

No. 24-

In the
Supreme Court of the United States

JOSE ROSARIO-ROJAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit**

APPENDIX

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APPENDIX A

**OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE
ELVENTH CIRCUIT, FILED JUNE 14, 2024**

104 F.4th 815

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Jhonathan ALFONSO, a.k.a. Jhonathan

Alfonzo, Defendant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Jose Miguel **Rosario-Rojas**, Defendant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Jose Jorge Kohen, Defendant-Appellant.

No. 22-10576, No. 22-10589, No. 22-10590

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Filed: 06/14/2024

Synopsis

Background: Defendants were convicted in the United States District Court for the Southern District of Florida, Nos. 1:21-cr-20306-CMA-1, 1:21-cr-20306-CMA-3, 1:21-cr-20306-CMA-2, [Cecilia M. Altonaga](#), Chief Judge, of violating the Maritime Drug Law Enforcement Act (MDLEA) after United States Coast Guard seized their vessel bearing no indicia of nationality in the Dominican Republic's Exclusive Economic Zone (EEZ) and discovered drugs. Defendants appealed.

Holdings: The Court of Appeals, [Branch](#), Circuit Judge, held that:

as a matter of first impression, the EEZ was part of the “high seas” for purposes of the Felonies Clause in Article I of the Constitution;

as a matter of first impression, because the “high seas” includes the EEZ, enforcement of the MDLEA in EEZ was proper; and

defendants' conviction for violation of MDLEA was not plain error despite defendants' constitutional challenge to MDLEA.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***817** Appeals from the United States District Court for the Southern District of Florida, D.C. Docket Nos. 1:21-cr-20306-CMA-1, 1:21-cr-20306-CMA-3, 1:21-cr-20306-CMA-2

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Before [Branch](#), [Luck](#), Circuit Judges, and Berger, * District Judge.

Opinion

[Branch](#), Circuit Judge:

***818** The United States Coast Guard seized the Appellants on a vessel bearing no indicia of nationality in what is known as the Dominican Republic's Exclusive Economic Zone (“EEZ”). When the Coast Guard boarded the vessel, no one claimed to be the vessel's master, but the crew asserted that the vessel was of Colombian nationality. Colombia, however, was unable to confirm or deny registry of the vessel, which rendered the vessel a “vessel without nationality”¹ and subject to the jurisdiction of the United States under § 70502(d)(1)(C) of the Maritime Drug Law Enforcement Act (“MDLEA”), 46 U.S.C. §§ 70501–70508.²

Once drugs were discovered on the vessel, the Appellants were arrested, brought to the United States, and prosecuted and convicted of violations of the MDLEA. They argue on appeal that Congress exceeded its authority under the Felonies Clause of the Constitution, and that the MDLEA is unconstitutional both facially and as applied to them for

several reasons. In order to address their claims, we must decide, as a matter of first impression, whether the EEZ—the waters extending 200 nautical miles seaward of and adjacent to the territorial sea of a nation—is part of the “high seas,” such that Congress has the authority under the Felonies Clause to punish drug-trafficking crimes that occur in the EEZ. Additionally, we address the Appellants’ contention that Congress exceeded its authority under the Felonies Clause by defining “a vessel without nationality”—*i.e.*, a stateless vessel—under the MDLEA to include vessels where registry is asserted but cannot be confirmed by the foreign country.³

After review and with the benefit of oral argument, we conclude that the EEZ is part of the “high seas” and thus within Congress’s authority under the Felonies Clause. We also conclude that the Appellants cannot show that there is any plain error with regard to the MDLEA’s definition of a vessel without nationality as including vessels where registry is asserted but cannot be confirmed or denied by the foreign country.⁴ Accordingly, we affirm.

*819 I. Background

In 2021, the Coast Guard stopped a go-fast vessel bearing no indicia of nationality approximately 69 nautical miles off the coast of the Dominican Republic in the Dominican Republic’s EEZ. The Appellants here, Jhonathan Alfonso, **Jose** Jorge Kohen, and **Jose** Miguel **Rosario-Rojas**, were aboard the go-fast vessel. Alfonso made a verbal claim of Columbian nationality for the vessel, but Colombia could not confirm or deny registry of the vessel, which rendered the vessel stateless and subject to the jurisdiction of the United States under the MDLEA, pursuant to  46 U.S.C. § 70502(d)(1)(C). When authorities searched the vessel, they discovered 12 bales of cocaine.

Alfonso, Kohen, and **Rosario-Rojas** were arrested, brought to the United States, and indicted on two counts: conspiracy to possess a controlled substance aboard a vessel, in violation of  46 U.S.C. § 70506(b) (Count One), and possession with intent to distribute a controlled substance aboard a vessel, in violation of  46 U.S.C. § 70503(a)(1) (Count Two). The indictment alleged that this conduct occurred “upon the high seas.”

The defendants jointly moved to dismiss the indictment on several grounds. As pertinent to this appeal, they argued that the MDLEA was unconstitutional as applied to them because they were arrested in the EEZ, which they asserted is not part of the “high seas” as defined by customary international law. Therefore, because the EEZ was not part of the “high seas,” their conduct fell outside of Congress’s authority under the Felonies Clause, and the district court lacked subject matter jurisdiction.

The government opposed the motion, arguing that although a coastal nation has special economic rights in the EEZ adjacent to its territorial waters, the EEZ is still part of the “high seas” within the meaning of the Felonies Clause.

Following an evidentiary hearing, the district court denied the motion to dismiss, concluding that the court had subject matter jurisdiction under the MDLEA. The district court explained that courts have recognized that a nation’s territorial waters extend up to twelve nautical miles from the nation’s coast and that the waters seaward of the territorial sea are the “high seas.” The district court noted that the defendants cited no case where a court had held that the EEZ was not part of the “high seas” and stated that it “[would] not be the first.”

Alfonso, Kohen, and **Rosario-Rojas** subsequently each pleaded guilty to Count One—conspiracy to possess with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States. In exchange for their pleas, the government agreed to dismiss Count Two. Notably, at no point in the proceedings below did the defendants argue that Congress exceeded its authority under the Felonies Clause by defining a “vessel without nationality” under § 70502(d)(1)(C) of the MDLEA to include vessels where registry is asserted but cannot be confirmed or denied by the foreign country.

Alfonso, Kohen, and **Rosario-Rojas** now appeal their convictions.⁵

*820 II. Standards of Review

Generally, the district court’s denial of a motion to dismiss an indictment is reviewed only for an abuse of discretion.

 *United States v. McPhee*, 336 F.3d 1269, 1271 (11th Cir. 2003). But when, as here, the motion to dismiss is based on subject matter jurisdictional grounds our review is *de*

novo. *Id.*; see also *United States v. Cabezas-Montano*, 949 F.3d 567, 588 & n.13 (11th Cir. 2020) (explaining that we review *de novo* issues of subject matter jurisdiction, including whether “the statutory requirements of MDLEA subject matter jurisdiction are met”). Likewise, “[w]e review *de novo* a district court’s interpretation of a statute and whether a statute is constitutional.” *Cabezas-Montano*, 949 F.3d at 586 n.10. “The government bears the burden of establishing that the statutory requirements of MDLEA subject-matter jurisdiction are met.” *Id.* at 588.

Finally, when a defendant raises a constitutional challenge for the first time on appeal, we review only for plain error. See *United States v. Valois*, 915 F.3d 717, 729 n.7 (11th Cir. 2019) (“We ordinarily review *de novo* the constitutionality of a statute, because it presents a question of law, but we review for plain error where a defendant raises his constitutional challenge for the first time on appeal.”).

III. Discussion

A. Whether the district court erred in concluding that it had subject matter jurisdiction because the EEZ is part of the “high seas”

We start with a discussion of the MDLEA and several relevant maritime law concepts to provide context for the parties’ arguments and the discussion that follows.

The MDLEA makes it a crime to “knowingly or intentionally ... possess with intent to manufacture or distribute, a controlled substance” on board “a [covered] vessel subject to the jurisdiction of the United States,” 46 U.S.C. § 70503(a)(1) and (e)(1), and to conspire to do the same, *id.* § 70506(b). The statute defines a “vessel subject to the jurisdiction of the United States” as including “a vessel without nationality.” *Id.* § 70502(c)(1)(A). And a “vessel without nationality” is further defined to include “a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.” *Id.* § 70502(d)(1)(C). Notably, the MDLEA “applies even though the act is committed outside the territorial jurisdiction of the United States.” *Id.* § 70503(b).

As mentioned previously, Article I, Section 8, Clause 10 of the Constitution bestows on Congress “three distinct grants of power:” (1) “the power to define and punish piracies,” (the Piracies Clause); (2) “the power to define and punish felonies committed on the high [S]eas,” (the Felonies Clause); and (3) “the power to define and punish offenses against the law of nations” (the Offences Clause). *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2012). We repeatedly have upheld the MDLEA as a valid exercise of Congress’s power “to define and punish ... Felonies on the high Seas.” *United States v. Estupinan*, 453 F.3d 1336, 1338–39 (11th Cir. 2006) (rejecting claim that Congress “exceeded its authority under the Piracies and Felonies Clause in enacting the MDLEA”); *821 *Cabezas-Montano*, 949 F.3d at 587 (holding that “the MDLEA is a valid exercise of Congress’s power under the Felonies Clause as applied to drug trafficking crimes without a ‘nexus’ to the United States”). Congress, however, lacks the power to proscribe drug trafficking in the territorial waters of another State. *United States v. Davila-Mendoza*, 972 F.3d 1264, 1269, 1274–77 (11th Cir. 2020); see also *Bellaizac-Hurtado*, 700 F.3d at 1258. In this case, the Appellants do not question Congress’s authority under the Felonies Clause to regulate conduct that occurs on the high seas. Instead, they argue that the EEZ—the location of their seized vessel—is not part of the “high seas” within the meaning of the Felonies Clause.

The EEZ sits just beyond a nation’s territorial waters but within 200 miles of the coastal baseline. See *United States v. Rioseco*, 845 F.2d 299, 300 n.1 (11th Cir. 1988) (describing the EEZ as “a 200 nautical mile zone extending from a coastal State’s baseline in which the coastal State has priority of access to living resources and exclusive right of access to non-living resources”); United Nations Convention on the Law of the Seas (“UNCLOS”), pt. V, art. 55, 57, Dec. 10, 1982, 21 I.L.M. 1261, 1280 (defining the EEZ as “an area beyond and adjacent to the territorial sea” that “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured,” “under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention”⁶); 33 C.F.R. § 2.30(b) (defining the EEZ as “the waters seaward of and adjacent to the territorial sea, not extending beyond 200 nautical miles from the territorial sea baseline, as recognized by the United States”). The question we must answer here is whether the EEZ is part of the “high

seas” for purposes of the Felonies Clause. Thus, this appeal turns on the meaning of the term “high seas” within the Felonies Clause.

The scope of Congress's authority under the Felonies Clause (*i.e.*, whether Congress can define and punish conduct that occurs in an EEZ) is informed by the meaning of “high seas” when the Framers ratified and adopted the Constitution.

See  *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 25–26, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022) (explaining that when assessing the scope of constitutional rights we must consult the historical understanding of the right);  *McDonald v. City of Chicago*, 561 U.S. 742, 828, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (Thomas, J., concurring) (“When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted.”);  *Boumediene v. Bush*, 553 U.S. 723, 843, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (Scalia, J., dissenting) (“The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people.”); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 403–10 (2012) (explaining that the original meaning governs interpretation of the Constitution).

Accordingly, to understand the meaning of the term “high seas” at the Founding, we turn to the history of maritime sovereignty. Throughout much of the sixteenth and seventeenth centuries, the sea was *822 largely viewed as common property subject to unilateral appropriation by any nation—rendering the boundaries within the sea fluid at best. See Thomas W. Fulton, *The Sovereignty of the Sea* 357, 538–55 (1911), available at <https://perma.cc/HE4Y-WMA3>; Bernard G. Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 Stan. L. Rev. 598, 598 (1959). As a result, nations made wide and conflicting claims of sovereignty over the seas.⁷ Fulton, *supra*, at 538–55; Heinzen, *supra*, at 600–01.

However, in the eighteenth century, the concept that a nation could exercise sovereignty over waters within the range of a nation's artillery on its shores—often referred to as the cannon shot rule—took root and became more widespread.⁸ Fulton, *supra*, at 556–58, 576–77; Heinzen, *supra*, at 602–05. Following the ratification and adoption of the Constitution, several of our nation's judicial decisions embraced the cannon

shot rule as establishing the United States's territorial waters.

See, e.g.,  *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234, 2 L.Ed. 249 (1804) (“The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel.”); *The Ann*, 1 Fed. Cas. 926, 926 (C.C.D. Mass. 1812) (No. 397) (Story, Circuit Justice) (“All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a cannon shot, or marine league, over the waters adjacent to its shores, and this doctrine has been recognized by the supreme court of the United States.” (internal citation omitted)); see also *United States v. Alarcon Sanchez*, 972 F.3d 156, 170 (2d Cir. 2020) (“At the founding, the United States's territorial waters extended ‘roughly three miles.’ ” (quoting  *In re Air Crash Off Long Island*, 209 F.3d 200, 205 (2d Cir. 2000))); Thomas Jefferson, Letter to Certain Foreign Ministers in the United States (Nov. 8, 1793) (stating in a letter that in considering what distance from our shores “the territorial protection of the United States shall be exercised,” President Washington had “provisionally” ordered his officers “to consider ... for the present ... the distance of one sea-league or three geographical miles from the sea shores,” which Jefferson equated with “the utmost range of a cannon ball”).⁹

Although the exact boundary of a cannon shot—be it one or three miles—may have been up for debate, it was generally understood that the “high seas” were the waters beyond a nation's territorial sea and that the “high seas” were not subject to the sovereignty of any nation. See, e.g., 1 William Blackstone, *Blackstone's Commentaries with Notes of Reference to the Constitution & Laws of the Federal Government of the United States; and of the Commonwealth of Virginia* *111–12 (1803) (referring to “[t]he main or high seas” as “begin[ning] at the low-water mark”); William Rawle, *A View of the* *823 *Constitution of the United States* 107 (2d ed. 1829) (“After the territorial boundaries of a nation are left, the sea becomes the common property of all nations, and the rights and privileges relative thereto being regulated by the law of nations and treaties, properly belong to the national jurisdiction.”); *id.* (“By the high seas we are to understand not only the ocean out of sight of land, but waters on the sea coast beyond the boundaries of low water mark, although in a roadstead or bay, within the jurisdiction or limits of one of the states or of a foreign government.”); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1159 (1833) (“What is the meaning of ‘high seas’

within the intent of [the Felonies Clause] does not seem to admit of any serious doubt. The phrase embraces not only the waters of the ocean, which are out of sight of land, but the waters on the sea coast below low water mark, whether within the territorial boundaries of a foreign nation, or of a domestic state.”); see also  *United States v. Rodgers*, 150 U.S. 249, 259, 14 S.Ct. 109, 37 L.Ed. 1071 (1893) (“[A] large body of navigable water[,] ... open and unconfined, and not under the exclusive control of any one nation or people, ... must fall under the definition of ‘high seas’”). In short, when the Framers adopted [Article I of the Constitution](#), there were two divisions of the sea—territorial waters of nations and the “high seas,” the latter of which fell outside of national sovereignty. Special carveout zones, such as the EEZ, did not exist.

The first official international recognition of the EEZ appears in the 1982 UNCLOS treaty, which defines the EEZ as the area of water just beyond a nation's territorial waters but within 200 miles of the coastal baseline. See UNCLOS, *supra*, arts. 55, 57; 33 C.F.R. § 2.30(b) (providing that “exclusive economic zone means the waters seaward of and adjacent to the territorial sea, not extending beyond 200 nautical miles from the territorial sea baseline, as recognized by the United States”). As the United States has made clear, the EEZ is a unique creation with limited features: “[t]he EEZ is a maritime area in which the coastal state may exercise certain limited powers as recognized under international law. The EEZ is not the same as the concept of the territorial sea, and [it] is beyond the territorial jurisdiction of any coastal state.” White House Office of the Press Secretary, Fact Sheet on Ocean Policy Accompanying Proclamation on an Exclusive Economic Zone, 22 I.L.M. 461, 462 (March 10, 1983). Rather, within each coastal nation's respective EEZ, coastal nations have only limited sovereign economic-related rights to explore, exploit, conserve, and manage the natural resources, both living and non-living. UNCLOS, *supra*, art. 56; see also  *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965 n.3 (4th Cir. 1999) (“Within [the EEZ], a nation may exercise exclusive control over economic matters involving fishing, the seabed, and the subsoil, but not over navigation.”).

Nothing about the modern EEZ as defined by customary international law disturbs in any way the Founding era concept of the term “high seas” that informed the original meaning of the Felonies Clause. Accordingly, we conclude, as a matter of first impression, that the EEZ is part of the “high

seas” for purposes of the Felonies Clause in [Article I of the Constitution](#).¹⁰

***824** The Appellants resist this conclusion and maintain that the scope of Congress's power under the Felonies Clause is confined to the limits proscribed by customary international law—by which they mean current contemporary concepts of international law—which provides that the EEZ is not part of the “high seas.” Therefore, they argue, the enforcement of the MDLEA in the EEZ exceeds Congress's power under the Felonies Clause.

In support of their argument that Congress's authority is limited by customary international law, the Appellants

mainly rely on our decision in  *Bellaizac-Hurtado*, which addressed Congress's authority under the Offences Clause (not the Felonies Clause) to proscribe drug trafficking committed in the territorial waters of another country.

 700 F.3d at 1248–49. Their reliance is misplaced. In

 *Bellaizac-Hurtado*, we concluded that the MDLEA was unconstitutional under the Offences Clause as applied to the defendants who had committed their drug trafficking

offense within the territorial waters of Panama.  *Id.* at 1247,

1258. After examining Supreme Court precedent and the text, history, and structure of the Offences Clause, we concluded that “[t]he power granted to Congress in the Offences Clause

is limited by customary international law.”  *Id.* at 1249.

In relevant part, we reasoned that the meaning of the phrase “define ... offenses against the laws of nations” during the Founding period “would not have been understood to grant Congress the power to create or declare offenses against the law of nations, but instead to codify and explain offenses that had already been understood as offenses against the law of nations.”  *Id.* at 1249–50. Thus, we held that “we look to international law to ascertain the scope of the power

granted to Congress under the Offences Clause.”¹¹  *Id.*

at 1251. We then agreed with our sister circuits that the phrase “ ‘law of nations’ in contemporary terms, means

customary international law.”  *Id.* Finally, we held that drug trafficking, like most instances of private criminal activity,

is not a violation of customary international law.¹²  *Id.* at 1249–58.

***825** The Appellants seek to extend  *Bellaizac-Hurtado*’s reasoning to the Felonies Clause and argue that, as with

the Offences Clause, Congress's authority under the Felonies Clause to define and punish felonies committed on the “high seas” is limited by customary international law. And the Appellants contend that, under customary international law, the EEZ is not part of the “high seas” based on UNCLOS's definition of EEZ and its related section pertaining to “high seas,”¹³ as well as the definition of an EEZ in the Code of Federal Regulations.¹⁴

We decline their invitation. Our holding in *Bellaizac-Hurtado* that the Offences Clause—“Congress shall have Power ... [t]o define and punish ... Offences against the Law of Nations,”¹⁵—was limited by customary international law was driven by the presence of the eighteenth-century phrase the “law of nations” that follows the word “define.” *700 F.3d at 1250–52*. Here, however, Congress's authority under the Felonies Clause—“[t]o define and punish ... Felonies committed on the high Seas”—is not narrowed by the limiting language “against the Law of Nations” that appears in the Offences Clause. *See U.S. Const., art. I, § 8, cl. 10*. Thus, *Bellaizac-Hurtado*'s discussion of the meaning of the word “define” as it relates to the Offences Clause does not support the Appellants' position that Congress's authority under the Felonies Clause is similarly limited to customary international law—much less customary international law as it is defined today. Rather, as we explained above, when the Framers adopted the Felonies Clause, there were two concepts of the sea—territorial waters and the “high seas.” Special carveout zones, such as the EEZ, did not exist. Rather, these special carveout zones fell within what has been historically recognized as the “high seas.” And the subsequent modern recognition of the EEZ in the twentieth century has no bearing on the original meaning of “high seas” in the Felonies Clause.¹⁶

***826** Our conclusion that the Felonies Clause is not limited by customary international law is reinforced by our post-*Bellaizac-Hurtado* decision in *United States v. Campbell*, 743 F.3d 802 (11th Cir. 2014). In *Campbell*, the defendant challenged his MDLEA convictions, arguing that Congress exceeded its authority under the Felonies Clause because his conduct lacked any nexus to the United States and because drug trafficking did not fall within the meaning of a felony at the time of the Founding. *Id. at 809–10*. We disagreed and upheld his convictions. As relevant here, we explained that “[w]e have always

upheld extraterritorial convictions under our drug trafficking laws as an exercise of power under the Felonies Clause,” citing *Bellaizac-Hurtado*. *Id.* We also noted that, in *Estupinan*, 453 F.3d at 1338, “we rejected an argument that Congress exceeded its authority under the Piracies and Felonies Clause in enacting the [MDLEA],” *Campbell*, 743 F.3d at 810 (quotations omitted). Although the Felonies Clause arguments in *Campbell* were different from those raised here, *Campbell* is still persuasive. If the Felonies Clause were also limited by customary international law, as the Appellants argue, then Campbell's MDLEA convictions could not be supported under the Felonies Clause because the Court would have run into the same problem it did with the Offences Clause in *Bellaizac-Hurtado*—customary international law does not limit drug trafficking. By continuing to uphold extraterritorial drug-trafficking convictions under the MDLEA as a valid exercise of Congress's authority under the Felonies Clause post-*Bellaizac-Hurtado*, we implicitly concluded that international law does not limit the Felonies Clause.

Finally, we note that we are not the only circuit to conclude that the EEZ is part of the “high seas.” In *United States v. Beyle*, 782 F.3d 159, 166 (4th Cir. 2015), the Fourth Circuit rejected a nearly identical argument to the one raised here and held that the “high seas” encompasses the EEZ. Specifically, Beyle's vessel was “thirty to forty nautical miles from the Somali coast” in the EEZ when the crimes occurred, and he insisted that “UNCLOS treat[ed] the EEZ as a distinct quasi-territorial entity and that the high seas do not *827 begin until two hundred nautical miles from land,” such that the United States did not have subject matter jurisdiction. *Id. at 162, 167*. The Fourth Circuit rejected this argument, reasoning that the “high seas” encompasses all waters outside the territorial sea, including the EEZ. *Id. at 166*. In rejecting Beyle's reliance on UNCLOS, the Fourth Circuit reasoned as follows:

While it is true that the part of UNCLOS that is titled “High Seas” concerns the waters extending beyond the borders of the EEZ, *see UNCLOS, supra*, art. 86, almost all of the treaty's high-seas provisions apply with equal force inside the EEZ as they do outside it, *see id.* art. 58(1)–(2). The EEZ bordering a particular nation's territorial sea is merely a part of the high seas where that nation has special economic

rights and jurisdiction. UNCLOS grants coastal nations certain rights to natural resources within the EEZ, as well as jurisdiction over marine scientific research and protection and preservation of the marine environment. *Id.* art. 56(1)

(a), (b); *see also*  *Titanic*, 171 F.3d at 965 n. 3 (noting that the EEZ grants “exclusive control over [certain] economic matters ... , but not over navigation”).

Any allocation of economic rights, however, is a far cry from conferring on a nation the exclusive authority endemic to sovereignty to define and punish criminal violations. In effect, Beyle would have us use UNCLOS's grant of certain specific enumerated rights as a wedge to dramatically expand Somalia's plenary control past the twelve-nautical-mile maximum. But Beyle points to no court that has declared that a nation's full sovereign rights extend two hundred nautical miles from the coast. We decline to credit such a sweeping interpretation.

 *Id.* at 166–67. Thus, the Fourth Circuit's decision further reinforces our conclusion.

Moreover, although the Fourth Circuit is the only other circuit to have squarely addressed the same question we face here, we note that several of our sister circuits have also indicated, albeit in passing, that the EEZ is part of the “high seas.” *See, e.g.,*  *United States v. Aybar-Ulloa*, 987 F.3d 1, 3 n.1 (1st Cir. 2021) (en banc) (explaining that although the defendant's vessel appeared to be within the EEZ, “[b]ecause the right of freedom of navigation on the high seas applies in the EEZ, we proceed with reference to the rules of interdiction applicable on the high seas”); *Alarcon Sanchez*, 972 F.3d at 170 (concluding that “high seas” means the waters “beyond a nation's territorial waters,” and therefore a vessel 132 nautical miles off the coast of Costa Rica “is comfortably beyond Costa Rica's territorial waters as the framers would have understood the term and under current international law”);  *United States v. Matos-Luchi*, 627 F.3d 1, 2 & n.1 (1st Cir. 2010) (upholding MDLEA conviction for individuals seized on a vessel in the Dominican Republic's EEZ and explaining that the area “about thirty to thirty-five miles” from the Dominican Republic's coast “is outside Dominican territorial waters and [is] considered the ‘high seas’ for purposes of the Coast Guard's enforcement jurisdiction, although within the Dominican Republic's exclusive economic zone” (internal citations omitted)). In fact, the Appellants have not pointed to any judicial decision holding that the EEZ is not part of the “high seas.”

Because the “high seas” includes EEZs, enforcement of the MDLEA in EEZs is proper, and the district court properly denied the Appellants' motion to dismiss the indictment.

*828 B. Appellants' constitutional

challenge to 46 U.S.C. § 70502(d)(1)(C)'s definition of a vessel without nationality

Next, the Appellants challenge the constitutionality of the MDLEA's definition of “a vessel without nationality” in  46 U.S.C. § 70502(d)(1)(C). To provide necessary context for the Appellants' arguments, however, we begin by summarizing some general international law principles and the relevant definition of a vessel without nationality in the MDLEA.

Under international law, as defined by multilateral international treaties entered into by the United States, vessels on the “high seas” are typically subject to the criminal jurisdiction only of their nation of registry.  *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982) (“[I]nternational law generally prohibits any country from asserting jurisdiction over foreign vessels on the high seas.”); *see also* Law of the Sea: Convention on the High Seas art. 6, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.”). However, “[s]tateless vessels, such as the one [the Appellants] boarded, are ‘international pariahs’ that have ‘no internationally recognized right to navigate freely on the high seas.’ ”  *Campbell*, 743 F.3d at 810 (quoting  *Marino-Garcia*, 679 F.2d at 1382). And “we have long upheld the authority of Congress to ‘extend[] the criminal jurisdiction of this country to any stateless vessel in international waters engaged in the distribution of controlled substances.’ ”  *Id.* (alteration in original) (quoting  *Marino-Garcia*, 679 F.2d at 1383).

The MDLEA defines a “vessel subject to the jurisdiction of the United States” as including “a vessel without nationality”—*i.e.*, a stateless vessel.  46 U.S.C. § 70502(c)(1)(A). And a “vessel without nationality” is further defined to include “a vessel aboard which the master or individual in

charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.”  *Id.* § 70502(d)(1)(C).

No one disputes that the Appellants’ vessel met the criteria of  § 70502(d)(1)(C)— a claim of Columbian registry was made, but Columbia could not confirm or deny registry of the vessel, which rendered the vessel stateless under this statutory provision. Rather, Appellants argue for the first time on appeal that § 70502(d)(1)(C) of the MDLEA is unconstitutional both facially and as applied. They maintain that under customary international law, a verbal claim of nationality is *prima facie* proof of the vessel’s nationality and that  § 70502(d)(1)(C) improperly displaces that proof without any affirmative evidence to the contrary.¹⁷

To begin, we must determine the appropriate standard of review. “We ordinarily review *de novo* the constitutionality of a statute, because it presents a question of law, but we review for plain error where a defendant raises his constitutional challenge for the first time on appeal.”  *Valois*, 915 F.3d at 729 n.7. The Appellants did not raise a constitutional *829 challenge to  § 70502(d)(1)(C) below, so we review only for plain error.¹⁸ “To establish plain error, a defendant must

show there is (1) error, (2) that is plain, and (3) that affects substantial rights.”  *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005). “If all three conditions are met, we may exercise our discretion to recognize a forfeited error, but only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”  *Id.* (quotations omitted). When neither the Supreme Court nor this Court has resolved an issue, there can be no plain error in regard to that issue. *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003). The Appellants concede that neither this Court nor the Supreme Court has addressed the constitutional challenge they raise.¹⁹ Accordingly, they cannot show that any error was plain. *Id.*

IV. Conclusion

For the above reasons, the Appellants are not entitled to relief on any of their claims, and we affirm the Appellants’ convictions.

AFFIRMED.

All Citations

104 F.4th 815

Footnotes

* The Honorable Wendy Berger, United States District Judge for the Middle District of Florida, sitting by designation.

¹ We note that while the relevant statute uses the term “vessel without nationality,”  46 U.S.C. § 70502(c)(1)(A), the parties and many of our cases colloquially refer to such vessels as “stateless” vessels. See, e.g.,  *United States v. Hernandez*, 864 F.3d 1292 (11th Cir. 2017);  *United States v. Cruickshank*, 837 F.3d 1182 (11th Cir. 2016);  *United States v. Campbell*, 743 F.3d 802 (11th Cir. 2014). Accordingly, to be consistent with the parties’ chosen terminology and our caselaw, we use the term “stateless” and a “vessel without nationality” interchangeably.

² Although we discuss the MDLEA in greater detail below, in general terms, the MDLEA makes it a crime to engage in drug trafficking (or conspiring to engage in drug trafficking) on board “a vessel subject to the jurisdiction of the United States,” which includes stateless vessels.  46 U.S.C. §§ 70502(c)(1)(A),  70503(a)(1),  (e)(1),  70506(b).

- 3 We note that the Appellants failed to raise this issue in the district court and are raising it for the first time on appeal.
- 4 The Appellants also argue that their prosecution under the MDLEA violates the Due Process Clause and exceeds Congress's authority under the Felonies Clause because the drug offenses they were charged with and convicted of bore no nexus to the United States. They acknowledge, however, that this claim is foreclosed by our binding precedent, and they merely seek to preserve it for further review. See  [United States v. Cabezas-Montano](#), 949 F.3d 567, 587 (11th Cir. 2020) (explaining that “this Court has held that the MDLEA is a valid exercise of Congress's power under the Felonies Clause as applied to drug trafficking crimes without a ‘nexus’ to the United States”);  [United States v. Rendon](#), 354 F.3d 1320, 1325 (11th Cir. 2003) (“[T]his circuit and other circuits have not embellished the MDLEA with a nexus requirement.”). We therefore do not address this issue further. See  [United States v. Archer](#), 531 F.3d 1347, 1352 (11th Cir. 2008) (explaining that under the prior panel precedent rule, “a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*”).
- 5 Despite pleading guilty, Alfonso, Kohen, and **Rosario-Rojas** are permitted to “question the Government's power to constitutionally prosecute” their offenses.  [Class v. United States](#), 583 U.S. 174, 181–82, 138 S.Ct. 798, 200 L.Ed.2d 37 (2018) (quotations omitted).
- 6 Although the United States was not a party to UNCLOS, it “generally recognizes the Convention as customary international law apart from the deep sea-bed mining provisions.”  [United States v. McPhee](#), 336 F.3d 1269, 1273 n.6 (11th Cir. 2003) (alteration adopted) (quotations omitted).
- 7 For instance, some nations contended that territorial jurisdiction extended 100 miles from their coasts, while others claimed only a six-mile boundary from the coast. See *Fulton*, *supra*, at 360, 569.
- 8 There was debate about the range of such a boundary, but sources generally agree it ranged from one to at most three miles from shore. *Fulton*, *supra*, at 565, 576; *Heinzen*, *supra*, at 602–05.
- 9 We note that the concept of territorial sea under international law has continued to evolve with time. In 1988, President Ronald Regan officially extended the United States' territorial sea from three to twelve nautical miles by means of a presidential proclamation to conform with current international law. See Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).
- 10 To be clear, we hold only that customary international law has no bearing on the meaning of the “high seas” as understood by the Framers at the time they adopted the Felonies Clause. We recognize that there are potentially other instances when international law considerations may inform MDLEA-based challenges. See  [United States v. Marino-Garcia](#), 679 F.2d 1373, 1380 (11th Cir. 1982) (noting that international law is relevant to statutory construction because “the Supreme Court has long admonished that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains” (quotations omitted)).
- 11 The Appellants assert that  [Bellaizac-Hurtado](#) established that the scope of Congress's power under the Piracies Clause is also limited by international law, and, therefore applying the principle of *noscitur a sociis*—the statutory canon of construction that associated words bear on one another's meaning—it follows that the Felonies Clause is similarly constrained. The Appellants are mistaken. In  [Bellaizac-Hurtado](#), we expressly stated that neither the Piracies Clause nor the Felonies Clause was implicated, and that only the Offences

Clause was in question.  700 F.3d at 1248–49. Furthermore, we emphasized that “the power to ‘define’ in Article I, Section 8, Clause 10, is limited by the three specific subjects of the Clause,”  *id.* at 1249, meaning that each of the three grants of power enumerated in Article I, Section 8, Clause 10, has its own unique and distinct meaning making application of the *noscitur a sociis* canon here a poor fit.

- 12 In reaching this conclusion, we explained that whether the Offences Clause “limits the power of Congress to define and punish only those violations of customary international law that were established at the Founding or whether the power granted under the Clause expands and contracts with changes in customary international law” remained an open question.  *Bellaizac-Hurtado*, 700 F.3d at 1253. But we declined to address this issue because, “under either approach, the result [was] the same” because “[d]rug trafficking was not a violation of customary international law at the time of the Founding, and drug trafficking is not a violation of [present-day] customary international law”  *Id.* at 1253–54.

- 13 A separate part of UNCLOS covering general provisions for the “high seas” carves out EEZs from its scope:

[t]he provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

UNCLOS, *supra*, pt. VII, § 1, art. 86.

- 14 As noted previously, UNCLOS defines the EEZ as “an area beyond and adjacent to the territorial sea” that “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured,” “under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.” *Id.* pt. V, arts. 55, 57. Similarly, the Code of Federal Regulations defines the EEZ as “the waters seaward of and adjacent to the territorial sea, not extending beyond 200 nautical miles from the territorial sea baseline, as recognized by the United States.” 33 C.F.R. § 2.30(b).

- 15 U.S. Const., art. I, § 8, cl. 10.

- 16 Despite the above, the Appellants argue that 33 C.F.R. § 2.32(d) confirms that the EEZ is not part of the “high seas.” Section 2.32 of the Code of Federal Regulations is entitled “High Seas” and provides in full as follows:

(a) For purposes of special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. 7, high seas means all waters seaward of the territorial sea baseline.

(b) For the purposes of section 2 of the Act of February 19, 1895, as amended (33 U.S.C. 151) and the Inland Navigational Rules Act of 1980 (33 U.S.C. Chapter 34), high seas means the waters seaward of any lines established under these statutes, including the lines described in part 80 of this chapter and 46 CFR part 7.

(c) For the purposes of 14 U.S.C. 522, 14 U.S.C. 545, 33 U.S.C. 409, and 33 U.S.C. 1471 *et seq.*, *high seas includes the exclusive economic zones of the United States and other nations, as well as those waters that are seaward of territorial seas of the United States and other nations.*

(d) Under customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea and without prejudice to high seas freedoms that may be exercised within exclusive economic zones pursuant to article 58 of the United Nations Convention on the Law of the Sea, and unless the context clearly requires otherwise (e.g., The International Convention Relating to Intervention on the

High Seas in Cases of Oil Pollution Casualties, 1969, including annexes thereto), *high seas means all waters that are not the exclusive economic zone (as defined in § 2.30), territorial sea (as defined in § 2.22), or internal waters of the United States or any other nation.*

33 C.F.R. § 2.32 (emphasis added). According to the Appellants, § 2.32(d) leaves no question that EEZs are not part of the “high seas” as that term is defined under customary international law.

Their reliance on subsection (d) is misplaced. As discussed above, we do not look to present day customary international law to determine the meaning of “high seas” in the Felonies Clause. Furthermore, § 2.32(c)—not subsection (d)—defines “high seas” for purposes of the interdiction of vessels on the “high seas” by the Coast Guard under 14 U.S.C. § 522—and, as set forth above, subsection (c) expressly includes the EEZ as part of the “high seas” definition.

See 33 C.F.R. § 2.32(c).

17 We reject the government's argument that the Appellants' claim is squarely foreclosed by our decisions in  *Campbell*, 743 F.3d at 802, and  *Hernandez*, 864 F.3d at 1298–1303. Although both cases involved a stateless vessel under  § 70502(d)(1)(C), neither case involved a challenge to the constitutionality of the definition of a stateless vessel in  § 70502(d)(1)(C). See  *Campbell*, 743 F.3d at 804, 810–11;  *Hernandez*, 864 F.3d at 1298–1303. Accordingly, they do not foreclose the Appellants' challenge here.

18 To the extent that the Appellants contend that their challenge to  § 70502(d)(1)(C) is one of subject matter jurisdiction and therefore subject to *de novo* review, we are not persuaded. Although we have construed the “on board a vessel subject to the jurisdiction of the United States” portion of the MDLEA as a congressionally imposed limit on courts' subject-matter jurisdiction,”  *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008), the Appellants are not challenging whether they met the definition of a stateless vessel in  § 70502(d)(1)(C), and were therefore subject to the jurisdiction of the United States. Instead, they are arguing that Congress exceeded its authority under the Felonies Clause in enacting the statute and defining a stateless vessel as one for which a nation cannot confirm or deny registry. This argument is a garden variety constitutional attack, which the Appellants should have raised below in order to preserve the issue for appeal. They failed to do so, and thus their claim is subject to plain error review.  *Valois*, 915 F.3d at 729 n.7.

19 In support of their argument, the Appellants rely almost exclusively on  *United States v. Davila-Reyes*, 23 F.4th 153 (1st Cir. 2022) ( *Davila-Reyes II*), a now-withdrawn opinion from the First Circuit, which struck down  § 70502(d)(1)(C) as facially unconstitutional. See *United States v. Davila-Reyes*, 38 F.4th 288 (1st Cir. 2022) (granting rehearing en banc and withdrawing  *Davila-Reyes II*).

Putting aside the problems inherent in relying on a withdrawn opinion,  *Davila-Reyes II* does not help the Appellants because it is not a decision from this Circuit or the Supreme Court, which is a necessary requirement to show error on plain error review. See  *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005) (“When neither the Supreme Court nor this Court has resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue.” (quotations omitted)).

Aside from the fact that the Appellants cannot show plain error because there is no decision from this Court or the Supreme Court addressing this issue, we note that the Ninth Circuit recently rejected the argument

that  § 70502(d)(1)(C) improperly displaces international law because an oral claim of a vessel's nationality constitutes a prima facie showing of nationality, which can only be rebutted by an affirmative denial by the asserted flag state, concluding that “no rule of international law requires this approach.”  *United States v. Marin*, 90 F.4th 1235, 1242–43 (9th Cir. 2024). Thus, the Ninth Circuit held that “[b]ecause there is no rule of international law speaking to this jurisdictional question, the United States does not overstep the limits which international law places upon its jurisdiction, in choosing to treat vessels as stateless where the claimed nation responds that it can neither confirm nor deny the registry.”  *Id.* at 1243 (internal citation omitted) (quotations omitted).

APPENDIX B

**JUDGMENT IN A CRIMINAL CONVICTION CASE, UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED
FEBRUARY 11, 2022**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

JOSE MIGUEL ROSARIO-ROJAS

§ **JUDGMENT IN A CRIMINAL CASE**

§

§

§ Case Number: **1:21-CR-20306-CMA(3)**

§ USM Number: **53648-069**

§

§ Counsel for Defendant: **Humberto Rolando Dominguez**

§ Counsel for United States: **Yvonne Rodriguez-Schack**

The defendant pled guilty to Count 1 of the Indictment.
The defendant is adjudicated guilty of the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
Conspiracy to Possess With Intent to Distribute a Controlled Substance (Cocaine) on Board a Vessel / 46 U.S.C. § 70506(b)	05/01/2021	1

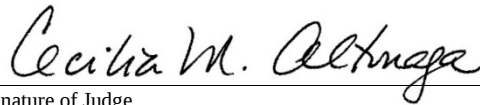
The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The remaining Counts are dismissed on the motion of the United States.

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

February 11, 2022

Date of Imposition of Judgment



Signature of Judge

CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

Name and Title of Judge

February 11, 2022

Date

DEFENDANT: JOSE MIGUEL ROSARIO-ROJAS
CASE NUMBER: 1:21-CR-20306-CMA(3)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **82 months**, with credit for time served since the date of his arrest, May 1, 2021.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOSE MIGUEL ROSARIO-ROJAS
CASE NUMBER: 1:21-CR-20306-CMA(3)

SUPERVISED RELEASE

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

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: JOSE MIGUEL ROSARIO-ROJAS
CASE NUMBER: 1:21-CR-20306-CMA(3)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the Court excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the Court excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.flsp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: JOSE MIGUEL ROSARIO-ROJAS
CASE NUMBER: 1:21-CR-20306-CMA(3)

SPECIAL CONDITIONS OF SUPERVISION

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

DEFENDANT: JOSE MIGUEL ROSARIO-ROJAS
CASE NUMBER: 1:21-CR-20306-CMA(3)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	\$100.00	\$.00	\$.00		

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.

** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.

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

DEFENDANT: JOSE MIGUEL ROSARIO-ROJAS
CASE NUMBER: 1:21-CR-20306-CMA(3)

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payments of \$100.00 due immediately.

It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTa assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

**ORDER OF THE UNITED STATES DISTRICT COURT FOR THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
FLORIDA, FILED NOVEMBER 11, 2021**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 21-20306-CR-ALTONAGA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

**JHONATHAN ALFONSO,
JOSE JORGE KOHEN, and
JOSE MIGUEL ROSARIO-ROJAS,**

Defendants.

_____ /

ORDER

THIS CAUSE came before the Court on Defendant, Jhonathan Alfonso's Motion to Dismiss Indictment [ECF No. 20], filed on October 21, 2021. Co-Defendants, Jose Jorge Kohen and Jose Miguel Rosario-Rojas, joined in the Motion. (*See* Oct. 25, 2021 Order [ECF No. 27] (Kohen); Oct. 26, 2021 Order [ECF No. 32] (Rosario-Rojas)). Defendants move to dismiss the Indictment [ECF No. 2] for lack of subject matter and personal jurisdiction. (*See generally* Mot.). The Government filed a Response [ECF No. 35], to which Defendants filed a Reply [ECF No. 38].

The Court held an evidentiary hearing on November 18, 2021. (*See* Minute Entry [ECF No. 46]). The Court has carefully reviewed the parties' written submissions, the record, and applicable law. For the following reasons, the Motion is denied.

Facts. On May 1, 2021, United States law enforcement arrested Defendants aboard a vessel located in the Caribbean Sea "approximately 69 nautical miles south of Santo Domingo, Dominican Republic." (Mot. 1 (quotation marks omitted)). At the time of arrest, Defendants claimed Colombian nationality for the vessel. (*See* Compl., Aff. Support Criminal Compl. [ECF

No. 1] 5).¹ Because the Colombian Government could neither confirm nor deny registry of the vessel, the vessel was treated as one without nationality and therefore subject to the jurisdiction of the United States. (*See id.*). A search of the vessel yielded 289 kilograms of cocaine. (*See id.*).

On May 7 around 3:30 p.m. local time, Defendants were transferred from the *USS Wichita* to the *USCGC Joseph Tezanos*, a 154-foot fast response cutter homeported in San Juan, Puerto Rico. (*See Resp. 2*). On May 9 around 6:00 p.m. local time, Defendants were transferred to the *USCGC Winslow Greisser*, another 154-foot fast response cutter stationed in San Juan, Puerto Rico. (*See id.*). On May 11 around 9:44 a.m. local time, Defendants were transferred to the *USCGC Charles David Jr.*, a 154-foot fast response cutter homeported in Key West, Florida. (*See id.*). Early May 12, 2021, the *USCGC Charles David Jr.* brought Defendants into port in San Juan, where Defendants were turned over to the DEA shortly thereafter. (*See id.*).

On May 11, 2021, the Government filed a criminal complaint in this District, charging Defendants under the Maritime Drug Law Enforcement Act (the “MDLEA”), 46 U.S.C. §§ 70501–70508, with one count of conspiracy to possess a controlled substance aboard a vessel, in violation of 46 U.S.C. section 70506(b); and one count of possession with intent to distribute a controlled substance aboard a vessel, in violation of 46 U.S.C. section 70503(a)(1). (*See generally* Compl.). The next day — the same day Defendants were turned over to the DEA in San Juan — Defendants appeared before a magistrate judge in the District of Puerto Rico via videoconference. (*See Mot. 2; Resp. 16*). A day later, a grand jury returned an Indictment charging Defendants with both of the counts enumerated in the Complaint. (*See generally* Indictment [ECF No. 2]). Defendants made their first appearances in this District on August 23, 2021. (*See Minute Orders* [ECF Nos. 12–14]).

¹ The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

Defendants now move to dismiss the Indictment, arguing (1) the Government lacks authority under the MDLEA because their offenses occurred in the Dominican Republic's Exclusive Economic Zone; (2) the MDLEA is unconstitutional as applied because there is no nexus between them and the United States; and (3) the Indictment should be dismissed as a sanction for the Government's outrageous conduct and violations of Federal Rules of Criminal Procedure 5(a) and (b). (*See generally* Mot.).

Standard. Under Federal Rule of Criminal Procedure 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.” *Id.* (alteration added). A defendant may challenge an indictment on a variety of grounds, including lack of jurisdiction and prosecutorial misconduct. *See United States v. Kaley*, 677 F.3d 1316, 1325–26 (11th Cir. 2012) (citations omitted).

In addressing a motion to dismiss an indictment, the court must accept the allegations of the indictment as true. *See United States v. Belcher*, 927 F.2d 1182, 1185 (11th Cir. 1991); *see also United States v. Sampson*, 371 U.S. 75, 78–79 (1962). The factual allegations in the indictment must be “viewed in the light most favorable to the government[.]” *United States v. Torkington*, 812 F.2d 1347, 1354 (11th Cir. 1987) (alteration added; citations omitted).

Whether the Government lacks authority under the MDLEA. The MDLEA criminalizes drug trafficking on the high seas. In enacting the MDLEA, Congress sought to address the “serious international problem” of drug trafficking aboard vessels, which it found “presents a specific threat to the security and societal well-being of the United States.” *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006) (quotation marks and citation omitted). To this end, Congress provided that the MDLEA applies to all cases where the alleged trafficking occurred on board a “vessel subject to the jurisdiction of the United States[.]” 46 U.S.C. § 70503(e)(1) (alteration

added) — “even though the act is committed outside the territorial jurisdiction of the United States[,]” *id.* § 70503(b) (alteration added).

The constitutionality of the MDLEA derives from Congress’ power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. Const. Art. I, § 8, cl. 10 (alteration added). “The Supreme Court has interpreted that Clause to contain three distinct grants of power: to define and punish piracies, to define and punish felonies committed on the high seas, and to define and punish offenses against the law of nations.” *United States v. Campbell*, 743 F.3d 802, 805 (11th Cir. 2014) (citation omitted). In *United States v. Bellaizac-Hurtado*, the Eleventh Circuit found that the MDLEA, as applied to drug trafficking activities in the territorial waters of another nation, fell “outside of the power of Congress under the Offences Clause.” 700 F.3d 1245, 1249 (11th Cir. 2012); *see also United States v. Matute*, No. 06-20596-cr, 2013 WL 6384610, *1 (S.D. Fla. Aug. 20, 2013). Nonetheless, the MDLEA remains constitutional under the Piracies Clause and Felonies Clause when applied to drug trafficking conduct on the high seas. *See Bellaizac-Hurtado*, 700 F.3d at 1257 (“Congress possesses additional constitutional authority to restrict conduct on the high seas, including the Piracies Clause, the Felonies Clause, and the admiralty power[.] And we have always upheld extraterritorial convictions under our drug trafficking laws as an exercise of power under the Felonies Clause.” (alteration added; citations omitted)).

Defendants argue the Indictment must be dismissed because their offenses took place in the Dominican Republic’s Exclusive Economic Zone — “the waters seaward of and adjacent to [a nation’s] territorial sea, not extending beyond 200 nautical miles from the territorial sea baseline, as recognized by the United States.” (Mot. 6 (alteration added; quoting 33 C.F.R. § 2.30(b))). According to Defendants, the Exclusive Economic Zone is not the high seas “as that term is defined

by customary international law”; therefore, “the United States lacks jurisdiction over [their offenses].” (*Id.* 9 (alterations added)).

Yet, courts — including the undersigned — have routinely held that the “United States generally recognizes the territorial seas of foreign nations up to twelve nautical miles adjacent to recognized foreign coasts[.]” *Butler v. United States*, No. 13-22668-Civ, 2014 WL 12597847, at *2 (S.D. Fla. June 16, 2014) (alteration added; quotation marks omitted; quoting *United States v. McPhee*, 336 F.3d 1269, 1273 (11th Cir. 2003)); *see also United States v. Oliveros-Estupinan*, 544 F. App’x 930, 933 (11th Cir. 2014) (“Generally, the United States ‘recognizes the territorial seas of foreign nations up to twelve nautical miles adjacent to recognized foreign coasts.’” (quoting *McPhee*, 336 F.3d at 1273)); *United States v. Williams*, 617 F.2d 1063, 1073 n.6 (5th Cir. 1980) (“This 12-mile limit includes the territorial sea, which extends to three miles from the coast, and the contiguous zone, which extends from three to 12 miles from the coast. . . . The high seas lie seaward of the territorial sea and thus encompass the contiguous zone.” (alteration added; citation omitted)); *United States v. Ruiz-Murillo*, No. 17-0003-cr, 2017 WL 1022807, at *8 (S.D. Ala. Mar. 16, 2017) (“The Court takes judicial notice that all of the listed sets of coordinates define locations that are far more than 12 miles beyond the coast of Colombia and therefore lie in international waters, as a matter of law.” (footnote call number omitted; citing *McPhee*, 336 F.3d at 1273)), *aff’d*, 736 F. App’x 812 (11th Cir. 2018); *United States v. Beyle*, 782 F.3d 159, 167 (4th Cir. 2015) (“The [Exclusive Economic Zone] bordering a particular nation’s territorial sea is merely a part of the high seas where that nation has special economic rights and jurisdiction. . . . [A] nation’s territorial waters generally extend to twelve nautical miles.” (alterations added; citations

omitted)).² Defendants provide no case where a court has held the Exclusive Economic Zone does not constitute the high seas for purposes of the MDLEA. The Court will not be the first.

Given that Defendants were arrested 69 miles south of the Dominican Republic — well past that nation’s territorial waters and therefore in the high seas — Defendants’ argument fails. *See United States v. Matos-Luchi*, 627 F.3d 1, 2 n.1 (1st Cir. 2010) (“The area is outside Dominican territorial waters and considered the ‘high seas’ for purposes of the Coast Guard’s enforcement jurisdiction, although within the Dominican Republic’s exclusive economic zone[.]” (alteration added; citations omitted)).

Whether the MDLEA is unconstitutional as applied to Defendants. Defendants contend that because neither they nor their offenses “had any prior ties to the United States,” the exercise of jurisdiction over Defendants violates their due process rights, and therefore the Indictment must be dismissed. (Mot. 9). Yet, Defendants acknowledge “that the Eleventh Circuit has rejected challenges to the MDLEA’s constitutionality as applied to unregistered vessels on the high seas.” (*Id.* 10 (citing *Campbell*, 734 F.3d at 806; *United States v. Cruickshank*, 837 F.3d 1182, 1190 (11th

² See also, e.g., *Ortiz Llaguno v. United States*, No. 8:20-cv-234, 2020 WL 4506397, at *4 (M.D. Fla. Aug. 5, 2020); *Delgado-Pachay v. United States*, No. 8:20-cv-154, 2020 WL 1820506, at *3 (M.D. Fla. Apr. 10, 2020); *United States v. Aguino-Ramos*, 406 F. Supp. 3d 1308, 1313 (S.D. Ala. 2019); *United States v. Naranjo*, No. 8:06-cr-345, 2017 WL 11207268, at *2 (M.D. Fla. Nov. 8, 2017); *Riascos v. United States*, No. 8:14-cv-2558, 2017 WL 4640332, at *2 (M.D. Fla. Oct. 13, 2017); *United States v. Chaverra-Serna*, 8:13-cv-1412, 2015 WL 225763, at *2 (M.D. Fla. Jan. 16, 2015); *Michileno-Valencia v. Rothman*, No. 1:13-cv-1045, 2014 WL 1048554, at *7–8 (N.D. Ala. Mar. 18, 2014); *Matute*, 2013 WL 6384610, at *6, *report and recommendation adopted*, 2013 WL 6212170 (S.D. Fla. Nov. 2013); *Guzman-Dearco v. United States*, No. 8:13-cv-1961, 2013 WL 3992401, at *2–3 (M.D. Fla. Aug. 2, 2013); *Velasquez v. United States*, No. 8:13-cv-01960, 2013 WL 3992400, at *3–4 (M.D. Fla. Aug. 2, 2013); *Francis v. United States*, No. 8:13-cv-995, 2013 WL 1798961, at *2–3 (M.D. Fla. Apr. 29, 2013); *Pomare v. United States*, No. 8:13-cv-1087, 2013 WL 1775047, at *2 (M.D. Fla. Apr. 25, 2013); *Jori v. United States*, No. 8:13-cv-1000, 2013 WL 1729219, at *2–3 (M.D. Fla. Apr. 22, 2013); *Minotta-Rodriguez v. United States*, No. 8:13-cv-596, 2013 WL 828623, at *2–3 (M.D. Fla. Mar. 6 2013); *Orjuela-Medina v. United States*, Nos. 8:13-cv-378, 8:06-cv-2207, 8:07-cv-1840, 2013 WL 557221, at *2–3 (M.D. Fla. Feb. 14, 2013); *Alvarez-Figueroa v. United States*, No. 8:13-cv-394, 2013 WL 524863, at *2–3 (M.D. Fla. Feb. 13, 2013); *Sarrias-Boya v. United States*, No. 8:13-cv-86, 2013 WL 12367010, at *2 (M.D. Fla. Jan. 31, 2013); *United States v. Espino-Macree*, No. 8:08-cr-451, 2013 WL 12333440, at *2 (M.D. Fla. Jan. 3, 2013).

Cir. 2016); *Estupinan*, 453 F.3d at 1338 n.2; *United States v. De La Garza*, 516 F.3d 1266, 1272 (11th Cir. 2008); *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003); *United States v. Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir. 1982))). Instead, Defendants insist their case is different because they were arrested in the Dominican Republic’s Exclusive Economic Zone. (*See* Mot. 10–11).

But, as discussed, the Eleventh Circuit and other courts define the area outside of 12 miles from a nation’s coast — and thus, a nation’s Exclusive Economic Zone — as the high seas for purposes of the MDLEA. *See, e.g., McPhee*, 336 F.3d at 1273. Because Defendants were arrested aboard a stateless vessel containing narcotics on the high seas, Defendants’ constitutional challenge is precluded by Eleventh Circuit precedent. *See, e.g., Ruiz-Murillo*, 736 F. App’x at 817 (“Subsequent cases reaffirm our holding that the MDLEA does not require a nexus to the United States.” (citing *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016); *Cruickshank*, 837 F.3d at 1187–88)).

Whether the Indictment should be dismissed as a sanction. According to Defendants, the Indictment should be dismissed as a sanction for the Government’s violations of Federal Rules of Criminal Procedure 5(a) and 5(b) or, in the alternative, under the doctrine of outrageous government conduct. (*See* Mot. 12–17). Each argument is without merit.

Federal Rule of Criminal Procedure 5(a). Defendants argue the Indictment should be dismissed based upon the 11-day delay between Defendants’ interdiction and initial appearances before a magistrate judge. Under Federal Rule of Criminal Procedure 5(a)(1)(B), “[a] person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge[.]” *Id.* (alterations added).

The Eleventh Circuit “expressly addressed ‘unnecessary delay’ under Rule 5(a)(1)(B)” in *United States v. Purvis*, 768 F.2d 1237, 1238–39 (11th Cir. 1985). *United States v. Cabezas-Montano*, 949 F.3d 567, 591 (11th Cir. 2020) (citing *id.*). In *Purvis*, the court stated that “the purpose of Rule 5(a) is to prevent oppressive police interrogations and other ‘third-degree’ tactics before bringing the accused in front of an officer of the court[.]” 768 F.2d at 1238 (alteration added; citing *Mallory v. United States*, 354 U.S. 449, 451–54 (1957)). Therefore, the court “held that various factors are considered in determining whether a delay is unnecessary, including: (1) the distance between the location of the defendant’s arrest in international waters and the U.S. port he was brought to; (2) the time between the defendant’s arrival at the U.S. port and his presentment to the magistrate judge; (3) any evidence of mistreatment or improper interrogation during the delay; and (4) any reason for the delay, like exigent circumstances or emergencies.” *Cabezas-Montano*, 949 F.3d at 591 (citing *id.* at 1238–39).

The first three factors weigh in the Government’s favor. First, Defendants were interdicted on the high seas far from U.S. soil — approximately 330 miles from San Juan. (*See Resp.* 13). At least some “part of the delay was necessitated by the fact that the arrest was made [] far from port on the high seas.” *Purvis*, 768 at 1239 (alteration added) (finding 5-day delay in presentment reasonable considering the defendants were arrested 350 miles from Key West).

Second, once they arrived in San Juan, Defendants were presented to the magistrate judge within hours. (*See Resp.* 15–16). Considering Defendants needed to be admitted into the country by Customs and Border Protection and booked by the DEA before they could be taken to a courtroom, this short delay was reasonable. (*See id.*); *see also Purvis*, 768 at 1239 (finding delay of less than one day after the defendants arrived in Key West reasonable).

And third, there is no evidence Defendants were mistreated or improperly interrogated during the 11-day period. According to the Government, logs kept by the Coast Guard show that Defendants “were well fed with meals such as eggs, sausage and pancakes; burgers, hot dogs and salad; and steak, salad and green beans.” (Resp. 15). They were also given “water, medical treatment, and clean clothing, and allowed to use the head and brush their teeth.” (*Id.*). And Defendants were only interrogated after they were brought ashore and read their rights, which they waived. (*See id.*).

The fourth factor — the reason for the delay — is more complicated. When suspected drug smugglers are apprehended at sea, it takes time for law enforcement to decide where to prosecute the case, as the MDLEA provides that any person violating its provisions upon the high seas may “may be tried in any district.” 46 U.S.C. § 70504(b)(2). This decision is complicated by the fact that the suspects are usually detained aboard vessels that resume normal patrol operations after the interdiction. As the Government explains:

When an interdiction of drug smugglers occurs at sea, the Narcotics and Dangerous Drugs Section (NDDS) of the Criminal Division of the Department of Justice decides where the case will be prosecuted. Because the defendants are detained on ships which resume normal patrol operations after the interdiction and detention of the defendants, it commonly takes multiple days before sufficient information is available to inform the decision as to where to prosecute the case. Once a decision is made, the USCG must work out the logistics of transporting the detainees to the district where they will be prosecuted, or to another district if necessary due to ship availability and operational needs.

(Resp. 14).

The Government provided a Coast Guard duty officer’s sworn statement to explain the 11-day delay before Defendants were presented to a magistrate judge. (*See* Lt. Paul Puddington Statement [ECF No. 43-1]; Nov. 18, 2021 Minute Entry). Defendants were arrested on May 1 and then detained aboard a patrolling U.S. vessel as the NDDS decided where to prosecute them. On

May 7, the NDDS decided to prosecute Defendants in the Southern District of Florida, at which point the Coast Guard immediately looked at options for transferring the detainees and evidence to the DEA case agents from the District. At that time, there were no available cutters transiting from Puerto Rico to the Southeastern United States, and using one of the cutters patrolling the area near Puerto Rico would have left a significant law enforcement and search and rescue readiness gap. Instead, the case agents arranged to fly to Puerto Rico to receive Defendants and the evidence on May 12, the earliest date available to them. Defendants were delivered to the case agents on May 12.

At first glance, the 11-day delay appears to be justified by the ordinary logistical challenges involved in transferring detainees arrested aboard vessels on the high seas to land. Further review establishes this delay was unnecessary.

Defendants cross-examined the Coast Guard officer who provided the sworn affidavit at the November 18, 2021 evidentiary hearing. The officer testified that on May 7, the Coast Guard learned Defendants would be prosecuted in the Southern District of Florida, and DEA case agents from the District would fly to San Juan to take custody of Defendants on May 12. Defendants were then kept aboard various Coast Guard vessels at sea until the agents arrived in San Juan. The Coast Guard officer admitted there were several opportunities to deliver Defendants to land between May 7 and May 12.

At one point, the Coast Guard intentionally transferred Defendants off a vessel that was going to port in Puerto Rico and onto another vessel that would remain at sea. At another point, the vessel Defendants were located on rescued a migrant at sea and delivered the migrant to Puerto Rico but kept Defendants on board instead of delivering them with the migrant. According to the Coast Guard officer, the Coast Guard did not deliver Defendants to land earlier because it typically

delivers suspects directly to the case agents who will be prosecuting the case. This explains why the Coast Guard intentionally waited to transfer Defendants until May 12, when the Southern District of Florida case agents would arrive.

The officer's testimony establishes that the delay was unnecessary. The Coast Guard could have transferred Defendants to land earlier without causing any complications. There simply were no exigent circumstances, such as in cases where there is delay because the Coast Guard needs another government's consent to take some action. *See, e.g., United States v. Castillo*, 899 F.3d 1208, 1217–18 (11th Cir. 2018) (Martin, J., concurring); *United States v. Stirling*, No. 11-20792-cr, 2012 WL 1200402, at *5 (S.D. Fla. Apr. 10, 2012); *United States v. Marin*, No. 8:19-cr-488, 2020 WL 7364601, at *13 (M.D. Fla. Apr. 24, 2020). The Coast Guard waited multiple days to deliver Defendants to land merely because certain DEA case agents were not yet in San Juan. But Defendants could have been processed by other law enforcement officers and brought before a magistrate judge earlier. Under these facts, the Court cannot say the delay was necessary.

Nonetheless, “the remedy for a Rule 5(a) violation is suppression of evidence obtained during the delay not dismissal.” *Marin*, 2020 WL 7364601, at *13 (citing *United States v. Carruthers*, 458 F. App'x 811, 818 (11th Cir. 2012) (“The only remedy we have recognized for a violation of Rule 5 is the suppression of evidence obtained as a result of the violation.” (citation omitted)); *United States v. Bibb*, 194 F. App'x 619, 623 (11th Cir. 2006) (“In fact, we have never recognized dismissal of the indictment as a proper remedy for a Rule 5 violation.” (citation omitted))). Thus, Defendants are not entitled to the relief they seek.

Federal Rule of Criminal Procedure 5(b). Defendants contend the Indictment should be dismissed because the Complaint was not filed until 10 days after their arrests. Under Federal Rule of Criminal Procedure 5(b), “[i]f a defendant is arrested without a warrant, a complaint

meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.” *Id.* 5(b) (alteration added).

The parties dispute whether Rule 5(b) is applicable to Defendants given that it is rooted in the Fourth Amendment, and Defendants are foreign nationals who were arrested on the high seas but were detained on U.S. ships in U.S. territorial waters. (*Compare* Resp. 18, *with* Reply 10). No matter. “The only remedy [the Eleventh Circuit] [has] recognized for a violation of Rule 5 is the suppression of evidence obtained as a result of the violation.” *Carruthers*, 458 F. App’x at 818 (alterations added; citation omitted). Consequently, this argument also fails.

Outrageous government conduct. Defendants maintain their alleged mistreatment as detainees aboard U.S. vessels and the 11-day delay in their presentment to a magistrate judge constitute outrageous government conduct warranting dismissal of the Indictment.

As an initial matter, the Eleventh Circuit has not adopted the outrageous government conduct doctrine. *See Marin*, 2020 WL 7364601, at *10 (citing *United States v. Jayyousi*, 657 F.3d 1085, 1111 (11th Cir. 2011)). And “other Circuits have either questioned or rejected it.” *Id.* (citations omitted).

“Outrageous government conduct occurs when law enforcement obtains a conviction for conduct beyond the defendant’s predisposition by employing methods that fail to comport with due process guarantees.” *United States v. Cizkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007) (citation omitted). In *Jayyousi*, the Eleventh Circuit stated: “[a]lthough we have never acknowledged the existence of the outrageous government conduct doctrine, we note that the actionable government misconduct must relate to the defendant’s underlying or charged criminal acts.” 657 F.3d at 1111 (alteration added). In that case, the defendant-appellant, who was convicted of conspiring to support terrorist activities, sought dismissal of his indictment due to

CASE NO. 21-20306-CR-ALTONAGA

“alleged mistreatment he received at the brig after the conclusion of his criminal acts and prior to the indictment on the present charges.” *Id.* at 1112. The Eleventh Circuit found that, “even if [they] were to adopt [the outrageous government conduct doctrine], the doctrine [did] not apply in this situation” because the defendant-appellant did not “claim that the government caused him to leave the United States to be a jihad recruit.” *Id.* (alterations added; citation omitted).

Similarly, the alleged mistreatment aboard U.S. vessels and delay in Defendants’ prosecution has nothing to do with Defendants’ underlying criminal conduct of drug trafficking. For this reason, the outrageous government conduct doctrine would not apply even if the Eleventh Circuit were to adopt it.

In any event, Defendants have not shown any outrageous Government conduct. As discussed, Defendants have not shown they were subject to mistreatment or improper interrogation. And a delay in presentment of a few extra days than was necessary could hardly constitute outrageous conduct in the absence of mistreatment or improper interrogation. Defendants’ final argument is thus without merit.

* * *

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendants’ Motion to Dismiss Indictment [ECF No. 20] is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 22nd day of November, 2021.



CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX D

**ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT, FILED OCTOBER 8, 2024**

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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October 08, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-10589-GG

Case Style: USA v. Jose Rosario-Rojas

District Court Docket No: 1:21-cr-20306-CMA-3

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-10576

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JHONATHAN ALFONSO,
a.k.a. Jhonathan Alronzo,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cr-20306-CMA-1

2

Order of the Court

22-10576

No. 22-10589

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE MIGUEL ROSARIO-ROJAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cr-20306-CMA-3

No. 22-10590

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

22-10576

Order of the Court

3

JOSE JORGE KOHEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cr-20306-CMA-2

ON PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC

Before BRANCH, LUCK, Circuit Judges, and BERGER,* District Judge.

PER CURIAM:

The Petitions for Rehearing En Banc are DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petitions for Rehearing En Banc are also treated as Petitions for Rehearing before the panel and are DENIED. FRAP 35, IOP 2.

* The Honorable Wendy Berger, United States District Judge for the Middle District of Florida, sitting by designation.