Nos. 19-8889 and 19-8910

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IN THE SUPREME COURT OF THE UNITED STATES

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HECTOR GUAGUA-ALARCON, PETITIONER

v.

UNITED STATES OF AMERICA

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TRINITY ROLANDO CABEZAS-MONTANO, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

Petitioners were convicted of committing drug-related offenses while on board a vessel in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq. The questions presented are:

1. Whether the admission of evidence about petitioners' silence during the Coast Guard's right-of-visit boarding of their vessel violated the Fifth Amendment or contravened United States v. Hale, 422 U.S. 171 (1975).

2. Whether the MDLEA is unconstitutional on the theory that it (a) violates the Sixth Amendment by specifying that the "[j]urisdiction of the United States" is "not an element of an offense" but a "preliminary question[] of law to be determined solely by the trial judge," 46 U.S.C. 70504(a), or (b) violates the Sixth Amendment or Article III by specifying that a foreign nation's response to a claim of registry made by the master of a vessel "is proved conclusively by certification of the Secretary of State" or his designee, 46 U.S.C. 70502(c)(2).

3. Whether a three-judge panel of the court of appeals violated Article III by concluding that it was bound to adhere to circuit precedent.

4. Whether the district court plainly erred in denying petitioner Hector Guagua-Alarcon's motion for a downward variance.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Cabezas-Montano, No. 16-cr-10050 (Sept. 26, 2017)

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

United States v. Palacios-Solis, No. 17-14294 (Jan. 30, 2020)

Supreme Court of the United States:

Palacios-Solis v. United States, cert. denied, No. 19-1195 (June 29, 2020)

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A103) is reported at 949 F.3d 567.[1] The order of the district court (Pet. App. A104) is unreported. The report and recommendation of the magistrate judge (Pet. App. A105-A108) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 30, 2020. The petition for a writ of certiorari in No. 19-8889

[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 19-8889.

was filed on June 26, 2020. The petition for a writ of certiorari in No. 19-8910 was filed on June 29, 2020 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners Hector Guagua-Alarcon and Trinity Rolando Cabezas-Montano were convicted on one count of conspiring to possess with intent to distribute while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70506(b), and one count of possessing with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States in violation of 46 U.S.C. 70503(a)(1). Pet. App. A8. The district court sentenced each petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Guagua-Alarcon Judgment 2-3; Cabezas-Montano Judgment 2-3. The court of appeals affirmed. Pet. App. A7-A103.

1. On the night of October 24, 2016, United States Coast Guard personnel in a marine patrol aircraft observed petitioners and a third confederate, Adalberto Frickson Palacios-Solis, aboard a go-fast vessel traveling northbound approximately 200 miles off the coast of Central America. Pet. App. A9. The aircraft notified a Coast Guard cutter, which dispatched a helicopter and two smaller boats to intercept the target vessel. Id. at A10-A11.

After a lengthy chase, during which the crew of the go-fast vessel jettisoned packages and repeatedly disregarded orders and warning shots from the Coast Guard, one of the Coast Guard boats reached the go-fast vessel. Pet. App. A11-A14. The go-fast vessel had no navigation lights and was more than 200 miles from the nearest land mass. Id. at A14. The Coast Guard officers announced over a loudspeaker, in both English and Spanish, "United States Coast Guard, put your hands in the air and move towards the front of the vessel." Ibid. The crew complied. Ibid.

The Coast Guard officers received authorization to conduct a right-of-visit boarding to determine the vessel's nationality. Pet. App. A14. The boarding team observed that the vessel was not flying a flag and bore no other indicia of nationality. Ibid. The team, which included a Spanish translator, asked twice if anyone wished to make a claim of nationality for the vessel, but the crew did not respond. Pet. App. A14-A15. The boarding team then asked them to identify the master of the vessel, but again, they did not respond. Id. at A15. When asked a second time to identify the master, petitioner Guagua-Alarcon and Palacios-Solis pointed at petitioner Cabezas-Montano, who in turn pointed at Palacios-Solis. Ibid. The team asked petitioner Cabezas-Montano and Palacios-Solis once more if either was the master, but they merely continued pointing at one another. Ibid.

The boarding team then asked about the vessel's last port of call. Pet. App. A15. Palacios-Solis responded that it was Manta,

Ecuador. Ibid. When asked when the passengers had left Ecuador, Palacios-Solis responded that he and his confederates had left on a fishing trip but had been lost at sea for 32 days. Ibid. They showed no signs of malnourishment, dehydration, or extended exposure to the elements, however, and did not appear happy to see the Coast Guard arrive. Id. at A15, A21.

The boarding team relayed to the Coast Guard cutter that the last port of call was in Ecuador, and that the vessel bore an Ecuadorian maker's mark. Pet. App. A15-A16. The Coast Guard contacted Ecuador to obtain a statement of no objection that would permit the Coast Guard to conduct a full law-enforcement boarding. Id. at A16. Ecuador provided a statement of no objection, after which the boarding team detained the crew, transferred them to the Coast Guard boat, and then conducted a full boarding. Id. at A16-A17.

Swab samples from the go-fast vessel's surface and one of the crew member's hands contained trace amounts of cocaine, and the team found, among other things, a buoy and black line matching those attached to a bale of cocaine that the Coast Guard had recovered during the chase, as well as packing tape identical to the tape that was wrapped around the cocaine bale. Pet. App. A16-A17. The next day, after conducting a drift analysis, Coast Guard officers recovered 24 additional bales of high-purity cocaine, along with buoys equipped with GPS trackers. Pet. App. A17-A18. The 25 recovered bales collectively weighed 614 kilograms, which

would amount to a wholesale value of more than $10 million. Id. at A18.

2. In December 2016, a federal grand jury in the Southern District of Florida charged petitioners and Palacios-Solis with counts of conspiring to possess with intent to distribute, and possessing with intent to distribute, five kilograms or more of cocaine while on a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq. Pet. App. A22; Indictment 1-2. The MDLEA defines a "vessel subject to the jurisdiction of the United States" to include "a vessel without nationality," 46 U.S.C. 70502(c)(1)(A), which is in turn defined to include 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," 46 U.S.C. 70502d)(1)(B). The MDLEA further provides that the "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).

A first jury trial resulted in a mistrial when the jury was unable to reach a unanimous verdict. Pet. App. A23. In advance of a second trial, petitioners moved to dismiss the indictment for lack of jurisdiction. Pet. App. A23 & n.6; see D. Ct. Doc. 64

(Apr. 5, 2017). As relevant here, petitioners argued that the MDLEA violates the Fifth and Sixth Amendments by permitting the district court, rather than the jury, to determine jurisdiction. Pet. App. A23. They further argued that the admission of a certification of the Secretary of State to support jurisdiction, as contemplated by 46 U.S.C. 70502(d)(2), would violate the Sixth Amendment's Confrontation Clause and constitute inadmissible hearsay. Pet. App. A24. Following a hearing, a magistrate judge recommended that the district court deny the motion because, as relevant here, circuit precedent foreclosed petitioners' arguments and any factual argument concerning a State Department certification was premature because no such certification had been presented. Id. at A24, A107. The district court adopted the recommendation and denied the motion. Id. at A24-A25, A104.

Palacio-Solis thereafter moved in limine to exclude, among other things, any evidence or argument concerning the defendants' silence before they were provided warnings under Miranda v. Arizona, 384 U.S. 436 (1966). Pet. App. A25; D. Ct. Doc. 87, at 1 (July 12, 2017). In particular, Palacio-Solis's motion -- which petitioner Guagua-Alarcon adopted -- sought to exclude evidence of the defendants' silence while on board the Coast Guard cutter. Pet. App. A25; D. Ct. Doc. 87, at 2. The motion acknowledged, however, that the argument it raised was foreclosed by United States v. Wilchcombe, 838 F.3d 1179 (11th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017). Pet. App. A25; D. Ct. Doc. 87, at 3. In

response to the motion, the government stated that it did not intend to include in its case-in-chief any silence or statements other than the defendants' responses to questions during the initial right-of-visit boarding of the go-fast vessel to establish its nationality. Pet. App. A25; D. Ct. Doc. 96, at 1-2 (July 14, 2017). But the government reserved the right to use any other silence or statements during the defense case and in rebuttal. Pet. App. A25. The district court denied the motion as moot, observing that the government intended to introduce only responses to right-of-visit questions, and finding those responses admissible. Id. at A25-A26.

Following the government's case-in-chief, petitioner Guagua-Alarcon moved for a judgment of acquittal on several grounds, including that the district court lacked subject matter jurisdiction. Pet. App. A27-A28; D. Ct. Doc. 173, at 145-146 (Nov. 6, 2017). Petitioner Cabezas-Montano also moved for a judgment of acquittal, but not on jurisdictional grounds. D. Ct. Doc. 173, at 143-144. The district court denied the motions. Pet. App. A28.

The jury found the defendants guilty on both charged counts. Pet. App. A28. Palacios-Solis filed a post-trial motion for judgment of acquittal, arguing, among other things, that the government at trial had failed to establish subject matter jurisdiction under 46 U.S.C. 70502(c)(1)(A) and (d)(1)(B). Pet. App. A28. The district court denied the motion, finding that because no defendant had claimed to be the master of the vessel or

claimed any nationality, and because the Coast Guard could not confirm the vessel's nationality, the vessel was without nationality and therefore subject to the MDLEA. Id. at A28-A29. The district court sentenced petitioners each to 240 months of imprisonment, to be followed by five years of supervised release. Id. at A68; Guagua-Alarcon Judgment 2-3; Cabezas-Montano Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A7-A89. As relevant here, the court of appeals first explained that circuit precedent foreclosed petitioners' argument that the MDLEA's jurisdictional requirement must be submitted to a jury for proof beyond a reasonable doubt. Id. at A32 (citing, inter alia, United States v. Tinoco, 304 F.3d 1088 (11th Cir. 2002), cert. denied, 538 U.S. 909 (2003); United States v. Campbell, 743 F.3d 802 (11th Cir.), cert. denied, 574 U.S. 1025 (2014)). The court further observed that it had no need to reach petitioners' arguments regarding the constitutionality of the MDLEA provisions regarding proof of vessel status through certifications from the Secretary of State because no such certification was submitted in this case. Pet. App. A33 & n.11. And the court of appeals rejected petitioner Guagua-Alarcon's argument that the government had failed to meet the MDLEA's statutory requirements for jurisdiction. Id. at A34-A38. Given the evidence at trial that the vessel was not flying a flag and that none of the defendants responded when asked if they wanted to make a claim of nationality for their vessel, the

court of appeals determined that the vessel was stateless for purposes of 46 U.S.C. 70502(c)(1)(A) and (d)(1)(B). Pet. App. A35-A38.

The court of appeals separately rejected Palacios-Solis's claim that the district court erred in denying his motion in limine to preclude the government from referring to the defendants' post-arrest, pre-Miranda silence. Pet. App. A48-A49. The court of appeals observed that the claim was foreclosed by circuit precedent, which had determined that the government may use a defendant's post-arrest, pre-Miranda silence in its case-in-chief to prove the defendant's guilt. Ibid. (citing Wilchcombe, 838 F.3d at 1190-1191; United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991)).

Finally, the court of appeals rejected petitioners' unpreserved procedural claim that the district court penalized them for exercising their right to trial in denying their motions for a downward variance. Pet. App. A82-A85. The court of appeals observed that the district court had addressed that right only in connection with Palacios-Solis's motion for a downward variance. Id. at A83. And the court of appeals explained that, in any event, even if the district court had referred to petitioners' decision to go to trial, the record as a whole -- including the district court's observation that "every defendant has an absolute right to go to trial and exercise it" -- confirmed that the district court did not err, plainly or otherwise. Id. at A84-A85.

Judge Rosenbaum concurred. Pet. App. A90-A103. She expressed disagreement with circuit precedent about a defendant's post-arrest, pre-Miranda silence, id. at A98-A101, but explained that the use of the defendants' silence in this case did not "affect the outcome," id. at A101, given -- among other things -- the "torrent of other evidence the government presented," id. at A103.

ARGUMENT

Petitioners Cabezas-Montano (19-8910 Pet. 6-9) and Guagua-Alarcon (19-8889 Pet. 13-19) both contend that the district court erred in permitting testimony about their silence during the right-of-visit boarding of their vessel. This Court recently denied a petition for a writ of certiorari raising a similar claim advanced by petitioners' co-defendant, Palacios-Solis v. United States, No. 19-1195 (June 29, 2020), and should do the same here. Petitioner Guagua-Alarcon also contends (19-8889 Pet. 5-13, 19-30) that the MDLEA violates the Sixth Amendment and Article III of the Constitution; that the court of appeals itself violated Article III by adhering to the rule that a three-judge panel generally may not overrule circuit precedent; and that the district court violated the Fifth and Sixth Amendments by denying his motion for a downward variance at sentencing. The court of appeals correctly rejected his MDLEA and sentencing claims, and it did not address his panel-precedent claim because he failed to press it before that court. The court of appeals correctly affirmed petitioners'

convictions, and the petitions for writs of certiorari should be denied.

1. A writ of certiorari is not warranted to review petitioners' claims (19-8889 Pet. 13-17; 19-8910 Pet. 6-9) concerning the admission of evidence about their silence during the Coast Guard's right-of-visit boarding of their vessel.

a. Petitioner Cabezas-Montano contends (19-8910 Pet. 6-9) that trial testimony about his silence during the right-of-visit questioning violated his Fifth Amendment privilege against self-incrimination. The court of appeals rejected that argument in affirming Palacios-Solis's conviction, Pet. App. A48-A49, and this Court recently denied Palacios-Solis's petition for a writ of certiorari raising the same claim, see Palacios-Solis v. United States, supra (No. 19-1195). For the reasons stated in the government's brief in opposition to Palacios-Solis's petition, further review is unwarranted here. See Br. in Opp. at 9-18, Palacios-Solis, supra (No. 19-1195).[2] In addition, this case would be a particularly poor vehicle for further review because petitioner Cabezas-Montano, unlike Palacios-Solis, did not raise that claim in the district court or on appeal. Accordingly, the claim would be reviewable, if at all, only for plain error. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 732-736 (1993).

[2] We have served petitioners with copies of the government's brief in opposition in Palacios-Solis. That brief is also available on this Court's electronic docket.

b. Petitioner Guagua-Alarcon similarly challenges the use of his silence, but he contends (19-8889 Pet. 13-14) that this Court need not address the constitutional issue and should instead hold that his testimony was inadmissible based on a "federal evidentiary rule" purportedly established by United States v. Hale, 422 U.S. 171 (1975). Although he joined in Palacios-Solis's constitutional challenge in the district court, see Pet. App. A25; D. Ct. Doc. 87, at 2-3, Guagua-Alarcon did not raise his separate non-constitutional claim in the district court or on appeal. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." United States v. Williams, 504 U.S. 36, 41 (1992) (citation and internal quotation marks omitted). And the claim would be reviewable, if at all, only for plain error. Fed. R. Crim. P. 52(b); Olano, 507 U.S. at 732-736.

Although those factors alone warrant denial of certiorari, the claim lacks merit in any event. This Court held in Hale that common-law evidentiary principles precluded cross-examination of a defendant about his post-arrest, post-Miranda silence. 422 U.S. at 176-177, 181. But, rather than "forbid[] using at trial for any purpose the defendant's silence while in custody," 19-8889 Pet. 14, the Court balanced the probative value and risk of prejudice in the particular "circumstances of th[at] case" as a matter of standard case-specific evidentiary admissibility, Hale, 422 U.S. at 181; see id. at 177, 179-180. And in assessing the

probative value of the defendant's silence, the Court emphasized that he was subject to "custodial interrogation" and "had just been given the Miranda warnings," such that he was "particularly aware of his right to remain silent and the fact that anything he said could be used against him." Id. at 177. Here, by contrast, the defendants were not subject to custodial interrogation, see Br. in Opp. at 16-17, Palacios-Solis, supra (No. 19-1195), and had not received Miranda warnings, Pet. App. A48-A49.

2. A writ of certiorari is also unwarranted with respect to petitioner Guagua-Alarcon's claims (19-8889 Pet. 5-13) that the MDLEA is unconstitutional.

a. Petitioner Guagua-Alarcon first contends (19-8889 Pet. 8-10) that the MDLEA violates the Sixth Amendment by providing that the United States' jurisdiction over a vessel is a "preliminary question[] of law to be determined solely by the trial judge" and "is not an element of an offense," 46 U.S.C. 70504(a). The court of appeals correctly rejected that claim, and despite some disagreement in the courts of appeals, this Court has repeatedly declined to review the issue.[3] The same result is warranted here.

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[3] See Perez-Cruz v. United States, 140 S. Ct. 2520 (2020) (No. 19-7484); Barrera-Montes v. United States, 140 S. Ct. 2519 (2020) (No. 19-6901); Vargas v. United States, 140 S. Ct. 895 (2020) (No. 19-6039); Valencia v. United States, 140 S. Ct. 631 (2019) (No. 18-9328); Mejia v. United States, 139 S. Ct. 593 (2018) (No. 18-5702); Carrasquilla-Lombada v. United States, 139 S. Ct. 480 (2018) (No. 18-5534); Cruickshank v. United States, 139 S. Ct.

The Constitution affords "a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511 (1995). That principle does not apply here, however, because the MDLEA expressly provides that "[j]urisdiction of the United States with respect to a vessel subject to [the MDLEA] is not an element of an offense" and is instead a "preliminary question[] of law to be determined solely by the trial judge." 46 U.S.C. 70504(a). Accordingly, a defendant has no constitutional right to have a jury decide that issue. See, e.g., United States v. Vilches-Navarrete, 523 F.3d 1, 20 (1st Cir.) ("This issue is not an element of the crime * * * and may be decided by a judge."), cert. denied, 555 U.S. 897 (2008); United States v. Tinoco, 304 F.3d 1088, 1109-1110 (11th Cir. 2002) ("[The MDLEA's] jurisdictional requirement is not an essential ingredient or an essential element of the MDLEA substantive offense, and, as a result, it does not have to be submitted to the jury for proof beyond a reasonable doubt."), cert. denied, 538 U.S. 909 (2003).

Moreover, the question whether a vessel is subject to the jurisdiction of the United States "does not raise factual questions that traditionally would have been treated as elements of an

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96 (2018) (No. 17-8953); Campbell v. United States, 574 U.S. 1025 (2014) (No. 13-10246); Tam Fuk Yuk, 565 U.S. 1203 (2012) (No. 11-6422); Sanchez-Salazar v. United States, 556 U.S. 1185 (2009) (No. 08-8036); Aguilar v. United States, 556 U.S. 1184 (2009) (No. 08-7048); Moreno v. United States, 549 U.S. 1343 (2007) (No. 06-8332); Estupinan v. United States, 549 U.S. 1267 (2007) (No. 06-8104).

offense under the common law." Tinoco, 304 F.3d at 1108. In Ford v. United States, 273 U.S. 593 (1927), the Court rejected an argument that the location of a ship's seizure must be submitted to a jury where that issue "did not affect the question of the defendants' guilt or innocence," but instead "only affected the right of the court to hold [them] for trial." Id. at 606. Here, as in Ford, whether the United States has jurisdiction over the vessel does not pertain to Guagua-Alarcon's participation in, or blameworthiness for, his drug-related offenses, but instead to the authority to try him for those offenses. Tinoco, 304 F.3d at 1108-1109 (explaining that the MDLEA's jurisdictional determination "does not go to the actus reus, causation, or the mens rea of the defendant"; nor does it "affect the defendant's blameworthiness or culpability"). "Congress inserted the requirement that a vessel be subject to the jurisdiction of the United States into the statute as a matter of diplomatic comity," not to define the defendant's culpability. Vilches-Navarrete, 523 F.3d at 22 (Lynch, J., opinion of the court and concurring in part).

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

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

As petitioner Guagua-Alarcon notes (19-8889 Pet. 8), the courts of appeals have taken different approaches to the submission of jurisdictional issues under the MDLEA to juries. In addition to the court below, the First Circuit has upheld the constitutionality of submitting the jurisdictional issue to a judge. See Vilches-Navarrete, 523 F.3d at 19-23; Tinoco, 304 F.3d at 1107-1112 (Lynch, J., opinion of the court and concurring in part). The Ninth Circuit agrees that the jurisdictional issue may be submitted to a judge when it poses only a question of law, but has concluded that, when the issue depends on a "disputed factual question," that question must be submitted to a jury. United States v. Perlaza, 439 F.3d 1149, 1165 (2006); see id. at 1164-1168; cf. United States v. Zakharov, 468 F.3d 1171, 1176 (9th Cir. 2006) (finding that the jurisdictional issue could be submitted to the judge in that case because there was "no factual question pertaining to statutory jurisdiction for the jury to decide"), cert. denied, 550 U.S. 927 (2007).[4]

[4] Contrary to petitioner Guagua-Alarcon's suggestion (19-8889 Pet. 8), neither United States v. Miranda, 780 F.3d 1185 (D.C.

This case does not squarely implicate that disagreement. The Ninth Circuit has required the submission of the jurisdictional issue to the jury only where the issue depends on the resolution of a "disputed factual question." Perlaza, 439 F.3d at 1165. And the Ninth Circuit applied that requirement in a context involving conflicting evidence about whether the vessel at issue was stateless. See id. at 1165-1166. In this case, in contrast, the court of appeals found no conflicting evidence on any issue of material fact. The court of appeals determined that jurisdiction was proper under 46 U.S.C. 70502(c)(1)(A) and 70502(d)(1)(b), Pet. App. A35, which allow jurisdiction over a vessel for which "the master or individual in charge fails * * * to make a claim of nationality or registry," 46 U.S.C. 70502(d)(1)(b). Although petitioner Guagua-Alarcon alleged on appeal that he and his confederates "verbally claimed Ecuadorian nationality for their vessel," the court of appeals found no "record evidence" that "any defendant claimed a nationality in response to the [Coast Guard] boarding team's questions." Pet. App. A36. Accordingly, this

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Cir. 2015), nor United States v. Van Der End, 943 F.3d 98 (2d Cir. 2019), petition for cert. pending, No. 19-8832 (filed June 18, 2020), decided the constitutional question at issue here. See Miranda, 780 F.3d at 1195-1196 ("[A]llocation of the [jurisdictional] issue to the court rather than the jury gives rise to a possible Sixth Amendment claim * * * but appellants raise no such claim here."); Van Der End, 943 F.3d at 104 (noting that the MDLEA's jurisdictional provision "might be stricken as violative of a criminal defendant's right to a jury trial" but rejecting that argument because the defendant waived his right to a jury trial by pleading guilty).

case does not present a circumstance involving contested evidence of the sort the Ninth Circuit might require submitting to a jury.

b. Petitioner Guagua-Alarcon also contends (19-8889 Pet. 10-13) that the MDLEA violates Article III by allowing certain facts regarding whether a vessel is subject to the jurisdiction of the United States to be proved conclusively by certification of the Secretary of State or his designee. The court of appeals declined to address this contention because "the district court did not rely on a Secretary of State certification in finding that the defendants' vessel was subject to the jurisdiction of the United States." Pet. App. A34 n.11. Guagua-Alarcon therefore lacks any basis to challenge the MDLEA provisions that implicate certification, and no sound basis exists for this Court to address the issue. See Cutter, 544 U.S. at 718 n.7 ("[W]e are a court of review, not of first view.").

In any event, Guagua-Alarcon's Article III challenge lacks merit. The relevant portion of the MDLEA specifies that a court may exercise jurisdiction when the master "makes a claim of registry" and the nation whose registry is claimed either denies the claim, 46 U.S.C. 70502(d)(1)(A), or does not affirmatively and unequivocally assert that the vessel is of its nationality, 46 U.S.C. 70502(d)(1)(C). The statute then provides that a foreign nation's "response * * * to a claim of registry under paragraph (1)(A) or (C) * * * is proved conclusively by certification of the Secretary of State or the Secretary's designee." 46 U.S.C.

70502(d)(2).[5] Contrary to Guagua-Alarcon's contention (19-8889 Pet. 10-13), these provisions do not trench on the judicial power. The certification process simply provides a way for the Executive Branch to inform courts that, as a matter of international relations, the vessel is one that the relevant countries treat as stateless and that the exercise of United States jurisdiction is therefore appropriate. See Tinoco, 304 F.3d at 1109 (noting that the MDLEA's statutory jurisdictional requirement "is meant to bear only on the diplomatic relations between the United States and foreign governments"). As the Eleventh Circuit has explained, "[n]egotiation with a foreign nation for permission to impose United States law in that nation's territory [is] not an inherently judicial function." United States v. Rojas, 53 F.3d 1212, 1215, cert. denied, 516 U.S. 976 (1995). And although the MDLEA provides that a foreign nation's response to a claim of registry made by the master of a vessel "is 'proved conclusively' by certification, nothing in th[at] provision deprives the district court of its power to determine whether the MDLEA's jurisdictional requirements have been met." United States v. Mejia, 734 Fed. Appx. 731, 734-735 (11th Cir.) (per curiam), cert. denied, 139 S. Ct. 593 (2018).

Moreover, Guagua-Alarcon has failed to identify any conflict in the courts of appeals, and this Court has repeatedly declined

[5] The MDLEA also provides that a foreign nation's consent or waiver to the enforcement of United States law by the United States under 46 U.S.C. 70502(c)(1)(C) or (E) is proved conclusively by the certification of the Secretary of State or the Secretary's designee. 46 U.S.C. 70502(c)(2)(B).

to review petitions for writs of certiorari raising this and similar questions, see Barrera-Montes, supra (No. 19-6901); Mejia, supra(No. 18-5702); Tam Fuk Yuk, supra (No. 11-6422); Brant-Epigmelio v. United States, 565 U.S. 1203 (2012) (No. 11-6306). It should follow the same course here.

3. Petitioner Guagua-Alarcon next contends (19-8889 Pet. 17-26) that the court of appeals violated Article III by adhering to the rule that a three-judge panel generally may not overrule circuit precedent. This Court recently denied a petition for a writ of certiorari raising a similar question, Orozco-Madrigal v. United States, 138 S. Ct. 982 (2018) (No. 17-6802), and the same result is warranted here.

a. Petitioner Guagua-Alarcon asserts (19-8889 Pet. 22-23) that judges who treat decisions of their own circuit as binding "abdicate their Article III jurisdiction" to "decide," rather than merely "rule on" individual cases. But, under well-established principles of stare decisis, the applicable law for district courts and three-judge panels includes circuit precedent. A defendant who believes that the governing precedent was wrongly decided is free to challenge it before the en banc court of appeals, which is in turn free to overrule circuit precedent for any reason -- including based on any novel arguments the defendant may raise. And contrary to petitioner Guagua-Alarcon's suggestion (id. at 23), federal judges often must "withhold [their] own judgment in deference to another's," including when lower courts are

constrained to follow precedents of this Court. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).[6]

b. Petitioner Guagua-Alarcon has not identified any decision, by any court, considering the arguments he now advances. Nor does he identify any decision recognizing any disagreement on these issues among the courts of appeals. Instead, he contends (19-8889 Pet. 25-26) that the Seventh Circuit applies a more permissive standard than other courts of appeals, in that a panel of the Seventh Circuit will give "fair consideration to any substantial argument that a litigant makes for overruling a previous decision." United States v. Reyes-Hernandez, 624 F.3d 405, 412 (7th Cir. 2010) (citation omitted).

As an initial matter, petitioner Guagua-Alarcon has not shown that this formulation differs in substance from the rule applied

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[6] Guagua-Alarcon additionally contends (19-8889 Pet. 23-25) that treating circuit precedent as binding denies litigants due process and equal protection of the law. That claim is not encompassed within the question presented and therefore is not properly at issue. See Wood v. Allen, 558 U.S. 290, 304 (2010). And even if it were, this Court recently denied a petition for a writ of certiorari raising the same issue, see Jackson v. United States, 138 S. Ct. 1326 (2018) (No. 17-6914). In any event, the court of appeals' rule does not deny litigants due process or equal protection. While this Court has held that, in some circumstances, it violates the Due Process Clause to treat a judgment in earlier litigation as binding on nonparties as a matter of claim or issue preclusion, Taylor v. Sturgell, 553 U.S. 880, 896-898 (2008), it carefully distinguished the application of those preclusion doctrines (which may raise due process concerns) from the application of ordinary principles of "stare decisis" (which does not), id. at 903; see South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-168 (1999). As noted in the text, an appellant who disagrees with circuit precedent may seek en banc review.

in other courts of appeals. Even a panel of the Seventh Circuit must give "considerable weight" to prior decisions of that court "unless and until other developments such as a decision of a higher court or a statutory overruling undermine them." United States v. Jackson, 865 F.3d 946, 953 (7th Cir. 2017) (citation omitted), cert. granted, vacated, and remanded on other grounds, 138 S. Ct. 1983 (2018). Moreover, a panel of the Seventh Circuit is "bound by recent precedent with substantially similar facts when governing Supreme Court precedent has yet to address the matter." Id. at 954 (citing Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1066-1067 (7th Cir. 2000)).

In any event, even if the Seventh Circuit has adopted a materially different standard governing the circumstances in which en banc consideration is necessary to overrule circuit precedent, this Court's intervention would not be required. This Court has recognized that the "courts of appeals have significant authority to fashion rules to govern their own procedures." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993). And Federal Rule of Appellate Procedure 47 reinforces that the courts of appeals may adopt differing local rules and internal operating procedures so long as those rules and procedures are consistent with applicable federal law.

c. Moreover, this case would not be an appropriate vehicle in which to consider the panel-precedent question for at least three reasons.

First, petitioner Guagua-Alarcon did not raise his current arguments below. Although he urged the Eleventh Circuit not to follow its precedent, see Guagua-Alarcon C.A. Br. 21-23, he did not contend that the Eleventh Circuit's rule governing circuit precedent violated his constitutional rights. He also did not seek to challenge that rule by filing a petition for rehearing en banc. The court of appeals therefore had no opportunity to address his present contentions. As previously noted, this Court's "traditional rule" "precludes a grant of certiorari" where, as here, "'the question presented was not pressed or passed upon below.'" Williams, 504 U.S. at 41 (citation omitted).

Second, this case does not implicate petitioner Guagua-Alarcon's concern (19-8889 Pet. 17) that the Eleventh Circuit's approach precludes panels from considering "novel and persuasive" arguments. Petitioner Guagua-Alarcon specifically contends (id. at 17) that the panel in this case "refused to consider [his] argument, never before addressed in the circuit, that the MDLEA's jurisdictional provision is inconsistent with Apprendi [v. New Jersey, 530 U.S. 466 (2000),] and its progeny." In fact, in rejecting petitioner Guagua-Alarcon's argument, the court of appeals cited multiple decisions addressing that argument. Pet. App. A32 (citing Tinoco, 304 F.3d at 1109-1112; United States v. Cruickshank, 837 F.3d 1182, 1192 (11th Cir. 2016), cert. denied, 137 S. Ct. 1435 (2017)).

Third, petitioner Guagua-Alarcon would not be entitled to relief even if he prevailed on the question presented. Had the panel revisited its precedents in light of Guagua-Alarcon's arguments concerning the MDLEA's jurisdictional provisions, it would have reached the same result, for the reasons set forth above. See pp. 13-19, supra.

4. Finally, petitioner Guagua-Alarcon contends (19-8889 Pet. 26-30) that the district court erred by denying his motion for a downward variance solely because he exercised his right to stand trial. As the court of appeals explained, however, the district court did not mention that petitioner Guagua-Alarcon exercised his right to trial in denying his motion. Pet. App. A83. Instead, the district court rejected his argument that he was just a "little guy[]" in a larger operation; observed that the potentially large rewards of trafficking undermined deterrence; noted that substantial penalties reflected the harm on society wrought by drug offenses; and found that petitioner Guagua-Alarcon was an essential member of the conspiracy. Ibid. The record therefore does not indicate that the district court even "considered" the fact that Guagua-Alarcon stood trial rather than pleading guilty, 19-8889 Pet. 27, let alone resolved his motion on that basis alone, see id. at 29-30.

As the court of appeals observed, the district court did remark, in connection with Palacios-Solis's motion for a downward variance, that if it sentenced defendants to the statutory-minimum

term of imprisonment "every time," then every defendant would want to "roll the dice" and go to trial. Pet. App A84. However, the district court did not refer to Guagua-Alarcon in making these comments, and in any event acknowledged every defendant's "absolute right to go to trial." Ibid. The court of appeals therefore correctly determined that "the record shows no error regarding the district court's denial of [Guagua-Alarcon's] downward-variance motion[], let alone any plain error affecting [his] substantial rights." Id. at A83. Petitioner Guagua-Alarcon provides no basis to disturb that finding, or reason for this Court to review his fact-bound sentencing claim.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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