

No. 17-8953

IN THE SUPREME COURT OF THE UNITED STATES

CARLINGTON CRUICKSHANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner was convicted of committing drug-related offenses while on board a vessel in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq. The questions presented are:

1. Whether petitioner was entitled under the Fifth and Sixth Amendments to a jury determination that the vessel at issue was "subject to the jurisdiction of the United States," 46 U.S.C. 70503(e)(1), when the MDLEA specifies that the jurisdictional question "is not an element of an offense" but a "preliminary question[] of law to be determined solely by the trial judge," 46 U.S.C. 70504(a).

2. Whether the MDLEA exceeds Congress's powers under the Piracies and Felonies Clause, U.S. Const. Art. I, § 8, Cl. 10, by criminalizing drug trafficking on board a vessel in international waters without requiring proof of a nexus between the drug trafficking and the United States.

3. Whether, in a prosecution under the MDLEA for a drug offense committed on board a vessel in international waters, the Due Process Clause of the Fifth Amendment requires the government to prove a nexus between the offense conduct and the United States.

4. Whether 46 U.S.C. 70502(d)(2), which provides that a foreign nation's response to a claim of registry "is proved conclusively" by a certification of the Secretary of State or his designee, violates the Confrontation Clause of the Sixth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-17a) is not published in the Federal Reporter but is reprinted at 721 Fed. Appx. 909. A prior opinion of the court of appeals (Pet. App. 1a-13a) is reported at 837 F.3d 1182.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2018. On March 15, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 14, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of 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 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). He was sentenced to 324 months of imprisonment, to be followed by ten years of supervised release. The court of appeals affirmed his convictions but remanded for resentencing, Pet. App. 1a-13a, and this Court denied a petition for a writ of certiorari, 137 S. Ct. 1435. On remand, the district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. The court of appeals affirmed. Pet. App. 14a-17a.

1. The Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq., makes it unlawful for any person to possess a controlled substance with the intent to distribute it, or to attempt or conspire to do the same, on board "a vessel subject to the jurisdiction of the United States." 46 U.S.C. 70503(a) and (e)(1), 70506(b).¹ Congress enacted the MDLEA because it found

¹ The MDLEA was amended in February 2016. See Coast Guard Authorization Act of 2015, Pub. L. No. 114-120, § 314(a), 130 Stat. 59. The amendments, which are not otherwise relevant to this case,

that "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." 46 U.S.C. 70501(1). Congress accordingly provided that the MDLEA would apply to any "vessel subject to the jurisdiction of the United States," 46 U.S.C. 70503(e)(1), "even though the act is committed outside the territorial jurisdiction of the United States," 46 U.S.C. 70503(b).

As relevant here, the MDLEA defines a "vessel subject to the jurisdiction of the United States" to include "a vessel without nationality." 46 U.S.C. 70502(c)(1)(A). A "vessel without nationality" is defined to include "a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality." 46 U.S.C. 70502(d)(1)(C). The MDLEA provides that the foreign nation's "response * * * to a claim of registry * * * 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." 46 U.S.C. 70502(d)(2). The MDLEA further provides that "[j]urisdiction of the United States with respect to a vessel subject to this chapter is not an element of

moved the phrase "vessel subject to the jurisdiction of the United States" from Section 70503(a) to Section 70503(e)(1). Because the relevant language is unchanged, this brief cites the current version of the statute for simplicity.

an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.” 46 U.S.C. 70504(a).

2. In February 2014, the United States Coast Guard recovered 171 kilograms of cocaine from an open-hulled, “go-fast” vessel known as the “Venus” in international waters approximately 160 miles from Jamaica. Coast Guard officers on a routine patrol in a helicopter detected the Venus using infrared technology. The Venus was operating without navigational lights and was stopping and starting repeatedly, in a manner consistent with the crew attempting to avoid detection. After spotting the helicopter, the Venus increased in speed, and its two-man crew began throwing things overboard. Both crew members changed clothes and washed, a tactic drug smugglers employ to try to evade ion scans used to detect controlled substances. After the Coast Guard fired warning shots, the Venus stopped and Coast Guard officers boarded the vessel. Pet. App. 8a; Gov’t C.A. Br. 3-4.²

Petitioner identified himself to Coast Guard officers as the person in charge of the boat and claimed that the Venus was Jamaican. Petitioner did not have any documents establishing Jamaican nationality for the Venus, and neither petitioner nor his crewmate, Carlos Acosta, had personal identification. Petitioner told Coast Guard officers that they had left Jamaica to assist a

² Unless otherwise noted, references to the government’s court of appeals brief refer to the brief filed in petitioner’s first appeal (No. 14-13754).

friend who had run out of gas and were planning to return to Jamaica. Coast Guard officers attempted to verify whether Jamaica would claim the vessel, but the Jamaican government responded that it could neither confirm nor deny that the Venus was registered in Jamaica. Coast Guard officers searched the vessel and found 171 kilograms of cocaine. Pet. App. 8a-9a; Gov't C.A. Br. 4-6.

3. A federal grand jury in the Middle District of Florida indicted petitioner and Acosta on one count of 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 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). Acosta pleaded guilty to the conspiracy count; petitioner went to trial.

At petitioner's trial, Acosta testified that he and his co-conspirators had purchased the Venus in Colombia and loaded it with cocaine to be smuggled to Jamaica. Gov't C.A. Br. 7-8. He stated that petitioner was hired to help make the trip and was aware that he was transporting cocaine. Ibid. After seeing the Coast Guard helicopter, Acosta said, he and petitioner threw groceries, garbage, plastic bags, and clothes overboard because they had purchased them in Colombia and did not want a boarding party to learn that they had come from Colombia. Id. at 23.

4. At the end of the trial, the United States argued that it had provided sufficient proof, in the form of a State Department certification, to permit the district court to find that the government of Jamaica had been unable to confirm or deny the Venus's registry and that, therefore, the Venus was subject to the jurisdiction of the United States. Gov't C.A. Br. 12. In response, petitioner stated that he had no objection to the authenticity of the certification and that his only objection on jurisdiction was his view that it was an element of the offense that had to be submitted to the jury. Ibid. Ruling that the question of jurisdiction was a matter for the court, the district court found that the Venus was subject to the jurisdiction of the United States. Id. at 12-13. The jury then found petitioner guilty on both counts, and the court sentenced him to 324 months of imprisonment. Pet. App. 6a.

5. The court of appeals affirmed petitioner's conviction, but remanded for resentencing. Pet. App. 1a-13a.

a. The court of appeals first rejected petitioner's contention that the MDLEA, as applied to drug-trafficking offenses in international waters that do not have a nexus to the United States, exceeds Congress's power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10. Relying on its prior decision in United States v. Campbell, 743 F.3d 802 (11th Cir.), cert. denied, 135 S. Ct. 704 (2014), the court held that a

nexus to the United States is not required because "the trafficking of narcotics is condemned universally by law-abiding nations." Pet. App. 7a (quoting Campbell, 743 F.3d at 810).

The court of appeals also held that Campbell foreclosed petitioner's claim that the MDLEA's lack of a nexus requirement violates the Due Process Clause of the Fifth Amendment. Pet. App. 7a. The court explained that "the MDLEA 'provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas.'" Ibid. (quoting Campbell, 743 F.3d at 810).

The court of appeals next rejected petitioner's contention that the district court violated his right to a trial by jury when it determined that the Venus was a vessel subject to the jurisdiction of the United States. Pet. App. 9a-10a. The court observed that "[t]he 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." Id. at 10a (citing 46 U.S.C. 70504(a)). The court also noted that it had held in United States v. Tinoco, 304 F.3d 1088, 1108-1109 (11th Cir. 2002), cert. denied, 538 U.S. 909 (2003), that "the MDLEA's jurisdictional requirement does not raise a factual issue that, under the common law, would have been considered an element of the offense" because "the jurisdictional requirement is intended to act as a diplomatic

courtesy, and does not bear on the individual defendant's guilt." Pet. App. 10a.

Finally, the court of appeals rejected petitioner's claim that the district court had violated the Confrontation Clause by relying on the State Department certification. Pet. App. 9a-10a. The court noted that it would review petitioner's Confrontation Clause claim only for plain error because petitioner had failed to preserve that claim at trial. Id. at 10a. The court then held that "[a] United States Department of State certification of jurisdiction under the MDLEA does not implicate the Confrontation Clause because it does not affect the guilt or innocence of a defendant," but rather relates only to jurisdiction. Ibid. (citing Campbell, 743 F.3d at 809).

b. The court of appeals vacated petitioner's sentence, finding that it was unclear whether the district court had erred in denying petitioner a minor-role reduction in calculating his advisory Sentencing Guidelines range. Pet. App. 12a.

c. This Court denied petitioner's petition for a writ of certiorari. 137 S. Ct. 1435 (No. 16-7337).

6. On remand, the district court again denied the minor-role reduction, but reduced petitioner's sentence in light of an intervening amendment to the Sentencing Guidelines. No. 17-10758 Gov't C.A. Br. 5. The court then varied downward to the applicable the statutory minimum sentence of 240 months. Ibid.

7. The court of appeals affirmed. Pet. App. 14a-17a. As relevant here, the court held that the law-of-the-case doctrine precluded reconsideration of the issues resolved in petitioner's first appeal. Id. at 16a-17a.

ARGUMENT

Petitioner renews his four constitutional challenges to his prosecution under the MDLEA. This Court has recently and repeatedly declined to review each of the issues that petitioner seeks to raise, including in petitioner's own prior petition for a writ of certiorari. The same result is warranted here, particularly because this case would be a poor vehicle in which to consider the questions presented even if those questions otherwise warranted this Court's review.

1. Petitioner first contends (Pet. 7-12) that the MDLEA violates the Fifth and Sixth Amendments by providing that the United States' jurisdiction over a vessel is a "preliminary question[] of law to be determined solely by the trial judge" and "is not an element of an offense." 46 U.S.C. 70504(a). That contention lacks merit, and, despite some disagreement in the courts of appeals, this Court has repeatedly declined to review the question. See Campbell v. United States, 135 S. Ct. 704 (2014) (No. 13-10246); Tam Fuk Yuk v. United States, 565 U.S. 1203 (2012) (No. 11-6422); Sanchez-Salazar v. United States, 556 U.S. 1185 (2009) (No. 08-8036); Aguilar v. United States, 556 U.S. 1184 (2009) (No. 08-7048); Moreno v. United States, 549 U.S. 1343 (2007)

(No. 06-8332); Estupinan v. United States, 549 U.S. 1267 (2007) (No. 06-8104). And in any event, this case would not be an appropriate vehicle in which to consider the question presented because no court of appeals would require a jury finding in the circumstances presented here.

a. The Constitution affords "a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511 (1995). That principle does not apply here, however, because the MDLEA expressly provides that "[j]urisdiction of the United States with respect to a vessel subject to [the MDLEA] is not an element of an offense" and is instead a "preliminary question[] of law to be determined solely by the trial judge." 46 U.S.C. 70504(a). Because the question whether a vessel is subject to the jurisdiction of the United States is a preliminary question of law and not an element of the offense, a defendant has no constitutional right to have a jury decide that issue. See, e.g., United States v. Vilches-Navarrete, 523 F.3d 1, 20 (1st Cir.) ("This issue is not an element of the crime * * * and may be decided by a judge."), cert. denied, 555 U.S. 897 (2008); United States v. Tinoco, 304 F.3d 1088, 1109-1110 (11th Cir. 2002) ("[The MDLEA's] jurisdictional requirement is not an essential ingredient or an essential element of the MDLEA substantive offense, and, as a result, it does not have to be submitted to the jury for proof beyond a reasonable doubt."), cert. denied, 538 U.S. 909 (2003).

This Court's decision in Ford v. United States, 273 U.S. 593 (1927), is controlling. In Ford, the defendants were charged with conspiring to violate the National Prohibition Act when their British vessel, laden with liquor, was seized "in the high seas off the Farallon Islands, territory of the United States, twenty-five miles west from San Francisco." Id. at 600. The defendants argued that it was "error * * * to refuse to submit to the jury on the trial the issue as to the place of the [ship's] seizure," but the Court disagreed. Id. at 606. The Court reasoned that a jury trial was not required because "[t]he issue whether the ship was seized within the prescribed [territorial] limit did not affect the question of the defendants' guilt or innocence," but instead "only affected the right of the court to hold [them] for trial." Ibid.

That reasoning applies equally here. The question whether a vessel is subject to the jurisdiction of the United States "does not raise factual questions that traditionally would have been treated as elements of an offense under the common law." Tinoco, 304 F.3d at 1108. As in Ford, whether the United States has jurisdiction over the vessel does not pertain to petitioner's participation in, or blameworthiness for, his drug-related offenses, but instead to the court's authority to try him for those offenses. Id. at 1108-1109 (explaining that the MDLEA's jurisdictional determination "does not go to the actus reus, causation, or the mens rea of the defendant"; nor does it "affect

the defendant's blameworthiness or culpability"). "Congress inserted the requirement that a vessel be subject to the jurisdiction of the United States into the statute as a matter of diplomatic comity," not to define the defendant's culpability. Vilches-Navarrete, 523 F.3d at 22; see Tinoco, 304 F.3d at 1109 ("[T]he statutory jurisdictional requirement * * * is unique because it is not meant to have any bearing on the individual defendant, but instead is meant to bear only on the diplomatic relations between the United States and foreign governments."); cf. S. Rep. No. 530, 99th Cong., 2d Sess. 16 (1986) ("In the view of the Committee, only the flag nation of a vessel should have a right to question whether the Coast Guard has boarded that vessel with the required consent. The international law of jurisdiction is an issue between sovereign nations. Drug smuggling is universally recognized criminal behavior, and defendants should not be allowed to inject these collateral issues into their trials.").

That result is consistent with this Court's holdings in other contexts that factual issues bearing on a defendant's susceptibility to prosecution may be resolved by the trial judge rather than the jury when they are not elements of the offense. For example, the determination whether a defendant has previously been placed in jeopardy for the charged offense, has been denied the right to a speedy trial, or has been selected for prosecution on an impermissible basis may all turn in part on findings of

historical fact. Those factual questions, however, are routinely entrusted to judicial resolution. See, e.g., Wayte v. United States, 470 U.S. 598, 606-610 (1985); Oregon v. Kennedy, 456 U.S. 667, 669-670, 679 (1982); Barker v. Wingo, 407 U.S. 514, 530-536 (1972).

For these reasons, Alleyne v. United States, 570 U.S. 99 (2013), is inapposite. Cf. Pet. 11. The Court's decision in that case reiterated that a jury must find every element of the offense and defined those "elements" to include "[f]acts that increase the mandatory minimum sentence." 570 U.S. at 108. But neither that holding nor any other aspect of the Court's decision undermines Ford's holding that facts relevant only to the court's jurisdiction are not elements and thus need not be put to the jury.

b. As petitioner notes (Pet. 9-11), the courts of appeals have taken different approaches to the submission of jurisdictional issues under the MDLEA to juries. The First and Eleventh Circuits have upheld the constitutionality of having the judge, not the jury, make the jurisdictional determination as provided by Section 70504(a). See, e.g., Vilches-Navarrete, 523 F.3d at 19-23; Tinoco, 304 F.3d at 1107-1112. But the Ninth Circuit has concluded that when the statutory question whether a vessel is "subject to the jurisdiction of the United States" depends on a "disputed factual question," the Fifth and Sixth Amendments require the factual issue to be resolved by a jury. United States v. Perlaza, 439 F.3d 1149, 1165-1168 (2006) (citation

omitted). To the extent that the jurisdictional inquiry poses only a question of law, however, the Ninth Circuit agrees with the other courts of appeals that it may be resolved by the court. Id. at 1164.

This case would not be an appropriate vehicle for addressing the disagreement in the courts of appeals. In Perlaza, there was conflicting evidence about whether the vessel at issue was stateless. See 439 F.3d at 1165-1166. Here, by contrast, no conflicting evidence raised any factual dispute. Upon being boarded by the Coast Guard, petitioner claimed that he was in charge and that the Venus was Jamaican. Pet. App. 8a. But petitioner had no documentation to support that claim, and he did not argue at trial or on appeal that the Venus was a Jamaican-flagged vessel. To the contrary, the evidence at trial showed that the Venus had been purchased in Colombia, not Jamaica. Gov't C.A. Br. 7-8. And the government introduced a State Department certification establishing that the Government of Jamaica had informed the United States that it was unable to confirm or deny the registry of the vessel in Jamaica. Id. at 12. That was sufficient to satisfy the statutory definition of a "vessel without nationality," because the "claimed nation of registry" did not "affirmatively and unequivocally assert that the vessel [wa]s of its nationality." 46 U.S.C. 70502(d)(1)(C).

Petitioner did not object to the authenticity of the certification at trial, and he has not argued that it was deficient

in any way. Gov't C.A. Br. 12. Accordingly, it is likely that no jury determination would have been required even in the Ninth Circuit. Cf. United States v. Zakharov, 468 F.3d 1171, 1176 (9th Cir. 2006) (finding "no factual question pertaining to statutory jurisdiction for the jury to decide"), cert. denied, 550 U.S. 927 (2007).

2. Petitioner next contends (Pet. 12-15) that, in the absence of any showing of a nexus with the United States, the MDLEA exceeds Congress's authority under the Piracies and Felonies Clause. That contention lacks merit, and this Court has repeatedly declined to review it. See Alexander v. United States, No. 17-7879 (June 18, 2018); Persaud v. United States, 136 S. Ct. 534 (2015) (No. 14-10407); Campbell, 135 S. Ct. 704; Brant-Epigmelio v. United States, 565 U.S. 1203 (2012) (No. 11-6306); Cardales-Luna v. United States, 565 U.S. 1034 (2011) (No. 10-10731); Renegifo v. United States, 565 U.S. 835 (2011) (No. 10-10382); Estrada-Obregon v. United States, 555 U.S. 997 (2008) (No. 08-5044); Moreno, 549 U.S. 1343; Estupinan, 549 U.S. 1267. Again, the same result is warranted here.

a. The Piracies and Felonies Clause empowers Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10. Every court of appeals to consider the question has concluded that the MDLEA's application to stateless vessels falls within that grant of authority, because the Clause authorizes

Congress to punish offenses “on the high Seas” and because “trafficking in narcotics is condemned universally by law-abiding nations.” Pet. App. 7a (citation omitted); see United States v. Campbell, 743 F.3d 802, 809-810 (11th Cir.), cert. denied, 135 S. Ct. 704 (2014); Perlaza, 439 F.3d at 1158-1160 (9th Cir.); United States v. Ledesma-Cuesta, 347 F.3d 527, 531-532 (3d Cir. 2003); United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056-1057 (3d Cir. 1993), cert. denied, 510 U.S. 1048 (1994); United States v. Alvarez-Mena, 765 F.2d 1259, 1264-1267, 1265 n.9 (5th Cir. 1985).

b. Petitioner does not cite any decision reaching a contrary conclusion. Instead, he relies (Pet. 12-13) on dissenting opinions issued by Judge Torruella. But those separate opinions could not establish a circuit conflict warranting this Court’s review. See Sup. Ct. R. 10. And in any event, Judge Torruella has argued only that the Piracies and Felonies Clause requires a nexus between the offense and the United States in cases involving “foreign nationals on a foreign-flag ship.” United States v. Angulo-Hernández, 576 F.3d 59, 60 (1st Cir.) (Torruella, J., dissenting from the denial of rehearing en banc), cert. denied, 558 U.S. 1063 (2009). Judge Torruella has acknowledged that his “analysis may be quite different” where, as here, the vessel at issue is stateless. Id. at 63 n.3; see United States v. Cardales-Luna, 632 F.3d 731, 747 (1st Cir.) (Torruella, J., dissenting)

(acknowledging that Congress has broader authority to regulate stateless vessels), cert. denied, 565 U.S. 1034 (2011).³

3. Petitioner further contends (Pet. 15-17) that the Due Process Clause of the Fifth Amendment requires a nexus between the offense conduct and the United States for prosecutions under the MDLEA. But no court of appeals has imposed a nexus requirement where, as here, the MDLEA is applied to conduct on a stateless vessel in international waters. Although the Ninth Circuit has inferred a nexus requirement in cases involving foreign-registered vessels, that divergence from other circuits -- even assuming it were at issue here -- has not been of practical consequence to date and does not warrant this Court's review. This Court has previously declined to review this issue, see, e.g., Wilchcombe v. United States, 137 S. Ct. 2265 (2017) (No. 16-1063); Persaud, 136 S. Ct. 534; Campbell, 135 S. Ct. 704; Tam Fuk Yuk, 565 U.S. 1203; Brant-Epigmelio, 565 U.S. 1203; Sanchez-Salazar, 556 U.S. 1185; Aguilar, 556 U.S. 1184, and the same result is appropriate here.

a. Petitioner asserts (Pet. 16) that he should not have been "prosecuted in the United States for drug offenses having no connection to the United States." Congress explicitly found and

³ Petitioner also cites (Pet. 13-15) Judge Torruella's dissent in United States v. Trinidad, 839 F.3d 112 (1st Cir. 2016), a case involving a stateless vessel. But that case did not present any claim that the MDLEA exceeded Congress's Article I authority; instead, Judge Torruella argued that the vessel at issue there did not qualify as stateless under the MDLEA in light of what he viewed as "undisputed circumstantial evidence" establishing that it was Colombian. Id. at 123 (Torruella, J., dissenting).

declared that "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." 46 U.S.C. 70501(1). And courts have repeatedly upheld prosecutions under the MDLEA (and its statutory predecessor) even in the absence of evidence that the drug trafficking was directed at the United States. See, e.g., United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003) (citing cases), cert. denied, 541 U.S. 1035 (2004).

With the exception of the Ninth Circuit, every court of appeals to consider the issue has held that the MDLEA validly applies to vessels on the high seas without any showing of a nexus between the offense and the United States. See, e.g., Rendon, 354 F.3d at 1325 (11th Cir.); Suerte, 291 F.3d at 375 (5th Cir.); United States v. Cardales, 168 F.3d 548, 552-553 (1st Cir.), cert. denied, 528 U.S. 838 (1999); Martinez-Hidalgo, 993 F.2d at 1056 & n.6 (3d Cir.). By contrast, the Ninth Circuit has read into the MDLEA a nexus requirement with respect to foreign-registered vessels, not as an element of the substantive offense but as a "judicial gloss" on MDLEA prosecutions even when the flag government consents to the United States' search, arrest, and prosecution. Zakharov, 468 F.3d at 1177 (quoting United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998), cert. denied, 528 U.S. 842 (1999)).

b. Nevertheless, the Ninth Circuit has clarified that, "if a vessel is deemed stateless, there is no requirement that the government demonstrate a nexus between those on board and the United States before exercising jurisdiction over them." Perlaza, 439 F.3d at 1161 (brackets and citation omitted). Accordingly, no court of appeals would impose a nexus requirement where, as here, the MDLEA is applied to an offense committed on a stateless vessel.⁴

Petitioner suggests in passing (Pet. 16) that this Court should address the due process question because "the MDLEA's definition of a vessel without nationality is broader than that recognized by international law" and because the determination that his vessel was stateless was based only "upon the assertion that Jamaica could neither confirm nor deny the registry of the vessel." But petitioner bases that argument on his challenges to the Secretary of State's certification of United States jurisdiction. For reasons discussed above and below, those

⁴ Petitioner also invokes a decision from the Second Circuit, which he says "required a nexus between a foreign citizen's extraterritorial conduct and the United States." Pet. 16 n.7. But that decision arose in a different context under a different statute, and presents no conflict with the decision below. In United States v. Yousef, 327 F.3d 56, cert. denied, 540 U.S. 933, and 540 U.S. 993 (2003), the Second Circuit noted that extraterritorial application of criminal law generally requires a nexus between the United States and criminal conduct abroad. Id. at 111. But Yousef involved, in relevant part, a conspiracy to bomb a civil aircraft registered in a foreign country, in violation of 18 U.S.C. 32(b)(3). See 327 F.3d at 84. It therefore raised no questions analogous to those involving a stateless vessel on the high seas, and the court did not consider the nexus issue in light of explicit congressional findings, like those about drug-trafficking contained in 46 U.S.C. 70501(1).

challenges lack merit. See pp. 9-15, supra; pp. 20-23, infra. And no evidence in the record, aside from petitioner's self-serving statement upon apprehension by the Coast Guard, suggests that the vessel here was in fact of Jamaican registry. To the contrary, Acosta, a Colombian national, testified at trial that his co-conspirators purchased the boat in Colombia before he and petitioner travelled to Jamaica. Gov't C.A. Br. 9. This case is therefore a particularly poor vehicle for assuming that the vessel at issue was anything but stateless.

4. Finally, petitioner contends (Pet. 17-18) that allowing the statelessness of the vessel to be "proved conclusively" by the certification of the Secretary of State, 46 U.S.C. 70502(d)(2), violated his rights under the Sixth Amendment's Confrontation Clause. That contention lacks merit, and the Court has previously declined to review the same question. See Campbell, 135 S. Ct. 704; Tam Fuk Yuk, 565 U.S. 1203; Mina v. United States, 554 U.S. 905 (2008) (No. 07-9435). Further review is likewise unwarranted here, particularly because petitioner's failure to raise the issue at trial means that his Confrontation Clause claim is reviewable only for plain error.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. This Court's decisions have characterized a defendant's right under the Confrontation Clause as "a trial right." Barber v. Page,

390 U.S. 719, 725 (1968); see Crawford v. Washington, 541 U.S. 36, 42-43 (2004) ("One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between.") (citations omitted); Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (opinion of Powell, J.) ("The opinions of this Court show that the right to confrontation is a trial right."). The Court has held that the Confrontation Clause does not apply at preliminary proceedings such as a probable-cause hearing, see Gerstein v. Pugh, 420 U.S. 103, 120-122 (1975), or a suppression hearing, see McCray v. Illinois, 386 U.S. 300, 305, 313-314 (1967). All of the Court's Confrontation Clause decisions since Crawford have involved trial settings.⁵

⁵ Crawford held that the Confrontation Clause generally bars the introduction of the "testimonial" statement of an absent witness at a criminal trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine. 541 U.S. at 68. In Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), the Court held that a certificate of forensic analysis, admitted to establish the truth of statements in the certificate, was testimonial and was inadmissible because the analyst was not present at trial and was unavailable for cross-examination. Id. at 310. In Bullcoming v. New Mexico, 564 U.S. 647 (2011), the Court applied Melendez-Diaz to hold that the Confrontation Clause did not allow the admission of an analyst's signed, forensic report certifying the results of a blood-alcohol test when offered through the trial testimony of another scientist who "did not sign the certification or perform or observe the test" and who had no "'independent opinion'" about its results. Id. at 652, 662 (citation omitted); see id. at 661-668. In Williams v. Illinois, 567 U.S. 50 (2012), five Members of the Court concluded that the Confrontation Clause was not violated when an expert witness testified at trial that two DNA profiles were a statistical match but acknowledged that she lacked personal knowledge of the analyses that led to the creation of the two profiles. Id. at 70-79, 81-

Petitioner presents no argument that would justify extending the Confrontation Clause's protections to the jurisdictional question at issue here. Congress has specified that the United States' jurisdiction over a vessel for purposes of the MDLEA "is not an element of an offense" but is instead a "preliminary question[] of law to be determined solely by the trial judge." 46 U.S.C. 70504(a). As discussed above, that inquiry does not pertain to a defendant's guilt or innocence and "is not meant to have any bearing on the individual defendant, but instead is meant to bear only on the diplomatic relations between the United States and foreign governments." Tinoco, 304 F.3d at 1109.

Nor do decisions in the courts of appeals support any such extension. Those courts have concluded that the Confrontation Clause is inapplicable to several other non-trial settings.⁶ And it appears that the First Circuit is the only other court of appeals, aside from the Eleventh Circuit, to have addressed whether the Confrontation Clause is violated by the MDLEA's certification provision. See Pet. 17. It reached the same conclusion as the court of appeals in this case. See United States v. Mitchell-

86 (plurality opinion); id. at 109-112 (Thomas, J., concurring in the judgment).

⁶ See, e.g., United States v. Henry, 852 F.3d 1204, 1206 (10th Cir. 2017) (Gorsuch, J.) (revocation of supervised release); United States v. Powell, 650 F.3d 388, 392-393 (4th Cir.) (sentencing), cert. denied, 565 U.S. 922 (2011); United States v. Smith, 79 F.3d 1208, 1210 (D.C. Cir. 1996) (pretrial detention hearing); United States v. Andrus, 775 F.2d 825, 836 (7th Cir. 1985) (preliminary hearing to determine admissibility of evidence).

Hunter, 663 F.3d 45, 50-51 (1st Cir. 2011) (rejecting such claims “[b]ecause the MDLEA’s jurisdiction determination is relegated by statute to a pretrial conclusion of law by the judge, and because the confrontation right has never been extended beyond the context of a trial”); see also United States v. Nueci-Peña, 711 F.3d 191, 199 (1st Cir. 2013) (following Mitchell-Hunter).

In the absence of any disagreement in the courts of appeals, further review of petitioner’s Confrontation Clause claim is unwarranted. And that is particularly true because petitioner “failed to raise” his Confrontation Clause claim “at any time before the district court,” and that claim is thus reviewable only “for plain error.” Pet. App. 10a; see Fed. R. Crim. P. 52(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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