessel is without
12 nationality if "the master or individual in charge makes a claim of registry that is
13 denied by the nation whose registry is claimed." *Id.* § 70502(d)(1)(A). A claim of
14 registry may be made in one of three ways: "(1) possession on board the vessel
15 and production of documents evidencing the vessel's nationality . . . ; (2) flying
16 its nation's ensign or flag; or (3) a verbal claim of nationality or registry by the
17 master or individual in charge of the vessel." *Id.* § 70502(e). "The response of a

1 foreign nation to a claim of registry . . . is proved conclusively by certification of
2 the Secretary of State or the Secretary's designee." *Id.* § 70502(d)(2).

3 "Jurisdiction of the United States with respect to a vessel subject to this
4 chapter is not an element of an offense." *Id.* § 70504(a). Rather, "[j]urisdictional
5 issues" that arise under MDLEA "are preliminary questions of law to be
6 determined solely by the trial judge." *Id.* As we have recently explained, the
7 function of MDLEA's jurisdictional language "is not to confer subject matter
8 jurisdiction on the federal courts, but rather to specify the reach of the statute
9 beyond the customary borders of the United States." *United States v. Prado*, 933
10 F.3d 121, 132 (2d Cir. 2019).

11 However, where there is no factual basis to find that the vessel on which a
12 defendant was apprehended was a vessel subject to the jurisdiction of the United
13 States, the defendant may still be permitted to raise that issue on appeal even
14 after pleading guilty. That is because "a defective guilty plea will not necessarily
15 be deemed to waive all objections to a conviction." *Id.* at 151. And when the
16 government's proof that a vessel was subject to the jurisdiction of the United
17 States is lacking, a district court might run afoul of Federal Rule of Criminal
18 Procedure 11(b)(1)(G), which "requires that the court must inform the defendant

1 of, and determine that the defendant understands, . . . the nature of each charge
2 to which the defendant is pleading,” and 11(b)(3), which “requires the court to
3 determine that there is a factual basis for the plea,” rendering the defendant’s
4 guilty plea invalid. *Id.* at 152 (alteration in original) (internal quotation marks
5 omitted).

6 **B. The *Sunshine* Was a Vessel Without Nationality**

7 Van Der End argues that the government did not present sufficient
8 evidence from which the district court could properly conclude that the *Sunshine*
9 was a vessel without nationality. He argues that the district court’s reliance on
10 the State Department certification violated the Confrontation Clause because it
11 amounted to a testimonial statement by a witness whom Van Der End did not
12 have an opportunity to confront. This argument is without merit. Van Der End’s
13 guilty plea waived his right to raise that Sixth Amendment challenge to the
14 evidence on which the government’s prosecution relied. *Boykin v. Alabama*, 395
15 U.S. 238, 243 (1969) (observing that “the right to confront one’s accusers” is
16 among the “federal constitutional rights [that] are involved in a waiver that takes
17 place when a plea of guilty is entered”); *United States v. Dhinsa*, 243 F.3d 635, 651
18 (2d Cir. 2001) (“[A] defendant who enters a plea of guilty waives his rights under

1 the Confrontation Clause.”); *see also Class v. United States*, 138 S. Ct. 798, 803
2 (2018) (differentiating claims that call into question “the very power of the State
3 to prosecute the defendant” from constitutional claims “related to events (say,
4 grand jury proceedings) that had occurred prior to the entry of the guilty plea”
5 (internal quotation marks omitted)).

6 Moreover, we are satisfied that the evidence the government presented of
7 the *Sunshine’s* statelessness sufficed. In *Prado*, we found problematic the “Coast
8 Guard boarding party’s inattention” to the MDLEA’s procedures for establishing
9 a vessel’s statelessness. 933 F.3d at 130. Most significantly, the government there
10 relied on the fact that the master of the vessel did not make a verbal claim of
11 nationality or registry; however, the government adduced no evidence that “an
12 officer of the United States authorized to enforce applicable provisions of United
13 States law,” 46 U.S.C. § 70502(d)(2), had made such a request. *Id.* at 130 & n.5.
14 And, because the Coast Guard had destroyed the vessel, “it became virtually
15 impossible for the government to demonstrate to the court in the statutorily
16 mandated preliminary hearing that the vessel was subject to the jurisdiction of
17 the United States and therefore that the MDLEA applied.” *Id.* at 132. Further, at
18 the defendants’ plea allocution, the district court made “no reference either to the

1 requirement that the vessel have been subject to the jurisdiction of the United
2 States or to the crucial issue of its statelessness,” nor did the defendants
3 “demonstrate awareness . . . of the crucial significance of statelessness.” *Id.* at
4 152-53. Thus, neither through the Government’s evidence nor the defendants
5 themselves, was there any “factual basis for the plea.” *Id.* at 153.

6 Here, however, the Coast Guard’s investigation suffered none of the same
7 defects. As explained above, Dow, the master of the *Sunshine*, claimed that the
8 vessel was registered in SVG and provided the Coast Guard with SVG
9 registration information. That sufficed to make a claim of registry. *See* 46 U.S.C.
10 §§ 70502(e)(1), (e)(3). The Coast Guard then contacted SVG officials who “refuted
11 the vessel’s claimed nationality.” App’x at 55. That established that the vessel
12 was without nationality. *See* 46 U.S.C. § 70502(d)(1)(A). Finally, the government
13 produced a certification from the United States Department of State that “proved
14 conclusively” the response of the SVG government. *See id.* § 70502(d)(2).

15 In short, a MDLEA defendant does not automatically waive his or her
16 ability to challenge the sufficiency of the government’s evidence regarding
17 whether a vessel is subject to the jurisdiction of the United States by pleading
18 guilty. *See Prado*, 933 F.3d at 151-52. However, that does not mean that a MDLEA

1 defendant who enters an unconditional guilty plea may still challenge all aspects
2 of the government's evidence. We are satisfied here that there was a factual basis
3 for Van Der End's guilty plea, such that he has waived his right to challenge the
4 district court's determination that the vessel was subject to the jurisdiction of the
5 United States.

6 **II. Jury Trial Rights**

7 Van Der End further argues that the district court was required to submit
8 to a jury the question of whether the *Sunshine* was subject to the jurisdiction of
9 the United States. This argument fails for much the same reason his
10 Confrontation Clause argument fails. By pleading guilty, Van Der End waived
11 his right to a jury trial. *McMann v. Richardson*, 397 U.S. 759, 766 (1970); *see also*
12 *Class*, 138 S. Ct. at 804-05.

13 To be clear, we recently recognized that, if the issue were properly
14 presented for appellate review, Section "70504(a)'s provision that the jurisdiction
15 of the United States be determined *solely* by the trial judge" might be stricken as
16 violative of a criminal defendant's right to a jury trial. *Prado*, 933 F.3d at 139 n.9;
17 *see also id.* at 157 (Pooler, J., concurring in the judgment). We thus cautioned that
18 district courts would be well advised "to submit the issue of jurisdiction over the

1 vessel to the jury notwithstanding the statutory word ‘solely’ — “after making
2 the preliminary determination required by § 70504(a) so that trial may proceed.”
3 *Id.* at 139 n.9. But here, the district court had no opportunity to submit the
4 question to a jury because Van Der End pled guilty after the district court made
5 the preliminary determination MDLEA requires.

6 **III. Due Process**

7 Finally, Van Der End argues that his prosecution violated the Due Process
8 Clause because there was no nexus between the offense conduct and the United
9 States. The government contends that no nexus is required because the *Sunshine*
10 was a stateless vessel and, even if a nexus were required, there was a sufficient
11 nexus here to satisfy due process.

12 As a threshold matter, we hold that Van Der End did not waive this
13 challenge to his prosecution by pleading guilty. We have previously held that a
14 criminal defendant who pleads guilty waives the argument “that the indictment
15 to which he [or she] pled guilty failed to adequately allege a nexus between his
16 [or her] alleged conduct and the United States, as required by the Due Process
17 Clause of the Fifth Amendment before a criminal statute may apply
18 extraterritorially.” *United States v. Yousef*, 750 F.3d 254, 256, 262 (2d Cir. 2014).

1 However, the Supreme Court has since clarified that a guilty plea does not “by
2 itself bar[] a federal criminal defendant from challenging the constitutionality of
3 the statute of conviction on direct appeal.” *Class*, 138 S. Ct. at 803. Although
4 criminal defendants cannot “contradict the terms of the indictment” to which
5 they pled guilty “or written plea agreement[s]” pursuant to which they pled
6 guilty, defendants may still raise constitutional challenges to the statute of
7 conviction that “can be resolved without any need to venture beyond the
8 record.” *Id.* at 804 (internal quotation marks omitted). In other words, criminal
9 defendants who have pled guilty may still “challenge the Government’s power
10 to criminalize [their] (admitted) conduct,” “thereby call[ing] into question the
11 Government’s power to constitutionally prosecute” them. *Id.* at 805. Here, Van
12 Der End raises precisely such a challenge. Whether the Due Process Clause
13 requires MDLEA crimes committed on board a stateless vessel to have a nexus to
14 the United States is a purely legal question on which the government’s
15 constitutional power to prosecute Van Der End turns.

16 Nevertheless, Van Der End’s challenge fails on the merits. We have
17 previously held that the MDLEA’s predecessor statute did not, as a statutory
18 matter, require a nexus. *United States v. Pinto-Mejia*, 720 F.2d 248, 261 (2d Cir.

1 1983), *modified in part on denial of reh’g*, 728 F.2d 142 (2d Cir. 1984); *United States v.*
2 *Henriquez*, 731 F.2d 131, 134 (2d Cir. 1984). We now hold that due process does
3 not require that there be a nexus between the United States and MDLEA
4 violations that transpire on a vessel without nationality.⁴ To begin with, the
5 MDLEA indisputably has extraterritorial application. 46 U.S.C. § 70503(b)
6 (“Subsection (a) [which proscribes specified drug trafficking activity] applies
7 even though the act is committed outside the territorial jurisdiction of the United
8 States.”). And “[w]here Congress expressly intends for a statute to apply
9 extraterritorially, . . . the burden is a heavy one for a defendant seeking to show
10 that extraterritorial application of the statute violates due process.” *United States*
11 *v. Epskamp*, 832 F.3d 154, 168 (2d Cir. 2016) (internal quotation marks omitted).

12 Van Der End cannot meet that burden. Although we have adopted a
13 “‘sufficient nexus’ test for determining whether the extraterritorial application of
14 federal criminal law comported with constitutional due process,” *id.*, MDLEA
15 prosecutions involving stateless vessels do not present the same concerns that

⁴ We need not, and do not, decide what the Due Process Clause may require before persons who are not on board a vessel without nationality may be prosecuted for violating the MDLEA.

1 are present in the extraterritorial application of typical criminal statutes. That is
2 because stateless “vessels are international pariahs” that “subject themselves to
3 the jurisdiction of all nations *solely* as a consequence of the vessel’s status as
4 stateless.” *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995) (internal
5 quotation marks omitted). “Because stateless vessels do not fall within the veil of
6 another sovereign’s territorial protection, all nations can treat them as their own
7 territory and subject them to their laws.” *Id.* at 373. Thus, when a vessel is subject
8 to the jurisdiction of another nation, a person trafficking drugs on board “would
9 have a legitimate expectation that because he has subjected himself to the laws of
10 one nation, other nations will not be entitled to exercise jurisdiction without
11 some nexus.” *Id.* at 372. The same is not true when “a defendant attempts to
12 avoid the law of *all* nations by travelling on a stateless vessel.” *Id.* at 372-73.

13 The purpose of requiring a sufficient nexus with the United States is to
14 prevent extraterritorial application of U.S. criminal laws from being “arbitrary or
15 fundamentally unfair.” *See Epskamp*, 832 F.3d at 168 (internal quotation marks
16 omitted); *see also United States v. Ballestas*, 795 F.3d 138, 148 (D.C. Cir. 2015)
17 (same). That “ultimate question” of arbitrariness or unfairness, *Ballestas*, 795 F.3d
18 at 148 (internal quotation marks omitted), in turn, hinges in part on the notion of

1 “fair warning.” *Epskamp*, 832 F.3d at 169. “The idea of fair warning is that no
2 [person] shall be held criminally responsible for conduct which he [or she] could
3 not reasonably understand to be proscribed.” *United States v. Al Kassar*, 660 F.3d
4 108, 119 (2d Cir. 2011) (internal quotation marks omitted). “Fair warning does
5 not require that the defendants understand that they could be subject to criminal
6 prosecution *in the United States* so long as they would reasonably understand that
7 their conduct was criminal and would subject them to prosecution somewhere.”
8 *Id.*

9 In other words, no nexus is required for the government to bring MDLEA
10 prosecutions against persons who are trafficking drugs on board stateless vessels
11 because such prosecutions are not arbitrary, since any nation may exercise
12 jurisdiction over stateless vessels, and they are not unfair, since persons who
13 traffic drugs may be charged with knowledge that such activity is illegal and
14 may be prosecuted somewhere. On that score, we have little trouble concluding
15 that those who participate in international drug trafficking activity are aware
16 that such conduct is illegal. *See* 46 U.S.C. § 70501 (congressional findings that
17 “trafficking in controlled substances aboard vessels is a serious international

3 CONCLUSION

18

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of January, two thousand twenty.

Before: Jon O. Newman,
Rosemary S. Pooler,
Circuit Judges,
Denise Cote,
District Judge.*

United States of America,

Appellee,

ORDER
Docket No. 17-2926

v.

Stefan Van Der End, AKA Stefan Van Dam Easel,

Defendant - Appellant.

Appellant Stefan Van Der End having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

A circular official seal of the United States Court of Appeals for the Second Circuit is positioned over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

*Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

GERSON PELAGIO SUAREZ & STEFAN
VAN DER END,

Defendants.

No. 16-cr-453 (RJS)
OPINION & ORDER

RICHARD J. SULLIVAN, District Judge:

On April 24, 2017, Defendants Gerson Pelagio Suarez (“Suarez”) and Stefan Van Der End (“Van Der End,” and together with Suarez, “Defendants”) moved to dismiss the indictment in this action. (Doc. Nos. 41, 45.) For the reasons set forth below and on the record at the Court’s May 4, 2017 pretrial conference, Defendants’ motion to dismiss is denied.

I. BACKGROUND

On May 23, 2016, a Coast Guard cutter (the “Cutter”) intercepted a vessel called the *Sunshine* in international waters approximately 300 nautical miles northeast of Bermuda. (Doc. No. 43-1 at 3.) The Cutter sent a law enforcement boarding team (the “Board Team”) on a smaller patrol boat to ascertain the vessel’s nationality. Richard Dow, the master of the *Sunshine* and a Canadian national, informed the Board Team that the *Sunshine* was registered in St. Vincent and the Grenadines (“SVG”) and that Dow and his fellow crew members Van Der End and Suarez – who are both Dutch – were sailing the ship from Grenada to Nova Scotia, Canada. (*Id.*; Doc. No. 43 at 2.) According to the government, the Board Team noticed that the *Sunshine* was sitting low in the water, suggesting it was weighed down by something heavy on board, and also observed other suspicious behavior on the part of the crew, including the fact that they had not pulled into port to fix malfunctioning equipment and to avoid highly turbulent weather. (*Id.*)

Based on this information, the Coast Guard determined that it had the authority to board the *Sunshine* pursuant to a bilateral treaty between the United States and SVG, which authorizes such boarding whenever Coast Guard officials encounter an SVG vessel suspected of “illicit traffic.” (*Id.* at 2–3.) The government alleges that the Coast Guard’s search uncovered over 1,200 kilograms of cocaine aboard the *Sunshine*. (Doc. No. 43 at 3.)

After the Coast Guard contacted the SVG government concerning the *Sunshine*’s registration status on May 24, 2016, SVG authorities provided the Coast Guard with the *Sunshine*’s certificate of registration on May 25, 2016, which showed that the *Sunshine* had been previously registered in SVG, but that its registration had expired three months earlier on February 25, 2016. (Doc. No. 44-1 at 3.) In a follow-up communication on May 25, 2016, SVG authorities confirmed to Coast Guard officials that the vessel was no longer subject to SVG’s jurisdiction. (*Id.* at 2.) On July 8, 2016, Gregory M. Tozzi, a Commander of the United States Coast Guard and a legal designee of the United States Secretary of State, signed a certification attesting to the facts of the *Sunshine*’s interdiction, SVG’s refutation of the vessel’s claimed nationality, and the government’s determination that the *Sunshine* – as a vessel without nationality – was subject to United States jurisdiction. (Doc. No. 43-1.)

II. PROCEDURAL HISTORY

On June 26, 2016, Defendants were indicted by a grand jury in this district on two counts under the Maritime Drug Law Enforcement Act (“MDLEA”). Specifically, the indictment charged Defendants with (1) manufacture and distribution, and possession with intent to manufacture and distribute, five kilograms and more of mixtures and substances containing a detectable amount of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a)(1), 70504(b)(1), 70506(a), 18 U.S.C. §§ 3238 & 2, and 21 U.S.C. § 960(b)(1)(B), and (2) conspiracy to do the same, in violation of 46 U.S.C. §§

70503, 70506(b), & 70504(b)(1), 18 U.S.C. § 3238, and 21 U.S.C. § 960(b)(1)(B). (Doc. No. 13.) Although originally assigned to Judge Crotty, the case was reassigned to my docket on April 19, 2017. On April 25, 2017, co-defendant Richard Dow pleaded guilty before the Honorable Kevin N. Fox, United States Magistrate Judge. (Doc. No. 47.)

On April 24, 2017, Defendants moved to dismiss the indictment on four grounds: (1) the *Sunshine* was not a “vessel subject to the jurisdiction of the United States” under the MDLEA, *see* 46 U.S.C. § 70503(e)(1); (2) the prosecution of Defendants violates the Due Process Clause of the Fifth Amendment of the United States Constitution; (3) the government lacks authority under the Define and Punish Clause of Article I, Section 8 of the Constitution to prosecute Defendants, and (4) the Southern District of New York is an improper venue. (Doc. Nos. 41, 42, 45.) The Court held oral argument on May 4, 2017, at which time it issued an oral order denying the motion to dismiss. After the Court denied the motion to dismiss, Defendants entered unconditional guilty pleas to the indictment.

III. DISCUSSION

A. Waiver

The Court first addresses the issue of waiver. “A knowing and voluntary guilty plea waives all nonjurisdictional defects in the prior proceedings,” unless the defendant has “obtain[ed] the approval of the court and the consent of the government” to enter a conditional guilty plea and has “reserve[d] the right to appeal in writing.” *United States v. Coffin*, 76 F.3d 494, 496–97 (2d Cir. 1996) (citing Fed. R. Crim. P. 11(a)(2)); *accord United States v. Yousef*, 750 F.3d 254, 258 (2d Cir. 2014) (“It is well settled that a defendant’s plea of guilty admits all of the elements of a formal criminal charge and, in the absence of a court-approved reservation of issues for appeal, waives all challenges to the prosecution except those going to the court’s jurisdiction.” (citation omitted)). However, “subject matter jurisdiction . . . can never be

forfeited or waived,” since “it involves a court’s power to hear a case.” *United States v. Cotton*, 535 U.S. 625, 630 (2002). Therefore, “in order ‘to attack a conviction post-plea, a defendant must establish that the district court lacked the power to entertain the prosecution.’” *Yousef*, 750 F.3d at 259 (quoting *United States v. Kumar*, 617 F.3d 612, 620 (2d Cir. 2010)).

Here, Defendants have indicated that they may appeal their forthcoming convictions and assert that certain of their arguments in support of dismissal implicate the Court’s subject matter jurisdiction.¹ In the interests of clarifying the record and elucidating its reasons for denying the motion to dismiss, the Court assumes, without opining, that Defendants’ arguments were not waived, and addresses each of Defendants’ arguments in support of dismissal.

B. “Subject to the Jurisdiction of the United States”

The Court next turns to Defendants’ contention that the indictment should be dismissed because there is insufficient evidence to establish that the *Sunshine* was “subject to the jurisdiction of the United States.” (Doc. No. 42 (“Mem.”) at 2–5.) The MDLEA makes it unlawful to “knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance,” “[w]hile on board a covered vessel,” 46 U.S.C. § 70503(a)(1), or to conspire to do so, 46 U.S.C. § 70506(b). There are several terms of art within the MDLEA that require explication here. First, “a covered vessel” includes a “vessel subject to the jurisdiction of the United States.” 46 U.S.C. § 70503(e)(1). The MDLEA, in turn, provides that “a vessel without nationality” is a “vessel subject to the jurisdiction of the United

¹ Indeed, there is a circuit split over whether the “vessel subject to the jurisdiction of the United States” provision implicates subject matter jurisdiction. Compare *United States v. Miranda*, 780 F.3d 1185, 1192 (D.C. Cir. 2015) (“[T]he question whether a vessel is ‘subject to the jurisdiction of the United States’ is a matter of subject-matter jurisdiction.”); *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008) (same); *United States v. Bustos-Useche*, 273 F.3d 622, 626 (5th Cir. 2001) (same), with *United States v. Gonzalez*, 311 F.3d 440, 443 (1st Cir. 2002) (concluding that the provision “refers to the substantive reach of the statute – applying to some vessels but not others – and not to the subject matter jurisdiction of the court”). The Second Circuit is currently considering this very issue in a pending appeal for which oral argument was held on May 10, 2017. See *United States v. Prado*, No. 15-cr-455 (JSR), Doc. Nos. 56, 57, 58 (S.D.N.Y. Apr. 5, 2016), *appeal docketed*, No. 16-1055 (2d Cir. Apr. 7, 2016).

States.” 46 U.S.C. § 70502(c)(1)(A). A “vessel without nationality” includes a vessel aboard which “the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed.” 46 U.S.C. § 70502(d)(1)(A). Pursuant to Section 70502(e)(3), “a verbal claim of nationality or registry by the master or individual in charge of the vessel” is a “claim of nationality or registry.” 46 U.S.C. § 70502(e). Under the MDLEA, “the response of a foreign nation to a claim of registry . . . is proved conclusively by certification of the Secretary of State or the Secretary’s designee.” 46 U.S.C. § 70502(d)(2).

Here, Defendants make a series of arguments that the *Sunshine* was not, in fact, stateless under the SVG’s Shipping Act and under international law. (*See* Mem. 2–5.) But Defendants’ arguments are inapposite. The government has proffered that it will offer evidence that Dow, the master of the ship, claimed to the Coast Guard that the *Sunshine* was registered in SVG. (Doc. No. 51 at 22–23.) Furthermore, the government has produced a certification from the United States Department of State, which indicates that the SVG government “refuted the vessel’s claimed nationality.” (Doc. No. 43-1.) Since the “response of a foreign nation to a claim of registry . . . is proved conclusively by certification of the Secretary of State or the Secretary’s designee,” 46 U.S.C. § 70502(d)(2), the government has conclusively demonstrated that Dow’s claim to SVG registration was in fact denied by SVG’s government. Therefore, the government has established that the *Sunshine* was subject to the jurisdiction of the United States. *See United States v. Campbell*, 743 F.3d 802, 809 (11th Cir. 2014) (opining that the State Department’s “certification is conclusive proof of a response to a claim of registry” and therefore “provide[s] conclusive proof that the vessel was within the jurisdiction of the United States under the Act”); *United States v. Cardales-Luna*, 632 F.3d 731, 737 (1st Cir. 2011) (State Department’s “certification is ‘conclusive[,]’ and any further question about its legitimacy is ‘a question of international law that can be raised only by the foreign nation’” (quoting *United States v. Bustos-*

Useche, 273 F.3d 622, 627 & n.5 (5th Cir. 2001)); see also *United States v. Mosquera-Murillo*, 153 F. Supp. 3d 130, 159 (D.D.C. 2015) (“The [vessel’s] status as a ‘vessel subject to the jurisdiction of the United States’ is proven conclusively by the State Department certification provided by the government.”).

Defendants have also argued, in the alternative, that any determination as to the *Sunshine*’s statelessness by the Court is premature, and that they should be permitted to make arguments concerning jurisdiction to the jury. (Doc. No. 53 at 3.) But under the MDLEA: “Jurisdiction 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) (emphasis added). Congress added this language to Section 70504 for the express purpose of “expand[ing] the Government’s prosecutorial effectiveness in drug smuggling cases.” *United States v. Gonzalez*, 311 F.3d 440, 447 (1st Cir. 2002) (Torruella, J., concurring) (discussing and quoting the legislative history). Consistent with the plain language of the statute and legislative history, most circuits that have addressed the issue have concluded that Section 70504(a) “removes the issue of jurisdictional determination from being an element of the offense for the jury to decide.” *United States v. Rendon*, 354 F.3d 1320, 1327 (11th Cir. 2003); accord *United States v. Miranda*, 780 F.3d 1185, 1193 (D.C. Cir. 2015) (whether a vessel under the MDLEA is subject to the jurisdiction of the United States is “a question of law for resolution by the court”); *United States v. Guerrero*, 114 F.3d 332, 340 n.9 (1st Cir. 1997) (“United States jurisdiction over vessels is no longer an element of an offense, but rather, a preliminary question of law for the trial judge.”); see also *United States v. Vilches-Navarrete*, 523 F.3d 1, 12 (1st Cir. 2008) (affirming district court’s jury instruction “that as a matter of law the motor vessel . . . was subject to the jurisdiction of the United States”).

Defendants acknowledge these decisions of the First, Eleventh, and D.C. Circuits. Nonetheless, they point to a 2-1 decision in the Ninth Circuit concluding that, “[n]otwithstanding the statutory language of” of the MDLEA, the right to due process guaranteed by the Fifth Amendment and the right to jury trial under the Sixth Amendment require the jury to resolve factual disputes relevant to a ship’s jurisdictional status, and that Section 70504(a) is unconstitutional. *United States v. Perlaza*, 439 F.3d 1149, 1166–67 (9th Cir. 2006) (“When that jurisdictional inquiry turns on ‘factual issues,’ such as . . . ‘where the vessel was intercepted’ . . . or . . . whether the [ship] was stateless, the jurisdictional inquiry *must* be resolved by a jury.” (brackets and internal citations omitted)). In other words, the Ninth Circuit concluded that the MDLEA’s jurisdictional provision presents one of the “‘limited circumstances’ in which ‘facts not formally identified as elements of the offense charged’ must be submitted to the jury and proved beyond a reasonable doubt” under the Fifth and Sixth Amendments. *Id.* (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986)).

The Court finds the Ninth Circuit’s reasoning to be unpersuasive. It is true that “the Supreme Court has suggested that when certain types of facts, though labeled as something other than elements by the legislature, are ‘traditional elements’ of an offense, the constitutional safeguards provided by the Due Process Clause and the Sixth Amendment right to a jury trial still may apply.” *United States v. Tinoco*, 304 F.3d 1088, 1107 (11th Cir. 2002) (quoting *Jones v. United States*, 526 U.S. 227, 241–42 (1999)); *see also Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” (quoting *Jones*, 526 U.S. at 243 n.6)). Even so, within these “broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal

offense.” *United States v. Gaudin*, 515 U.S. 506, 525 (1995) (Rehnquist, C.J., concurring); *Staples v. United States*, 511 U.S. 600, 604 (1994) (“[D]efinition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.”) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)); *McMillan*, 477 U.S. at 86 (“[W]e should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.”).

The Fifth and Sixth Amendments are not implicated where, as here, the question to be resolved – the issue of jurisdiction – neither alters “the presumption of a defendant’s innocence” nor “subject[s] the defendant to an increased penalty,” and there was “no evidence that Congress was attempting to evade defendants’ constitutional rights.” *Vilches-Navarrete*, 523 F.3d at 20 (citing *McMillan*, 477 U.S. at 86–90); accord *Tinoco*, 304 F.3d at 1107 (citing *Apprendi*, 530 U.S. at 490 and *McMillan*, 477 U.S. at 86–87). To the contrary, the MDLEA’s “jurisdictional requirement is intended to act as a diplomatic courtesy, and does not bear on the individual defendant’s guilt.” *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016); *United States v. Greer*, 285 F.3d 158, 175 (2d Cir. 2002) (“[T]he MDLEA requires the consent of foreign nations for purposes of international comity and diplomatic courtesy, not as a protection for defendants.”); *Tinoco*, 304 F.3d at 1108 (observing that “the jurisdictional requirement was inserted into the statute as a diplomatic courtesy to foreign nations and as a matter of international comity in order to avoid ‘friction with foreign nations’” (quoting *United States v. Gonzalez*, 776 F.2d 931, 940 (11th Cir. 1985))); see also *Vilches-Navarrete*, 523 F.3d at 22 (“It is misleading . . . to consider [a foreign nation’s] consent an element of the offense; rather, it is a diplomatic requisite illustrating the international partnership that ensures the rule of law on the high seas.” (quoting *Gonzalez*, 776 F.2d at 940)).

Furthermore, “[u]nder historical practice the determination of whether a vessel is subject to the jurisdiction of the United States would not be an essential element of the offense.” *Vilches-Navarrete*, 523 F.3d at 21. Rather, the historical elements of a crime “included ‘each part of the *actus reus*, causation, and the *mens rea*.’” *Id.* (quoting and following *Tinoco*, 304 F.3d at 1108); *see also id.* (noting that, “in determining whether legislatures have transgressed constitutional boundaries in defining elements of a crime, the Supreme Court has given great weight to the historic treatment of particular categories of facts” and citing *United States v. Gaudin*, 515 U.S. 506, 515 (1995)). Therefore, this Court declines to follow the holding of the Ninth Circuit and instead follows the plain language of the statute, and the reasoning of the First, Eleventh, and D.C. Circuits.

At oral argument, Defendants for the first time asserted a corollary argument that the government could not, consistent with the Confrontation Clause of the Sixth Amendment, introduce the affidavit of the State Department without affording Defendants the opportunity to cross examine Commander Tozzi, the affiant. To be sure, the Confrontation Clause “prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is ‘unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015) (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). “Ordinarily, a witness is considered to be a witness ‘against’ a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt.” *Cruz v. New York*, 481 U.S. 186, 190 (1987); *see also Davis v. Washington*, 547 U.S. 813, 825 (2006) (favorably citing *Dowdell v. United States*, 221 U.S. 325, 330–31 (1911), in which the Supreme Court concluded that “facts regarding conduct of prior trial certified to by the judge . . . did not relate to defendants’ guilt or innocence,” and therefore “were not statements of ‘witnesses’ under the Confrontation Clause”). Here, as set

forth above, the MDLEA’s “jurisdictional requirement is intended to act as a diplomatic courtesy, and does not bear on the individual defendant’s guilt.” *Cruickshank*, 837 F.3d at 1192. Therefore, because Tozzi’s certification is *not* “part of the body of evidence that the jury may consider in assessing his guilt,” *Cruz*, 481 U.S. at 190, Tozzi is not functioning as a “witness” against Defendants and he need not testify in order for the government to admit his certification, *Cruickshank*, 837 F.3d at 1192 (“A United States Department of State certification of jurisdiction under the MDLEA does not implicate the Confrontation Clause because it does not affect the guilt or innocence of a defendant.”). Accordingly, Defendants’ motion to dismiss on this ground is denied, and their alternative request to argue jurisdictional facts to the jury is also denied.

C. Due Process

Defendants next argue that, even if the action against them is consistent with the MDLEA, their prosecution violates the Due Process Clause. (Mem. 6–7.) The Second Circuit has found that, “[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.” *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (quoting *United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003)). Seizing upon this language, Defendants insist that: (1) there is “no nexus between the *Sunshine* or its operations and the United States,” since the vessel was not bound for the United States and there is no evidence Defendants had any ties to the United States, and therefore, (2) “application of the MDLEA to” Defendants violates due process. (Mem. 7.)

Again, Defendants’ arguments are unpersuasive. At the outset, several circuits have rejected virtually identical assertions. *See, e.g., United States v. Campbell*, 743 F.3d 802, 809–

10, 812 (11th Cir. 2014) (“[T]he Due Process Clause of the Fifth Amendment does not prohibit the trial and conviction of an alien captured on the high seas while drug trafficking,” even when there is no “nexus to the United States,” since the MDLEA “provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas”); *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002) (“[T]o the extent the Due Process Clause may constrain the MDLEA’s extraterritorial reach, that clause does not impose a nexus requirement”); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (“[T]he government need not establish a domestic nexus to prosecute offenses” under the MDLEA; since “the trafficking of narcotics is condemned universally by law-abiding nations,” there is “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.”); *but see United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (concluding that due process requires a nexus in MDLEA prosecutions and that a nexus is found when “the plan for shipping the drugs was likely to have effects in the United States” (citation omitted)). And as Judge Rakoff recently noted in a comprehensive decision that persuasively rejected similar arguments, the Second Circuit has “repeatedly made clear that ‘stateless vessels on the high seas are, by virtue of their statelessness, subject to the jurisdiction of the United States . . . even absent proof that the vessel’s operators intended to distribute their cargo in the United States.’” *United States v. Prado*, 143 F. Supp. 3d 94, 98 (S.D.N.Y. 2015) (quoting *United States v. Henriquez*, 731 F.2d 131, 134 (2d Cir. 1984) and *United States v. Pinto-Mejia*, 720 F.2d 248, 260–61 (2d Cir. 1983)). This is because “‘vessels without nationality are international pariahs,’ and those aboard stateless vessels lack the protections of any country’s law.” *Id.* (quoting *Pinto-Mejia*, 720 F.2d at 261). Therefore, “[i]t is not arbitrary or fundamentally unfair to prosecute those who have renounced the legal world and ‘constitute a potential threat to the order and stability of navigation on the high seas.’”

Id. (quoting *Pinto-Mejia*, 720 F.2d at 261). This position finds strong support in the Second Circuit’s recent decision in *United States v. Epskamp*, which underscored that due process “does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.” 832 F.3d 154, 169 (2d Cir. 2016); *see also id.* (noting that due process was satisfied in light of the fact that “Epskamp’s behavior was ‘self-evidently criminal’” (quoting *Al Kassar*, 660 F.3d at 119)).

Here, Defendants sailed a vessel “without nationality” and are alleged to have engaged in “self-evidently criminal” behavior – namely, transporting mass quantities of cocaine over the high seas. *Id.* Accordingly, it is clear that Defendants’ prosecution is not inconsistent with the Due Process Clause.

D. Article I, Sec. 8 – “Define and Punish Clause”

The Court next turns to Defendants’ argument that their prosecution is unconstitutional as applied to them because they were not captured on the “high seas.” (Mem. 8–10.) The Define and Punish Clause of Article I, Section 8 of the Constitution “grants Congress the authority ‘[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.’” *United States v. Ballestas*, 795 F.3d 138, 146 (D.C. Cir. 2015) (quoting U.S. Const. art. I, § 8, cl. 10). As the D.C. Circuit has explained, the Define and Punish Clause “encompasses three distinct powers: (i) to define and punish piracy; (ii) to define and punish felonies committed on the high seas; and (iii) to define and punish offenses against the Law of Nations.” *Id.* at 146–47 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158–59 (1820)). It is well settled that the MDLEA is a valid exercise of the second of these powers – namely, to “define and punish felonies committed on the high seas.” *See, e.g., id.; United States v. Garcia*, 182 F. App’x 873, 874 (11th Cir. 2006); *United States v. Matos-Luchi*, 627 F.3d 1, 3 (1st Cir.

2010); *United States v. Ledesma-Cuesta*, 347 F.3d 527, 532 (3d Cir. 2003); *United States v. Moreno-Morillo*, 334 F.3d 819, 824 (9th Cir. 2003).

Here, the State Department’s certificate indicates that Defendants were identified approximately 300 miles off the coast of Bermuda. (Doc. No. 44-2.) Relying on this evidence, Defendants speculate that there is a possibility that they were arrested within Bermuda’s Exclusive Economic Zone (“EEZ”) – i.e., within 200 nautical miles of Bermuda’s coast – since some evidence shows that “the Sunshine was pursued by the Coast Guard for many hours” and “travel[ed] a significant distance” before being intercepted. (Mem. 9.) Accordingly, Defendants request an evidentiary hearing to determine whether they were arrested within Bermuda’s EEZ and surmise that, if they were in fact arrested within that territory’s EEZ, then: (1) they were not arrested on the “high seas,” and (2) the government cannot prosecute them pursuant to its authority under Article I, Section 8 to define and punish felonies on the high seas. (*Id.* at 9–10.) Defendants rely heavily on the definition of the term “high seas” under the United Nations Convention on the Law of the Sea (“UNCLOS”), which defines the “high seas” as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State.” UNCLOS art. 86, Dec. 10, 1982, 21 I.L.M. 1245, 1286.

But Defendants’ argument, in addition to being highly speculative, overrelies on the UNCLOS language and rests on several dubious legal premises. As Chief Judge McMahon has noted, “[i]n MDLEA prosecutions, courts have repeatedly recognized that the ‘high seas’ begin outside of a country’s twelve-mile territorial waters, not outside the country’s EEZ.” *United States v. Montano Preciado*, No. 14-cr-874 (CM), 2016 WL 4184304, at *1 (S.D.N.Y. Aug. 4, 2016) (collecting cases); see also *Matos-Luchi*, 627 F.3d at 2 n.1 (concluding that vessel was interdicted on the “high seas,” notwithstanding the fact that it had been arrested within the Dominican Republic’s EEZ); cf. *In re Air Crash Off Long Island, N.Y., on July 17, 1996*, 209

F.3d 200, 202, 215 (2d Cir. 2000) (concluding that under the Death on the High Seas Act, the “‘high seas’ refers to those waters beyond the territorial waters of the United States” after conducting an exhaustive analysis of the historical understanding of the term “high seas”). Therefore, so long as the *Sunshine* was more than twelve nautical miles outside of Bermuda’s territorial waters – which it indisputably was – it is clear that Defendants were on the “high seas” as that term is understood under the Define and Punish Clause.

More fundamentally, Defendants place undue emphasis on the location of their *arrest*. However, the text of Article I, Section 8 “is simple,” as “it permits Congress to criminalize and exert its authority over ‘felony offenses’ in ‘international waters.’” *United States v. Carvajal*, 924 F. Supp. 2d 219, 258 (D.D.C. 2013) (quoting *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008)); *United States v. Sprague*, 282 U.S. 716, 731 (1931) (instructing courts to interpret the Constitution in a manner that accords with “normal and ordinary” meaning). Thus, “[u]ltimately, the place of seizure is irrelevant to the Court’s jurisdiction once the Defendants were brought to this country inasmuch as the Court finds that the vessel in question traveled on the high seas.” *Carvajal*, 924 F. Supp. 2d at 258. While the arrest of MDLEA defendants in a sovereign’s territorial waters may present complications in the realm of international relations, it is for the executive branch – not individual defendants – to assert any interests foreign governments may have with respect to these prosecutions. *See Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“[T]he historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–611 (1952) (Frankfurter, J., concurring))); *cf. Greer*, 285 F.3d at 175 (“[T]he MDLEA requires the consent of foreign nations for purposes of international comity and diplomatic courtesy, not as a protection for defendants.”). Therefore, “Congress’s authority to criminalize conduct under the

Felonies on the High Seas Clause of Article I § 8 of the Constitution does not depend on where a vessel is seized, although it may be tempered by foreign relations executed by the Executive.” *Carvajal*, 924 F. Supp. 2d at 259. Accordingly, even assuming, *arguendo*, that Defendants were arrested in Bermuda’s territorial waters, the government may, consistent with Article I, Section 8 of the Constitution, prosecute them so long as the *Sunshine* “traveled on the high seas.” *Carvajal*, 924 F. Supp. 2d at 258.

Defendants nonetheless insist that the Eleventh Circuit’s decision in *United States v. Bellaizac-Hurtado* supports their argument that the indictment should be dismissed if they had been arrested in Bermudan territorial waters. (Mem. 11 (citing 700 F.3d 1245, 1258 (11th Cir. 2012))).) In *Bellaizac-Hurtado*, the Eleventh Circuit vacated the convictions of MDLEA defendants who had engaged in narcotics trafficking aboard a stateless vessel in the territorial waters of Panama. But even if the Court were inclined to agree with the Eleventh Circuit’s reasoning in *Bellaizac-Hurtado* – which it does not – that case is readily distinguishable from the case here. Significantly, the government in *Bellaizac-Hurtado* relied exclusively on its authority to “define and punish . . . Offences against the Law of Nations,” and the Eleventh Circuit premised its decision to vacate on its conclusion that “drug trafficking is not a violation of customary international law.” *Bellaizac-Hurtado*, 700 F.3d at 1248–49, 1258. Therefore, *Bellaizac-Hurtado* is clearly inapposite to this case, since the government here has invoked its authority under a different subclause of Article I, which grants it authority to “define and punish . . . Felonies committed on the high Seas.” art. I, § 8, cl. 10; (*see also* Doc. No. 51 at 15); *United States v. Macias*, 654 F. App’x 458, 461 (11th Cir. 2016) (explaining that *Bellaizac-Hurtado* has no application to a “prosecution under the MDLEA for drug trafficking crimes committed onboard a stateless vessel in international waters,” since such a prosecution “is a constitutional exercise of extraterritorial jurisdiction under the Felonies Clause”); *Ballestas*, 795

F.3d at 147 (“Because the government in this case defends Congress’s authority under the Felonies Clause, not the Law of Nations Clause, *Bellaizac–Hurtado* is of little assistance to [defendant].”); *see also United States v. Baston*, 818 F.3d 651, 667 (11th Cir. 2016) (observing that had the government in *Bellaizac–Hurtado* relied on a different provision of Article I, “we might have reached a different result”).

In sum, the Court concludes that: (1) the government has the authority under Article I to prosecute Defendants; (2) an evidentiary hearing to determine the location of Defendants’ arrest is unnecessary; and (3) Defendants’ reliance on *Bellaizac–Hurtado* is entirely misplaced. The Court therefore denies Defendants’ motion to dismiss on this ground as well.

E. Venue

Defendants also argue that venue is improper. (Mem. 11–13.) Defendants do not contest that the government has satisfied the MDLEA’s venue provision, since the Southern District of New York is the “district at which” they “enter[ed] the United States.” 46 U.S.C. § 70504(b)(1); *see also* 18 U.S.C. § 3238 (providing that “all offenses begun or committed upon the high seas . . . shall be [tried] in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought”). Rather, Defendants accuse the government of engaging in “forum shopping” in directing cases to this district in order to avoid the impact of less favorable decisions issued in other circuits, such as *United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006) and *United States v. Bellaizac–Hurtado*, 700 F.3d 1258 (11th Cir. 2012). But Defendants fail to cite a single case where the venue provisions of the MDLEA or Title 18 were satisfied but the government’s engagement in “forum shopping” warranted a transfer of venue. In any event, as even a brief perusal of Westlaw makes clear, the government continues to bring numerous cases under MDLEA in other circuits – in fact, this Opinion and Order addresses several recent decisions of the First, Eleventh, and D.C. Circuits affirming convictions under the

A. 036

MDLEA. Thus, Defendants' complaints regarding forum shopping amount to nothing more than hollow rhetoric and fail to raise a cognizable basis for dismissal based on improper venue.

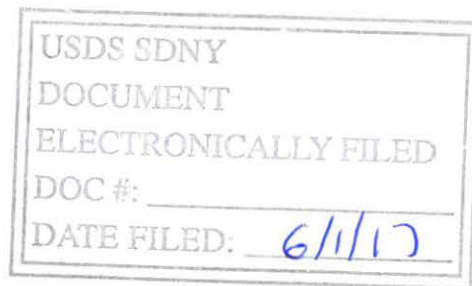
IV. CONCLUSION

Accordingly, for the reasons set forth above, Defendants' motion to dismiss (Doc. Nos. 41, 45) is DENIED. The parties are reminded that Suarez's sentencing is scheduled to take place on September 6, 2017 at 10:00 a.m., and Van Der End's sentencing is scheduled to take place on September 8, 2017 at 2:30 p.m.

SO ORDERED.

Dated: June 1, 2017
New York, New York



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

H54YDOWH2 HEARING 1

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v. 16 CR 453 (RJS)

5 RICHARD DOW, et al.,

6 Defendants.

7 -----x

8 New York, N.Y.
May 4, 2017
9 9:00 a.m.

10 Before:

11 HON. RICHARD J. SULLIVAN,

12 District Judge

13

14 APPEARANCES

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25 ATTORNEY'S OFFICE

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H54YDOWH2 HEARING 2

1 (Prior proceedings reported; not transcribed herein)

2 THE COURT: Does anybody want to be heard further with

3 respect to duress? We can have some argument now.

4 MS. HELLER: Yes, your Honor.

5 THE COURT: Okay. Ms. Heller.

6 MS. HELLER: Thank you, your Honor. Mr. Suarez's

7 duress argument is based on the fact that he had a reasonable

8 fear at the time he moved the bales, not, as the government is

9 alleging, that he knew prior to boarding the boat. That is not

10 what's necessary to prove a conspiracy. The general jury

11 instructions warrants just one act. At the time Mr. Suarez

12 moved the bales, he realized what they were.

13 THE COURT: Yes. That's the testimony. I get that.

14 The issue is at that point, what was the basis for his

15 well-founded fear of impending death or serious bodily injury?

16 MS. HELLER: The basis for his well-founded fear of

17 impending death or serious bodily injury is that he was now

18 alone on a boat hundreds of miles from shore.

19 THE COURT: So I think what you're saying is that

20 anybody on a boat has a fear of impending death or serious

21 bodily injury just by virtue of being on a boat with a guy who

22 curses.

23 MS. HELLER: No. Anybody on a boat with somebody they

24 now realize is moving what appears to be a large amount of

25 drugs would have a well-founded fear of death or bodily injury.

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H54YDOWH2 HEARING 3

1 THE COURT: I haven't seen any cases like that. Are

2 you aware of any that say basically that this is the boat

3 exception to the duress defense that allows you to basically

4 say the well-founded fear is just by virtue of the fact that

5 you're on a boat?

6 MS. HELLER: No. What I have seen though, your Honor,

7 are cases that say generally the well-founded fear has not been

8 met if there is an ability to escape. Mr. Suarez --

9 THE COURT: That's a different element. That's a

10 different element. The lack of a reasonable opportunity to

11 escape harm, other than by engaging in the illegal activity.

12 That's relevant. We've heard testimony about that.

13 I think you're saying he had no ability to escape. At

14 the time that he's asked to move the bales, he can't just say,

15 I'm going to go for a walk and leave. He can't do that. I

16 don't think there's any question about that.

17 I think what you're saying is when you're on a boat,

18 you don't really need to prove the second element, or the

19 second element is presumed I think is what you're saying.

20 MS. HELLER: I think when you're on a boat with

21 somebody who has demonstrated, at best, a very bad temper --

22 THE COURT: Well, he cursed is all we heard; right?

23 These are the elements, and you agree. It's in your papers.

24 MS. HELLER: We agree.

25 THE COURT: A threat of force directed at the time of

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H54YDOWH2 HEARING 4

1 the defendant's conduct.

2 MS. HELLER: Mr. Suarez testified that --

3 THE COURT: He was told to move the bales.

4 MS. HELLER: And that Mr. Dow looked at him --

5 THE COURT: Abnormally.

6 MS. HELLER: Abnormally.

7 THE COURT: Okay. And had a reputation for cursing.

8 I think that's a stretch, I have to say, for the first two

9 elements. I don't think there are too many cases that would

10 say that's sufficient.

11 I think most of the testimony that you elicited is

12 really about the lack of opportunity to escape. I think

13 there's a question as to the government's theory in some ways;

14 right?

15 Because this is an ongoing conspiracy at the time of

16 the Coast Guard pulling up. That may have been an opportunity

17 to escape. That wasn't available at the time the bales were

18 moved, but it certainly was an opportunity during the course of

19 the conspiracy.

20 So it's similar to a case where somebody is a courier

21 on an airplane and has an opportunity when they're at customs

22 to say, there are drugs here. You should know. If they don't

23 do that, then they haven't availed themselves of the

24 opportunity to escape.

25 Is this the same? When the Coast Guard comes

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1 alongside, not for a minute but for a significant period of
2 time, is that an opportunity to escape?

3 MS. HELLER: Well, your Honor, I think -- the
4 testimony hasn't elicited this, but the evidence provided by
5 the government indicated clearly that the Coast Guard came
6 beside the boat in high seas and bad weather.

7 THE COURT: It was a couple feet away is what I heard.
8 There wasn't really testimony about the weather. I agree. A
9 couple feet away would seem to be an opportunity to say, hey.
10 I'm being held against my will here. There are drugs on board.
11 Save me.

12 MS. HELLER: At that point, Mr. Suarez testified that
13 Mr. Dow instructed him not to. He was already in fear.

14 THE COURT: In fear of being thrown overboard; right?
15 There were no guns on this. It's not like he was going to get
16 shot.

17 MS. HELLER: No.

18 THE COURT: And nobody else was going to shoot him;
19 right? He wasn't afraid of the other folks on the boat,
20 Mr. Van Der End or anyone else; right?

21 MS. HELLER: There was only Mr. Van Der End and
22 Mr. Dow.

23 THE COURT: I think it will be interesting to see how
24 far you can analogize this to the airplane situation. I think
25 I'm focused more on the threat of force that is sufficient to

1 induce a well-founded fear of impending death or serious bodily
2 injury because all we really have is very circumstantial
3 evidence that he cursed, he has a temper, and they're on a
4 boat. So it seems to me those might be hard to get over.

5 Is there anything else you want to say on those
6 points?

7 MS. HELLER: No, your Honor.

8 THE COURT: Ms. Houle, do you want to be heard on
9 this?

10 MS. HOULE: Yes. Thank you, your Honor.

11 I think that your Honor has already touched on this,
12 but essentially what the defense is doing here is conflating
13 the second and third elements of the duress claim.

14 There are, of course, three elements, the threat of
15 force directed at the time of the conduct -- the threat needs
16 to be sufficient to induce a well-founded fear of impending
17 death or serious bodily injury -- and then the lack of
18 opportunity to escape harm.

19 The Second Circuit has been clear that these are three
20 distinct elements and that to satisfy the burden at this
21 hearing, the defendant needs to present evidence as to each of
22 those elements in order to be entitled to a duress instruction.

23 Your Honor noted that it was unlikely that there would
24 be cases that would find that the threat or the circumstances
25 that have been alleged here would rise to the level of a threat

1 sufficient to induce a well-founded fear.

2 I think, your Honor, that there is a Second Circuit
3 case that is very closely aligned with what the defendant is
4 alleging now where the claim was rejected, and that's, as
5 your Honor noted, the Villegas opinion, which is 899 F.2d 1324.

6 There the defendant claimed duress based on a lack of
7 opportunity to leave a cocaine factory. The defendant said
8 that there had been no direct threat made against him and,
9 instead, that, like the testimony of Mr. Suarez, he suddenly
10 realized that he was surrounded by cocaine and cocaine
11 traffickers. So he intuited a threat based on those
12 circumstances.

13 In that case the evidence was also that he had been
14 treated rudely and that he had been told to obey someone. The
15 district court excluded any duress defense, and the Second
16 Circuit went so far as to say that the appeal of that was
17 frivolous because a generalized fear based on being around
18 alleged drug traffickers and being treated rudely is plainly
19 not sufficient.

20 Ultimately, your Honor, the defendant fails to meet
21 any of the prongs of the duress defense. As to the first
22 prong, he hasn't alleged any threat, let alone one at the time
23 of his conduct. As to the second, for the reasons I just gave,
24 the threat was not sufficient to induce a well-founded fear of
25 impending death.

1 The testimony has only been he heard Mr. Dow curse;
2 that Mr. Dow cursed at the time that he asked him to move the
3 bales. He said that he had not been previously afraid of
4 Mr. Dow until that moment. There was no explicit threat made
5 against him. It is insufficient under the law.

6 I point your Honor to Judge Rakoff's decision, which
7 you noted as well. There the fears were grounded in someone
8 having been kidnapped by the FARC, held in the jungle, told
9 that disobeying the FARC would result in death, witnessing more
10 than 200 people carried away to their deaths.

11 Judge Rakoff found that that ultimately was still just
12 a generalized fear, and it was not sufficient to induce a fear
13 of impending death. In comparison here, the defendant claims
14 that he was just treated rudely.

15 Finally as to final prong, the lack of opportunity to
16 escape harm, I think the defendant's testimony was focused on
17 his subjective belief as to whether it would have been useful
18 for him to use the satellite phones or the radio or the laptop
19 or the Blackberry that was on board.

20 But in United States v. Gonzalez, the Second Circuit
21 said it's not a subjective belief that controls. The focus is
22 on what an objective, reasonable person would do in that
23 circumstance.

24 THE COURT: In what circumstance I guess is the
25 question. At the time they are induced to join the conspiracy?

1 Or at any point during the course of the conspiracy?

2 MS. HOULE: I think the law is at the point where
3 they've agreed to join the conspiracy.

4 THE COURT: So that's at the moment that he's hauling
5 bales; right?

6 MS. HOULE: As your Honor noted, the conspiracy
7 continued. He didn't present any testimony that he tried to
8 withdraw from the conspiracy once he agreed to move the bales.
9 So the government's view is that the defendant could have used
10 any of those devices to call for help. He could have tried to
11 escape using the Zodiac. As your Honor noted, he could have
12 told the Coast Guard when they arrived.

13 THE COURT: So I guess that's my third question. The
14 third element is the lack of a reasonable opportunity to escape
15 harm, other than by engaging in the illegal activity.

16 Does that extend to days after the hauling of the
17 bales? Or are we focused on sort of at the moment that he's
18 enlisted to either haul or not haul?

19 MS. HOULE: I think it begins at the moment where he
20 says that he joined the conspiracy and it continues through his
21 involvement within that conspiracy.

22 THE COURT: So, if he tried to escape at any point,
23 then that's sufficient?

24 MS. HOULE: Yes, your Honor.

25 THE COURT: So, if there was an opportunity at any

1 point between when he joins and when the conspiracy is ended,
2 either because of law enforcement coming in or the completion
3 of the conspiracy, then he's unable to meet the third element?
4 That's what you're saying?

5 MS. HOULE: Because he was continuing to engage in the
6 offense. I think your Honor has noted the airplane scenario.
7 I think this is similar to the United States v. Al Kassar case,
8 837 F.3d 103, where the two women had been raped. They had
9 been told that they needed to carry this cocaine on board an
10 airplane. There was someone in the background who they said
11 was a watcher.

12 Through the course of the women's journey, including
13 when they were going through airport security and were
14 separated from the watcher, the Second Circuit looked to at any
15 point along that way did they try to escape.

16 THE COURT: That's why it seems to me that the third
17 element, which relates to a reasonable opportunity to escape,
18 would cover a broader period of time than the moment of the
19 bales being hauled.

20 MS. HOULE: Yes, your Honor. I'm sorry if I was
21 unclear. What I meant to express is that it began at the
22 moment that he moved the bales and continued through his
23 involvement in the conspiracy.

24 THE COURT: Yes. What is the "it" in that sentence?
25 I'm not sure I'm following you. You're saying "it" began.

1 What began?

2 MS. HOULE: The opportunity to escape.

3 THE COURT: The element is a lack of a reasonable
4 opportunity to escape. So I think your point is that if at any
5 point in that continuum there is an opportunity to escape that
6 is not available, then that is a failure to establish the third
7 element.

8 MS. HOULE: That is the point I'm trying to make, and
9 I thank your Honor for clarifying it.

10 THE COURT: Okay.

11 Ms. Heller, is there anything you want to say in
12 response?

13 MS. HELLER: Just simply, your Honor, that conspiracy
14 requires willingness.

15 THE COURT: Right.

16 MS. HELLER: That's really the question.

17 THE COURT: Well, I understand that. Your client said
18 on the stand that at the time he hauled the drugs, he knew that
19 they were drugs. Right? It wasn't an accident. It wasn't a
20 mistake. It wasn't, I thought it was laundry. I knew it was
21 drugs. I moved them. I was in the conspiracy at that point,
22 but I had no choice because of duress.

23 Then the issue is at any point during the course of
24 that conspiracy, which doesn't end until the Coast Guard
25 basically takes the bales, then if he had an opportunity to

1 escape and didn't avail himself of it, it seems to me that the
2 duress defense is not available.

3 MS. HELLER: The threat and the fear of Mr. Dow
4 continues beyond just prior to him moving the bales though,
5 your Honor. He was still afraid.

6 THE COURT: I think the issue is whether there was an
7 opportunity to escape during that period. It's not whether or
8 not he had a fear. It's whether or not he had an opportunity
9 to escape, just like the two women who were on the airplane and
10 who were at various times on the ground or had opportunities to
11 confer or ask for help from immigration officials or customs
12 officials.

13 Are you familiar with the case?

14 MS. HELLER: I'm familiar with the case.

15 THE COURT: It seems to me that the Coast Guard is
16 fairly analogous to the opportunity to speak to a customs
17 official. It's not on all fours, but it seems similar.

18 I think the bigger problem here is that there really
19 has been no articulation of a threat other than a vague,
20 subjective belief based on bad manners, cursing, and the fact
21 that this is drugs on a boat. I just don't think in the Second
22 Circuit that's enough.

23 I think I'll have to write on this. I'll develop this
24 more fully, but I don't think the elements have been met here.
25 I don't think there has been a showing of some evidence with

1 respect to each of the elements that would be required to get
2 this to the jury. So I'm going to deny the request to submit
3 to the jury the duress defense.

4 That may be enough to take care of the severance all
5 by itself, but I don't think there was really much of a motion
6 for a severance based on this testimony anyway.

7 Do you want to be heard on that?

8 MS. SHELLLOW: I do, your Honor.

9 The point is that Mr. Suarez's belief that the bales
10 that he was told to move were drugs is fundamentally in-- he's
11 acting as a prosecutor against Mr. Van Der End because at that
12 point, he's putting on evidence --

13 THE COURT: He's not saying Mr. Van Der End was
14 threatening him; right?

15 MS. SHELLLOW: No. Quite the contrary. He doesn't say
16 anything about Mr. Van Der End threatening him. What he does
17 do though is clearly testifies that, in his belief, there were
18 drugs on that boat.

19 If Mr. Van Der End is going to mount a defense, that's
20 as good as prosecuting Mr. Van Der End. Those are words coming
21 from a codefendant that is strong evidence that a jury can't
22 acquit one and convict the other.

23 THE COURT: Knowledge would be separate for each of
24 the defendants.

25 MS. SHELLLOW: Yes, but that's very compelling

1 evidence, your Honor. Even though --

2 THE COURT: Whether or not Mr. Suarez even testified
3 to that, the jury is going to see what these things looked
4 like. The jury will have to determine whether that should have
5 put people on notice as to what was in the bales and the other
6 circumstances of them being on the boat.

7 At the very least, I would give a limiting instruction
8 that would tell the jury that the testimony of Mr. Suarez's
9 knowledge is particular to Mr. Suarez and can't be considered
10 with respect to Mr. Van Der End. I have no reason to think the
11 jury couldn't follow that instruction.

12 I don't even know if Mr. Suarez is ultimately going to
13 testify at this point. I'm not too worried about the prejudice
14 to Mr. Van Der End. If Mr. Dow were here, it might be a
15 different story, but he's not going to be here.

16 MS. SHELLLOW: Your Honor, it operates to essentially
17 reduce the burden that's on the government.

18 THE COURT: I don't think so. There are certainly
19 limiting instructions that would make it very clear that it
20 does no such thing, and I don't think the jury would be unable
21 to follow my instructions on that, in the hypothetical
22 situation which you described, which I don't even know if the
23 evidence will come in that way.

24 Respectfully -- and I have nothing but respect for
25 Ms. Shellow. I think she is a very, very fine lawyer -- I will

1 deny the request. So I'm going to deny the motion for
2 severance, as I have denied the motion for duress. I may write
3 a little more but probably not too much more on the experience.
4 We do have other things to get to.

5 MS. SHELLLOW: As long as I'm at the lectern, I thought
6 I might address the configuration of the courtroom. I think we
7 are going to have a problem.

8 THE COURT: It's hard to see the witnesses.

9 MS. SHELLLOW: It's hard to see the witnesses. I don't
10 know that we could even move this table.

11 THE COURT: Good luck. That's a heavy table.

12 MS. SHELLLOW: I'm not planning to move the table,
13 your Honor.

14 THE COURT: Let me see if we can get space in either
15 318 or 506. Those are larger courtrooms that have larger
16 tables that have better sightlines to the witnesses. I'll
17 explore that, and I'll let you know later today if we can get a
18 shot at that.

19 MS. SHELLLOW: Your Honor, the other possibility that
20 we didn't explore is if the witness is positioned differently
21 in the witness box. I don't know whether it's possible for his
22 or her chair to move such that he can be seen.

23 THE COURT: I think it's just tough to do. I think
24 the problem is the bench. This is a great building. Cass
25 Gilbert did a nice job, but I don't think the firm knew enough

1 about courtrooms because the sightlines are tricky.

2 This one is better than most in this courthouse. I do
3 think that 318 and 506 work pretty well. They're cavernous.
4 They're big courtrooms. The acoustics are no worse than here,
5 and the sightlines are better.

6 Does anybody have an objection to moving to a larger
7 courtroom?

8 MS. HOULE: No objection.

9 THE COURT: So we'll explore that. We'll explore that
10 at the break. Then we'll come back, and we'll talk about the
11 other motions, the motion to dismiss and the motions in limine.
12 Thank you.

13 (Recess)

14 THE COURT: Mr. Suarez, and Mr. Van Der End, while you
15 were out, we were just chatting amongst ourselves. I'm going
16 to try and get a different courtroom. I haven't received word
17 yet about which one. I'll certainly know by the end of the
18 day. If we don't resolve it while you're all here, I'll let
19 you know today.

20 Let's now move on to some of the other motions.
21 There's also a motion to dismiss the indictment. So I've
22 reviewed the papers on this. I'm not the first judge on the
23 planet to have addressed this issue or a motion like this.

24 Does anybody wish to be heard further on this?
25 Ms. Shellow?

1 MS. SHELLLOW: Your Honor, Mr. Silverman would like to
2 address the Court.

3 THE COURT: Okay.

4 MR. SILVERMAN: Your Honor, I think largely we put it
5 in our papers, but I think that with respect to what due
6 process allows in terms of the extraterritorial application of
7 the Maritime Drug Law Enforcement Act to individuals such as
8 Mr. Van Der End who are foreign nationals who were not born in
9 the United States, there does appear to be an intra-circuit
10 split. As to the question of what the Second Circuit would do
11 now --

12 THE COURT: You're betting on the Ninth?

13 MR. SILVERMAN: Our view is, given that they have
14 stated a categorical view twice recently, the 35-year-old cases
15 aren't as persuasive as they would seem.

16 The first one, Pinto-Mejia, did not address a
17 constitutional challenge. In that case, the defendant
18 challenged the statute on the basis that it violated
19 international law. The second case one year later dealt with
20 defendants who appear to have raised a due process challenge to
21 the extraterritorial application of the statute.

22 In that case, the Second Circuit very tersely dealt
23 with the issue by citing the Pinto-Mejia case which had not
24 addressed the issue at all. So on the one hand you have the
25 Second Circuit that has twice recently categorically ruled that

1 there is a U.S. nexus requirement and has described that
2 requirement in terms that are more narrow than the Ninth
3 Circuit has.

4 The Ninth Circuit has explicitly said, we have a nexus
5 requirement. The Second Circuit didn't footnote an exception.
6 It's possible, even likely, that when they were writing the
7 Yousef and Al Kassar decision, no one was aware of these
8 35-year-old or 30-year-maritime cases.

9 As to the question of what the Second Circuit would do
10 today, it's our view that they would apply their categorical
11 nexus requirement which requires a nexus for non-U.S. persons
12 with some U.S. interests.

13 The object of the conspiracy, which is in paragraph 2
14 of the indictment in this case, is to manage, distribute, or
15 possess drugs on a boat that is subject to the jurisdiction of
16 the United States.

17 The reason they are not subject to the jurisdiction of
18 the United States is because it's in the middle of the ocean
19 outside the United States. So they have a conspiracy, the
20 object of which is to have drugs outside of the United States.

21 They have not indicted this under the Controlled
22 Substance Act. They have not indicted this as a plan
23 indirectly to route drugs into the United States. It appears
24 to us they've made a full proffer of the evidence which is
25 sufficient for a ruling by the Court on a motion to dismiss

1 under Alfonso.

2 It appears to us they haven't alleged that the drugs
3 were going past Canada. They made no proffer of that evidence.
4 We respectfully submit that what they have proffered with
5 respect to a distant coconspirator who may be an American is
6 insufficient because in Al Kassar, the Second Circuit was clear
7 that in conspiracy cases, the nexus is based on the aim of the
8 conspiracy.

9 The Second Circuit said jurisdictional nexus is
10 determined by the aims of the conspiracy, not by its effects.
11 So to talk about how a coconspirator who was not arrested with
12 him on the boat, whose involvement is not specified, who
13 happens to be an American citizen is inconsistent.

14 There may be a conflation with the idea of so-called
15 nationality jurisdiction, that is, jurisdiction of a U.S.
16 citizen operating abroad, and their codefendant. But
17 jurisdiction over U.S. citizens operating abroad, I don't know
18 of any basis for extending that to their codefendants.

19 The discussion of these points in the government's
20 brief is quoting footnote 24, Yousef, where he talks about
21 customary international law, not the reaches of due process.

22 So we respectfully submit, your Honor, that at this
23 point it would be appropriate to dismiss the indictment. There
24 has been a full proffer of the evidence, and it is insufficient
25 to meet the Second Circuit's nexus requirements.

1 THE COURT: Does anybody want to respond?

2 MR. SWERGOLD: Your Honor, just very briefly. I just
3 want to make sure the record is clear on this. There actually
4 isn't really a circuit split at all here because the Ninth
5 Circuit has said, just like all the other circuits to have
6 considered this issue, that for stateless vessels, no nexus is
7 required. That's because stateless vessels are international
8 pariahs. They're on the high seas, not subjecting themselves
9 to anybody's laws. So they can't claim the protections of
10 anybody else's laws.

11 The Second Circuit cases here I think are particularly
12 instructive. If you look at the language in Henriquez, which
13 defense counsel sort of glosses over this idea that it just
14 sort of relied on Pinto-Mejia, the language is very clear there
15 though that they're saying that for stateless vessels on the
16 high seas, by virtue of their statelessness, they're subject to
17 the jurisdiction of the United States even absent proof that
18 the vessel's operators intended to distribute their cargo in
19 the United States.

20 The Second Circuit is quoting from Pinto-Mejia here.
21 That case was decided just the year prior. If he take those
22 two cases together, if we're looking at what the Second Circuit
23 is saying with respect to stateless vessels, which were not
24 issues in Yousef and not issues in Al Kassar, have all come out
25 the same way, including the Ninth Circuit. Stateless vessels

do not require a nexus to the United States.

With respect to Al Kassar, the test in Al Kassar is that it has to be foreseeable to them and fair and reasonable that they're going to be prosecuted somewhere for their conduct.

Clearly when you're on a boat with over a thousand kilograms of cocaine, the defendants know they're going to be prosecuted somewhere, especially when you have defendants here who are from countries, the Netherlands and Curacao, that have drug-trafficking laws.

THE COURT: I think in some ways, more relevant although not exactly analogous cases, Epskamp, which is a case that involved an airplane flying from the Dominican Republic to the Netherlands or Belgium. Nonetheless, it was a U.S.-marked plane.

The Second Circuit concluded that due process does not require that the defendants understand that they could be subject to criminal prosecution in the United States so long as they could reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.

In light of the fact that the behavior was self-evidently criminal, the due process challenge was rejected in Epskamp. Again, it's not on all fours, but I think it's instructive. I'm going to deny the motion. I'm going to write on that more too, just so the record is clear. For purposes of

the trial, we have to move. So the motion is denied.

Here is the predicament we're in right now. Off the record.

(Recess)

THE COURT: Thank you for accommodating me. As I said, we have a number of motions in limine. So I want to get to those now.

The motions in limine that the government has brought include a motion that the defendants be precluded from arguing to the jury that the Sunshine was not subject to United States jurisdiction; second, that the defendants should be precluded from arguing that they didn't know the Sunshine was subject to U.S. jurisdiction; and third, that evidence of Mr. Van Der End's prior narcotics convictions should be admissible under 404(b). So let's take them one at a time.

With respect to arguing the jurisdictional issue, does anybody intend to argue that at this point?

MR. SILVERMAN: Your Honor, we don't intend to argue Mr. Van Der End's knowledge.

THE COURT: The second point you're not arguing, but you do intend to argue the first point?

MR. SILVERMAN: Right. We put this in our motion to dismiss as well. We believe that the question of statelessness is disputed. We believe that it should be submitted to the jury.

The Ninth Circuit has so held. The two other courts, the First Circuit and the D.C. Circuit, have not ruled on the issue, but they suggest that there might be a Sixth Amendment problem with not submitting statelessness to the jury. We think it should be submitted to the jury. We do not think that Mr. Van Der End's knowledge as to jurisdictional, where he was, is relevant to that inquiry.

THE COURT: Ms. Heller or Mr. London.

MS. HELLER: We agree. The issue is really whether or not the vessel was stateless.

THE COURT: I don't know who is arguing this for the government.

MR. SWERGOLD: Your Honor, again, with reliance on the Ninth Circuit, the Ninth Circuit has actually said that in cases where there is no factual dispute about statelessness, it's not an issue for the jury. Here there is no dispute about statelessness because the MDLEA provides a very clear framework for determining whether a vessel is stateless.

In this case, the one that comes into play is did the master or person in charge of the vessel make a claim of nationality or registry for the vessel. The answer is yes.

There is no dispute that Mr. Dow claimed that the vessel was registered with Saint Vincent and the Grenadines. Then the vessel is considered stateless if the flag, the claimed flag state nation, rejects that claim of registry,

which is exactly what happened here.

The MDLEA also provides that the certification from the State Department is conclusive proof of what the foreign state's response is. Here we've produced the State Department certification. We've also produced the underlying emails between the Coast Guard command and Saint Vincent and the Grenadines' Guard that showed that when asked whether the Sunshine was registered with them, Saint Vincent and the Grenadines said, this vessel is no longer registered to us. It is not subject to our jurisdiction.

That is all that the statute requires. The statute also goes so far as to say that this is not an element of the offense. It does not go to the jury. It is a preliminary decision for the judge.

That's really driven by the diplomatic policy reasons underlying the MDLEA which is that Congress, in passing the MDLEA and its predecessor statutes, was seeking to expand the United States' ability to police the high seas so it didn't turn into a highway for unchecked drug trafficking.

The U.S. has bilateral agreements with many nations on specifically maritime counter drug enforcement operations, including Saint Vincent and the Grenadines.

So the purpose of this subject to the jurisdiction of the United States is to make sure that the United States is not trampling on the rights of other nations, and that's why the

1 statute provides to those countries, not to the defendants, the
2 right to challenge under international law or under a bilateral
3 agreement, a violation by the United States.

4 Of course, here that didn't happen at all. The
5 United States Coast Guard complied with the bilateral
6 agreement. The United States Coast Guard reached out to Saint
7 Vincent and the Grenadines, and Saint Vincent and the
8 Grenadines authorities said this is not subject to our
9 jurisdiction. That, under the MDLEA, makes it stateless.

10 The defense is saying that there are these facts that
11 are in dispute. They're actually either irrelevant or they're
12 not in dispute. One of them they talk about in their briefing
13 is the ownership of the vessel, whether it's owned by someone
14 from Saint Vincent and the Grenadines, by a company there, by
15 someone in the United States. None of that matters.

16 The MDLEA provides three very specific ways that you
17 can demonstrate nationality of a vessel -- registration papers,
18 flying the flag of a country, or making a verbal claim.

19 The verbal claim is the one at issue here. It has
20 nothing to do with ownership of the vessel. It has nothing to
21 do with the nationality of people on board of the vessel. So
22 that ultimately doesn't dispute the statelessness of the vessel
23 in this case. The other one that they raised --

24 THE COURT: The other one?

25 MR. SWERGOLD: The other what they claim is

1 potentially a disputed fact is where the vessel was interdicted
2 because if it's in another country's 12-mile territorial water
3 limits, then there is case law that suggests that the
4 United States has to reach out to that country because the
5 Coast Guard can't just go in. There's also case law saying the
6 opposite.

7 In this case, it doesn't matter. In this case it
8 doesn't matter because the vessel was undisputedly outside of
9 anybody's territorial waters of 12 miles. The defendants raise
10 the idea that well, perhaps it went through the exclusive
11 economic zone.

12 The record also demonstrates that it was well outside
13 even Bermuda's exclusive economic zone. Again, that's just
14 another irrelevant argument because within the exclusive
15 economic zone, all of the authorities, including the one cited
16 by the defendants, stand for the proposition that that is not
17 an area where a country exercises sovereignty. It's where they
18 have limited rights with respect to exploration and
19 exploitation of the natural resources.

20 No court has recognized the exclusive economic zone as
21 the territorial sovereign waters of another country. So there
22 really are no factual issues in dispute about the statelessness
23 of the Sunshine.

24 Under the plain language of the statute, the Coast
25 Guard made the inquiry after they were given a verbal claim of

1 registry. The country denied it. The State Department
2 certification conclusively proves that, and this is not an
3 issue that should be going to the jury.

4 THE COURT: Mr. Silverman.

5 MR. SILVERMAN: First, as to what the government said
6 is conclusive proof, I need to make a record. Our view is that
7 it would violate the confrontation laws to consider that
8 evidence.

9 The government does not contest -- and we have
10 submitted -- that it has the burden of proving beyond a
11 reasonable doubt the statelessness of the vessel.

12 There's a First Circuit case saying there's a
13 preponderance standard. We believe it should be a reasonable
14 doubt standard. The defendant government has not quibbled with
15 that.

16 The question then is what can be used to prove that.
17 The statute says that the certification of the secretary is
18 conclusive proof. We submit that that violates the
19 confrontation clause --

20 THE COURT: Do you make this confrontation clause
21 argument in papers?

22 MR. SILVERMAN: Your Honor, we made it in our reply.
23 We understand that it wasn't considered, but we respectfully
24 request that we can make a record here very are quickly.

25 THE COURT: Okay.

1 MR. SILVERMAN: We think it violates the confrontation
2 clause. One, we believe that these are facts that should be
3 submitted to the jury, proven beyond a reasonable doubt at
4 trial.

5 THE COURT: I think you're conflating two things.
6 You're conflating who's decision is it to make with respect to
7 the jurisdictional issue. So the statute says jurisdiction of
8 the United States with respect to a vessel subject to this
9 chapter is not an element of the offense. Jurisdictional
10 issues arising under this chapter are preliminary questions of
11 law to be determined solely by the trial judge. That's the
12 language.

13 MR. SILVERMAN: It does say that, your Honor. The
14 Ninth Circuit in Perlaza said that it would be unconstitutional
15 to keep those facts from the jury.

16 THE COURT: That's the only court to have said that.

17 MR. SILVERMAN: To have held it. But Judge Boudin in
18 the First Circuit in the Gonzalez case sua sponte speculated
19 that it might violate the Sixth Amendment. He did not rule on
20 it because the defendant had not raised it.

21 THE COURT: The First Circuit has already ruled
22 otherwise. Right?

23 MR. SILVERMAN: Your Honor, we're talking now about
24 the question of submitting these questions to the jury. I
25 understand that the footnote --

1 THE COURT: This is United States v. Guerrero. That's
2 the First Circuit. United States jurisdiction over vessels is
3 no longer an element of an offense but, rather, a preliminary
4 question of law for the trial judge.

5 That's the holding of the First Circuit. The fact
6 that the other panels in the First Circuit have mused on this
7 subject doesn't seem to me to be authority.

8 MR. SILVERMAN: Your Honor, none of this is a binding
9 authority. In terms of addressing the point that only the
10 Ninth Circuit has raised this, there are two other courts that
11 have raised it, in Gonzalez Judge Boudin, and Judge Srinivasan
12 in the Miranda opinion from the D.C. Circuit. My only point is
13 that of all of this nonbinding authority. It's just not the
14 Ninth Circuit that makes the point.

15 THE COURT: I guess I'm making a different
16 distinction. The First Circuit authority I just said would be
17 binding authority on the First Circuit it would seem to me.

18 MR. SILVERMAN: It would.

19 THE COURT: The fact that a subsequent panel has
20 questioned or mused on the subject is of no relevant moment. I
21 think the First Circuit has spoken on this, as has the D.C.
22 Circuit and as has the Eleventh; right? It seems to me.

23 MR. SILVERMAN: Yes, your Honor. All I'm saying is
24 that as none of those holdings are binding on this Court in
25 terms of weighing the question which is open in this circuit,

1 it's not just the Ninth Circuit Perlaza case that is cited.
2 That's my only point, your Honor.

3 To answer your Honor's question about conflation, the
4 reason this is relevant and the reason that I raised it is
5 because Crawford talks about trial rights and talks about the
6 right to confrontation at trial. First and foremost, we say
7 that Crawford is applicable to the Secretary's certification
8 because this is a trial right that somebody submitted to the
9 jury.

10 THE COURT: If it is a question for the Court and not
11 for a jury, then why is it a trial right for the jury?

12 MR. SILVERMAN: So, even if your Honor were to reject
13 the Ninth Circuit's holding that it is unconstitutional to
14 submit these questions to the jury, even if your Honor were to
15 reject that, we still submit that Crawford applies.

16 Because unlike other situations where Crawford isn't
17 held applicable, for example, sentencing submissions, Fatico
18 hearings, suppression hearings -- none of those involve
19 findings of fact that are necessary to inflict punishment.

20 They involve findings of fact necessary to reduce or
21 raise sentences or to admit certain evidence. We respectfully
22 submit -- this is an open question -- that when it comes to
23 factual findings that are a necessary prerequisite for the
24 infliction of punishment on the defendant, that that requires
25 an advocacy of Crawford, and under those circumstances,

1 applying the statute as it is written -- we concede as it is
2 written -- to deem conclusive the sworn out-of-court affidavit
3 of a Coast Guard commander violates the Crawford, violates the
4 Sixth Amendment.

5 THE COURT: The sworn affidavit of a Coast Guard
6 commander? Or are you talking about the State Department
7 certificate?

8 MR. SILVERMAN: Well, your Honor, this is Exhibit 3 of
9 the Shellow declaration. The State Department certificate is
10 certifying the sworn affidavit of Coast Guard Commander Tozzi.
11 So the Coast Guard commander makes a sworn affidavit about what
12 happened, and then the Secretary of State puts a seal on it, as
13 I understand the process. The government may be able to
14 explain it.

15 THE COURT: I think the certificate is being offered
16 for a different purpose, about the statelessness of the vessel.
17 I'm asking Mr. Swergold this.

18 MR. SWERGOLD: Yes, your Honor.

19 THE COURT: The purpose of the certificate is being
20 offered for what purpose?

21 MR. SWERGOLD: The State Department certificate under
22 the statute is conclusive proof of what the foreign flag
23 state's response was.

24 THE COURT: It's not based on the Coast Guard
25 officer's testimony; right?

1 MR. SWERGOLD: It just so happens that a commander in
2 the United States Coast Guard is the affiant in the
3 certification. What it really is just saying is on this date,
4 the Coast Guard reached out. On this date, the country came
5 back and said that it is not a vessel subject to our
6 jurisdiction. They refuted the claim of registry. That's what
7 the purpose of the certification is.

8 THE COURT: It's a State Department certification.

9 MR. SWERGOLD: Yes. It's also an exhibit to the
10 government's motion in limine.

11 THE COURT: Exhibit C?

12 MR. SWERGOLD: I believe it's C to Ms. Shellow's
13 declaration, and it's A to the government's motion in limine.

14 THE COURT: This is from the Department of State?

15 MR. SWERGOLD: That's right. Page 1.

16 THE COURT: That's what the State Department
17 certification is. It basically certifies what the position of
18 another country is with respect to whether or not a vessel is a
19 flag vessel or a registered vessel.

20 What's your position, Mr. Silverman? We have to call
21 in somebody from the other country to say that the vessel
22 wasn't registered there?

23 MR. SILVERMAN: Yes, Judge.

24 THE COURT: Really?

25 MR. SILVERMAN: Yes, your Honor. Two points in

1 response to that. The first is that it appears that to tie in
2 the first page, which I believe your Honor is looking at, the
3 rest of the document, which is on State Department letterhead,
4 which appears to us to be part of a certification, is the
5 affiant, the Commander Gregory M. Tozzi, and it lays out the
6 basis for the State Department's decision. We submit that at
7 the very least, that person would have to come in and testify.

8 The government is trying to meet its burden of proving
9 this beyond a reasonable doubt entirely with an out-of-court
10 affidavit by an individual we have not had a chance to depose
11 and we have not had a chance to cross-examine.

12 THE COURT: If the Secretary of State himself reached
13 out to the secretary of state of another country and was told
14 that vessel is not registered here, we'd have to call the
15 Secretary of State in your view?

16 MR. SILVERMAN: If the Secretary of State personally
17 did that, in our view, yes. You would have to personally call
18 the Secretary of State.

19 THE COURT: So there's no such thing as a certificate
20 as far as you're concerned. There needs to be a witness who
21 nonetheless needs to testify about what he was told by a
22 foreign government?

23 MR. SILVERMAN: Yes, your Honor. As I understand the
24 certificate takes into consideration that they can offer some
25 proof, but it's not enough -- to some extent what we're doing

1 here is relying on the executive branch's sort of
2 representation as to what they were told. Even the certificate
3 itself doesn't purport to say we can just certify this with a
4 stamp. They offer some evidence. The evidence they offer --

5 THE COURT: The government of Saint Vincent and the
6 Grenadines refuted the vessel's claimed nationality. That's
7 really the money line. So it would seem to me that what you're
8 saying is I need a records custodian from the government of
9 Saint Vincent and the Grenadines to say, I ran it and didn't
10 find the registration. That's what you're really saying?

11 MR. SILVERMAN: We would say, your Honor, at the very
12 least, we would need to bring somebody in somebody from the
13 U.S. Department of Justice.

14 THE COURT: Why the U.S. Department of Justice? The
15 affiant here is designated by the Secretary of State.

16 MR. SILVERMAN: I'm sorry. Or the Secretary of State.
17 Somebody from the executive branch because the statute refers
18 to what they were told. We'd also dispute -- the government
19 says it's not in dispute. We dispute as to whether there is
20 underlying proof of statelessness.

21 The government has independently provided -- and now
22 they say it was superfluous -- but they provided an email
23 exchange between the Coast Guard that was forwarded by a number
24 of people. There's hearsay within hearsay within hearsay of
25 people in Saint Vincent making comments about the vessel.

1 THE COURT: Let's just be pure. What you're really
2 saying is that I need a records custodian from Saint Vincent to
3 attest to the lack of a registration. Right? That's really
4 what you're saying it seems to me. Everything else is hearsay,
5 and everything else violates the confrontation clause.

6 MR. SILVERMAN: Yes. At the very least, if the
7 statute were to be construed to say it's sufficient that the
8 Secretary was so informed so that the statement from Saint
9 Vincent --

10 THE COURT: So the Secretary of State can't designate
11 anybody in your view. The Secretary of State himself must do
12 this?

13 MR. SILVERMAN: No. That's not what I'm saying.

14 THE COURT: I don't understand what you're saying.

15 MR. SILVERMAN: If it's sufficient that the State
16 Department was so informed and if you didn't have to look as to
17 whether or not that was a true representation from Saint
18 Vincent, then in that case you would have to bring in someone
19 from the State Department. I think the State Department
20 designated Commander Tozzi to give that.

21 THE COURT: If the Secretary of State himself or
22 herself was told that that vessel is not registered here, your
23 view is that the Secretary of State would have to testify to
24 that fact?

25 MR. SILVERMAN: If it was the Secretary himself who

1 was told that, then yes.

2 THE COURT: So the fact that there's a designee
3 doesn't really change the analysis.

4 MR. SILVERMAN: We don't believe so. The designee
5 would have to come in and testify.

6 THE COURT: Why would it not be hearsay even then or a
7 violation of the confrontation clause even then? Why would it
8 be that you have to have an actual person from the country in
9 question, Saint Vincent and the Grenadines or whatever country
10 is involved, to say, yeah. They're not registered here?

11 MR. SILVERMAN: Your Honor, the answer was based on
12 the idea which I believe the government had argued that it's
13 sufficient that someone in the Department of State was told
14 this.

15 The question about whether or not the vessel was
16 actually stateless is not appropriate. If facts prove, then it
17 would seem that the prior statement would not be hearsay, but
18 you would still need to bring in someone from the Department of
19 State to give testimony that that is a fact that they were told
20 this.

21 Your Honor, you're correct. We believe that the
22 statelessness of the ship has to be proven, and that requires
23 authenticated records from the company house.

24 THE COURT: Isn't the whole point of a certificate of
25 this sort that the State Department speaks for other countries

1 who communicate country to country? Isn't that the whole
2 point?

3 MR. SILVERMAN: Yes, your Honor. This is not,
4 for example, who to extradite and who not to, and the executive
5 branch exercises that kind of authority in terms of who is to
6 be brought before this court.

7 Here the statute informs the Court, instructs the
8 Court, to make factual findings as to the nationality of the
9 vessel. We believe that the Court, therefore, has an
10 independent obligation to explore this and make its assessment.

11 THE COURT: Does anybody else want to be heard?

12 MR. SWERGOLD: Just a few very brief points,
13 your Honor. The first one is that in our brief, in our motion
14 in limine, page 9, footnote 6, we cite a number of
15 post-Crawford cases where the courts have said that defendants
16 cannot look beyond the State Department certification.
17 Your Honor is sort of getting to this as well.

18 Taking this to its logical conclusion, the government
19 would need to call somebody in the State Department, then
20 potentially the person who, namely, the affiant that the
21 certification is attached to, then the people who are speaking
22 in the foreign countries. Obviously, that's not what the MDLEA
23 is requiring. That's not the type of diplomatic relations that
24 are supposed to be accomplished by this statute.

25 On the issues of whether you can impose punishment --

1 I think that was something defense counsel talked about --
2 there is actually a Supreme Court case, Ford v. United States,
3 273 U.S. 593. It's a 1927 case in which the defendants were
4 charged with conspiracy to transport liquor into the
5 United States in violation of the United States/Great Britain
6 treaty.

7 There the Supreme Court rejected the argument that
8 whether the vessel was in the territorial limits of the
9 United States was for the jury because what the court said was
10 where the vessel was seized "did not affect the question of the
11 defendants' guilt or innocence. It was just necessarily
12 preliminary to trial because it only affected the right of the
13 court to hold their persons for trial." That's what the
14 statute makes plain here.

15 When the defendants filed their motion to dismiss,
16 which they filed probably about an hour before the government
17 filed their motions in limine, because we had simultaneous
18 briefing there, they argued that this was a preliminary
19 question of law for the judge.

20 It was only then upon seeing our motions in limine
21 that they then, in their opposition, changed their mind and
22 said, it's for the jury. The statute clearly makes it for the
23 judge. There's no confrontation clause issue. The
24 certification is conclusive proof.

25 THE COURT: Other than the Ninth Circuit, I think that

1 the clear authority lines up in favor of the government's
2 reading of this. I think the language of the statute does as
3 well. I think this is a question for the Court.

4 With respect to the confrontation clause, the Eleventh
5 Circuit I think addressed this exact question in Cruickshank
6 making clear that a certification of the sort contemplated here
7 is not in violation of the confrontation clause and doesn't
8 implicate due process concerns. I think the cases cited by the
9 government in footnote 6 of their brief also say the same
10 thing.

11 Most of this is not in the Second Circuit. Most of
12 this is all out of circuit. So it's persuasive, not binding
13 authority. I think it's persuasive. So, to the extent we're
14 dealing with the motion to preclude defendants from arguing to
15 the jury that the Sunshine was not subject to United States
16 jurisdiction, I'm granting that motion.

17 The next motion it seems like nobody is arguing
18 anymore, and that's whether or not the defendants should be
19 precluded from arguing that they didn't know the Sunshine was
20 subject to U.S. jurisdiction. I think Mr. Silverman and
21 Ms. Heller indicated they're not planning to argue that anyway.
22 So that's denied as moot in light of those representations.

23 Then let's talk now about the prior narcotics
24 convictions for Mr. Van Der End. It's not yet clear to me
25 whether Mr. Van Der End is going to be challenging his

1 knowledge or challenging the evidence in this case in such a
2 way as to implicate these convictions. So let's start there.

3 Do we even need to get here? Ms. Shellow?

4 MS. SHELLOW: Your Honor, we could reserve on the
5 issues of the admissibility of the documents and the
6 convictions until such time as they become relevant.

7 THE COURT: If you're going to open on an argument,
8 then I think the government should understand what that is so
9 that they can then prepare to introduce evidence as we go.

10 What exactly are you going to be arguing with respect
11 to Mr. Van Der End's knowledge, lack of mistake, etc.?

12 MS. SHELLOW: I'm likely to open on the fact that he
13 does have convictions. I'm going to acknowledge his
14 convictions.

15 THE COURT: What are you asserting with respect to his
16 knowledge or lack of knowledge or his -- it's a 404(b)
17 analysis. So there are various reasons why these prior
18 convictions can come in, so long as it's not that he's just a
19 guy who commits crimes.

20 So you're going to introduce these convictions for
21 what purpose? You're going to raise them why?

22 MS. SHELLOW: Your Honor, to start with, we can't deny
23 them. We're going to concede he's been convicted of prior
24 crimes. That doesn't mean that he'll do it again. We're not
25 disputing -- let's take the convictions one at a time. The

1 French, the earlier two convictions, we're not contesting the
2 admissibility of the French rap sheet.

3 THE COURT: Which I have a copy of. Let me just find
4 it. That's Exhibit B to the government's letter or the
5 government's submission?

6 MS. HOULE: Yes, your Honor.

7 THE COURT: So you're not objecting to that being
8 introduced.

9 MS. SHELLLOW: No. The one that I object to being
10 introduced is the one that translates.

11 THE COURT: Related to the Dutch or the French?

12 MS. SHELLLOW: French first.

13 MS. HOULE: Your Honor, this was attached to the
14 government's letter early this morning, the order of charge
15 before a specialist.

16 MS. SHELLLOW: It's Exhibit C, your Honor.

17 THE COURT: Exhibit C to?

18 MS. HOULE: To the letter this morning.

19 THE COURT: Your letter, Ms. Houle?

20 MS. HOULE: Yes, your Honor.

21 THE COURT: Exhibit C?

22 MS. HOULE: Yes, your Honor. It's labeled as
23 Government Exhibit 808T is the translation.

24 THE COURT: Okay. It's a ten-page document in French,
25 and then there's a translation. Right?

1 MS. SHELLLOW: Correct.

2 THE COURT: You're objecting to what?

3 MS. SHELLLOW: I am objecting to the document as a
4 whole because --

5 THE COURT: I thought this was what you are not
6 objecting to.

7 MS. SHELLLOW: I am objecting to this document. I am
8 not objecting to the prior document, to Exhibit B.

9 THE COURT: The government is only going to seek to
10 introduce this if you put in issue your client's knowledge or
11 understanding that he doesn't know anything about drugs or
12 cocaine or drugs on ships. I don't know what the defense is
13 going to be.

14 Can you give me a preview as to what exactly is the
15 defense or reason why this shouldn't come in to just prove that
16 he had a prior conviction that involved the importation of --

17 This is the one that was like 1,000 kilos or
18 something?

19 MS. HOULE: Yes, your Honor.

20 MS. SHELLLOW: Your Honor, the reason it shouldn't come
21 in is that it appears to be a charge. This is not a
22 conviction.

23 THE COURT: So the fact of a conviction and the
24 circumstances of the conduct you're not opposed to coming in.

25 MS. SHELLLOW: No. I'm opposed to this conduct.

1 THE COURT: So let's talk about that.

2 Are you looking to introduce this document or merely
3 the fact of a prior conviction in France in which the defendant
4 was convicted and found with 1.2 tons of cocaine or something?
5 Is it that much? It was a lot.

6 MS. SHELLLOW: It's a lot.

7 MS. HOULE: Yes, your Honor. I believe it was 1.4.
8 We would seek to introduce both, your Honor. Although as to
9 the second record that Ms. Shellow is addressing, there are
10 facts in this record that are outside of the defendant's just
11 transport of the cocaine. So the government would propose
12 redactions at that point.

13 THE COURT: At what point?

14 MS. HOULE: I think, your Honor, what Ms. Shellow is
15 essentially arguing is that there is some sort of standard
16 under 404(b) that any facts that come into evidence must be
17 proved conclusively beyond a reasonable doubt. This is what
18 she's said before the conference.

19 What we're trying to make clear here, your Honor, is
20 that this document contains facts. They were found by a court.
21 It's not a full record of conviction, but we think it's
22 analogous to when a police officer would get up and testify
23 about the circumstances of an arrest. These are additional
24 facts relating to the French conviction.

25 THE COURT: There's a section that says, "Whereas the

1 following facts have been established," and then it goes on for
2 pages. Right?

3 MS. HOULE: Yes, your Honor.

4 THE COURT: You're hoping to introduce that?

5 MS. HOULE: Yes, your Honor.

6 THE COURT: For what purpose?

7 MS. HOULE: It comes in under 404(b), your Honor.

8 THE COURT: It says, "Despite the continuing denials
9 of Nico Arends." It's important to know that there were
10 continuing denials of Nico Arends?

11 MS. HOULE: No, your Honor. That's what we would seek
12 to redact.

13 THE COURT: I think a lot of this is going to end up
14 getting redacted. The fact that none of the three men made
15 statements -- that would be important for the jury to know
16 that?

17 MS. HOULE: That would be redacted as well, Your
18 Honor. Perhaps it would be best if we submitted a proposed
19 redacted version.

20 THE COURT: You're only allowed to introduce evidence
21 that is relevant to what 404(b) allows.

22 MS. HOULE: Yes, your Honor.

23 THE COURT: It seems to me that most of what's in here
24 is not relevant to that.

25 MS. HOULE: There are details in here, Your Honor,

A. 048

1 regarding the defendant's possession and transport of the
2 cocaine, the vessels that he used, the waters in which he
3 transported it.

4 THE COURT: There might be. So boil it down to what
5 you think is relevant, and then send it to Ms. Shellow and to
6 me. Then we can see what it's about. The purity of the
7 cocaine -- I can't imagine that that's particularly relevant.
8 Is it?

9 MS. HOULE: Agreed, your Honor.

10 THE COURT: She's not objecting to the fact of the
11 conviction and the circumstances relating to the conviction to
12 the extent that they are similar to what went on here: Vessel,
13 amount of drugs, type of drugs, high-seas interdiction, that
14 kind of thing.

15 MS. HOULE: Understood, your Honor. I would just note
16 that in advance the government proposed a stipulation to
17 defense counsel that would set out those facts, and defense
18 counsel declined. So that is why we're seeking to introduce
19 the records.

20 THE COURT: I can't make anybody stipulate. It might
21 be cleaner to do it that way. Otherwise, if it means redacting
22 down this document into something that sort of looks like what
23 you would be stipulating to, then that is I guess the next best
24 thing. Let's do that.

25 In terms of an opening, are you planning to open on

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1 the French conviction and the Dutch conviction?

2 MS. HOULE: No, your Honor.

3 THE COURT: Ms. Shellow, it sounds like you are
4 planning to open on those things, at least to some extent.

5 MS. SHELLOW: I may well.

6 THE COURT: Are we talking about the Dutch one as
7 well?

8 MS. SHELLOW: We can now move to the Dutch one.

9 THE COURT: Okay.

10 MS. SHELLOW: The Dutch one is problematic for a
11 different reason. Just to be clear, we're not arguing the
12 authenticity of the documents. This is not a Rule 902 issue.

13 THE COURT: Okay.

14 MS. SHELLOW: This is a 403 objection because the
15 transmittal letter that goes with the documents that were
16 provided by the Dutch government says this document is not
17 accurate.

18 THE COURT: This document is not accurate.

19 MS. SHELLOW: It says it was a pending open matter
20 that is not really open.

21 THE COURT: That would seem to be something that ought
22 to be redacted in any event. If it's commenting on the state
23 of other charges elsewhere, I don't know why that particularly
24 matters to a 404(b) analysis.

25 MS. SHELLOW: It goes to the reliability of the

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1 document. That is to say, if what they certified is a document
2 they admit is not accurate, I'm concerned about relying on the
3 underlying document.

4 If they had a document that the government in evidence
5 said, this is a correct rap sheet, for lack of a better
6 description of it, then I wouldn't have a problem.

7 Where you have an incorrect rap sheet coming from a
8 foreign country -- the government has known that Mr. Van Der
9 End has foreign convictions for some period of time. The cover
10 letter says, we can't get to you in time before trial a
11 corrected version.

12 THE COURT: I'm not sure how much of this would be
13 coming in under 404(b). Maybe the best thing to do is figure
14 out what portion of these two documents the government is
15 seeking to introduce, and then maybe these problems go away.

16 I really don't think the jury needs to get ten pages
17 of a French or a Dutch document that includes facts that are
18 completely extraneous to the legitimate and permissible
19 purposes of 404(b).

20 MS. HOULE: We would agree, your Honor. That's why in
21 our letter this morning we proposed that as to the Dutch
22 record, the only portion that would come in would be related to
23 the narcotics conviction that the government seeks to
24 introduce, which is the May 31, 2016, conviction. We propose
25 that the rest of the record be redacted.

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1 Now, if the defense wants to argue to the jury that
2 the document is not reliable, we could put in the whole
3 document. If they wished, they could put in this cover letter
4 from the Dutch authorities, or they could propose a stipulation
5 to the government so that they could argue the reliability of
6 the document.

7 THE COURT: What is the portion that you're looking to
8 get in? What page?

9 MS. HOULE: It's page 2.

10 THE COURT: Page 2 of 10? That?

11 MS. HOULE: No. It's 2 of 3. If you're looking at
12 the exhibits to our letter of last night, then it is -- one
13 moment, your Honor. I just want to confirm.

14 THE COURT: I think it's Exhibit B.

15 MS. HOULE: B.

16 THE COURT: So page 2. What portion of it?

17 MS. HOULE: So it begins at the top of the page,
18 your Honor, the national offense of the prosecutor, and then
19 for the date of decision, it says May 31, 2016. We would seek
20 to admit the act, the qualification which describes the
21 offense, the classification which drugs the drug type.

22 THE COURT: Heroin/cocaine? Is that the one?

23 MS. HOULE: Yes. The period the crime was committed.
24 One moment, your Honor.

25 (Pause)

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1 MS. HOULE: That's it, your Honor.

2 THE COURT: That's just for act 2?

3 MS. HOULE: That's for act 1, your Honor.

4 THE COURT: Ms. Shellow.

5 MS. SHELLOW: I want to make sure that I understand

6 what the portion of the document is that they propose. Can I

7 suggest, your Honor, that they similarly redact this document.

8 THE COURT: Let's do that. That didn't involve a

9 vessel; right? This Dutch conviction is not a vessel. It's

10 hand-to-hand. Right?

11 MS. HOULE: This is importation of narcotics.

12 THE COURT: By giving one's self or a third party.

13 It's not the kind of language we would use.

14 What is the conduct that is covered by this

15 conviction?

16 MS. HOULE: I take your Honor's point. The statute

17 that is cited under this conviction is the importation statute.

18 THE COURT: What is the conduct?

19 MS. HOULE: That he was importing cocaine.

20 THE COURT: Importing cocaine how?

21 MS. HOULE: We don't have that information from the

22 Dutch authorities. We do think, your Honor, regardless that

23 the fact of his conviction for importing cocaine goes to his

24 knowledge that there was cocaine on the vessel that he was

25 transporting.

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1 THE COURT: The fact of his conviction goes to his

2 knowledge?

3 MS. HOULE: The underlying conduct of importing

4 cocaine.

5 THE COURT: It's a prior bad act that you're getting

6 in. The conviction is not the prior bad act. The prior bad

7 act is what you're trying to get in under 404(b); right?

8 MS. HOULE: Yes. The prior bad act of importing

9 cocaine.

10 THE COURT: It would seem to me it matters what that

11 act was. If it was selling a few loose of bags of marijuana,

12 that would be very, very different than this case which

13 involved a different drug and involved massive quantities on

14 board a vessel.

15 It seems that's more of a stretch as to whether that's

16 indicative of knowledge or understanding or lack of mistake or

17 modus operandi. That's what it seems to me. The French one is

18 the exact same MO. It's on a vessel, it's more than a ton, and

19 it's the same job.

20 It's not at all clear to me that the Dutch one tracks

21 nearly as closely on all those things. I don't think the mere

22 fact that you have a drug conviction means it comes in because

23 it happens to be a drug case.

24 MS. HOULE: Importing a drug, and the same drug, your

25 Honor, that he's charged with transporting here.

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1 THE COURT: This says heroin/cocaine. It doesn't say

2 the details about it. Redact it out. We can chat more about

3 it.

4 You're not opening on this either; right?

5 MS. HOULE: That's correct.

6 THE COURT: In some ways, you're not even sure you're

7 going to try to introduce it because, in part, it turns on what

8 the defense is; right?

9 MS. HOULE: Yes, your Honor.

10 THE COURT: I guess I'm going to hold off for now on

11 this one, but I do think the French one is almost certainly in

12 in some redacted form. The Dutch one might be a closer call.

13 So let's talk about it before anybody opens on it or before

14 anybody tries to introduce evidence in front of a jury. Okay?

15 MS. SHELLOW: Thank you, your Honor.

16 THE COURT: So those are the motions in limine that

17 come to mind.

18 Is there something else I've overlooked?

19 MR. SWERGOLD: Your Honor, with respect to defendants'

20 motion to dismiss, they've raised a number of issues. If the

21 Court has denied the motion to dismiss in its entirety, then we

22 have no other issue. There are arguments that nobody

23 addressed.

24 THE COURT: What are you referring to specifically?

25 MR. SWERGOLD: Specifically I'm referring to they made

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1 a Sixth Amendment forum shopping claim.

2 THE COURT: I'm denying it in its entirety. I'll

3 write more on that. I don't think it's a good use of time now

4 for me to read an opinion into the record for you. I'm denying

5 on that. That's not going to affect the evidence coming in;

6 right? Because that's a motion to dismiss.

7 MR. SWERGOLD: Of course, your Honor.

8 THE COURT: So I'm denying the motion to dismiss, and

9 I will issue an opinion that builds this in more detail.

10 Anything else, Ms. Shellow?

11 MS. SHELLOW: We've got the late-produced documents

12 from the government of Saint Vincent that the government

13 proposes to offer. I think the only remaining issue is we

14 object to those documents.

15 THE COURT: Initially I think you were objecting and

16 you were seeking sanctions suggesting that they sort of held

17 back on producing them. Now it sounds like you're saying that

18 it's really just too long and you'd be prejudiced, and you

19 either need more time or they should be prevented from

20 introducing them.

21 Is that a fair characterization?

22 MS. SHELLOW: That's a fair characterization. In

23 your Honor's prior ruling, you had then suggested that we had

24 not established prejudice. The late production of these

25 documents is sort of baffling to us, your Honor. They're

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1 clearly Rule 16 documents, not 3500 material.

2 THE COURT: They're not Rule 16 documents until the
3 government possesses them; right?

4 MS. SHELLLOW: That's correct, but their possession of
5 them applies to anybody, an agency that they've worked with in
6 this investigation. You can't just say, we didn't have it in
7 our office because some member of the task force in Grenada or
8 Saint Vincent had it.

9 THE COURT: Are you saying that foreign law
10 enforcement are effectively arms of the Department of Justice
11 for purposes of this case?

12 MS. SHELLLOW: We don't know, your Honor, whether there
13 was a coordinated task force investigation that led to these
14 charges. We know that somebody on the government's witness
15 list has the words "task force" in his title. We don't know
16 what any of that is.

17 THE COURT: I don't think that gets you too far. In
18 any event, why don't we focus on the prejudice. If you're
19 suggesting that they sort of sandbagged you and that they sort
20 of made sure they didn't come into possession of these things
21 until real late in the day so that you couldn't make use of it,
22 that would be a serious allegation.

23 I haven't seen anything that would suggest that that's
24 the case. It doesn't sound like you have anything that really
25 establishes that either; right?

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1 MS. SHELLLOW: Your Honor, I don't. Although I know
2 that unlike the photographs which they say that our agent just
3 got, they don't discuss how they happened to come into
4 possession of these documents in their submission this morning.

5 THE COURT: Let's talk about the documents. Let's
6 talk about the prejudice that flows from your receiving them.

7 When did you get them specifically?

8 MS. SHELLLOW: Last Wednesday, the 26th.

9 THE COURT: Ten days or so. Almost two weeks before
10 trial or maybe two weeks before they will be introduced at
11 trial.

12 MS. SHELLLOW: Perhaps.

13 THE COURT: Let's talk about the prejudice that comes
14 from that late production.

15 MS. SHELLLOW: They came to us without any
16 certification of authenticity. The people who do these
17 documents in the Caribbean and the Caribbean islands, when they
18 create companies in the Caribbean islands, there certainly is a
19 reasonable inference that the government often draws in cases
20 where it wants to that these are people who are looking to hide
21 assets, hide ownership.

22 We don't know. We don't know how the documents were
23 created. We don't know whether they were created at or about
24 the time of the dates that they purport to be.

25 It's not like they're going to the Secretary of State

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1 of New York and creating a corporation that's well documented.
2 These are often poorly regulated, if regulated at all.

3 We don't know anything about the bona fides of the
4 documents themselves. We have a certificate. We got the
5 stamped copies just last night or just yesterday I believe,
6 just yesterday afternoon. I'm not even sure we have the
7 certificates at this point.

8 THE COURT: Can I see the documents you're talking
9 about.

10 MS. SHELLLOW: I have a set, your Honor, that I can
11 tender to you. I'm giving the judge for the record articles of
12 incorporation for all of these documents related to Grenadines
13 Investment Group 88, Inc., articles of incorporation, statutory
14 declaration under the company's act.

15 MS. HOULE: Your Honor, if I could pass up the
16 documents that the government is seeking to introduce.

17 THE COURT: That's probably the best way to do it.
18 Does that not include what was just referenced by Ms. Shelllow?

19 MS. HOULE: It's not clear to me exactly what
20 Ms. Shelllow was going to reference. I can show it to her first
21 and then pass them up to you.

22 THE COURT: Let's do that.

23 MS. HOULE: Your Honor, I'm passing up what we've
24 stamped as Government Exhibits 802, 803, 804, and 805.

25 THE COURT: I don't think I've seen these yet. These

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1 were not attached to anything?

2 MS. HOULE: They were not, your Honor.

3 THE COURT: They were listed but not shown.

4 MS. SHELLLOW: Your Honor, just for completeness, I
5 should add that the government is also seeking to introduce
6 Canadian passport documents. I'm not arguing about the
7 Canadian passport documents, but for completeness, in terms of
8 the argument --

9 THE COURT: You're not arguing about the Canadian
10 passport documents?

11 MS. SHELLLOW: I'm not arguing about the Canadian
12 passport documents. I'm not going to stand here and say to you
13 that copies of Canadian passports are of the same suspect
14 nature as the documents that come out of Saint Vincent and the
15 Grenadines.

16 THE COURT: I've got these exhibits now which are
17 going to be offered as what? Business records?

18 MS. HOULE: No, your Honor. They'd be offered as
19 records received from a foreign public authority under 902.3.

20 THE COURT: They will be coming in through a
21 certificate or a witness or what?

22 MS. HOULE: They would come in through a certificate.
23 We do not yet have that certificate.

24 THE COURT: And the objection is what?

25 MS. SHELLLOW: The objection is that on their face, the

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1 documents, even accompanied by a certificate, absent the
2 opportunity to investigate the bona fides of these documents,
3 we have no ability to cross-examine the person who gave these
4 to the government.

5 How did the government procure these documents and
6 from whom? Under what circumstances? Who kept them? The
7 concept of regularly kept foreign records that would allow a
8 certificate to substitute for a witness doesn't hold water, if
9 you'll pardon the expression, when you're talking about
10 documents created in the Caribbean for what appears to be an
11 entity of some kind, paid at some point in time, in connection
12 with people who are charged with dealing drugs, all of which
13 makes the documentation suspect.

14 THE COURT: I think you can argue all that. That
15 seems to go to the weight. The issue is that these documents
16 were produced by foreign officials. We don't have the
17 certificates.

18 So I don't know what it says, how they were produced,
19 or from whence they came. They're basically purporting to be
20 records kept by the Saint Vincent and the Grenadines country
21 officers; right? Country officials.

22 Is that right?

23 MS. HOULE: Yes, your Honor.

24 THE COURT: So the argument is that you haven't had an
25 opportunity to cross-examine the person who's doing the

1 certificate or somebody else?

2 MS. SHELLLOW: I haven't had an opportunity to
3 investigate the bona fides of the documents. I got them too
4 late. I have yet to get whatever the certificate is. So I
5 can't investigate it between now and Monday.

6 THE COURT: But the documents here that we're looking
7 at are articles of incorporation with respect to something
8 called Grenadines Investment Group 88, which then lists a
9 condominium at a particular place with a name. It's not even
10 clear to me at this point -- you know better than I do. You
11 folks are trying the case.

12 What is the relevance of these documents? What's it
13 being offered to show?

14 MS. HOULE: The relevance, your Honor, is that that
15 company was the registered owner of the boat.

16 THE COURT: So? Why is that relevant?

17 MS. HOULE: Well, your Honor, the government is going
18 to seek to introduce the full picture of this conspiracy, who
19 was involved, including the sole shareholder of that company,
20 who is a United States citizen.

21 THE COURT: Who is that? Luis Rivera you mean?

22 MS. HOULE: Yes, your Honor. Evidence will also show
23 that at least one of the defendants in conjunction with his
24 coconspirators was receiving money from someone, as was Luis
25 Rivera, and that Luis Rivera was actively involved in this

1 conspiracy.

2 THE COURT: You're going to have a witness testify
3 about Luis Rivera?

4 MS. HOULE: Yes.

5 THE COURT: And then you're going to introduce these
6 documents to show there's a guy named Luis Rivera who is
7 connected to an apartment about which there was testimony and a
8 boat about which there is going to be testimony?

9 MS. HOULE: Putting aside the apartment, your Honor,
10 yes.

11 THE COURT: Not the apartment. This is not a place
12 where somebody stayed or something happened during the course
13 of the conspiracy?

14 MS. HOULE: It's an address that's listed for Luis
15 Rivera, but we're not otherwise going to be seeking --

16 THE COURT: So it's really just a name. Luis Rivera
17 is associated with the company that owns the boat.

18 MS. HOULE: Yes, your Honor.

19 THE COURT: That's in order to make a connection in
20 order to corroborate your witness?

21 MS. HOULE: Yes, your Honor.

22 THE COURT: Ms. Shelllow, your objection is that you
23 don't have an opportunity to go see whether this document that
24 has Luis Rivera's name on it is in fact kept in some office in
25 the Grenadines?

1 MS. SHELLLOW: Your Honor, I don't have an opportunity
2 to investigate the completeness of the government's production.
3 For example, hypothetically, let us say that Grenadines
4 Investment Group 88, Inc. at some point sold all its assets,
5 including the boat.

6 I have no way of investigating that now. I have no
7 way of knowing whether the ownership of Grenadines Investment
8 Group 88, Inc. was transferred between the time these documents
9 were created and the time that the boat left Grenada.

10 So I have no way of investigating the relationship
11 that the government purports to put forth, other than -- if the
12 government has evidence of Mr. Rivera's ownership of the boat
13 through a witness, it doesn't need these documents.

14 I'm somewhat at a loss as to why they want them to
15 begin with because they have a witness who presumably will
16 testify as to some relationship with Mr. Rivera and
17 Mr. Rivera's relationship to the boat.

18 THE COURT: It seems to me whether or not the interest
19 was later sold or not, they would be introducing this to show
20 that there's a connection between an individual about whom
21 there will be testimony as a member of the conspiracy and some
22 documentation that shows there's a link between the boat and
23 that person.

24 So why would they not be allowed to introduce that?
25 Why would the fact that you might be able to find some other

1 stuff that shows that he sold it or that he really isn't the
2 owner -- they're just trying to show a link. They're not
3 trying to establish a chain of title. They're trying to
4 establish that there's a link.

5 MS. SHELLLOW: Your Honor, so long as the government
6 represents clearly that that's the sole use of these documents
7 and that's the purpose for which they are being admitted, then
8 I'll agree.

9 THE COURT: Is there something else that's going on
10 here? You know the case better than I. I'm just seeing these
11 documents for the first time. I would like if you could send
12 me a binder of all the exhibits before Monday. That way I can
13 review them over the weekend. It makes it easier to rule on
14 evidentiary objections when I'm seeing the evidence.

15 Is it like a binder or multiple binders? How much
16 stuff is it?

17 MS. HOULE: One binder.

18 THE COURT: If you can get me that tomorrow.

19 MS. HOULE: May I have one moment, your Honor?

20 THE COURT: Sure.

21 (Pause)

22 MS. HOULE: Yes, your Honor. I've summarized already
23 what the purpose of the documents is, what we would seek to
24 prove. There is no other argument that we plan to make.

25 THE COURT: You're not even really offering this for

1 the truth; right? It may be that Rivera isn't actually the
2 owner. It may be that he isn't actually an officer.

3 You're just looking to show that there is a document
4 that has his name, he's implicated by other evidence in this
5 conspiracy, as is the boat, and there's a link between the two.
6 It might all be false. Maybe he doesn't really own it. Maybe
7 George Steinbrenner really owns it for all I know.

8 MS. HOULE: Yes, your Honor. We view these as
9 essentially being coconspirator statements.

10 THE COURT: It's proof of an association. It's not
11 necessarily proof of ownership or proof of title or addresses
12 or anything else. Right?

13 MS. HOULE: That's right, your Honor.

14 THE COURT: I'm not sure what that does for you,
15 Ms. Shellow. Does that alleviate your concerns?

16 MS. SHELLLOW: Yes, your Honor. As I said, so long as
17 the government concedes that that's the purpose for admitting
18 these documents, we're fine.

19 THE COURT: Are you opening on these documents? Who
20 is doing the opening?

21 MR. SWERGOLD: I am, your Honor.

22 THE COURT: Are you planning to open on these
23 documents?

24 MR. SWERGOLD: As of now, no.

25 THE COURT: That makes it easier in some ways. Let me

1 know if that changes. Otherwise, I think these probably do
2 come in. We'll have time to vet that more closely if and when
3 you have a witness or you're at the point in the trial when
4 you're going to introduce them.

5 So let's revisit them at that point. I think they're
6 probably coming in. I think it sounds like Ms. Shellow, for
7 that limited purpose, doesn't really care that much.

8 MS. SHELLLOW: That's correct.

9 THE COURT: Anything else?

10 MS. SHELLLOW: If I could just have a moment to confer
11 with Mr. Silverman and my client just to make sure we get
12 everything resolved.

13 THE COURT: Sure.

14 (Pause)

15 THE COURT: Ms. Shellow.

16 MS. SHELLLOW: Your Honor, we have one more matter.
17 Mr. Van Der End would like to enter a guilty plea.

18 THE COURT: That's certainly your right, Mr. Van Der
19 End. Are you sure of that? Do you want to take some time to
20 think about it?

21 DEFENDANT VAN DER END: No.

22 THE COURT: We'll obviously have to figure out a time
23 to do that. I obviously can't do it right now. It may have to
24 wait until tomorrow or perhaps with a referral to a magistrate
25 judge. We'll get back to you with a date and a time shortly.

1 You have time to change your mind back if you want.
2 You're not locked in just because you told me right now.

3 DEFENDANT VAN DER END: Right.

4 THE COURT: What will happen at that guilty plea,
5 whether it's me or a magistrate judge -- I generally would like
6 to do it myself. If I can't get it done in time and since time
7 is of the essence, I'll ask another judge to do it.

8 Basically it will be a series of questions to make
9 sure you understand your rights and to make sure that you're
10 pleading guilty because you are guilty and not for some other
11 reason. That's the main purpose of that proceeding.

12 It's not short. For me it takes like an hour.

13 Magistrate judges tend to be faster than me, but it's not a
14 short proceeding. There will be time to go through all of
15 that, and I'll get back to you with a date and a time.

16 DEFENDANT VAN DER END: Thank you, your Honor.

17 MS. SHELLLOW: If your Honor is available, we would
18 probably prefer your Honor.

19 THE COURT: That goes without saying. Sure.

20 MS. SHELLLOW: Thank you, your Honor.

21 THE COURT: I will let you know. I have a sentencing
22 that is now going to be at 2:30. Maybe 4:00 today, but I'll
23 get back to you.

24 MS. SHELLLOW: Thank you very much.

25 THE COURT: Ms. Heller, do you have any surprises for

1 me?

2 MS. HELLER: Not to my knowledge right now,
3 your Honor.

4 THE COURT: Is there anything else we need to cover?

5 MS. HELLER: No.

6 THE COURT: Government, anything else?

7 MR. SWERGOLD: Your Honor, just one brief point. I
8 believe that now with only one defendant, he should be
9 allocuted --

10 THE COURT: Do you want to keep this courtroom if it's
11 only one defendant? It's tricky for two because the sightlines
12 are what are bad. With one defendant generally it's not a
13 problem.

14 MR. SWERGOLD: Your Honor, we defer to whatever the
15 Court wants.

16 THE COURT: We'll nail that down.

17 MR. LONDON: There may be no defendants. My client is
18 reconsidering his position, but he hasn't made a decision as of
19 right now.

20 THE COURT: Let me know as soon as possible obviously.
21 The government has to decide I guess what position they're
22 taking with respect to acceptance of responsibility and things
23 like that under the guidelines. Not that it's binding on me,
24 but it's a consideration. I don't know if there is a plea
25 agreement or not, but I assume a Pimentel letter is in order.

1 MR. SWERGOLD: That's correct. There are no plea
2 agreements. What I was going to say, your Honor, was that for
3 the defendants that remain who go to trial, that they be
4 allocuted on the plea offers that they've rejected.

5 THE COURT: Let's hold off on that.

6 MR. SWERGOLD: The other thing we want to note is that
7 at trial the government is prepared to prove that there were
8 approximately 1,300 kilos of coke on the boat.

9 THE COURT: If they plead guilty and there's a dispute
10 about weight, then there would be a hearing, and we should do
11 that sooner rather than later since you've got witnesses here.

12 MR. SWERGOLD: Exactly, your Honor.

13 THE COURT: Why don't you talk to counsel about that
14 because I'm open to doing the Fatico hearing next week when we
15 would have been doing the trial if there is no trial. If there
16 is a trial --

17 Mr. Suarez and Mr. Van Der End, both of you should
18 understand that you have a right to go to trial, and we're
19 ready. You have a right to plead guilty if you want.

20 It's your decision, and I'm sure your lawyers are
21 advising you, and they may have a point of view, and you should
22 listen carefully to it, but it's your decision. If you wish to
23 go to trial, obviously, we respect that. We're ready, and
24 we'll go.

25 If you wish to plead guilty, we'll respect that too.

1 That's your call. Don't feel that you have to do one or the
2 other because I'm ready, and I've blocked out the time. It
3 doesn't matter. That's irrelevant.

4 If you think it's in your interests to do this, to
5 plead guilty, then do that. If you think it's in your
6 interests to go forward with trial, you should do that.

7 MR. SWERGOLD: Your Honor, one other thing we just
8 want to put on the record is that it's the government's
9 position that all of the issues that the defendants have now
10 raised pretrial, by pleading guilty, they will waive their
11 right to appeal that.

12 THE COURT: We'll go over that in a guilty plea, if
13 there are guilty pleas. That's correct.

14 MR. SWERGOLD: Since they're thinking about it now,
15 I'm just making sure that's out there.

16 MS. SHELLLOW: That is not our position, your Honor.

17 THE COURT: With respect to maybe a jurisdictional
18 argument. You ought to resolve this. Take a look at Epskamp
19 and Watson because those are relevant cases where people
20 thought they were preserving jurisdictional arguments, and they
21 were not reserved for appeal.

22 MR. SWERGOLD: There are also MDLEA cases, including
23 Pinto-Mejia and Henriquez which were conditional guilty pleas
24 in the Second Circuit on subject matter jurisdiction issues
25 where that's the only reason why the Second Circuit addressed

1 them.

2 THE COURT: They preserved that issue for appeal.

3 What you're saying is you are not going to do that.

4 MR. SWERGOLD: We are not doing that.

5 MR. SILVERMAN: Your Honor, our position is that by
6 pleading guilty to the indictment, the jurisdictional issues
7 which implicate subject matter jurisdiction wouldn't be waived
8 and are not waived by pleading guilty to the indictment. We
9 will look at the cases that Your Honor has cited.

10 THE COURT: So let me know, Ms. Heller and Mr. London,
11 what your client's plans are when he knows. I'll get back to
12 you about whether we can do this at 4:00 today or another time.

13 MS. SHELLLOW: Fair enough. Thank you, your Honor.

14 (Adjourned)

A. 054

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

UNITED STATES OF AMERICA,

v.

16 CR 453 (RJS)

STEFAN VAN DER END,

Defendant.
-----x

New York, N.Y.
May 4, 2017
4:15 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

JOON H. KIM
Acting United States Attorney for the
Southern District of New York
JASON M. SWERGOLD
AMANDA LEIGH HOULE
EDWARD YOUNG KYU KIM
Assistant United States Attorneys

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Attorneys for Defendant
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ALSO PRESENT: PETER CALABRESE, PARALEGAL, UNITED STATES
ATTORNEY'S OFFICE

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(Case called)

THE COURT: Have a seat. Thank you.

Mr. Swergold, just tell us who is at your table.

MR. SWERGOLD: Yes. Good afternoon, your Honor.

Jason Swergold, Amanda Houle, and Edward Kim for the
government. We're joined by Peter Calabrese, a paralegal in
our office.

THE COURT: For the defendant.

MS. SHELLOW: Yes, your Honor. Good afternoon. Jill
Shellow. With me is Benjamin Silverman. Between us is Mr. Van
Der End.

THE COURT: So we had a lengthy conference after which
it was reported to me that Mr. Van Der End wished to plead
guilty to the indictment, which is two counts, without
agreement, just an open guilty plea.

Is that correct, Ms. Shellow?

MS. SHELLOW: That is correct, your Honor.

THE COURT: Mr. Van Der End, before I accept your
guilty plea, I'm going to ask you some questions here in court.
The purpose of my questions is really -- there are really two
purposes.

First, to make sure that you fully understand your
rights, the rights that you have as a defendant in a criminal
case. Second, it's to make sure that you are pleading guilty
because you are guilty and not for some other reason. So, as I

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ask you these questions, if you don't understand the questions,
tell me. I'll rephrase it. I'll explain it better.

If at any point you want to confer with your attorneys
before answering a question, that's fine. Under no
circumstances of course should you make any false statements.
In a moment, I'm going to have you take an oath. I'll have you
stand and swear that you will truthfully answer my questions.

If at that point you were to make any false
statements, well, that would be a crime. That would be the
crime of perjury, which would carry penalties separate and
distinct from the penalties that are already associated with
the crimes charged in the indictment. I tell you that not to
scare you, just to make sure you understand that it's really
important for you to be truthful and complete in all your
answers. Okay?

THE DEFENDANT: I understand.

THE COURT: Do you have any questions so far?

THE DEFENDANT: No questions so far.

THE COURT: Let me ask you to stand and raise your
right hand.

(Defendant sworn)

THE COURT: Please have a seat.

Mr. Van Der End, can you tell me your full name.

THE DEFENDANT: My full name is Stefan Van Der End.

THE COURT: I'm not really pronouncing your name

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right. I'm pronouncing it like an American. So say your full
name.

THE DEFENDANT: Stefan is my first name. Van Der End.

If you translate it, it's from the end.

THE COURT: I'll try to pronounce it right,
recognizing that my American tongue will perhaps botch it a few
times.

How old are you, Mr. Van Der End?

THE DEFENDANT: I'm forty-eight years old.

THE COURT: How far did you go in school?

THE DEFENDANT: I think it's a bit different in
American, but I would say after you're 16 years old, I
graduated, and then you choose sort of the direction whatever
you want. I did that another two years.

THE COURT: So you were 18 when you stopped going to
school?

THE DEFENDANT: Yeah. I had to go in the Army. We
still had the -- how do you say forcing?

MS. SHELLOW: Conscription, draft.

THE COURT: It's mandatory service in many European
countries.

That was where? In the Netherlands?

THE DEFENDANT: In the Netherlands Army but stationed
in Germany.

THE COURT: I see. You obviously speak English very

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A. 055

1 well. I assume it's not your first language.
 2 THE DEFENDANT: No. I speak German and French and a
 3 little Spanish.
 4 THE COURT: Are you comfortable proceeding in English?
 5 THE DEFENDANT: Yes. I'm quite comfortable, yes.
 6 THE COURT: Your English is excellent. It's probably
 7 better than mine.
 8 THE DEFENDANT: Thank you.
 9 THE COURT: Still, this is an important proceeding.
 10 If you'd be more comfortable proceeding in a different
 11 language, we would be able to do that.
 12 THE DEFENDANT: No. It's fine with me to proceed in
 13 English.
 14 THE COURT: Are you now or have you recently been
 15 under the care of a doctor or psychiatrist?
 16 THE DEFENDANT: No.
 17 THE COURT: Have you ever been treated or hospitalized
 18 for any addiction or any kind of mental illness?
 19 THE DEFENDANT: No.
 20 THE COURT: In the past two days, have you taken any
 21 medicines or pills or drugs of any kind?
 22 THE DEFENDANT: No.
 23 THE COURT: Have you drunk any alcohol?
 24 THE DEFENDANT: No.
 25 THE COURT: Is your mind clear today?

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

1 THE DEFENDANT: I think it's quite clear, yes.
 2 THE COURT: Do you understand the nature of this
 3 proceeding and what will take place this afternoon?
 4 THE DEFENDANT: Yes.
 5 THE COURT: Ms. Shellow, do you have any doubt as to
 6 your client's mental competence or his ability to enter an
 7 informed plea?
 8 MS. SHELLOW: No. I have no doubt, your Honor.
 9 THE COURT: Mr. Swergold, do you have any such doubts?
 10 MR. SWERGOLD: No, your Honor.
 11 THE COURT: Neither do I. I don't know Mr. Van Der
 12 End very well. I've only really seen him today I think.
 13 Certainly his demeanor this morning and today, his responses to
 14 my questions today, at least this afternoon, and the
 15 representations of counsel demonstrate to me that he's clearly
 16 competent and capable of entering an informed plea.
 17 So, Mr. Van Der End, as I understand it, you wish to
 18 plead guilty to the two charges in the indictment. Is that
 19 correct?
 20 THE DEFENDANT: Yes. That's correct.
 21 THE COURT: Do you feel you've had enough time to
 22 discuss this step with your two lawyers?
 23 THE DEFENDANT: Yes. I've had enough time.
 24 THE COURT: Do you feel you've had enough of a chance
 25 to discuss with them any possible defenses you have to the

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

1 charges in the indictment?
 2 THE DEFENDANT: No.
 3 THE COURT: Do you think you've had enough time to
 4 discuss that?
 5 THE DEFENDANT: Yes, your Honor. Yes.
 6 THE COURT: Are you satisfied with Ms. Shellow's and
 7 Mr. Silverman's representation of you?
 8 THE DEFENDANT: I'm satisfied, yes.
 9 THE COURT: What I want to do now is go over with you
 10 certain rights that you have. I typically do that in two ways:
 11 First I generally send to the lawyers a three-page or a
 12 two-page document -- I guess it's two pages in English -- that
 13 lays out some of the basic rights of a defendant in a criminal
 14 case. So I send those to Ms. Shellow.
 15 Have you had a chance to go over those Mr. Van Der
 16 End?
 17 MS. SHELLOW: Yes, we did go over the document.
 18 THE COURT: If you could hand that document over to
 19 Mr. Van Der End.
 20 If you could look at the second page. Is that your
 21 signature there?
 22 THE DEFENDANT: Yes.
 23 THE COURT: Before you signed that document, did you
 24 read it?
 25 THE DEFENDANT: Yes.

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

1 THE COURT: You obviously speak English. Do you read
 2 English?
 3 THE DEFENDANT: I read English, and I write English as
 4 well.
 5 THE COURT: Have you had a chance to discuss that
 6 document and the rights described in that document with
 7 Ms. Shellow and Mr. Silverman?
 8 THE DEFENDANT: Yes. I understood it fully.
 9 THE COURT: Ms. Shellow, you've reviewed it with your
 10 client?
 11 MS. SHELLOW: I did, but I have not signed the
 12 attorney portion of this document, your Honor.
 13 THE COURT: Are you comfortable signing it?
 14 MS. SHELLOW: I'm not comfortable signing it. I'm
 15 happy to represent to Your Honor that I have reviewed the
 16 contents of it with him. I've reviewed the requirements of the
 17 attorneys' statement, but I'm not comfortable being forced to
 18 disclose privileged communications with my client.
 19 THE COURT: I generally don't ask anybody to do that.
 20 That's fine. If you don't want to sign it, that's okay.
 21 I do this just because it gives me comfort knowing
 22 that a defendant has reviewed that document which I think
 23 accurately lays out the various rights with their attorney. I
 24 have no doubt that you did that. That's what you've
 25 represented.

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

A. 056

1 So if you would hand that up to me, I'll mark it as a
2 court exhibit. I'll mark it as Court Exhibit 1, and I'll date
3 and initial it.

4 MS. SHELOW: Thank you.

5 THE COURT: Mr. Van Der End, I also am going to ask
6 you some questions in court just about those same rights just
7 because these rights are so important and your understanding of
8 them is so essential that I don't want to leave anything to
9 chance.

10 So, as I go over these rights, if you have any
11 question about any of them or if you'd like some additional
12 followup or detail on any of them, that's fine. We're in no
13 rush. This is important. I want to make sure that you fully
14 understand these rights. Okay?

15 THE DEFENDANT: Okay.

16 THE COURT: Good. Thank you.

17 The first right that I want to go over with you is a
18 pretty basic one, and that's your right to a speedy and public
19 trial by a jury on the charges contained in the indictment.

20 Do you understand you have that right?

21 THE DEFENDANT: Yes.

22 THE COURT: So, if there were a trial, the government,
23 the folks at the front here, would have the obligation of
24 proving beyond a reasonable doubt that you were guilty of the
25 crimes charged in the indictment.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 THE DEFENDANT: Right.

2 THE COURT: Do you understand that?

3 THE DEFENDANT: Yes.

4 THE COURT: So a jury of 12 citizens would have to be
5 persuaded that the government's proof reached a level of beyond
6 a reasonable doubt. That's the standard, beyond a reasonable
7 doubt, before you could be found guilty. They would have to
8 agree unanimously in order to return a guilty verdict.

9 Do you understand that?

10 THE DEFENDANT: I understand.

11 THE COURT: You wouldn't have to prove that you were
12 innocent if you went to trial. You wouldn't have to prove
13 anything if you went to trial. You could sit quietly and do
14 nothing. The burden would always be on the government to prove
15 that you were guilty beyond a reasonable doubt.

16 Do you understand that?

17 THE DEFENDANT: I understand that, yes.

18 THE COURT: Now, at a trial and at every stage of your
19 case, you would be entitled to be represented by an attorney.
20 If you couldn't afford an attorney, then one would be appointed
21 for you at no cost to you.

22 Do you understand that?

23 THE DEFENDANT: I understand that.

24 THE COURT: In this case, Ms. Shellow was appointed to
25 represent you; is that correct?

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 THE DEFENDANT: Yes.

2 THE COURT: Ms. Shellow is one of a group of attorneys
3 that is available to represent people who can't otherwise
4 afford an attorney. So we're very fortunate. That's a group
5 of lawyers that's approved by the court, and it's invariably
6 lawyers of great experience and skill and commitment. They're
7 available to represent people, and if those folks want to go to
8 trial, that's fine. If they wish to plead guilty, that's their
9 decision too.

10 So you're not paying Ms. Shellow or Mr. Silverman;
11 right?

12 THE DEFENDANT: No.

13 THE COURT: They're here to represent you. Whatever
14 you wish to do going forward, they'll represent you.

15 Do you understand that?

16 THE DEFENDANT: I understand, yes.

17 THE COURT: Now, if there were a trial, the witnesses
18 for the government would have to come into court, and they'd
19 have to testify here in your presence.

20 Do you understand that?

21 THE DEFENDANT: Yes.

22 THE COURT: They'd have to sit right here in this
23 witness box so that you could see them and so that you could
24 hear them. In fact, we had a discussion today about whether we
25 needed to move to a different courtroom just because the

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 sightlines were not particularly good when the table is
2 crowded.

3 That's because you have the right to confront your
4 accusers, which means that they have to come into court,
5 testify openly. And your lawyers get the opportunity to ask
6 questions, to test the truthfulness, the accuracy, the motive
7 to lie or to give testimony that a witness might have. That's
8 your right.

9 Do you understand that?

10 THE DEFENDANT: Yes. I understand.

11 THE COURT: Now, as I said before, you would have no
12 obligation to do anything at trial if you didn't want to. If
13 you wished to, you could put on a defense, you could call
14 witnesses, and you could introduce evidence if you wished.

15 Do you understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: You yourself could testify at trial if you
18 wanted to.

19 Do you understand that?

20 THE DEFENDANT: I understand.

21 THE COURT: But you also have the right not to
22 testify. If you chose not to testify, the jury could draw no
23 negative inference from that fact. They couldn't say, oh, this
24 guy, Van Der End, if they could pronounce it -- they couldn't
25 say, well, this guy must be guilty because he didn't take the

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A. 057

1 witness stand. An innocent person would have taken the stand
2 and told us his side of the story. They're not allowed to say
3 that or think that.

4 So I would tell them at the beginning of the trial and
5 then again at the end of the trial that that's not proper. I
6 would remind them that the defendant is presumed innocent, and
7 I would remind them that the burden is always on the government
8 to prove the defendant's guilt beyond a reasonable doubt.

9 I would say that if the defendant chooses not to
10 testify, you can't consider that. You can give it no weight
11 whatsoever in determining whether the government met its
12 burden.

13 Do you understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: Now, if there were a trial and if the jury
16 returned a guilty verdict against you, you then would have the
17 right to appeal the jury's verdict.

18 Do you understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: There's a Court of Appeals that sits
21 literally right above me on the 17th floor, and their job is to
22 make sure that the trial was fair and that the verdict was
23 supported by sufficient evidence. So, if you wished, you could
24 appeal the verdict up to them at some point.

25 Do you understand that?

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 THE DEFENDANT: Yes.

2 THE COURT: Even now, as we're preparing to have you
3 enter a guilty plea, you have the right to change your mind.

4 Do you understand that?

5 THE DEFENDANT: I understand that.

6 THE COURT: We haven't yet crossed point of no return.
7 I guess we're getting pretty close, but if you told me right
8 now, I've changed my mind. I want to go to trial, that would
9 be fine. I wouldn't be mad at you. The lawyers wouldn't be
10 mad at you. We all understand this is your call, and we would
11 all go forward on Monday as we planned.

12 Do you understand that?

13 THE DEFENDANT: I understand that, your Honor.

14 THE COURT: Do you wish to go forward with your
15 guilty plea today?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Do you understand that if you plead guilty
18 and if I accept your guilty plea, it means there will be no
19 trial in this case?

20 Do you understand that?

21 THE DEFENDANT: I understand, your Honor.

22 THE COURT: So you will have given up your right to a
23 trial and all the rights that I just mentioned with maybe two
24 exceptions.

25 Do you understand that?

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 THE DEFENDANT: I understand.

2 THE COURT: The two exceptions would be your right to
3 counsel. That would continue. You wouldn't be giving up your
4 right to counsel by pleading guilty. Ms. Shellow and
5 Mr. Silverman would continue to represent you through
6 sentencing and through to an appeal.

7 You might also have the ability to appeal. As a
8 result of your guilty plea, it is possible and in fact likely
9 that you would be giving up at least some arguments on appeal.
10 That's a point that I think we're probably going to talk about
11 some more. I want to make sure that you're at least aware that
12 by pleading guilty, some and perhaps all of your arguments on
13 appeal could be waived or given up.

14 Do you understand that?

15 THE DEFENDANT: I understand, yes.

16 THE COURT: You might be able to appeal sentencing.
17 We'll talk more about sentencing. To the extent there's a
18 jurisdictional issue here like we talked about this morning,
19 that might be something that is still preserved for an appeal.
20 You can make that argument on appeal. It's possible that the
21 Court of appeals will say, no. You waived that one when you
22 pled guilty.

23 Do you understand that?

24 THE DEFENDANT: I understand that.

25 THE COURT: You should also understand that as a

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 result of your guilty plea, you'll be sentenced for the crimes
2 that you've pled guilty to.

3 Do you understand that?

4 THE DEFENDANT: I understand.

5 THE COURT: I'm not going to sentence you today, but
6 ultimately the sentence will be based on the crimes that you've
7 admitted and pled guilty to.

8 Do you understand that?

9 THE DEFENDANT: I understand.

10 THE COURT: The last thing I want to just make sure
11 you understand is that before I accept your guilty plea this
12 afternoon, I'm going to ask you to tell me what it is you did
13 that makes you guilty of these crimes.

14 I do that because I want to be confident that you're
15 pleading guilty because you are guilty and not for some other
16 reason. The worst-case scenario would be that someone pleads
17 guilty to a crime that they don't believe they're actually
18 guilty of, but they're pleading guilty because they're afraid
19 of the consequences of being found guilty at trial; that
20 they'll do worse if convicted after trial than if they plead
21 guilty before. That's not a good reason to plead guilty. So I
22 will need to be quite certain that you're pleading guilty
23 because you are guilty.

24 In order to achieve that certainty, I'm going to need
25 you to tell me what it is you did that makes you guilty of that

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A. 058

crime. That's going to require you to give up your right not to incriminate yourself.

Are you prepared to do that?

THE DEFENDANT: I am prepared to do that, yes.

THE COURT: Now, do you have any questions about any of these rights that I've just mentioned that we've just been talking about?

THE DEFENDANT: No questions, your Honor.

THE COURT: So you're willing to give up your right to a trial and the other rights that I've discussed with you?

THE DEFENDANT: Yes.

THE COURT: What I'd like to do now is talk about the charges in the indictment. You've seen a copy of the indictment in this case. Is that correct?

THE DEFENDANT: Yes. That's right.

THE COURT: I think you said you discussed those charges with your attorneys and any possible defenses that you may have.

I'm not going to read the indictment out loud, but you're charged in the indictment with two counts. The first charges you with conspiracy to violate the provisions of the law that make it illegal, while on board a vessel subject to the jurisdiction of the United States, to distribute and possess with the intent to distribute a controlled substance. So that's what you're charged with.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

Do you understand that?

THE DEFENDANT: Yes. I understand that.

THE COURT: The second count is what's called a substantive count. That count charges you with possessing with the intent to distribute narcotics or controlled substances while on board a vessel subject to the jurisdiction of the United States.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: These are two crimes. Each crime, all crimes, are comprised of what are called elements. The elements are just the things that a jury would have to find beyond a reasonable doubt before they could return a verdict.

THE DEFENDANT: Right.

THE COURT: The elements are things that I will have to be persuaded have been demonstrated today before I will accept your guilty plea. They can seem a little technical, but I think generally they're designed so that regular, non lawyers can understand them.

So I'm going to ask Mr. Swergold just to summarize the elements of these two crimes. Listen carefully as he does that. We've already had some back-and-forth on this through the proposed jury charge, which you may have seen or not.

Listen to Mr. Swergold. If, when he's finished, you have any questions about the elements, let me know. We can

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

talk about it. Okay?

THE DEFENDANT: Yes.

THE COURT: Great. Thanks.

Mr. Swergold.

MR. SWERGOLD: Thank you, your Honor.

With respect to Count One, which is the conspiracy charge, there are two elements: First, that there was a conspiracy or agreement to violate the Maritime Drug Law Enforcement Act, specifically to distribute or possess with intent to distribute 5 kilograms or more of cocaine on board a vessel subject to the jurisdiction of the United States.

Second, that the defendant intentionally and knowingly became a member of that conspiracy, knowingly associated himself with other coconspirators and participated in the conspiracy, again, to distribute and possess with intent to distribute cocaine on board a vessel subject to the jurisdiction of the United States.

Count Two, which is the substantive offense, has two elements: First, that the defendant distributed or possessed with the intent to distribute 5 kilograms or more of a controlled substance, here, cocaine, on board a vessel subject to the jurisdiction of the United States. Second, that the defendant did so unlawfully, intentionally, and knowingly.

With respect to both counts, the government would have to prove by a preponderance of the evidence that venue is

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(212) 805-0300

proper in the Southern District of New York.

THE COURT: That venue would be proper by virtue of where Mr. Van Der End first appeared in the United States. Is that correct?

MR. SWERGOLD: Under the MDLEA, venue is proper in either the District of Columbia or the first district where an individual arrives in the United States.

THE COURT: You would proffer that that's the Southern District of New York. He first arrived at the Westchester Airport?

MR. SWERGOLD: That's correct.

THE COURT: From where? Guantanamo Bay?

MR. SWERGOLD: He was brought from the cutter to Guantanamo Bay. From there he was flown to the Bahamas. From the Bahamas, he was flown directly to Westchester County Airport.

THE COURT: Mr. Van Der End, do you have any questions about any of those elements that Mr. Swergold summarized?

THE DEFENDANT: No.

THE COURT: And you've discussed those before with your attorneys?

THE DEFENDANT: Yes.

THE COURT: So let me tell you what the maximum penalties are for each of these. Each of these crimes carries a maximum term of imprisonment of life, as well as a mandatory

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A. 059

minimum term of imprisonment of ten years.

Each also carries a maximum term of supervised release of life and a mandatory minimum term of supervised release of five years. In addition, each carries a maximum fine of the greatest of either \$10,000,000 or twice the gross gain, financial gain, derived from this crime or twice the gross loss to persons other than yourself that resulted from this crime.

They each also include a mandatory special assessment of \$100, as well as the potential forfeiture or any proceeds received as a result of the crime or forfeiture of any property used to facilitate the crime. So those are the maximum penalties you face.

Do you understand that?

THE DEFENDANT: I understand, yes.

THE COURT: Are there any other aspects of sentencing or penalties, Mr. Swergold, you would like me to go over?

MR. SWERGOLD: Just one minute, your Honor. Your Honor, just one thing we would want to note for the record is that the government's position is that the safety valve provisions do not apply to Title 46 cases. We just want to make sure that that's on the record for the defendant to consider.

THE COURT: I think we can talk about that more in a minute when I go through the Pimentel letter. That's fine.

Those are the maximum penalties that you face. You

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

should know a couple other things about sentencing.

First of all, you're not a United States citizen; correct?

THE DEFENDANT: Correct.

THE COURT: So it is almost certain and perhaps something you would prefer anyway, but it's almost certain that you would be deported from the United States once you complete your sentence.

Do you understand that?

THE DEFENDANT: Yes. I understand.

THE COURT: There could be exceptions to that, but usually a crime of this type would result in mandatory deportation.

In addition, you should be aware that there is no parole in the federal system. So France and the Netherlands and New York state, as opposed to the national courts here -- they all have things like parole, which means that you might be sentenced to a particular sentence when you come into court by a judge, but you would actually serve a fraction of that, perhaps half, perhaps a third, by virtue of parole, which would allow a parole board or some other actor to decide that you can go home sooner and not serve the full sentence.

That's not part of this system. In the national courts of the United States, there is no parole. So whatever sentence I impose, that is the sentence that you will serve.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: The only exception of that is you could get a certain amount of time off for what's called good behavior, but the amount of time off for good behavior could not exceed 15 percent. That's the biggest reduction you could get by law. The determination as to whether you had demonstrated good behavior -- that would be up to the Bureau of Prisons, not up to me.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, supervised release is a component of sentencing. I mentioned that before. I think it's unlikely in this case I'm going to impose supervised release. That's usually for folks who are citizens or people who are likely to remain in the United States.

What it provides is that once you're released from prison, while you're living here, you would be supervised by probation. You'd have certain conditions that you would have to comply with. If you didn't, then you could be returned to prison for the full term of supervised release.

I think it's unlikely that that's going to apply here, but I guess it could at least conceivably could. So you should be aware of that. If you were to violate the terms of supervised release, I could send you back to jail for the full

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(212) 805-0300

term of supervised release, and you wouldn't get credit for any time you already spent on supervised release prior to resentencing.

THE DEFENDANT: Right.

THE COURT: Now, are you serving any other sentence anyplace else? There was talk this morning about prior convictions in France and the Netherlands.

Are you serving currently any other sentence anyplace else?

THE DEFENDANT: No.

THE COURT: I suppose it's at least conceivable that there could be a sentence that's later brought in St. Vincent and the Grenadines or the Bahamas. It's probably not likely, but I suppose it could happen. If that were to happen, then it's at least conceivable that those sentences would be in addition to any sentence that's imposed in this case.

Do you understand that?

THE DEFENDANT: Yes. I understand.

THE COURT: A couple of other things about sentencing I want to make sure you understand. The determination as to what sentence you will receive is up to me and no one else.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: So the only restrictions on me really are the maximum sentence of life, which is no restriction at all,

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 and the mandatory minimum sentence of ten years. So each of
2 these sentences carries a mandatory minimum term of a ten-year
3 sentence.

4 I'm not free to sentence you to anything less than ten
5 years unless you were to qualify for what Mr. Swergold referred
6 to as the safety valve, and he disputes that even applies here.
7 But for certain narcotics offenses that have mandatory minimum
8 sentences, a defendant could qualify for something known as the
9 safety valve, which would allow that person to actually be
10 sentenced below the ten-year mandatory minimum if they met the
11 criteria.

12 I'm not sure whether the safety valve applies here or
13 not. The government is insisting it doesn't. They might be
14 right. You should presume that it's right for purposes of
15 taking a sentence. If that is a deal-breaker, then you should
16 let me know. If there is a mandatory minimum -- I've been told
17 there is -- then I am not free to sentence you to anything less
18 than ten years, even if I wished to.

19 Do you understand that?

20 THE DEFENDANT: I understand, yes.

21 THE COURT: One other way out from under a mandatory
22 minimum sentence would be if you cooperated with the government
23 and provided substantial assistance to them in the
24 investigation and prosecution of other individuals.

25 For that to happen, the government would have to make

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 a motion at the time of sentencing, and they would have to
2 advise the Court of the substantial assistance that you
3 provided. That would be a basis for sentencing you to less
4 than the mandatory minimum. Ultimately, the government would
5 have to make that motion before I would be empowered to
6 sentence you below the ten-year mandatory minimum.

7 Do you understand that?

8 THE DEFENDANT: I understand fully.

9 THE COURT: Now, there are certain factors that I have
10 to consider and weigh as I decide what's an appropriate
11 sentence. One of those factors is the United States
12 Guidelines.

13 Have you heard of the sentencing guidelines?

14 THE DEFENDANT: Yes. I've seen them.

15 THE COURT: I'm sure you've discussed those with your
16 attorneys. Most countries in Europe and elsewhere don't have
17 them. So I'll just tell you again what they are in case you're
18 not sure.

19 I'm holding up a book. This book is the United States
20 Sentencing Commission's Guidelines Manual. It's about 500 or
21 600 pages long. It's pretty lengthy. This book is prepared by
22 a commission that consists of some judges, some lawyers, some
23 experts in the field of criminal law. This book is designed to
24 give guidance to judges like me who have the responsibility of
25 imposing sentences.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 So the way it works is that every crime or type of
2 crime is covered by a chapter or a subchapter in this book. So
3 the judge is directed to go to the chapter that relates to the
4 crimes at issue, in this case, the chapter on narcotics
5 offenses.

6 Once in that chapter, the judge is prompted to make
7 certain findings. In drug cases, it usually consists of the
8 type of drug because some drugs are more harmful than others
9 and more serious than others, the amount of drug because
10 generally a large quantity is more harmful and dangerous than a
11 small quantity.

12 Then there might be enhancements for things like guns
13 and whether airplanes or boats were used and whether somebody
14 was a pilot or a navigator, whether someone died, whether
15 someone was a leader and an organizer of the criminal activity
16 that was extensive.

17 In each of those cases, it might be that there are
18 additional points that are added. It's sort of a mathematical
19 process, simple arithmetic really, adding and subtracting
20 points. At the end of that process, the judge makes a finding
21 of an offense level, a final number.

22 The judge then goes to another chapter in this book
23 that relates to criminal history. Not surprisingly, people
24 with prior convictions and people who have been sentenced to
25 prison -- they will typically be treated more harshly than

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(212) 805-0300

1 people who have no prior convictions.

2 So the judge goes to the chapter on criminal history
3 and makes determinations as to whether there were prior
4 convictions. If so, when and for how long, and in this case,
5 as might be relevant, where.

6 Depending on the answers to those questions, the judge
7 assigns points, the judge adds points, and comes up with
8 another number. That number is referred to as the criminal
9 history category.

10 There are six criminal history categories. Category I
11 is the lowest and least serious. Category VI is the highest
12 and most serious. With those two numbers, the offense category
13 on the one hand and the criminal history category on the other,
14 the judge goes to the back of this book where there is a grid
15 or a table.

16 I don't know if you can see it. I'm sure you've gone
17 over it with your lawyers. It's a simple chart really.
18 There's a column on the far left which is the offense level
19 column. It's numbered 1 through 43.

20 The judge goes down that column until he or she gets
21 to the number that the judge found to be the offense level.
22 The judge then makes a right turn into these other columns,
23 each of which represents a criminal history category.

24 Then the judge stops when he or she gets to the
25 criminal history category that the judge found to be

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A. 061

appropriate. Then at that point, the judge will announce the range in terms of months that's reflected on the chart.

Now, this book is not mandatory. I don't have to follow this book. I'm free to sentence above or below the range in this book.

THE DEFENDANT: Right.

THE COURT: The mandatory minimum sentences though are not advisory. Those I do have to follow. The book I don't. I have to consider the book, and I have to make my findings under the book.

Now, in addition to the book, I also have to consider some other factors that are just as important as the book, and I have to balance these factors along with the manual.

Those other factors include, first of all, your own personal experience, your personal history.

THE DEFENDANT: Right.

THE COURT: I have to tailor the sentence to you as a person. So I have to look at your entire experience from your birth right up until now, and that includes things like your childhood, the circumstances of your youth, your educational background, your work history, your criminal history, your family situation today, all the things that make you who you are. I have to consider those things.

Another factor that I have to consider, which is partially considered by the guidelines but I have to also

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(212) 805-0300

separately consider, are the facts and circumstances of these crimes. These are obviously very serious crimes.

I have to look at the details of these crimes, what went on for how long, where, what was your role relative to the role of others, what harms resulted from this, if any.

I have to make sure that the sentence is not only tailored to you as a person but also tailored to the circumstances and facts of this crime. That means making sure that the sentence I impose reflects the seriousness of the crime, that it promotes respect for the law, and that it provides a just punishment. So that's another factor I have to weigh.

Another factor I have to weigh is sometimes referred to as deterrence. That's simply the notion that by imposing a sentence on you in this case, I have to hopefully send a message to you and to others that this kind of conduct won't be tolerated and that there are consequences.

The hope is that that message is received, internalized, and it affects future behavior so that in the future, you and others who might learn of the sentence might think twice or more than twice about engaging in this kind of conduct. Hopefully there will be less criminal conduct as a result.

I don't have a crystal ball. It's hard to predict the future. Nonetheless, I think this is a legitimate objective of

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(212) 805-0300

sentencing. It's one that Congress has said judges have to consider. It's one that I think criminal justice systems everywhere and almost for all time have considered relevant. So that's one factor, among many, that I have to consider.

Another factor that I have to consider involves your own needs while you're in custody. You seem like a pretty healthy guy. Sometimes I have people with real physical health needs or other times people with some substance-abuse treatment needs or mental health treatment needs. Sometimes I have very young defendants who, frankly, need opportunities for job training and educational opportunities.

So, whatever the needs, I have to try to make sure the sentence I impose addresses those needs and allows a person to deal with those needs while they're in custody. So that's another factor.

Then I guess the last factor that I have to consider and balance is sometimes referred to as the need to avoid unwarranted sentencing disparities between similarly situated people. What does that mean.

Well, I think it means basically before imposing a sentence in this case, I have to take a step back and make sure that this particular sentence is consistent with, in line with, sentences imposed in other cases involving similar conduct and involving defendants with similar histories, recognizing no two cases are exactly alike, no two people are exactly alike.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

Where there are strong similarities, the sentences should be similar.

If they're all over the place, some people are getting really clobbered doing decades in jail and others are getting the minimum, that could lead to disrespect for the law. It might make the whole system seem arbitrary.

So that's one of a variety of factors I have to balance. My job will be to balance all of these things and to come up with a sentence that I think is appropriate in light of all these different considerations. It's, frankly, more art than science probably, but it's something I take seriously and something I'll probably need some time to assess and work my head around.

Do you have any questions about any of that?

THE DEFENDANT: No.

THE COURT: You should understand also that whatever sentence I impose, even if you're unhappy with it, you will not be able to withdraw your guilty plea at that point.

Do you understand?

THE DEFENDANT: I understand, yes.

THE COURT: As I said, we're not yet at the point of no return, but once you've pled guilty and once I've accepted your guilty plea, you won't be able to say, hey. I've changed my mind now. I'm ready to go to trial.

THE DEFENDANT: I understand.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A. 062

1 THE COURT: That train will have left the station.

2 THE DEFENDANT: I understand.

3 THE COURT: Now, there's no plea agreement in this

4 case, but the government has written a letter that is sometimes

5 referred to as a Pimentel letter. That's simply a reference to

6 a case that was decided many years ago, United States v.

7 Pimentel.

8 That letter basically recommends that the government

9 apply a practice that was particularly relevant when this book

10 was mandatory. There was a time when these were mandatory

11 guidelines, not advisory guidelines.

12 So the thinking was that before a defendant pleads

13 guilty, he or she should be aware of at least what the

14 government's view of how the book applies to the case is. Let

15 me make that more clear. That before pleading guilty, you

16 should have a sense of the government's view of the guidelines

17 application.

18 You're free to argue that it's wrong. You're free to

19 argue that the guidelines are quite different. You're free to

20 argue for a sentence below the guidelines, even if those

21 guidelines are right. The thinking is you should at least be

22 entitled to know what the government's thinking is at this

23 stage. So that's the purpose of this letter.

24 Have you had a chance to read it?

25 THE DEFENDANT: No.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 THE COURT: You haven't? It's about 2 1/2 pages. Do

2 you want to take a look?

3 THE DEFENDANT: I have it right here.

4 THE COURT: Why don't you take a minute and just read

5 it because I do think it's important, and then I'll come back

6 and chat with you a little bit about it.

7 (Pause)

8 THE COURT: Are you still reading?

9 MS. SHELLOW: We're just finishing it, your Honor.

10 THE DEFENDANT: All right, your Honor.

11 THE COURT: So you've had a chance to read it.

12 Do you have any questions about this document or what

13 it purports to say?

14 THE DEFENDANT: I don't have any questions.

15 THE COURT: The bottom line is that the government's

16 view is that the sentencing guidelines, as applied in this

17 case, would provide for a sentence of 292 months to 365 months,

18 which is basically about 24 1/2 years or so, to about 30 years.

19 So that's the range which is set forth in terms of months.

20 Do you understand that?

21 THE DEFENDANT: I understand, yes.

22 THE COURT: The mandatory minimum is of course ten

23 years. Then the government sort of gets there by saying that

24 the amount of the drugs is more than 450 kilograms of cocaine;

25 that additional levels are added because you were the navigator

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 of a vessel that was carrying the drugs.

2 An additional two levels are added because you

3 obstructed justice by attempting or destroying some of the

4 evidence, which I gather in this case is the cocaine that was

5 found on the ship.

6 Then the government, in their view -- they agree that

7 you are entitled to a two-level reduction for acceptance of

8 responsibility by pleading guilty today.

9 Do you understand that's their view of the guidelines?

10 THE DEFENDANT: Yes. I understand.

11 THE COURT: You should understand that I'm not bound

12 by any of this. So I might come to a different view as to

13 whether the enhancements should apply or whether the reduction

14 should apply, including acceptance of responsibility.

15 I don't know for sure that I would necessarily

16 conclude that any acceptance of responsibility is warranted

17 based on a plea at this late date after so much evidence was

18 turned over and it was sort of clear what this trial was going

19 to be about. I'm not sure. I just want to make it clear. I'm

20 not bound by any of this, and I might come to different

21 decisions.

22 Do you understand that?

23 THE DEFENDANT: I understand, yes.

24 THE COURT: Then the government is also suggesting

25 that there might be a basis for an upward departure from these

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(212) 805-0300

1 guidelines based on your prior convictions, which don't count

2 towards criminal history because they're foreign convictions.

3 But given, particularly the French conviction that involves

4 another huge amount of drugs being imported, that might be an

5 argument for a higher sentence than what even the guidelines

6 call for.

7 Do you understand that?

8 THE DEFENDANT: I understand.

9 THE COURT: Let me ask you: Has anybody threatened

10 you or offered you any thing of value in exchange for pleading

11 guilty here today?

12 THE DEFENDANT: No.

13 THE COURT: Has anybody promised you what your

14 sentence will be?

15 THE DEFENDANT: No.

16 THE COURT: Mr. Swergold, is there anything else you

17 would like me to point out or address in connection with this

18 Pimentel letter?

19 MR. SWERGOLD: No. Thank you, your Honor.

20 THE COURT: The fine is \$50,000 to \$10,000,000. As I

21 said, there's also the prospect of forfeiture for any property

22 or proceeds that were used or derived from the offense,

23 including money that was made by you or other members of the

24 conspiracy.

25 Ms. Shellow, are you aware of any defense that would

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A. 063

prevail as a matter of law or any other reason why Mr. Van Der End should not be allowed to plead guilty here today?

MS. SHELLLOW: No. I'm not aware of any reason why he should not be allowed to plead guilty.

THE COURT: Mr. Van Der End, let me ask you: Just tell me now in your own words what it is you did that makes you guilty of these crimes. You can stay seated. That's fine.

MS. SHELLLOW: Your Honor, Mr. Van Der End and I prepared a brief written statement. I'd like him to be able to read it just for convenience.

THE COURT: That's fine. There's nothing wrong with that. That's not unusual. I just want to make sure that the statement you're reading is a statement that you participated in and that you adopt as your own and that you're not just sort of reading what somebody slipped under your nose.

THE DEFENDANT: No.

THE COURT: That's fine. You can go ahead and read it.

THE DEFENDANT: I knew that there were more than 5 kilos on board the Sunshine. We were in international waters, and I agreed with others to deliver the cocaine to Canada.

THE COURT: When did this take place?

THE DEFENDANT: That was May I would say.

THE COURT: May of 2016?

THE DEFENDANT: Yes. Exactly a year ago basically.

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(212) 805-0300

We left the 15th I would say.

THE COURT: So you're charged in the first count with a conspiracy, which is an agreement. Just agreeing to do this would be enough, even if it ultimately didn't come to fruition. You have to have agreed with at least one or more persons who is not a law enforcement officer to carry out this illegal scheme.

Did you have that agreement with at least one other person?

THE DEFENDANT: At least one person, yes.

THE COURT: When you did this, did you know that what you were doing was wrong and illegal?

THE DEFENDANT: Yes.

THE COURT: I think that probably covers both counts. The first count is the conspiracy, which is merely the agreement. The second count is the actual substantive count of actually possessing the drugs with an intent to distribute them while on board a vessel. Otherwise, it's basically again you have to have the intent. You to have to known what you were doing was wrong and illegal. You have to have understood what you were doing at the time.

THE DEFENDANT: Yes.

THE COURT: So you understood that what you were doing was illegal at the time. Is that correct?

THE DEFENDANT: Yes.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

THE COURT: Mr. Swergold, is there anything else you would like me to elicit or ask related to the elements?

MR. SWERGOLD: No, your Honor.

THE COURT: Ms. Shellow, is that a satisfactory allocution to your mind?

MS. SHELLLOW: It is satisfactory. Thank you.

THE COURT: I think so too. Have a seat. Thank you.

THE DEFENDANT: Thank you.

THE COURT: I'll ask Mr. Swergold to summarize the government's evidence if the case were to go to trial.

Mr. Swergold.

MR. SWERGOLD: Yes, your Honor. If the case were to go to trial, the government would prove the defendant's guilt beyond a reasonable doubt through evidence that includes testimony from Coast Guard officers involved in the boarding of the Sunshine; photographs of the defendant, both at sea and on land, including photographs of him loading cocaine onto the vessel; as well as physical evidence, items recovered off of the Sunshine, including some of the cocaine.

THE COURT: Ms. Shellow, you don't disagree with that characterization of the evidence?

MS. SHELLLOW: No. I don't disagree with it.

THE COURT: Before I formally enter the plea, I would like to maybe just discuss briefly whether there are issues for a Fatico hearing, which is a sentencing hearing on disputed

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(212) 805-0300

facts. There was some suggestion of that today, Mr. Swergold.

Are you aware of any issues that would need to be resolved by a separate hearing?

MR. SWERGOLD: Without knowing what the defendant's position is, your Honor, we would seek to prove that the full weight was over 1,300 kilos. Obviously, we put enhancements into our Pimentel letter that includes the fact that he was a navigator. It talks about the destruction of evidence.

I don't know whether the defendant is going to contest any of those. Our position is that we have witnesses who can be flown in from the Coast Guard here who are deploying at the end of next week. Since everybody has already blocked off the time, and if there are going to be disputes, we can perhaps start the Fatico.

THE COURT: Ms. Shellow, do you intend to dispute the quantity of drugs, which is more than 450 kilograms?

MS. SHELLLOW: No, your Honor. I'm not going to dispute the quantity.

THE COURT: How about the other enhancements that the government is seeking, including an enhancement for obstruction of justice by destroying evidence or the enhancement for being the navigator of a vessel carrying controlled substances?

MS. SHELLLOW: Your Honor, I'm not sure we're going to take a position that agrees with the navigator enhancement. Although I don't believe that needs to be addressed at a Fatico

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A. 064

1 hearing or that any of the Coast Guard witnesses would be
 2 required for any such resolution of that issue.

3 THE COURT: I don't know. If it is going to require
 4 that, I guess I'd just assume do it next week since I blocked
 5 off the whole week.

6 Do any of the Coast Guard witnesses have any testimony
 7 related to the navigator point?

8 MR. SWERGOLD: They do, your Honor, which includes
 9 some statements made by Mr. Van Der End. I should mention also
 10 that there is some relevant conduct that we would seek to prove
 11 that includes conduct by this defendant that proceeded for many
 12 months before they left in May of 2016 to attempt to bring this
 13 cocaine up to Canada.

14 THE COURT: Why is that relevant conduct? What do you
 15 mean?

16 MR. SWERGOLD: It's not in the indictment. The
 17 indictment just charges a conspiracy in May 2016. This isn't
 18 the first trip. They tried earlier, some combination of the
 19 conspirators in this case.

20 There will be testimony about the defendant's
 21 involvement in that, about his involvement in unloading and
 22 reloading the drugs. So this is all stuff that the government
 23 is going to want to rely on at sentencing because we think it
 24 absolutely goes towards the arguments that we want to be
 25 making.

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1 THE COURT: That's not in the Pimentel I don't think.
 2 One of the issues I'd like to nail down is whether we're going
 3 to be having a hearing. If so, whether it should be next week
 4 to take advantage of the fact that witness are here or whether
 5 it can or should be later.

6 You suggested that the navigation point, the
 7 enhancement for being a navigator, is something that there
 8 would be at least some relevant testimony from the Coast Guard
 9 witnesses. If that's the case, then I think we should probably
 10 go forward on Monday with that testimony, since the witnesses
 11 are here.

12 MS. SHELLOW: Your Honor, if the government would
 13 proffer what that testimony is going to be. I don't know that
 14 we would necessarily be contesting it. I am curious about what
 15 statements of Mr. Van Der End the government is relying on
 16 because I do not believe that any statements of my client have
 17 been produced to us.

18 THE COURT: I don't know whether they have or not. I
 19 think you said statements made to Coast Guard officers.

20 Isn't that what you said, Mr. Swergold?

21 MR. SWERGOLD: Yes, your Honor. It wasn't in the form
 22 of questioning. It was while they were at sea on the cutter,
 23 statements the defendant was making regarding his ability to
 24 navigate by stars and wind and notice areas in the ocean so
 25 that he was able to tell where they were.

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 (212) 805-0300

1 THE COURT: Did you disclose that to the defense?

2 MR. SWERGOLD: No. We haven't disclosed it. We just
 3 learned it in speaking with our witnesses.

4 THE COURT: Generally statements of a defendant are
 5 supposed to be disclosed. Right?

6 MR. SWERGOLD: You're right, your Honor. We should
 7 have disclosed it earlier. Obviously it would come under 3500.
 8 I understand they should have been disclosed earlier.

9 MS. SHELLOW: Statements of the defendant are not 3500
 10 material.

11 MR. SWERGOLD: I just said that we should have
 12 disclosed it earlier after learning of it.

13 THE COURT: Again, so there are witnesses who are here
 14 now or soon to be here who have testimony about statements made
 15 by Mr. Van Der End?

16 MR. SWERGOLD: Your Honor, we would not offer the
 17 statements that he made on the cutter. What I would say is
 18 that the Coast Guard witnesses' testimony would absolutely be
 19 critical to the obstruction enhancement, and also we have a
 20 cooperating witness who would testify about facts that would be
 21 relevant for sentencing.

22 THE COURT: That witness I assume can testify any
 23 time.

24 MR. SWERGOLD: That's correct. The Coast Guard
 25 witnesses will corroborate -- to the extent that defendants are

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 (212) 805-0300

1 going to challenge things that the cooperating witness is
 2 saying, the government would seek to corroborate his testimony
 3 through other evidence, documents or testimony, that could be
 4 presented at another time.

5 But for the Coast Guard witnesses, it may make sense
 6 to just take their testimony now, and then we can argue about
 7 the corroboration later after the cooperating witnesses were to
 8 testify.

9 THE COURT: That's with respect to the obstruction?

10 MR. SWERGOLD: Yes.

11 THE COURT: Are you challenging the obstruction part,
 12 Ms. Shellow?

13 MS. SHELLOW: No, I'm not.

14 THE COURT: I'm not sure what the testimony of the
 15 Coast Guard witnesses would be relevant to then if that's not
 16 being contested.

17 MS. SHELLOW: I'd like a proffer as to what it is they
 18 would testify to, your Honor.

19 MR. SWERGOLD: Your Honor, as we said, we're not going
 20 to offer the statement on the navigator. We would get that
 21 evidence in through other witnesses, through another witness.

22 So, if they're not going to contest the obstruction
 23 points, then we don't need the Coast Guard witnesses for that.
 24 Again, they would corroborate other evidence and of our
 25 cooperating witnesses' testimony.

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A. 065

1 MS. SHELLLOW: Your Honor, the government should be
2 precluded from in any way using statements of my client that
3 have not been produced to us, whether through a Coast Guard
4 witness or any other witness.

5 THE COURT: I'm past that though. I'm trying to
6 figure out if there's any need for us to have a Fatigo hearing
7 next week with the witnesses who are here or who are likely to
8 be here but are likely to be unavailable later. That's really
9 what I'm trying to figure out.

10 It's not clear to me that they are. It sounds like
11 what you're saying, Mr. Swergold, is that they might have
12 things that corroborate a cooperating witness. About what, I'm
13 not sure. We're kind of groping to figure out what relevant
14 testimony they have that would justify doing this next week.

15 MR. SWERGOLD: Your Honor, assuming that Mr. Suarez is
16 also going to plead guilty after this and takes the same
17 position with respect to the obstruction points, then we do not
18 need the Coast Guard witnesses for a hearing next week on that
19 issue.

20 THE COURT: On any issue.

21 MR. SWERGOLD: On any issue. That's right,
22 your Honor.

23 THE COURT: Is there anything else being disputed with
24 respect to the guidelines calculation in the Pimentel letter?

25 MS. SHELLLOW: No.

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1 THE COURT: Then I do think it's worth at least
2 fleshing out what the defense position and the government
3 position is with respect to appellate arguments. We alluded to
4 that this morning.

5 I'm not sure we have to resolve it today, but I do
6 think it's a good thing to at least identify what those
7 arguments are and to make it clear to Mr. Van Der End that it's
8 at least possible that the Second Circuit is going to say,
9 yeah. You pled guilty. You waived this. So that was at least
10 a consequence of pleading guilty.

11 I don't want him to then say, oh, I wouldn't have pled
12 guilty had I known there was a possibility the circuit wouldn't
13 consider the appellate argument, because I think that's
14 something we can address now.

15 Mr. Silverman, I think you were really covering that.
16 You covered it very well I might say. I was very impressed
17 with your argument and your briefs. So tell me what exactly
18 you were contemplating this morning when you said we would
19 perhaps have appellate arguments.

20 MR. SILVERMAN: Our position is that it's an open
21 issue in the Second Circuit. Three circuits, including very
22 recently and persuasively the D.C. Circuit, have held that the
23 question of whether a vessel is stateless for purposes of the
24 Maritime Drug Law Enforcement Act is a matter of subject matter
25 jurisdiction.

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1 It's a question of subject matter jurisdiction.
2 Therefore, it's not waivable at any time, and it can be raised
3 sua sponte and in fact should be raised sua sponte by the
4 Court.

5 There is a conflicting opinion from the First Circuit,
6 the Gonzalez decision. We view that as an outlier. The Second
7 Circuit has a panel that's going to hear argument on this next
8 week. We've discussed the issue with our client.

9 THE COURT: That's Judge Rakoff's case?

10 MR. SILVERMAN: That's Judge Rakoff's case, yes.

11 THE COURT: That's fine. I have no doubt that you'll
12 be able to at least initially raise the issue in front of the
13 Second Circuit. They could take the position that the First
14 Circuit has taken and say, sorry. That one is not preserved
15 because it's not jurisdictional. So you're out of luck by
16 pleading guilty. I don't know that they will, but at least
17 that could happen.

18 You're aware of that, Mr. Van Der End?

19 THE DEFENDANT: Yes. I'm aware of that.

20 THE COURT: It may be that the Second Circuit is going
21 to resolve this one way or the other before you even make your
22 appeal, before you're even sentenced. I guess we'll see.

23 I just want to make sure that you're aware that that
24 is at least a possibility. I don't want you to come back six
25 months from now and say, had I known that, I never would have

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1 pled guilty. I would have gone to trial.

2 Do you understand?

3 THE DEFENDANT: I understand.

4 THE COURT: Were there any other arguments on appeal,
5 Mr. Silverman, that you believe would have been preserved
6 beyond this guilty plea?

7 MR. SILVERMAN: No, your Honor.

8 THE COURT: Just that one.

9 Let me ask the government: Is there anything else you
10 would like me to inquire on before I formally have the plea
11 entered?

12 MR. SWERGOLD: No, your Honor.

13 THE COURT: So, Mr. Van Der End, could you just stand
14 now and tell me: How do you now plead to Counts One and Two of
15 the indictment? Guilty or not guilty?

16 THE DEFENDANT: Guilty, Your Honor.

17 THE COURT: Did you do the things you're charged with
18 in this indictment?

19 THE DEFENDANT: Yes.

20 THE COURT: Are you pleading guilty because you are
21 guilty?

22 THE DEFENDANT: Yes.

23 THE COURT: Are you pleading guilty voluntarily and of
24 your own free will?

25 THE DEFENDANT: Yes.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A. 066

1 THE COURT: Mr. Van Der End, because you acknowledge
2 that you're guilty, because your plea is entered knowingly and
3 voluntarily, because you know your rights, and because the plea
4 is supported by an independent basis for each of the elements I
5 talked about before, I accept your guilty plea, and I adjudge
6 you guilty on Counts One and Two of the indictment.

7 Have a seat.

8 So what we're going to do now I think is set a
9 sentencing date. Generally I would set that about three or
10 four months out. That seems like a long time. That's designed
11 to allow me to get some additional information.

12 One of the things that will happen in the interim is
13 the probation department, which is an arm of the Court, not the
14 government -- they will do an investigation, and they will
15 prepare a report. That report is referred to as a presentence
16 report or a PSR.

17 THE DEFENDANT: PSR.

18 THE COURT: The PSR is sometimes quite lengthy. It
19 might be 20 or 30 or 40 pages long. It will have a lot of
20 detail, a lot of information about you, a lot of information
21 about this crime or these crimes, much more than what we've
22 talked about here.

23 That information will be derived from a number of
24 sources, but mostly I think it's fair to say the probation
25 department will be interviewing people. They'll talk to the

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1 agents. They'll talk perhaps to the Coast Guard officers.
2 They'll talk to your family members and your employers.
3 They'll talk to you. You will be interviewed as part of this
4 process.

5 So I assume, Ms. Shellow, you and Mr. Silverman want
6 to be present for any interview?

7 MS. SHELLOW: Absolutely, Your Honor.

8 THE COURT: So I will direct that no interview should
9 take place unless you are present.

10 Once that interview takes place, Mr. Van Der End, I
11 will ask, of course, that you be truthful and complete in all
12 your answers to the probation officer and in all your
13 statements to the probation officer.

14 The probation officer works for me, as I said. So
15 treat them with the same respect that you treat me with. If
16 you were to make false statements to the probation officer,
17 that would be a crime. That would be the crime of obstruction
18 of justice. It might also result in additional consequences
19 under the guidelines in this case.

20 I have no reason to think that you will make any false
21 statements. I just say that so you will be aware of the need
22 to be complete and truthful in all your statements to the
23 probation officer.

24 Now, once the probation officer has completed that
25 report, that PSR, you'll get a chance to see it. You'll read

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1 it, along with your lawyers. If there is anything in that
2 report that is inaccurate, tell your attorneys. They will
3 promptly call the probation officer to say, hey, you got this
4 wrong and that wrong and whatever else.

5 The probation officer will then issue a second report,
6 the final report. That's the first one that will come to me.
7 You'll get a copy of it too. You should read it. If there's
8 anything in there that's incorrect, tell your lawyers.

9 Don't assume that it has incorporated your prior
10 changes. Don't assume that it's the same as before. Don't
11 assume anything. Read it carefully. Any changes that you have
12 will then be formally made to me in the form of objections by
13 your attorneys. The government will have the same opportunity.

14 I will then resolve any objections, if there are any.
15 I might do that by hearing testimony. Perhaps we'll have that
16 cooperating witness or others testify. I don't know.

17 Perhaps I'll review exhibits or photos or something.
18 Maybe I'll just have argument with the lawyers. Maybe it's not
19 so much a disagreement as to what the facts are as much as what
20 conclusions should be drawn from facts. Either way, I will
21 resolve whatever objections there are.

22 Now, in addition to that presentence report, I will
23 review sentencing submissions made by the lawyers. So I expect
24 your lawyers will make a submission or file a brief related to
25 sentencing on your behalf. Naturally, I will read that

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1 carefully. The government will have the same opportunity.
2 Naturally, I'll read that.

3 If there's anybody else who wants to write a letter to
4 me or make some kind of submission, that's fine. If you
5 yourself want to write a letter to me, that's fine. You're not
6 required to. You don't have to. If you want to, you're
7 welcome.

8 The only thing I would ask is that if you or any of
9 your friends or family members or anybody wants to write a
10 letter to me in connection with sentencing, have those letters
11 go to your attorneys first. They will collect them all. They
12 will attach them to their submission. I've found over the
13 years that that's the best way to ensure that I get everything
14 and that nothing slips through the cracks. Okay?

15 THE DEFENDANT: Preferable in English or any language?

16 THE COURT: If it's in another language, we'll get
17 interpreters. Don't worry about that. Whatever is the best
18 way to convey information. In any language, we've got
19 resources, and we'll get the translations.

20 Now, on the day of sentencing, we'll come back in
21 here. At that point, I will resolve any objections. I'll
22 review with you everything that I've received in connection
23 with sentencing.

24 That way you or your attorneys can say, oh, there was
25 another letter that you didn't mention, Judge. Then I can tell

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1 you, well, I didn't get it. Or yes, I overlooked it, but I
2 read it. Thank you.
3 I will then make my findings under the guidelines, and
4 then I will hear from the attorneys. I'll give them a chance
5 to further develop arguments that may have been in their papers
6 or make new arguments as they see fit. I may have some
7 questions as we go.
8 Once they have finished, I'll then give you an
9 opportunity to speak, if you'd like. You're not required to
10 speak, but you're welcome to, and, in fact, you have a right
11 to. So I'll give you that opportunity.
12 At the end of all of that, then finally, I will tell
13 you the sentence that I intend to impose, I'll explain my
14 reasons for it, I'll check with the lawyers to make sure I
15 haven't done something illegal. If not, then I will formally
16 impose sentence. So that's the basic drill.
17 Do you have any questions about any of that?
18 THE DEFENDANT: No. No questions.
19 THE COURT: Let's pick a date. Friday, September 8,
20 at 2:30. If that date changes, your attorneys will let you
21 know. In the meantime, obviously, stay in touch with your
22 attorneys because there's a lot to do. If at any point between
23 now and then you think you need to see me for whatever reason,
24 tell your lawyers. We can schedule something. It's not a
25 problem. Okay?

1 THE DEFENDANT: All right.
2 THE COURT: In the meantime, you'll remain in custody,
3 but I'm pretty confident whatever time you've spent in custody
4 will count towards your sentence. So you'll be getting credit
5 for it.
6 Is there anything else we should cover today?
7 MR. SWERGOLD: Not from the government.
8 THE COURT: From the defense?
9 MS. SHELLLOW: No. Thank you, your Honor.
10 THE COURT: So good luck to you then, Mr. Van Der End.
11 I will see you in a few months.
12 THE DEFENDANT: Thank you. See you too.
13 THE COURT: Thank you.
14 Let me thank the marshals. Let me thank the court
15 reporter.
16 (Adjourned)
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