

Petitioner's Appendix

837 F.3d 1182
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Carlington CRUICKSHANK, Defendant–Appellant.

No. 14–13754
|
Date Filed: 09/20/2016

Synopsis

Background: Defendant was convicted in the United States District Court for the Middle District of Florida, No. 8:14-cr-00055-SDM-EAJ-1, of conspiracy to possess with intent to distribute cocaine while aboard vessel and aiding and abetting possession with intent to distribute cocaine while aboard vessel, and he was sentenced to prison term of 324 months. Defendant appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

[1] Congress did not exceed its authority under Felonies Clause when it enacted Maritime Drug Law Enforcement Act (MDLEA);

[2] evidence was sufficient to establish mens rea element to support defendant's convictions;

[3] United States State Department certification of jurisdiction under MDLEA did not implicate Confrontation Clause or Due Process Clause; and

[4] in denying defendant's request for minor-role sentencing reduction, court improperly suggested that quantity of cocaine was so large that no participant in scheme could be eligible for such reduction.

Affirmed in part, vacated in part, and remanded.

West Headnotes (33)

[1] **Criminal Law**

🔑 Review De Novo

Criminal Law

🔑 Jurisdiction and venue

Court of Appeals reviews a district court's interpretation and application of a statute concerning its subject-matter jurisdiction de novo, but it reviews factual findings with respect to jurisdiction for clear error.

Cases that cite this headnote

[2] **Criminal Law**

🔑 Review De Novo

Court of Appeals reviews the legal question of whether a statute is constitutional and constitutional objections de novo.

Cases that cite this headnote

[3] **Courts**

🔑 Number of judges concurring in opinion, and opinion by divided court

Under the prior precedent rule, the Court of Appeals is bound to follow a prior binding precedent unless and until it is overruled by the court, sitting en banc, or by the Supreme Court.

1 Cases that cite this headnote

[4] **Criminal Law**

🔑 Offenses on the high seas or beyond the jurisdiction of any state

Congress did not exceed its authority under Felonies Clause when it enacted Maritime Drug Law Enforcement Act (MDLEA), even though MDLEA did not require nexus between criminal act and the United States, since narcotics trafficking was condemned universally by law-abiding nations, thus supporting MDLEA's extraterritorial reach.

U.S. Const. art. 1, § 8, cl. 10; 46 U.S.C.A. §§ 70502(c)(1)(A), (d)(1)(A), 70503(a)(1).

4 Cases that cite this headnote

[5] Constitutional Law

✦ Extraterritorial application of penal laws

Criminal Law

✦ Offenses on the high seas or beyond the jurisdiction of any state

Maritime Drug Law Enforcement Act (MDLEA) provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas, and thus a prosecution under the MDLEA does not violate the Due Process Clause. U.S. Const. Amend. 5; 46 U.S.C.A. §§ 70502(c)(1)(A), (d)(1)(A), 70503(a)(1).

3 Cases that cite this headnote

[6] Criminal Law

✦ Review De Novo

Criminal Law

✦ Construction of Evidence

Court of Appeals reviews de novo whether sufficient evidence supports a conviction, drawing all reasonable factual inferences from the evidence in favor of the verdict.

Cases that cite this headnote

[7] Criminal Law

✦ Reasonable Doubt

Evidence is sufficient to support a conviction if a reasonable trier of fact could have found that it established guilt beyond a reasonable doubt.

Cases that cite this headnote

[8] Criminal Law

✦ Inferences or hypotheses from evidence

In rebutting the government's evidence, a defendant must do more than put forth a reasonable hypothesis of innocence, because the issue is whether a reasonable jury could

have convicted, not whether a conviction was the only reasonable result.

Cases that cite this headnote

[9] Conspiracy

✦ Nature and Elements of Criminal Conspiracy in General

To establish a conspiracy, the government must prove beyond a reasonable doubt that two or more persons entered into an unlawful agreement to commit an offense, that the defendant knew of the agreement, and that he voluntarily became a part of the conspiracy.

1 Cases that cite this headnote

[10] Conspiracy

✦ Particular crimes

Defendant's presence on a vessel, though not determinative, is a material factor supporting his participation in a conspiracy relating to that vessel, and the defendant's presence becomes more significant when the value of the contraband is high, as it is highly improbable that drug smugglers would allow an outsider on board a vessel filled with millions of dollars worth of contraband.

Cases that cite this headnote

[11] Conspiracy

✦ Particular crimes

Controlled Substances

✦ Possession for sale or distribution

When the Court of Appeals reviews a conspiracy or a possession-with-intent-to-distribute conviction involving a vessel laden with narcotics, the court considers, among other things: (1) the probable length of the voyage; (2) the size of the contraband shipment; (3) the necessarily close relationship between captain and crew; (4) whether the contraband was in plain view, could be smelled, or was in a place where a person on a vessel would ordinarily discover it; and, (5) other factors, including diversionary maneuvers designed to evade detection and

apprehension, attempts to flee, inculpatory and false exculpatory statements made after apprehension, witnessed participation as a crewman, and the absence of supplies or equipment necessary to the vessel's intended use.

Cases that cite this headnote

[12] Controlled Substances

➔ Possession for sale or distribution

In order to convict a defendant for possession with intent to distribute a controlled substance, the government must prove knowing possession and an intent to distribute.

1 Cases that cite this headnote

[13] Controlled Substances

➔ Constructive possession

Controlled Substances

➔ Joint or exclusive possession

Defendant may constructively possess a controlled substance if he exercises some measure of control over the contraband, either exclusively or in association with others.

Cases that cite this headnote

[14] Controlled Substances

➔ Presumptions and burden of proof

Defendant's intent to distribute a controlled substance may be inferred from a variety of factors, including whether the government seized a large quantity of controlled substances.

1 Cases that cite this headnote

[15] Criminal Law

➔ Aiding, abetting, or other participation in offense

In order to prove that a defendant aided and abetted an offense, the government must establish that: (1) someone else committed the substantive offense; (2) the defendant

committed an act that contributed to and furthered the offense; and (3) the defendant intended to aid in the commission of the offense.

Cases that cite this headnote

[16] Conspiracy

➔ Narcotics and dangerous drugs

Controlled Substances

➔ Possession for sale or distribution

Evidence was sufficient to establish mens rea element to support defendant's convictions for conspiracy to possess with intent to distribute cocaine while aboard vessel and aiding and abetting possession with intent to distribute cocaine while aboard vessel, where defendant was one of two individuals who had been hired to transport drugs on vessel from Colombia to Jamaica, he told co-defendant that he was comfortable with presence of drugs on vessel, and, even though defendant had nothing to do with loading cocaine onto vessel, reconstructing vessel to carry drugs, fueling, or attending meetings leading up to trip, he helped to program vessel's GPS devices and to throw evidence overboard, and he created cover story and told that story to Coast Guard. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 1010, 21 U.S.C.A. § 960(b)(1)(B)(ii); 46 U.S.C.A. §§ 70503(a), 70506(a), (b).

1 Cases that cite this headnote

[17] Criminal Law

➔ Reception of evidence

Criminal Law

➔ Review De Novo

Generally, the Court of Appeals reviews whether hearsay statements are testimonial de novo, but if a defendant does not raise an objection based on his confrontation right at trial, the court reviews a confrontation claim for plain error. U.S. Const. Amend. 6.

Cases that cite this headnote

[18] Criminal Law Necessity of Objections in General

To show plain error, the defendant must establish (1) an error, (2) that is plain or obvious, and (3) that affected his substantial rights.

Cases that cite this headnote

[19] Criminal Law Necessity of Objections in General

If a defendant establishes plain error, the Court of Appeals may exercise its discretion to recognize the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Cases that cite this headnote

[20] Criminal Law Necessity of Objections in General

Error is plain when it contradicts precedent from the Supreme Court or the reviewing Court of Appeals directly resolving the issue.

Cases that cite this headnote

[21] Criminal Law Necessity of Objections in General

Under plain error review, an error affects a substantial right of a party if it has a substantial influence on the outcome of a case or leaves grave doubt as to whether it affected the outcome of the case.

Cases that cite this headnote

[22] Criminal Law Necessity of Objections in General

Where the effect of an error on the result in the district court is uncertain or indeterminate, the defendant has not met his burden of demonstrating prejudice under plain error review.

Cases that cite this headnote

[23] Criminal Law Availability of declarant

Confrontation Clause prevents the admission of a witness's testimonial statement when the witness does not appear at trial, unless he is unavailable to testify and the defendant had a prior opportunity to cross-examine him. U.S. Const. Amend. 6.

Cases that cite this headnote

[24] Constitutional Law Extraterritorial application of penal laws**Criminal Law**

 Offenses on the high seas or beyond the jurisdiction of any state

Criminal Law Right of Accused to Confront Witnesses

United States State Department certification of jurisdiction under Maritime Drug Law Enforcement Act (MDLEA) did not implicate Confrontation Clause or Due Process Clause in prosecution for conspiracy to possess with intent to distribute cocaine while aboard vessel and aiding and abetting possession with intent to distribute cocaine while aboard vessel, because such certification was not element of either offense and did not affect defendant's guilt or innocence. U.S. Const. Amends. 5, 6; 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 1010, 21 U.S.C.A. § 960(b)(1)(B)(ii); 46 U.S.C.A. §§ 70503(a), 70504(a), 70506(a), (b).

3 Cases that cite this headnote

[25] Jury Sentencing Matters**Sentencing and Punishment** Factors enhancing sentence

Any facts that increase the applicable statutory mandatory-minimum sentence for a crime must be submitted to a jury and found beyond a reasonable doubt.

Cases that cite this headnote

[26] Criminal Law Sentencing

Court of Appeals reviews a district court's denial of a minor-role sentencing reduction for clear error. U.S.S.G. § 3B1.2(b).

11 Cases that cite this headnote

[27] Criminal Law Questions of Fact and Findings

Clear error review is deferential, and the Court of Appeals will not disturb a district court's findings unless it is left with a definite and firm conviction that a mistake has been committed.

1 Cases that cite this headnote

[28] Criminal Law Sentencing

Upon review of the denial of a minor-role sentencing reduction, the district court's choice between two permissible views of the evidence as to the defendant's role in the offense will rarely constitute clear error, so long as the basis of the trial court's decision is supported by the record and does not involve a misapplication of a rule of law. U.S.S.G. § 3B1.2(b).

3 Cases that cite this headnote

[29] Sentencing and Punishment Degree of Proof

To obtain a minor-role sentencing reduction, the defendant bears the burden of establishing his minor role in the offense by a preponderance of the evidence. U.S.S.G. § 3B1.2(b).

14 Cases that cite this headnote

[30] Sentencing and Punishment Minor or minimal participation

Sentencing courts analyzing a claim for a minor-role reduction should first consider the defendant's role in the relevant conduct for which he has been held accountable at

sentencing, and then his role as compared to that of other participants in his relevant conduct. U.S.S.G. § 3B1.2(b).

25 Cases that cite this headnote

[31] Criminal Law Effect of change in law or facts**Sentencing and Punishment** Nature of amendment or revision

Although the Court of Appeals will apply the version of the Sentencing Guidelines in effect on the date of sentencing, when reviewing a district court's application of the Guidelines, the Court of Appeals will consider clarifying amendments retroactively, regardless of the date of sentencing. U.S.S.G. § 1A1.3 et seq.

18 Cases that cite this headnote

[32] Sentencing and Punishment Amendment

Amendment to the commentary, and not the text, of the Sentencing Guidelines suggests that the amendment clarifies the Guideline, rather than substantively alters it.

20 Cases that cite this headnote

[33] Criminal Law Sentence**Sentencing and Punishment** Minor or minimal participation

In denying defendant's request for minor-role sentencing reduction, court improperly suggested that quantity of cocaine being transported on vessel was so large that no participant in scheme could be eligible for such reduction, thus meriting remand for resentencing in prosecution for conspiracy to possess with intent to distribute cocaine while aboard vessel and aiding and abetting possession with intent to distribute cocaine while aboard vessel, even though it was possible that court considered other relevant factors and did not rely solely on drug quantity in making its determination, consequences for defendant's

advisory sentencing range were significant, as potential for six-level reduction to his offense level was at stake. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 1010, 21 U.S.C.A. § 960(b)(1)(B)(ii); 46 U.S.C.A. §§ 70503(a), 70506(a, b); U.S.S.G. §§ 2D1.1(a)(5), 3B1.2(b).

1 Cases that cite this headnote

***1186** Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:14-cr-00055-SDM-EAJ-1

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Before MARCUS and WILLIAM PRYOR, Circuit Judges, and DAVIS, * District Judge.

* Honorable Brian J. Davis, United States District Judge for the Middle District of Florida, sitting by designation.

Opinion

MARCUS, Circuit Judge:

On February 11, 2014, the U.S. Coast Guard recovered 171 kilograms of cocaine from a vessel known as the “Venus” in international waters in the Caribbean Sea. Carlington Cruickshank, one of two men aboard the vessel, was later convicted and sentenced to 324 months' imprisonment for one count of conspiracy to possess with intent to distribute five kilograms or more ***1187** of cocaine while aboard a vessel, in violation of 21 U.S.C. § 960(b)(1)(B)(ii) and 46 U.S.C. §§ 70503(a), 70506(a) and (b), and one count of aiding and abetting possession with

intent to distribute five kilograms or more of cocaine while aboard a vessel, in violation of 18 U.S.C. § 2, 21 U.S.C. § 960(b)(1)(B)(ii), and 46 U.S.C. §§ 70503(a), 70506(a). On appeal, Cruickshank argues that: (1) jurisdiction did not exist to prosecute him under the Maritime Drug Law Enforcement Act (“MDLEA”) and, moreover, the MDLEA is unconstitutional; (2) the district court erred in denying his motion for judgment of acquittal based on insufficient evidence of mens rea; (3) the district court erred by establishing jurisdiction under the MDLEA by relying on a United States Department of State certification, and by removing from the jury the factual question concerning jurisdiction; and (4) the district court clearly erred in denying him a minor-role reduction under U.S.S.G. § 3B1.2(b). After careful review of the parties' briefs and the record, and having had the benefit of oral argument, we affirm in part, and vacate and remand in part.

I.

[1] [2] [3] First, we reject Cruickshank's claims that jurisdiction did not exist to prosecute him under the MDLEA and that the MDLEA is unconstitutional. We review a district court's interpretation and application of a statute concerning its subject-matter jurisdiction *de novo*, but we review factual findings with respect to jurisdiction for clear error. *United States v. Campbell*, 743 F.3d 802, 805 (11th Cir.), *cert. denied*, — U.S. —, 135 S.Ct. 704, 190 L.Ed.2d 438 (2014). We review the legal question of whether a statute is constitutional and constitutional objections *de novo*. *Id.* Under our prior precedent rule, we are bound to follow a prior binding precedent unless and until it is overruled by us sitting en banc or by the Supreme Court. *United States v. Vega–Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008).

The MDLEA prohibits knowingly or intentionally possessing a controlled substance, with the intent to distribute, onboard any vessel subject to the jurisdiction of the United States. 46 U.S.C. § 70503(a)(1) (“While on board a covered vessel, an individual may not knowingly or intentionally ... possess with intent to manufacture or distribute, a controlled substance.”). It was enacted under Congress's authority provided by the Felonies Clause, U.S. Const. Art. I, § 8, cl. 10, to define and punish felonies committed on the high seas. *Campbell*, 743 F.3d at 805. Pursuant to the MDLEA, “a vessel without nationality”

is “subject to the jurisdiction of the United States” and it defines a stateless vessel as including “a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed.” 46 U.S.C. § 70502(c)(1)(A), (d)(1)(A).

[4] In Campbell, the United States Coast Guard had intercepted the defendant while aboard a vessel in the international waters off the eastern coast of Jamaica. 743 F.3d at 804. The vessel lacked all indicia of nationality: it displayed no flag, port, or registration number. Id. Although one of the individuals aboard the vessel claimed it was registered in Haiti, the government of Haiti told the Coast Guard that it could neither confirm nor deny the registry. Id. Campbell, the defendant, argued that Congress had exceeded its authority under the Felonies Clause of the Constitution when it enacted the MDLEA. We disagreed, recognizing that “[w]e have always upheld extraterritorial convictions under our drug trafficking laws as an exercise of power under the Felonies *1188 Clause.” Id. at 809–10 (quotation omitted). As we explained, a criminal act does not need a nexus to the United States in order to be criminalized under the MDLEA “because universal and protective principles support its extraterritorial reach.” Id. at 810. In other words, because the Felonies Clause empowers Congress to punish crimes committed on the high seas, and because “the trafficking of narcotics is condemned universally by law-abiding nations,” we rejected the argument “that it is fundamentally unfair for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.” Id. (quotations omitted). This is especially true, we explained, when vessels on the high seas “are engaged in conduct that has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.” Id. (quotations omitted).

[5] We also explained in Campbell that the “Due Process Clause of the Fifth Amendment does not prohibit the trial and conviction of an alien captured on the high seas while drug trafficking.” Id. at 812 (citing United States v. Rendon, 354 F.3d 1320, 1326 (11th Cir. 2003)). In our view, the MDLEA “provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas.” Id.

In this case, all of Cruickshank's arguments concerning the MDLEA are foreclosed by our prior precedent. In

Campbell, we reaffirmed that Congress did not exceed its authority by enacting the MDLEA; we determined that no jurisdictional nexus was required under the MDLEA; and we concluded that convictions under the MDLEA do not violate the Due Process Clause of the Constitution. See id. at 809–10, 812. Because we are bound by our prior precedent concerning all of Cruickshank's challenges to the MDLEA, his arguments necessarily fail.

II.

[6] [7] [8] We are also unpersuaded by Cruickshank's claim that the district court erred in denying his motion for judgment of acquittal based on insufficient evidence of mens rea. We review de novo whether sufficient evidence supports a conviction, drawing all reasonable factual inferences from the evidence in favor of the verdict. United States v. Beckles, 565 F.3d 832, 840 (11th Cir. 2009). Evidence is sufficient if a reasonable trier of fact could have found that it established guilt beyond a reasonable doubt. Id. In rebutting the government's evidence, a defendant must do more than put forth a reasonable hypothesis of innocence, because the issue is whether a reasonable jury could have convicted, not whether a conviction was the only reasonable result. Id. at 840–41.

[9] [10] [11] To establish a conspiracy, the government must prove beyond a reasonable doubt that two or more persons entered into an unlawful agreement to commit an offense, that the defendant knew of the agreement, and that he voluntarily became a part of the conspiracy. United States v. Tinoco, 304 F.3d 1088, 1122 (11th Cir. 2002); United States v. Alvarez, 837 F.2d 1024, 1027 (11th Cir. 1988). The defendant's presence on a vessel, though not determinative, is a material factor supporting his participation in a conspiracy relating to that vessel. Tinoco, 304 F.3d at 1122–23. “A defendant's presence becomes more significant when the value of the contraband is high, as it is highly improbable that drug smugglers would allow an outsider on board a vessel filled with millions of dollars worth of contraband.” Id. at 1123 (quotation omitted). When we review a conspiracy or a possession-with-intent-to-distribute conviction involving a vessel laden *1189 with narcotics, we consider, among other things: (1) the probable length of the voyage; (2) the size of the contraband shipment; (3) the necessarily close relationship between captain and crew; (4) whether the contraband was in plain view, could be smelled,

or was in a place where a person on a vessel would ordinarily discover it; and, (5) other factors, including diversionary maneuvers designed to evade detection and apprehension, attempts to flee, inculpatory and false exculpatory statements made after apprehension, witnessed participation as a crewman, and the absence of supplies or equipment necessary to the vessel's intended use. *Id.*; United States v. Cruz-Valdez, 773 F.2d 1541, 1546–47 (11th Cir. 1985).

[12] [13] [14] [15] “In order to convict a defendant for possession with intent to distribute a controlled substance, the government must prove knowing possession and an intent to distribute.” United States v. Camacho, 233 F.3d 1308, 1317 (11th Cir. 2000). The law recognizes that a defendant may constructively possess a controlled substance if he exercises some measure of control over the contraband, either exclusively or in association with others. Tinoco, 304 F.3d at 1123. The defendant's intent to distribute may be inferred from a variety of factors, including whether the government seized a large quantity of controlled substances. *Id.* In order to prove that the defendant aided and abetted an offense, the government must establish that: (1) someone else committed the substantive offense; (2) the defendant committed an act that contributed to and furthered the offense; and (3) the defendant intended to aid in the commission of the offense. Camacho, 233 F.3d at 1317.

[16] After thoroughly reviewing this record, we are satisfied that the evidence was sufficient to establish beyond a reasonable doubt Cruickshank's criminally culpable mens rea or state of mind to convict him on both charges—conspiracy to possess with intent to distribute five kilograms or more of cocaine while aboard a vessel, and aiding and abetting possession with intent to distribute five kilograms or more of cocaine while aboard a vessel. Among other things, Cruickshank's co-defendant, Carlos Acosta, testified that Cruickshank was one of two individuals who had been hired to transport drugs on a vessel from Colombia to Jamaica. Acosta said that, when he met Cruickshank and told him drugs were on the boat, Cruickshank stated that he was comfortable with that. The other individual who was supposed to show up to assist with the operation did not, leaving only Acosta and Cruickshank to transport the drugs. Acosta admitted that Cruickshank arrived after the cocaine had been loaded onto the Venus, so Cruickshank had nothing to do with loading the cocaine onto the vessel, reconstructing

the Venus to carry the drugs, fueling, or attending any of the meetings leading up to the trip. Acosta said, however, that Cruickshank programmed the vessel's GPS devices with Acosta's help. In so doing, they configured the GPS devices to transport the ship and the contraband across the Caribbean Sea from Colombia to Jamaica, with waypoints near Jamaica. According to Acosta, once they reached the waypoint closest to Jamaica, someone was going to meet them and take the drugs.

As for their capture, Acosta said that he and Cruickshank had become concerned during the trip when they realized a Coast Guard helicopter was flying above the Venus. They eventually stopped the vessel when the Coast Guard fired warning shots. Before a Coast Guard officer from a nearby vessel boarded the Venus, they threw grocery items, garbage, and clothes overboard in an attempt to get rid of evidence *1190 that they were coming from Colombia, and one of the men took off articles of clothing and washed. Cruickshank suggested that they tell the Coast Guard that he and Acosta were searching for another vessel, but they did not decide who would admit to being in charge.

Ian Groom, a lieutenant with the U.S. Coast Guard, and Andre Trinidad, a machinery technician specializing in counter-drug enforcement with the Coast Guard, also testified. Lieutenant Groom explained that in the pre-daylight hours of February 11, 2014, he had been co-piloting a Coast Guard helicopter when he acquired visibility of a vessel operating without navigational lights. Groom noticed the vessel stopping and starting, and, after spotting the helicopter, the vessel increased its rate of speed and the two people onboard began throwing overboard unidentified objects, which appeared to be clothing, a bucket, and a jug of water. Officer Trinidad, who was aboard a vessel that Lieutenant Groom had directed to the Venus, testified that he then boarded the Venus to question the occupants. Trinidad relayed that, in response to his questions, Cruickshank said that he was in charge and that the vessel was Jamaican. Trinidad asked for documentation to support that the boat was Jamaican, but there was no supporting documentation. Cruickshank also told Trinidad that they had left Jamaica to assist a friend who had run out of gas, and were planning to return to Jamaica. Cruickshank said that they had not found the friend, and he did not identify the friend or the name of his vessel. Trinidad contacted his supervisor, and Trinidad was eventually informed that Jamaica was

not accepting the claim of nationality. At that point, Trinidad's supervisors made a request to assimilate the vessel without nationality, which meant U.S. law would be imposed and the vessel would be subject to all U.S. laws.

Trinidad testified that the captured vessel was the Venus, and that Cruickshank and Acosta were on board. Trinidad also said that a scan performed on the Venus tested positive for cocaine, and that he found hidden kilogram-size packages of cocaine after drilling a hole in a bench on the vessel. Ultimately, authorities found a handheld GPS device, a handheld two-way radio, and approximately 171 kilograms of cocaine on the Venus.

As the evidence at trial showed, while Cruickshank was on the Venus, it was operated without lights, it attempted evasive maneuvers when the Coast Guard helicopter was overhead, and the occupants threw items overboard to conceal their starting point. Evidence also revealed that Cruickshank had said he was comfortable with the drugs being on the boat, he programmed the vessel's GPS devices, he came up with a cover story for the authorities, and he ultimately told the Coast Guard that he was in charge and gave the false statement about why they were at sea. There was more than sufficient evidence to establish Cruickshank's guilt beyond a reasonable doubt on both charges.

III.

[17] [18] [19] [20] [21] [22] We are also unpersuaded by Cruickshank's claims that the district court erred by establishing jurisdiction under the MDLEA in two respects: (1) by relying on a United States Department of State certification, in violation of the Confrontation Clause of the Constitution; and (2) by removing from the jury the question of fact concerning jurisdiction, in violation of Alleyne v. United States, 570 U.S. —, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Normally, we review whether hearsay statements are testimonial de novo. United States v. Caraballo, 595 F.3d 1214, 1226 (11th Cir. 2010). But if a defendant (like *1191 Cruickshank) did not raise an objection based on his confrontation right at trial, we review a confrontation claim for plain error. United States v. Charles, 722 F.3d 1319, 1322 (11th Cir. 2013). To show plain error, the defendant must establish (1) an error, (2) that is plain or obvious, and (3) that affected his substantial rights. United States v. Turner,

474 F.3d 1265, 1276 (11th Cir. 2007). And, if a defendant satisfies these three conditions, we may exercise our discretion to recognize the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id. An error is plain when it contradicts precedent from the Supreme Court or our Court directly resolving the issue. See United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003). "Errors [] affect a substantial right of a party if they have a 'substantial influence' on the outcome of a case or leave 'grave doubt' as to whether they affected the outcome of a case." Turner, 474 F.3d at 1276 (quotation omitted). But "where the effect of an error on the result in the district court is uncertain or indeterminate," the defendant has not met his burden of demonstrating prejudice for purposes of plain error review. United States v. Rodriguez, 398 F.3d 1291, 1301 (11th Cir. 2005). And, finally, as we said earlier, we review constitutional issues de novo. Campbell, 743 F.3d at 805.

[23] [24] The Sixth Amendment's Confrontation Clause prevents the admission of a witness's testimonial statement when the witness does not appear at trial, unless he is unavailable to testify and the defendant had a prior opportunity to cross-examine him. Id. at 806. However, a United States State Department certification of jurisdiction under the MDLEA does not implicate the Confrontation Clause because it does not affect the guilt or innocence of a defendant. See id. at 806–09.

[25] In Alleyne, the Supreme Court revisited two of its prior cases: (1) Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which requires that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt; and (2) Harris v. United States, 536 U.S. 545, 567–68, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), which held that judicial factfinding that increased the applicable statutory mandatory-minimum sentence was permissible under the Sixth Amendment. Alleyne, 133 S.Ct. at 2157–58. In Alleyne, the Supreme Court expressly overturned Harris because it was inconsistent with its decision in Apprendi, and held that any facts that increase the applicable statutory mandatory-minimum sentence for a crime must be submitted to a jury and found beyond a reasonable doubt. Id. at 2155, 2163.

The MDLEA expressly provides that the United States's jurisdiction over a vessel is not an element of the offense, and that jurisdiction is a preliminary question of law to be resolved by the district court. 46 U.S.C. § 70504(a) (“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.”). In Tinoco, we asked whether the MDLEA jurisdictional requirement raised “factual questions that traditionally would have been treated as elements of an offense under the common law, thereby triggering the constitutional safeguards provided by the Due Process Clause and the Sixth Amendment right to a jury trial.” 304 F.3d at 1107–08. Analyzing the common law, we held that the MDLEA's jurisdictional requirement does not raise a factual issue that, under the common law, ***1192** would have been considered an element of the offense. Id. at 1108. This is because the jurisdictional requirement is intended to act as a diplomatic courtesy, and does not bear on the individual defendant's guilt. Id. at 1108–09. Therefore, because the jurisdictional requirement under the MDLEA is not an element of the offense, neither the Due Process Clause nor the Sixth Amendment to the Constitution are implicated when the jurisdictional requirement under the MDLEA is not proven to the satisfaction of a jury. Id. at 1111–12.

As an initial matter, we review Cruickshank's Confrontation Clause argument for plain error because he failed to raise it at any time before the district court, although we review his Alleyne argument *de novo*, since he raised that one in the district court. But under any standard of review, plain or otherwise, there was no Confrontation Clause violation. 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. Campbell, 743 F.3d at 809. Nor did the district court err by rejecting Cruickshank's Alleyne argument, since we've squarely held the jurisdictional requirement is not an element of the offense, need not be determined by a jury, and does not violate the Due Process Clause or the Sixth Amendment. 46 U.S.C. § 70504(a); Tinoco, 304 F.3d at 1108, 1111–12. These claims are without merit.

IV.

[26] [27] [28] [29] As for Cruickshank's last claim, however—that the district court erred in denying him a minor-role reduction under U.S.S.G. § 3B1.2(b)—we are compelled to vacate and remand for resentencing. We review a district court's denial of a role reduction for clear error. United States v. Bernal–Benitez, 594 F.3d 1303, 1320 (11th Cir. 2010). Clear error review is deferential, and “we will not disturb a district court's findings unless we are left with a definite and firm conviction that a mistake has been committed.” United States v. Ghertler, 605 F.3d 1256, 1267 (11th Cir. 2010) (quotations omitted). The district court's “choice between two permissible views of the evidence” as to the defendant's role in the offense will rarely constitute clear error “[s]o long as the basis of the trial court's decision is supported by the record and does not involve a misapplication of a rule of law.” United States v. De Varon, 175 F.3d 930, 945 (11th Cir. 1999) (en banc) (emphasis and quotation omitted). The defendant bears the burden of establishing his minor role in the offense by a preponderance of the evidence. Bernal–Benitez, 594 F.3d at 1320.

[30] The Sentencing Guidelines provide for a two-level decrease to a base offense level if a defendant was a minor participant in the criminal activity. U.S.S.G. § 3B1.2(b). A minor participant is one “who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.” Id. cmt. n.5. Our leading case concerning the minor-role reduction—De Varon—has long instructed sentencing courts analyzing a claim for a minor-role reduction to consider “first, the defendant's role in the relevant conduct for which [he] has been held accountable at sentencing, and, second, [his] role as compared to that of other participants in [his] relevant conduct.” 175 F.3d at 940. As the en banc Court explained in De Varon, “[t]hese principles advance both the directives of the Guidelines and our case precedent by recognizing the fact-intensive nature of this inquiry and by maximizing the discretion of the trial court in determining the defendant's role in the offense.” Id. at 934.

***1193** In De Varon, the defendant was a drug courier—she had ingested and smuggled 70 heroin-filled pellets into the United States from Colombia. Id. We recognized that “when a drug courier's relevant conduct is limited to her own act of importation, a district court may legitimately conclude that the courier played an important or essential role in the importation of those drugs.” Id. at 942–43. However, we declined to “create a presumption that drug

couriers are never minor or minimal participants, any more than that they are always minor or minimal”; rather, we held that “the district court must assess all of the facts probative of the defendant's role in her relevant conduct in evaluating the defendant's role in the offense.” *Id.* at 943. We offered examples of relevant factors for the court to consider, including the “amount of drugs, fair market value of drugs, amount of money to be paid to the courier, equity interest in the drugs, role in planning the criminal scheme, and role in the distribution.” *Id.* at 945. We stressed that this is “not an exhaustive list,” nor is “any one factor ... more important than another,” especially since the determination is highly fact-intensive and “falls within the sound discretion of the trial court.” *Id.* The en banc Court in *De Varon* ultimately concluded that it was well within the sentencing court's discretion to deny the minor-role adjustment to the defendant, after it determined that De Varon was central to the importation scheme, that she had carried a substantial amount of high-purity heroin on her person, that it was unclear from the record that she was less culpable than the other described participant in the scheme, and that De Varon had furnished \$1,000 of her own money to finance the smuggling enterprise. *Id.* at 945–46.

The Sentencing Commission, through Amendment 635 to the Sentencing Guidelines, adopted our approach in *De Varon* that “§ 3B1.2 does not automatically preclude a defendant from being considered for a mitigating role adjustment in a case in which the defendant is held accountable under § 1B1.3 solely for the amount of drugs the defendant personally handled.” See U.S.S.G. App. C, Amend. 635, Reason for Amendment. As the Commission explained, “[i]n considering a § 3B1.2 adjustment, a court must measure the defendant's role against the relevant conduct for which the defendant is held accountable at sentencing, whether or not other defendants are charged.” *Id.*

More recent amendments to the Sentencing Guidelines—that went into effect after the sentencing hearing in this case—further clarify the factors for a court to consider for a minor-role adjustment, and still continue to embrace the approach we took in *De Varon*. In November 2015, the Commission added the following language to Application Note 3(C) for § 3B1.2:

In determining whether [a defendant warrants a minimal or minor participant] or an intermediate

adjustment, the court should consider the following non-exhaustive list of factors:

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
- (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
- (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
- (v) the degree to which the defendant stood to benefit from the criminal activity.

***1194** For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.

U.S.S.G. Supp. App. C, Amend. 794. Not surprisingly, this non-exhaustive list of factors includes many of the same factors we delineated in *De Varon*, including the defendant's role in planning and carrying out the scheme, as well as the amount the defendant stood to be paid. *De Varon*, 175 F.3d at 945.

[31] [32] Although this Court applies the version of the Guidelines in effect on the date of sentencing, when reviewing the district court's application of the Guidelines, we consider clarifying amendments retroactively on appeal regardless of the date of sentencing. *United States v. Jerchow*, 631 F.3d 1181, 1184 (11th Cir. 2011). As we've explained, an amendment to the commentary, and not the text, of the Guidelines “suggest[s] that it clarifies” the guideline “rather than substantively alters it.” *Id.* at 1187. Thus, the government in this case

argues correctly that Amendment 794 merely clarified the factors to consider for a minor-role adjustment, and did not substantively change § 31B.2. Accord United States v. Quintero-Leyva, 823 F.3d 519, 523 (9th Cir. 2016) (holding Amendment 794 was intended as a clarifying amendment and it therefore applies retroactively on direct appeal). The Sentencing Commission, moreover, did not describe Amendment 794 as making a substantive change, but stated that it provides “additional guidance to sentencing courts.” See U.S.S.G. Supp. App. C, Amend. 794, Reason for Amendment. In other words, Amendment 794 merely explains the meaning of the terms in the original guideline. See Jerchow, 631 F.3d at 1184.

[33] Our task, therefore, is to review the district court's ruling in light of the Guidelines, our case law, and clarifying Amendment 794. For starters, we note that the evidence at trial painted a fairly full picture of the role that Cruickshank took in the offense—among other things, he was involved in programming the vessel's route, in evading authorities, and in obstructing the Coast Guard's inquiry. Moreover, the record makes clear that the district court discussed many of the factors our Court and the Sentencing Commission have laid out as important to the minor-role determination. These factors included the quantity of drugs Cruickshank transported, Cruickshank's expectation of “premium pay,” Cruickshank's role as one of only two people on board to take the vessel from Colombia to Jamaica, and the dangerousness of the offense of “transport[ing] a large cargo of contraband in a transoceanic voyage from one continent to another”—a “voyage [that] necessitate[d] the intervention of the United States military to defeat it,” and that intentionally or unintentionally endangered many lives. DE101 at 17–19.

However, one portion of the district court's decision gives us pause—its suggestion that the quantity of cocaine being transported on the *Venus* was so large that no participant in the scheme could ever have been eligible for a minor-role reduction. At one point the court said that the quantity of drugs was “so large that any participant in [the case] can't be said to be engaged in minor activity.” DE101 at 14. Later, it reiterated that “171 kilograms of high-quality cocaine, almost pure cocaine *1195 in this circumstance, that will be, as the druggies say, stepped on two or three or four times is not even available for a minor role under the language of Rodriguez De Varon.” DE101 at 18 (emphasis added). But De Varon stressed

the fact-intensive nature of the inquiry, and the sentencing court's role in assessing the totality of the circumstances, where no one factor is “more important than another.” 175 F.3d at 945; *id.* at 943 (“[T]he district court must assess all of the facts probative of the defendant's role in her relevant conduct in evaluating the defendant's role in the offense.”) (emphasis added).¹ Moreover, Amendment 794 clarified that a defendant could be considered for a minor-role adjustment in many circumstances, none of which turn on drug quantity. See, e.g., Amendment 794 (A defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks “should be considered for an adjustment under this guideline.”) (emphasis added); *id.* (A defendant who performed an essential or indispensable role in the criminal activity “may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.”) (emphasis added).

¹ While the Court indicated in De Varon that we would not “foreclose the possibility” in a drug courier case “that amount of drugs may be dispositive—in and of itself—in the extreme case,” we allowed for that possibility because “the amount of drugs in a courier's possession—whether very large or very small—may be the best indication of the magnitude of the courier's participation in the criminal enterprise.” 175 F.3d at 943. De Varon involved a defendant who had swallowed the contraband to transport it, so the amount in her possession was actually on her person and perhaps was more likely to be indicative of her relative role in the offense. But this is not that kind of case. Here, there is nothing in the record to suggest that the amount of drugs was indicative of the magnitude of Cruickshank's participation in the crime—to the contrary, he did not load the drugs on the vessel, reconstruct the vessel, fuel the vessel, attend the planning meetings for the trip, or otherwise appear to have any role concerning the quantity of drugs aboard.

Indeed, although nothing in De Varon or Amendment 794 precludes a district court from considering the drug quantity with which the defendant was involved as an indicator of his role, we think it was legal error for the district court to say that this is the only factor to be considered in a case like this one. While it is possible that the district court did not rely solely on drug quantity in making its minor-role determination, the consequences for Cruickshank's advisory sentencing range could be

significant—a potential six-level reduction to his offense level, see U.S.S.G. §§ 2D1.1(a)(5), 3B1.2(b). Thus, we think the wisest course of action is to vacate the district court's decision and remand for resentencing. On remand, the district court should perform an inquiry based on the totality of circumstances, taking into account the variety of factors laid out in De Varon and Amendment 794.

**AFFIRMED IN PART, VACATED AND REMANDED
IN PART.**

All Citations

837 F.3d 1182, 26 Fla. L. Weekly Fed. C 813

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Only the Westlaw citation is currently available.

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Carlington CRUICKSHANK, Defendant-Appellant.

No. 17-10758
|
Non-Argument Calendar
|
(January 12, 2018)

Synopsis

Background: Defendant was convicted, in the United States District Court for the Middle District of Florida, No. 8:14-cr-00055-SDM-AAS-1, of conspiracy to possess with intent to distribute cocaine while aboard a vessel and possession with intent to distribute cocaine while aboard a vessel. On appeal, the Court of Appeals, 837 F.3d 1182, affirmed in part, vacated in part, and remanded. Following a new sentencing hearing, defendant again appealed.

Holdings: The Court of Appeals held that:

[1] Sentencing Court did not err in denying defendant a two-level minor-role reduction; and

[2] law-of-the-case doctrine precluded Court of Appeals from considering defendant's constitutional challenges to the Maritime Drug Law Enforcement Act (MDLEA).

Affirmed.

West Headnotes (2)

[1] Sentencing and Punishment

🔑 Minor or minimal participation

District court did not err, when sentencing defendant convicted of conspiracy to possess with intent to distribute cocaine while aboard a vessel and possession with intent to distribute cocaine while aboard a vessel, in denying him a two-level minor-role reduction; as the crewmember in charge of the vessel's GPS system and navigation, defendant played an important or essential role in the scheme, and even if he did not engage in the planning or organizing of the scheme to the same extent as one of his co-conspirators, he was the authority figure on the vessel, since he provided the route, handled the vessel, spoke with the Coast Guard, and claimed nationality for the vessel. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 1010, 21 U.S.C.A. § 960(b)(1)(B)(ii); 46 U.S.C.A. §§ 70503(a), 70506(a), 70506(b); U.S.S.G. § 3B1.2(b).

Cases that cite this headnote

[2] Criminal Law

🔑 Subsequent Appeals

Law-of-the-case doctrine precluded Court of Appeals from considering defendant's argument, on appeal of his convictions for conspiracy to possess with intent to distribute cocaine while aboard a vessel and possession with intent to distribute cocaine while aboard a vessel, that the Maritime Drug Law Enforcement Act (MDLEA) violated the Fifth and Sixth Amendments to the Constitution and exceeded Congress's Article I powers; Court of Appeals had already held that all of defendant's constitutional challenges to the MDLEA were without merit, and he failed to establish that any of the exceptions to the law-of-the-case doctrine applied. U.S.C.A. Const. Art. 1; U.S.C.A. Const. Amends. 5, 6; 18 U.S.C.A. § 2;

Comprehensive Drug Abuse Prevention and Control Act of 1970 § 1010, 21 U.S.C.A. § 960(b)(1)(B)(ii); 46 U.S.C.A. §§ 70503(a), 70506(a), 70506(b).

Cases that cite this headnote

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:14-cr-00055-SDM-AAS-1

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Before MARCUS, WILSON and JORDAN, Circuit Judges.

Opinion

PER CURIAM:

*1 Carlington Cruickshank appeals his convictions for conspiracy to possess with intent to distribute five kilograms or more of cocaine while aboard a vessel, in violation of 21 U.S.C. § 960(b)(1)(B)(ii) and 46 U.S.C. §§ 70503(a), 70506(a) and (b), and one count of possession with intent to distribute five kilograms or more of cocaine while aboard a vessel, in violation of 18 U.S.C. § 2, 21 U.S.C. § 960(b)(1)(B)(ii), and 46 U.S.C. §§ 70503(a), 70506(a). On appeal, Cruickshank argues that: (1) the district court erred in denying him a minor-role reduction under U.S.S.G. § 3B1.2(b) because he was less culpable than his co-conspirator and other participants in the conspiracy; and (2) the Maritime Drug Law Enforcement Act (“MDLEA”) is unconstitutional, an issue the government says is barred under the law-of-the-case doctrine. After careful review, we affirm.

In reviewing a district court’s use of the Guidelines, we review purely legal questions de novo and the district

court’s factual findings for clear error. United States v. White, 335 F.3d 1314, 1317 (11th Cir. 2003). A “district court’s determination of whether a defendant qualifies for a minor role adjustment under the Guidelines is a finding of fact that will be reviewed only for clear error.” United States v. De Varon, 175 F.3d 930, 934 (11th Cir. 1999) (en banc). We review de novo the application of the law-of-the-case doctrine. United States v. Bobo, 419 F.3d 1264, 1267 (11th Cir.2005).

Harmless error analysis is also applied to sentencing cases, and remand is unnecessary if the party defending the sentence persuades the appellate court that the district court would have imposed the same sentence absent the erroneous factor. United States v. Williams, 503 U.S. 193, 203, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992). Where the district court properly imposes the statutory minimum sentence, any alleged error in the Guidelines calculations is harmless and need not be addressed. United States v. Raad, 406 F.3d 1322, 1323 n.1 (11th Cir. 2005); United States v. Jackson, 613 F.3d 1305, 1310 n.7 (11th Cir. 2010).

[1] First, we are unpersuaded by Cruickshank’s argument that the district court erred in denying him a minor-role reduction pursuant to U.S.S.G. § 3B1.2(b). The Sentencing Guidelines provide a mitigating role adjustment based on the defendant’s role in the offense. See U.S.S.G. § 3B1.2. Specifically, a defendant may receive a two-level reduction if he was a “minor” participant in the criminal activity. See § 3B1.2(b). A minor participant is one who is less culpable than most other participants, but whose role could not be described as minimal. Id., comment. (n.5). “The proponent of the downward adjustment ... always bears the burden of proving a mitigating role in the offense by a preponderance of the evidence.” De Varon, 175 F.3d at 939. In determining a defendant’s role in an offense, a district court’s decision must “clearly resolve[] any disputed factual issues.” Id. (emphasis omitted). As long as the district court’s decision is supported by the record, the sentencing judge need not make specific subsidiary factual findings regarding the defendant’s role in the offense. Id.

*2 In De Varon, we established a two-part test to determine whether a defendant qualifies for a minor-role adjustment. See id. at 940. First, “the district court must measure the defendant’s role against the relevant conduct for which [he] has been held accountable.” Id. at 945. “When the relevant conduct attributed to a defendant [at

sentencing] is identical to his actual conduct, he cannot prove that he is entitled to a minor-role adjustment simply by pointing to some broader scheme for which he was not held accountable.” United States v. Alvarez-Coria, 447 F.3d 1340, 1343 (11th Cir. 2006). Second, “the district court may also measure the defendant’s role against the other participants, to the extent that they are discernable, in [the] relevant conduct.” De Varon, 175 F.3d at 945.

To conduct this inquiry, we’ve held that “the conduct of participants in any larger criminal conspiracy is irrelevant.” *Id.* at 944. Rather, the district court should (1) look to “other participants only to the extent that they are identifiable or discernable from the evidence,” and (2) “consider only those participants who were involved in the relevant conduct attributed to the defendant.” *Id.* We’ve advised that “[a] defendant is not automatically entitled to a minor role adjustment merely because [he] was somewhat less culpable than the other discernable participants.” United States v. Bernal-Benitez, 594 F.3d 1303, 1320-21 (11th Cir. 2010) (emphasis omitted). Additionally, we have warned that “[t]he fact that a defendant’s role may be less than that of other participants engaged in the relevant conduct may not be dispositive of role in the offense, since it is possible that none [of the participants] are minor or minimal participants.” De Varon, 175 F.3d at 944. Amendment 794 to the Sentencing Guidelines embraced the approach we took in De Varon, and incorporated many of the same factors delineated in De Varon. United States v. Cruickshank, 837 F.3d 1182, 1193-94 (11th Cir. 2016) (“Cruickshank I”).

Here, the district court did not clearly err in denying Cruickshank a two-level minor-role reduction. For starters, because the district court properly imposed the statutory minimum sentence, Cruickshank’s alleged error in the Guidelines calculations is harmless and we need not address it. *See Raad*, 406 F.3d at 1323 n.1; *Jackson*, 613 F.3d at 1310 n.7. But even if we were to address his claim on the merits, the record reveals that Cruickshank has failed to prove by a preponderance of the evidence that (1) his actual conduct was any different from the relevant conduct for which he was held accountable at sentencing, or (2) he was less culpable than most other participants in his relative conduct. *See De Varon*, 175 F.3d at 939, 945.

As the record shows, Cruickshank played an important or essential role in his relevant conduct for conspiring to possess with intent to distribute, and possession with

intent to distribute, five kilograms or more of cocaine—he was the crewmember in charge of the vessel’s GPS system and navigation. *See id.* at 942-43. Moreover, the only other discernable participant involved in the venture was his co-conspirator, Carlos Acosta. *See id.* at 944. As for Cruickshank’s argument that he was less culpable than those individuals involved in the venture, but who were not on the vessel, it is irrelevant—the conduct of other participants in a larger criminal conspiracy has no bearing on Cruickshank’s role in transporting the drugs, and the individuals who he identifies in his brief were not involved in the relevant conduct attributable to him. *Id.* at 944.

To the extent Cruickshank challenges certain factual findings by the district court, including that Acosta was not a mere messenger and did not obtain the crew, the court was not required to make those subsidiary factual findings. *See id.* at 940. Regardless, the record supports the district court’s finding that Acosta did not obtain the boat crew; rather, another person, named Kevin, gathered the crew. In addition, while Cruickshank may disagree with the district court’s conclusion that Acosta was a mere messenger, the district court recognized all of the relevant facts on which Cruickshank relied in concluding that Acosta was not a mere messenger. The district court also clearly resolved disputed factual issues, and concluded that, based on the totality of the circumstances, Cruickshank was the authority figure on the boat, since he provided the route, handled the vessel, spoke with the Coast Guard, and claimed nationality for the vessel. On this record, the fact that Cruickshank may not have engaged in the planning or organizing to the same extent as Acosta is not dispositive of Cruickshank’s role in the offense; indeed, neither Cruickshank nor Acosta were considered minor participants. *Id.* at 944.

***3 [2]** As for Cruickshank’s argument that the MDLEA violates the Fifth and Sixth Amendments to the U.S. Constitution and exceeds Congress’s Article I powers, we reject this argument based on the law-of-the-case doctrine. Under the law-of-the-case doctrine, district and appellate courts are generally bound to follow a prior appellate decision in the same case. Thomas v. United States, 572 F.3d 1300, 1303 (2009); *see also Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir. 1984) (“[T]he law of the case doctrine invokes the rule that findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal.” (quotation omitted)).

In general, the law-of-the-case doctrine “operates to preclude a reexamination of issues decided upon appeal, either by the district court on remand or by the appellate court itself upon a subsequent appeal.” Westbrook, 743 F.2d at 768 (quotation omitted). We’ve recognized three exceptions to the law-of-the-case doctrine, in cases where: “(1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to the issue, or (3) the previous decision was clearly erroneous and would work a manifest injustice.” Id. at 768-69.

We agree with the government that the law-of-the-case doctrine precludes us from considering Cruickshank’s constitutional challenges to the MDLEA. In Cruickshank’s first appeal to this Court, we rejected all four of the constitutional challenges he again raises here. See Cruickshank I, 837 F.3d at 1188, 1192 (rejecting his arguments, among others, that the MDLEA violated Article I of the U.S. Constitution, as well as the Fifth

and Sixth Amendments to the Constitution). Our holdings in Cruickshank I became law of the case. See Thomas, 572 F.3d at 1303. Further, Cruickshank did not put forth any different evidence on remand from our prior decision, nor was there any change in controlling authority between his two sentencing hearings, nor were our holdings in Cruickshank I clearly erroneous. Because we’ve already held that all of Cruickshank’s constitutional challenges to the MDLEA were without merit, and he has not established that any of the exceptions to the law-of-the-case doctrine apply, his appeal on these issues are foreclosed. See Westbrook, 743 F.2d at 768. Accordingly, we affirm Cruickshank’s conviction and sentence.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2018 WL 388237

TITLE 46

SHIPPING

SUBTITLE VII—SECURITY AND DRUG ENFORCEMENT

CHAPTER 705—MARITIME DRUG LAW ENFORCEMENT

Sec.	
70501.	Findings and declarations.
70502.	Definitions.
70503.	Prohibited acts.
70504.	Jurisdiction and venue.
70505.	Failure to comply with international law as a defense.
70506.	Penalties.
70507.	Forfeitures.
70508.	Operation of submersible vessel or semi-submersible vessel without nationality.

§ 70501. Findings and declarations

Congress finds and declares that (1) trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States and (2) operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States.

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1685; Pub.L. 110-407, Title II, § 201, Oct. 13, 2008, 122 Stat. 4299.)

§ 70502. Definitions

(a) **Application of other definitions.**—The definitions in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) apply to this chapter.

(b) **Vessel of the United States.**—In this chapter, the term “vessel of the United States” means—

(1) a vessel documented under chapter 121 of this title or numbered as provided in chapter 123 of this title;

(2) a vessel owned in any part by an individual who is a citizen of the United States, the United States Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the United States or of a State, unless—

(A) the vessel has been granted the nationality of a foreign nation under article 5 of the 1958 Convention on the High Seas; and

(B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States who is authorized to enforce applicable provisions of United States law; and

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United

States, was sold to a person not a citizen of the United States, placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation.

(c) **Vessel subject to the jurisdiction of the United States.**—

(1) **In general.**—In this chapter, the term “vessel subject to the jurisdiction of the United States” includes—

(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel in the customs waters of the United States;

(E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and

(F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that—

(i) is entering the United States;

(ii) has departed the United States; or

(iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

(2) **Consent or waiver of objection.**—Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under paragraph (1)(C) or (E)—

(A) may be obtained by radio, telephone, or similar oral or electronic means; and

(B) is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(d) **Vessel without nationality.**—

(1) **In general.**—In this chapter, the term “vessel without nationality” includes—

(A) a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed;

(B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(C) 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.

(2) **Response to claim of registry.**—The response of a foreign nation to a claim of registry under paragraph (1)(A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(e) **Claim of nationality or registry.**—A claim of nationality or registry under this section includes only—

(1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas;

(2) flying its nation's ensign or flag; or

(3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.

(f) **Semi-submersible vessel; submersible vessel.**—In this chapter:

(1) **Semi-submersible vessel.**—The term "semi-submersible vessel" means any watercraft constructed or adapted to be capable of operating with most of its hull and bulk under the surface of the water, including both manned and unmanned watercraft.

(2) **Submersible vessel.**—The term "submersible vessel" means a vessel that is capable of operating completely below the surface of the water, including both manned and unmanned watercraft.

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1685; Pub.L. 109-241, Title III, § 303, July 11, 2006, 120 Stat. 527; Pub.L. 110-181, Div. C, Title XXXV, § 3525(a)(6), (b), Jan. 28, 2008, 122 Stat. 601; Pub.L. 110-407, Title II, § 203, Oct. 13, 2008, 122 Stat. 4300.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in subsec. (a), is Pub.L. 91-513, Title II, § 102, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified to 21 U.S.C.A. § 802.

Chapter 121 of this title, referred to in subsec. (b)(1), is Documentation of Vessels, 46 U.S.C.A. § 12101 et seq.

Chapter 123 of this title, referred to in subsec. (b)(1), is Numbering Undocumented Vessels, 46 U.S.C.A. § 12301 et seq.

Presidential Proclamation 7219 of September 2, 1999, referred to in subsec. (c)(1)(F), probably means Proc. No. 7219, Aug. 2, 1999, 64 FR 48701, which is set out as a note under 43 U.S.C.A. § 1331.

Section 401 of the Tariff Act of 1930, referred to in subsec. (c)(1)(F)(iii), is Act June 17, 1930, c. 497, Title IV, § 401, 46 Stat. 708, which is classified to 19 U.S.C.A. § 1401.

Codifications

Pub.L. 109-304, Oct. 6, 2006, 120 Stat. 1485, which completed the codification of T. 46, Shipping, as positive law directed that if a law enacted after April 30, 2005, amends or repeals a provision replaced by Pub.L. 109-304, that law is deemed to amend or repeal the corresponding provision enacted by Pub.L. 109-304. See Pub.L. 109-304, § 18(a), Oct. 6, 2006, 120 Stat. 1709, set out as a note preceding 46 U.S.C.A. § 101. Pub.L. 109-241, Title III, § 303, July 11, 2006, 120 Stat. 527, amended former 46 App. U.S.C.A. § 1903(c)(2), from which this section was derived, by striking the last two sentences and inserting: "The response of a foreign nation to a claim of registry under subparagraph (A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is conclusively proved by certification of

the Secretary of State or the Secretary's designee.", and was subsequently repealed by Pub.L. 110-181, Div. C, Title XXXV, § 3525(b), Jan. 28, 2008, 122 Stat. 601.

§ 70503. Prohibited acts

(a) **Prohibitions.**—While on board a covered vessel, an individual may not knowingly or intentionally—

(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;

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

(3) conceal, or attempt or conspire to conceal, more than \$100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

(b) **Extension beyond territorial jurisdiction.**—Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.

(c) **Nonapplication.**—

(1) **In general.**—Subject to paragraph (2), subsection (a) does not apply to—

(A) a common or contract carrier or an employee of the carrier who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business; or

(B) a public vessel of the United States or an individual on board the vessel who possesses or distributes a controlled substance in the lawful course of the individual's duties.

(2) **Entered in manifest.**—Paragraph (1) applies only if the controlled substance is part of the cargo entered in the vessel's manifest and is intended to be imported lawfully into the country of destination for scientific, medical, or other lawful purposes.

(d) **Burden of proof.**—The United States Government is not required to negative a defense provided by subsection (c) in a complaint, information, indictment, or other pleading or in a trial or other proceeding. The burden of going forward with the evidence supporting the defense is on the person claiming its benefit.

(e) **Covered vessel defined.**—In this section the term "covered vessel" means—

(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States. (Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1687; Pub.L. 114-120, Title III, § 314(a), (b), (e)(1), Feb. 8, 2016, 130 Stat. 59.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in subsec. (a)(2), is Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1236, as amended, which is classified principally to chapter 13 of Title

21, 21 U.S.C.A. § 801 et seq. Section 511 of the Act is classified to 21 U.S.C.A. § 881. For complete classification, see Short Title note set out under 21 U.S.C.A. § 801 and Tables.

§ 70504. Jurisdiction and venue

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

(b) **Venue.**—A person violating section 70503 or 70508 of this title shall be tried in the district court of the United States for—

(1) the district at which the person enters the United States; or

(2) the District of Columbia.

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub.L. 110-407, Title II, § 202(b)(2), Oct. 13, 2008, 122 Stat. 4300.)

§ 70505. Failure to comply with international law as a defense

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

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub.L. 110-407, Title II, § 202(b)(3), Oct. 13, 2008, 122 Stat. 4300.)

§ 70506. Penalties

(a) **Violations.**—A person violating paragraph (1) of section 70503(a) of this title shall be punished as provided in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960). However, if the offense is a second or subsequent offense as provided in section 1012(b) of that Act (21 U.S.C. 962(b)), the person shall be punished as provided in section 1012 of that Act (21 U.S.C. 962).

(b) **Attempts and conspiracies.**—A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503.

(c) **Simple possession.**—

(1) **In general.**—Any individual on a vessel subject to the jurisdiction of the United States who is found by the Secretary, after notice and an opportunity for a hearing, to have knowingly or intentionally possessed a controlled substance within the meaning of the Controlled Substances Act (21 U.S.C. 812) shall be liable to the United States for a civil penalty of not to exceed \$5,000 for each violation. The Secretary shall notify the individual in writing of the amount of the civil penalty.

(2) **Determination of amount.**—In determining the amount of the penalty, the Secretary shall consider the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree

of culpability, any history of prior offenses, ability to pay, and other matters that justice requires.

(3) **Treatment of civil penalty assessment.**—Assessment of a civil penalty under this subsection shall not be considered a conviction for purposes of State or Federal law but may be considered proof of possession if such a determination is relevant.

(d) **Penalty.**—A person violating paragraph (2) or (3) of section 70503(a) shall be fined in accordance with section 3571 of title 18, imprisoned not more than 15 years, or both. (Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub.L. 111-281, Title III, § 302, Oct. 15, 2010, 124 Stat. 2923; Pub.L. 114-120, Title III, § 314(c), Feb. 8, 2016, 130 Stat. 59.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Controlled Substances Act, referred to in subsec. (c)(1), is Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I of chapter 13 of Title 21, 21 U.S.C.A. § 801. For complete classification, see Short Title note set out under 21 U.S.C.A. § 801 and Tables.

§ 70507. Forfeitures

(a) **In general.**—Property described in section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)) that is used or intended for use to commit, or to facilitate the commission of, an offense under section 70503 or 70508 of this title may be seized and forfeited in the same manner that similar property may be seized and forfeited under section 511 of that Act (21 U.S.C. 881).

(b) **Prima facie evidence of violation.**—Practices commonly recognized as smuggling tactics may provide prima facie evidence of intent to use a vessel to commit, or to facilitate the commission of, an offense under section 70503 of this title, and may support seizure and forfeiture of the vessel, even in the absence of controlled substances aboard the vessel. The following indicia, among others, may be considered, in the totality of the circumstances, to be prima facie evidence that a vessel is intended to be used to commit, or to facilitate the commission of, such an offense:

(1) The construction or adaptation of the vessel in a manner that facilitates smuggling, including—

(A) the configuration of the vessel to ride low in the water or present a low hull profile to avoid being detected visually or by radar;

(B) the presence of any compartment or equipment that is built or fitted out for smuggling, not including items such as a safe or lock-box reasonably used for the storage of personal valuables;

(C) the presence of an auxiliary tank not installed in accordance with applicable law or installed in such a manner as to enhance the vessel's smuggling capability;

(D) the presence of engines that are excessively overpowered in relation to the design and size of the vessel;

(E) the presence of materials used to reduce or alter the heat or radar signature of the vessel and avoid detection;

(F) the presence of a camouflaging paint scheme, or of materials used to camouflage the vessel, to avoid detection; or



United States Department of State

Washington, D.C. 20520

March 12, 2014

**CERTIFICATION FOR THE MARITIME DRUG LAW ENFORCEMENT ACT
CASE INVOLVING A GO-FAST VESSEL (WITHOUT NATIONALITY)
FEDERAL DRUG IDENTIFICATION NUMBER (FDIN) – 2014525254**

I, Commander Salvatore J. Fazio, USCG, declare as follows:

1. That I have been assigned as the Coast Guard Liaison Officer to the Bureau of International Narcotics and Law Enforcement Affairs, U.S. Department of State, since 15 June 2012.
2. That in my official capacity, I have been designated by the Secretary of State, through the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, to make certifications under 46 U.S.C. §§ 70502(c)(2) & (d)(2) and 18 U.S.C. § 2237(d).
3. That I make the following statements based upon my personal knowledge and upon information furnished to me in the course of my official duties.
4. I certify the following:
 - a. On February 11, 2014, United States law enforcement officials detected a go-fast vessel approximately 160 nautical miles southeast of Kingston, Jamaica, seaward of the territorial waters of any State. The vessel was not displaying any registry numbers, a hailing port, or flying a national flag. United States law enforcement officials suspected the vessel of illicit drug trafficking because of the type of vessel and its presence in a known drug trafficking area. After detecting United States law enforcement officials, the crew of the vessel failed to obey an order to heave to their vessel. United States law enforcement officials eventually stopped the vessel and conducted a right-of-visit boarding. Upon inquiry, one of the two individuals on board identified himself as the master of the vessel and claimed Jamaican nationality for the vessel. No registration documentation was provided to or located by United States law enforcement officials.
 - b. In accordance with the Agreement Between the Government of the United States of America and the Government of Jamaica Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking (hereafter, "the Agreement"), the Government of the United States requested that the Government of Jamaica confirm or deny the vessel's registry.

Exhibit One

c. The Government of Jamaica responded that it could neither confirm nor deny the claim that the vessel was registered in Jamaica.

d. Accordingly, the Government of the United States determined the vessel was without nationality in accordance with 46 U.S.C. § 70502(d)(1)(C), rendering the vessel subject to the jurisdiction of the United States pursuant to 46 U.S.C. § 70502(c)(1)(A) and 18 U.S.C. § 2237(e)(3).

e. During the boarding and search of the vessel, United States law enforcement personnel discovered approximately 171 kilograms of contraband which tested positive for cocaine.

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 2014.



Salvatore J. Fazio
Commander, U. S. Coast Guard
Maritime Law Enforcement Officer
U. S. Coast Guard Liaison Officer to the Bureau of
International Narcotics and Law Enforcement Affairs
U. S. Department of State

14022314-6

United States of America



DEPARTMENT OF STATE

To all to whom these presents shall come, Greetings:

That Salvatore J. Fazio, whose name is subscribed to the document hereunto annexed, at the time of subscribing the same Commander, US Coast Guard, Maritime Law Enforcement Liaison Officer to the Bureau of International Narcotics and Law Enforcement Affairs, Department of State, United States of America, and that full faith and credit are to be given to the contents as such.

This certificate is not valid if it is removed or altered in any way whatsoever

In testimony whereof, I, John F. Kerry, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Assistant Authentication Officer, of the said Department, at the city of Washington, in the District of Columbia, this thirteenth day of March, 2014.

Issued pursuant to CHXIV, Stat. 68-69;
Sept. 15, 1900, Stat. 68-69;
USC 2657; 22 C 2651a; 5 U.S.C.
301; 28 USC 1443(f); Rules of
Civil Procedure

By John F. Kerry Secretary of State
By [Signature] Assistant Authentication Officer,
Department of State

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:14-CR-55-T-23EAJ

CARLINGTON CRUICKSHANK

**GOVERNMENT'S MOTION FOR PRE-TRIAL
DETERMINATION OF JURISDICTION**

The United States of America, by A. Lee Bentley, United States Attorney for the Middle District of Florida, respectfully requests that this Honorable Court make a pre-trial determination regarding jurisdiction, specifically whether the vessel on which the defendant was aboard is a "vessel subject to the jurisdiction of the United States," within the meaning of Title 46, United States Code, Section 70502. In support of this request, the United States states as follows:

STATEMENT OF THE FACTS

On or about February 11, 2014, U.S. Coast Guard Law Enforcement Detachment 403 was deployed on the British warship (RFA) WAVE KNIGHT, patrolling in international waters of the Caribbean Sea. A U.S. Coast Guard helicopter, launched from the RFA WAVE KNIGHT, located the stateless go-fast vessel VENUS, approximately 160 nautical miles southeast of Kingston, Jamaica. Despite visual and verbal requests for the go-fast vessel VENUS to halt, the vessel continued sailing away from the helicopter and the crewmembers on board

jettisoned various items. After the Coast Guard helicopter fired warning shots, the VENUS went Dead-in-the-Water and a right of approach was done by a boarding team composed of members of LEDET 403. One of the two crewmembers, Carlington Cruickshank, made a verbal claim of Jamaican registry for the vessel without any supporting documentation.

The Government of Jamaica was contacted through appropriate channels concerning the claim of registry for the vessel. The Government of Jamaica responded it could neither confirm or deny the go-fast vessel VENUS was registered in Jamaica.

Once on board the go-fast vessel VENUS, the Coast Guard encountered two crew members: Carlington Cruickshank, a Jamaican, who was the master of the vessel, and Carlos Acosta, a Colombian, who served as a crew member. An at-sea space accountability assessment determined the areas below the bench seats on the go-fast vessel VENUS were inaccessible. Permission was granted for the boarding team to conduct a minimally intrusive search of those areas. Ultimately, one hundred and seventy-one kilograms of cocaine were recovered from these areas of the go-fast vessel VENUS. See Certification of the U.S. Department of State (**Exhibit A**).

MEMORANDUM OF LAW

1. The Maritime Drug Law Enforcement Act (MDLEA) is codified in Title 46 and governs the trafficking of controlled substances aboard vessels. 46 U.S.C. § 70501, et seq. The MDLEA notes that drug trafficking on board vessels

“is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States.” 46 U.S.C. § 70501(1).

2. Section 70503 of the MDLEA prohibits the possession with intent to distribute of controlled substances by persons on board vessels subject to the jurisdiction of the United States. Section 70502 further describes those vessels that are subject to the jurisdiction of the United States and specifically includes “a vessel without nationality”. 46 U.S.C. § 70502(c)(1)(A).

3. That section further provides that a “vessel without nationality” includes “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(d)(1)(C). The response of a foreign nation “may be obtained by radio, telephone, or similar oral or electronic means” and “is proved conclusively by certification of the Secretary of State or the Secretary’s designee.” 46 U.S.C. § 70502(d)(2).

4. According to Exhibit A, the nation of Jamaica could neither confirm or deny the go-fast vessel VENUS was registered in the nation of Jamaica. Further, the go-fast vessel VENUS was observed and boarded approximately 160 nautical miles from the closest point of land, well beyond the 12 nautical mile territorial sea of any nation. See United States v. McPhee, 336 F.3d 1269 (11th Cir. 2003) (recognizing 12 nautical mile limit of the territorial sea provided by the 1982 UN

Convention on the Law of the Sea). Thus, the go-fast vessel VENUS was on the high seas at all relevant times, in a geographic area where the MDLEA applies.

WHEREFORE, the United States respectfully requests this Honorable Court determine that the go-fast vessel VENUS is a vessel subject to the jurisdiction of the United States in accordance with the Maritime Drug Law Enforcement Act, 46 U.S.C. 70501, et seq. and grant such other relief as is just and proper.

Respectfully submitted,

A LEE BENTLEY, III
United States Attorney

By: /s/ Joseph K. Ruddy
JOSEPH K. RUDDY
Assistant United States Attorney
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U.S. v. Carlington Cruickshank

Case No. 8:14-CR-55-T-23EAJ

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to counsel of record.

Jenny Devine, Esq.

/s/ Joseph K. Ruddy
JOSEPH K. RUDDY
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FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:13-CR-

55T23EAS

CARLINGTON CRUICKSHANK, and
CARLOS ACOSTA

21 U.S.C. § 960
46 U.S.C. § 70503(a), § 70506
21 U.S.C. § 853(p), 881, 970-Forfeiture
28 U.S.C. § 2461(c)-Forfeiture
46 U.S.C. § 70507-Forfeiture

INDICTMENT

The Grand Jury Charges:

COUNT ONE

Beginning on an unknown date and continuing through on or about
February 11, 2014, while aboard a vessel subject to the jurisdiction of the United
States, the defendants,

CARLINGTON CRUICKSHANK, and
CARLOS ACOSTA,

each of whom was first brought into the United States at a point in the Middle
District of Florida, did knowingly and willfully combine, conspire, and agree with
each other and with other persons unknown to the Grand Jury, to possess with the
intent to distribute and to distribute five (5) kilograms or more of a mixture and
substance containing a detectable amount of cocaine, a Schedule II controlled
substance.

All in violation of Title 46, United States Code, Sections 70503(a) and
70506(a) and (b), and Title 21, United States Code, Section 960(b)(1)(B)(ii).

COUNT TWO

Beginning on an unknown date and continuing through on or about February 11, 2014, while aboard a vessel subject to the jurisdiction of the United States, the defendants,

CARLINGTON CRUICKSHANK, and
CARLOS ACOSTA,

each of whom was first brought into the United States at a point in the Middle District of Florida, did knowingly and intentionally, while aiding and abetting each other and other persons unknown to the Grand Jury, possess with the intent to distribute five (5) kilograms or more of a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance.

All in violation of Title 46, United States Code, Sections 70503(a) and 70506(a), Title 18, United States Code, Section 2, and Title 21, United States Code, Section 960(b)(1)(B)(ii).

FORFEITURES

1. The allegations contained in Counts One and Two of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to the provisions of Title 21, United States Code, Sections 853, 881, and 970, Title 46, United States Code, Section 70507, and Title 28, United States Code, Section 2461(c).

2. Upon their conviction of any of the violations alleged in Counts One or Two of this Indictment, each punishable by imprisonment for more than one (1)

year, in violation of Title 46, United States Code, Sections 70503 and 70506, and Title 21 United States Code, Section 960, the defendants,

CARLINGTON CRUICKSHANK, and
CARLOS ACOSTA,

shall forfeit to the United States, pursuant to Title 21, United States Code, Section 970, incorporating the provisions of Title 21, United States Code, Section 853(a)(1) and (2), all of their right, title, and interest in any:

- a. Property constituting or derived from any proceeds the defendants obtained, directly or indirectly, as the result of such violations; and
- b. Property used or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violations;

and, pursuant to Title 46, United States Code, Section 70507, Title 21, United States Code, Section 881(a), and Title 28, United States Code, Section 2461(c), all of their right, title and interest in any and all property described in Title 21, United States Code, Section 881(a), including, but not limited to:

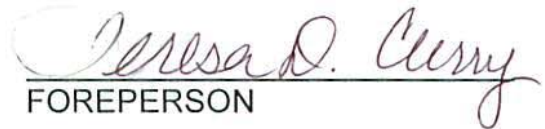
- a. Property furnished or intended to be furnished in exchange for a controlled substance;
- b. Property constituting, or derived from, any proceeds the defendants obtained, directly or indirectly, as a result of such violations; and
- c. All moneys and conveyances used or intended to be used to commit, or to facilitate the commission of the alleged offense.

4. If any of the property described above, as a result of any act or omission of the defendants:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with a third party;
- c. has been placed beyond the jurisdiction of the Court;
- d. has been substantially diminished in value; or,
- e. has been commingled with other property, which cannot be divided without difficulty;

the United States of America shall be entitled to forfeiture of substitute property under the provision of Title 21, United States Code, Section 853(p).

A TRUE BILL


FOREPERSON

A. LEE BENTLEY III
United States Attorney

By: 
JOSEPH K. RUDDY
Assistant United States Attorney
Chief, Narcotics Section

By:  FOR:
RACHELLE DESVAUX BEDKE
Assistant United States Attorney
Chief, Criminal Division (South)

FORM OBD-34
APR 1991

No.

UNITED STATES DISTRICT COURT
Middle District of Florida
Tampa Division

THE UNITED STATES OF AMERICA

vs.

CARLINGTON CRUICKSHANK, and
CARLOS ACOSTA

INDICTMENT

Violations: Title 46, United States Code, Sections 70503(a), and 70506(a) and (b)

A true bill,


Foreperson

Filed in open court this 18th day, of February, 2014.

Clerk

Bail \$ _____

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**MARK A. PIZZO
U.S. MAGISTRATE JUDGE**

CASE NO. 8: 13-Cr-55-T-23EAJ

DATE: February 18, 2014

UNITED STATES OF AMERICA

GA: Natalie Adams

v.

CARLINGTON CRUICKSHANK
CARLOS ACOSTA

D.A.: Adam Allen, AFD
D.A.: Victor Martinez, CJA

RICARDO ARENAS, Spanish Interpreter

Courtroom: 12B

Time: 3:15p-3:30p

Tape: Digital

INITIAL APPEARANCE and ARRAIGNMENT MINUTES

- (X) Defendant present; Advised of rights and charges; FPD and CJA appointed
- (X) Information/Indictment Filed and Copy to Defendants
- (X) Defendant Waives Reading of Information/Indictment
- (X) Arraigned and Pleaded Not Guilty
- (X) Trial set for the weeks beginning March 31, 2014 before Judge Steven D. Merryday
- (X) Pretrial Discovery Order - to be filed by Magistrate Judge Elizabeth A. Jenkins

The Government requested detention (Both defendants are illegal and detainers); Defendants reserved a detention hearing; Ordered DETAINED PENDING TRIAL.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

vs.

CASE NUMBER: 8:14-cr-55-T-23AAS
USM NUMBER: 70473-004

CARLINGTON CRUICKSHANK

Defendant's Attorney: Jenny Devine, AFD

The defendant was found guilty on counts one and two of the indictment.

The defendant is adjudicated guilty of these offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
46 U.S.C. §§ 70503(a) 46 U.S.C. §§ 70506(a) and (b) 21 U.S.C. § 960(b)(B)(ii)	Conspiracy to possess with intent to distribute five kilograms or more of cocaine while aboard a vessel.	February 11, 2014	One
46 U.S.C. §§ 70503(a) 46 U.S.C. §§ 70506(a) 21 U.S.C. § 960(b)(B)(ii) 18 U.S.C. § 2	Possession with intent to distribute five kilograms or more of cocaine while aboard a vessel.	February 11, 2014	Two

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

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.

Date of Imposition of Judgment: January 26, 2017


STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

 2017

Defendant: CARLINGTON CRUICKSHANK
Case No.: 8:14-cr-55-T-23AAS

Judgment - Page 2 of 7

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for concurrent terms of **two hundred and forty months** as to each of counts one and two.

☒ The court makes the following recommendations to the Bureau of Prisons: return defendant to his designated facility.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at a.m./p.m. on .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☐ before 2 p.m. on .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

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: CARLINGTON CRUICKSHANK
Case No.: 8:14-cr-55-T-23AAS

Judgment - Page 3 of 7

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for concurrent terms of a **hundred and twenty months** as to both counts one and two.

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 courts determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *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)*
6. ☐ You must participate in an approval 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 other conditions on the attached page.

Defendant: CARLINGTON CRICKSHANK
Case No.: 8:14-cr-55-T-23AASJudgment - Page 4 of 7**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 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 probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer 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 the www.uscourts.gov.

Defendant's Signature _____

Date _____

Defendant: CARLINGTON CRUICKSHANK
Case No.: 8:14-cr-55-T-23AAS

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SPECIAL CONDITIONS OF SUPERVISION

- 1.) If the defendant is deported, he shall not re-enter the United States without the express permission of the appropriate governmental authority.

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTAL	\$200	n/a	waived	n/a

— The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

— The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	---------------------	----------------------------	-------------------------------

TOTALS

- Restitution amount ordered pursuant to plea agreement \$ _____.
- The defendant must pay interest on a fine or restitution of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 7 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the ____ fine ____ restitution.
 - the interest requirement for the ____ fine ____ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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

Defendant: CARLINGTON CRUICKSHANK
Case No.: 8:14-cr-55-T-23AASJudgment - Page 7 of 7**SCHEDULE OF PAYMENTS**

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

- A. ☒ Lump sum payment of **\$200** due immediately, balance due
 ___ not later than ___, or
 ___ in accordance with ___ C, ___ D, ___ E, or ___ F below; or
- B. ___ Payment to begin immediately (may be combined with ___ C, ___ D, or ___ F below); or
- C. ___ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ days (e.g., thirty or sixty days) after the date of this judgment; or
- D. ___ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____, (e.g., months or years) to commence _____ (e.g. thirty or sixty days) after release from imprisonment to a term of supervision; or
- E. ___ Payment during the term of supervised release will commence within _____ (e.g., thirty or sixty days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or
- F. ___ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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.

___ Joint and Several

- ___ The defendant shall pay the cost of prosecution.
- ___ The defendant shall pay the following court cost(s):
- ___ The defendant shall forfeit the defendant's interest in the following property to the United States:

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



Prosecutions for 2018

Lead Charge: 46 USC 70503 - Possession control substance on vessel subject to jurisdiction of US

The latest available data from the Justice Department show that during the first six months of FY 2018 the government reported 199 new prosecutions for these matters. Those cases had a lead charge of "46 USC 70503 - Possession control substance on vessel subject to jurisdiction of US". If this activity continues at the same pace, the annual total of prosecutions will be 398 for this fiscal year. According to the case-by-case information analyzed by the Transactional Records Access Clearinghouse (TRAC), this estimate is up 1% over the past fiscal year when the number of prosecutions totaled 394.

Number Year-to-date	199
Percent Change from previous year	1
Percent Change from 5 years ago	477
Percent Change from 10 years ago	342
Count 20 years ago	0

Table 1: Criminal Prosecutions

The comparisons of the number of defendants charged with offenses are based on case-by-case information obtained by TRAC under the Freedom of Information Act from the Executive Office for United States Attorneys (see Table 1).

Compared to five years ago when there were 69, the estimate of FY 2018 prosecutions of this type is up 477 percent. Prosecutions over the past year are much higher than they were ten years ago. Overall, the data show that prosecutions of this type are up 342 percent from the level of 90 reported in 2008.

The long term trend in prosecutions for these matters going back to FY 1998 is shown more clearly in Figure 1. The vertical bars in Figure 1 represent the number of prosecutions of this type recorded each fiscal year. Projected figures for the current fiscal year are shown. Each presidential administration is distinguished by the color of the bars. To view trends month-by-month rather than year-by-year, see [TRAC's monthly report series for the latest data](#).

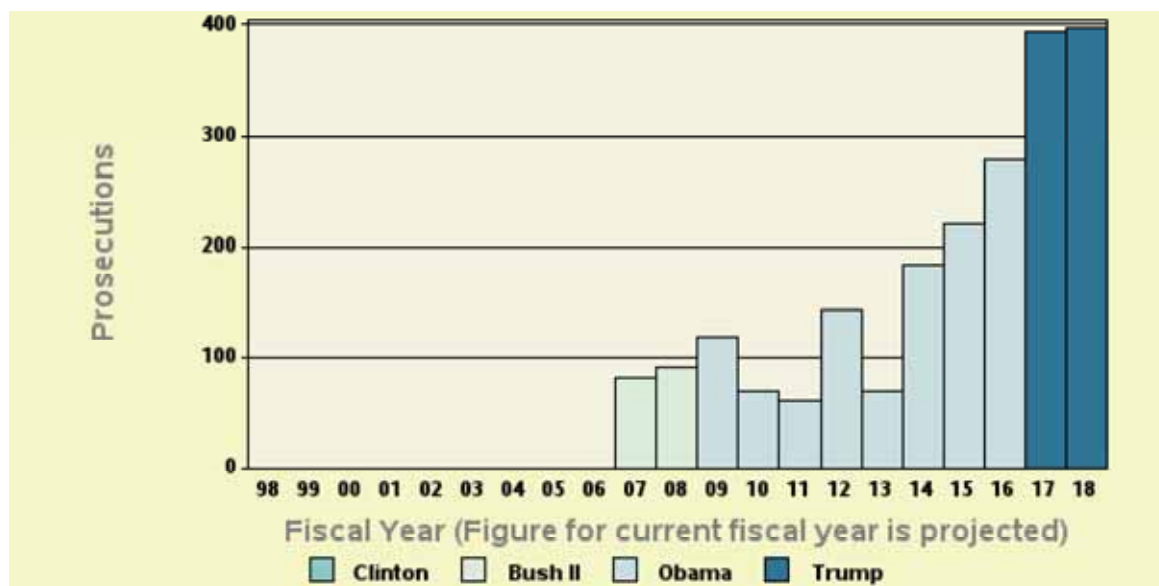


Figure 1: Criminal Prosecutions over the last 20 years

Leading Program Areas

Cases were classified by prosecutors into more specific types. The single largest number of prosecutions of these matters through March 2018 was for "Narcotics/Drugs", accounting for 93.5 percent of prosecutions.

The second largest number of matters were Prosecutions filed under the program area of "Organized Crime " (1.5%) .

Leading Investigative Agencies

The lead investigative agency for prosecutions through March 2018 was "Justice - Drug Enforcement Administration" accounting for 33.7 percent of prosecutions referred.

As shown in Figure 3, additional agencies with substantial numbers of referrals were: Justice - Federal Bureau of Investigation (21.1%), "Homeland Security - Immigration and Customs Enforcement" (19.1%), "Homeland Security - Other" (14.6%), "Homeland Security - Customs and Border Protection" (3%).

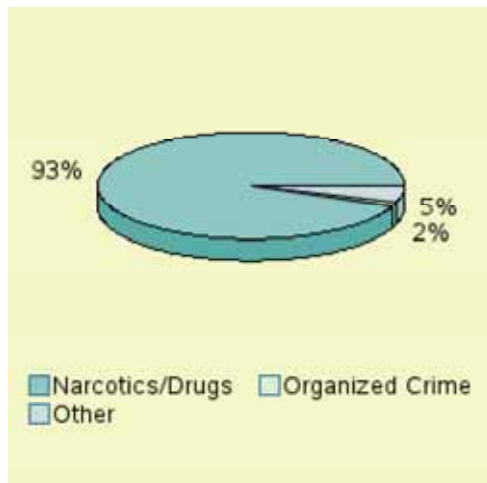


Figure 2: Specific types of prosecutions

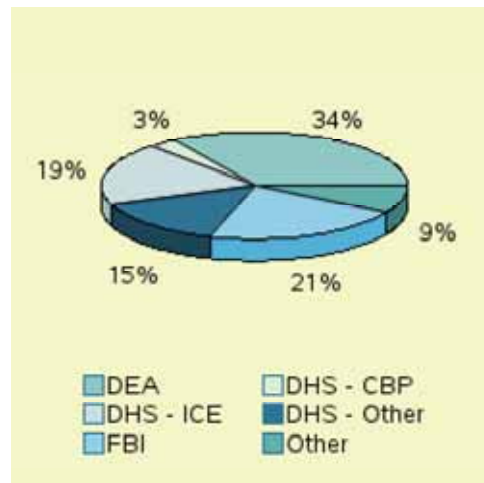


Figure 3: Prosecutions by Investigative Agency

Judicial District	Per capita	Count	Rank	1yr ago	5yrs ago	10yrs ago	
Fla, M	19	109	1	1	1	1	More
Fla, S	13	47	2	2	4	2	More
Cal, S	9	16	3	3	2	-	More
Texas, E	5	9	4	4	-	-	More
N. Y., S	2	5	5	5	-	-	More
Texas, S	1	3	6	6	-	-	More
La, E	0	0	7	-	-	-	More

Table 2: Top 10 districts (per one million people)

The federal judicial district which showed the greatest projected growth in the rate of prosecutions compared to one year ago—101 percent—was Southern District of Texas (Houston). Compared to five years ago, the district with the largest projected growth—9070 percent—was Southern District of Florida (Miami) .

In the last year, the judicial District Court recording the largest projected drop in the rate of prosecutions—33.4 percent—was Southern District of New York (Manhattan).

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