No. 19-8889

In the
Supreme Court of the United States of America

HECTOR GUAGUA-ALARCON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Petitioner's Reply to the United States' Brief in Opposition to the Petition for Writ of Certiorari

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The United States agrees that the circuit courts are split on the first three issues the Petition raises. First, basing federal jurisdiction on the prosecution's unsubstantiated assertions, for the stated purpose of obviating jurisdictional challenges to MDLEA prosecutions, violates the Sixth Amendment and intrudes on the core Article III function. Second, admitting silence as evidence of guilt is a quintessentially inquisitorial tactic that confuses juries far more than it aids in resolving guilt and innocence—yet the government and the courts of appeals ignore this Court's holding that such evidence is insolubly ambiguous. Third, as the Petitioner expressly argued below beginning in his initial brief, the Eleventh Circuit's "prior panel rule" denies appellants their statutory right to an appeal. Under that rule, bare holdings are mechanically applied, no matter the arguments raised, even when they are irreconcilable with this Court's constitutional holdings. The fourth issue directly confronts the pernicious, inquisitorial, and now prevalent notion that an accused can be punished for exercising his right to a trial by jury. Only this Court can resolve these issues and delay will exacerbate these departures from adversarial norms.

I. The government exploits the circuit split over whether proof of a "covered vessel" is an element of an MDLEA offense by forum-shopping for jurisdictions that do not apply this Court's constitutional holdings defining an "element."

The government admits, with considerable understatement, that there is "some disagreement in the courts of appeals" as to whether jurisdictional facts are elements of an MDLEA offense. Brief in Opposition at 13 & n.3. The "seven-week odyssey" the Coast Guard undertook to bring Guagua-Alarcon to a forum favorable to the prosecution, *see* Appendix at

A-90 & n.1, belies the government's attempt to minimize the pressing importance of this issue. The government exploits the circuit split to circumvent this Court's Sixth Amendment holdings—no matter the cost. This Court's intervention is needed to put a stop to this flagrant flouting of this Court's constitutional precedents.

A. The government does not deny that the prevailing interpretation of the MDLEA violates this Court's Sixth Amendment holdings.

Each of the government's arguments against granting the Petition assumes the very ground on which this Court's review is sought. First, the government argues that whether jurisdiction exists under the MDLEA is not an element of the offense because the statute calls it a "preliminary question." *See* Brief in Opposition at 14–15. The issue is whether the statute is constitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which postdates the challenged provision by four years. Similarly, the government's observation "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*," Brief in Opposition at 15–16 (emphasis added), begs the question of whether a "covered vessel" is an MDLEA element. Finally, it matters not at all that "the court of appeals found no conflicting evidence on any *issue of material fact,*" Brief in Opposition at 17 (emphasis added), because there is no summary judgment in criminal cases. The government must prove and the jury must find every element regardless of whether the judge thinks there is an "issue of material fact."

B. The MDLEA intrudes on Article III by requiring courts to give conclusive weight to the prosecution's assertion that jurisdiction exists.

The government distorts Guagua-Alarcon's argument that the MDLEA is unconstitutional because it requires Article III courts to conclusively presume a fact to be

true on the basis of a representation by the Executive Branch. Guagua-Alarcon's argument does not have anything to do with whether the Secretary of State certified the vessel in this case as stateless. The argument is that the district court determined that it had jurisdiction on the basis of a statutory presumption triggered by a DEA agent's affidavit, filed as Docket Entry No. 1 in the district court. That affidavit averred: "The crew, however, claimed Ecuadorian nationality for the vessel. The Government of Ecuador was contacted. The Government of Ecuador responded that they could neither confirm nor deny the nationality of the vessel and the [vessel] was treated as a vessel without nationality." Based on that representation, and in accordance with the MDLEA, the district court determined conclusively that it had jurisdiction. The panel found that the testimony at trial differed in material respects from the affidavit, *see* Appendix at A-36–A-37, but by the time of trial the district court had already decided that jurisdiction existed based on the affidavit. Consequently, the jury was not asked to find any jurisdictional facts, and the court's ruling on that issue made any defense evidence undermining the jurisdictional facts irrelevant.

This case thus squarely raises the question whether the MDLEA violates Article III, as well as the Sixth Amendment, by erecting a conclusive presumption that jurisdictional facts are established by the prosecution's assertion that jurisdiction exists. Guagua-Alarcon's argument does not depend on whether those facts are proven by the Secretary of State's certification or, as they were in this case, by an affidavit before trial. Conclusive presumptions "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime, and ... invade the factfinding function which in a criminal case the law assigns solely to the jury." *Sandstrom v. Montana*, 442 U.S. 510,

523 (1979) (citation omitted). Because the particular presumption the MDLEA creates is conditioned only on the Executive Branch making certain representations, it is tantamount to authorizing prosecutors to tell district courts how to rule on their own jurisdiction.

II. The parties agree that this Court can resolve a long-standing circuit split by reaffirming that custodial silence is insolubly ambiguous, confuses the jury, and carries little probative value.

The government agrees that the split among the circuits can be resolved by granting the Petition and holding, as a matter of federal evidence law, that a defendant's silence while in custody is insolubly ambiguous, creates a substantial risk of confusing the jury, and has little if any probative value. As the Petition explains without rejoinder from the government, the Eleventh and other circuits allow evidence of an accused's silence to demonstrate guilt because they have misread *Fletcher v. Weir*, 455 U.S. 603 (1982) (*per curiam*), and *Jenkins v. Anderson*, 447 U.S. 231 (1980). *See United States v. Rivera*, 944 F.2d 1563, 1568 (CA11 1991). Like the Eleventh Circuit in *Rivera*, many courts and lawyers have failed to realize that *United States v. Hale*, 422 U.S. 171 (1975), not *Weir* and *Jenkins*, bans such evidence from federal prosecutions.

Consequently, as happened in this case, challenges to the use of a federal defendant's silence are nearly always placed on a constitutional rather than an evidentiary basis. For example, the concurring judge below questioned whether *Rivera* ought to remain the law in the circuit court, *see* Appendix at A-99–A-100, but missed that *Rivera* should have relied on *Hale* rather than on *Weir* and *Jenkins.* The underlying argument—that silence is minimally probative and very confusing—is the same under evidentiary law as under constitutional law. *See Perry v. New Hampshire*, 565 U.S. 228, 247 (2012) (noting the due process argument for

excluding suggestive identification was indistinguishable from Rule 403 argument for excluding it).

This Court should therefore take this opportunity to end the persistent confusion on this fundamental issue. The question is as starkly raised as it would have been had the lawyers invoked evidentiary rather than constitutional law. Even if a different standard of review applies, the legal issue on the merits is identical, regardless of the source of law: It is unfair to use an accused's silence against him at trial because it is very likely to confuse the jury and has only minimal, if any, probative value.

III. Not only did the Petitioner challenge the Eleventh Circuit's "prior panel rule" in his initial and reply briefs, but the government relied on that rule to urge the circuit panel to ignore this Court's constitutional holdings.

Contrary to the government's contentions, Guagua-Alarcon *did* challenge the Eleventh Circuit's "prior panel rule" below in both his initial and reply briefs. That is because his counsel anticipated that the circuit court would, yet again, ignore this Court's precedents as well as Guagua-Alarcon's arguments and decide the case by mechanically applying its own abrogated precedents under its "prior panel rule." That rule gives circuit precedent issue-preclusive effect in every subsequent case. It radically departs from traditional principles of *stare decisis*, as the government's own argument to the panel shows. The government specifically argued (as it frequently does) that the panel *lacked the power* to consider whether circuit precedent conflicts with this Court's Sixth Amendment decisions. Thus, even though the panel ignored the issue (also typical), the extensive briefing in this case is more than fulsome enough to afford meaningful and complete review of this practice and its effects.

Quite familiar with the Eleventh Circuit's penchant for ignoring appellants' arguments and mechanically applying outdated precedent, the Petitioner's counsel took on the "prior panel rule" from the start:

> This Court's internal "prior panel rule" cannot save *Tinoco* because *Tinoco* plainly conflicts with *Apprendi* and its progeny, including *Booker*. If this Court were to hold that *Tinoco* is the law of this Circuit without first ensuring that it can be reconciled with earlier Supreme Court precedent, this Court would be asserting that one of its panels can overrule the Supreme Court.

Appellant's Brief at 22–23. In its response, the government insisted that the rule not only applied but *obliged* the Eleventh Circuit *to ignore* this Court's constitutional holdings:

> Consistent with these principles, the prior panel precedent rule *precludes the Court from revisiting* its holding in *Tinoco*, even if the *Tinoco* panel had overlooked or even altogether ignored the arguments that Guagua-Alarcon now raises.

Government's Response Brief at 28 (emphasis added). The Petitioner's reply devoted an entire sub-section to refuting this. *See* Reply Brief at 8–9 ("Because the government concedes that the Eleventh Circuit precedents it cites cannot be reconciled with *Booker*, the government's position has no merit and Mr. Guagua-Alarcon's conviction must be vacated.").

This did no good. Not only did the Eleventh Circuit rely on its "prior panel rule" to ignore Guagua-Alarcon's argument on the merits of the MDLEA issue, it also refused to consider his argument that the "prior panel rule" is unconstitutional, dismissing it as frivolous on the record at the start of oral argument.

There is no question, as the government's argument below also shows, that the Eleventh Circuit's "prior panel rule" infringes on equal protection and due process by giving preclusive effect to circuit decisions, regardless of what any appellant argues. The

government actively exploited the "prior panel rule" in this case to nullify Guagua-Alarcon's appeal. It insisted that the circuit court had no legal authority to do anything but affirm the conviction by applying circuit precedent without even bothering to consider whether that precedent could be squared with this Court's more recent constitutional holdings. The court of appeals did exactly what the government asked. Thus, not only does the "prior panel rule" infringe on the rights to equal protection and due process, but the government in this very cases successfully exploited that fact to deny Guagua-Alarcon a fair appeal, exposing the disingenuousness of its claim that the "prior panel rule" does not infringe these fundamental rights. *See* Brief in Opposition at 21 n.6.

The government mentions the theoretical possibility of *en banc* review only because it incorrectly claims that this issue was not raised to the panel. That is a distraction from the record fact that the panel ignored the Petitioner's frontal assault on the "prior panel rule" and accepted the government's invitation to ignore this Court's Sixth Amendment holdings. In any event, the Eleventh Circuit has already denied *en banc* review on this very issue. *See, e.g.*, *United States v. Nuñez*, No. 18-15025 (CA11 2019). Given that the panel ignored the issue completely, there is no reason to think the Eleventh Circuit will ever change its mind about *en banc* consideration.

The Petitioner was entitled to have his appeal heard on the basis of *this Court's* understanding of the U.S. Constitution. The government argued instead that the panel should *ignore this Court's constitutional holdings*, and the panel agreed. As a result, the panel decided the case on the basis of stale circuit precedent, without even trying to reconcile that precedent with the Petitioner's multitude of citations to this Court's constitutional holdings.

The record shows there is no likelihood that the Eleventh Circuit will ever entertain a challenge to the "prior panel rule," even though it denies appellants equal protection and due process of law in a substantial proportion of that court's cases. (One reason the circuit relies on the rule so heavily is that the Eleventh Circuit has had 12 active judges since it was formed in 1981. The rule allows it to process criminal appeals quickly, without pausing to consider the particular arguments raised.)

Seeking *en banc* review is not a prerequisite to seeking redress in this Court, particularly when *en banc* review was denied in another case raising the identical issue just last year. As a practical matter, this Court is the only venue in which the legality of the Eleventh Circuit's routine practice will ever be examined. Without this Court's intervention, the Eleventh Circuit will continue to disregard, with the government's encouragement, this Court's constitutional holdings on the basis of an internal judicial "rule," even when doing so means ignoring this Court's constitutional holdings—just as occurred in this case.

IV. As the government conceded before the panel, the record shows that the district court denied Guagua-Alarcon's motion for a downward variance solely because he exercised his right to trial.

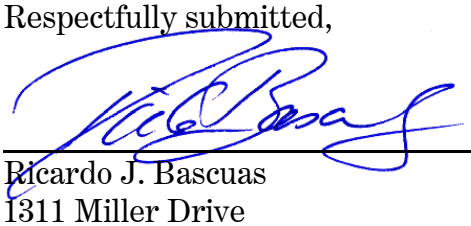
The government raises only one argument against granting the Petition on the question of whether it is constitutional to inflict a harsher sentence on a person because he exercised his right to trial. Relying on the panel decision's misleading summary of the sentencing hearing, it claims that the record does not show why Guagua-Alarcon's motion for a downward variance was denied. That is not true, and the government's brief below admits that, in fact, the motion was denied only because Guagua-Alarcon stood trial.

Guagua-Alarcon was sentenced together with two co-defendants. All three defendants sought downward variances on identical grounds. At the start of the hearing, his counsel advised the judge that he would be adopting all arguments made by co-defendants' counsel. A co-defendant's lawyer argued the downward variance motions. The judge denied them *only* because he believed defendants should be encouraged to admit their guilt—a notion characteristic of inquisitorial systems of justice, not our adversarial one.

Everyone involved in the proceeding understood that the district judge denied all three defendants' motions for a downward variance at the same time and for the same unconstitutional reason. The government's brief to the panel reflects that understanding: "The court referenced the defendants' decision to proceed to trial in the context of its rulings on their motions for downward variance, not in applying the § 3553(a) factors in imposing sentence." Government's Brief at 52. Tellingly, the government did not argue in the court of appeals, as it does now, that Guagua-Alarcon lacked standing to argue this issue because he does not.

Because the government's only objection to granting the Petition on this issue contradicts its own earlier admission about what the record shows, the Petition should be granted. The government implicitly concedes—and it is undeniable—that this Court should determine whether it is constitutional to predicate any part of a convict's sentence on the exercise of the right to trial. The record in this case shows, as the government conceded below, that is what happened to Guagua-Alarcon, as well as to his co-defendants.

Respectfully submitted,



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