

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JORGE RAMON NEWBALL MAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BJORN E. BRUNVAND
Brunvand Wise, P.A.
615 Turner Street
Clearwater, Florida 33756
Ph: (727) 446-7505
Email: bjorn@acquitter.com
Florida Bar No. 0831077
Counsel of Record for Petitioner

QUESTIONS PRESENTED

I.

Whether the Maritime Drug Law Enforcement Act, 46 U.S.C. 70501 *et. seq.*, is unconstitutional on its face and in violation of the Sixth Amendment rights to confrontation and to a trial by jury because it precludes the jury from making a determination of jurisdiction and, instead, permits the Government to establish jurisdiction in a pre-trial hearing by submitting documents that were prepared in anticipation of litigation and without calling the declarants of those documents to testify?

LIST OF PARTIES

The parties to the judgment from which review is sought are the Petitioner and appellant in the lower court, Jorge Ramon Newball May, and the Respondent and appellee in the lower court, the United States of America.

TABLE OF CONTENTS

	Page
Questions Presented	ii
List of Parties	iii
Table of Contents	iv
Table of Cited Authorities.....	vi
Opinion Below	1
Grounds for Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Petition.....	9
I. THE QUESTION OF WHETHER THE ADMISSION OF A DOCUMENT PREPARED IN ANTICIPATION OF LITIGATION VIOLATES THE SIXTH AMENDMENT WHEN THE PURPOSE OF THE DOCUMENT IS TO ESTABLISH STATUTORY JURISDICTION AND THE GOVERNMENT FAILS TO PRESENT TESTIMONY FROM THE DECLARANTS OF THE ASSERTIONS CONTAINED WITHIN THE DOCUMENT.....	9
A. Jurisdiction Under the MDLEA	9
B. The MDLEA Violates the Sixth Amendment Right to a Jury Trial Because it Exempts the Government from its Requirement to Prove Jurisdiction to a Jury Beyond a Reasonable Doubt.....	12
C. The MDLEA Further Violates the Sixth Amendment Because the Procedure by Which it Allows the Government to Prove Jurisdiction Violates Defendants' Rights to Confrontation	15
1. The Confrontation Clause Should Apply to the Proof of Jurisdiction Required under the MDLEA	16

2. The Document at Issue in this Case was Testimonial in Nature and was Representative of the Documentation that the Government Routinely Relies on to Establish Jurisdiction in MDLEA Cases.....	17
D. The Lower Circuit Courts are Split in their Interpretation of the MDLEA.....	19
Conclusion	21
APPENDICES	Page
Appendix A: The Eleventh Circuit Opinion Below	A
Appendix B: 46 U.S.C. §§ 70501, <i>et. seq.</i>	B

TABLE OF CITED AUTHORITIES

Cases	Page(s)
<i>Crawford v. Washington</i> ,	
557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2004)	17-18
<i>Melendez-Diaz v. Massachusetts</i> ,	
557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)	17
<i>Pennsylvania v. Ritchie</i> ,	
480 U.S. 39, 52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)	16
<i>United States v. Barona-Bravo, et. al.</i> ,	
685 Fed.Appx. 761 (11th Cir. 2017).....	19
<i>United States v. Campbell</i> ,	
743 F.3d 802 (11th Cir. 2014)	8
<i>United States v. Cardales</i> ,	
168 F.3d 548 (1st Cir. 1999).....	20
<i>United States v. Cruickshank</i> ,	
837 F.3d 1182 (11th Cir. 2016)	8, 19
<i>United States v. De La Garza</i> ,	
516 F.3d 1266 (11th Cir. 2008)	10
<i>United States v. Gaudin</i> ,	
515 U.S. 506 (1995)	13
<i>United States v. Mena</i> ,	
863 F.2d 1522 (11th Cir. 1989)	19

TABLE OF CITED AUTHORITIES (Cont.)

Cases (Cont.)	Page(s)
<i>United States v. Mitchell-Hunter</i> ,	
663 F.3d 45 (1st Cir. 2011).....	20
<i>United States v. Newball May, et. al.</i> , --- Fed.Appx. ---,	
2021 WL 717002 , No. 19-13114 (11th Cir. Feb. 24, 2021).....	1, 7-8
<i>United States v. Passos-Paternina</i> ,	
918 F.2d 979, 982 (1st Cir. 1990).....	11
<i>United States v. Perez-Oviedo</i> ,	
281 F.3d 400 (3d Cir. 2002).....	20
<i>United States v. Perlaza</i> ,	
439 F.3d 1149 (9th Cir. 2006)	20
<i>United States v. Suerte</i> ,	
291 F.3d 366 (5th Cir. 2002))	20
<i>United States v. Tinoco</i> ,	
304 F.3d 1088 (11th Cir. 2002)	10, 12
<i>United States v. Tsurkan</i> ,	
742 Fed.Appx. 411 (11th Cir. 2018).....	19
<i>United States v. Vega-Castillo</i> ,	
540 F.3d 1235 (11th Cir. 2008)	8
<i>United States v. Yousef</i> ,	
327 F.3d 56, 111 (2d Cir. 2003).....	20

TABLE OF CITED AUTHORITIES (Cont.)

Cases (Cont.)	Page(s)
<i>United States v. Zakharov</i> , 468 F.3d 1171 (9th Cir. 2006)	20
Constitutional Provisions	
U.S. CONST. amend. V	13, 20
U.S. CONST. amend. VI.....	2, 9, 12-15
Statutes and Rules	
18 U.S.C. § 2	5
18 U.S.C. § 1001	13
21 U.S.C. § 960	5
28 U.S.C. § 1254	1
46 U.S.C. §§ 70501, <i>et. seq</i>	2, 5, 9
46 U.S.C. § 70502	7-8, 10-11, 13
46 U.S.C. § 70503	5, 7, 11, 14, 16-17
46 U.S.C. § 70504	8, 11-13, 17
46 U.S.C. § 70506	5
SUP. CT. R. 10	21

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court in an unpublished opinion, *United States v. Jorge Ramon Newball May, et. al.*, --- Fed.Appx. ----, 2021 WL 717002 , No. 19-13114 (11th Cir. Feb. 24, 2021), which is attached hereto as Appendix A.

GROUND FOR JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its panel opinion on February 24, 2021. *See* Appendix A. Petitioner thereby seeks the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) through the filing of the instant petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

46 U.S.C. §§ 70501, *et. seq.*

Attached hereto as Appendix C.

STATEMENT OF THE CASE

The events leading up to the instant case began when a U.S. Coast Guard airplane spotted a small vessel in international waters off of Jamaica. The boat had a red tarp covering it as a makeshift roof. (Doc. 217 at 156.) It was not underway. (Doc. 217 at 156.) Four occupants were on the boat. (Doc. 217 at 157.)

While being surveilled, the boat would allegedly travel underway in a northward direction and then stop periodically. (Doc. 217 at 158-59.) At some point during that time, the boat jettisoned several white packages. (Doc. 217 at 159.)

The Coast Guard airplane watched and recorded the boat for two and half to three and a half hours. (Doc. 217 at 164.) During that time, the plane was from three to six miles from the boat at an elevation of 6700 feet. (Doc. 218 at 7.) At times, the boat dropped off the airplane's camera, but allegedly remained on its radar during that time. (Doc. 217 at 161.)

The Coast Guard passed on its observations to a Canadian ship that was in the area. (Doc. 217 at 165, 188.) That night, a U.S. Coast Guard law enforcement detachment team that was present on the Canadian ship made contact with an approximately 30-foot boat that was believed to be the same boat the airplane had observed. (Doc. 218 at 15-20, 115.) The contact was made approximately 110 nautical miles southwest of Jamaica. (Doc. 218 at 19.)

The boat had no nautical lights, no navigational equipment, and no engines. (Doc. 218 at 19-21, 122.) Twelve fuel barrels were onboard. (Doc. 218 at 20-21.) Those barrels contained little to no actual fuel. (Doc. 218 at 93.) Three of the crewmen,

including Mr. Newball-May, were Colombian. (Doc. 218 at 20.) The fourth crewmember was from Belize. (Doc. 218 at 20.) Emiro Hinestroza-Newbbooll was the captain. (Doc. 218 at 20.)

The captain informed the Coast Guard that the boat was of Colombian nationality. (Doc. 218 at 24.) The boat was not flying a flag and had no registration on board. (Doc. 218 at 25.) Colombia allegedly could not confirm the boat's registry. (Doc. 218 at 24.)

The captain indicated that they had been fishing for mahi-mahi and diving for conch. (Doc. 218 at 21-23.) The Coast Guard alleged that no fishing or diving equipment was on board. (Doc. 218 at 22.) A snorkel was, however, found on the boat. (Doc. 218 at 98.) The captain further indicated that their boat had been adrift for the last six days after having engine troubles. (Doc. 218 at 22-23, 77.) The captain explained that they had been using the engines as anchors after running into the engine troubles. (Doc. 218 at 77.) At some point, however, the lines holding the engines snapped and the engines were lost. (Doc. 218 at 77.) The captain also said they had jettisoned their conch catch after spotting the Coast Guard plane because it was illegal to possess conch in Colombia. (Doc. 218 at 23, 79.) Mr. Newball-May had also similarly informed the Coast Guard that they had been fishing and diving for conch, had lost their engines, and had been adrift for six days. (Doc. 218 at 116-17.)

The Coast Guard went on to board the boat. (Doc. 218 at 28.) It took ion scan swabs of the boat. (Doc. 218 at 29, 133-37.) It would also later swab the crewmembers' hands and forearms. (Doc. 218 at 32, 137-39.) Swabs from various areas of the boat,

the swabs of the four individuals' hands, and the swab of the captain's forearm alerted for cocaine. (Doc. 218 at 172-76.) The alerts were all for 8% or less cocaine. (Doc. 219 at 22-24.) The Coast Guard found no contraband on the boat. (Doc. 218 at 30.)

The next day, the Coast Guard airplane crew attempted to locate the jettisoned packages. (Doc. 217 at 165.) It was unable to find any of the packages. (Doc. 217 at 165.)

The four crewmembers were arrested and transported to the Middle District of Florida. (Doc. 1.) On December 12, 2018, the crewmembers were charged by indictment with one count of knowingly and willfully conspiring to possess with intent to distribute five kilograms or more of a mixture or substance containing cocaine while aboard a vessel subject to the jurisdiction of the United States and one count of possessing with intent to distribute five kilograms or more of a mixture or substance containing cocaine while aboard a vessel subject to the jurisdiction of the United States in violation of 46 U.S.C. §§ 70503(a), 70506(a), (b); 21 U.S.C. § 960(b)(1)(B)(ii); and 18 U.S.C. § 2. (Doc. 28.)

Prior to the start of trial, the District Court held a hearing on a Government motion that sought a finding that the interdicted boat was a "vessel subject to the jurisdiction of the United States," within the meaning of the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 et seq. (Doc. 74, 75.) Prior to the hearing, the Government had filed a certification from the Department of State that had attached as an exhibit an affidavit from a Coast Guard Commander, David M. Bartram. (Doc. 74-1.) Commander Bartram did not testify during the hearing nor at the trial.

Commander Bartram's affidavit was titled "Certification for the Maritime Drug Law Enforcement Act Case Involving Go Fast Vessel Unknown (Without Nationality)." (Doc. 74-1 at 2.) The affidavit went on to state that Bartram has been designated by the Department of State to make certifications for MDLEA purposes. (Doc. 74-1 at 1.) The affidavit then recounted the interdiction of the "go-fast" vessel on December 1, 2018 and alleged that, on that date, the "Government of the United States" made a request of "the Government of the Republic of Colombia" that it confirm or deny the vessel's registry. (Doc. 74-1 at 1.) The affidavit further stated that "the Government of the Republic of Colombia," if it could confirm registry, was asked to authorize the boarding and search of the vessel. (Doc. 74-1 at 1.) The affidavit gave no indication as to who, within the "Government of the United States," made the contact with Colombia. (Doc. 74-1.) The affidavit then stated that Colombia purportedly "could neither confirm nor refute the vessel's registry or nationality." (Doc. 74-1 at 1.) The affidavit did not provide a name of the Colombian official who allegedly responded to the request, nor did it include any documentation or other information to corroborate the alleged response by Colombia. (Doc. 74-1.)

Mr. Newball-May objected to the admission of the document in question on Confrontation Clause grounds. (Doc. 247 at 7-8.) The District Court overruled the objection and found, based on the document, that the vessel is subject to the jurisdiction of the United States. (Doc. 247 at 9.)

Three of the four defendants later proceeded to trial beginning on May 6, 2019. (Doc. 217-220.) The fourth defendant, the captain, Emiro Hinestroza-Newbbooll, was

severed for trial shortly before the trial was to begin due to unexpected health concerns of his counsel.¹ (Doc. 100.) At trial, the Government presented various members of the Coast Guard LEDET team to discuss the facts set forth above. The jury went on to convict the defendants as charged. (Doc. 125-127.) Mr. Newball May was thereafter sentenced to concurrent sentences of 235 months of imprisonment to be followed by five years of supervised release. (Doc. 162.)

The Direct Appel to the Eleventh Circuit

The defendants then appealed the convictions and sentences to the United States Court of Appeals for the Eleventh Circuit. The defendants raised various grounds, including the question of whether the method utilized by the Government for establishing jurisdiction under the MDLEA violated the Confrontation Clause. On February 24, 2021, the Eleventh Circuit issued a panel opinion affirming the defendants' convictions, but vacating all of the defendants' sentences and remanding the case to the district court for resentencing.

Concerning the Confrontation Clause issue, the Eleventh Circuit denied relief, relying on its prior panel decisions and reasoning:

The MDLEA broadly prohibits drug trafficking while on board any vessel “subject to the jurisdiction of the United States.” *See* 46 U.S.C. § 70503(a). A vessel subject to the jurisdiction of the United States includes a “vessel without nationality,” which, in turn, includes “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.” *Id.* § 70502(c)(1)(A), (d)(1)(C). A foreign nation’s consent or waiver of objection to United States jurisdiction is conclusively proven

¹ Mr. Hinestroza-Newbbooll was convicted on both counts of the indictment in a separate jury trial conducted in January 2020. (Doc. 293.)

by a certification from the State Department. *Id.* § 70502(c)(2). Whether a vessel is subject to the jurisdiction of the United States “is not an element of an offense” but rather a “[j]urisdictional issue” that is a “preliminary question[] of law to be determined solely by the trial judge.” *Id.* § 70504(a).

In support of its pretrial motion to establish that the defendants’ vessel was subject to the jurisdiction of the United States, the government introduced a certification on behalf of the U.S. State Department stating that the vessel met the definition of a “vessel without nationality.” The district court found jurisdiction, overruling a defense objection based on the Confrontation Clause.

Under binding precedent, the district court correctly found that the introduction of a State Department certification to establish MDLEA jurisdiction does not violate the Confrontation Clause. In *Campbell*, we held that “a pretrial determination of extraterritorial jurisdiction does not implicate the Confrontation Clause” because the MDLEA’s jurisdictional requirement is not an element of an offense. 743 F.3d at 806–09. Likewise, in *United States v. Cruickshank*, we held that “[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.” 837 F.3d 1182, 1192 (11th Cir. 2016).

Defendants maintain that *Campbell* and *Cruickshank* were wrongly decided and that their rights to confrontation attached during the pretrial determination of MDLEA jurisdiction. Whatever the merits of these arguments, we must follow our prior precedent. *See United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) (“Under the prior precedent rule, we are bound to follow a prior binding precedent unless and until it is overruled by this court en banc or by the Supreme Court.” (quotation marks omitted)). Accordingly, the district court properly determined that it had jurisdiction.

App. A at 3-4.

This petition follows.

REASONS FOR GRANTING THE PETITION

I.

THE QUESTION OF WHETHER THE ADMISSION OF A DOCUMENT PREPARED IN ANTICIPATION OF LITIGATION VIOLATES THE SIXTH AMENDMENT WHEN THE PURPOSE OF THE DOCUMENT IS TO ESTABLISH STATUTORY JURISDICTION AND THE GOVERNMENT FAILS TO PRESENT TESTIMONY FROM THE DECLARANTS OF THE ASSERTIONS CONTAINED WITHIN THE DOCUMENT

Petitioner Newball May respectfully submits that the Maritime Drug Law Enforcement Act (“MDLEA”), 46 U.S.C. 70501 *et. seq.*, is facially unconstitutional and in violation of the Sixth Amendment rights to confrontation and to a fair trial by jury. As explained in more detail below, the MDLEA’s constitutional shortcomings are at least two-fold. First, the MDLEA violates the Sixth Amendment because it requires that statutory jurisdiction, an implicit element of MDLEA offenses, be decided by the trial court rather than by the jury. Second, the MDLEA permits the Government to obtain that pretrial determination of jurisdiction through the submission of documents that were prepared in anticipation of litigation, and which typically contain declarations from representatives of foreign nations, without calling as witnesses the declarants of the statements contained with the documents.

A. Jurisdiction Under the MDLEA

Because the instant charges arose on international waters aboard a non-U.S.

flagged vessel, the Government bore the burden of proving that the “go-fast” boat was a vessel subject to the jurisdiction of the United States under the MDLEA. *See United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008); *United States v. Tinoco*, 304 F.3d 1088, 1114 (11th Cir. 2002). The MDLEA provides that a “vessel subject to the jurisdiction of the United States” includes--

- (A) a vessel without nationality;
- (B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;
- (C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;
- (D) a vessel in the customs waters of the United States;
- (E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and
- (F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that--
 - (i) is entering the United States;
 - (ii) has departed the United States; or
 - (iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

46 U.S.C § 70502(c)(1). The MDLEA similarly holds that a “vessel without nationality” includes--

- (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). In due course, “[t]he 1958 Convention on the High Seas, to which [the MDLEA] refers, provides that ‘[a] ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a vessel without nationality.’” *United States v. Passos-Paternina*, 918 F.2d 979, 982 (1st Cir. 1990) quoting Convention on the High Seas, art. 6(2), opened for signature April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200.

The substantive MDLEA offense at issue in this case, 46 U.S.C. § 70503 holds, in relevant part:

(a) Prohibitions.—An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board—
(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or
(2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

46 U.S.C. § 70503.

As set forth above, § 70502 fastidiously sets forth the methods for acquiring jurisdiction under the MDLEA. Section 70503, the substantive criminal offense, likewise proscribes conduct on board “a vessel of the United States or a vessel subject to the jurisdiction of the United States.” 46 U.S.C. § 70503(a)(1). Nevertheless, the follow-up subsection of the MDLEA, states in relevant part, “[j]urisdiction 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). Prior to 1996,

jurisdiction was an element that the Government was required to prove to the jury beyond a reasonable doubt in MDLEA cases. *See Tinoco*, 304 F.3d at 1102-04 *citing United States v. Medina*, 90 F.3d 463-64 (11th Cir. 1996).

B. The MDLEA Violates the Sixth Amendment Right to a Jury Trial

Because it Exempts the Government from its Requirement to Prove Jurisdiction to a Jury Beyond a Reasonable Doubt

The MDLEA violates the Sixth Amendment right to a jury trial because it requires that a material element of the offense be determined by the court prior to trial, rather than by the jury during the trial. More specifically, the MDLEA criminalizes conduct on vessels “subject to the jurisdiction of the United States,” but then mandates that courts make a judicial determination of the jurisdictional element of the offense, rather than allowing a jury to make that factual finding beyond a reasonable doubt. *See 46 U.S.C. § 70504, supra.* Relying on the language of 46 U.S.C. § 70504, the Eleventh Circuit has found that “the ... 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.” *Tinoco*, 304 F.3d at 1109-1110.

Aside from unconstitutionally lessening the Government’s burden of proving jurisdiction beyond a reasonable doubt to the jury, the MDLEA permits the Executive Branch to perform a judicial function. Concerning the question of jurisdiction, the MDLEA states that a foreign nation’s consent or waiver to jurisdiction under the MDLEA “is proved conclusively by certification of the Secretary of State or the

Secretary's designee." 46 U.S.C. § 70502(c)(2)(B). The MDLEA provides for the identical certification procedure as evidence of a foreign nation's response to a claim of registry. 46 U.S.C. § 70502(d)(2). As set forth above, the question of jurisdiction is material to a prosecution under the MDLEA. Under the MDLEA's certification procedure, however, the Executive Branch may extra-judicially establish that it has purportedly obtained consent to jurisdiction from a foreign nation. That procedure runs afoul of the Sixth Amendment.

This Court's long-standing precedent establishes that the question of jurisdiction must be decided by a jury to satisfy the rights to due process and to a fair trial by jury. *See United States v. Gaudin*, 515 U.S. 506 (1995) (holding that the Fifth and Sixth Amendments require that every element of criminal conviction be based upon a jury determination and, therefore, finding that proof of the materiality element of 18 U.S.C. 1001, though a mixed question of law and fact, must be an issue for the jury). Prior to 1996, the jurisdictional element of MDLEA offenses was a question for the jury, as just the same as the material elements of nearly every other criminal offense in the United States. *Id.* at 1102 *citing* Pub.L. 104–324, § 1138(a)(5), 110 Stat. 3901 (1996). In 1996, however, Congress revised the MDLEA and took the jurisdictional element out of the hands of the jury by promulgating the statute now codified at 46 U.S.C. § 70504. *Id.* The question of jurisdiction in a case involving a foreign vessel in international waters is, however, tantamount to the "interstate commerce" element in firearms cases and other domestic offenses. The question of MDLEA jurisdiction, just like the element of interstate commerce, is an essential

element of the charged offense because it bears on Congress' power to criminalize and regulate extraterritorial conduct. Therefore, while Congress has attempted to classify the jurisdictional element of the MDLEA as a non-element, the statutory language of the substantive MDLEA offense, 46 U.S.C. § 70503, clearly sets forth a jurisdictional element. *See* 46 U.S.C. § 70503 (proscribing offenses committed on "a vessel of the United States *or a vessel subject to the jurisdiction of the United States.*" *Id.* at (a)(1) (emphasis added)). Congress' removal of the jurisdictional element from the jury, thereby, violates the Sixth Amendment and renders the MDLEA unconstitutional.

Based on the facts of the instant case, in which the jurisdiction of the United States is clearly in great dispute, this case presents a prime vehicle for the Court to decide the question of whether the MDLEA jurisdictional determination procedure violates the Sixth Amendment right to a trial by jury. The Government exercised jurisdiction over the foreign crewmembers and their boat despite the fact that the offenses charged against them under the MDLEA bore no ties or nexus to the United States. Petitioner Newball May assert that Due Process requires that a nexus to the United States, akin to minimum contacts under a personal jurisdiction analysis, are required in order for the United States to exercise jurisdiction over a foreign-registered vessel. Indeed, in the instant case, none of the crewmembers had any ties whatsoever to the United States. Their boat, likewise, had not departed from, headed towards, nor even passed through United States waters. Under the circumstances, and given the text of the MDLEA statutes, proof that the Government had

jurisdiction to prosecute the instant case was a material element of the offense that must have been proven to the jury.

C. The MDLEA Further Violates the Sixth Amendment Because the Procedure by Which it Allows the Government to Prove Jurisdiction Violates Defendants' Rights to Confrontation

The process by which the Government is permitted to establish jurisdiction under the MDLEA, through a pretrial judicial determination, violates the Confrontation Clause of the Sixth Amendment. The process for determining jurisdiction under the MDLEA deprives defendants from their ability to explore or challenge the Government's alleged bases for obtaining jurisdiction over foreign vessels that are interdicted in international waters and which otherwise bear no connection to the United States. In the instant case, for instance, the District Court admitted into evidence and relied on an unauthenticated hearsay document, which contained suspect hearsay from an identified declarant in a foreign governmental agency. Because the Government opted not to call as witnesses the author of that document, nor any other any other declarant who might be cross-examined in regards to that document, the Defendants were left to blindly and helplessly accept the Government's claim of jurisdiction.

1. The Confrontation Clause Should Apply to the Proof of Jurisdiction

Required under the MDLEA

This Court has long held that the right to confrontation is a trial right. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Consequently, the right typically does not attach in pre-trial settings. As set forth above, however, the MDLEA requires that the trial court make a pre-trial determination of the statutory element of jurisdiction. As such, the MDLEA essentially requires that the Government prove a material element of a criminal offense in a pretrial hearing. Elements of an offense are, of course, generally required to be proven at trial, as discussed in the preceding subsection.

When, in 1996, Congress made the decision to remove the jurisdictional element of the MDLEA from the province of the jury, it did not remove the jurisdictional element from the language of the substantive criminal offense. *See* 46 U.S.C. § 70503 (proscribing offenses committed on “a vessel of the United States or a vessel subject to the jurisdiction of the United States.” *Id.* at (a)(1)); *see also supra* Question I. As a result, jurisdiction remains a material element to be proven by the Government as a prerequisite to a conviction under the MDLEA. Proof of that element is now the Government’s gateway to trial, as opposed to a proof it must make during trial in MDLEA cases. Because, however, jurisdiction remains a material prerequisite to the Government’s proof of the substantive offense, jurisdiction remains the functional equivalent of a trial proof. Moreover, because the substantive MDLEA offenses still proscribe acts committed on “a vessel of the United States or a

vessel subject to the jurisdiction of the United States,”² the MDLEA still bears a jurisdictional element, even in light of 46 U.S.C. § 70504. In the all-too-often quoted words of Shakespeare, “a rose by any other name would smell as sweet.”³ Therefore, because jurisdiction remains a critical statutory prerequisite to an MDLEA prosecution, the right to confrontation must attach during trial courts’ determinations of jurisdiction.

**2. The Document at Issue in this Case was Testimonial in Nature and
was Representative of the Documentation that the Government
Routinely Relies on to Establish Jurisdiction in MDLEA Cases**

Assuming that the Confrontation Clause applied at the MDLEA jurisdictional hearing, the document that the Government presented to the district court in support of its allegation of jurisdiction should have been precluded from evidence because the document was testimonial in nature. In deciding *Crawford v. Washington*, this Court held that testimonial evidence included, among many other classes of evidence, “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford v. Washington*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2004). This Court further expanded on the testimonial definition in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), which

² 46 U.S.C. § 70503(a)(1).

³ William Shakespeare, *Romeo and Juliet*, 1594.

addressed whether the Confrontation Clause applied to the admission of affidavits reporting the results of forensic analyses of substances believed to be illegal drugs. The Court ultimately found that such documents were well within the “core class of testimonial statements” that implicate Confrontation Clause protections. *Id.* at 310-11. In reaching its holding, this Court relied on the fact that the documents in question contained “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* citing *Crawford*, 541 U.S. at 51 (internal quotations omitted).

The document that the Government relied on in the instant case, which is representative of the documents that the Government typically uses to establish jurisdiction in other MDLEA cases, was clearly a “declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* Moreover, that document was not merely maintained in the regular course of business, but instead, was a document that the Government requested solely for the purpose of attempting to establish that the “go-fast” boat was a vessel subject to the jurisdiction of the United States, as required by the MDLEA. The sole purpose for that document was, consequently, for use to prove some fact in the litigation of the instant case. Correspondingly, when the Government requested the document in question from the respective foreign state agency, the agency almost certainly would have expected the United States Government to be using that document in the instant prosecution. As a result, the document was clearly testimonial in nature and was, thereby, subject to the protections of the Confrontation Clause.

Based on the forgoing, Petitioner Newball-May requests this Honorable Court to grant this Petition for a Writ of Certiorari to determine whether the admission of the document in question at the pretrial jurisdictional hearing violated the Confrontation Clause. As discussed in the preceding subsection, the instant case would be a perfect vehicle for this Court to decide the question because it involved the Government proving jurisdiction through a State Department certification that is representative of the certification that the Government routinely relies on in MDLEA cases. *See e.g. United States v. Tsurkan*, 742 Fed.Appx. 411 (11th Cir. 2018); *United States v. Barona-Bravo, et. al.*, 685 Fed.Appx. 761 (11th Cir. 2017); *United States v. Cruickshank*, 837 F.3d 1182 (11th Cir. 2016). Furthermore, the crewmembers and the boat that they were present on bore no ties whatsoever to the United States so as to suggest that the Government might have obtained jurisdiction in the instant case through any means other than the MDLEA certification procedure. The MDLEA jurisdictional issue was, moreover, raised and decided on the merits in both the District Court and the Eleventh Circuit below.

D. The Lower Circuit Courts are Split in their Interpretation of the MDLEA

A steady flow of MDLEA cases have passed through the courts of appeal in recent years and have left the circuits split on the instant issue. The lower court, the Eleventh Circuit, has declined to find a nexus requirement in other cases involving foreign registered vessels. *See United States v. Cruickshank*, 837 F.3d 1182 (11th Cir. 2016); *United States v. Mena*, 863 F.2d 1522, 1527 (11th Cir. 1989). In contrast to the Eleventh Circuit, the Second and Ninth Circuits have found a nexus

requirement. *See United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003); *United States v. Zakharov*, 468 F.3d 1171, 1177 (9th Cir. 2006). The Ninth Circuit, for instance, has held that, in cases involving registered vessels, “due process requires the Government to demonstrate that there exists ‘a sufficient nexus between the conduct condemned and the United States’ such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant.” *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006). The First, Third, and Fifth Circuits, on the other hand, have joined the Eleventh Circuit in rejecting any such nexus requirement. *See United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002); *United States v. Suerte*, 291 F.3d 366 (5th Cir. 2002). The First Circuit has similarly agreed with the Eleventh Circuit that the Confrontation Clause does not apply to pretrial determinations of jurisdiction under the MDLEA. *United States v. Mitchell-Hunter*, 663 F.3d 45, 49 (1st Cir. 2011).

As set forth above, prosecutions of foreign vessels under the MDLEA remain constant across the lower district courts. In nearly all such cases, jurisdiction will be a material element of the substantive offense. Furthermore, as it continues to promulgate legislation in any ever-shrinking world, Congress would indeed be well guided by an answer to the question of whether the Constitution requires a jury determination of jurisdiction when jurisdiction is a material element of a substantive offense.

For the reasons set forth above, Petitioner Newball May respectfully submits that the question of the MDELA's constitutionality is one of great importance that has not yet been decided by this Court and one which will arise frequently in the lower courts in the future. SUP. CT. R. 10(c). Moreover, the question presented in this petition is likely to arise in other contexts involving legislation that pertain to the United States' exercise of jurisdiction over foreign or stateless entities and over acts that occur in neutral or foreign territories. *Id.* Petitioner Newball May, consequently, asks this Honorable Court to grant certiorari in this case to determine the constitutionality of the MDLEA.

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully Submitted on this 24th day of May 2021,



BJORN E. BRUNVAND
Brunvand Wise, P.A.
615 Turner Street
Clearwater, Florida 33756
Ph: (727) 446-7505
Email: bjorn@acquitter.com
Florida Bar No. 0831077
Counsel of Record for Petitioner