

No. _____

IN THE
Supreme Court of the United States

CARLINGTON CRUICKSHANK,

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**

PETITION FOR A WRIT OF CERTIORARI

Donna Lee Elm
Federal Defender

M. Allison Guagliardo, Counsel of Record
Assistant Federal Defender
Federal Defender's Office
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-mail: allison_guagliardo@fd.org

QUESTIONS PRESENTED

Petitioner Carlington Cruickshank is a foreign citizen who was found on a vessel in international waters approaching Jamaica. Even though no connection was shown between the drugs on board the vessel and the United States, the U.S. government brought Mr. Cruickshank to Tampa, Florida, for prosecution under the Maritime Drug Law Enforcement Act (“MDLEA”), 46 U.S.C. § 70501 *et seq.*

Petitioner’s case presents the following important constitutional questions:

1. Whether this Court should resolve the circuit split concerning whether 46 U.S.C. § 70504(a) of the MDLEA, which removes any findings of fact related to whether a vessel is “subject to the jurisdiction of the United States” from the jury, violates the Fifth and Sixth Amendments?
2. Whether the MDLEA exceeds Congress’s Article I powers, particularly where the MDLEA is extended to the prosecution of a foreign citizen found in international waters whose offense had no nexus to the United States?
3. Whether the prosecution under the MDLEA of a foreign citizen who was traveling on a vessel in international waters and whose offense had no nexus to the United States violates the Due Process Clause of the Fifth Amendment?
4. Whether 46 U.S.C. § 70502(d)(2) of the MDLEA, which provides that a country’s response to a claim of registry for the vessel is “proved conclusively by certification of the Secretary of State or the Secretary’s designee,” violates the Confrontation Clause of the Sixth Amendment?

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction.....	1
Relevant Constitutional and Statutory Provisions	1
Statement of the Case.....	2
Reasons for Granting the Writ	7
I. The Circuits are Divided on Whether the MDLEA Violates the Fifth and Sixth Amendments Because it Removes the Jurisdictional Element from the Jury.....	9
II. The MDLEA Exceeds Congress’s Article I Powers Under the Piracies and Felonies Clause	12
III. The Due Process Clause of the Fifth Amendment Requires a Nexus Between the Offense Conduct and the United States for Prosecutions Under the MDLEA	15
IV. The MDLEA Violates the Confrontation Clause of the Sixth Amendment	17
Conclusion	19

TABLE OF CONTENTS – cont’d

Appendices

Appendix A: Opinion, <i>United States v. Cruickshank</i> , 837 F.3d 1182 (11th Cir. 2016)	1a
Appendix B: Opinion, <i>United States v. Cruickshank</i> , No. 17-10758, 2018 WL 388237 (11th Cir. Jan. 12, 2018).....	14a
Appendix C: The Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 <i>et seq.</i>	18a
Appendix D: State Department Certification Prepared for Petitioner’s Case	21a
Appendix E: Government’s Motion for Pre-Trial Determination of Jurisdiction.....	24a
Appendix F: Indictment	29a
Appendix G: Minutes of Initial Appearance Before the U.S. District Court for the Middle District of Florida	34a
Appendix H: Judgment	35a
Appendix I: MDLEA Prosecution Data	42a

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alleyne v. United States</i> , 570 U.S. 99 (2013).....	4, 11
<i>Harris v. United States</i> , 536 U.S. 545 (2002).....	11
<i>In re Winship</i> , 397 U.S. 358 (1970).....	11
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009)	18
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986).....	10
<i>United States v. Angulo-Hernandez</i> , 576 F.3d 59 (1st Cir. 2009)	13, 15
<i>United States v. Campbell</i> , 743 F.3d 802 (11th Cir.), <i>cert. denied</i> , 135 S. Ct. 704 (2014).....	<i>passim</i>
<i>United States v. Cardales</i> , 168 F.3d 548 (1st Cir. 1999).....	16
<i>United States v. Cardales-Luna</i> , 632 F.3d 731 (1st Cir. 2011)	13-14
<i>United States v. Cruickshank</i> , 837 F.3d 1182 (11th Cir. 2016).....	1
<i>United States v. Cruickshank</i> , No. 17-10758, 2018 WL 388237 (11th Cir. Jan. 12, 2018).....	1
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995).....	11
<i>United States v. Gonzalez</i> , 776 F.3d 931 (11th Cir. 1985)	13
<i>United States v. Matos-Luchi</i> , 627 F.3d 1 (1st Cir. 2010)	10
<i>United States v. Medina</i> , 90 F.3d 463 (11th Cir. 1996).....	9
<i>United States v. Medjuck</i> , 48 F.3d 1107 (9th Cir. 1995)	8
<i>United States v. Mitchell-Hunter</i> , 663 F.3d 45 (1st Cir. 2011).....	10, 18
<i>United States v. Perez-Oviedo</i> , 281 F.3d 400 (3d Cir. 2002)	16

TABLE OF AUTHORITIES – cont’d

Cases	Page(s)
<i>United States v. Perlaza</i> , 439 F.3d 1149 (9th Cir. 2006).....	<i>passim</i>
<i>United States v. Saac</i> , 632 F.3d 1203 (11th Cir. 2011)	15
<i>United States v. Suerte</i> , 291 F.3d 366 (5th Cir. 2002)	16
<i>United States v. Tinoco</i> , 304 F.3d 1088 (11th Cir. 2002)	9, 10
<i>United States v. Trinidad</i> , 839 F.3d 112 (1st Cir. 2016).....	12, 14, 17
<i>United States v. Vilches-Navarrete</i> , 523 F.3d 1 (1st Cir. 2008)	10
<i>United States v. Yousef</i> , 327 F.3d 56 (2d Cir. 2003).....	16
<i>United States v. Zakharov</i> , 468 F.3d 1171 (9th Cir. 2006).....	15
 U.S. Constitution	
U.S. Const. art. I, § 8, cl. 10.....	4, 12, 13
U.S. Const. amend. V.....	<i>passim</i>
U.S. Const. amend. VI	<i>passim</i>
 Statutes	
28 U.S.C. § 1254.....	1
46 U.S.C. § app. 1903(f)	10
46 U.S.C. § 70501.....	i, 2
46 U.S.C. § 70502.....	<i>passim</i>
46 U.S.C. § 70503.....	3
46 U.S.C. § 70504.....	<i>passim</i>

TABLE OF AUTHORITIES – cont’d

U.S. Sentencing Guidelines	Page(s)
U.S.S.G. § 3B1.2.....	6
 Federal Register	
Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18863 (Apr. 30, 2018).....	9
 Secondary Sources	
Churchill, R. R. and Lowe, A.V., <i>The Law of the Sea</i> (3d ed. 1999)	17
Kontorovich, Eugene, <i>Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction Over Drug Crimes</i> , 93 Minn. L. Rev. 1191 (2009)	11, 14, 15
Kontorovich, Eugene, <i>The “Define and Punish” Clause and the Limits of Universal Jurisdiction</i> , 103 Nw. U. L. Rev. 149 (2009)	14
Wessler, Seth Freed, “The Coast Guard’s ‘Floating Guantánamos,’” <i>The New York Times Magazine</i> (Nov. 20, 2017), available at https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html (last visited May 13, 2018).....	8, 9
 Briefs	
Brief of the United States in Opposition, <i>Cruickshank v. United States</i> , No. 16-7337	6
Initial Brief of Appellant Cruickshank, <i>United States v. Cruickshank</i> , No. 17-10758-EE, 2017 WL 2807265 (11th Cir. June 27, 2017)	6

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carlington Cruickshank respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

On September 20, 2016, the Eleventh Circuit affirmed Mr. Cruickshank's convictions but vacated and remanded for resentencing in a published decision, *United States v. Cruickshank*, 837 F.3d 1182 (11th Cir. 2016). See Pet. App. 1a-13a. After resentencing, the Eleventh Circuit affirmed, *United States v. Cruickshank*, No. 17-10758, 2018 WL 388237 (11th Cir. Jan. 12, 2018). See Pet. App. 14a-17a.

JURISDICTION

The Eleventh Circuit issued its opinion and final judgment on January 12, 2018. Pet. App. 14a. Justice Thomas granted Petitioner's timely application to extend the time to file his petition for a writ of certiorari to and including May 14, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article 1, Section 8, Clause 10 of the U.S. Constitution provides:

The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

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

The Sixth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Maritime Drug Law Enforcement Act (“MDLEA”), 46 U.S.C. § 70501 *et seq.*, is attached hereto in the appendix, Pet. App. 18a-20a.¹

STATEMENT OF THE CASE

1. In February 2014, the U.S. Coast Guard intercepted a vessel, the *Venus*, in international waters approximately 160 nautical miles from Jamaica. See Pet. App. 21a; Doc. 43. On board the vessel were two individuals, Carlos Acosta, a Colombian citizen, and Petitioner Carlington Cruickshank, a Jamaican citizen. See Doc. 98 at 192; Presentence Investigation Report (“PSR”) at 3. Upon questioning by the Coast Guard, Petitioner made a claim of nationality for the vessel, stating that it was registered in Jamaica. See Pet. App. 21a; Doc. 98 at 130-32.

According to the U.S. government, the Jamaican government could neither confirm nor deny registry of the vessel. Pet. App. 21a-22a. The Coast Guard waited only about two to two and a half hours for Jamaica’s response. Doc. 98 at 133. Because Jamaica could neither confirm nor deny registry of the vessel, the U.S. government determined that the “vessel was without nationality” and “subject to the jurisdiction of the United States,” under 46 U.S.C. § 70502(c)(1)(A) and (d)(1)(C). Pet. App. 22a.² The Coast Guard searched the vessel and

¹ The MDLEA was amended after Petitioner’s conviction, but the changes are not pertinent here. See Coast Guard Authorization Act of 2015, Pub. L. No. 114-120, § 314, 130 Stat. 27 (Feb. 8, 2016). Accordingly, the current version of the MDLEA is cited herein.

² The MDLEA defines a “vessel subject to the jurisdiction of the United States” to include a “vessel without nationality,” including “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.” 46 U.S.C. § 70502(c)(1)(A), (d)(1)(C).

found 171 kilograms of cocaine hidden within benches constructed on the boat. *See* Doc. 43; Doc. 98 at 141-47, 216-17.

2. The U.S. government detained Petitioner and brought him before the U.S. District Court for the Middle District of Florida, Tampa Division, for prosecution under the MDLEA. The government introduced no evidence at Petitioner's trial to establish any nexus between the criminal activity and the United States. *See* Docs. 94, 98, 99, 100. To the contrary, Acosta (who had entered a guilty plea) testified that he brokered the transportation of the cocaine between individuals in Colombia and Jamaica; that he and Petitioner were taking the boat from Colombia to the closest waypoint off Jamaica; and that he expected that the vessel was staying in Jamaica. *See* Doc. 98 at 84, 196-218, 225-28; Doc. 99 at 8-10.

3. Prior to and during the trial, the government asked the district court to make a judicial determination that the vessel is a "vessel subject to the jurisdiction of the United States" for the purpose of prosecuting Petitioner under the MDLEA. *See* Pet. App. 24a-28a; Doc. 94 at 91. Petitioner was not otherwise subject to prosecution under the MDLEA. *See* 46 U.S.C. § 70503(a), (e) (proscribing activity "[w]hile on board a covered vessel," including a "vessel subject to the jurisdiction of the United States").

The government contended that the vessel was "subject to the jurisdiction of the United States" under § 70502(c)(1)(A) and 70502(d)(1)(C), relying upon a State Department Certification stating that Jamaica could neither confirm nor deny that the vessel was registered in that country. Pet. App. 21a-28a. The State Department Certification was prepared for purposes of Petitioner's prosecution – three weeks after Petitioner had been indicted under the MDLEA and brought to federal court in Tampa. *See* Pet. App. 21a-23a, 29a-34a.

The State Department Certification declarant did not testify at Petitioner's trial. See Docs. 94, 98, 99, 100. Other Coast Guard officers testified that the vessel was intercepted while heading towards Jamaica; Petitioner verbally claimed Jamaican registry for the vessel but had no supporting documentation; and after two to two and a half hours, Jamaica "was not accepting the claim of nationality." Doc. 98 at 84, 129-33.

Petitioner objected to the court, rather than the jury, making a determination of whether the jurisdictional element in the MDLEA had been met. Petitioner contended, based upon *Alleyne v. United States*, 570 U.S. 99 (2013), that the jury must find all of the elements of the offense, including the jurisdictional facts. Doc. 94 at 91-92.

The district court rejected Petitioner's argument, relying upon the State Department Certification and testimony at trial to find that the vessel "was interdicted in international water southeast of Jamaica without any display identifying its nationality, without registration documentation aboard or available, and without either acknowledgement or denial of nationality by the government of Jamaica upon inquiry by the United States." Doc. 94 at 93. Based on this judicial finding, the district court concluded that the *Venus* was "a vessel without nationality" and "subject to the jurisdiction of the United States" under § 70502(d)(1)(C) and (c)(1)(A). Doc. 94 at 93. The district court therefore instructed the jury that this element was proven. Doc. 100 at 14 ("The vessel *Venus*, when apprehended by [the Coast Guard] southeast of Jamaica, was a vessel subject to the jurisdiction of the United States.").

4. On appeal, Petitioner challenged his convictions and sentence. The Eleventh Circuit affirmed Petitioner's convictions based upon binding circuit precedent. See Pet. App. 6a-7a, 9a-10a. Specifically, the court of appeals rejected Petitioner's argument that the MDLEA exceeds Congress's authority under the Piracies and Felonies Clause, U.S. Const., Art. I, § 8, cl. 10, relying

upon its published decision in *United States v. Campbell*, 743 F.3d 802 (11th Cir.), *cert. denied*, 135 S. Ct. 704 (2014). *Id.* at 6a-7a. In *Campbell*, the Eleventh Circuit held that the Piracies and Felonies Clause permits Congress to prohibit drug activity on the high seas, even with no showing of a nexus to the United States, based on “universal and protective principles” because “the trafficking of narcotics is condemned universally by law-abiding nations.” *Id.* at 7a (quoting *Campbell*, 743 F.3d at 810) (internal quotation marks omitted).

The court of appeals, again relying upon *Campbell*, also rejected Petitioner’s argument that the Due Process Clause prohibited the prosecution of foreign citizens found in international waters with no showing of any nexus to the United States. *Id.* The Eleventh Circuit reiterated its view that “the MDLEA ‘provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas.’” *Id.*

In addition, the Eleventh Circuit rejected Petitioner’s Fifth and Sixth Amendment argument that the MDLEA, § 70504(a), is unconstitutional because it removes the jurisdictional finding from the jury and permits the district court to make such findings. *Id.* at 9a-10a. The court of appeals, relying upon its prior precedent, concluded that the MDLEA’s jurisdictional requirement – that the vessel be “subject to the jurisdiction of the United States” – is not an element of the offense and therefore need not be proven to a jury. *Id.* at 10a.

Addressing Petitioner’s final constitutional challenge to his conviction, the court of appeals concluded that the district court’s reliance on the State Department Certification in making the jurisdictional finding did not violate the Confrontation Clause. *Id.* The court of appeals concluded that, “A United States Department of State certification of jurisdiction under the MDLEA does not implicate the Confrontation Clause because it does not affect the guilt or innocence of a defendant.” *Id.* Although the Eleventh Circuit reviewed this issue for plain error,

it found that there was no Confrontation Clause violation “under any standard of review, plain or otherwise.” *Id.*

The court agreed with Petitioner, however, that the district court had erred at sentencing in its denial of a minor-role adjustment under U.S.S.G. § 3B1.2. *Id.* at 10a-13a. The court of appeals therefore vacated Petitioner’s sentence and remanded for resentencing. *Id.* at 13a.

5. Because the Eleventh Circuit had affirmed Petitioner’s convictions and remanded only for resentencing, Petitioner filed a petition for a writ of certiorari seeking review of the Eleventh Circuit’s decision affirming his convictions. See *Cruickshank v. United States*, No. 16-7337. The Solicitor General opposed review, asserting among other things that “this case does not warrant this Court’s review because it is in an interlocutory posture.” Brief of the United States in Opposition at 8, *Cruickshank v. United States*, No. 16-7337. This Court denied certiorari on April 3, 2017.

Petitioner’s case is now final. On remand for resentencing, the district court again denied a minor-role adjustment but resentedenced Petitioner to the 20-year mandatory-minimum term of imprisonment. Pet. App. 16a, 36a. Petitioner appealed to the Eleventh Circuit, reasserting his constitutional challenges to his convictions (to ensure he may seek further review before this Court) and challenging his sentence. See Initial Brief of Appellant Cruickshank, *United States v. Cruickshank*, No. 17-10758-EE, 2017 WL 2807265, at *2-3 & n.2 (11th Cir. June 27, 2017). The Eleventh Circuit declined to review the constitutional challenges to his convictions based upon the law-of-the-case doctrine, leaving its original decision intact. Pet. App. 16a-17a. The Eleventh Circuit affirmed Petitioner’s sentence. Pet. App. 15a-16a.

REASONS FOR GRANTING THE WRIT

The U.S. Coast Guard intercepted Petitioner, a Jamaican citizen, in international waters heading toward Jamaica. After about two and a half hours, Jamaica could neither confirm nor deny Jamaican registry of the vessel. The U.S. government then brought Petitioner to Tampa, Florida, where he was prosecuted and convicted in federal court under the Maritime Drug Law Enforcement Act. Petitioner has been sentenced to 20 years of incarceration, though no showing was made to establish any nexus between his conduct and the United States.

Through the MDLEA, Congress has asserted that certain vessels are “subject to the jurisdiction of the United States,” including “a vessel aboard which the master or individual in charge makes claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.” 46 U.S.C. § 70502(c)(1)(A), (d)(1)(C). The vessel therefore need not actually be stateless for individuals on board to be prosecuted under the MDLEA; the claimed country of registry need only be unable – here, in a mere two and a half hour period – to confirm or deny the claim before the U.S. government asserts jurisdiction. Once brought to the United States for criminal prosecution, Congress, through the MDLEA, has denied defendants the right to confront, and to have the jury find, the facts needed to establish that the vessel is “subject to the jurisdiction of the United States.” 46 U.S.C. §§ 70502(d)(2), 70504(a).

This Court’s intervention is needed to address the important constitutional questions concerning Congress’s authority, under Article I and the Due Process Clause, to reach such criminal conduct having no connection to the United States. This Court’s review is also needed to address whether Congress may deny defendants – involuntarily brought from international

waters to face trial in the United States – the right to confront and have a jury finding concerning the very jurisdictional facts that subject them to prosecution under the MDLEA.

Petitioner’s case is an excellent vehicle to address these questions. Petitioner objected to the district court, rather than the jury, making the jurisdictional findings. The circuits are split on this question, with the Ninth Circuit requiring the government to prove disputed facts concerning jurisdiction over a vessel (such as whether it is stateless) to a jury, whereas the First and Eleventh Circuits do not. Petitioner’s preserved claim provides an excellent opportunity to resolve this constitutional issue.

As recently reported in *The New York Times Magazine*, the circuits are also split on whether the Due Process Clause requires the government to establish a nexus between the criminal activity and the United States to prosecute a defendant under the MDLEA. See Seth Freed Wessler, “The Coast Guard’s ‘Floating Guantánamos,’” *The New York Times Magazine* (Nov. 20, 2017) (hereinafter “NYT”), available at <https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html> (last visited May 13, 2018). For over two decades, the Ninth Circuit has required the government to establish a sufficient nexus between the criminal conduct and the United States to accord with due process in cases involving foreign-flagged vessels. See *id.*; *United States v. Perlaza*, 439 F.3d 1149, 1160-61 (9th Cir. 2006) (citing, *inter alia*, *United States v. Medjuck*, 48 F.3d 1107, 1111 (9th Cir. 1995)). Other circuits, including the Eleventh Circuit, do not impose this requirement. Although the government has asserted that the vessel in this case is stateless, rather than foreign-flagged, the government brought Petitioner to Tampa where it did not have to prove to the jury that the vessel was actually stateless. See Issue I, *infra*. The government’s ability to choose the location of prosecution – with an express preference of bringing cases in the Eleventh Circuit, rather than in the Ninth – only makes the need for this

Court's review more pressing. See *NYT* (interview with Coast Guard lawyer); Pet. App. 43a (data showing that the majority of MDLEA prosecutions are brought within the Eleventh Circuit).

The number of MDLEA prosecutions is increasing, with an estimated 477 percent increase from just five years ago. See Pet. App. 42a. MDLEA prosecutions result in a significant cost to the American taxpayer, including the high cost of incarcerating foreign citizens in U.S. prisons. Petitioner's incarceration alone will cost over \$725,000, though the government showed no connection between his conduct and the United States.³ Given the significant constitutional issues presented by the prosecution of foreign citizens having no connection to the United States, and the resulting costs to the American taxpayer, Petitioner respectfully seeks this Court's review.

I. The Circuits are Divided On Whether the MDLEA Violates the Fifth and Sixth Amendments Because it Removes the Jurisdictional Element from the Jury

Prior to 1996, jurisdiction was an element of an offense under the MDLEA that had to be proven to a jury beyond a reasonable doubt. See *United States v. Tinoco*, 304 F.3d 1088, 1102-04 (11th Cir. 2002) (citing *United States v. Medina*, 90 F.3d 463-64 (11th Cir. 1996)). Congress amended the MDLEA in 1996; in its current form, the statute provides that:

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

46 U.S.C. § 70504(a); see *Tinoco*, 304 F.3d at 1105-06.

The courts of appeals are divided on whether the MDLEA's statutory jurisdictional requirement – that the defendant must be on board a “vessel subject to the jurisdiction of the United States” – must be proven to a jury. In the Eleventh Circuit, where Petitioner was prosecuted, the

³ The average cost of incarceration in federal prison is \$36,299.25. See Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18863 (Apr. 30, 2018) (\$36,299.25 per year x 20 years of incarceration = \$725,985).

court has decided that the MDLEA's "jurisdictional requirement [should] be treated only as a question of subject matter jurisdiction for the court to decide." *Tinoco*, 304 F.3d at 1106. The Eleventh Circuit reasoned:

[S]tatutory jurisdictional requirements like the one in the MDLEA do not fit into the traditional definition of what constitute offense elements. Hence, the . . . jurisdictional requirement is not an essential ingredient or an essential element of the MDLEA substantive offense, and, as a result, it does not have to be submitted to the jury for proof beyond a reasonable doubt.

304 F.3d at 1109-10. Relying upon this precedent, the Eleventh Circuit has rejected the argument, including in the decision below, that Congress's removal of the jurisdictional element from the jury violates the Fifth and Sixth Amendments. Pet. App. 10a (citing *Tinoco*, 304 F.3d at 1107-09, 1111-12).⁴

The Ninth Circuit has expressly disagreed with the Eleventh Circuit, concluding that disputed facts pertaining to whether a vessel is subject to the jurisdiction of the United States, such as where the vessel was intercepted or whether it is stateless, should be resolved by a jury. *Perlaza*, 439 F.3d at 1165-67. As the Ninth Circuit reasoned:

Notwithstanding the statutory language of § 1903(f)^[5] and Congress' prerogative in enacting the law of federal crimes, we are mindful that we must honor the strictures of the Fifth and Sixth Amendments. Thus, this case presents one of the "limited circumstances" in which "facts not formally identified as elements of the offense charged" must be submitted to the jury and proved beyond a reasonable doubt. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). This is because "the Due Process Clause protects the accused against conviction except upon proof

⁴ The First Circuit has rejected constitutional challenges to § 70504(a) and has stated that a preponderance-of-the-evidence standard may be applied to this finding. See *United States v. Mitchell-Hunter*, 663 F.3d 45, 50-51 (1st Cir. 2011); *United States v. Matos-Luchi*, 627 F.3d 1, 5 (1st Cir. 2010) ("Defendants raise no constitutional objection on th[e] issue [of fact-finding on a preponderance-of-the-evidence standard], and we see none."); but see *id.* at 13-15 (Lipez, J., dissenting) (disagreeing on the burden-of-proof standard, observing that "a failure to prove that defendants' conduct occurred on board a covered vessel amounts to a failure to prove that the defendants violated the MDLEA"); *United States v. Vilches-Navarrete*, 523 F.3d 1, 19-23 (1st Cir. 2008) (rejecting constitutional challenge to § 70504(a) on plain-error review).

⁵ 46 U.S.C. § app. 1903(f) is now codified at § 70504(a).

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970); *see also Harris v. United States*, 536 U.S. 545, 561 (2002) (defining “elements” as “ ‘fact[s] ... legally essential to the punishment to be inflicted.’ ” . . .). “It is equally clear that the ‘Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.’ These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes....” *United States v. Booker*, 543 U.S. 220 (2005) (quoting *United States v. Gaudin*, 515 U.S. 506, 511 (1995)).

439 F.3d at 1166 (citations and parallel citations omitted).

This circuit split warrants the Court’s review. Because the MDLEA provides for venue in “the district at which the person enters the United States,” 46 U.S.C. § 70504(b)(1), the U.S. government controls the jurisdiction in which a defendant is prosecuted. The majority of cases are brought within the Eleventh Circuit’s geographic jurisdiction, which does not require that the jurisdictional facts be proven to a jury. *See* Pet. App. 43a; Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction Over Drug Crimes*, 93 Minn. L. Rev. 1191, 1205 (2009) (hereinafter “*Beyond the Article I Horizon*”) (noting that the Eleventh Circuit “gets most MDLEA cases”). Petitioner, who was subjected to prosecution in the Eleventh Circuit’s jurisdiction, objected before the district court and court of appeals that the jury should have to find the jurisdictional facts that were necessary for his prosecution under the MDLEA. *See* Pet. App. 6a, 9a-10a; Doc. 94 at 91-93.

This Court has recently reaffirmed that the elements of the offense, including facts that increase the punishment, must be proven to a jury beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 103-08 (2013). Because the MDLEA jurisdictional requirement is necessary to convict a defendant in every case, it is an element that must be proven to a jury beyond a reasonable doubt. *See id.* at 107; *Perlaza*, 439 F.3d at 1166-67. Indeed, without a determination that the vessel was a “vessel subject to the jurisdiction of the United States,”

Petitioner (and others like him) could not be prosecuted in federal court under the MDLEA. See *United States v. Trinidad*, 839 F.3d 112, 124-25 (1st Cir. 2016) (Torruella, J., dissenting) (“[T]he status of [defendant’s] boat goes far beyond the question of whether United States courts have jurisdiction. It goes to the very heart of whether there has been any crime committed at all. If [the defendant] cannot face any criminal penalty at all in the absence of proof of his vessel’s statelessness, how can proof of his vessel’s statelessness possibly be subjected to a preponderance of the evidence standard?”) (citations omitted). Given the importance of defining the “elements” of the MDLEA offense that must be proven to a jury beyond a reasonable doubt, and the circuit split on this issue, Petitioner seeks this Court’s review.

II. The MDLEA Exceeds Congress’s Article I Powers Under the Piracies and Felonies Clause

The Constitution provides Congress the power to “define and punish Piracies and Felonies committed on the high Seas.” U.S. Const. art. I, § 8, cl. 10 (hereinafter “Piracies and Felonies Clause”). This petition raises an important question relating to the scope of Congress’s power under the Piracies and Felonies Clause to define and punish offenses committed on international waters with no nexus to the United States. Because of the divergent views on the constitutionality of the MDLEA, Petitioner respectfully seeks this Court’s review.

The Eleventh Circuit, the court with the most MDLEA cases, has held that Congress can reach extraterritorial drug activity through its Piracies and Felonies Clause power. Pet. App. 6a-7a. In its view, Congress may reach drug activity, even though it has no nexus to the United States. Pet. App. 7a (citing *Campbell*, 743 F.3d at 810). The Eleventh Circuit has concluded that Congress may reach this activity because drug trafficking is “condemned universally by law-abiding nations.” *Id.* (internal quotation marks omitted). And, the protective principle – which “permits a nation to assert jurisdiction over a person whose conduct outside the nation’s territory

threatens the nation's security or could potentially interfere with the operation of its governmental functions" – allows Congress to reach extraterritorial drug conduct without any showing of actual or intended effects in the United States. See *Campbell*, 743 F.3d at 810; *United States v. Gonzalez*, 776 F.2d 931, 938-39 (11th Cir. 1985). As to stateless vessels in particular, the Eleventh Circuit has found that they are "international pariahs" and therefore subject to any nation's laws. *Campbell*, 743 F.3d at 810 (internal quotation marks omitted).

These conclusions, however, have their judicial and scholarly dissenters. As the Honorable Juan Torruella, United States Circuit Judge, has explained, the conclusion that Congress can reach extraterritorial activity without a nexus to the United States cannot be sustained under the Piracies and Felonies Clause:

The MDLEA, as applied without a nexus requirement, cannot be legitimately based on the "Piracy and Felonies" clause, which gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. The term "Felonies" has not been read to include all felonies, but rather only felonies with an adequate jurisdictional nexus to the United States. See, e.g., *United States v. Furlong*, 18 U.S. 184, 197, 5 Wheat. 184, 5 L.Ed. 64 (1820). The *Furlong* decision rejected a prosecution for murder of a foreigner by another foreigner on a foreign vessel. *Id.* In so doing, the Court effectively distinguished between "Felonies," which are not subject to universal jurisdiction, and "Piracy," which is. *Id.* at 196-198, 5 Wheat. 184 ("If by calling murder piracy, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device?"). . . .

Even though the term "Piracy" has evolved to include other crimes that are universally condemned (as the slave trade has since become), the drug trade is not subject to universal jurisdiction. See *id.* at 1223-27. . . [T]he protective principle also does not support exercise without nexus. *Id.* at 1229-31. . . . Thus, the exercise of Congressional power in enacting the MDLEA is not consistent with the Constitution, which limits Congress's power to proscribe crimes on the high sea to crimes of universal jurisdiction and crimes with a U.S. nexus.

United States v. Angulo-Hernandez, 576 F.3d 59, 62-63 (1st Cir. 2009) (Torruella, J., dissenting from denial of rehearing en banc) (emphases added; footnotes omitted); see *United States v.*

Cardales-Luna, 632 F.3d 731, 739-51 (1st Cir. 2011) (Torruella, J., dissenting); *Trinidad*, 839 F.3d at 116 (Torruella, J., dissenting) (“I can no longer support the approach taken by this and our sister circuits in embracing the sweeping powers asserted by Congress and the Executive under the [MDLEA], and I am of the view that the district court acted without jurisdiction over appellant.”).

Judge Torruella’s opinions draw on scholarly articles concluding that Congress has only the constitutional authority to punish drug trafficking that has a nexus to the United States. See Eugene Kontorovich, *Beyond the Article I Horizon*, 93 Minn. L. Rev. at 1207-31; Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149, 159-68 (2009). Professor Kontorovich opines that drug crimes are not universal jurisdiction offenses in international law. 93 Minn. L. Rev. at 1195, 1207-27; *cf.* Pet. App. 7a (citing *Campbell*, 743 F.3d at 810). And, because the protective principle extends to offenses that threaten the security of the state or integrity of the government’s functions, not offenses (such as drug offenses) relating to a country’s physical and moral well-being, this principle does not support the constitutionality of the MDLEA. 93 Minn. L. Rev. at 1229-31.

Judge Torruella and Professor Kontorovich have also addressed the MDLEA’s definition of a “stateless” vessel (or a “vessel without nationality”), and have concluded that the MDLEA uses a broader definition than recognized in international law. For example, as relevant here, the MDLEA includes as a vessel without nationality a vessel for which a claim of nationality is neither confirmed nor denied by the country. See 46 U.S.C. § 70502(d)(1)(C). In international law, however, a stateless vessel is one that, in fact, is not registered with the country, rather than one that, in the time permitted, has not been confirmed or denied. 193 Minn. L. Rev. at 1227-29; *Trinidad*, 839 F.3d at 122 (Torruella, J., dissenting) (“[T]he acquisition of jurisdiction in this case on the basis of ‘statelessness’ because of Colombia’s failure to make an unequivocal assertion of

nationality within the twenty-four hours or so given is a gross overstepping of jurisdictional boundaries”).

Hundreds of foreign citizens, including Petitioner, are incarcerated in American prisons based on Congress’s exertion of criminal authority over conduct on the high seas. *See Beyond the Article I Horizon*, 93 Minn. L. Rev. at 1195. This petition raises significant questions about whether Congress has this authority, including (a) whether “Felonies” are limited to offenses with a nexus to the United States, and (b) whether “Piracies” has evolved to include other universal jurisdiction offenses and, if so, is drug trafficking a universal jurisdiction offense? *Compare* Pet. App. 7a, with *Angulo-Hernandez*, 576 F.3d at 62-63 (Torruella, J., dissenting), and *Beyond the Article I Horizon*, 93 Minn. L. Rev. at 1207-31. The Eleventh Circuit itself has noted the “dearth of authority interpreting the scope of Congress’s power under the [Piracies and Felonies] Clause.” *See United States v. Saac*, 632 F.3d 1203, 1209 (11th Cir. 2011). Because of the importance of this issue, and the need for this Court’s guidance, Petitioner respectfully seeks this Court’s review.

III. The Due Process Clause of the Fifth Amendment Requires a Nexus Between the Offense Conduct and the United States for Prosecutions Under the MDLEA

The circuits are split on whether the Due Process Clause of the Fifth Amendment requires the government to establish a nexus to the United States in cases prosecuted under the MDLEA. The Ninth Circuit has held that, in cases involving foreign-registered vessels outside the territory of the United States, “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.” *Perlaza*, 439 F.3d at 1160;⁶ *see United States v. Zakharov*, 468 F.3d 1171, 1177 (9th Cir. 2006) (“To accord with

⁶ The Ninth Circuit has termed this “constitutional” jurisdiction, which must be established in addition to the MDLEA’s “statutory” jurisdiction. *See id.* at 1160-61.

due process, we require a sufficient nexus between the United States and the defendant's activities before exerting jurisdiction over foreign vessels.”).⁷ Other circuits, including the Eleventh Circuit, have rejected that the Due Process Clause requires a showing of a nexus to the United States to prosecute a foreign citizen under the MDLEA. See Pet. App. 7a; *United States v. Cardales*, 168 F.3d 548, 552-53 (1st Cir. 1999); *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002); *United States v. Suerte*, 291 F.3d 366, 372-77 (5th Cir. 2002).

This Court's guidance is needed to resolve the proper reach and scope of the MDLEA. As applied here, Petitioner was pulled from international waters and prosecuted in the United States for drug offenses having no connection to the United States. The U.S. government treated his vessel as a vessel without nationality, but that occurred because the MDLEA's definition of a vessel without nationality is broader than that recognized by international law. See Issue II, *supra*. Based upon the assertion that Jamaica could neither confirm nor deny the registry of the vessel, Petitioner was subjected to U.S. criminal law and sentenced to 20 years in prison.

In seeking this Court's review, Petitioner notes that the Ninth Circuit does not require that a nexus be shown for stateless vessels. See *Perlaza*, 439 F.3d at 1161. But, because the U.S. government subjected Petitioner to prosecution in the Eleventh Circuit, it did not have to prove to a jury that the vessel is actually stateless. See Issue I, *supra*.

⁷ The Second Circuit has likewise required a nexus between a foreign citizen's extraterritorial conduct and the United States. See *United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003) (“The Ninth Circuit has held that ‘[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.’ We agree.”) (citation omitted). In *Yousef*, the Second Circuit held that the prosecution was consistent with the Due Process clause, because the requisite nexus had been met where a U.S.-flag aircraft was the target of the conspiracy to attack. *Id.* at 112.

Moreover, the MDLEA uses an overly broad definition of statelessness that does not accord with international law, including the provision applied here, resulting in the denial of due process for Petitioner. *See Trinidad*, 839 F.3d at 121 n.14 (Torruella, J., dissenting) (noting such due process concerns and stating, “I agree with those commentators who have found that ‘[t]he better view appears to be that there is a need for some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce the laws against them.’”) (quoting R.R. Churchill & A.V. Lowe, *The Law of the Sea* 214 (3d ed. 1999)). To be consistent with the Fifth Amendment, the MDLEA should be interpreted to require a showing between the criminal activity and the United States before a foreign citizen is prosecuted and imprisoned in the United States. Petitioner therefore respectfully seeks this Court’s review.

IV. The MDLEA Violates the Confrontation Clause of the Sixth Amendment

Foreign citizens are brought to the United States for criminal prosecution under the MDLEA, which uses a definition of a stateless vessel (a “vessel without nationality”) that is broader than that recognized in international law. *See* Issue II, *supra*. Once here, these criminal defendants are then denied a jury finding on such jurisdictional facts. *See* Issue I, *supra*. And, they are denied the right to confront the declarant who prepared the State Department Certification that purports to document the country’s (here, Jamaica’s) response to a claim of nationality for the vessel. *See* Pet. App. 21a-23a; 46 U.S.C. § 70502(d)(2) (“The response of a foreign nation to a claim of registry . . . is proved conclusively by certification of the Secretary of State or the Secretary’s designee.”). Yet, these critical facts form the basis – if any – for their prosecution under the MDLEA.

Consistent with his request for this Court’s review of whether the jury must find the jurisdictional facts (Issue I), Petitioner respectfully seeks this Court’s guidance to address whether the Sixth Amendment’s Confrontation Clause affords the right to confront concerning the State

Department's Certification. The First and Eleventh Circuits have rejected Confrontation Clause arguments, reasoning that the MDLEA denies a jury trial as to the jurisdictional facts and therefore there is no right to confront. See 46 U.S.C. § 70504(a); Pet. App. 10a (citing *Campbell*, 743 F.3d at 809); *United States v. Mitchell-Hunter*, 663 F.3d 45, 49-53 (1st Cir. 2011). This reasoning, of course, begs the question of whether § 70504(a) itself is unconstitutional – an issue that divides the circuits. See Issue I, *supra*.

Without the facts establishing that the vessel here was “without nationality,” there was no basis to prosecute Petitioner under the MDLEA. Like the certificates at issue in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11, 313 (2009), Petitioner should have been able to confront the out-of-court testimony against him concerning a “fact necessary for his conviction.” The State Department Certification is the documentation prepared for the very purpose of prosecution under the MDLEA. Indeed, in Petitioner's case it was executed on March 12, 2014, three weeks after Petitioner had been indicted under the MDLEA and brought to federal court in Tampa. See Pet. App. 21a, 29a, 34a. Because these constitutional issues warrant further review, Petitioner respectfully asks this Court to grant this petition.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender



M. Allison Guagliardo
Assistant Federal Defender
Federal Defender's Office
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-mail: allison_guagliardo@fd.org
Counsel of Record for Petitioner