

IN THE
Supreme Court of the United States

CARLINGTON CRUICKSHANK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

The government acknowledges that the circuits are split on two important constitutional questions presented in Maritime Drug Law Enforcement Act (“MDLEA”) prosecutions: (i) whether the government must prove to a jury the disputed jurisdictional facts required to prosecute a defendant under the MDLEA, to accord with the Fifth and Sixth Amendments (Question Presented 1), and (ii) whether the government must prove to a jury that the drug offense had a connection to the United States, to accord with the Due Process Clause (Question Presented 3). BIO at 13-14, 17-19. The government controls the venue of MDLEA prosecutions by choosing the district to which it brings defendants after seizing them on international waters. *See* 46 U.S.C. § 70504(b) (2014). In its brief, the government does not address, let alone dispute, that it far more often chooses to prosecute in the Eleventh Circuit’s jurisdiction where, unlike in the Ninth Circuit, it is not required to prove these facts to the jury. *See* Pet. at 8-9, 11 & App. 43a; BIO at 1-23.

The government attempts to avoid review by contending that Petitioner Carlington Cruickshank’s case is a poor vehicle. BIO at 9-10, 14-15, 19-20. Petitioner’s case, however, is an excellent vehicle to resolve the circuit split on the important constitutional questions presented by his prosecution within the Eleventh Circuit’s jurisdiction.

1. Because the Government Prosecuted Petitioner in the Eleventh Circuit, It Was Not Required to Prove, and Did Not Prove, the Jurisdictional Facts to the Jury (Question Presented 1)

Based on the Fifth and Sixth Amendments, the Ninth Circuit, unlike the Eleventh Circuit, requires the government to prove to a jury disputed facts concerning jurisdiction over a vessel, such as whether it is stateless. Pet. at 9-11; *compare United States v. Perlaza*, 439 F.3d 1149, 1165-67 (9th Cir. 2006), *with United States v. Tinoco*, 304 F.3d 1088, 1106-12 (11th Cir. 2002). The government, acknowledging this circuit split, asserts that review is not warranted here because

there was no conflicting evidence in Petitioner's case about whether the vessel was stateless. BIO at 10, 13-15. The government is incorrect.

While on board the *Venus*, Petitioner stated he was the person in charge and made a verbal claim of Jamaican nationality of the vessel. Doc. 98 at 129-31; *see* 46 U.S.C. § 70502(e)(3) (recognizing that a "claim of nationality or registry" includes "a verbal claim of nationality or registry by the master or individual in charge of the vessel"). The State Department Certification, on which the government relied before the district court (rather than the jury) to establish jurisdiction, stated that Jamaica could neither confirm nor deny the registry of the vessel. Pet. at 3 & App. 21a-22a. Because the MDLEA also denied Petitioner his right at trial to confront this assertion in the State Department Certification, however, he was precluded from questioning the veracity or validity of this information — including the fact that the Coast Guard waited merely two and a half hours for a response from Jamaica. Pet. at 4, 17-18 (Question Presented 4). As the Honorable Juan Torruella, U.S. Circuit Judge, has opined, the government has not established that the vessel was actually stateless under such circumstances. *Id.* at 14-15; *United States v. Trinidad*, 839 F.3d 112, 122-24 (1st Cir. 2016) (Torruella, J., dissenting). A jury could have similarly concluded that the government had failed to meet its burden to prove that the vessel here is stateless. *See Perlaza*, 439 F.3d at 1165-66 & n.20 ("The Government bears the burden of proving statelessness.").

The government's reliance upon the trial testimony of Carlos Acosta, the Colombian who organized the trip, only underscores the conflicting evidence in Petitioner's case. BIO at 5, 14. Mr. Acosta testified that other Colombian individuals had obtained the boat on credit. Doc. 98 at 215-16. Contrary to the government's suggestion, this testimony did not establish from where the

boat originated. *See* BIO at 5, 14. Moreover, Mr. Acosta testified that he thought the boat would remain in Jamaica, further raising a jury question as to the vessel's registry. Doc. 98 at 228.

Petitioner was not subject to prosecution under the MDLEA absent a showing that he was on board a "vessel subject to the jurisdiction of the United States." *See* 46 U.S.C. § 70503. These disputed factual issues as to the vessel's statelessness should have therefore been resolved by a jury beyond a reasonable doubt. Pet. at 10-12; *Perlaza*, 439 F.3d at 1165-67; *Trinidad*, 839 F.3d at 124-25 (Torruella, J., dissenting) (citing *Perlaza*, 439 F.3d at 1167).

The government asserts that this Court's decision in *Ford v. United States*, 273 U.S. 593, 606 (1927), is controlling. BIO at 11. In *Ford*, however, this Court decided that the defendants had "waive[d] the question of the jurisdiction of the persons of defendants." 273 U.S. at 606; *see United States v. Alvarez-Machain*, 504 U.S. 655, 661 n.7 (1992) (noting that in *Ford* "the argument as to personal jurisdiction was deemed to have been waived"). The MDLEA jurisdictional requirement is unlike personal jurisdiction and, for that matter, double jeopardy, speedy trial, and selective prosecution, which are defenses that a defendant may raise (or waive). BIO at 12-13 (collecting cases). Because the MDLEA jurisdictional requirement is necessary to convict a defendant in every case, it is an element that must be proven to a jury beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013); *Perlaza*, 439 F.3d at 1165-67; *Trinidad*, 839 F.3d at 124-25 (Torruella, J., dissenting).

Petitioner preserved this issue before the district court and court of appeals. His case is therefore an excellent vehicle to resolve the circuit split.

2. Because the Government Prosecuted Petitioner in the Eleventh Circuit, It Was Not Required to Prove, and Did Not Prove, Any Connection Between His Offense and the United States (Question Presented 3)

The circuits are also split on whether the Due Process Clause requires the government to establish a nexus between the criminal activity and the United States to prosecute a defendant under the MDLEA. Pet. at 15-17. In the Ninth Circuit, the government must establish “a sufficient nexus between the conduct condemned and the United States” to accord with due process in cases involving foreign-flagged vessels. *Perlaza*, 439 F.3d at 1160 (internal quotation marks and citations omitted). Other circuits, including the Eleventh Circuit, do not impose this requirement. Pet. at 16.

The government acknowledges this circuit split. BIO at 17-19. The government also does not dispute that it showed no connection between Petitioner’s offense and the United States. *See id.* at 1-23. Indeed, the evidence supports only that Petitioner’s offense had no connection to the United States. As the government itself points out, Carlos Acosta testified that he organized the trip to bring the drugs from Colombia to Jamaica. *Id.* at 5; *see* Doc. 98 at 202-03, 212. Thus, even assuming the circuit split has not had “practical consequence” in other cases, that is not the case here. BIO at 17.

The government nonetheless contends that this circuit split is not implicated here because the Ninth Circuit does not require the government to show a nexus between the offense and the United States when the vessel is stateless. *Id.* at 17-20. But because Petitioner was prosecuted in the Eleventh Circuit, rather than in the Ninth Circuit, the government did not have to prove to the jury, and did not prove, that the vessel was actually stateless. *See* Pet. at 9-12; *see* pp. 2-3, *supra*.

Moreover, the government prosecuted Petitioner based on the MDLEA's definition of statelessness that is broader than that recognized by international law. *Compare* Pet. at 14-15; *id.* at 16, *with* BIO at 19. In international law, a stateless vessel is one that, in fact, is not registered with the country, rather than one that, in the time permitted, has not been confirmed or denied. Pet. at 14-15. Petitioner made a verbal claim of registry, which is recognized by the MDLEA. 46 U.S.C. § 70502(e)(3); *cf.* BIO at 20 (attempting to dismiss Petitioner's verbal claim of registry as "self-serving"). But the MDLEA then permitted Petitioner's prosecution based upon a definition of statelessness that does not comport with international law – i.e., Jamaica's inability to confirm or deny the registry in the less than three hours provided by the U.S. government. *See Trinidad*, 839 F.3d at 122 (Torruella, J., dissenting) ("[T]he acquisition of jurisdiction in this case on the basis of 'statelessness' because of Colombia's failure to make an unequivocal assertion of nationality within the twenty-four hours or so given is a gross overstepping of jurisdictional boundaries").

Petitioner was pulled from international waters using a definition of statelessness that does not accord with international law and then prosecuted in the United States without showing any connection between the criminal activity and the United States. Petitioner's case is therefore an excellent vehicle to resolve the circuit split on whether the U.S. government must show a connection between the drug offense and the United States to accord with due process. Petitioner thus asks for this Court's review.

3. Petitioner's Convictions Cannot Stand Should the Court Conclude that the MDLEA Exceeds Congress's Authority Under the Piracies and Felonies Clause (Question Presented 2)

This Court's review is also needed to resolve the fundamental question of whether Congress has the authority under the Piracies and Felonies Clause, U.S. Const. art. I, § 8, cl. 10, to

criminalize activity in international waters having no connection to the United States. *See* Pet. at 12-15. As Petitioner has addressed, Judge Torruella and Professor Eugene Kontorovich have concluded that the MDLEA, when applied without a nexus to the United States, exceeds Congress's power under the Piracies and Felonies Clause. *See id.* at 13-15.

The government does not dispute that it showed no connection between the criminal activity in Petitioner's case and the United States. *See* BIO at 1-23. The government instead asserts that the vessel here is stateless and, therefore, Petitioner's request for review is not supported by the dissenting opinions of Judge Torruella. *Id.* at 16-17.

As Petitioner has demonstrated, the government did not establish that the vessel here is actually stateless. Pet. at 14-15; *see* pp. 2-3, *supra*. Indeed, in making his argument, Petitioner has relied upon the opinions of Judge Torruella and Professor Kontorovich that the MDLEA uses a broader definition of statelessness than is recognized in international law. Pet. at 14-15. Thus, contrary to the government's argument, Petitioner's case falls squarely within the divergent views about whether Congress has the constitutional authority to reach his conduct.

Should this Court agree that the MDLEA exceeds Congress's authority under the Piracies and Felonies Clause, Petitioner's convictions would have to be vacated. Petitioner's case is therefore an excellent vehicle to resolve this issue.

4. The MDLEA Denied Petitioner's Confrontation Right (Question Presented 4)

Petitioner has also sought this Court's review to address whether the MDLEA violates the Confrontation Clause. Pet. at 17-18. Should this Court determine that the jury must find the jurisdictional facts necessary for a prosecution under the MDLEA (Question Presented 1), then the government's response that the Confrontation Clause does not apply outside of trial (BIO at 20-23) would be inapplicable.

Petitioner's case is an excellent vehicle to resolve this issue as well. He preserved the jury trial issue (Question Presented 1), which underlies this argument. Moreover, the standard of review on the Confrontation Clause issue was not dispositive below. *See* Pet. App. 10a (Eleventh Circuit's conclusion that there was no Confrontation Clause violation "under any standard of review, plain or otherwise"). Accordingly, Petitioner respectfully seeks this Court's review of the constitutional issues presented in his petition.

5. Petitioner's Case is Final and Ripe for Review

Petitioner seeks review from the final judgment of the Eleventh Circuit affirming his convictions and sentence. Pet. at 6. The government opposes review, asserting that this Court has already denied certiorari in Petitioner Cruickshank's case. BIO at 9. The government's argument, however, should be rejected.

The government opposed Mr. Cruickshank's previously filed petition because his case was in an "interlocutory posture." Brief for the United States in Opposition at 8, *Cruickshank v. United States*, No. 16-7337. At that time, the Eleventh Circuit affirmed Petitioner's convictions but remanded for resentencing. *See* Pet. App. 6a-13a. The district court has since resentenced Mr. Cruickshank to 20 years in prison, and the Eleventh Circuit has affirmed. Pet. App. 15a-17a, 35a-36a. There is thus no impediment to reviewing Petitioner's case, and the government points to none. *See, e.g., Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (explaining, after denying certiorari in the first appeal but granting it in the second, "We now consider all of the substantial federal questions determined in the earlier stages of the litigation . . . , for it is settled that we may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal.") (internal quotation marks and citations omitted).

6. Petitioner's Case Presents Important and Recurring Issues

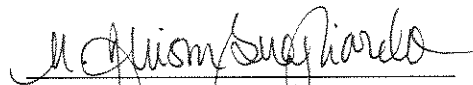
As demonstrated by Petitioner's case, the government's prosecution of foreign citizens seized on international waters for drug offenses having no connection to the United States raises significant constitutional issues. The number of MDLEA prosecutions is increasing, with data showing a 477% increase over the past five years. Pet. at 9; Pet. App. 42a. The government does not address, let alone refute, this data. BIO at 1-23. Given the significant constitutional issues presented by his prosecution – and the significant cost of MDLEA prosecutions and incarcerations to the American taxpayer – Petitioner respectfully seeks this Court's review. See Pet. at 9.

CONCLUSION

Petitioner respectfully requests that this Court grant his petition.

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