

NO: 17-7879

**IN THE
SUPREME COURT OF THE UNITED STATES**

DESMOND ALEXANDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENTS AND CITATIONS OF AUTHORITY

Certiorari should be granted to review whether the prosecution of a foreign national for trafficking marijuana in international waters exceeds Congress' powers, where there is no connection between the offense and the United States.

A. This case presents a question of exceptional importance which has not been decided by this Court and which is ripe for review.

The government has tacitly conceded, by not refuting, Mr. Alexander's assertion that the MDLEA is "arguably the most expansive grant of extraterritorial jurisdiction in the United States Code." (Petition at 8). It may be the most expansive grant of extraterritorial jurisdiction in the history of our nation. And yet, Mr. Alexander is one of thousands of foreign nationals who have been convicted under the statute without any guidance from this Court on the threshold question of whether the United States even has the authority to prosecute.

The government has similarly not disputed the central premise of Mr. Alexander's petition for certiorari: that this petition raises a significant and far-reaching question of constitutional law on which this Court has not spoken in nearly two hundred years. Nor has the government alleged any problem with Mr. Alexander's case as a vehicle for certiorari. Instead, the arguments in the government's Brief in Opposition (BIO) relate primarily to the its view of the merits, and the meaning of a series of 200-year old precedents from the Court. (See BIO at

7-8). But the fact that the parties are disputing the meaning these ancient precedents is, by itself, a powerful argument in favor of granting review.

In his petition, Mr. Alexander argued that the traditional notion of waiting for a Circuit conflict to develop should carry less weight where the government is in complete control of its forum. (Petition at 19). The government does not dispute the observation that, despite the lack of any ties to the forum, “[m]ost MDLEA prosecutions have taken place within the Eleventh Circuit.” (See BIO at 10; Petition at 19 (citing Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1205 (April 2009))). The government responds instead by pointing out that some MDLEA cases continue to be brought in other Circuits. (BIO at 10). But this does not mitigate the mischief inherent in the statute’s forum selection clause. The jurisdictional questions in the MDLEA are complex and may turn on many variables, including the location of the vessel,¹ the registry of the vessel,² and whether there are factual disputes over the vessel’s registration.³ Because most

¹ *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012) (holding vessel located in foreign territorial waters not subject to prosecution under the MLDEA).

² See *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006) (holding that “where the MDLEA is being applied extraterritorially . . . due process requires the Government to demonstrate that there exists ‘a sufficient nexus between the conduct condemned and the United States’ such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant”).

³ See *id.* at 1167 (“When that jurisdictional inquiry turns on ‘factual issue[s]’, such as the question ‘where the vessel was intercepted’ . . . or in this case, whether the Go-Fast was stateless, the jurisdictional inquiry must be resolved by a jury.”) (internal citation and emphasis omitted).

MDLEA defendants are arrested at sea, the government has ample time to review the factual scenario and choose a jurisdiction that will offer the fewest road blocks to prosecution.⁴

As noted in Mr. Alexander’s petition, Congress recently made it easier for the government to cherry-pick the law that will govern MDLEA prosecutions. On December 12, 2017, 46 U.S.C. § 70504(b)(2) was amended to provide that the United States may prosecute an offense committed on the high seas anywhere, without regard to the situs of the defendants’ entry into the United States. Not surprisingly, in the months since, the Eleventh Circuit has become home to several defendants who were not only apprehended closer to other venues, but were actually brought before a magistrate court in other jurisdictions. *See United States v. Price*, 1:18-cr-2009-DPG-1 (S.D. Fl. Jan. 4, 2018) (transfer documents for defendant charged in the Southern District of Florida with MDLEA offense occurring off the coast of Canada, first arrested and brought before a magistrate in the District of Massachusetts); *United States v. Reina Guerrero*, 1:1-cr-2088-MGC (S.D. Fl. April 25, 2018) (transfer documents for defendant charged in the Southern District of Florida with MDLEA offense, first brought before a magistrate in the Southern District of California); *United States v. Wes Arismendi*, 1:18-cr-20287-RNS (S.D. FL. May 3, 2018) (same).

It is further worth nothing that, of the eight cases cited by the government in which this Court has previously denied review, seven arose from the Eleventh

⁴ See Seth Freed Wessler, *The Coast Guard’s ‘Floating Guantánamos’*, N.Y. TIMES, Nov. 20, 2017, <https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html> (“We try not to bring these cases to the Ninth Circuit.”).

Circuit. (BIO at 6). The fact that this Court has denied similar petitions in the past is no reason to deny review in this case. To the contrary, that this issue continues to be presented confirms that it is an important question of law, which will continue to recur until it is resolved by the Court.

B. The Court has never addressed jurisdiction over stateless vessels outside of the piracy cases.

The government hedges its response to Mr. Alexander’s argument that *United States v. Furlong*, 184 U.S. 184, 196 (1820), recognized a limit on Congress’ power to punish felonies on the high seas, absent a nexus to the United States. (See Petition at 12-14). The government argues that, “even if it could be read as establishing the bounds of Congress’ authority, *Furlong* expressly limited its statement to crimes committed on ‘foreign ship[s].” 18 U.S. at 197. Of course, the language in *Furlong* only addressed the facts presented to the Court in that case.

The government is wrong, moreover, to suggest that in *United States v. Holmes*, 18 U.S. 412 (1820), the Court sustained a similar prosecution merely because the offense occurred aboard a stateless vessel. (BIO at 7). To the contrary, the Court has never addressed whether the United States may enforce its laws over offenses committed on stateless vessels, outside the specific context of piracy.

Article I, Section 8, Clause 10 of the United States Constitution grants Congress the 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. These have been viewed by the Court as “three distinct grants of power: the power to

define and punish piracies, the power to define and punish felonies committed on the high seas, and the power to define and punish offenses against the law of nations.” *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2012) (citing *United States v. Smith*, 18 U.S. 153 (1820)).

It is uncontroverted that piracy is – and was at the time of the founding - subject to universal jurisdiction. “[U]nder the international law doctrine of universal jurisdiction (UJ), a nation may prosecute certain serious offenses even though they have no nexus to its territory or nationals, and no impact on its territory or citizens.” *United States v. Cardales-Luna*, 632 F.3d 731, 740 (1st Cir. 2011) (Torruella, J., dissenting). In *Smith*, the Court recognized “the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [piracy] against any persons whatsoever, with whom they are in amity.” 18 U.S. at 162. The same is not true for the vast majority of offenses, and it is not true for drug trafficking. *Bellaizac-Hurtado*, 700 F.3d at 1260-61 (Barkett, J., specially concurring).⁵ Nor has this Court ever held that universal jurisdiction may be asserted based on the mere statelessness of a vessel on the high seas.

The government quotes language in *Holmes*, 18 U.S. at 417-418, addressing a “vessel having no national character” and “persons not lawfully sailing under the

⁵ See generally also, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761-762 (2004) (Breyer, J., concurring in part and concurring in the judgment) (“Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. . . . That subset includes torture, genocide, crimes against humanity, and war crimes.”) (citations omitted).

flag of any foreign nation.” (BIO at 7). But the vessel in *Holmes* had “no national character” because it “was possessed and held by pirates.” 18 U.S. at 417. The same was true in *United States v. Klintock*, 18 U.S. 144, 150 (1820), in which the Court held that “all persons on board vessels which throw off their national character by cruising piratically and committing piracy on other vessels” are subject to the laws of the United States. 18 U.S. at 153. In both cases, the Court was reviewing convictions under a piracy statute and was thus proceeding under Congress’ Article I, § 8, cl. 10 power to define and punish piracies — not the separate power to define and punish felonies on the high seas, which is the subject of this petition.

The government asserts that Judge Torruella’s dissenting opinion in *Cardales-Luna* “acknowledg[ed] this Court’s decisions about congressional authority to regulate stateless vessels.” (BIO at 9 (citing *Cardales-Luna*, 632 F.3d at 747) (Torruella, J., dissenting)). But Judge Torruella was referring specifically to *Holmes* and *Klintock*, which both turned on the piracy power, as discussed above. Judge Torruella wrote:

In the case of stateless vessels we again go back to early constitutional history not totally unrelated to UJ piracy. In 1820, the Supreme Court in essence decided that stateless vessels, that is, vessels that were not registered and 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 the crew.

Cardales-Luna, 632 F.3d at 747 (emphasis added).

There was nothing “in essence” about it: That is precisely what the Court held, because the vessels in those case had, in fact, “turned pirate,” and the

defendants were literally engaged in piracy. Thus, *Holmes* and *Klintock* stand for no more than the undisputed proposition that piracy offenses may be prosecuted by any nation without regard to traditional notions of prescriptive jurisdiction. See *Furlong*, 18 U.S. at 193 (“From which it follows, that when embarked on a piratical cruise, every individual becomes equally punishable under the law of 1790, whatever may be his national character or whatever may have been that of the vessel in which he sailed, or of the vessel attacked.”).

Moreover, while it may be true that all ships which “throw off their national character” by engaging in piracy may be said to be stateless, it does not follow that all stateless vessels have engaged in piracy. See generally, Barry Hart Dubner & Mary Carmen Arias, *Under International Law, Must A Ship On The High Seas Fly The Flag Of A State In Order To Avoid Being A Stateless Vessel? Is A Flag Painted On Either Side Of The Ship Sufficient To Identify It?*, 29 U.S.F. Mar. L.J. 99, 119 (2016-2017) (“Nowhere is it said that a stateless vessel has committed a universal crime by being ‘stateless.’”). And, whether offenses committed on stateless vessels are necessarily subject to universal jurisdiction is an issue over which academic opinion is divided. See *id.* at 118. (“Scholars disagree as to whether or not customary international law and conventional law allows any country to exercise jurisdiction over stateless ships.”). This is all an academic inquiry with regard to the MDLEA, in any event, because “the MDLEA’s definition of statelessness goes far beyond what is recognized by international custom or convention.” Kontorovich, *Beyond the Article I Horizon*, 93 MINN. L. REV. at 1228 (citation omitted).

In the end, the registration of the vessel is a red herring, because the defendant's lack of protection from a foreign flag cannot alter Congress' enumerated Article I powers. By travelling on a stateless vessel, the defendant may forfeit the protection of a flag state. *See* Dubner and Arias, *Under International Law, Must A Ship On The High Seas Fly The Flag Of A State In Order To Avoid Being A Stateless Vessel?*, 29 U.S.F. Mar. L.J. at 122 (“[I]t is commonly considered that either ships having no nationality or falsely assuming a nationality are almost completely without protection.”). But the United States is a government of limited powers, and the absence of diplomatic protection for the accused does not equate to an unlimited license for the prosecution. If Article I, §. 8, cl. 10, does not grant Congress the power to punish a wholly foreign drug trafficking offense committed aboard a registered vessel on the high Seas, it is hard to understand how the same grant of power can extend to the same offense, committed in the same place, simply because no foreign government can complain.

This case thus presents an “important question of federal law that has not been, but should be, settled by this Court.” S. Ct. R. 10(c). Mr. Alexander respectfully asks the Court to take this opportunity answer the fundamental and recurring question of federal constitutional law presented herein.

CONCLUSION

Based upon the foregoing, Mr. Alexander asks the Court to grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

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