

## 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

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: August 13, 2018

Decided: November 14, 2019)

Docket No. 17-2926

UNITED STATES OF AMERICA,

*Appellee,*

1

STEFAN VAN DER END, AKA STEFAN VAN  
DAM EASEL,

### *Defendant-Appellant.<sup>1</sup>*

Before: NEWMAN and POOLER, *Circuit Judges*, and COTE, *District Judge*.<sup>2</sup>

<sup>1</sup> The Clerk of the Court is directed to amend the caption as above.

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

Appeal from United States District Court for the Southern District of New York (Richard J. Sullivan, J.), convicting defendant Stefan Van Der End, after a trial, of guilty, of engaging in drug trafficking activity, and conspiring to do so, in violation of the Maritime Drug Law Enforcement Act (the “MDLEA”), 46 U.S.C. § 501 et seq. Because Van Der End has waived his Confrontation Clause and trial right challenges to his conviction by pleading guilty, and because the Due Process Clause does not require a nexus between the United States and the MDLEA violations that transpire on a vessel without nationality, we affirm the conviction.

Affirmed.

BENJAMIN SILVERMAN, Patel & Shellow LLP, New York, N.Y., for Defendant-Appellant.

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

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

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.

## 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).<sup>3</sup>

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

---

<sup>3</sup> 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. *Boikin 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.<sup>4</sup> 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

---

<sup>4</sup> 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

1 problem [and] is universally condemned"). In this context, that is all due process  
2 requires.

3 **CONCLUSION**

4 We have considered the remainder of Van Der End's arguments and find  
5 them to be without merit. For the foregoing reasons, we AFFIRM the judgment  
6 of the district court.

**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 22<sup>nd</sup> day of January, two thousand twenty.

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

---

United States of America,  
Appellee,

v.

Stefan Van Der End, AKA Stefan Van Dam Easel,  
Defendant - Appellant.

---

**ORDER**  
Docket No. 17-2926

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

  
Catherine O'Hagan Wolfe

---

\*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 & ORDERRICHARD 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.<sup>1</sup> 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

---

<sup>1</sup> 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*, 447 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

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

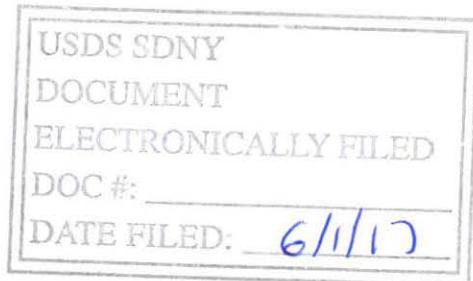
Accordingly, for the reasons set forth above, Defendants' motion to dismiss (Doc. Nos. 41, 45) is DENIED. The parties are reminded that Suarez's sentencing is scheduled to take place on September 6, 2017 at 10:00 a.m., and Van Der End's sentencing is scheduled to take place on September 8, 2017 at 2:30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

4 UNITED STATES OF AMERICA,

5 v. 16 CR 453 (RJS)

6 RICHARD DOW, et al.,

7 Defendants.

8 -----x

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

10 Before:

11 HON. RICHARD J. SULLIVAN,

12 District Judge

13 APPEARANCES

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

19 LONDON & ROBIN  
20 Attorneys for Defendant Suarez  
BY: IRA D. LONDON  
-AND-

21 MEREDITH STACY HELLER

22 PATEL & SHELLOW LLP  
23 Attorneys for Defendant Van Der End  
BY: JILL R. SHELLOW  
24 BENJAMIN ADAM SILVERMAN

25 ALSO PRESENT: PETER CALABRESE, PARALEGAL, UNITED STATES  
ATTORNEY'S OFFICE

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

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.

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

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  
Is this the same? When the Coast Guard comes

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

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

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

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

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

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?

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

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

H54YDOWH2 HEARING 9

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

H54YDOWH2 HEARING 10

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.

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

H54YDOWH2 HEARING 11

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

H54YDOWH2 HEARING 12

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

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

H54YDOWH2 HEARING 13  
 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. SHELLOW: 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. SHELLOW: 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. SHELLOW: Yes, but that's very compelling

H54YDOWH2 HEARING 14  
 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. SHELLOW: 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

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

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

H54YDOWH2 HEARING 15  
 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. SHELLOW: 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. SHELLOW: 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. SHELLOW: 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. SHELLOW: 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

H54YDOWH2 HEARING 16  
 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?

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

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

H54YDOWH2 HEARING 17

1 MS. SHELLOW: 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

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

H54YDOWH2 HEARING 18

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

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

H54YDOWH2 HEARING 19

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.

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

H54YDOWH2 HEARING 20

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

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

|           |   |    |
|-----------|---|----|
| H54YDOWH2 | HEARING   | 21 |
| 1         | do not require a nexus to the United States.                    |    |
| 2         | With respect to Al Kassar, the test in Al Kassar is             |    |
| 3         | that it has to be foreseeable to them and fair and reasonable   |    |
| 4         | that they're going to be prosecuted somewhere for their         |    |
| 5         | conduct.  |    |
| 6         | Clearly when you're on a boat with over a thousand              |    |
| 7         | kilograms of cocaine, the defendants know they're going to be   |    |
| 8         | prosecuted somewhere, especially when you have defendants here  |    |
| 9         | who are from countries, the Netherlands and Curacao, that have  |    |
| 10        | drug-trafficking laws.  |    |
| 11        | THE COURT: I think in some ways, more relevant                  |    |
| 12        | although not exactly analogous cases, Epskamp, which is a case  |    |
| 13        | that involved an airplane flying from the Dominican Republic to |    |
| 14        | the Netherlands or Belgium. Nonetheless, it was a U.S.-marked   |    |
| 15        | plane.  |    |
| 16        | The Second Circuit concluded that due process does not          |    |
| 17        | require that the defendants understand that they could be       |    |
| 18        | subject to criminal prosecution in the United States so long as |    |
| 19        | they could reasonably understand that their conduct was         |    |
| 20        | criminal and would subject them to prosecution somewhere.       |    |
| 21        | In light of the fact that the behavior was                      |    |
| 22        | self-evidently criminal, the due process challenge was rejected |    |
| 23        | in Epskamp. Again, it's not on all fours, but I think it's      |    |
| 24        | instructive. I'm going to deny the motion. I'm going to write   |    |
| 25        | on that more too, just so the record is clear. For purposes of  |    |

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

|           |  |    |
|-----------|--|----|
| H54YDOWH2 | HEARING  | 22 |
| 1         | the trial, we have to move. So the motion is denied.           |    |
| 2         | Here is the predicament we're in right now. Off the            |    |
| 3         | record.  |    |
| 4         | (Recess)   |    |
| 5         | THE COURT: Thank you for accommodating me. As I                |    |
| 6         | said, we have a number of motions in limine. So I want to get  |    |
| 7         | to those now.  |    |
| 8         | The motions in limine that the government has brought          |    |
| 9         | include a motion that the defendants be precluded from arguing |    |
| 10        | to the jury that the Sunshine was not subject to United States |    |
| 11        | jurisdiction; second, that the defendants should be precluded  |    |
| 12        | from arguing that they didn't know the Sunshine was subject to |    |
| 13        | U.S. jurisdiction; and third, that evidence of Mr. Van Der     |    |
| 14        | End's prior narcotics convictions should be admissible under   |    |
| 15        | 404(b). So let's take them one at a time.                      |    |
| 16        | With respect to arguing the jurisdictional issue, does         |    |
| 17        | anybody intend to argue that at this point?                    |    |
| 18        | MR. SILVERMAN: Your Honor, we don't intend to argue            |    |
| 19        | Mr. Van Der End's knowledge.                                   |    |
| 20        | THE COURT: The second point you're not arguing, but            |    |
| 21        | you do intend to argue the first point?                        |    |
| 22        | MR. SILVERMAN: Right. We put this in our motion to             |    |
| 23        | dismiss as well. We believe that the question of statelessness |    |
| 24        | is disputed. We believe that it should be submitted to the     |    |
| 25        | jury.  |    |

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

|           |   |    |
|-----------|---|----|
| H54YDOWH2 | HEARING   | 23 |
| 1         | The Ninth Circuit has so held. The two other courts,            |    |
| 2         | the First Circuit and the D.C. Circuit, have not ruled on the   |    |
| 3         | issue, but they suggest that there might be a Sixth Amendment   |    |
| 4         | problem with not submitting statelessness to the jury. We       |    |
| 5         | think it should be submitted to the jury. We do not think that  |    |
| 6         | Mr. Van Der End's knowledge as to jurisdictional, where he was, |    |
| 7         | is relevant to that inquiry.                                    |    |
| 8         | THE COURT: Ms. Heller or Mr. London.                            |    |
| 9         | MS. HELLER: We agree. The issue is really whether or            |    |
| 10        | not the vessel was stateless.                                   |    |
| 11        | THE COURT: I don't know who is arguing this for the             |    |
| 12        | government.   |    |
| 13        | MR. SWERGOLD: Your Honor, again, with reliance on the           |    |
| 14        | Ninth Circuit, the Ninth Circuit has actually said that in      |    |
| 15        | cases where there is no factual dispute about statelessness,    |    |
| 16        | it's not an issue for the jury. Here there is no dispute about  |    |
| 17        | statelessness because the MDLEA provides a very clear framework |    |
| 18        | for determining whether a vessel is stateless.                  |    |
| 19        | In this case, the one that comes into play is did the           |    |
| 20        | master or person in charge of the vessel make a claim of        |    |
| 21        | nationality or registry for the vessel. The answer is yes.      |    |
| 22        | There is no dispute that Mr. Dow claimed that the               |    |
| 23        | vessel was registered with Saint Vincent and the Grenadines.    |    |
| 24        | Then the vessel is considered stateless if the flag, the        |    |
| 25        | claimed flag state nation, rejects that claim of registry,      |    |

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

|           |   |    |
|-----------|---|----|
| H54YDOWH2 | HEARING   | 24 |
| 1         | which is exactly what happened here.                            |    |
| 2         | The MDLEA also provides that the certification from             |    |
| 3         | the State Department is conclusive proof of what the foreign    |    |
| 4         | state's response is. Here we've produced the State Department   |    |
| 5         | certification. We've also produced the underlying emails        |    |
| 6         | between the Coast Guard command and Saint Vincent and the       |    |
| 7         | Grenadines' Guard that showed that when asked whether the       |    |
| 8         | Sunshine was registered with them, Saint Vincent and the        |    |
| 9         | Grenadines said, this vessel is no longer registered to us. It  |    |
| 10        | is not subject to our jurisdiction.                             |    |
| 11        | That is all that the statute requires. The statute              |    |
| 12        | also goes so far as to say that this is not an element of the   |    |
| 13        | offense. It does not go to the jury. It is a preliminary        |    |
| 14        | decision for the judge.   |    |
| 15        | That's really driven by the diplomatic policy reasons           |    |
| 16        | underlying the MDLEA which is that Congress, in passing the     |    |
| 17        | MDLEA and its predecessor statutes, was seeking to expand the   |    |
| 18        | United States' ability to police the high seas so it didn't     |    |
| 19        | turn into a highway for unchecked drug trafficking.             |    |
| 20        | The U.S. has bilateral agreements with many nations on          |    |
| 21        | specifically maritime counter drug enforcement operations,      |    |
| 22        | including Saint Vincent and the Grenadines.                     |    |
| 23        | So the purpose of this subject to the jurisdiction of           |    |
| 24        | the United States is to make sure that the United States is not |    |
| 25        | trampling on the rights of other nations, and that's why the    |    |

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

H54YDOWH2 HEARING 25  
 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

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

H54YDOWH2 HEARING 27  
 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 quickly.

25 THE COURT: Okay.

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

H54YDOWH2 HEARING 26  
 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

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

H54YDOWH2 HEARING 27  
 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 quickly.

25 THE COURT: Okay.

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

H54YDOWH2 HEARING 28  
 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 --

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

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,

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

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

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 Shallow 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. Shallow'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

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

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

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

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

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

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

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.

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

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

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

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

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

H54YDOWH2 HEARING 37

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 --

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

H54YDOWH2 HEARING 38

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

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

H54YDOWH2 HEARING 39

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

H54YDOWH2 HEARING 40

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

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

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

H54YDOWH2 HEARING 41  
 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. SHELLOW: 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. SHELLOW: 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. SHELLOW: 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?

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

H54YDOWH2 HEARING 43  
 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. SHELLOW: 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. Shallow 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. Shallow 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

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

H54YDOWH2 HEARING 42  
 1 MS. SHELLOW: Correct.  
 2 THE COURT: You're objecting to what?  
 3 MS. SHELLOW: 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. SHELLOW: 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. SHELLOW: 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. SHELLOW: No. I'm opposed to this conduct.

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

H54YDOWH2 HEARING 43  
 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. SHELLOW: 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. Shallow 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. Shallow 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

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

H54YDOWH2 HEARING 45

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

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

H54YDOWH2 HEARING 46

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

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

H54YDOWH2 HEARING 47

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.

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

H54YDOWH2 HEARING 48

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)

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

H54YDOWH2 HEARING

49

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.

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

H54YDOWH2 HEARING

50

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.

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

H54YDOWH2 HEARING

51

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

H54YDOWH2 HEARING

52

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

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

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

H54YDOWH2 HEARING 53  
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. SHELLOW: 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. SHELLOW: 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?

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

H54YDOWH2 HEARING 54  
1 MS. SHELLOW: 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. SHELLOW: 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. SHELLOW: Perhaps.  
13 THE COURT: Let's talk about the prejudice that comes  
14 from that late production.  
15 MS. SHELLOW: 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

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

H54YDOWH2 HEARING 55  
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. SHELLOW: 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. Shellow?  
19 MS. HOULE: It's not clear to me exactly what  
20 Ms. Shellow 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

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

H54YDOWH2 HEARING 56  
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. SHELLOW: 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. SHELLOW: 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. SHELLOW: The objection is that on their face, the

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

H54YDOWH2 HEARING 57  
 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

H54YDOWH2 HEARING 58  
 1 certificate or somebody else?  
 2       MS. SHELLOW: 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

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

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

H54YDOWH2 HEARING 59  
 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. Shellow, 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?

H54YDOWH2 HEARING 60  
 1       MS. SHELLOW: 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

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

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

H54YDOWH2 HEARING 61  
 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. SHELLOW: 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

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

H54YDOWH2 HEARING 62  
 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. SHELLOW: 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

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

H54YDOWH2 HEARING 63  
 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. SHELLOW: That's correct.

9 THE COURT: Anything else?

10 MS. SHELLOW: 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. SHELLOW: 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.

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

H54YDOWH2 HEARING 64  
 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. SHELLOW: If your Honor is available, we would  
 18 probably prefer your Honor.

19 THE COURT: That goes without saying. Sure.

20 MS. SHELLOW: 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. SHELLOW: Thank you very much.

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

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

1 H54YDOWH2 HEARING 65  
 2 me?  
 3 MS. HELLER: Not to my knowledge right now,  
 4 your Honor.  
 5 THE COURT: Is there anything else we need to cover?  
 6 MS. HELLER: No.  
 7 THE COURT: Government, anything else?  
 8 MR. SWERGOLD: Your Honor, just one brief point. I  
 9 believe that now with only one defendant, he should be  
 10 allocuted --  
 11 THE COURT: Do you want to keep this courtroom if it's  
 12 only one defendant? It's tricky for two because the sightlines  
 13 are what are bad. With one defendant generally it's not a  
 14 problem.  
 15 MR. SWERGOLD: Your Honor, we defer to whatever the  
 16 Court wants.  
 17 THE COURT: We'll nail that down.  
 18 MR. LONDON: There may be no defendants. My client is  
 19 reconsidering his position, but he hasn't made a decision as of  
 20 right now.  
 21 THE COURT: Let me know as soon as possible obviously.  
 22 The government has to decide I guess what position they're  
 23 taking with respect to acceptance of responsibility and things  
 24 like that under the guidelines. Not that it's binding on me,  
 25 but it's a consideration. I don't know if there is a plea  
 agreement or not, but I assume a Pimentel letter is in order.

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

1 H54YDOWH2 HEARING 67  
 2 That's your call. Don't feel that you have to do one or the  
 3 other because I'm ready, and I've blocked out the time. It  
 4 doesn't matter. That's irrelevant.  
 5 If you think it's in your interests to do this, to  
 6 plead guilty, then do that. If you think it's in your  
 7 interests to go forward with trial, you should do that.  
 8 MR. SWERGOLD: Your Honor, one other thing we just  
 9 want to put on the record is that it's the government's  
 10 position that all of the issues that the defendants have now  
 11 raised pretrial, by pleading guilty, they will waive their  
 12 right to appeal that.  
 13 THE COURT: We'll go over that in a guilty plea, if  
 14 there are guilty pleas. That's correct.  
 15 MR. SWERGOLD: Since they're thinking about it now,  
 16 I'm just making sure that's out there.  
 17 MS. SHELLOW: That is not our position, your Honor.  
 18 THE COURT: With respect to maybe a jurisdictional  
 19 argument. You ought to resolve this. Take a look at Epskamp  
 20 and Watson because those are relevant cases where people  
 21 thought they were preserving jurisdictional arguments, and they  
 22 were not reserved for appeal.  
 23 MR. SWERGOLD: There are also MDLEA cases, including  
 24 Pinto-Mejia and Henriquez which were conditional guilty pleas  
 25 in the Second Circuit on subject matter jurisdiction issues  
 where that's the only reason why the Second Circuit addressed

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

1 H54YDOWH2 HEARING 68  
 2 MR. SWERGOLD: That's correct. There are no plea  
 3 agreements. What I was going to say, your Honor, was that for  
 4 the defendants that remain who go to trial, that they be  
 5 allocated on the plea offers that they've rejected.  
 6 THE COURT: Let's hold off on that.  
 7 MR. SWERGOLD: The other thing we want to note is that  
 8 at trial the government is prepared to prove that there were  
 9 approximately 1,300 kilos of coke on the boat.  
 10 THE COURT: If they plead guilty and there's a dispute  
 11 about weight, then there would be a hearing, and we should do  
 12 that sooner rather than later since you've got witnesses here.  
 13 MR. SWERGOLD: Exactly, your Honor.  
 14 THE COURT: Why don't you talk to counsel about that  
 15 because I'm open to doing the Fatico hearing next week when we  
 16 would have been doing the trial if there is no trial. If there  
 17 is a trial --  
 18 Mr. Suarez and Mr. Van Der End, both of you should  
 19 understand that you have a right to go to trial, and we're  
 20 ready. You have a right to plead guilty if you want.  
 21 It's your decision, and I'm sure your lawyers are  
 22 advising you, and they may have a point of view, and you should  
 23 listen carefully to it, but it's your decision. If you wish to  
 24 go to trial, obviously, we respect that. We're ready, and  
 25 we'll go.  
 If you wish to plead guilty, we'll respect that too.

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

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.

10 Before:

11 HON. RICHARD J. SULLIVAN,

12 District Judge

13 APPEARANCES

14 JOON H. KIM  
15 Acting United States Attorney for the  
Southern District of New York

16 JASON M. SWERGOLD

17 AMANDA LEIGH HOULE

18 EDWARD YOUNG KYU KIM

19 Assistant United States Attorneys

20 PATEL & SHEOLLOW LLP  
Attorneys for Defendant

21 BY: JILL R. SHEOLLOW

22 ALSO PRESENT: PETER CALABRESE, PARALEGAL, UNITED STATES  
ATTORNEY'S OFFICE

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

(Case called)

2 THE COURT: Have a seat. Thank you.

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

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

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

8 THE COURT: For the defendant.

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

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

16 Is that correct, Ms. Shellow?

17 MS. SHEOLLOW: That is correct, your Honor.

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

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

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

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

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

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

16 THE DEFENDANT: I understand.

17 THE COURT: Do you have any questions so far?

18 THE DEFENDANT: No questions so far.

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

21 (Defendant sworn)

22 THE COURT: Please have a seat.

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

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

25 THE COURT: I'm not really pronouncing your name

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

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

3 THE DEFENDANT: Stefan is my first name. Van Der End.  
4 If you translate it, it's from the end.

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

8 How old are you, Mr. Van Der End?

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

10 THE COURT: How far did you go in school?

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

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

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

19 MS. SHEOLLOW: Conscription, draft.

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

22 That was where? In the Netherlands?

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

25 THE COURT: I see. You obviously speak English very

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

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

H54ENDP Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 9 of 54 9  
 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. SHELLOW: 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

H54ENDP Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 11 of 54 11  
 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

H54ENDP Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 10 of 54 10  
 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

H54ENDP Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 12 of 54 12  
 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

H54XENDP  
Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 13 of 54 13  
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

H54XENDP  
Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 14 of 54 14  
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

H54XENDP  
Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 15 of 54 15  
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. Shallow 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

H54XENDP  
Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 16 of 54 16  
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

H54XENDP Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 17 of 54 17  
1 crime. That's going to require you to give up your right not  
2 to incriminate yourself.

3 Are you prepared to do that?

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

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

8 THE DEFENDANT: No questions, your Honor.

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

11 THE DEFENDANT: Yes.

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

15 THE DEFENDANT: Yes. That's right.

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

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

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

1 Do you understand that?

2 THE DEFENDANT: Yes. I understand that.

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

8 Do you understand that?

9 THE DEFENDANT: Yes.

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

14 THE DEFENDANT: Right.

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

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

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

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

1 talk about it. Okay?

2 THE DEFENDANT: Yes.

3 THE COURT: Great. Thanks.

4 Mr. Swergold.

5 MR. SWERGOLD: Thank you, your Honor.

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

12 Second, that the defendant intentionally and knowingly  
13 became a member of that conspiracy, knowingly associated  
14 himself with other coconspirators and participated in the  
15 conspiracy, again, to distribute and possess with intent to  
16 distribute cocaine on board a vessel subject to the  
17 jurisdiction of the United States.

18 Count Two, which is the substantive offense, has two  
19 elements: First, that the defendant distributed or possessed  
20 with the intent to distribute 5 kilograms or more of a  
21 controlled substance, here, cocaine, on board a vessel subject  
22 to the jurisdiction of the United States. Second, that the  
23 defendant did so unlawfully, intentionally, and knowingly.

24 With respect to both counts, the government would have  
25 to prove by a preponderance of the evidence that venue is

1 proper in the Southern District of New York.

2 THE COURT: That venue would be proper by virtue of  
3 where Mr. Van Der End first appeared in the United States. Is  
4 that correct?

5 MR. SWERGOLD: Under the MDLEA, venue is proper in  
6 either the District of Columbia or the first district where an  
7 individual arrives in the United States.

8 THE COURT: You would proffer that that's the Southern  
9 District of New York. He first arrived at the Westchester  
10 Airport?

11 MR. SWERGOLD: That's correct.

12 THE COURT: From where? Guantanamo Bay?

13 MR. SWERGOLD: He was brought from the cutter to  
14 Guantanamo Bay. From there he was flown to the Bahamas. From  
15 the Bahamas, he was flown directly to Westchester County  
16 Airport.

17 THE COURT: Mr. Van Der End, do you have any questions  
18 about any of those elements that Mr. Swergold summarized?

19 THE DEFENDANT: No.

20 THE COURT: And you've discussed those before with  
21 your attorneys?

22 THE DEFENDANT: Yes.

23 THE COURT: So let me tell you what the maximum  
24 penalties are for each of these. Each of these crimes carries  
25 a maximum term of imprisonment of life, as well as a mandatory

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

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

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

SOUTHERN DISTRICT REPORTERS, P.C.  
(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 anywhere else? There was talk this morning about prior convictions in France and the Netherlands.

Are you serving currently any other sentence anywhere 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

## A. 060

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

SOUTHERN DISTRICT REPORTERS, P.C.  
 (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

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

SOUTHERN DISTRICT REPORTERS, P.C.  
(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

SOUTHERN DISTRICT REPORTERS, P.C.  
(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

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 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

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. SHELOW: 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

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

Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 37 of 54 37  
 1 prevail as a matter of law or any other reason why Mr. Van Der  
 2 End should not be allowed to plead guilty here today?  
 3  
 4 MS. SHELOW: No. I'm not aware of any reason why he  
 should not be allowed to plead guilty.  
 5  
 6 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  
 7 guilty of these crimes. You can stay seated. That's fine.  
 8  
 9 MS. SHELOW: Your Honor, Mr. Van Der End and I  
 prepared a brief written statement. I'd like him to be able to  
 10 read it just for convenience.  
 11  
 12 THE COURT: That's fine. There's nothing wrong with  
 that. That's not unusual. I just want to make sure that the  
 13 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  
 14 of reading what somebody slipped under your nose.  
 15  
 16 THE DEFENDANT: No.  
 17  
 18 THE COURT: That's fine. You can go ahead and read  
 it.  
 19  
 20 THE DEFENDANT: I knew that there were more than 5  
 kilos on board the Sunshine. We were in international waters,  
 21 and I agreed with others to deliver the cocaine to Canada.  
 22  
 23 THE COURT: When did this take place?  
 24 THE DEFENDANT: That was May I would say.  
 25 THE COURT: May of 2016?  
 THE DEFENDANT: Yes. Exactly a year ago basically.

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

Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 38 of 54 38  
 1 We left the 15th I would say.  
 2  
 3 THE COURT: So you're charged in the first count with  
 4 a conspiracy, which is an agreement. Just agreeing to do this  
 would be enough, even if it ultimately didn't come to fruition.  
 5 You have to have agreed with at least one or more persons who  
 6 is not a law enforcement officer to carry out this illegal  
 7 scheme.  
 8  
 9 Did you have that agreement with at least one other  
 person?  
 10  
 11 THE DEFENDANT: At least one person, yes.  
 12  
 13 THE COURT: When you did this, did you know that what  
 you were doing was wrong and illegal?  
 14  
 15 THE DEFENDANT: Yes.  
 16  
 17 THE COURT: I think that probably covers both counts.  
 18 The first count is the conspiracy, which is merely the  
 19 agreement. The second count is the actual substantive count of  
 20 actually possessing the drugs with an intent to distribute them  
 21 while on board a vessel. Otherwise, it's basically again you  
 have to have the intent. You have to know what you were  
 22 doing was wrong and illegal. You have to have understood what  
 you were doing at the time.  
 23  
 24 THE DEFENDANT: Yes.  
 25  
 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

Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 39 of 54 39  
 1  
 2 THE COURT: Mr. Swergold, is there anything else you  
 would like me to elicit or ask related to the elements?  
 3  
 4 MR. SWERGOLD: No, your Honor.  
 5  
 6 THE COURT: Ms. Shellow, is that a satisfactory  
 allocution to your mind?  
 7  
 8 MS. SHELOW: It is satisfactory. Thank you.  
 9  
 10 THE COURT: I think so too. Have a seat. Thank you.  
 11  
 12 THE DEFENDANT: Thank you.  
 13  
 14 THE COURT: I'll ask Mr. Swergold to summarize the  
 government's evidence if the case were to go to trial.  
 15  
 16 Mr. Swergold.  
 17  
 18 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  
 19 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.  
 20  
 21 THE COURT: Ms. Shellow, you don't disagree with that  
 characterization of the evidence?  
 22  
 23 MS. SHELOW: No. I don't disagree with it.  
 24  
 25 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

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

Case 1:16-cr-00453-RJS Document 99 Filed 06/05/17 Page 40 of 54 40  
 1 facts. There was some suggestion of that today, Mr. Swergold.  
 2  
 3 Are you aware of any issues that would need to be  
 resolved by a separate hearing?  
 4  
 5 MR. SWERGOLD: Without knowing what the defendant's  
 position is, your Honor, we would seek to prove that the full  
 6 weight was over 1,300 kilos. Obviously, we put enhancements  
 7 into our Pimentel letter that includes the fact that he was a  
 8 navigator. It talks about the destruction of evidence.  
 9  
 10 I don't know whether the defendant is going to contest  
 any of those. Our position is that we have witnesses who can  
 11 be flown in from the Coast Guard here who are deploying at the  
 12 end of next week. Since everybody has already blocked off the  
 13 time, and if there are going to be disputes, we can perhaps  
 14 start the Fatico.  
 15  
 16 THE COURT: Ms. Shellow, do you intend to dispute the  
 quantity of drugs, which is more than 450 kilograms?  
 17  
 18 MS. SHELOW: No, your Honor. I'm not going to  
 dispute the quantity.  
 19  
 20 THE COURT: How about the other enhancements that the  
 government is seeking, including an enhancement for obstruction  
 21 of justice by destroying evidence or the enhancement for being  
 22 the navigator of a vessel carrying controlled substances?  
 23  
 24 MS. SHELOW: Your Honor, I'm not sure we're going to  
 take a position that agrees with the navigator enhancement.  
 25 Although I don't believe that needs to be addressed at a Fatico

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

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.

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

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.

SOUTHERN DISTRICT REPORTERS, P.C.  
(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

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.

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

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

1 MS. SHELOW: 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 Fatico 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. SHELOW: No.

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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?

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

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. SHEOLLOW: 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)

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