No. 21-6139

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

Reply to the Brief in Opposition to the Petition for Writ of Certiorari

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Table of Contents

Table of Authorities

Reply to the Brief in Opposition to the Petition for Writ of Certiorari

I. This case squarely raises whether proof of a "covered vessel" is a jurisdictional element of an MDLEA offense because the parties agreed on all other points.

A. Contrary to what the government assumes, this Court has held that jurisdictional facts can also be offense elements.

The government first argues that, if Nuñez were correct that proof of a "covered vessel" is an MDLEA element, his claim would be procedurally defaulted. Resp. at 6–9. This argument assumes that a jurisdictional fact can not also be an offense element. That is not so, as this Court has held:

> [T]he substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority. *Both kinds of elements must be proved to a jury beyond a reasonable doubt; and because that is so, both may play a real role in a criminal case.*

Torres v. Lynch, 578 U.S. 452, 467 (2016) (emphasis added; citation omitted); *see also Rehaif v. United States*, 139 S.Ct. 2191, 2196 (2019) ("Because *jurisdictional elements* normally have nothing to do with the wrongfulness of the defendant's conduct, such *elements* are not subject to the presumption in favor of scienter." (emphases added)).

McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936), is not to the contrary. That case held that federal courts must dismiss a case whenever the plaintiff fails to establish that subject-matter jurisdiction exists:

> If [the plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and *for that purpose* the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.

298 U.S. at 189 (emphasis added). Because *McNutt* was a civil case, it did not concern the Sixth Amendment and did not suggest that jurisdictional facts in a criminal case can be proven to a judge rather than a jury. *Rehaif* and *Torres* leave no doubt that they cannot be.

Consequently, the government's complaint that Nuñez's position is inconsistent—that he wants to "have it both ways," Resp. at 8—is misplaced. There is nothing contradictory about Nuñez's position. His claim is jurisdictional—as both parties have agreed all along—but that does not mean that it cannot also pertain to an offense element.

This case thus squarely raises the Petition's primary question and provides a good record on this important issue. That record reflects the parties' agreement on everything except the question presented—*i.e.* whether MDLEA jurisdictional facts are a "jurisdictional element," notwithstanding the language in 46 U.S.C. § 70504(a) to the contrary. As the district court stated, "At oral argument upon the § 2255 motion in proceedings before the Magistrate Judge, the Government ultimately acknowledged that the record did not factually establish subject matter jurisdiction, and made an *ore tenus* motion for an evidentiary hearing to provide it with an opportunity to fill the evidentiary gap on MDLEA jurisdiction." DE37:3. Thus, both parties accepted circuit precedent holding that the government's missing proof pertained to subject-matter jurisdiction *and* that this proof was indispensable to Nuñez's conviction. The record also evinces the parties' agreement that Nuñez's conviction must be vacated if proof of a "covered vessel" is an MDLEA jurisdictional element. The only disputed issue is whether § 70504(a), which was enacted before *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), is consistent with that constitutional decision.

B. The government's contention that jurisdictional elements never need to be proven to a jury is unsupported as well as mistaken.

The government next argues that *Ford v. United States*, 273 U.S. 592 (1927), somehow survived *Apprendi*, *Torres*, and *Rehaif* and excepts proof of jurisdictional facts from their holdings. There is nothing to this argument. *Ford* says nothing about offense elements or subject-matter jurisdiction. It concerned only a question of personal jurisdiction, which is not at issue in this case. *See United States v. Alvarez-Machain*, 504 U.S. 655, 661 (1992) ("In *Ford v. United States*, 273 U.S. 593 (1927), the argument as to *personal jurisdiction* was deemed to have been waived.") (emphasis added).

The *Ford* defendants were smuggling liquor into the United States aboard a British vessel seized off San Francisco Bay. 273 U.S. at 601. They contended that their arrest violated a treaty with Great Britain and, consequently, that the courts lacked personal jurisdiction over them. Applying a settled rule, this Court held that the defendants waived any challenge to personal jurisdiction by failing to raise it before their initial plea. Evidence regarding the location of the seizure was therefore irrelevant at trial:

> The issue whether the ship was seized within the prescribed limit did not affect the question of the defendants' guilt or innocence. *It only affected the right of the court to hold their persons for trial.* It was necessarily preliminary to that trial. The proper way of raising the issue of fact of the place of seizure was by a plea to the jurisdiction. A plea to the jurisdiction must precede that plea of not guilty. Such a plea was not filed. *The effect of the failure to file it was to waive the question of the jurisdiction of the persons of defendants.* It was not error, therefore, to refuse to submit to the jury on the trial the issue as to the place of the seizure.

273 U.S. at 606 (citations omitted; emphases added). Every case this Court cited in support held that an objection to personal jurisdiction is waived unless asserted before arraignment.[*]

Rehaif and *Torres* refute the government's response regarding the Petition's primary question. Jurisdictional facts can be offense elements. *Rehaif* and *Torres* do not mention *Ford* or *McNutt* because those cases are inapposite. Needless to say, issues unrelated to the facts underlying the charge, like double-jeopardy or selective-prosecution claims, Resp. at 10–11, have nothing to do with whether MDLEA jurisdictional facts come within *Apprendi*'s holding. The government's arguments against granting the writ have no support.

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[*] *See, e.g.*, *Albrecht v. United States*, 273 U.S. 1, 8 (1927) ("[A] court may acquire jurisdiction over the person of the defendant by his voluntary appearance."); *Dowdell v. United States*, 221 U.S. 325, 332 (1911) (holding that an objection "to the want of proper arrest" is waived unless "taken before pleading to the general issue"); *South Carolina v. Browning*, 50 S.E. 185, 186 (SC 1905) (holding that objection to venue "related to the jurisdiction of the person, and was waived when the defendant contested the case upon the merits"); *Hollibaugh v. Hehn*, 79 P. 1044, 1045 (WY 1905) ("That the court then had jurisdiction of their persons cannot be doubted."); *Gardner v. United States*, 5 Ind. T. 150, 156 (CAIT 1904) (holding that the defendant waived his objection that court was out of session by submitting to a jury trial); *In re Brown*, 64 P. 76, 77 (KS 1901) ("Having submitted himself to the jurisdiction of the district court of Montgomery county on the trial of the offense charged, without raising the question of the legality of his preliminary examination, he may not in this proceeding raise that question."); *Rhode Island v. Watson*, 39 A. 193, 194–95 (RI 1898) (holding that a special plea "shall precede the plea of not guilty" or is waived); *In re Roszcynialla*, 99 Wis. 534, 538 (1898) ("For a prisoner to go to trial without objection not only waives prior irregularities, but objections going to the jurisdiction of the person."); *Minnesota ex rel. Brown v. Fitzgerald*, 51 Minn. 534, 535 (1892) ("[A]s defects in jurisdiction of the person may be waived, and as in general they are to be deemed waived by failure to make objection seasonably, the relator must be held to have waived the objection by pleading to the complaint without making it."); *Iowa v. Kinney*, 41 Iowa 424, 424–25 (1875) (holding that "any error or irregularity in taking defendant before the justice rendering the judgment ... was waived"); *In re Blum*, 30 N.Y.S. 396, 397 (1894) ("Having demanded and stood trial, without objection, he cannot be heard, after conviction, to claim that the court had no jurisdiction of his person."); *Connecticut v. Bishop*, 7 Conn. 181, 182 (1828) (holding that an objection to venue was waived "[b]y the plea of *not guilty*").

The government's final contention—that this case "does not implicate" the circuit split because Nuñez does not challenge the evidence prosecutors presented, Resp. at 11–12—assumes the ground in controversy. The government presented its essential evidence of jurisdictional facts, over Nuñez's objections, to a magistrate judge, not a jury. This case thus squarely raises the very issue on which the appellate courts are divided—*i.e.*, whether proof of a "covered vessel," which is essential to every MDLEA conviction, pertains to an offense element. Because it does, the government's presentation to the district court was a nullity.

C. The government understates the scope of the circuit split over the MDLEA's elements and does not deny that it exploits the Eleventh Circuit's erroneous stance by forum-shopping MDLEA cases there.

The response suggests that only the First, Ninth, and Eleventh circuits have ruled on whether proof of a "covered vessel" is an MDLEA element. Resp. at 11–12. In fact, the split extends additionally to the Second, Fifth, and D.C. circuits. Pet. at 12–13; *United States v. Prado*, 933 F.3d 121, 145–51 (CA2 2019). The courts' growing divide emphasizes the need for this Court's review. The question is all the more urgent in light of the response's failure to deny that the government takes prisoners on protracted sea voyages to exploit the Eleventh Circuit's position. Pet. at 12–13; *United States v. Cabezas-Montano*, 949 F.3d 567, 613–14 (CA11 2020) (Rosenbaum concurring) ("I am deeply troubled that the government took seven weeks between arresting the defendants and bringing them before a magistrate judge for a probable-cause determination."). Were this Court to hold that proof of a "covered vessel" is an MDLEA element, Nuñez's conviction would be vacated, the circuit split would be resolved, and the government's ignominious forum-shopping would end.

II. Neither any circuit court nor the government has advanced any colorable legal basis for the widely used "prior panel rule," and the record reflects the Eleventh Circuit's persistent refusal to examine the rule's legality.

Like the circuit courts that routinely reject appeals using the "prior panel rule," the government fails to advance any legal theory under which the rule is arguably constitutional. Instead, it just asserts that this practice is "settled," citing *Yovino v. Rizo*, 139 S.Ct. 706, 708 (2019). Resp. at 13. *Yovino* does not say that the rule's legality is "settled." On the contrary, because the rule lacks any supporting rationale, *Yovino* is pointedly agnostic as to its legality: "Like other courts of appeals, the Ninth Circuit *takes the position that* a panel decision ... can be overruled only by a decision of the en banc court or this Court ... ." *Id.* at 708 (emphasis added).

Citing Justice Kavanaugh's concurrence in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), the government equates the rule to *stare decisis*, Resp. at 13, but that opinion shows that declaring panel decisions binding on other panels is a distortion, not an application, of the common-law doctrine: "The doctrine of *stare decisis* does not mean, of course, that the Court should never overrule erroneous precedents. All Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions." 140 S.Ct. at 1411. The prior panel rule overrides that hallmark of *stare decisis*, keeping judges from fulfilling their Article III duty to decide cases using their own independent judgment. Pet. at 24–26.

Contrary to what the response says, Resp. at 14, the Petition identified several cases calling the rule's legality into doubt precisely because it is not the same as *stare decisis*. One example is the *en banc* Fourth Circuit decision in *McMellon v. United States*, 387 F.2d

329, 339 (CA4 2004), which conceded that the power to make a panel ruling binding on another panel does not exist—yet went on to exercise it. Pet. at 26. The Petition also quoted Judge Niemeyer's *McMellon* dissent, which preferred the nuanced *stare decisis* doctrine to the rigid rule. Pet. at 27. It also quoted a case stating that Judge Charles Edward Clark earlier reached the same conclusion as Judge Niemeyer. Pet. at 25 (quoting *Dunbar v. Henry Du Bois' Sons Co.*, 275 F.2d 304, 306 (CA2 1960)). Finally, the Seventh Circuit's reliance on traditional *stare decisis* is itself a reproach of the rule. *See* Pet. at 18–19.

This case shows that the prior panel rule is neither a form of *stare decisis* nor a mere procedural rule, and no court has held that it is. A rule that strips judges of their ability to decide cases independently exceeds not only the courts' rule-making power but Article III itself. Nuñez directly challenged the rule on that ground as well as due process and equal protection grounds. Without analyzing the rule at all, the panel used it as the sole basis for refusing to consider Nunez's appeal: "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." A-10. The panel did this even though Nuñez pointed out that a Justice of this Court publicly doubted that the rule is consistent with due process. Pet. at 18. Underscoring the circuit's refusal to examine its rule, the appellate court denied *en banc* review. A-11; A-38.

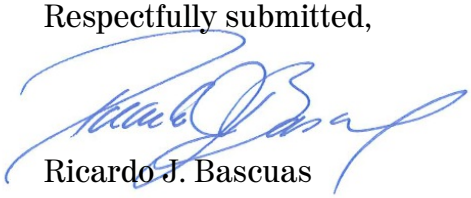
Lastly, the response argues that Nuñez cannot prevail even if the prior panel rule is unconstitutional because the 2002 Eleventh Circuit MDLEA precedent that the panels below deemed binding "itself 'cited to *Apprendi*.'" Resp. at 15. The point of the Petition is that the

prior panel rule is unconstitutional because it precludes any challenge *to that precedent*. The prior panel rule violates due process exactly because it precludes argument from one who "has not had a 'full and fair opportunity to litigate' the claims and issues settled" in an earlier case. *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996); *accord Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008); *see* Pet. at 17.

Alternatively, the government reasons that, had the panel believed it could consider the merits of Nuñez's challenge to his conviction, it might have revisited not only circuit precedent on the MDLEA's elements but also its precedent holding that proof of an MDLEA "covered vessel" relates to subject-matter jurisdiction. Resp. at 15–16. This overlooks that the government has insisted at every stage of this case that its missing proof relates *solely* to subject-matter jurisdiction and *for that reason* cannot also relate to an element, as the district court noted. DE37:3 (quoted *supra* at 2). The government has never disputed that point at any stage of this habeas action.

Consequently, this case squarely raises the Petition's second issue. The parties twice briefed the issue in the circuit court. One panel ignored the challenge and the other said that the prior panel rule itself precludes any challenge to its own constitutionality. A-10. The circuit denied *en banc* review both times, even though no opinion establishes the rule's legality and even though Justice Sotomayor questioned it. A-11; A-38. Plainly, the Eleventh Circuit is unlikely to ever examine the rule. Given its concededly widespread use to dispose of countless *meritorious* appeals across the country, *see* Pet. at 21–23, this Court's review is needed to secure for all litigants the equal protection of this Court's holdings.

Respectfully submitted,



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