23- ____

SUPREME COURT OF THE UNITED STATES OF AMERICA

Gilmer Diaz-Jaramillo

Petitioner

v.

United States of America

Respondent

On Peition for Writ of Certiorari to the United States of Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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Julio César Alejandro Serrano

QUESTIONS PRESENTED

Whether denial of a pretrial challenge to the court's subject matter jurisdiction under the Maritime Drug Enforcement Law warrants interlocutory review since citizens of foreign states, don't have to follow United States Laws and hence are effectively immune from criminal prosecution when they have not acted in contravention to United States interests or are present therein.

Whether the Maritime Drug Enforcement Law is authorized under the Define and Punish Clause as a Felony on the High Seas, as per the meaning of that term of art in the Eighteen century when it was developed to encompass a particular set of criminal acts that was incidental to piratical conduct.

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PETITION FOR WRIT OF CERTIORARI

Gilmer Diaz Jaramillo, a Colombian taxi driver from Bogotá turned drug smugglers and apprehended in the Caribbean Sea by the United States Coast Guard while enroute to the Dominican Republic, petitions this court for a writ of certiorari to review the denial of his motion to dismiss because the Constitution of the United States of America did not authorize the Congress of the United States to criminalize drug trafficking in international waters.

OPINIONS BELOW

The opinion in case 20-446 of the District Court for the District of Puerto Rico-denying the motion to dismiss on the grounds that Congress has no authority to criminalize drug trafficking in the high seas by non-resident foreign citizens is attached at page 3 of the appendix. The order where the First Circuit Court of Appeals dismisses the appeal for want of appellate jurisdiction is at pages 1-2 of the appendix.

JURISIDICTION

Mr. Diaz's appeal in case 23-1017 of the First Circuit Court of Appeals was dismissed on September 22, 2023. This court has jurisdiction under 28 U.S.C. § 1257 because Mr. Diaz has filed this petition within 90 days of the denial of the motion for rehearing *en banc.*

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, section 8, clause 10:

The Congress shall have Power […] [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations[…]

STATEMENT OF THE CASE

During the pandemic Diaz Jaramillo lost his job as a taxi driver. He moved east towards the Colombian desert and embarked from La Guajira, Colombia, on a go-fast vessel destined for the Dominican Republic. Just before reaching the shore, the United States Coast Guard apprehended him and charged him with violating the Maritime Drug Enforcement Law, the MDLEA. By charging Mr. Diaz the United States took an entirely Colombian-Dominican problem and applied its own policies and views of the issues that turn run-of-the-mill Colombians into drug dealers. The social and economic policies of both nations regarding a trade prohibition such as unauthorized controlled substance trafficking; were completely supplanted by the United States' view on the matter.

This was not the original purpose of the Define and Punish Clause.

The MDLEA was enacted under the Define and Punish Clause. The reasoning behind granting power to the Congress to define and punish felonies committed upon the sea was aimed at consolidating upon the federal government the new nation's international obligations to curb piratical conduct and to observe the body of laws know as the Laws of Nations. 19 Journals of the Continental Congress 315 and 361; Washington Government Printing Office (1912) ; 20 id. at 762; 21 id. at 1136–37, 1158 and Wombwell, A. James. The Long War Against Piracy: Historical Trends. Fort Leavenworth, Kansas: Combat Studies Institute Press., p. 28-49 (2010).

. The power to "declare the law and punishment of piracies and felonies committed on the high seas" was considered to be essential to this catalog of

obligations that must be met pursuant to the customs and usage of civilized nations. 2 Records of the Federal Convention of 1787, at 168, 182, Max Farrand ed. (1937). From the congressional debate it is evident that the Founders wanted to vest Congress with sufficient power to authorize the courts to criminalize piratical conduct and violations against the laws of nations but without impinging upon the international consensus that was responsible for developing and recognizing which conduct could be prosecuted equally by all nations.

The legal principles that were developed responded to two main concerns. First, which conduct would be considered piratical and which conduct would not. Secondly, how to distinguish between non-commissioned pirates and corsairs or buccaneers, who were private individuals authorized by Government to attack and disrupt the merchant marines of enemy nations.

Diaz Jaramillo did not engage in piratical conduct. He did not forge the coin of a foreign nation, and did not attack a diplomat. The United States charged Diaz Jaramillo under the Maritime Drug Enforcement Law 46 USC §70501 et seq., because he engaged in the commerce of controlled substances. Inasmuch as these drugs were headed towards the Dominican Republic; the matter would seem to be within the exclusive purview of the Dominican and Colombian authorities. The commerce occurred between Dominican Republic and Colombian nationals and shores.

The MDLEA sort of interjects United States anti-drug trafficking policies in this scenario by declaring that substances which are controlled substances in the

United States must also be prohibited to everyone else in the high seas. All the nationals of all nations are subject to the prohibition set forth in the MDLEA so long as the Coast Guard and the Department of Justice can figure out a way to have the vessel be deemed stateless, or that its flag nation abandons jurisdiction.

But the Define and Punish Clause was included in the Constitution to allow the federal government to prosecute individuals who conducted themselves in the High Seas in such a manner that they could be deemed to recognize the authority of no sovereign. In other words pirates who sailed on vessels that they themselves had turned stateless by unlawfully removing the vessel's owners from its command. Piracy being the offense of theft upon the seas, was insufficient to prosecute pirates for the whole myriad of unlawful conduct that they exhibited. Hence, the power to define and prosecute those felonies that were committed while conducting themselves as pirates was also incorporated into Clause 8.

Diaz Jaramillo was no pirate. And drug trafficking did not turn him into a pirate. The prevailing view is that the MDLEA was enacted pursuant to the delegation of power in the Define and Punish Clause. United States v. Nueci-Peña, 711 F.3d 191, 198 (1st Cir. 2013) Hence, Congress had no authority to enact legislation that prohibits drug trafficking in the High Seas pursuant to a Constitutional provision that was meant to address piratical activities during the Eighteen Century.

A) Piracy was a practice defined by original body of legal principles known as the Laws of Nations and later on considered as customary international law, the

felonies incident to piracy came to be defined at common law back then and known as Felonies on the High Seas.

The body of legal principles known as the law of nations developed a small subdiscipline with legal principles directed at piratical conduct. First a definition that piracy was depredation or theft upon the sea was easily achieved. Along with theft, came other conduct that was not technically theft, but also amounted to unwanted disruption and deplorable conduct while at sea, such as murder.

The Drafters of the Constitution recognized that these "accompanying offenses" needed to be defined by the nation and not incorporated from the definitions prevailing at common law. United States v. Smith, 18 U.S. (5 Wheat) 153, at 158-59 (1820); . 5 Debates on the Federal Constitution 437 (Jonathan Elliot ed., 2d ed. 1836). Immediately following the founding of the union, Congress codified these offenses in Section 8 of the Law of 1790. Currie, David P.; The Constitution in Congress, The Federalist Period 1789-1801, at p. 93, and 296 Second Edition, The University of Chicago Press (1997):

"*And be it enacted, that if any person or persons shall commit, upon the high seas*, or in any river, haven, basin or bay*, out of the jurisdiction of any particular state,* 1) *murder or* 2) *robbery, or* 3) *any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or* 4) *if any captain or mariner of any ship or other vessel, shall, piratically and feloniously,* ***run away with such ship or vessel***, or 5) *any goods or merchandise, to the value of fifty dollars*, or 6) *yield up such ship or vessel voluntarily to any pirate*; or 7)*if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust*, or 8) *shall make a revolt in the ship*; every such offender shall be deemed, taken and adjudged to be a *pirate and felon*, and being thereof convicted, shall *suffer death*; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

As cited in United States v. Palmer, 16 U.S. 610, 626-27 (1818) (the enumeration and italics identify the felonies enacted pursuant to the crimes that the Framers considered Felonies on the High Seas.)

Secondly, that whoever overtook a vessel from its owner without commission from a recognized sovereign became an enemy of all nations alike, -e.g. stateless-; and was therefore subject to the intervention and jurisdiction of all recognized nations or sovereigns. United States v. Holmes, 18 U.S. (5 Wheat.) 412, 417–18 (1820). This second principle avoided a result in which a privateer, a corsair, or a buccaneer was prosecuted for piracy notwithstanding that his actions were really aggressions of war and not criminal acts. The authorization by commission to attack a vessel from an adversary nation made piracy legal.

But, whatever crimes occurred in ships overtaken by non-commissioned crews, regardless of their nationality, would be subject to the prosecution of whichever sovereign detained the rogue vessel. United States v. Klintock, 18 U.S. (5 Wheat.) 144, 145-46 (1820) The crew would be considered stateless and subject to prosecution by the nation that detained them for the crimes committed while the ship was under pirate control. United States v. Furlong, 18 U.S. 184, 196 (1820). However, if these crimes occurred while the vessel was under the control of a recognized sovereign they would not be considered as Offenses in the High Seas even if they occurred in the maritime demarcation known as international waters or the high seas. United States v. Palmer 16 U.S. 610, 634 (1818)

The recurrence of the piracy theme in the above cited opinions is not the coincidence. In these cases the Supreme Court differentiated felonies occurred in international waters which were within the reach of the federal courts and which were not, and the operative set of conditions that rendered them reachable was that they shared the same piratical origin. Kontorovich, Eugene, The Define and Punish Clause and the Limit of Universal Jurisdiction 103 Northwestern Law Review 149, at page 193 (2009). The anxieties of the preconstitutional period certainly played a substantial role in the definition of offenses that could be enacted pursuant to the Define and Punish Clause. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 114 (2013); *citing* Sosa v. Alvarez-Machain, 542 U.S. 692, 714 and 719, (2004). The case law cited above – - Furlong, McKlintock, and Palmer - recognize that although that power was delegated to the national government it was limited in its scope and reach.

This historical analysis of the context in which the wording of the Constitution was approved, at least in so far as it pertain to the Government recognizing its own boundaries and limitation, is appropriate as it illustrates the meaning of legal concepts and principles as understood back then.. New York State Rifle & Pistol Assn., Inc. v. Bruen, No. 20-843, slip copy page 15 , 597 U.S. ___, 142 S. Ct. 2111, 213 L.Ed.2d 387 (June 23, 2022).

B) The MDLEA does not define a Felony on the High Seas as per the meaning of the Define and Punish Clause.

The Maritime Drug Enforcement Law is a statute that criminalizes drug trafficking in the high seas. It is applicable to all ships subject to the jurisdiction of

the United States of America. And the way that the statute defines which ships are subject to the jurisdiction of the United States of America includes all ships which are stateless because they bear no indicia of nationality or because the United States naval or law enforcement authorities cannot confirm the flag state for the detained vessel, or because the flag state of the vessel waives its jurisdiction over it. 46 USC §70503 (e) and §70502(d). .

For purposes of this petition it will be assumed that all these options for deeming a vessel stateless – i.e. that the vessel bears no indicia of nationality, that nationality has not been confirmed, or that jurisdiction has been waived – all comport to international law practices.

The contrast between the international law method, and the method which prevailed in the Eighteen Century is the main reason for this petition. In the 18th century it was the crew's conduct which rendered a vessel stateless. United States v. Holmes 18 US 412, 416 (1820). The crew rendered a vessel stateless when it took possession of the ship and converted it to the crew's own use outside the authorization given by the flag state or sovereign. US v.Klintock 18 US 144, at 152 Thereby, a vessel became stateless not by virtue of its registration but by the actions of its crew.

All sovereigns or nations of the world could intervene and prosecute the rogue crew. No nation had priority over another. By dispossessing the authorized owner of the vessel, that crew had cut all ties with all sovereign authorities of the world. No nation owed assistance or protection to the rogue crew and all nations could prosecute

the renegades, regardless of the nationality of the vessel's rightful owner or the pirates who overtook it. United States v. Klintock, 18 U.S. 144, 152 (1820)

That is not the statelessness test urged by the MDLEA. The MDLEA invokes registry, which is the method currently recognized by international law to assess the owner of a vessel. If no registry is found, regardless of the conduct of the crew; the vessel is subject to the jurisdiction of the United States of America. Moreover, and somewhat contradictorily; if the crew of the vessel claims nationality or can produce registry papers, then American law enforcement agents may seek confirmation and/or waiver of the registry claim from the flag nation. No such practice would have been allowed or necessary under the historical meaning and reach of the concept of statelessness as a manner to acquire jurisdiction over a foreign vessel.

C) Historical analysis of the Define and Punish Clause yields that Piracies, Felonies on the High Seas, and Offenses Against the Laws of Nations corresponded to a legal body of principles reached by consensus amongst all nations of the world and did not respond to the policy considerations of any particular sovereign.

The historical approach to the definition of felonies on the high seas, and statelessness serves an important role in curbing the reach of Congressional prescriptive jurisdiction in international waters. The approach preserves the original intent of the drafters of the Constitution.

The Drafters were concerned that the new nation could respond to its international obligations with other sovereign nations. That the authority of the federal union would sufficient to meet its obligation to criminalize piratical activities

and to prosecute criminal acts executed by rogue sailors while onboard pirate vessels. The Drafters deemed those prerogatives as inherent to the States' sovereign condition, and the reason for the delegation of power to the federal government was premised on the grounds of consistency in the extraction of the criminal statutes and their codification into federal law. So that a foreigner who ran away with vessels and was found by Massachusetts authorities was exposed to the same criminal liability as someone who was found by the authorities in Pennsylvania.

The body of sovereign prerogatives that were vested upon the young nation were known as the law of nations. It was not inherited from England, or otherwise developed from common law. The body of legal principles that constituted the law of nations was developed and applied coextensively by all sovereign nations in the world and reflected the consensus amongst sovereigns rather than the policies of any particular nation.

The debate as to the extent and nature of the delegation of power were clear. The States delegated to the federal government their sovereign prerogative under the law of nations, to criminalize piracy, which was a term defined by the laws of nations. At the same time, the States delegated to the federal government their prerogative to criminalize conduct that accompanied piracy but did not constitute "theft on the high seas". If an offense was not catalogued as one that transgressed that international consensus, it was not reachable and applicable to foreigners through the Define and Punish Clause. . The Antelope 23 US 66, 117 (1825)

Hence, a historical analysis of the power delegated to the federal government provides the entire framework necessary to answer the question of which crimes or felonies may be enacted pursuant to the Define and Punish Clause.

No such international consensus exists as to drug trafficking offenses. Kontorovich, Eugene; Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes 93 Minnesota Law Review 1191, at page 1208 (2009) There is no evidence that the text of the Define and Punish Clause allowed Congress to invent international law altogether. Id at pages 1222-1223. Even the staunchest defenders of the constitutional authority to enact the MDLEA agree that drug trafficking is yet to become a universal jurisdiction offense. A.J. Casavant, In Defense of the U.S. Maritime Drug Law Enforcement Act: A Justification for the Law's Extraterritorial Reach, 8 Harv. Nat'l Security J. 191, 196 (2017). Even if it could be argued that the Define and Punish Clause was a sort of authority window historically left open so that the United States of America could temper its extraterritorially reaching criminal statutes to the new requirements of international cooperation on the high seas; there is no evidence that the MDLEA was enacted pursuant to the consensus of all civilized nations.

Any new or novel offenses that may have to be incorporated as part of the body of offenses that may require the exercise of the jurisdiction delegated through the Define and Punish Clause must be defined and delineated, pursuant to the common perception by the international community that the conduct in question is equally offensive to all nations alike. That is not the issue with drug trafficking. Although

drug trafficking is criminalized by all civilized nations in the world, such as murder, or rape, or even theft; the practice of trafficking narcotics is not borne out of the relationship amongst nations. The prohibition against drug trafficking is not the result of the necessary common use of the sea as a universal resource; and ultimately the prohibition is not the result of the interaction of sovereigns in the common arena.

Although prohibiting drug trafficking is a venerable policy aggressively sponsored by the United States Congress, it is not universally frowned upon with the intensity. While most civilized drugs prohibit the trafficking of controlled substances, their approaches vary widely. Hence, it would matter which sovereign detains a defendant, and would also matter what steps a person would have taken so that his commercial activity would not facilitate or otherwise assist drug trafficking endeavors. Gonzalez v. Raich 545 US 1, 25 (2005). (Congress may criminalize possession with intent to distribute through the powers enumerated in the Commerce Clause).

In other words, a person who fixes a cargo boat of a known drug trafficker to make it seaworthy might not be in violation of the drug trafficking prohibitions in his own country. However, that person would be in violation of the MDLEA if the vessel takes to the high seas, or worse yet, if the United States Coast Guard detects the vessel in the territorial waters of the flag country and requests a waiver of jurisdiction.

An opinion from the Supreme Court providing a limiting framework for Congressional action in this topic is necessary to preserve the original delegation of

power made to the Congress of the United States of America through the Define and Punish Clause.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In the instant case the First Circuit Court of Appeals held that the challenge to the dispositions through which the federal government reached and intends to prosecute his conducts merely challenge the district court;s personal jurisdiction. And that insofar as the motion merely claims that the indictment fails to state an offense, both issues are not amenable to interlocutory appeal. See opinion in Appendix. Both statements also exemplify the reasons why certiorari should be granted. Because the indictment reaches both conduct and individuals who are functionally immune from the authority and delegations delineated in the Constitution of the United States of America.

There is a significant conflict amongst the Circuits as to whether the jurisdictional test required by the MDLEA for the applicability of the statute to a vessel results from the district court's extension of its personal jurisdiction over crew members or the application of subject matter jurisdiction to vessels deemed stateless.

At first glance the statutory provision defining the scope of the prohibition in the MDLEA seems to limit the substantive reach of the statute. The statute itself indicates that it extends to vessels under the jurisdiction of the United States of America. And the First Circuit has held that 46 USC §70503 (c)(1) simply limits the reach of the statute without amplifying or otherwise requiring an extension of the Court's subject matter jurisdiction. United States v. Dávila-Reyes, No. 16-2089, at

p. 4 and p. 25 (1st Cir. Oct. 5, 2023). The opinion itself recognizes the circuit split at p. 25 As several circuits have considered that the extension of the applicability of the MDLEA to foreign vessels extends the subject matter jurisdiction of the Court, United States v. Miranda, 780 F.3d 1185, 1191 (D.C. Cir. 2015); United States v. Tinoco, 304 F.3d 1088, 1106 (11th Cir. 2002); United States v. Bustos-Useche, 273 F.3d 622, 626 (5th Cir. 2001) while the First Circuit and the Second Circuit have held that it does not. United States v. Gonzalez, 311 F.3d 440 (1st Cir. 2002), United States v. Prado, 933 F.3d 121, 132-51 (2nd Cir. 2019).

However, upon closer inspection, the statute really extends the subject matter jurisdiction of Congress by roping in vessels which could not otherwise be reached but for the fact that they carried narcotics. US v. Rendon 354 F3d 1320, 1324 (11th Cir. 2003) These vessels in the high seas are not subject to United States naval regulations, trade laws, or custom powers of the federal government. But, because they carry narcotics, that fact, and that fact alone, makes them amenable to prosecution pursuant to the MDLEA. Since virtually all circuits to consider the matter have discarded the need for a nexus between the United States and the illicit cargo, the issue becomes then whether the vessel is carrying narcotics or not, and not whether these were intended for distribution or importation into the United States. Id at 1325.

The naval authorities of the United States have a right of inspection inherent in the international law consensus regarding the use of the high seas. All domestic vessels are subject to inspection by any sovereign's naval authority. Foreign vessels

cannot be said to be under the jurisdiction of the United States until the naval authorities detect that controlled substances are carried within it.

Hence, the statutory provisions of the MDLEA are not meant to instrument or regulate the acquisition of personal jurisdiction by the Courts, but to establish that the Courts have subject matter jurisdiction over the crew of the vessel because of the drug trafficking conduct.

The United States needs to establish such conduct before being able to prosecute the crew and there is a difference between being able to establish an offense and not being able to prosecute. Blackledge v. Perry, 417 U.S. 21, 30 (1974).. Before that operative factual assessment, the Government is unable to prosecute the defendants, and not merely unable to establish an offense at trial. Class v. United States, 138 S. Ct. 798, 805 (2018) The crewmembers of the vessel are wholly and entirely exempt from complying or even minding the laws of the United States of America. They should also be entitled to pretrial resolution of that claim. . Abney v. United States, 431 U.S. 651, 659 (1977)

Their vessel remains the territory of the nationality of its owners, the crewmembers may respond to that sovereign and to their own national sovereign for their conduct. But, crewmembers are not bound to the laws of the United States prior to the detection of drug trafficking conduct.

Unlike other US citizens and residents who may owe allegiance to federal laws regardless of where they are *see* Carlisle v. United States 16 Wall. 147, 83 US 147, 154 (1872); these individuals owe no such allegiance. They are effectively immune

from application of the laws of the United States to their conduct. Congress cannot prescribe criminal prohibitions to foreign crewmembers on board foreign vessels no more than it could prescribe naval regulations, trade prohibitions, or impose taxes upon those vessels and their crew. Morrison v. National Australia Bank Ltd. 561 US 247, 255 (2010). (recognizing that Congress usually legislates to regulate domestic and not foreign matters.)

The argument in this case is that the enabling constitutional provision for the MDLEA does not reach the type of conduct that Congress criminalized. Hence, the Define and Punish Clause did not recognize an abrogation of the de facto immunity against the application of United States laws that has be recognize to foreigners on board foreign vessels. The defendant, a Venezuelan national, did not need to even mind the existence of the MDLEA and its prohibitions.

A review of the congressional debates, some legal historians, contemporaneous commentators, and legislation enacted during the First Congress all lead to the same conclusion. The intended delegation of powers was limited to the narrow set of offenses enacted by Congress in the Act of 1790. Possession with intent to distribute a controlled substance is not a felony rooted in the common law tradition.

The extension of prescriptive jurisdiction delegated under the Define and Punish Clause is distorted by the MDLEA. The crew of the vessel in which the defendant was arrested did absolutely nothing to render the Mi Liny or themselves *hostis humani generis* a rogue vessel acknowledging the authority, or owing allegiance to no sovereign. No tradition existed that considered drug traffickers as

individuals acknowledging the authority of no nation. The Define and Punish Clause did not delegate to Congress the power to reach the conduct of foreigners in foreign vessels, that had not been rendered stateless through the actions of their crews.

As prosecution continues in this case, that de facto immunity is lost. That issue is sufficiently collateral to warrant interlocutory review. Cohen v. Beneficial Industrial Loan Corp. 337 US 541, 546 (1949) Hence, a rule that clarifies whether such lack of allegiance is tantamount to immunity; and whether such immunity is effectively lost if a MDLEA charge is allowed to proceed against a foreign crewmember onboard a foreign vessel is an important question of law as well.

Another conflict between the circuits is apparent when one looks to the application of the prohibition to vessels that may not be in international waters, or vessels not in the high seas.

Each circuit to have tackled the issue seems to have developed a different approach as to when and how to concern itself with the fact that the conduct criminalized by the MDLEA may not only occur far away from the territory of the union, but that prosecution may impinge upon the policy interests of foreign states. Where and when was the person detected with the illegal cargo plays a role on whether the MDLEA was violated or not, depending on the circuit. That is precisely the inconsistencies that the Drafters sought to avoid.

Four circuits have held that the extraterritorial application of the MDLEA is premised upon the recognition that international drug trafficking is a serious problem for which Congress was allowed to enact proper prohibitions through

legislation. United States v. Ballestas 795 F3d 138, at p. 144-45 (D.C. Cir. 2015); US. V. Antonius 73 Fed. 4th 82, 88 (2nd Cir. 2023); US v. Davila Mendoza 972 F3d 1264, 1275 (11th Cir. 2020), US v. Suerte 291 F3d 366 (5th Cir. 2002).

In United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1248 (11th Cir. 2012) the Eleventh Circuit held that a foreign vessel detained in the territorial waters of a foreign nation was not amenable to prosecution pursuant to the MDLEA because the statute did not define an offense against the law of nations.

Meanwhile, the First Circuit's *en banc* opinion in United State v. Aybar-Ulloa 987 F3d 1, 3-4 (1st Cir. 2021) has at the very least implicitly recognized that the extension of jurisdiction under the statute beyond the contours of the territorial principle of prescriptive international law is problematic. Aybar-Ulloa along with the Ninth Circuit decision in US v. Moreno Morillo 334 F3d 819, 827 (9th Cir. 2003) are premised upon a finding that individuals onboard an unregistered vessel are amenable to jurisdiction under the MDLEA because failure to provide proof of registry is tantamount to statelessness and stateless vessel allow the exercise of jurisdiction by any interdicting sovereign.

A clarification of the rule of the game in the enactment of extraterritorial legislation criminalizing conduct in the high seas is long overdue.

Requiring that Congress enact and define an extraterritorial offense within the proper operative framework might stimulate international consensus as to the policies that should govern a truly universal prohibition of controlled substances. It would also certainly place the nation in a position to better exploit its bargaining

position with foreign nations when articulating the terms of covenants that implement policies which prohibit international controlled substances trade.

CONCLUSION

This Court must grant certiorari to review the determination of the First Circuit that the determination of whether the MDLEA applies or not to foreign crewmember is an issue that only pertains to the extension of the court's personal matter jurisdiction.

The Court should clarify that applicability of the MDLEA is a subject matter jurisdictional issue with profound constitutional implications. Moreover, it should also clarify that the Define and Punish Clause only authorizes the enactment of criminal statutes that prohibit piracy and criminal conduct that is incidental to or related to such piratical conduct of rogue crewmembers. Hence the MDLEA, which prohibits drug trafficking on board all vessels found in the high seas, was not a proper exercise of Congressional authority pursuant to the Define and Punish Clause.

PROOF OF SERVICE

A copy of the petition for certiorari and the motion to proceed in forma pauperis has been sent to the United States Attorney's Office for the District of Puerto Rico at Suite 1201 Torre Chardón, 350 Chardón Street, San Juan, Puerto Rico 00918 and to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D. C. 20530–0001.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this December 21, 2023.

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US Supreme Court No. 252167

INDEX TO APPENDIX

United States Court of Appeals
For the First Circuit

No. 23-1017

UNITED STATES,

Appellee,

v.

GILMER DIAZ-JARAMILLO, a/k/a Gilmer Diaz-Jamillo,

Defendant - Appellant.

Before

Kayatta, Gelpí and Montecalvo,
Circuit Judges.

JUDGMENT

Entered: September 22, 2023

Defendant-Appellant Gilmer Diaz Jaramillo seeks review of a district court order denying his motion to dismiss a criminal indictment. The court ordered defendant to show cause why the appeal should not be dismissed for lack of finality. Having carefully reviewed the record and the response to the show cause order, we conclude that the challenged order is not final and is not otherwise immediately appealable.

In a criminal case, a defendant usually must wait until after sentencing to obtain appellate review of an interlocutory order. See Flanagan v. United States, 465 U.S. 259, 263 (1984) ("In a criminal case the [final judgment] rule prohibits appellate review until conviction and imposition of sentence."). Here, defendant asserts that the denial of his motion to dismiss is immediately reviewable because the motion was based on a claim of "immunity"; however, defendant does not identify an explicit constitutional or statutory pronouncement giving rise to this claim of "immunity." See United States v. Joseph, 26 F.4th 528, 533-34 (1st Cir. 2022) (discussing requirement "that a right not to be tried must be explicitly rooted in a statute or the Constitution" in order to "serve as a basis for interlocutory review").

Further, to the extent defendant's "immunity" claim is, in substance, a claim that the district court lacks personal jurisdiction, such a claim is insufficient to anchor an immediate appeal. See

United States v. Sorren, 605 F.2d 1211, 1214 (1st Cir. 1979) ("Nor does the fact that this case involves personal jurisdiction over a criminal defendant necessarily elevate this inconvenience to a basis for immediate appeal."). "Finally, to the extent that [defendant] merely allege[s] that the indictment fails to state an offense, this theory is not amenable to interlocutory appeal. As the Supreme Court has explained, 'an order denying a motion to dismiss an indictment for failure to state an offense . . . may be reviewed effectively, and, if necessary, corrected if and when a final judgment results.'" Joseph, 26 F.4th at 535–36 (quoting Abney v. United States, 431 U.S. 651, 663 (1977)).

We, accordingly, dismiss this appeal.

DISMISSED.

By the Court:

Maria R. Hamilton, Clerk

cc:
Max J. Pérez-Bouret
Mariana E. Bauzá Almonte
Vanessa Elsie Bonhomme
Jordan Huffman Martin
Julio César Alejandro-Serrano
Gilmer Diaz-Jaramillo

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

United States of America, **Plaintiff,** v. Gilmer Diaz-Jaramillo, **Defendant.**	**CRIMINAL NO. 20-446-1 (RAM)**

OPINION AND ORDER

RAÚL M. ARIAS-MARXUACH, U.S. District Judge

Pending before the Court is Defendant Gilmer Diaz-Jaramillo's ("Diaz-Jaramillo" or "Defendant") *Motion to Dismiss and to Supress [sic]* ("*Motion to Dismiss*" or "*Motion*"). (Docket No. 59). For the reasons set forth below, the Court **DENIES** Defendant's *Motion*.

I. BACKGROUND

Diaz-Jaramillo is a Colombian national who was indicted on December 17, 2020 for possession of a controlled substance onboard a vessel subject to the jurisdiction of the United States in violation of the Maritime Drug Law Enforcement Act ("MDLEA"). (Docket Nos. 3; 59 at 1). United States authorities detained Diaz-Jaramillo and his two Co-defendants in the high seas south of the Dominican Republic on December 10, 2020. (Docket No. 59 at 2). Reportedly, the Coast Guard recovered a total of 20 packages of

cocaine on the vessel and in the water immediately surrounding the vessel.[1] Diaz-Jaramillo and his Co-defendants purportedly did not make a claim of nationality for the vessel, thus it has been treated as a "vessel without nationality" pursuant to § 70502(d)(1)(B) of the MDLEA. Id. As a "vessel without nationality," it is subject to U.S. jurisdiction. *See* 46 U.S.C. § 70502(c)(1)(A).

On October 27, 2021, Diaz-Jaramillo filed the present *Motion to Dismiss*. (Docket No. 59). He argues that the MDLEA is unconstitutional, even as applied to stateless vessels such as his. Id. at 1. He also seeks to suppress the seized contraband, alleging that it was obtained through a violation of his Fourth Amendment right. Id. The Government filed a response on November 10, 2021. (Docket No. 62). It argues that Diaz-Jaramillo lacks standing to challenge his indictment under the MDLEA and that the MDLEA as applied to stateless vessels in the high seas, like Defendant's, is constitutional. Id. at 1. Diaz-Jaramillo filed a reply brief on November 17, 2021 and a supplemental brief in support of his *Motion to Dismiss* on March 8, 2022. (Docket Nos. 65 and 75, respectively). Defendant's supplemental brief points to two recent First Circuit cases that he contends support a dismissal of his indictment. (Docket No. 75 at 2).

[1] United States authorities allegedly saw Defendants jettison several bales of cocaine into the water when they were approached by the authorities. (Docket No. 59 at 2).

II. LEGAL STANDARD

A. Motion to Dismiss an Indictment

Pursuant to Fed. R. Crim. P. 12(b)(1), "[a] party may raise by pretrial motion any defense, objection or request that the court can determine without a trial on the merits." Moreover, it provides that "[a] motion that the court lacks jurisdiction may be raised at any time while the case is pending." Fed. R. Crim. P. 12(b)(2). However, the power to dismiss an indictment pursuant to Fed. R. Crim. P. 12(b) is "reserved for extremely limited circumstances" because it "directly encroaches upon the fundamental role of the grand jury." Whitehouse v. United States District Court, 53 F.3d 1349, 1360 (1st Cir. 1995) (citing Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988)).

A motion to dismiss must attack the facial validity of the indictment and not the government's substantive case. *See* United States v. Ngige, 780 F.3d 497, 502 (1st Cir. 2015) (citing United States v. Stewart, 744 F.3d 17, 21 (1st Cir. 2014)). When a defendant seeks an indictment's dismissal, "courts take the facts of the indictment as true, mindful that 'the question is not whether the government has presented sufficient evidence to support the charge, but solely whether the allegations in the indictment are sufficient to apprise the defendant of the charged offense.'" Ngige, 780 F.3d at 502 (quoting United States v. Savarese, 686 F.3d 1, 7 (1st Cir. 2012)). "In general, an

indictment is adequate if it specifies the elements of the offense charged, fairly apprises the defendant of the charge against which he must defend and allows him to contest it without fear of double jeopardy." United States v. Savarese, 686 F.3d 1, 7 (1st Cir. 2012) (citation omitted). The indictment "may use the statutory language to describe the offense, but it must also be accompanied by such statement of facts and circumstances as to inform the accused of the specific offense with which he is charged." Id. (citing United States v. Mojica-Baez, 229 F.3d 292, 309 (1st Cir. 2000)). Most notably, "the government need not put forth specific evidence to survive a motion to dismiss." Ngige, 780 F.3d at 502.

The courts' reticence regarding pretrial motions to dismiss indictments reaches cases where defendants contend subject matter jurisdiction is lacking. *See, e.g.*, United States v. Guerrier, 669 F.3d 1, 4 (1st Cir. 2012) (quoting United States v. Alfonso, 143 F.3d 772, 776-77 (2d Cir. 1998))(alterations in original) ("[U]nless prosecutors have 'made what can fairly be described as a full proffer of the evidence [they] intend[ ] to present on a pretrial to satisfy the jurisdictional element of the offense, the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss the indictment.'"). With few exceptions, a district court generally has subject matter jurisdiction over a federal criminal case "if the indictment charges that the defendant committed a crime described in a federal

criminal statute." United States v. González-Mercado, 402 F.3d 294, 300-01 (1st Cir. 2005) (quotation omitted).

B. MDLEA

The MDLEA states that "[w]hile on board a covered vessel, an individual may not knowingly or intentionally . . . manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance." 46 U.S.C. § 70503(a)(1). A "covered vessel" includes "a vessel subject to the jurisdiction of the United States," id. § 70503(e)(1), which includes "a vessel without nationality," id. § 70502(c)(1)(A). A "vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel" is one of three types of "vessel[s] without nationality" listed in the MDLEA. Id. § 70502(d)(1)(B). Defendant does not contest that his vessel is a "vessel without nationality" under § 70502(d)(1)(B) and thus subject to U.S. jurisdiction under the MDLEA. (Docket No. 59).

Congress passed the MDLEA pursuant to its authority under the Define and Punish Clause of the Constitution. *See* United States v. Gutierrez-Moreno, 2022 WL 2827462, at *3 (D.P.R. 2022). The Define and Punish Clause imbues Congress with the "Power . . . To define and punish Piracies and Felonies committed on the high Seas, and

Offences against the Laws of Nations[.]" U.S. Const. art. I, § 8, cl. 10.

III. DISCUSSION

A. Standing

As a preliminary matter, the Court discusses Defendant's standing to challenge the constitutionality of the MDLEA. The MDLEA itself states:

> A person charged with violating section 70503 of this title, or against whom a civil enforcement proceeding is brought under section 70508, does not have standing to raise a claim of failure to comply with international law as a basis for a defense. A claim of failure to comply with international law in the enforcement of this chapter may be made only by a foreign nation. A failure to comply with international law does not divest a court of jurisdiction and is not a defense to a proceeding under this chapter.

46 U.S.C. § 70505.

The Government argues that this provision of the MDLEA deprives Defendant of standing to challenge his indictment because his theory is that the MDLEA does not conform with international law. (Docket No. 62 at 3). However, the core of Defendant's argument is that because the MDLEA does not conform with international law, **it violates the United States Constitution.** (Docket No. 59). Given this nuance, the Court will evaluate Defendant's challenge to his indictment under the MDLEA.

B. Constitutionality Under the Define and Punish Clause

Defendant's theory is that the MDLEA is unconstitutional because the Framers did not intend to give Congress the power to punish crimes such as drug trafficking; they only imbued Congress with the authority to punish crimes under "customary international law." (Docket Nos. 59 at 8; 75 at 5). Another recent First Circuit case, United States v. Aybar-Ulloa, has already addressed the MDLEA's conformity with international law as applied to § 70502(d)(1)(B) stateless vessels, like Defendant's. *See* 987 F.3d 1 (1st Cir. 2021)). The First Circuit held:

> [P]rosecution in the United States for drug trafficking on a stateless vessel stopped and boarded by the United States in waters subject to the rights of navigation on the high seas violates no recognized principle of international law. To the contrary, international law accepts the criminal prosecution by the United States of persons . . . seized by the United States while trafficking cocaine on a stateless vessel on the high seas, just as if they were trafficking on a United States-flagged ship.

Id. at 3. The opinion then goes into further detail on why prosecution for drug charges under the MDLEA is consistent with international law. Id. at 9-13. The court also explains that "[a]lthough not a crime that gives rise to universal jurisdiction . . . drug trafficking has long been regarded as a serious crime by nearly all nations." Id. at 14 (citations omitted).

Earlier First Circuit caselaw also affirms the MDLEA's conformity with international law as applied to stateless vessels. *See, e.g.*, United States v. Matos-Luchi, 627 F.3d 1, 6 (1st Cir. 2010) ("[T]he MDLEA does not conflict with international law. For international law too treats the 'stateless vessel' concept as informed by the need for effective enforcement. Thus, a vessel may be deemed 'stateless,' and subject to the enforcement jurisdiction of any nation on the scene[.]"). Accordingly, the MDLEA as applied to stateless vessels in the high seas is not unconstitutional for failure to conform to international law.

1. Bellaizac-Hurtado

Defendant's first brief in support of this *Motion* relies almost exclusively on an Eleventh Circuit case that is neither binding on this Court nor supportive of Defendant's *Motion*. In United States v. Bellaizac-Hurtado, the Eleventh Circuit held that Congress exceeded its power under the **Offences Clause** when it criminalized drug trafficking **in another country's territorial waters** under the MDLEA. *See* 700 F.3d 1245, 1258 (11th Cir. 2012) (emphasis added). Defendant fails to note that Bellaizac-Hurtado involved U.S. jurisdiction over vessels found in another country's territorial waters, not the high seas. Defendant also fails to mention that the Eleventh Circuit limited its holding to Congress's authority under the Offences Clause, which is only part of the Define and Punish Clause. In fact, the Eleventh Circuit explicitly

stated that "Congress possesses additional constitutional authority . . . to restrict conduct on the high seas," including the Piracies Clause, the Felonies Clause, and its admiralty power. Id. at 1257. The court also noted that it has "always upheld extraterritorial convictions under [its] drug trafficking laws as an exercise of power under the Felonies Clause." Id. Thus, the case that Defendant seems to center his *Motion* around actually affirms the MDLEA's constitutionality as applied to stateless vessels in the high seas.

Defendant attempts to extend the Eleventh Circuit's analysis of the Offenses Clause in Bellaizac-Hurtado to the Felonies Clause. (Docket No. 59 at 9-10). However, this historical analysis is not transferrable. The Bellaizac-Hurtado Court analyzed the historical debate amongst the Framers around the word "define" specifically in the context of "Offenses against the Laws of Nations" and not the rest of the Define and Punish Clause. *See* Bellaizac-Hurtado, 700 F.3d at 1249-51. Hence the court concluded that it must "look to international law to ascertain the scope of power granted to Congress **under the Offenses Clause**." Id. at 1251 (emphasis added).

2. Early Supreme Court Caselaw

Defendant also misconstrues the Supreme Court's early caselaw discussing crimes committed in the high seas aboard non-U.S. vessels. (Docket No. 59 at 11-12). According to Diaz-Jaramillo, these early cases prove that Congress may only criminalize

"piratical" conduct, and that not even a crime as universally condemned as murder is punishable under the Define and Punish Clause unless it was under piratical circumstances. (Docket Nos. 59 at 11; 75 at 6). Defendant argues that since these early cases all involved "piratical conduct[,]" the Drafters meant to limit Congress's power to define and punish felonies in the high seas to those "intricately linked to [a] piratical nucleus of facts[.]" (Docket No. 75 at 12). In doing so, Defendant implies that the First Circuit erroneously upheld the MDLEA in Aybar-Ulloa, since that case did not involve a "piratical" crime. Id. at 6.

Defendant misreads these early cases. The Supreme Court indeed held that Congress lacks authority under the Felonies Clause to extend U.S. jurisdiction to felonies committed by foreign nationals on foreign vessels. *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 632-34, 4 L.Ed. 471 (1818); United States v. Furlong, 18 U.S. (5 Wheat.) 184, 198, 5 L.Ed. 64 (1820). However, the Supreme Court was also clear that crimes such as murder committed by and against foreigners **on stateless vessels** can be prosecuted in the United States. *See* United States v. Klintock, 18 U.S. (5 Wheat.) 144, 151, 5 L.Ed. 55 (1820); United States v. Holmes, 18 U.S. (5 Wheat.) 412, 417-18, 5 L.Ed. 122 (1820). Judge Torruella summarized the historic rationale for this distinction in United States v. Cardales-Luna:

> In 1820, the Supreme Court in essence decided that stateless vessels, that is, vessels that were not registered or did not fly the flag of any nation, were considered to have "turned pirate," i.e., were engaged in piracy and the crew were pirates, and thus lost their status under international law of having the protection of any nation and were subject to the jurisdiction of whatever nation first acquired physical jurisdiction over the vessel and its crew.

632 F.3d 731, 747 (1st Cir. 2011) (Torruella, J., dissenting).[2]

3. Recent First Circuit Caselaw

Defendant's second brief in support of his *Motion* includes a final Hail Mary. While at the same time suggesting that Aybar-Ulloa was wrongly decided, Defendant argues that it and United States v. Dávila-Reyes, 23 F.4th 153 (1st Cir. 2022), signal a doctrinal shift in First Circuit MDLEA doctrine. (Docket No. 75 at 2). Under the protective principle, a nation can "define trafficking in controlled substances aboard vessels as a threat sufficient to justify an assertion of jurisdiction[.]" Aybar-Ulloa, 987 F.3d at 2-3 (citing United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999)). Defendant posits that Aybar-Ulloa and Dávila-Reyes signal an erosion of the protective principle and a

[2] Judge Torruella dissented on grounds irrelevant to the quoted paragraph. He objected to the sufficiency of the government's evidence and to the application of the MDLEA to foreign vessels, not stateless vessels. He explicitly exempted stateless vessels from his conclusion regarding the MDLEA's unconstitutionality. *See* Cardales-Luna, 632 F.3d at 751 (Torruella, J., dissenting) ("Except for piracy, slave trading, and stateless vessels, the United States lacks UJ to apprehend and try foreigners for conduct on foreign vessels on the high seas for violation of United States criminal laws where there is no nexus to the United States.").

shift towards using international law as the appropriate basis for defining crimes punishable at sea. (Docket No. 75 at 2). He argues that both cases rejected the notion that drug trafficking is a universal jurisdiction offense. Id. at 15-16. Defendant thus concludes that the MDLEA is unconstitutional per recent First Circuit caselaw.

As a preliminary matter, the Court notes that Dávila-Reyes has since been vacated. *See* United States v. Dávila-Reyes, 38 F.4th 288 (1st Cir. 2022). However, even if Dávila-Reyes were still good law, Defendant would not prevail. Dávila-Reyes would have struck down the portion of the MDLEA that the First Circuit panel deemed conflicted with international law. *See* Dávila-Reyes, 23 F.4th at 195. The panel held that one of the three definitions for statelessness within the MDLEA conflicted with international norms. Id. However, the definition at issue was § 70502(d)(1)(C), not the type of stateless vessel involved here -- § 70502(d)(1)(B). Nothing in the vacated opinion suggests that the First Circuit was concerned about § 70502(d)(1)(B)'s conformity with international law.

Defendant also misconstrues Aybar-Ulloa, which is binding precedent. The Court has already addressed Aybar-Ulloa, which contradicts, not supports, Defendant's theory. In sum, that First Circuit opinion explicitly states that international law permits prosecution of drug trafficking aboard a stateless vessel in the

high seas, despite the fact that it is "not a crime that gives rise to universal jurisdiction[.]" Aybar-Ulloa, 987 F.3d at 14 (citations omitted). The Court need not delve into the fate of the protective principle because, as these cases show, prosecution of drug trafficking aboard a stateless vessel in the high seas is consistent with international law.

Defendant's challenge to the constitutionality of the MDLEA as applied to stateless vessels fails. None of his arguments about the Framers' intent, early Supreme Court caselaw, or recent First Circuit caselaw support such a challenge. "[I]f a person intent on drug trafficking on the high seas wants to be prosecuted in his own country should he be caught, he should sail under the country's flag." Id. at 9.

C. Motion to Suppress

Finally, the Court turns to Defendant's request that the seized contraband be suppressed for allegedly having been obtained in violation of his Fourth Amendment right. (Docket No. 59 at 1). Defendant fails to provide any evidence in the record supporting his version of events that supposedly establish a Fourth Amendment violation. Consequently, the Court is not able to determine whether such a violation occurred, especially in light of the Government's contestation of those events. Regardless, "the Fourth Amendment does not apply to activities of the United States against aliens in international waters." United States v. Vilches-Navarrete, 523

F.3d 1, 13 (1st Cir. 2008) (citing United States v. Bravo, 489 F.3d 1, 8 (1st Cir. 2007)); *see also* United States v. Clark, 266 F. Supp. 3d 573, 581 n.4 (D.P.R. 2017); United States v. Verdugo-Urquídez, 494 U.S. 259, 267 (1990).

V. CONCLUSION

For the reasons set forth above, the Court **DENIES** Defendant's *Motion to Dismiss*. (Docket No. 59).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 2nd day of December 2022.

S/ RAÚL M. ARIAS-MARXUACH
United States District Judge