No. _____

In the
Supreme Court of the United States of America

Yency Nuñez,

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

Appendix to Petition for Writ of Certiorari

Volume I

Ricardo J. Bascuas
Counsel of Record
University of Miami School of Law
1311 Miller Drive
Coral Gables, Florida 33146
305-284-2672

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Volume II

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11955
Non-Argument Calendar

D.C. Docket Nos. 1:17-cv-20440-JEM; 1:13-cr-20295-JEM-6

YENCY NUNEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 26, 2021)

Before WILSON, ROSENBAUM and MARCUS, Circuit Judges.

PER CURIAM:

Yency Nuñez, a counseled prisoner serving a 135-month sentence for a violation of the Maritime Drug Law Enforcement Act ("MDLEA"), appeals the district court's denial of his 28 U.S.C. § 2255 motion, in which he argued that the

record of his underlying criminal conviction did not establish jurisdiction under the MDLEA and his trial and appellate counsel were ineffective for failing to raise the issue. On appeal, Nuñez argues that the district court erred by conducting an evidentiary hearing in his § 2255 proceedings to determine whether subject matter jurisdiction existed in his criminal case. After careful review, we affirm.

In a § 2255 proceeding, we review legal conclusions de novo and findings of fact for clear error. Spencer v. United States, 773 F.3d 1132, 1137 (11th Cir. 2014) (en banc). The federal habeas statute provides that upon the filing of a § 2255 motion, a district court "shall . . . grant a prompt hearing . . . [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). We review the decision to hold a hearing for abuse of discretion. Aron v. United States, 291 F.3d 708, 714 n.5 (11th Cir. 2002).

The scope of appellate review in § 2255 cases is limited to the issues specified in the certificate of appealability ("COA"). Kuenzel v. Allen, 488 F.3d 1341, 1343 (11th Cir. 2007). While we may sua sponte expand a COA under "exceptional circumstances," an appellant granted a COA on one issue cannot simply brief other issues to compel this Court to address them. Dell v. United States, 710 F.3d 1267, 1272 (11th Cir. 2013). A party abandons an issue on appeal by failing to prominently raise it in his initial brief, by only raising it in a perfunctory manner without supporting arguments and authority, or by making only "passing references to it that

are background to other arguments or [are] buried within other arguments, or both." United States v. Corbett, 921 F.3d 1032, 1043 (11th Cir. 2019) (quotation omitted). This applies to issues included in the COA that are not briefed or argued on appeal. See Jones v. Campbell, 436 F.3d 1285, 1303 (11th Cir. 2006).

The nature of a § 2255 motion is that of a civil matter. Burgess v. United States, 874 F.3d 1292, 1296 (11th Cir. 2017). Consequently, § 2255 motions are governed by the Federal Rules of Civil Procedure and, to the extent the practice of § 2255 proceedings is not specified in a federal statute, the Rules Governing § 2255 Proceedings for the U.S. District Courts ("§ 2255 Rules"). Id. The § 2255 Rules allow a district court to direct the parties to expand the record by filing additional relevant materials, including letters predating the filing of the motion, documents, and exhibits. § 2255 Rule 7(a), (b). The court then reviews the motion, answer, and any material submitted under Rule 7 to determine whether an evidentiary hearing is warranted. § 2255 Rule 8(a). A court may refer a motion to a magistrate judge to conduct hearings and file proposed findings of facts and recommendations for disposition, which the court may accept, reject, or modify. § 2255 Rule 8(b).

"Habeas corpus has long been available to attack convictions and sentences entered by a court without jurisdiction." United States v. Addonizio, 442 U.S. 178, 185 (1979); see 28 U.S.C. § 2255(a) (providing relief from a federal sentence if "the court was without jurisdiction" to impose it). While a habeas proceeding generally

cannot "do service for an appeal," a challenge to a court's jurisdiction is an exception. Sunal v. Large, 332 U.S. 174, 178 (1947); Bowen v. Johnston, 306 U.S. 19, 26 (1939) ("[T]he remedy of habeas corpus may be needed to release the prisoner from a punishment imposed by a court manifestly without jurisdiction to pass judgment."). In a habeas appeal, "[a] jurisdictional defect is one that strip[s] the court of its power to act and ma[kes] its judgment void" and, thus, "a judgment tainted by a jurisdictional defect must be reversed." McCoy v. United States, 266 F.3d 1245, 1249 (11th Cir. 2001) (quotation omitted); Harris v. United States, 149 F.3d 1304, 1309 (11th Cir. 1998) (reversing and remanding for resentencing where the district court lacked jurisdiction to impose an enhanced sentence), abrogated on other grounds by United States v. DiFalco, 837 F.3d 1207, 1216 (11th Cir. 2016) ("[O]ur decisions [holding] that [21 U.S.C.] § 851 imposes a jurisdictional limit on a district court's authority [to enhance a sentence] have been undermined to the point of abrogation by subsequent decisions of the Supreme Court.").

In Harris, a prisoner filed a § 2255 motion attacking his sentence on the ground that the district court had lacked jurisdiction to impose an enhanced sentence. 149 F.3d at 1305-06. At the time, our precedent held that a court lacked jurisdiction to enhance a sentence based on a prior conviction unless the government strictly complied with the procedural requirements of 21 U.S.C. § 851(a), and the facts of Harris's case showed that the district court had lacked jurisdiction to impose his

enhanced sentence. Id. at 1306-07. While Harris had failed to object to the enhancement on jurisdictional grounds before pleading guilty and had not filed a direct appeal, we held that jurisdictional claims could not be procedurally defaulted, and reversed and remanded his case for resentencing. Id. at 1303, 1308-09.

The MDLEA prohibits any person from knowingly or intentionally possessing with intent to manufacture or distribute a controlled substance on board a vessel subject to the jurisdiction of the United States, or conspiring to do the same. 46 U.S.C. §§ 70503(a)(1), 70506(b). A "vessel subject to the jurisdiction of the United States" includes "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." Id. § 70502(c)(1). Notably, under the MDLEA, "[j]urisdiction of the United States with respect to a vessel" is "not an element of an offense"; rather, "[j]urisdictional issues arising under [the MDLEA] are preliminary questions of law to be determined solely by the trial judge." Id. § 70504(a). We've interpreted the "on board a vessel subject to the jurisdiction of the United States" phrase of the MDLEA as a congressionally imposed limit on courts' subject matter jurisdiction. United States v. De La Garza, 516 F.3d 1266, 1271 (11th Cir. 2008). The government bears the burden of proving that the statutory requirements of MDLEA subject matter jurisdiction are met. United States v. Tinoco, 304 F.3d 1088, 1114 (11th Cir. 2002).

In Tinoco, we ruled that the MDLEA "unambiguously mandates that the jurisdictional requirement be treated only as a question of subject matter jurisdiction for the court to decide." Id. at 1106 (11th Cir. 2002) (applying the predecessor to § 70504(a), which had very similar language). As we explained, jurisdiction was not "a traditional element, or otherwise an essential ingredient, of a criminal offense," so Congress's removal of this issue from the jury's consideration did not offend a defendant's due process or jury trial rights. Id. at 1107-12. In reaching our holding -- that it was constitutional for Congress to define the MDLEA's jurisdictional requirement as a non-element of the crime -- we cited Apprendi v. New Jersey, which held that other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," 530 U.S. 466, 490 (2000). See Tinoco, 304 F.3d at 1098. Thus, "the unique proscription upon legislative power in defining crimes that was set forth in Apprendi . . . is not applicable here." Id. at 1107.

Since Tinoco, we've repeatedly confirmed that the MDLEA's jurisdictional requirement is not an element of an MDLEA offense that must be decided by a jury. See United States v. Iguaran, 821 F.3d 1335, 1336 (11th Cir. 2016) (describing the MDLEA's jurisdictional requirement that a defendant be on board a vessel "subject to the jurisdiction of the United States . . . as a congressionally imposed limit on courts' subject matter jurisdiction, akin to the amount-in-controversy requirement

contained in 28 U.S.C. § 1332") (quotation omitted); United States v. Cruickshank, 837 F.3d 1182, 1192 (11th Cir. 2016) ("[T]he [MDLEA's] jurisdictional requirement is not an element of the offense, need not be determined by a jury, and does not violate the Due Process Clause or the Sixth Amendment."); United States v. Estupinan, 453 F.3d 1336, 1339 (11th Cir. 2006) (holding that the MDLEA does not violate due process and the right to a jury trial by removing the jurisdictional inquiry from the jury); United States v. Rendon, 354 F.3d 1320, 1328 (11th Cir. 2003) (rejecting the defendant's argument that "subject matter jurisdiction is an element of the charged crimes . . . to be decided by a jury" as foreclosed by Tinoco).

In Iguaran, we allowed a defendant to challenge the district court's subject matter jurisdiction under the MDLEA -- on the ground that the subject vessel was not subject to the jurisdiction of the United States -- for the first time on appeal, because subject matter jurisdiction is a question of law that we review de novo and can be raised at any time. 821 F.3d at 1336. Finding that the government needed to "preliminarily show that the conspiracy's vessel was, when apprehended, subject to the jurisdiction of the United States," and that the record in the case did not establish a basis for subject matter jurisdiction, we vacated and remanded. Id. at 1336-38 (explaining that "[w]hen a party's failure to challenge the district court's jurisdiction is at least partially responsible for the lack of a developed record, . . . the proper course of action . . . is to remand the case to the district court for factual findings")

(quotation omitted). We advised that after both parties had the opportunity on remand to present evidence about whether the vessel was subject to the jurisdiction of the United States, the district court was to decide whether the government carried its burden as to jurisdiction, and if so, to reinstate the defendant's conviction. Id.

In United States v. Hernandez, a defendant argued on direct appeal that under the MDLEA, the government had to have jurisdiction over the subject vessel before the commission of the underlying offense. 864 F.3d 1292, 1297, 1303 (11th Cir. 2017). We held that the post-offense certification, which established the United States' jurisdiction, eliminated his timing argument because, to obtain jurisdiction over a MDLEA prosecution, the government need only show that the MDLEA's statutory requirements were met. Id. at 1303-04.

And in United States v. Phillips, we held that when a district court finds that an out-of-time appeal in a criminal case was warranted as the remedy in a § 2255 proceeding, it should: (1) vacate the original judgment of conviction; (2) reimpose the same sentence; and (3) advise the defendant of his right to appeal and the time for filing a notice of appeal from the reimposed sentence. 225 F.3d 1198, 1201 (11th Cir. 2000). We later noted that the remedy outlined in Phillips "put the defendant back in the position he would have been in had his lawyer filed a timely notice of appeal," i.e., the position had the error not occurred. McIver v. United States, 307 F.3d 1327, 1331 (11th Cir. 2002) (quotation omitted, alteration accepted).

Under our prior panel precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008). The intervening decisions must "actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel." United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009). There is no exception to the rule based upon an "overlooked reason" or "perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time." Smith v. GTE Corp., 236 F.3d 1292, 1303 (11th Cir. 2001).

Here, Nuñez argues that the district court should not have held an evidentiary hearing during his § 2255 proceedings to allow the government to present evidence to establish jurisdiction in his underlying criminal case. We disagree. For starters, a district court "shall . . . grant a prompt hearing" when a petitioner files a § 2255 motion, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. § 2255(b), and we cannot say that the record of Nuñez's criminal case conclusively showed that he was not entitled to relief. Moreover, the procedure followed by the district court is in line with our previous decisions. In Iguaran, we allowed the government to present new evidence to establish the court's MDLEA jurisdiction after judgment was entered, and in Hernandez, we held that the time at which the government proved jurisdiction did

not matter, so long as it showed that the MDLEA's statutory requirements were met. Indeed, our Court in Iguaran expressly permitted the government to belatedly present evidence of the court's jurisdiction, even while noting that the MDLEA provided that jurisdiction was a threshold matter that the government had to "preliminarily show." 821 F.3d at 1336.

To the extent Nuñez claims that Iguaran and Tinoco were wrongly decided and conflict with Apprendi, his argument is foreclosed by our prior precedent rule -- especially since both cases cited to Apprendi and we've repeatedly affirmed Tinoco. Similarly, Nuñez's arguments challenging the prior precedent rule itself are also foreclosed, because neither this Court sitting en banc nor the Supreme Court has overruled or undermined it to the point of abrogation.[1]

Accordingly, because our prior precedent allows the government to present evidence establishing MDLEA jurisdiction after a final judgment, the district court did not err in allowing the government to do so in these § 2255 proceedings.

AFFIRMED.

[1] Finally, we decline to consider any of Nuñez's arguments that are outside the scope of the district court's COA, including his double jeopardy argument. See Kuenzel, 488 F.3d at 1343. Nuñez also has abandoned the argument that his trial and appellate counsel were ineffective for failing to raise the issue of the court's jurisdiction. See Corbett, 921 F.3d at 1043.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11955-AA

YENCY NUNEZ,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, ROSENBAUM, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 17-20440-CIV-MARTINEZ-GOODMAN
(CASE NO. 13-20295-CR-MARTINEZ)

YENCY NUÑEZ,
Movant,
v.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THIS MATTER was referred to the Honorable Jonathan Goodman, United States Magistrate Judge, for a Report and Recommendation ("R&R") on Movant's Amended Verified Motion to Vacate Conviction and Sentence Pursuant to 28 U.S.C. § 2255. [ECF Nos. 1, 4]. After conducting an evidentiary hearing pursuant to this Court's instruction, Magistrate Judge Goodman filed an R&R, [ECF No. 95], recommending that this Court find that the Government carried its burden of establishing that the Subject Vessel (*ANDREA I*) was subject to the jurisdiction of the United States when it was interdicted, and to therefore deny Movant's habeas petition. The R&R further suggested this Court grant the issuance of a certificate of appealability. Both parties filed timely objections. [ECF Nos. 100, 101].

The Court, having conducted a *de novo* review of the record and the issues presented in the parties' respective objections, agrees with Magistrate Judge Goodman's conclusion that the Government has met its burden to show that the Subject Vessel (*ANDREA I*) was subject to the jurisdiction of the United States under the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70503(a), (b). The Court will address the objections herein.

OBJECTIONS

I. Subject Matter Jurisdiction

The Court agrees with Magistrate Judge Goodman's R&R that Nunez's first claim of habeas relief based on insufficiencies in the record for jurisdiction under the MDLEA fails. [ECF No. 95]. Pursuant to Rule 7 of the Rules Governing 2255 Proceedings for the United States District Court, an evidentiary hearing was held, and the Government supplemented the record with necessary facts supporting jurisdiction under the MDLEA. [ECF No. 90]. Nunez does not object to the R&R's jurisdictional factual findings, but rather objects to the procedure used to make such findings. Nonetheless, because the record was properly expanded under Rule 7 by conducting an evidentiary hearing on the issue, the Court affirms and adopts Magistrate Judge Goodman's conclusion that the Government carried its burden of establishing subject matter jurisdiction over the interdicted vessel under the MDLEA.

Accordingly, the Court agrees with the R&R's conclusion that Nunez's claim for ineffective assistance of counsel likewise fails for failure to show prejudice.

II. Double Jeopardy

Nunez's main point of contention throughout these proceedings is that subjecting him to the evidentiary hearing, and permitting the Government to introduce additional evidence not introduced at his initial trial, subjected Nunez to double jeopardy. As outlined in the Eleventh Circuit's dismissal of Nunez's interlocutory appeal of his motion to arrest proceedings, Nunez's double jeopardy claim is "not colorable." [ECF No. 86].

The protection of the Double Jeopardy Clause applies "only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). "Whether judicial action constitutes an acquittal for double jeopardy purposes does not depend on 'the form of the judge's action,' but instead on 'whether the ruling

of the judge, whatever its label, actually represents a resolution, correct or not, ***of some or all of the factual elements of the offense charged***.'" [ECF No. 86 at 2 (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (emphasis added)]. Jurisdiction is not a factual element of the MDLEA. *See United States v. Tinoco*, 304 F.3d 1088, 1106–12 (11th Cir. 2002); *United States v. Rendon*, 354 F.3d 1320, 1328 (11th Cir. 2003); *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016). Further, errors in the proceedings do not terminate jeopardy. *See Richardson*, 468 U.S. at 325. In short, there has been no jeopardy-terminating event. So even assuming the evidentiary proceeding to expand the record on jurisdiction was improper—a contention with which this Court disagrees—Nunez still cannot establish this subjected him to double jeopardy.

III. Certificate of Appealability

"Section 2253(c) bars appeals from 'final order[s]' in § 2255 proceedings '[u]nless a circuit justice or judge issues a certificate of appealability.'" *Jackson v. United States*, 875 F.3d 1089, 1090 (11th Cir. 2017) (quoting 28 U.S.C. § 2253(c)(2)). Section 2253(c) permits the issuance of a certificate of appealability only where a petitioner has made a "substantial showing of the denial of a constitutional right." *Miller El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal citation omitted). In turn, this requires the petitioner to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id*. (internal quotations omitted).

As discussed at length in the R&R, Magistrate Judge Goodman previously recommended against holding the evidentiary hearing under *United States v. Iguaran*, 821 F.3d 1335 (11th Cir. 2016). The Court disagreed and overruled that decision, recommitting the question to Magistrate Judge Goodman pursuant to Rule 7 of the Rules Governing 2255 Proceedings with directions to

expand the record by conducting an evidentiary hearing on the issue of MDLEA subject matter jurisdiction. [ECF No. 37 at 5]. Though the Court believes this procedure was proper under Rule 7, a reasonable jurist, such as Magistrate Judge Goodman, could believe that the Court's additional reliance on *Iguaran* is misplaced.

The procedure laid out in *Iguaran* related to a direct criminal appeal. The Court used this procedure in this habeas action relating to an insufficient record in a now-closed criminal case. Reasonable jurists could debate the application of *Iguaran* to this habeas action.[1] To be clear, however, the Court finds the procedure was proper both under Rule 7 and under *Iguaran*.

Accordingly, after careful consideration, it is hereby:

ORDERED AND ADJUDED that

1. United States Magistrate Judge Goodman's Report and Recommendation, [ECF No. 95], is **AFFIRMED and ADOPTED**.

2. Movant's Amended Verified Motion to Vacate Conviction and Sentence Pursuant to 28 U.S.C. § 2255, [ECF No. 1], is **DENIED**. All pending motions are **DENIED AS MOOT**, and this case is **CLOSED.**

3. Movant is **GRANTED** the issuance of a Certificate of Appealability.

DONE and ORDERED in Chambers at Miami, Florida, this 21st day of May 2020.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Goodman
All Counsel of Record

[1] When the Eleventh Circuit dismissed Nunez's interlocutory appeal, it noted that "nothing in this order addresses, or precludes, Mr. Nunez's ability to raise a double jeopardy or other claim in an appeal following final judgement." [ECF No. 86 at 4].

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 17-20440-CIV-MARTINEZ/GOODMAN
(CASE NO. 13-20295-CR-MARTINEZ)

YENCY NUÑEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATIONS
RECOMMENDING DENIAL OF § 2255 MOTION

Movant Yency Nuñez filed an amended motion to correct his sentence under 28 U.S.C. § 2255. [ECF No. 1]. Nuñez asserts two claims: (1) lack of subject-matter jurisdiction (because the "record fails to disclose any basis for federal jurisdiction") and (2) ineffective assistance of counsel (for his counsel's failure to challenge the Court's jurisdiction and failure to timely perfect a direct appeal "in which federal jurisdiction could be challenged"). [ECF No. 1, pp. 1-3]. United States District Judge Jose E. Martinez referred the amended § 2255 motion to the Undersigned. [ECF No. 4]. The United States filed a response in opposition [ECF No. 11] and Nuñez filed a reply [ECF No. 12].

For the reasons discussed below, the Undersigned **respectfully recommends** that the District Court find that the Government has carried its burden of establishing that the

Subject Vessel (*ANDREA I*) was subject to the jurisdiction of the United States when it was interdicted, and **deny** Movant's habeas motion but **grant** the issuance of a certificate of appealability.

I. Factual and Procedural Background

a. Criminal Case

Nuñez pleaded guilty to conspiring to possess with intent to distribute five kilograms or more of cocaine on board a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70503(a), (b). [CRDE No. 91].[1] The factual proffer provided that Nuñez and his co-defendants organized a shipment of cocaine from Colombia to Panama on the *ANDREA I* vessel, which was intercepted by the U.S. Coast Guard. [CRDE No. 90]. United States District Judge Jose E. Martinez entered judgment and sentenced Nuñez to 135 months in prison. [CRDE No. 154].

Nuñez filed a notice of appeal to the Eleventh Circuit. [CRDE No. 228]. Nuñez also filed various motions at the District Court level, seeking clarification and suggesting that the United States did not prove that the vessel at issue was subject to the jurisdiction of the United States, as required under the MDLEA. [CRDE Nos. 241; 244; 249; 252]. Judge Martinez denied these various motions because Nuñez's appeal to the Eleventh Circuit

[1] References to the docket in the underlying criminal case will be to "CRDE" and references to the instant civil § 2255 habeas case will be to "ECF."

divested the District Court of jurisdiction. [CRDE No. 260, p. 2]. Nuñez subsequently voluntarily dismissed his direct appeal to the Eleventh Circuit. [CRDE 269].

b. Habeas Proceedings

Nuñez filed this 28 U.S.C. § 2255 habeas action, reasserting his argument that the record in his criminal prosecution did not establish that the vessel was subject to the jurisdiction of the United States, as required under the MDLEA. [ECF No. 1]. The MDLEA provides that a vessel is "subject to the jurisdiction of the United States" under multiple circumstances, including if the vessel is without nationality or interdicted in the waters of a foreign nation that consents to the enforcement of United States law. *See* 46 U.S.C. § 70503(c). Here, Nuñez points to the indictment and factual proffer, which include general-type statements that the vessel at issue was "subject to the jurisdiction of the United States," but fail to specify which jurisdictional requirement was met under the MDLEA, i.e., whether the vessel was without nationality or was interdicted in the waters of a foreign nation that consents to enforcement of United States law. [ECF No. 1]. Thus, Nuñez argues, because jurisdiction was not established under the MDLEA, the District Court lacked subject-matter jurisdiction in the criminal prosecution, and his conviction and sentence must be vacated. [ECF No. 1].

Judge Martinez referred Nuñez's § 2255 motion to the Undersigned. [ECF No. 4]. In its briefing, the United States acknowledged that an "insufficient factual showing" was made to the District Court in the criminal prosecution to answer the question of

jurisdiction under the MDLEA. [ECF No. 11, p. 17]. During a hearing on Nuñez's § 2255 motion and in later supplemental briefing submitted by the parties, the United States requested an evidentiary hearing so that the Court could consider additional evidence from the United States and make factual findings as to whether the District Court had subject-matter jurisdiction over Nuñez's criminal prosecution. [ECF Nos. 20; 21; 24; 28; 29].

The Undersigned entered an Omnibus Order denying the United States' request for an evidentiary hearing and recommending that the District Court grant Nuñez's petition to vacate his conviction and sentence. [ECF No. 30]. The Undersigned noted the decision was a "close call" considering *United States v. Iguaran*, 821 F.3d 1335, 1338 (11th Cir. 2016), but recommended against holding an evidentiary hearing to allow the United States to supplement the record of a now-closed criminal prosecution in order to prove jurisdiction under the MDLEA. [ECF No. 30, pp. 3-4, 37-39].

Judge Martinez overruled the Undersigned's Omnibus Order and recommitted this matter to the Undersigned "pursuant to Rule 7 of the Rules Governing 2255 Proceedings" with "directions to expand the record . . . by conducting an evidentiary hearing on the issue of threshold MDLEA subject matter jurisdiction." [ECF No. 37, p. 5]. And the Undersigned was further "requested to then determine whether the Government has carried its burden of establishing that the vessel in which the defendant was apprehended was subject to the jurisdiction of the United States, and to submit a

supplemental Report and Recommendations accordingly upon the merits of defendant's § 2255 petition." [ECF No. 37, pp. 5-6].

The Undersigned scheduled an evidentiary hearing for December 6, 2018 in compliance with Judge Martinez's Order. [ECF No. 45]. Nuñez then filed a motion to arrest proceedings on double jeopardy grounds, arguing that the scheduled evidentiary hearing would violate the Fifth Amendment's bar on double jeopardy. [ECF No. 46]. The Undersigned recommended that Judge Martinez deny the motion to arrest proceedings because the MDLEA jurisdictional requirement is not an element of the offense and thus a finding that the Government did not meet the jurisdictional requirement in Nuñez's criminal prosecution does not terminate jeopardy against Nuñez (and does not prevent an evidentiary hearing being held to determine if the Government can satisfy its burden that the MDLEA jurisdictional requirement is met). [ECF No. 58, pp. 102]. Judge Martinez adopted the Undersigned's Report and Recommendations. [ECF No. 68].

Nuñez appealed the denial of his motion to arrest proceedings to the Eleventh Circuit. [ECF No. 69]. In light of the appeal divesting the Court of jurisdiction as to the matter appealed, the Undersigned canceled the evidentiary hearing scheduled for December 6, 2018. [ECF No. 75]. The Eleventh Circuit later dismissed Nuñez's appeal, finding that his double jeopardy claim is "not colorable." [ECF No. 86, p. 3]. The evidentiary hearing was rescheduled for June 27, 2019. [ECF No. 87].

The Court held an evidentiary hearing on June 27, 2019, during which the

Government proffered evidence and presented testimony in order to meet its burden of establishing that the vessel at issue was subject to the jurisdiction of the United States. [ECF No. 90].

II. Legal Standard and Analysis

Nuñez asserts two claims in his habeas petition: (1) lack of subject-matter jurisdiction because the "record fails to disclose any basis for federal jurisdiction," and (2) ineffective assistance of counsel for his counsel's failure to challenge the Court's subject-matter jurisdiction and failure to timely perfect a direct appeal "in which federal jurisdiction could be challenged." [ECF No. 1, pp. 1-3].

As discussed below, both of Nuñez's claims fail. First, the issue of subject-matter jurisdiction was recommitted by Judge Martinez to the Undersigned to hold an evidentiary hearing to expand the record and the Undersigned finds that the Government has met its burden to show that the subject vessel was subject to the jurisdiction of the United States under the MDLEA. Second, the Undersigned finds that Nuñez's claim for ineffective assistance of counsel based on his counsel's failure to challenge the District Court's jurisdiction fails because Nuñez does not explain how he was prejudiced by his counsel's failure to make this challenge when it is clear that the vessel at issue was subject to the MDLEA at the time of interdiction.

a. Subject-Matter Jurisdiction under the MDLEA

Nuñez was charged under 46 U.S.C. § 70503 of the MDLEA, which provides that

"on board a ***covered vessel***, an individual may not knowingly or intentionally--(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance." § 70503(a) (emphasis added). A "covered vessel" is defined as "a vessel of the United States or a ***vessel subject to the jurisdiction of the United States***." § 70503(e) (emphasis added).

The MDLEA further provides that:

> **(c) Vessel subject to the jurisdiction of the United States.**--
>
> > **(1) In general.**--In this chapter, the term "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;
> >
> > . . .
>
> **(2) Consent or waiver of objection.**--Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under paragraph (1)(C) or (E)—
>
> > **(A)** may be obtained by radio, telephone, or similar oral or electronic means; and
> >
> > **(B)** is proved conclusively by certification of the Secretary of State or the

Secretary's designee.

46 U.S.C. § 70502.

"Thus, 'for a district court to have adjudicatory authority over a charge that a defendant conspired to violate the substantive crime defined in [the MDLEA], the Government must preliminarily show that the conspiracy's vessel was, when apprehended, subject to the jurisdiction of the United States.'" *Iguaran*, 821 F.3d at 1336 (citing *United States v. De La Garza*, 516 F.3d 1266, 1272 (11th Cir. 2008)).

Nuñez claims that the record in his criminal case "does not disclose a basis for federal jurisdiction" and thus his conviction and sentence must be vacated. [ECF No. 1, pp. 1, 3]. Nuñez points out that the Government failed to identify the name of the vessel in the indictment and that the factual proffer in support of the plea did not provide that the vessel was in international waters. [ECF No. 1, p. 1].

As noted by Judge Martinez, the Government "ultimately acknowledged that the record did not factually establish subject matter jurisdiction" and requested an evidentiary hearing to fill in the gaps. [ECF No. 37, pp. 2-3]. Judge Martinez found that that the "proper course" of action was outlined in *Iguaran*. [ECF No. 37, p. 5]. In *Iguaran*, Iguaran filed a direct appeal of his conviction under the MDLEA, arguing that the district court did not have subject matter jurisdiction. *Iguaran*, 821 F.3d at 1336. The Eleventh Circuit agreed with Iguaran and found that the district court "did not expressly make any factual findings with respect to its jurisdiction." *Id.* at 1337. Nevertheless, the

appellate court remanded the case for an evidentiary hearing. Specifically, the Court in *Iguaran* held that:

> When a party's failure to challenge the district court's jurisdiction is at least partially responsible for the lack of a developed record, we have said that "the proper course of action ... is to remand the case to the district court for factual findings" as to jurisdiction. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1320 (11th Cir. 2001); *see also Belleri v. United States*, 712 F.3d 543, 548 (11th Cir. 2013) (stating that when we discover "a serious question regarding the factual predicate for subject-matter jurisdiction, we should remand for a finding to resolve the jurisdictional question") (quotation marks and alteration omitted); *Rolling Greens MHP, LP v. Comcast SCH Holdings LLC*, 374 F.3d 1020, 1020–21 (11th Cir.2004) (remanding to the district court "for limited purpose of determining whether diversity jurisdiction exists"). Although neither side requests it, a limited remand is the proper course of action in this case.
>
> We therefore remand the case to the district court for the limited purpose of determining whether subject matter jurisdiction exists. On limited remand, the government "should be afforded an opportunity to submit evidence in support of its assertion" that Iguaran's vessel was subject to the jurisdiction of the United States, and Iguaran should be afforded an opportunity to present evidence that it was not. *Williams*, 269 F.3d at 1321. The district court should then determine whether the government has carried its burden of establishing that the vessel in which Iguaran was apprehended was subject to the jurisdiction of the United States.

Id. at 1338.

Here, Judge Martinez found that Nuñez was "at least partially responsible for the lack of the developed record" on the MDLEA jurisdictional issue. [ECF No. 37, p. 5]. Thus, relying on *Iguaran*, Judge Martinez recommitted this matter to the Undersigned to hold an evidentiary hearing to determine whether jurisdiction under the MDLEA is satisfied. Based on the findings of fact made during the evidentiary hearing, which are discussed

below, the Undersigned finds that the Government has met its burden of establishing jurisdiction under the MDLEA.

i. Findings of Fact

Upon consideration of the record in the criminal case, as well as the evidence and testimony from Command Duty Officer Christopher Dunton (Custodian of Records for U.S. Coast Guard) presented by the Government at the evidentiary hearing held on June 27, 2019, the Undersigned makes the following findings of fact:

1. On October 14, 2011, U.S. Coast Guard personnel observed the motor vessel *ANDREA I* (IMO No. 5275894) ("Subject Vessel") while on routine patrol, approximately 75 nautical miles north east of El Porvenir, Panama. [*See* ECF Nos. 93-1, 93-2, 93-3].

2. U.S. Coast Guard personnel suspected the *ANDREA I* of illicit trafficking because it was transiting in a known drug trafficking area; was not transmitting AIS or using radar; and the master stated that the vessel was not carrying any cargo, yet the vessel was riding low in the water. [ECF No. 93-2].

3. During right of approach questioning, the master of the *ANDREA I* made a verbal claim of Bolivian registry for the vessel. [ECF No. 93-2].

4. U.S. Coast Guard personnel contacted the Government of Bolivia to confirm registration and request authorization to board. [ECF No. 93-2].

5. Pending Bolivia's response, the *ANDREA I* continued to its port of call, Colon, Panama. [ECF No. 93-2].

6. Prior to receiving a response from Bolivia, the ANDREA I entered into Panamanian territorial waters. [ECF No. 93-2].

7. U.S. Coast Guard personnel pursued the *ANDREA I* into Panamanian waters and the Coast Guard Cutter *GALLATIN* interdicted the vessel *ANDREA I*. [ECF No. 93-2].

8. Coast Guard officers and crew stopped, boarded, and searched the *ANDREA I*. [ECF No. 93-2].

9. During the course of the boarding, the U.S. Coast Guard seized approximately 402 kilogram-sized bricks of a substance that tested positive for cocaine from the bilge access space of the *ANDREA I*. [ECF Nos. 93-1; 93-2].

10. The United States requested by diplomatic note that the Republic of Panama decline to exercise jurisdiction over the *ANDREA I*, its cargo, and the eight Colombian crew members for the purpose of allowing enforcement of the law of the United States. [ECF No. 93-2].

11. On October 25, 2011, the Republic of Panama's Minister of External Relations to Embassy of the United States notified the United States by letter that it did not object to the United States' exercise of jurisdiction over the *ANDREA I*, its cargo, and the eight Colombian crew members. [ECF Nos. 93-2; 93-4; 93-5].

12. A copy of the letter from the Republic of Panama's Minister of External Relations to Embassy of the United States was translated into English by an official

translator at the U.S. Coast Guard headquarters. [ECF No. 93-5]. The Undersigned does not find any reason to believe that the translation is incorrect (and Petitioner did not provide his own alternate translation, nor did he pinpoint any purported mistakes or irregularities).

13. Command Duty Officer Christopher Dunton testified that the Marine Information for Safety and Law Enforcement ("MISLE") system is the record-keeping system for actions taken by the Coast Guard to interdict vessels and for case prosecution. In order to be entered in MISLE, the documents must go through coordination.

14. Command Duty Officer Christopher Dunton verified that Government's exhibits 2-5 (ECF Nos. 93-2; 93-3; 93-4; 93-5) were contained in the MISLE case for the interdiction of *ANDREA I*.

15. In his factual proffer entered pursuant to his guilty plea, Nuñez admitted that he, along with his co-defendants organized a shipment of cocaine from Colombia on the *ANDREA I*. [CRDE No. 90].

16. Specifically, Nuñez admitted that:

> From as early as June 1, 2011, and continuing through May 31, 2012, Yency NUÑEZ and his co-defendants organized the shipment of cocaine from Colombia on the *ANDREA I*. These defendants, including NUÑEZ, would coordinate with each other, the captain of the vessel, and other persons to have the cocaine loaded onto the vessel while the vessel was in port at the Puerto Nuevo, La Guajira, Colombia. A corrupt naval official would then inspect the narcotics laden vessel and overlook the narcotics. Upon being inspected and cleared, the vessel would then leave the North Coast of Colombia destined for Colon, Panama.

> The vessel the co-conspirators launched was the *ANDREA I*. Beginning on October 1, 2011, Colombian law enforcement officials intercepted communication of several of the coconspirators and the defendant, Yency NUÑEZ. These calls revealed that these individuals were putting together a shipment of cocaine. Specifically, on October 10, 2011, NUÑEZ was intercepted speaking to Tabares Quinones. In that call, Tabares Quinones asked NUÑEZ to confirm that the vessel will leave on Wednesday. NUÑEZ confirmed that it will. In another call, on October 10, 2011, NUÑEZ was intercepted speaking to Hernandez Epiyeu. In that call, Hernandez Epiyeu asked whether the driver had left. NUÑEZ confirmed that he was already rolling (which was coded language for the cocaine leaving the stash house and headed to the next location).
>
> On October 14, 2011, the Coast Guard Cutter *GALLATIN*, observed the vessel *ANDREA I* and made contact. Upon searching the vessel, USCG seized approximately 402 kilograms of cocaine from the bilge access space. After this seizure, Colombia law enforcement continued intercepting calls from the co-conspirators in this case. In a call on October 17, 2011, NUÑEZ was intercepted speaking to a co-conspirator. In that call, Hernandez Epiyeu informed NUÑEZ that something serious happened and that they inspected the car (which was code for the vessel).

[CRDE No. 90, pp. 1-2].

17. The Government also provided a copy (and made available the original version during the evidentiary hearing) of a certification from the Secretary of State that the United States determined that the *ANDREA I* was subject to the jurisdiction of the United States pursuant to 46 U.S.C. § 70502(c)(1)(E). [ECF No. 93-2].

18. Specifically, Commander Francis J. Del Rosso, declares under penalty of perjury that the Coast Guard pursued the *ANDREA I* into Panamanian waters pursuant to Article VI of the Supplementary Arrangement Between the United States and Republic of Panama to the Arrangement Between the United States and the Republic of Panama

for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice ("Salas-Becker Agreement"). [ECF No. 93-2, p.1].

19. Pursuant to Panama's authorization, the Coast Guard stopped, boarded, and searched the *ANDREA I*. [ECF No. 93-2, p. 3].

20. And that pursuant to Article XI of the Salas-Becker Agreement, the United States requested by diplomatic note that the Republic of Panama decline to exercise jurisdiction over the *ANDREA I* and that the Republic of Panama notified the United States that it did not object on October 25, 2011. [ECF No. 93-2, p. 3].

ii. Conclusions of Law

Based on the record and consistent with the evidence and testimony presented, and given that:

(1) the Coast Guard interdicted the *ANDREA I* in the territorial waters of a foreign nation -- The Republic of Panama,

(2) the Republic of Panama consented to the enforcement of the law of the United States over the *ANDREA I* [*See* ECF Nos. 93-4; 93-5],

(3) the Secretary of State has certified that the Republic of Panama does not object to the United States' exercise of jurisdiction over the *ANDREA I*, and

(4) no evidence to the contrary was presented by the Defendant,

the Undersigned finds that the Government has met its burden to establish that the

Subject Vessel (*ANDREA I*) is 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" under 46 U.S.C. § 70502(c)(1)(E). And further, consent and waiver of objection by the Republic of Panama has been proven conclusively by certification of the Secretary of State [ECF No. 93-2, p. 2] under 46 U.S.C. § 70502(c)(2)(B).

Because 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 falls within the category of "vessel[s] subject to the jurisdiction of the United States," under 46 U.S.C. § 70502(c)(1)(A) and 46 U.S.C. § 70503, the Undersigned concludes that the Subject Vessel (*ANDREA I*) was subject to the jurisdiction of the United States when it was interdicted by the Coast Guard. Therefore, the Undersigned **respectfully recommends** that Judge Martinez find that subject matter jurisdiction exists in this action over the Subject Vessel (*ANDREA I*) for purposes of the MDLEA.

Judge Martinez recommitted this matter to the Undersigned for an evidentiary hearing "pursuant to Rule 7 of the Rules Governing 2255 Proceedings for the United States District Court" and the Undersigned finds that the Government has met its burden to show that the Subject Vessel (*ANDREA I*) was subject to the jurisdiction of the United States under the MDLEA. Thus, Nuñez's first claim to habeas relief (based on alleged insufficiencies in the record for jurisdiction under the MDLEA) fails as the Government has supplemented the record with the necessary facts supporting jurisdiction under the

MDLEA.

b. Ineffective Assistance of Counsel

Nuñez also argues that his counsel in his underlying criminal case was constitutionally ineffective for failing to challenge the Court's jurisdiction during the criminal proceedings and failing to perfect a direct appeal in which federal jurisdiction could be challenged. [ECF No. 1, p. 3].

To prevail on an ineffective assistance of counsel claim, Nuñez must establish: (1) deficient performance -- that his counsel's representation fell below an objective standard of reasonableness; ***and*** (2) prejudice -- that but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 691 (1984); *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000).

Nuñez's one-paragraph argument fails to explain how he was prejudiced by his counsel's failure to make this challenge when it is clear that the Subject Vessel meets the requirements of jurisdiction under the MDLEA, as discussed above. If Nuñez's counsel would have raised this issue during the underlying criminal proceedings, then the Government presumably would have moved to correct this deficiency. And, alternatively, if Nuñez's counsel would have perfected a direct appeal challenging jurisdiction, like in *Iguaran*, the Eleventh Circuit could have remanded the case to the district court to determine whether subject matter jurisdiction existed. *See Iguaran*, 821

F.3d at 1338.

Nuñez cannot establish that the result of the proceeding would have been different if his counsel would have raised these issues during the criminal trial proceedings or on direct appeal. Accordingly, his claim of ineffective assistance of counsel fails. *See Strickland*, 466 U.S. at 687, 691.

III. Certificate of Appealability

Even though the Undersigned finds that Nuñez is not entitled to relief under § 2255, the Undersigned recommends that the District Court issue a certificate of appealability. "Section 2253(c) bars appeals from 'final order[s]' in § 2255 proceedings '[u]nless a circuit justice or judge issues a certificate of appealability.'" *Jackson v. United States*, 875 F.3d 1089, 1090 (11th Cir. 2017) (quoting 28 U.S.C. § 2253(c)(2)).

Section 2253(c) permits the issuance of a certificate of appealability only where a petitioner has made a "substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal citation omitted). This requires the petitioner to, in turn, show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* (internal quotations omitted).

In this case, the United States is making a novel use of the procedure laid out in *Iguaran* (a direct criminal appeal) to this habeas action relating to an insufficient record

in a now-closed criminal case. Reasonable jurists could debate the application of *Iguaran* to this habeas action.[2] Therefore, the Undersigned finds that a certificate of appealability is appropriate and **respectfully recommends** that Judge Martinez issue a certificate appealability.

IV. Conclusion

Upon careful consideration, the Undersigned **respectfully recommends** that Judge Martinez find that subject matter jurisdiction exists in this action over the Subject Vessel (*ANDREA I*) for purposes of the MDLEA and **deny** Nuñez's habeas motion but **grant** the issuance of a certificate of appealability.

V. Objections

The parties will have 14 days from the date of this Report and Recommendations within which to file written objections, if any, with the District Judge. Each party may file a response to the other party's objection within 14 days of the objection. Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in the Report except upon grounds of plain error if necessary in the interests of justice. *See* 29 U.S.C. § 636(b)(1); *Thomas v.*

[2] Further, when dismissing Nuñez's interlocutory appeal of the denial of his motion to arrest proceedings on double jeopardy grounds, the Eleventh Circuit noted that "nothing in this order addresses, or precludes, Mr. Nunez's ability to raise a double jeopardy or other claim in an appeal following final judgment." [ECF No. 86, p. 4].

Arn, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, at Miami, Florida, July 8, 2019.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Jose E. Martinez
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15025-EE

YENCY NUNEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: MARCUS, WILSON and GRANT, Circuit Judges.

BY THE COURT:

The government's motion to dismiss this appeal for lack of jurisdiction, construed from its response to the jurisdictional question that we issued, is GRANTED.

Yency Nunez was convicted in 2016, following a guilty plea, of conspiracy to possess with intent to distribute a controlled substance on board a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. § 70506(b). Mr. Nunez later filed a 28 U.S.C. § 2255 motion contending, in part, that the record in the criminal case failed to establish a basis for federal jurisdiction under the MDLEA. The district court eventually entered an order granting the government's motion for an evidentiary hearing on the issue of jurisdiction, and Mr. Nunez moved to "arrest proceedings on double jeopardy grounds." Mr. Nunez now seeks interlocutory review of the district court's denial of

that motion.

We conclude that Mr. Nunez's double jeopardy claim is not colorable, and that we therefore lack jurisdiction to review it before final judgment. To warrant interlocutory review, a double jeopardy claim must at least be "colorable," in that it must have "some possible validity." *See Richardson v. United States*, 468 U.S. 317, 322, 326 n.6 (1984); *accord United States v. Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005). Claims and arguments already squarely decided by binding precedent are not colorable and thus do not afford this Court jurisdiction to review interlocutory orders. *See Bobo*, 419 F.3d at 1267. The protection of the Double Jeopardy Clause applies "only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson*, 468 U.S. at 325. Whether judicial action constitutes an acquittal for double jeopardy purposes does not depend on "the form of the judge's action," but instead on "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). While a finding of insufficient evidence on appeal terminates jeopardy, errors in the proceedings, such as a defective indictment, do not. *See Richardson*, 468 U.S. at 325; *Delgado v. Fla. Dep't of Corr.*, 659 F.3d 1311, 1324-25 (11th Cir. 2011); *United States v. Thurston*, 362 F.3d 1319, 1323 (11th Cir. 2004).

The MDLEA 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 that "[j]urisdictional issues arising under [the MDLEA] are preliminary questions of law to be determined solely by the trial judge." 46 U.S.C. § 70504(a). We have repeatedly held, interpreting this statutory provision and its predecessor, that jurisdiction is not an element of an MDLEA offense that must be submitted to a jury and that this statutory provision is constitutional. *See United States v. Tinoco*, 304 F.3d

1088, 1106-12 (11th Cir. 2002); *United States v. Rendon*, 354 F.3d 1320, 1328 (11th Cir. 2003); *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016). Contrary to Mr. Nunez's argument on appeal, we are bound by prior panel precedent unless and until it is overruled or undermined by the Supreme Court or a panel of this Court sitting *en banc*, *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), and there is no exception to this rule based upon an "overlooked reason" or "perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time." *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001).

Even assuming that the district court expressly concluded that the government had failed to carry its burden in establishing jurisdiction under the MDLEA, such a conclusion resolves only a preliminary question of jurisdiction, not a factual element of the offense changed. Therefore, our binding precedent establishes that there has been no jeopardy-terminating event, and Mr. Nunez has not raised a colorable double jeopardy claim that we have jurisdiction to review on interlocutory appeal. We note that nothing in this order addresses, or precludes, Mr. Nunez's ability to raise a double jeopardy or other claim in an appeal following final judgment.

All other pending motions are DENIED as moot.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15025-EE

YENCY NUNEZ,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

On Appeal from the United States
District Court for the Southern District of Florida

BEFORE: WILSON, NEWSOM, and GRANT, Circuit Judges.

BY THE COURT:

Yency Nunez's petition for rehearing and rehearing *en banc*, which has been construed as a motion for reconsideration of our May 7, 2019 order dismissing this appeal for lack of jurisdiction, is DENIED.

Yency Nunez's "Time-Sensitive Motion to Recall the Mandate" is DENIED.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 17-20440-CIV-MARTINEZ-GOODMAN
(Case No. 13-20925-CR- MARTINEZ-GOODMAN)

YENCY NUNEZ,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This CAUSE came before the Court on Movant Yency Nuñez's Motion to Arrest Proceedings on Double Jeopardy Grounds (the "Motion") [ECF No. 46]. Respondent, the Government, filed a response in opposition [ECF No. 48] and Movant filed a reply [ECF No. 54]. This Court referred Movant's Motion to the Honorable Jonathan Goodman for a Report and Recommendation [ECF No. 47]. Magistrate Judge Goodman subsequently filed a Report and Recommendation on Movant's Motion, recommending that this Court DENY Movant's Motion [ECF No. 58]. Movant filed objections to Magistrate Judge Goodman's Report and Recommendation and requested a stay of the proceedings pending resolution of Movant's Amended Petition for a Writ of Mandamus before the United States Court of Appeals for the Eleventh Circuit [ECF No. 59].[1] Respondent filed a response in opposition to Movant's objections

[1] This Court referred Movant's motion to stay the proceedings in this matter to Magistrate Judge Goodman [ECF No. 59]. Magistrate Judge Goodman subsequently issued a Report and Recommendation, recommending that this Court deny Movant's motion to stay the proceedings [ECF No. 65] and Movant filed objections [ECF No. 66]. On December 3, 2018, Movant filed a "Notice that Motion for Stay is Moot" with the Court, advising the Court that the Eleventh Circuit denied his Amended Petition for a Writ of Mandamus [ECF No. 67]. In his notice, Movant included a copy of the Eleventh Circuit's order denying his petition for a writ of mandamus [ECF No. 67-1]. Hence, Movant's motion to stay the proceedings is moot at this time.

and his motion to stay the proceedings [ECF No. 62].

The Court has reviewed the entire file and record, has made a *de novo* review of the issues that Movant's objections to the Report and Recommendation present [ECF No. 59], and is otherwise fully advised in the premises. The Court finds the issues raised by Movant's double jeopardy objections are already addressed by Magistrate Judge Goodman's well-reasoned Report and Recommendation [ECF No. 58]. To the extent that Petitioner objects to the evidentiary hearing scheduled in this matter on December 6, 2018 before Magistrate Judge Goodman, this Court has already ruled that such a hearing is appropriate under the facts of this case and *United States v. Iguaran*, 821 F.3d 1335 (11th Cir. 2016) [ECF No. 37].

Accordingly, after careful consideration, it is hereby:

ADJUDGED that United States Magistrate Judge Jonathan Goodman's Report and Recommendation [ECF No. 58] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that Movant's Motion to Arrest Proceedings on Double Jeopardy Grounds [ECF No. 46] is **DENIED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of December, 2018.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Goodman
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 17-20440-CIV-MARTINEZ/GOODMAN
(CASE NO. 13-20295-CR-MARTINEZ)

YENCY NUÑEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

REPORT AND RECOMMENDATIONS ON NUÑEZ'S MOTION TO ARREST PROCEEDINGS ON DOUBLE JEOPARDY GROUNDS

Movant Yency Nuñez moves to arrest the proceedings on double jeopardy grounds. [ECF No. 46]. United States District Judge Jose E. Martinez referred the motion to the Undersigned [ECF No. 47], the United States filed a response in opposition [ECF No. 48], and Nuñez filed a reply to the United States' response [ECF No. 54]. The Undersigned **respectfully recommends** that Judge Martinez **deny** the motion to arrest the proceedings on double jeopardy grounds.

As explained below, because the Maritime Drug Law Enforcement Act's ("MDLEA") jurisdictional requirement is not an element of the offense and does not relate to the defendant's guilt or innocence, a finding that the Government did not meet the jurisdictional requirement in Nuñez's criminal prosecution does not terminate

jeopardy against Nuñez (and does not prevent an evidentiary hearing designed to see if the MDLEA's jurisdictional requirement can be presented to the Court's satisfaction).

Factual and Procedural History

Nuñez pleaded guilty to conspiring to possess with intent to distribute five kilograms or more of cocaine on board a vessel subject to the jurisdiction of the United States, in violation of the MDLEA. 46 U.S.C. §§ 70503(a), (b). The factual proffer provided that Nuñez and his co-defendants organized a shipment of cocaine from Colombia to Panama on the ANDREA I vessel, which was intercepted by the U.S. Coast Guard. [CRDE No. 90]. United States District Judge Jose E. Martinez entered judgment and sentenced Nuñez to 135 months in prison. [CRDE No. 154].[1]

Nuñez filed a notice of appeal to the Eleventh Circuit. [CRDE No. 228]. Nuñez also filed various motions at the District Court level, seeking clarification and suggesting that the United States did not prove that the vessel at issue was subject to the jurisdiction of the United States, as required under the MDLEA. [CRDE Nos. 241; 244; 249; 252]. Judge Martinez denied these various motions because Nuñez's appeal to the Eleventh Circuit divested the District Court of jurisdiction. [CRDE No. 260, p. 2]. Nuñez subsequently voluntarily dismissed his direct appeal to the Eleventh Circuit. [CRDE 269].

[1] References to the docket in the underlying criminal case will be to "CRDE" and references to the instant civil § 2255 habeas case will be to "ECF."

Nuñez then filed this 28 U.S.C. § 2255 habeas action, reasserting his argument that the record in his criminal prosecution did not establish that the vessel was subject to the jurisdiction of the United States, as required under the MDLEA. [2] [ECF No. 1]. The MDLEA provides that a vessel is "subject to the jurisdiction of the United States" under multiple circumstances, including if the vessel is without nationality or is registered in a foreign nation that has consented to the enforcement of United States law. *See* 46 U.S.C. § 70503(c). Here, Nuñez points to the indictment and factual proffer, which include general-type statements that the vessel at issue was "subject to the jurisdiction of the United States," but fail to specify *which* jurisdictional requirement was met under the MDLEA, i.e., whether the vessel was without nationality or was registered in a foreign nation that consented to enforcement of United States law. [ECF No. 1]. Thus, Nuñez argues, because jurisdiction was not established under the MDLEA, the District Court

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[2] Nuñez was charged under 46 U.S.C. § 70503 of the MDLEA, which provides that "on board a ***covered vessel***, an individual may not knowingly or intentionally--(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance." § 70503(a) (emphasis added). A "covered vessel" is defined as "a vessel of the United States or a ***vessel subject to the jurisdiction of the United States***." § 70503(e) (emphasis added).

A "vessel subject to the jurisdiction of the United States" is defined to include: (1) a vessel without nationality; (2) 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; (3) a vessel in the customs waters of the United States; and (4) 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. 46 U.S.C. § 70502(c)(1).

lacked subject-matter jurisdiction in the criminal prosecution, and his conviction and sentence must be vacated. [ECF No. 1].

Judge Martinez referred Nuñez's § 2255 motion to the Undersigned. [ECF No. 4]. In its briefing, the United States acknowledged that an "insufficient factual showing" was made to the District Court in the criminal prosecution to answer the question of jurisdiction under the MDLEA. [ECF No. 11, p. 17]. During a hearing on Nuñez's § 2255 motion and in later supplemental briefing submitted by the parties, the United States requested an evidentiary hearing so that the Court could consider additional evidence from the United States and make factual findings as to whether the District Court had subject-matter jurisdiction over Nuñez's criminal prosecution. [ECF Nos. 20; 21; 24; 28; 29].

The Undersigned entered an Omnibus Order denying the United States' request for an evidentiary hearing and recommending that the District Court grant Nuñez's petition to vacate his conviction and sentence. [ECF No. 30]. In sum, the Undersigned found that holding an evidentiary hearing to allow the United States to supplement the record of a now-closed criminal prosecution in order to prove jurisdiction under the MDLEA was not permissible here, even though it was permitted in limited circumstances under *United States v. Iguaran*, 821 F.3d 1335, 1338 (11th Cir. 2016). [ECF No. 30, pp. 3-4, 37-39].

Judge Martinez overruled the Undersigned's Omnibus Order and recommitted this matter to the Undersigned with "directions to expand the record … by conducting an evidentiary hearing on the issue of threshold MDLEA subject matter jurisdiction." [ECF No. 37, p. 5]. And the Undersigned was further "requested to then determine whether the Government has carried its burden of establishing that the vessel in which the defendant was apprehended was subject to the jurisdiction of the United States, and to submit a supplemental Report and Recommendations accordingly upon the merits of defendant's § 2255 petition." [ECF No. 37, pp. 5-6].

The Undersigned scheduled an evidentiary hearing for December 6, 2018 in compliance with Judge Martinez's Order. [ECF No. 45]. Nuñez then filed this motion to arrest proceedings on double jeopardy grounds, arguing that the evidentiary hearing violates the Fifth Amendment bar on double jeopardy.[3]

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[3] Nuñez titles his motion: "Motion to Arrest Proceedings." Nuñez does not cite to a rule of procedure in support of this specific type of motion; however, it appears that the title may be a reference to Federal Rule of Criminal Procedure 34, titled: "Arresting Judgment." Rule 34 provides that "upon the defendant's motion or on its own, the Court must arrest judgment if the court does not have jurisdiction of the charged offense." But the time to file such a motion is fourteen days after a plea of guilty. Fed. R. Crim. P. 34. Clearly, the time to file such a motion in the now-closed criminal proceeding has expired.

But because Nuñez argues that the Double Jeopardy Clause would be violated by the holding of an evidentiary hearing, interests of justice require that this determination be made before the evidentiary hearing. *See Abney v. United States*, 431 U.S. 651, 660, (1977) ("[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence."). Further, as

Legal Analysis

Nuñez argues that the Double Jeopardy Clause is violated because there has been a finding that the jurisdictional requirement was not satisfied in his criminal prosecution, which terminates jeopardy against Nuñez. Nuñez argues an evidentiary hearing on the jurisdictional requirement puts Nuñez into jeopardy a second time. Nuñez's argument fails.

Even assuming that Nuñez's conviction was vacated because the United States failed to meet the MDLEA jurisdictional requirement, only a holding that there was insufficient evidence relating to a ***factual element*** would terminate jeopardy against Nuñez. *See Burks v. United States*, 437 U.S. 1, 10 (1978) (finding jeopardy terminates when there is a resolution of "some or all of the factual elements of the offense"). Eleventh Circuit case law is clear that the MDLEA jurisdictional requirement is not an element of the offense. *See United States v. Tinoco*, 304 F.3d 1088, 1105 (11th Cir. 2002). Accordingly, jeopardy has not been terminated against Nuñez and holding an evidentiary hearing on the jurisdictional requirement does not violate the Double Jeopardy Clause.

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previously noted, this case involves the unique scenario of a habeas court conducting an evidentiary hearing to supplement the record of a criminal prosecution. Thus, here, unlike in a typical habeas action, the Undersigned is considering Nuñez's double jeopardy claim in the first instance. Moreover, Nuñez argues that his motion must be resolved before the evidentiary hearing occurs.

The MDLEA Jurisdictional Requirement Is Not an Essential Element of the Offense

Nuñez argues that the facts necessary to prove jurisdiction under the MDLEA (i.e., whether the vessel is without nationality or is registered in a nation that has consented), go to an essential element of an MDLEA offense and must be proved to a jury. This argument fails, however, because a number of Eleventh Circuit decisions squarely hold that the jurisdictional requirement under the MDLEA is **not** an essential element of an offense and does not need to go to a jury.

In *United States v. Tinoco*, appellants were convicted under the MDLEA and appealed their convictions to the Eleventh Circuit on the ground that the MDLEA violated the Due Process Clause and Sixth Amendment right to a jury trial because it directed the trial judge, but not the jury, to determine jurisdictional issues. 304 F.3d at 1092, 1103.[4] Appellants argued that the question of whether a vessel is "***subject to the jurisdiction of the United States***" under the MDLEA is a substantive element that must be determined by a jury. *Id.*

The Eleventh Circuit rejected this argument and found that Congress has the flexibility to label the jurisdictional requirement under the MDLEA as a non-element of the offense because it is not a traditional element that goes to the "actus reus, causation, or the mens rea of the defendant." *Id.* at 1107-08. Rather, "the statutory jurisdictional

[4] The MDLEA provides that "[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) (emphasis added).

requirement is an ancillary consideration that was enacted as part of the statute in order to promote smooth relations between sovereigns in the domain of international waters." *Id.* at 1108. The jurisdictional requirement "does not affect the defendant's blameworthiness or culpability, which is based on participation in drug trafficking activities, not on the smoothness of international relations between countries." *Id.* at 1109.

The Eleventh Circuit reinforced this holding in subsequent decisions. *See, e.g.*, *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016) ("[T]he jurisdictional requirement is intended to act as a diplomatic courtesy, and does not bear on the individual defendant's guilt."); *United States v. Campbell*, 743 F.3d 802, 809 (11th Cir. 2014) ("[W]e have rejected the argument that a jury must determine jurisdiction under the Act."); *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008) ("We have interpreted the 'on board a vessel subject to the jurisdiction of the United States' … as a congressionally imposed limit on courts' subject matter jurisdiction, akin to the amount-in-controversy requirement . . . ."); *United States v. Rendon*, 354 F.3d 1320, 1328 (11th Cir. 2003) ("Rendon's argument that subject matter jurisdiction is an element of the charged crimes … is foreclosed by *Tinoco*, where we decided that [the MDLEA] does not violate a defendant's Fifth and Sixth Amendment rights.").

Contrary to Nuñez's argument, *Tinoco* and its progeny have not been implicitly abrogated by Supreme Court decisions holding that a defendant's right to a jury trial is

violated when a judge determines facts that enhance the criminal defendant's sentence beyond the statutory maximum. Nuñez relies on the following cases: *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000), which held that a hate crime enhancement determined by a judge is unconstitutional; *Blakely v. Washington*, 542 U.S. 296, 308 (2004), which found a judge's enhancement of a maximum sentence based on a finding of deliberate cruelty to be unconstitutional; *U.S. v. Booker*, 543 U.S. 220, 226-27 (2005), which also found a judge's enhancement of a sentence to be unconstitutional; and *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016), which deemed unconstitutional a sentencing scheme that allowed a judge to determine whether certain circumstances justified the death penalty.

These cases are all factually distinguishable from Nuñez's case. Here, we are not considering a "fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. A judge's determination that the MDLEA jurisdictional requirement is met does not increase a defendant's sentence beyond the statutory maximum. We are considering here what has been deemed solely a jurisdictional question, akin to the amount-in-controversy requirement, which does not go to the defendant's guilt or innocence. *See De La Garza*, 516 F.3d at 1271.

A similar argument was attempted in *Cruickshank*. There, Cruickshank argued that the MDLEA jurisdictional finding was a question for a jury under *Alleyne v. United States*, 570 U.S. 99, 102 (2013), a decision relying on the principle set out in *Apprendi* that "any fact that … increases the penalty for a crime is an 'element' that must be submitted

to the jury." *Cruickshank*, 837 F.3d at 1190-91. The Eleventh Circuit, relying on *Tinoco* and *Campbell*, found that "because the jurisdictional requirement under the MDLEA is not an element of the offense, neither the Due Process Clause nor the Sixth Amendment to the Constitution are implicated when the jurisdictional requirement under the MDLEA is not proven to the satisfaction of a jury." *Cruickshank*, 837 F.3d at 1192.

Cruickshank also argued that the Confrontation Clause was violated because the judge relied on a State Department certification to find that the jurisdictional requirement under the MDLEA was met. *Id.* The Court rejected this argument, as well, stating that the MDLEA jurisdictional requirement "does not implicate the Confrontation Clause because it does not affect the guilt or innocence of a defendant." *Id.*

Accordingly, Nuñez has failed to show that these factually distinguishable decisions dealing with sentencing enhancements have somehow abrogated Eleventh Circuit precedent holding that the MDLEA jurisdictional requirement is not an element of the offense.

Jeopardy Has Not Terminated Here

Nuñez argues that the Double Jeopardy Clause would be violated by a post-conviction evidentiary hearing convened in his § 2255 habeas case because he contends that a finding that evidence is insufficient as to the jurisdictional requirement terminates jeopardy against Nuñez. Therefore, Nuñez says, an evidentiary hearing on

the jurisdictional requirement puts him into jeopardy a second time. But as discussed above, the jurisdictional requirement is not an element of the offense that goes to Nuñez's guilt or innocence. Accordingly, even if Nuñez's conviction was vacated for lack of proof on the MDLEA jurisdictional requirement, jeopardy against Nuñez would not be terminated. Analysis of the Double Jeopardy Clause demonstrates why his theory is unconvincing.

The Double Jeopardy Clause of the Fifth Amendment provides that no person "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause "protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense." *United States v. Thurston*, 362 F.3d 1319, 1322 (11th Cir. 2004) (citation omitted).

However, "[d]ouble jeopardy concerns are not implicated unless there has been some jeopardy-terminating event, such as an acquittal." *United States v. Bobo*, 419 F.3d 1264, 1268 (11th Cir. 2005). A holding that there is insufficient evidence to sustain a conviction has the effect of an acquittal and is therefore a jeopardy-terminating event. *Id.* at 1268. By contrast, there is no jeopardy-terminating event (and the Government is free to retry a defendant) when a conviction is set aside because of some error in the proceedings. *United States v. Thurston*, 362 F.3d 1319, 1323 (11th Cir. 2004).

In *Burks v. United States*, 437 U.S. 1, 12 (1978), the Supreme Court first clarified the distinction between "insufficient evidence" and "error in the proceedings" and its

effect on double jeopardy. There, the Court explained the rationale for allowing the Government to retry a defendant whose conviction is overturned for a procedural error:

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, ***it implies nothing with respect to the guilt or innocence of the defendant.*** Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Id. at 15 (emphasis added).

An example of an error in the proceedings includes a defective indictment. *Thurston*, 362 F.3d at 1322. In *Thurston*, the defendant pleaded guilty to a defective indictment, which alleged that he was simply negligent, even though the crime charged required a finding of gross negligence. *Id.* at 1321. At the sentencing hearing, the district court set aside the guilty plea and dismissed the indictment without prejudice because it did not allege gross negligence. *Id.* at 1322. The defendant was then charged with a second indictment alleging gross negligence. *Id.* The defendant moved to dismiss the indictment on double jeopardy grounds, which the district court denied. *Id.*

On appeal, the Eleventh Circuit held that the second indictment did not violate the Double Jeopardy Clause because the dismissal of the first indictment was for an

error in the proceedings and thus did not terminate jeopardy against the defendant. *Id.* at 1323; *see also Bobo*, 419 F.3d at 1265, 1268 (finding conviction that was vacated based on an insufficient indictment that failed to specify manner and means of healthcare scheme was an error in the proceedings and, therefore, did not terminate jeopardy).

A holding of insufficient evidence, however, "represent[s] a resolution . . . of ***some or all of the factual elements of the offense charged***." *Burks*, 437 U.S. at 10 (emphasis added) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). A finding of insufficient evidence must go to the guilt or innocence of the defendant. *See, e.g.*, *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) (citation omitted) ("Subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause."); *Delgado v. Fla. Dep't of Corr.*, 659 F.3d 1311, 1328 (11th Cir. 2011) (citation omitted) (finding jeopardy did not terminate based upon reversal that "implied nothing with respect to the guilt or innocence of the defendant"). Otherwise, the Double Jeopardy Clause would be negated if the Government was afforded a "second bite at the apple" to prove an element of the offense that was not proved in the first prosecution. *Burks*, 437 U.S. at 17.

For example, a finding that the Government failed to rebut a defendant's proof of insanity goes to the defendant's capacity to be responsible for the criminal act. *Id.* at 11, 18. This "unquestionably" represents a resolution of "some or all of the factual elements of the offense charged," which terminates jeopardy against the defendant. *Id.* at 18.

Likewise, a finding that the prosecution failed to prove the "firearm" element of an offense requiring that the weapon used was less than 16 inches in length represents a resolution of an element of the offense and terminates jeopardy against the defendant. *Smith*, 543 U.S. at 464-66, 474.

Here, jeopardy attached when Nuñez pled guilty. *United States v. McIntosh*, 580 F.3d 1222, 1227 (11th Cir. 2009) (citing *United States v. Baggett*, 901 F.2d 1546, 1548 (11th Cir. 1990)) ("Jeopardy normally attaches when the court unconditionally accepts a guilty plea."). However, jeopardy has not terminated against Nuñez. While Nuñez does not pinpoint exactly when it was that jeopardy purportedly terminated against him, he states that jeopardy "terminated no later" than when Judge Martinez "held that the record evidence was insufficient to support a conviction." [ECF No. 54, p. 8].

But this is not what Judge Martinez held. Rather, Judge Martinez overruled the Undersigned's Report and Recommendations and recommitted the matter to the Undersigned "for an evidentiary hearing on the issue of MDLEA subject matter jurisdiction." [ECF No. 37, p. 5]. Judge Martinez noted in the Order that the "Government ultimately acknowledged that the record ***did not factually establish subject matter jurisdiction***." [ECF No. 37, pp. 2-3 (emphasis added)]. But this is not the holding. *See Bobo*, 419 F.3d at 1268-69 (finding that statement by court that it "questioned" whether the evidence presented was sufficient to support the convictions did not "speak in the language of a holding" as it was missing the "tell-tale 'we hold' or

'we reach'"). And this statement is missing the key finding that the "evidence was insufficient" to support **a conviction**. [*See* ECF No. 37].

Further, even if Nuñez's conviction were to be vacated because the MDLEA evidentiary requirement was not met, this would not be a finding of insufficient evidence for double jeopardy purposes because the jurisdictional requirement is not an element of the offense. *See, e.g.*, *Tinoco*, 304 F.3d at 1109 (stating jurisdictional requirement is a "non-element"); *Campbell*, 743 F.3d at 806 (finding jurisdictional requirement of MDLEA is not an element of the offense). Accordingly, such a ruling would not resolve "***some or all of the factual elements of the offense charged***." *Burks*, 437 U.S. at 10 (emphasis added). Nor does the evidentiary requirement affect the guilt or innocence of the defendant. *See Cruickshank*, 837 F.3d at 1192 (stating MDLEA jurisdictional requirement "does not affect the guilt or innocence of a defendant"). Thus, a holding on the MDLEA jurisdictional question does not terminate jeopardy and, therefore, does not implicate the Double Jeopardy Clause.

Finally, Nuñez is correct that the parties in *United States v. Iguaran*, 821 F.3d 1335 (11th Cir. 2016) did not raise the issue of double jeopardy. But we can assume that the appellate court was aware of fundamental constitutional rights, including the Double Jeopardy Clause, when the *Iguaran* Court remanded the case to the District Court to determine if jurisdiction under the MDLEA existed and could be proven by the Government. *See Iguaran*, 821 F.3d at 1338. And, as explained above, binding precedent

establishes that the MDLEA jurisdictional question is not an element of the offense, does not go to a defendant's guilt or innocence, and does not implicate the Fifth and Sixth Amendment. *See Cruickshank*, 837 F.3d at 1192.

At bottom, the evidentiary hearing is not designed to pursue new charges against Nuñez, to initiate a new criminal prosecution against him, or to give the United States a chance to tackle an insufficiency-of-evidence scenario created in the initial criminal prosecution. Instead, the hearing is designed to merely develop the factual record on an issue which is not an element of the offense.

Therefore, the Undersigned **respectfully recommends** that Judge Martinez **deny** Nuñez's motion to arrest the proceedings (i.e., the type of evidentiary hearing used in *Iguaran*) on double jeopardy grounds.[5]

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[5] Because Nuñez's claim fails on the merits, the Undersigned need not address in detail the United States' arguments that Nuñez waived this claim by pleading guilty, that his claim is untimely, and that he is procedurally barred. But it appears that these arguments would fail.

Nuñez's argument regarding the right to a jury determination of the jurisdictional requirement is made in the limited capacity of his double jeopardy claim, i.e., the Double Jeopardy Clause is violated because a finding that evidence is insufficient as it relates to an essential element (which should be determined by a jury) terminates jeopardy against Nuñez and an evidentiary hearing on this alleged essential element puts Nuñez into jeopardy a second time. Thus, it is difficult to see how Nuñez could have possibly waived his double jeopardy argument **before** the Court granted the United States' request for an evidentiary hearing in this habeas action.

Objections

The parties will have seven (7) days from the date of this Report and Recommendations within which to file written objections, if any, with the District Judge. Each party may file a response to the other party's objection within seven (7) days of the objection.[6] Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in the Report except upon grounds of plain error if necessary in the interests of justice. *See* 29 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

DONE and ORDERED in Chambers, in Miami, Florida, on November 7, 2018.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Jose E. Martinez
All Counsel of Record

[6] The Undersigned is shortening the deadlines for objections and responses because the issues have already been fully briefed and because Judge Martinez needs to rule on any objections before the scheduled December 6, 2018 evidentiary hearing.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15485-F

In re: YENCY NUNEZ,

Petitioner.

On Petitions for Writ of Mandamus from the United States District Court for the Southern District of Florida

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Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Petitioner Yency Nuñez's motion for leave to proceed *in forma pauperis* is GRANTED. His petition for a writ of mandamus is DENIED. His motion for expedited oral argument is DENIED AS MOOT, and his motion for leave to reply is DENIED.

The government's motion for leave to file its response out of time is GRANTED.

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.

YENCY NUNEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: **13-20295-CR-MARTINEZ**
USM Number: **08434-104**

Counsel For Defendant: **Oscar Arroyave**
Counsel For The United States: **Monique Botero**
Court Reporter: **Dawn Whitmarsh**

The defendant pleaded guilty to count(s) 1 of the Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
46 U.S.C.§ 70506(b)	conspiracy to possess with intent to distribute five kilograms or more of cocaine on board a vessel subject to the jurisdiction of the United States.	05/31/2012	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **2/1/2016**

Jose E. Martinez
United States District Judge

Date: 1 Feb 2016

DEFENDANT: **YENCY NUNEZ**
CASE NUMBER: **13-20295-CR-MARTINEZ**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **135 months** as to Count One.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **YENCY NUNEZ**
CASE NUMBER: **13-20295-CR-MARTINEZ**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years** as to Count One.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **YENCY NUNEZ**
CASE NUMBER: **13-20295-CR-MARTINEZ**

SPECIAL CONDITIONS OF SUPERVISION

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

DEFENDANT: **YENCY NUNEZ**
CASE NUMBER: **13-20295-CR-MARTINEZ**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **YENCY NUNEZ**
CASE NUMBER: **13-20295-CR-MARTINEZ**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-20295-CR-MARTINEZ

UNITED STATES OF AMERICA

vs.

JORGE ZACARIAS HERNANDEZ EPIEYU,

Defendant.
_____/

FACTUAL PROFFER

If this matter were to proceed to trial, the Government would prove the following facts beyond a reasonable doubt. The Parties agree that these facts, which do not include all facts known to the Government and the Defendant, JORGE ZACARIAS HERNANDEZ EPIEYU, are sufficient to prove the guilt of the Defendant of the above-referenced Indictment:

From as early as June 1, 2011, and continuing through May 31, 2012, JORGE ZACARIAS HERNANDEZ EPIEYU and his co-defendants organized the shipment of cocaine from Colombia on the *ANDREA I.* These defendants, including JORGE ZACARIAS HERNANDEZ EPIEYU, would coordinate with each other, the captain of the vessel, and other persons to have the cocaine loaded onto the vessel while the vessel was ~~in port at the Puerto Nuevo~~ AT SEA OFF RIO HACHA, La Guajira, Colombia. A corrupt naval official would then inspect the narcotics laden vessel and overlook the narcotics. Upon being inspected and cleared, the vessel would then leave the North Coast of Colombia destined for Colon, Panama. In some instances, the vessels would depart Colombia without the cocaine load and would receive the load during an at-sea transfer. HERNANDEZ EPIEYU was responsible for coordinating these at-sea transfers using ~~go-fast~~ SMALL FISHING vessels from Rio Hacha, Colombia to the vessel as it was in transit to Panama.

Exhibit #1
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Beginning on October 1, 2011, Colombian law enforcement officials intercepted communication of several of the co-conspirators and the defendant, HERNANDEZ EPIEYU in discussions organizing the launch of the *ANDREA I*. These calls revealed that these individuals were putting together a shipment of cocaine. Specifically, in a call, on October 10, 2011, HERNANDEZ EPIEYU was intercepted speaking to Yency Nunez. In that call, HERNANDEZ EPIEYU asked whether the driver had left. Nunez confirmed that he was already rolling (which was coded language for the cocaine leaving the stash house and headed to the next location).

On October 14, 2011, the Coast Guard Cutter *GALLATIN*, observed the vessel *ANDREA I* and made contact. Upon searching the vessel, USCG seized approximately 402 kilograms of cocaine from the bilge access space. After this seizure, Colombia law enforcement continued intercepting calls from the co-conspirators in this case. In a call on October 17, 2011, HERNANDEZ EPIEYU was intercepted speaking to NUNEZ. HERNANDEZ EPIEYU informed Nunez that something serious happened and that they inspected the car (which was code for the vessel).

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 1/26/16 By: _____
MONIQUE BOTERO
ASSISTANT UNITED STATES ATTORNEY

Date: Jan 26, 2016 By: _____
DOUGLAS WILLIAMS
ATTORNEY FOR DEFENDANT

Date: Jan. 26th, 2016 By: _____
JORGE ZACARIAS HERNANDEZ EPIEYU
DEFENDANT