No. 19-8832

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

STEFAN VAN DER END,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

JILL R. SHELLOW
LAW OFFICES OF
JILL R. SHELLOW
80 Broad Street, Suite 1900
New York, New York 10004
jrs@shellowlaw.com
(212) 792-4911
Bar No.: 201957

BENJAMIN SILVERMAN
LAW OFFICES OF
BENJAMIN SILVERMAN
224 West 30th Street, Suite 302
New York, NY 10001
benjamin@bsivlermanlaw.com
(212) 203-8074
Bar No.: 312681

Attorneys for Petitioner Stefan Van Der End

TABLE OF CONTENTS

Page

I. The MDLEA provides that a ship's occupants are "subject to the jurisdiction of the United States" upon a finding that the vessel was stateless……..…….2

II. The MDLEA violates the Fifth and Sixth Amendments by withholding from jury consideration the offense's jurisdictional element: statelessness..…….…..4

III. This case presents an opportunity for the Court to address this important and frequently litigated question……8

TABLE OF AUTHORITIES

Cases

Page(s)

Alleyne v. United States, 570 U.S. 99 (2013)…..……4, 5, 6, 7

Bradshaw v. Stumpf, 545 U.S. 175 (2005)…….……2, 8

Brady v. United States, 397 U.S. 742 (1970)…..……9

Class v. United States, 138 S. Ct. 798 (2018).…..……11

Ford v. United States, 273 U.S. 593 (1927)……..……..7

Hurst v. Florida, 136 S. Ct. 616 (2016)……..9

Jones v. United States, 526 U.S. 227 (1999).…….……5

Mathis v. United States, 136 S. Ct. 2243 (2016)……6, 7

Neder v. United States, 527 U.S. 1 (1999).……...……..5

Rehaif v. United States, 139 S. Ct. 2191 (2019).…….……5

United States v. Booker, 543 U.S. 220 (2005)……4

United States v. De La Garza, 516 F.3d 1266 (11th Cir. 2008)…….……11

United States v. Gaudin, 515 U.S. 506 (1995)……4,

United States v. Gonzalez, 311 F.3d 440 (1st Cir. 2002)……..……4, 6, 7, 11

United States v. Miranda, 780 F.3d 1185 (D.C. Cir. 2015)……...……3, 6, 7

United States v. Moreno-Morillo, 334 F.3d 819 (9th Cir. 2003)……..……11

United States v. O'Brien, 560 U.S. 218 (2010)……...……4

United States v. Perlaza, 439 F.3d 1149 (9th Cir. 2006)……...……3, 6, 7

United States v. Taylor, 136 S. Ct. 2074 (2016).……5

United States v. Tinoco, 304 F.3d 1088 (11th Cir. 2002)……6

United States v. Van Der End, 943 F.3d 98 (2d Cir. 2019)……..……6, 10

United States v. Vilches-Navarrete, 523 F.3d 1 (1st Cir. 2008)……..……6

Statutes

18 U.S.C. § 922(g)…...…….……..5

18 U.S.C. § 1343…….…….……..5

18 U.S.C. § 1951……..……..5

18 U.S.C. § 2119……..……..5

46 U.S.C. § 70502(d)(1).……..……..3, 7

46 U.S.C. § 70504(a).…….……3

No. 19-8832

IN THE SUPREME COURT OF THE UNITED STATES

STEFAN VAN DER END, PETITIONER

v.

UNITED STATES OF AMERICA,

REPLY BRIEF FOR PETITIONER

This case presents the open and frequently litigated question of whether the provision in the Maritime Drug Law Enforcement Act (MDLEA) that takes away from the jury a question essential to conviction – whether a vessel was "stateless" and therefore "subject to the jurisdiction of the United States" – violates the due process and jury trial clauses of the Fifth and Sixth Amendments.

The government acknowledges a split among the courts of appeal. Opp. 16 ("[T]he courts of appeals have taken different approaches to the submission of statelessness issues under the MDLEA to juries."). It nonetheless urges this Court to let the issue to fester because it does not view any case as a proper vehicle for review. The government is mistaken.

Petitioner's case presents the question squarely. The parties disputed whether the vessel was stateless. The district judge refused to allow the

jurisdictional element to be heard by a jury and instead made findings to resolve the factual dispute in favor of the government. After informing Petitioner that the crime to which he pled guilty did *not* include, as an element, the question of the vessel's nationality, the district court accepted Petitioner's guilty plea. Because a plea to a criminal offense is valid only if the defendant is apprised of all the offense's elements prior to the plea, *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005), the correctness of the Second Circuit's holding that Petitioner entered a valid plea necessarily turns on the legal question presented for this Court to review: whether the MDLEA's jurisdictional inquiry is to be treated as an element of the offense.

I. The MDLEA provides that a ship's occupants are "subject to the jurisdiction of the United States" upon a finding that the vessel was stateless.

The MDLEA provides three factual scenarios from which the government can choose to establish that a vessel was "stateless" and its occupants therefore "subject to the jurisdiction of the United States":

> (A) 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;
>
> (B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States

> authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and
>
> (C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

46 U.S.C. § 70502(d)(1).

The MDLEA, however, bars a jury from this factfinding role. It instead provides that "[j]urisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense" and that "[j]urisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge." 46 U.S.C. § 70504(a).

This provision runs afoul of the due process and jury trial clauses of the Fifth and Sixth Amendments. The statute's constitutional infirmity has been explicitly found by the Ninth Circuit, *see United States v. Perlaza*, 439 F.3d 1149, 1166-1167 (9th Cir. 2006) ("When that jurisdictional inquiry turns on factual issue[s], . . . in this case, whether the Go–Fast was stateless, the jurisdictional inquiry *must* be resolved by a jury" notwithstanding statutory mandate to the contrary) (internal quotation marks omitted) (emphasis in original), and noted by others, *e.g.*, *United States v. Miranda*, 780 F.3d 1185, 1195-1196 (D.C. Cir. 2015) ("To be sure, allocation of the issue to the court rather than the jury gives rise to a

possible Sixth Amendment claim (regardless of whether the issue goes to subject-matter jurisdiction), but appellants raise no such claim here.") (Srinivasan, J.); *United States v. Gonzalez*, 311 F.3d 440, 444 (1st Cir. 2002) ("Certainly by providing for a judge to decide the vessel issue rather than jury, Congress has introduced a possible Sixth Amendment objection to the statute.") (Boudin, J.).

II. The MDLEA violates the Fifth and Sixth Amendments by withholding from jury consideration the offense's jurisdictional element: statelessness.

The government's contention that the jurisdictional element may be decided by a judge as a pretrial "question of law" overlooks this Court's directive that "every fact which 'is in law essential to the punishment sought to be inflicted'" be treated as an "element" and therefore submitted to a jury to decide. *Alleyne v. United States*, 570 U.S. 99, 109 (2013) (quoting *United States v. O'Brien*, 560 U.S. 218 (2010)). By labeling the jurisdictional inquiry a "preliminary question of law," the MDLEA contravenes this constitutional guarantee because it instructs judges to find facts that are necessary prerequisites to guilt and criminal punishment. *United States v. Booker*, 543 U.S. 220, 230 (2005) ("It is equally clear that the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime which he is charged.") (quoting *United*

States v. Gaudin, 515 U.S. 506, 511 (1995)).

The MDLEA contrasts with every other federal crime in which the jurisdictional question is an element for the jury to decide. These jurisdictional elements directed to the jury include, for example, whether a Hobbs Act robbery affected interstate commerce;[1] a felon was in possession of a firearm transported in interstate commerce;[2] a carjacked vehicle travelled in interstate commerce;[3] and a fraudulent scheme used the interstate wires.[4] If Congress were to rewrite the Hobbs Act to make the interstate commerce inquiry "a preliminary question of law for the court to decide," the resulting statute would contravene *Alleyne*. So too the MDLEA's instruction that district courts determine before trial whether a vessel was stateless – the fact rendering it "subject to the jurisdiction of the United States" – violates the Fifth and Sixth Amendments. *See Gaudin*, 515 U.S. at 511.

The government does not address numerous lower appellate court decisions identifying the constitutional infirmity in the MDLEA raised in this petition,

---

[1] 18 U.S.C. § 1951; *United States v. Taylor*, 136 S. Ct. 2074, 2078 (2016).

[2] 18 U.S.C. § 922(g); *Rehaif v. United States*, 139 S. Ct. 2191, 2205 (2019).

[3] 18 U.S.C. § 2119; *Jones v. United States*, 526 U.S. 227, 232 (1999).

[4] 18 U.S.C. § 1343; *Neder v. United States*, 527 U.S. 1, 20 (1999).

including those by Chief Judge Srinivasan and Judge Boudin. *Miranda*, 780 F.3d at 1195-96 (Srinivasan, J.); *Gonzalez*, 311 F.3d at 444 (Boudin, J.).[5] The government instead analogizes the MDLEA's jurisdictional element to a trial judge's ability to resolve matters that are *not* elements of a criminal offense such as speedy trial and double jeopardy disputes. Opp. 15. The government's comparisons are inapt. Factual findings concerning double jeopardy and speedy trial issues are not necessary prerequisites to inflicting criminal punishment. They are not therefore "elements" that need to be resolved by a jury. *Alleyne*, 570 U.S. at 109; *see also Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) ("'Elements' are the 'constituent parts' of a crime's legal definition – the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant.") (citations omitted). The MDLEA's jurisdictional element, by contrast, falls firmly within *Alleyne* and *Mathis*: the

[5] The First and Eleventh Circuits hold that judges may determine pretrial whether a vessel was stateless, and the government acknowledges the circuit split. Opp. 16; *Compare United States v. Vilches-Navarrete*, 523 F.3d 1, 19-20 (1st Cir. 2008) (statelessness may be determined by court) *and United States v. Tinoco*, 304 F.3d 1088, 1109-1110 (11th Cir. 2002) (same) *and Perlaza*, 439 F.3d at 1166-67 (factual disputes about statelessness must be submitted to jury) *with United States v. Van Der End*, 943 F.3d 98, 104 (2d Cir. 2019) (advising district courts to submit the issue of jurisdiction over the vessel to the jury while holding plea valid where district judge informed defendant that statelessness is *not* an element of offense).

MDLEA requires resolving facts – whether a vessel was stateless because it fit within one of three scenarios set forth in § 70502(d) – as a prerequisite to a finding of guilt and infliction of punishment.

The government relies on *Ford v. United States*, 273 U.S. 593 (1927) (cited Opp. 13), which does not support its position. *Ford* addressed the *legal* question of whether the location where a ship was intercepted fell within U.S. territorial waters. *Id.* at 602-603. Determining whether certain waters are within U.S. territorial limits requires reading international treaties and maps; the inquiry is akin to a judicially noticed legislative fact. It is entirely different from resolving *factual* questions about a ship's registered nationality or whether and how the ship's master responded to a Coast Guard inquiry as required by the MDLEA, 46 U.S.C. § 70502(d)(1). *See generally Perlaza*, 349 F.3d at 1167, 1181.

In short, this Court has long established that "[i]f a fact was by law essential to the penalty, it was an element of the offense" and that the Fifth and Sixth Amendments require all elements of an offense submitted to a jury to decide. *Alleyne*, 570 U.S. at 109; *Mathis*, 136 S. Ct. at 2248. The MDLEA's directive that the jurisdictional facts be determined pretrial by the court contravenes these constitutional guarantees, as recognized by appellate judges around the country. *Perlaza*, 349 F.3d at 1167, 1181; *Miranda*, 780 F.3d at 1195-96; *Gonzalez*, 311

F.3d at 444.

III. This case presents an opportunity for the Court to address this important and frequently litigated question.

This case presents an unambiguous opportunity for the Court to settle the debate over the MDLEA's jurisdictional element. The government claimed that Petitioner was apprehended in international waters aboard a sailboat that was "stateless" because, when asked by the United States Coast Guard, the captain claimed Saint Vincent & the Grenadines ("SVG") registration that SVG later reported as lapsed. Pet. App. 3-4. Petitioner disputed the government's contentions. Pet. App. 42-44. The vessel's nationality was Petitioner's only trial defense.

The government has it backwards when it suggests that Petitioner's guilty plea renders this case a poor vehicle for the Court's consideration of the issue. The government's position overlooks the operative legal doctrine: a plea is only valid if the defendant is informed of all the offense's elements. *Bradshaw*, 545 U.S at 183 ("Where a defendant pleads guilty to a crime without having been informed of the crime's elements, . . . the plea is invalid."); Pet. 15-16. Here, Petitioner entered his plea only after the district judge advised him that the vessel's nationality was *not* an element of the offense. Pet. App. 25, 44-45, 58. Thus, the question of waiver

and the validity of Petitioner's plea are the vehicle presenting the legal question for review. Determining the validity of Petitioner's plea requires a conclusion about the elements of a MDLEA offense.

The government is mistaken insofar as it suggests (Opp. 18) that the Court would need to resolve a preliminary waiver question before addressing the merits in this case. On the contrary, the question of whether the waiver was knowing and voluntary turns on the legal question of whether the ship's nationality is an element of the offense. Petitioner's decision to plead guilty was predicated on the district court's decision that the vessel's statelessness would not be submitted to a jury. The district court was wrong, and thus Petitioner's guilty plea was invalid. The government's reliance on *Brady v. United States*, 397 U.S. 742, 757 (1970) (cited at Opp. 10, 12), is misplaced. *Brady* found a plea knowing and voluntary even though the statutory penalties changed after the plea was entered. *Id. Brady* did not address a plea entered when the defendant was misinformed of the offense's elements. The question here is not what waiver entails (*see* Opp. 10-11 (citing *Hurst v. Florida*, 136 S. Ct. 616, 623 (2016)), but rather whether the plea was valid.

The government is also mistaken when it contends that this is an issue "on which the court of appeals has not passed." Opp. 18. The court of appeals'

conclusion that Petitioner's plea was valid necessarily determined that Petitioner was accurately informed of each of the offense's elements. Pet. 15-16. But on the day that he pled guilty, Petitioner was told by the district judge that the ship's nationality was not an element of the offense and would not be submitted to a jury. Pet. App. 46.[6] Thus, the Second Circuit now holds that statelessness is not an element of a MDLEA offense – even as it "advises" district courts to submit the question to the jury. *Van Der End*, 943 F.3d at 104.

The government turns the law on its head when it suggests that Petitioner's routine Rule 11 plea allocution renders this case improper for review. Opp. 12. Following the ordinary practice for a criminal plea, the district court advised Petitioner that he was waiving many non-jurisdictional legal arguments (although the district court noted that Petitioner preserved his challenges insofar as they impacted the court's subject matter jurisdiction, Pet. App. 65). But any appellate waiver is necessarily invalid if the plea is invalid. The district court's advisement that a knowing and voluntary plea waives appellate arguments does not eliminate an appeal of whether the plea is itself knowing and voluntary.

---

[6] In addition to creating a split with the Ninth Circuit, the Second Circuit acknowledged that its legal conclusion was tenuous by "caution[ing] that district courts would be well advised to submit the issue of jurisdiction over the vessel to the jury." *Van Der End*, 943 F.3d at 104 (internal quotation marks omitted).

The government cites a string of lower court cases finding this issue waived by entry of a guilty plea, but those cases are inapplicable. First, none of these cases address whether the plea discussed was knowing and voluntary, which turns on the question of the offense's elements. *See* Opp. 11 (citing *United States v. Gonzalez*, 311 F.3d 440, 444 (1st Cir. 2002) (not addressing voluntariness of plea); *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008) (elements of the offense never litigated below; contrasts with this case in which the question was litigated and the district judge informed Petitioner that the jurisdictional inquiry is not an element)); *see also United States v. Moreno-Morillo*, 334 F.3d 819, 825 (9th Cir. 2003) (same).

Second, all the cases cited by the government predate this Court's decision in *Class v. United States*, 138 S. Ct. 798 (2018). *Class* holds that a criminal defendant's entry of a guilty plea does not waive on appeal his claim that the government lacked the power "to constitutionally prosecute him." *Id.* at 805 (internal quotation marks omitted). Under *Class*, the question of whether the court had subject matter jurisdiction – and whether its determination of that jurisdiction was procedurally permissible under the Fifth and Sixth Amendments – is not waived by entry of a guilty plea.

The government notably does not identify any case, real or hypothetical, that

it believes would be a better vehicle for review of this important legal question on which the lower courts are split, and this Court should look no further.

CONCLUSION

This case presents the unresolved question of law at the heart of a nationwide proliferation of litigation about the constitutionality of a federal criminal statute: Is the MDLEA's jurisdictional inquiry an "element" of the offense? The government acknowledges the courts of appeal are split and this case provides a clear opportunity for this Court to resolve the question.

Dated: New York, New York
September 30, 2020

Respectfully submitted,

/s/ Benjamin Silverman

JILL R. SHELLOW
Law Offices of Jill R. Shellow
80 Broad Street, Suite 1900
New York, NY 10004
(212) 792-4911
Bar No.: 201957

BENJAMIN SILVERMAN
Attorney at Law
224 West 30th St., Suite 302
New York, NY 10001
(212) 203-8074
Bar No.: 312681