

No.

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

JESUS SALVADOR GONZALEZ-LUNAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

The question presented by this case is as follows:

Whether the Constitution requires a jury trial and proof beyond a reasonable doubt, or an adequate factual basis during a guilty plea, to find that a defendant committed a covered offense “while on board” a “covered vessel,” as required by the plain language of 46 U.S.C. § 70503(a), or whether such temporal nexus is subsumed within the determination of what is a “covered vessel,” as held by the First Circuit in reliance on 46 U.S.C. §70504(a)’s delegation of jurisdictional questions to the district court?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. None of the parties are corporations.

RELATED PROCEEDINGS

United States v. Gonzalez-Lunar, No. 3:19-cr-150 (D.P.R.)

United States v. Marcano-Godoy, 462 F. Supp. 3d (D.P.R. 2020)

United States v. Gonzalez-Lunar, No. 21-1458 (1st Cir.)

Marcano-Godoy v. United States, No. 23-6086 (S.Ct., cert. pet. filed Nov. 15, 2023)

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceedings on September 18, 2023.

OPINIONS BELOW

The Judgment, entered in the United States District Court, District of Puerto Rico (Besosa, J.) on May 13, 2021, has not been reported and is reprinted in Appendix B. The denial of the Motion to Dismiss is published at 462 F.Supp.3d 88 and is reproduced in Appendix C. The Judgment and Opinion of the United States Court of Appeals for the First Circuit is unpublished and reproduced in Appendix A.

JURISDICTION

Petitioner stands convicted by guilty plea of Conspiracy to Possess With Intent to Distribute Cocaine while on board a vessel subject to the jurisdiction of the

United States in violation of 46 U.S.C. §§ 70502(c)(1), 70503(a) and 70506(a). The district Court exercised jurisdiction pursuant to 18 U.S.C. § 3231.

Petitioner filed a timely notice of appeal. The United State Court of Appeals for the First Circuit affirmed in an unpublished Judgment and Opinion filed on September 18, 2023. See Appendix A. Petitioner did not seek rehearing. This petition is filed within ninety days of the First Circuit's judgment. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED
U.S. Const., Art. I, Sec. 9, cl. 3:

No bill of attainder or ex post facto Law shall be passed.

U.S. Const., amend. V:

No person shall ... be deprived of life, liberty, or property, without due process of law

U.S. Const., Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

46 U.S.C. § 70502:

(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) ...;

(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;

(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. § 70503:

(a) Prohibitions. —While 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;
- (2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); . . .

46 U.S.C. § 70504

(a) Jurisdiction. —

Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

46 U.S.C. § 70506

(b) Attempts and Conspiracies. —

A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503.

Federal Rule of Criminal Procedure 11

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

STATEMENT OF THE CASE

On February 14, 2019, the United States Coast Guard (“USCG”) located a boat approximately 65 nautical miles south of the United States Virgin Islands, an area of the high seas. This vessel contained possible contraband on deck. The crew jettisoned their load of suspected narcotics, later counted as twelve (12) bales. A USCG cutter recovered the bales and approached the boat. Petitioner González-Lunar identified himself as the master and claimed Venezuelan nationality for himself and the vessel, the Jeis Juli I. The vessel was disabled and taking on water. The nine-member crew evacuated the Jeis Juli I, getting to safety onboard the USCG cutter. They were kept in custody thereafter.

On February 15, 2019, the Government of Venezuela confirmed registration of the Jeis Juli I and authorized the USCG to search its cargo and crew. No further contraband was recovered from that consent to search.

On February 16, the Government of Venezuela waived its primary right to exercise jurisdiction over the Jeis Juli I. A week later, USCG cutter arrived in San Juan, Puerto Rico with the defendants and 12 bales of suspected narcotics. The bales tested positive for the presence of cocaine.

On February 27, 2019, a grand jury returned a three-count indictment charging the Petitioner and his crew with conspiracy to possess with intent to distribute a controlled substance on board a vessel subject to the jurisdiction of the United States (Count One), possession with intent to distribute a controlled substance on board a vessel subject to the jurisdiction of the United States (Count

Two), and conspiracy to destroy property subject to forfeiture pursuant to section 511(a) of the Comprehensive Drug Abuse Prevention Act of 1970 while on board a covered vessel (Count Three) in violation of the Maritime Drug Law Enforcement Act [MDLEA], 46 U.S.C. §§ 70502(c)(1), 70503(a) and 70506(a). Although Count 3 used the statutory phrase “while on board” a covered vessel, Counts 1 and 2 did not. The only date contained in the Indictment was February 14, 2019.

On May 14, 2019, the Government of Venezuela confirmed waiver of jurisdiction over Jeis Juli I, its crew, and any cargo, to the extent necessary for the enforcement of United States law.

Two co-defendants filed a motion to dismiss on the basis that exercising jurisdiction over defendants while in international waters violated the Constitution of the United States. The motion was denied on May 21, 2020. See Opinion and Order, Appx. C.

Petitioner González-Lunar entered a plea of guilty to Count I of the Indictment on February 11, 2021 pursuant to a written plea agreement. The factual basis for the plea recited a subset of the facts found by the district court with respect to the previously litigated Motion to Dismiss, stating that the Jeis Juli I was found in international waters, the boat did not have a flag showing, the crew was seen ejecting bales from the vessel, the bales and crew were retrieved, and the bales contained cocaine. The Stipulation recounted that the United States approached the Government of Venezuela and received permission to board and search the vessel. The only other mention of jurisdiction in the stipulation was that the

Defendant acknowledged he conspired to possess between fifty (50) and one hundred and fifty (150) kilograms of cocaine on board a vessel subject to the jurisdiction of the United States, but the time and fact of the consent of Venezuela to such prosecution was not included in the written plea agreement. During the change of plea hearing, the district court told him: “Mr. Gonzalez, you are charged in Count One of the indictment that you knowingly and intentionally combined, conspired, and agreed with other persons to possess with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine on board a vessel subject to the jurisdiction of the United States, *which was a vessel without nationality.*” (Emphasis added). The written plea agreement contained an appellate waiver.

On May 13, 2021, the district court sentenced Mr. González-Lunar to 108 months imprisonment, the bottom of the range including an uncontested and agreed-to safety valve adjustment. Judgment at 2, Appendix B. Mr. González-Lunar entered a timely notice of appeal.

On appeal, Petitioner argued both that Congress exceeded its powers in enacting the MDLEA as well as that the plea was not knowing and voluntary, as the factual basis did not establish that the offense occurred while Petitioner was on a vessel subject to the jurisdiction of the United States, but rather the facts established that the offenses of possession and conspiracy had concluded prior to the time the United States obtained jurisdiction over the *Jeis Juli I*. The First Circuit entered a Judgment and Opinion holding that the issue of whether Congress

acted within its constitutional powers in creating the MDLEA was waived by the appeal waiver and did not fit within the exception to an appeal waiver. Recognizing that the adequacy of the plea procedure was not waived, the Court held:

These arguments were not raised below and thus are subject to plain error review. See *United States v. Urbina-Robles*, 817 F.3d 838, 842 (1st Cir. 2016) (explaining that unpreserved Rule 11 defects, including a failure to inform defendant about the nature of the charge, are subject to plain-error review). After careful review of the parties' submissions and relevant portions of the record, we conclude that, with the claim, defendant has not satisfied the demanding plain error standard, as, if nothing else, defendant has not demonstrated that any error was prejudicial. See *United States v. Mitchell-Hunter*, 663 F.3d 45, 51 (1st Cir. 2011) ("The MDLEA's jurisdiction determination is explicitly 'not an element of an offense,' and '[j]urisdictional issues arising under [the MDLEA] are preliminary questions of law to be determined solely by the trial judge.'") (quoting 46 U.S.C. § 70504(a)) (alterations in original); see also *United States v. Urbina-Robles*, 817 F.3d 838, 843–44 (1st Cir. 2016) ("[Defendant] still does need to show that there is a reasonable probability that he would not have pled guilty had the Rule 11 colloquy been conducted without this error.").

First Circuit Judgment and Opinion at 1-2, Appendix A. As the First Circuit's decision appears to conflict with the premise that the Fifth Amendment Due Process Clause and the Sixth Amendment Jury Clause require that facts that are necessary to establish the commission of an offense must be plead and proven beyond a reasonable doubt, see *Jones v. United States*, 526 U.S. 227 (1999), the First Circuit's decision conflicts with prior precedent of this Court. Further, the plain language of the MDLEA requires that a covered offense be committed "while on board a covered vessel." Applying the MDLEA to a crime that concluded prior to any basis to exercise jurisdiction renders the statute constitutionally suspect and upsets the balance of interests established by Congress in enacting the MDLEA. The Court should grant review.

I.

THE FIRST CIRCUIT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT SETTING FORTH WHEN FACTUAL ISSUES MUST BE PLED IN AN INDICTMENT AND PROVEN TO A JURY BEYOND A REASONABLE DOUBT

Petitioner Gonzalez-Lunar challenged the voluntariness of his guilty plea due to the absence of an adequate factual basis to establish that he had committed the charged crime “while on board a covered vessel,” either by way of the written agreement or during the colloquy. The First Circuit agreed this issue was not waived by the terms of the plea agreement. See Judgment and Order at 1, Appx. A. The written plea agreement lacked an assertion of consent by Venezuela to jurisdiction and the district judge relied on statelessness as the basis for jurisdiction during the oral plea colloque. The First Circuit denied the appeal on the basis that jurisdiction is not an element of an MDLEA offense, and thus any discrepancy in the basis of jurisdiction could not have affected Petitioner’s willingness to plead guilty. See Judgment and Opinion, Appx. A at 1-2. The Circuit treated all jurisdictional bases the same, and treated them as establishing jurisdiction over the vessel “while” the charged crimes were being committed. The problem is, as inimically phrased by Sesame Street: “One of these things is not like the others.” That thing is jurisdiction obtained by consent.

The various ways that the United States can exercise extraterritorial jurisdiction in an uncontroversial manner is neatly summarized as follows:

[F]ive bases exist for jurisdiction over extraterritorial crimes: territorial, protective, nationality, universal, and passive personality. Under the territorial theory a state may assert jurisdiction with respect to any crime

committed wholly or partly within its territory. Under the protective theory a state may assert jurisdiction over an alien for any crime committed outside its territory impinging upon the security, territorial integrity, or political independence of the state. Under the nationality theory a state may assert jurisdiction over any crime committed outside its territory by a national of that state. The universal theory labels certain crimes so heinous that any nation obtaining control over the suspect may assert jurisdiction regardless of the accused's nexus to the forum. The passive personality principle permits a state to assert jurisdiction over the accused solely because the offense harmed a national of the state claiming jurisdiction.

See Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599, 601 (1987). The MDLEA largely reflects these bases of jurisdiction. See 46 U.S.C. § 70502(b) and (c). Under the exercise of jurisdiction other than by consent, proof that the United States has jurisdiction would also establish proof that the offense occurred “while on board” a covered vessel, as the United States *always* has jurisdiction over its own territory, its own citizens, and arguably over stateless vessels. However, Congress chose not to exercise jurisdiction over a vessel of another nation located in international waters unless and until that nation grants consent. This reliance on consent may reasonably be seen as due to the increasing exercise of extraterritorial jurisdiction by nations, and the friction that can arise when two nations assert jurisdiction over the same incident in international waters. See generally, Danielle Ireland-Piper, *Extraterritorial criminal jurisdiction: Does the long arm of the law undermine the rule of law?* 13 Melbourne J. of Internat'l L., 122 (2012). To comply with the idea that only one nation should assert jurisdiction over an offense at any one time, the plain language of § 70503(a) requires a temporal connection between when

jurisdiction by the United States can be exercised and the commission of the offense.

The problem in Petitioner’s case is that the facts recited by the plea agreement indicate that any conspiracy to possess with intent to distribute cocaine ceased prior to the United States obtaining the consent of Venezuela to exercise jurisdiction over the offense. A conspiracy ends when its object results in success or failure. See *Krulewich v. United States*, 336 U.S. 440, 442 (1949). See also *United States v. Upton*, 559 F.3d 3, 10 (1st Cir. 2009) (“A conspiracy endures as long as the co-conspirators endeavor to attain the ‘central criminal purposes’ of the conspiracy”), *United States v. Delpit*, 94 F.3d 1134, 1150-1151 (8th Cir. 1996) (reversing convictions for interstate travel for murder for hire and conspiracy where interstate travel completed before defendant’s involvement in attempted murder, a non-federal offense). The other charges contained in the Indictment, which refer to substantive possession with intent to distribute and conspiracy to destroy evidence by throwing bales of cocaine into the sea, also ended prior to the time the United States obtained consent. The fact that the Jeis Juli I was non-operational at the time the bales went overboard indicates a final intent to end possession, and the object of a conspiracy to destroy evidence by throwing the bales into the sea concluded by actually doing so. A district court may be able to determine whether a basis for exercising jurisdiction exists, but not able to be the sole arbiter of whether the crime occurred during the exercise of that jurisdiction. This case illustrates why

facts related to jurisdiction may also prove the offense occurred while jurisdiction existed, but they do not *always* do so.

Exercising jurisdiction in a post-offense situation undermines the constitutionality of the statutory framework in a number of ways. First, it deprives a person so prosecuted of Due Process in that relieves the state of the burden to plead and prove all facts relevant to establishing the elements of an offense, which occurred here. The Indictment contained no allegation that the charged conspiracy occurred “while” on board a covered vessel and neither the written plea agreement nor the plea colloquy established that any crime had occurred after the United States obtained jurisdiction. See *Jones*, 526 U.S., at 240-243 (setting forth the implications of absolving the prosecution of the burden of pleading and proving facts necessary to a conviction). Second, relying on consent to apply United States law to a completed crime violates the prohibition against *ex post facto* punishments, again, due to the creation of liability to United States laws and procedure after all criminal conduct has concluded. See e.g. *Thompson v. Utah*, 170 U.S. 343, 352 (1898) (“a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be *ex post facto* in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure”). Third, construing the statute to take the matter of timing out of the realm of an element of the offense and granting such factual determination to a district court deprives an individual of the right to have all facts that are relevant to punishment decided by a jury beyond a

reasonable doubt, in violation of the Sixth Amendment. See *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000) (any factual element that establishes a degree of criminal liability must be plead and proven beyond a reasonable doubt). Removing the temporal nexus between the ability to exercise jurisdiction and the commission of offense also leads to the acceptance of guilty pleas without an adequate factual basis, in violation of Rule 11 of the Federal Rules of Criminal Procedure, which then undermines whether a guilty plea is knowing and voluntary. See *Bousley v. United States*, 523 U.S. 614, 618 (1998) (guilty plea is only constitutionally valid if defendant adequately informed of the elements of the offense). These are all results of a misreading of the plain language of the statute.

The plethora of bad results need not occur. It need not even take much of this Court's time to correct. This Court recently granted review in *Erlinger v. United States*, S.Ct. No. 23-370, on the question as to "Whether the Constitution requires a jury trial and proof beyond a reasonable doubt to find that a defendant's prior convictions were 'committed on occasions different from one another,' as is necessary to impose an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1)." *Id.*, Petition for Certiorari. The statutory mandate in § 924(e)(1) contains words denoting timing that affect criminal liability. Should the Court determine that the plain language of § 924(e)(1) creates a factual element that must be plead and proven beyond a reasonable doubt, the Court could remand this case to the First Circuit for reconsideration in light of any such ruling. Conversely, the Court may wish to grant full review in this case to highlight the

constitutional implications of temporal requirements contained in federal criminal statutes. Either way, the manner in which the First Circuit denied relief in this case conflicts with clear precedent of this Court, a conflict that only this Court can remedy.

CONCLUSION

For the foregoing reasons, Petitioners request this Court to grant review of the First Circuit's decision.

Dated: December 7, 2023

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