UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Case No.: _____

Criminal Case No.: 17-CR-20877-UNGARO

PATRICK W. FERGUSON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION UNDER 28 U.S.C. § 2255 TO VACATE OR SET ASIDE CONVICTION AND INCORPORATED MEMORANDUM OF FACTS AND LAW IN SUPPORT

Movant Patrick W. Ferguson respectfully moves under 28 U.S.C. § 2255 to vacate or set aside his conviction under 18 U.S.C. § 2237(a)(2)(B) on the grounds that the Court lacked jurisdiction over his extraterritorial conduct and that his conviction is, therefore, unconstitutional. For the reasons set forth in this incorporated memorandum of law and facts in support, the motion should be granted.

PRELIMINARY STATEMENT

Patrick Ferguson is a Jamaican national and fisherman. On September 13, 2017, he left his home in Jamaica on board a thirty-two foot, Jamaican-registered boat, the *Jossette* WH 478, for a two-day fishing trip with four other Jamaican fisherman. The next day, after being blown off-course during an unexpected storm, the U.S. Coast Guard stopped and boarded the *Jossette* in international waters in the East Caribbean Sea, just outside the territorial waters of Haiti.

During the Coast Guard's boarding of the *Jossette*, Coast Guard officers asked the crew where they were heading, and one or more of the men responded that they were lost and trying to find their way back to Jamaica. The Coast Guard searched the *Jossette* and crewmembers for illicit substances. Although none were found onboard the *Jossette* or on any of the crewmembers, the Coast Guard forcibly removed Mr. Ferguson and the other four crewmembers from the *Jossette*, detained them onboard a Coast Guard ship, and destroyed the *Jossette*.

The Coast Guard detained Mr. Ferguson and his fellow crew members for the next thirty-two days, by chaining them to the exposed decks of four different Coast Guard ships. Coast Guard officers ordered the men to strip-naked and to dress in paper-thin jumpsuits that did not protect them from the elements. While in Coast Guard custody, Coast Guard officers denied Mr. Ferguson and the other crewmembers access to shelter, basic sanitation, proper food and water, and medical care. The Coast Guard also denied the men's repeated requests to contact their

families in Jamaica, as well as their requests to contact their families on their behalf. The men feared, correctly, that their families must have presumed that they were dead.

On October 16, 2017, the Coast Guard delivered Mr. Ferguson to Miami, and to the custody of the Drug Enforcement Administration. The United States initially charged Mr. Ferguson with conspiracy to possess with intent to distribute marijuana. Later, the United States admitted that it "would have required a miracle" to prove the drug charges initially made against Mr. Ferguson; a miracle that it "could not have pulled off." Instead, on January 3, 2018, Mr. Ferguson pled guilty to one count of knowingly providing a materially false statement to a federal law enforcement officer, during a boarding, while on board a vessel subject to the jurisdiction of the United States, in violation of 18 U.S.C. § 2237(a)(2)(B).

Having been kept from his home and his family for more than three months, Mr. Ferguson's guilty plea presented him with the fastest possible path back to Jamaica. But Congress lacks the constitutional authority to criminalize the making of false statements by a foreign national while that national is aboard a foreign-flagged vessel located in international waters. This Court also lacked jurisdiction to accept Mr. Ferguson's guilty plea and, accordingly, should grant his motion to vacate or set aside his conviction under 28 U.S.C. § 2255.

First, the High Seas Clause of the U.S. Constitution prohibits the extraterritorial application of United States law where, as here, the charging documents and other information before the Court shows that a criminal defendant has no connection to, or impact in, the United States. Under its existing precedent interpreting the High Seas Clause, the Eleventh Circuit has refused to incorporate any nexus requirement limiting Congress's authority under that Clause. Even so, the Court has consistently held that, for the United States to apply its criminal statutes extraterritorially, as it did with Mr. Ferguson, the United States must satisfy some principle of

extraterritorial jurisdiction recognized by customary international law. No such principle applies here. Mr. Ferguson's conduct did not occur in the United States, nor did it have an actual or potential effect in the United States. And his conduct is not otherwise universally punishable. Accordingly, the United States lacked the constitutional authority to prosecute Mr. Ferguson for making a false statement aboard a foreign-flagged vessel located on the High Seas.

Second, the Eleventh Circuit's existing interpretation of the High Seas Clause, particularly the Court's refusal to incorporate into that Clause a nexus requirement between the charged conduct and the United States, is contrary to the Framers' original understanding of the High Seas Clause. The High Seas Clause is part of the Define and Punish Clause, which grants Congress authority to "define and punish" three separate and distinct types of crimes: (i) piracies; (ii) felonies committed on the high seas; and (iii) offences against the law of nations. U.S. Const. art. I, § 8, cl. 10. In conferring on Congress the authority over separate types of crimes, the Framers intended to draw a distinction between Congress's authority to define and punish "piracy" and its authority to define and punish "felonies committed on the high seas" by granting Congress authority to define and punish piracy without regard to the charged crime's nexus to the United States and to define and punish felonies committed on the high seas only where such a nexus is present. The Eleventh Circuit's prior interpretation of the High Seas Clause rejecting this distinction is incorrect and should be overruled. Mr. Ferguson advances this argument to preserve it for appellate review.

Finally, Mr. Ferguson's conviction also violates the U.S. Constitution's Due Process Clause. The Eleventh Circuit has confirmed that the extraterritorial application of United States law to foreign nationals on the high seas is constitutional under the Due Process Clause only in situations where the criminalized conduct is contrary to the laws of all reasonably developed

legal systems. Mr. Ferguson is aware of no other nation that criminalizes the making of unsworn false statements to a government official during a boarding of a vessel on the high seas. This serves as a third separate and independent ground supporting Mr. Ferguson's motion.

JURISDICTION

Mr. Ferguson was convicted by this Court of one count of violating 18 U.S.C. § 2237(a)(2)(B). Mr. Ferguson's judgment of conviction was entered on January 10, 2018. He currently resides in Jamaica and is subject to a non-reporting term of supervised release that expires on July 13, 2019. The Court has subject matter jurisdiction over Mr. Ferguson's motion to vacate or set aside his conviction under 28 U.S.C. § 2255.

FACTUAL BACKGROUND

On October 18, 2017, Mr. Ferguson was charged in a Criminal Complaint with one count of conspiracy to possess with intent to distribute a controlled substance, namely a mixture and substance containing 100 kilograms or more of marijuana, in violation of 46 U.S.C. §§ 70503(a)(1) and 70506(b). (Ex. 1.[1]) The affidavit submitted in support of the Criminal Complaint states that the Coast Guard stopped the *Jossette* "in international waters approximately 13 nautical miles off the coast of the Navassa island." (*Id.* ¶ 5.) According to the affiant, while in pursuit of the *Jossette*, "Coast Guard personnel observed the crew . . . jettison approximately 20-25 bales of suspected contraband that had been on deck," and Coast Guard personnel subsequently retrieved "several jettisoned bales in the surrounding waters that matched the appearance and size of the bales seen thrown from the [*Jossette*], which tested positive for marijuana." (*Id.* ¶¶ 5, 8.) As the United States acknowledged at sentencing, however, the Coast

[1] All cited exhibits ("Ex.") are annexed to the Declaration of Paul A. Shelowitz filed herewith.

Guard also performed an ion scan to "test[] for illicit substances onboard the vessel," which tested negative for marijuana. (Ex. 8 at 23:23-24:4.[2])

On December 13, 2017, the United States filed an Information, which charged Mr. Ferguson with "knowingly and intentionally provid[ing] materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination," (Ex. 2.) According to the Information, "while on board a vessel subject to the jurisdiction of the United States, . . . the defendants [(including Mr. Ferguson)] represented to a Coast Guard officer that the vessel's destination was the waters near Jamaica, when in truth and in fact, and as the defendants then and there well knew, the vessel's destination was Haiti." (*Id.*) Mr. Ferguson entered into a plea agreement with the United States in which he agreed to plead guilty to the sole count of the Information. (Ex. 3.)

Additionally, before he entered his guilty plea, Mr. Ferguson and the United States signed a factual proffer setting forth the factual bases for his plea. (Ex. 4.) According to the proffer, Mr. Ferguson and the United States agreed that "[i]f this matter proceeded to trial the Government would have proved beyond a reasonable doubt" certain facts, including the following:

- On September 14, 2017, the Coast Guard spotted "a vessel [the *Jossette*] speeding towards Haiti[] from the direction of Jamaica";
- The Coast Guard stopped the vessel "in international waters near Haiti";
- During the boarding process, one unnamed individual "claimed that the vessel was Jamaican and that the vessel was registered in Jamaica";
- "Jamaica was contacted," and "Jamaica confirmed the registration of the vessel, but authorized the United States to board and search the vessel";

[2] The prosecutor represented to the Court that "the ion scan said there was something else," (Ex. 8 at 23:23-24:7), although he did not disclose what that "something else" was, and it is indisputable that, other than the Criminal Complaint alleging a marijuana conspiracy, the United States never alleged that Mr. Ferguson was involved in any other drug-related offense.

- "Jamaica also later waived jurisdiction over the vessel," making "the vessel . . . subject to the jurisdiction of the United States"; and
- "When asked about the destination of the vessel, each of the members of the crew, including [Mr. Ferguson], told the United States Coast Guard boarding officers that the vessel's destination was the waters near the coast of Jamaica, where they intended to fish. This was not true. As the crew members, including [Mr. Ferguson], then and there well knew, the vessel's true destination was Haiti."

On January 3, 2018, Mr. Ferguson pled guilty pursuant to his plea agreement. (Ex. 8 at 20:9-21:4.) During his plea allocution, this Court confirmed that Mr. Ferguson signed his proffer, had a full opportunity to review the proffer with his attorney, and agreed with the facts contained in his proffer. (*Id.* at 19:4-20:8.) During the hearing, the United States admitted that the Coast Guard found no drugs onboard the *Jossette* and that ion scans confirmed the absence of any indication that marijuana had ever been onboard the vessel or on its crew members. (*Id.* at 23:8-24:7.) The United States also admitted that, although marijuana was found one mile from the *Jossette*, "it would have required a miracle" to prove that the marijuana recovered was onboard the *Jossette*, one which the United States admitted it "could not have pulled off." (*Id.* at 24:4-7.)

Mr. Ferguson was sentenced to ten months' imprisonment and one-year of supervised release. (Ex. 5.) He was released from custody on July 13, 2018 (Ex.9), and subsequently removed from the United States to Jamaica on August 30, 2018. While he is residing outside of the United States, Mr. Ferguson's supervised release is "non-reporting," but, if Mr. Ferguson "reenters the United States within the term of supervised release," he is required "to report to the nearest U.S. Probation Office within 72 hours of the [his] arrival." (Ex. 5.)

Mr. Ferguson filed a notice of appeal (Ex. 6), which he subsequently moved to dismiss. On April 24, 2018, the United States Court of Appeals for the Eleventh Circuit entered an order dismissing Mr. Ferguson's appeal. (Ex. 7.) Mr. Ferguson then had 90 days to petition the United States Supreme Court to review his conviction on certiorari. *See* Sup. Ct. R. 13(1). Because Mr.

Ferguson did not seek Supreme Court review of his conviction, his conviction became "final" within the meaning of 28 U.S.C. § 2255(1) on July 23, 2018. *See Kaufmann v. United States*, 282 F.3d 1336, 1338 (11th Cir. 2002) ("holding that even when a prisoner does *not* petition for certiorari, his conviction does not become 'final' for purposes of § 2255(1) until the expiration of the 90-day period for seeking certiorari"). (Ex. 5.) Mr. Ferguson has not filed a prior motion under 28 U.S.C. § 2255.

ARGUMENT

I. Mr. Ferguson's Guilty Plea Does Not Bar His Motion

The Eleventh Circuit has repeatedly held that "[t]he constitutionality of a [federal statute] . . . is a jurisdictional issue that [is not] waive[d] upon pleading guilty." *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011); *see also United States v. St. Hubert*, 909 F.3d 335, 341 (11th Cir. 2018) (holding that a defendant's guilty plea did not "bar his claim that [the] statute of conviction is unconstitutional"). Mr. Ferguson challenges the constitutionality of 18 U.S.C. § 2237(a)(2)(B) as applied to the facts set forth in the charging documents and otherwise before the Court when he entered his guilty plea. This is a jurisdictional claim that is not barred by his guilty plea. *See Saac*, 632 F.3d at 1208; *St. Hubert*, 909 F.3d at 341. Additionally, because the claim is jurisdictional, Mr. Ferguson does not need to "show 'cause' to justify [his] failure to raise such a claim" in the initial trial proceedings or on direct appeal. *Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) (jurisdictional claim asserted in 28 U.S.C. § 2255 motion held not waivable), *abrogated on other grounds by United States v. DiFalco*, 837 F.3d 1207, 1215 (11th Cir. 2016); *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994) (same), *overruled on other grounds by United States v. Ceballos*, 302 F.3d 679 (7th Cir. 2002).

II. Mr. Ferguson's Conviction Violates the High Seas Clause

As relevant to Mr. Ferguson's conviction, section 2237(2)(a) provides:

> It shall be unlawful for any person on board 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], to—
>
> . . .
>
> (B) provide materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew.

18 U.S.C. § 2237(a)(2)(B); *see also id.* § 2237(e)(3); 46 U.S.C. § 70502. When Mr. Ferguson, who is a Jamaican national, allegedly made false statements to the Coast Guard, he was onboard a foreign-flagged vessel in international waters. And there is no indication in the charging documents or the record before the Court that Mr. Ferguson's conduct had any connection to, or actual or potential effect in, the United States. The United States acted without constitutional authority when it prosecuted Mr. Ferguson under these circumstances.

Mr. Ferguson challenges the constitutionality of his conviction on two separate grounds based on the High Seas Clause. First, although existing Eleventh Circuit precedent rejects the argument that the High Seas Clause imposes on the United States an obligation to demonstrate a nexus between the charged conduct and the United States, the Court has consistently recognized that extraterritorial application of United States law must be supported by a principle of extraterritorial jurisdiction recognized by customary international law. The only conceivable basis for the United States to criminalize Mr. Ferguson's alleged statements to the Coast Guard is through application of the "protective" principle of customary international law. To satisfy that principle of jurisdiction, the United States must show that Mr. Ferguson's conduct had a potentially adverse effect in the United States *and* is generally recognized as a crime by nations that have reasonably developed legal systems. The United States can make neither showing here,

and the other potential bases for Congress to criminalize Mr. Ferguson's extraterritorial conduct are not applicable.

Second, although Congress did not specify the constitutional power it was invoking when it enacted section 2237(a)(2)(B), presumably it was relying on the High Seas Clause of the Define and Punish Clause. The Define and Punish Clause grants Congress authority to criminalize three separate and distinct categories of crime: (i) piracy; (ii) felonies committed on the high seas; and (iii) offenses against the law of nations. U.S. Const. art. I, § 8, cl. 10. Each of the three categories incorporates limitations on Congress's authority to define and punish these crimes, and, although foreclosed by existing precedent, the original understanding of the High Seas Clause shows that the Framers intended to limit Congress's authority to define and punish felonies committed on the high seas ("High Seas Clause") by requiring that Congress only exercise that authority when the defined "felonies" have a nexus to the United States. Because Mr. Ferguson's conduct had no such nexus, his conviction is unconstitutional.

A. Mr. Ferguson's Conviction is Unconstitutional Under Existing Precedent Interpreting the Extraterritorial Reach of United States Law

The "Define and Punish" Clause gives Congress authority "[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. Although the Eleventh Circuit has rejected arguments that Congress's authority to define and punish felonies committed on the high seas is limited to those instances where the conduct being punished has a nexus to the United States, it has consistently held that the extraterritorial application of United States law must be supported by a principle of extraterritorial jurisdiction recognized by customary international law. *See United States v. Campbell*, 743 F.3d 802, 809-12 (11th Cir. 2014); *Saac*, 632 F.3d at 1210; *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006). Thus, the Eleventh Circuit has held that

"international law generally prohibits any country from asserting jurisdiction over foreign vessels on the high seas" unless that country can demonstrate the existence of an internationally recognized basis for the exercise of extraterritorial jurisdiction, such as (i) the "protective" principle of jurisdiction; (ii) the "objective" principle of jurisdiction; or (iii) "universal jurisdiction." *United States v. Marino-Garcia*, 679 F.2d 1373, 1380-82 (11th Cir. 1982); *see also Campbell*, 743 F.3d at 809-10. None of these bases for the exercise of jurisdiction justify Mr. Ferguson's conviction. Because the United States lacked jurisdiction to prosecute Mr. Ferguson, his conviction should be set aside or vacated.[3]

1. The Protective Principle Does Not Apply to Mr. Ferguson

Under the protective principle of jurisdiction, states may "assert jurisdiction over foreign vessels on the high seas that threaten their security or governmental functions." *Marino-Garcia*, 679 F.2d at 1381. For the protective principle to provide jurisdiction to the United States to criminalize extraterritorial conduct, the United States must demonstrate that the charged conduct "has a potentially adverse effect [in the United States] *and* is generally recognized as a crime by nations that have reasonably developed legal systems." *United States v. Gonzalez*, 776 F.2d 931, 939 (11th Cir. 1985) (citing Restatement (Second) of Foreign Relations Law of the United States § 33) (emphasis added). The United States can satisfy neither prong of the protective principle here.

First, merely providing a false statement to the Coast Guard regarding a vessel's destination does not have the type of "potentially adverse effect" in the United States that is

[3] Other cases also support exercise of extraterritorial jurisdiction based on the so-called "passive personality" and "nationality" principles, both of which are clearly inapplicable to Mr. Ferguson. *See United States v. Malago*, No. 12-20031-CR, 2012 WL 3962901, at *4 (S.D. Fla. Sept. 11, 2012) (passive personality principle applies to "persons or vessels that injure the citizens of another country"); *United States v. Plummer*, 221 F.3d 1298, 1307 (11th Cir. 2000) (the nationality principle "permits a state to exercise criminal jurisdiction over one of its nationals").

required by the protective principle of jurisdiction. "Protective" jurisdiction is not a general catchall principle intended to cover any situation in which an individual allegedly provides a false statement during an extraterritorial interaction with a federal officer. It instead applies to a much narrower subclass of conduct. The Eleventh Circuit has recognized this limited scope, specifically identifying cases applying the protective principle as those that "generally involve forgeries of government documents in foreign countries or attempts to illegally obtain entry into the United States." *Marino-Garcia*, 679 F.2d at 1381 n.14 (collecting cases). And the limited scope of protective jurisdiction is further confirmed by the Restatement (Second) of Foreign Relations Law of the United States, on which the Eleventh Circuit expressly relied. *See Gonzalez*, 776 F.2d at 939-40; *Marino-Garcia*, 679 F.2d at 1381 & n.14. Like the Eleventh Circuit, the Second Restatement identified the types of extraterritorial conduct that a state is authorized to criminalize, including "in particular the counterfeiting of the state's seal and currency, and the falsification of its official documents." Restatement (Second) of Foreign Relations Law of the United States § 33(2).

Updated versions of the Restatement post-dating *Gonzalez* and *Marino-Garcia* have only served to further narrow a states' exercise of protective jurisdiction. The Third Restatement, for example, provided that the protective principle only applies to "*a limited class* of other state interests." Restatement (Third) of Foreign Relations Law of the United States § 402(3) (emphasis added). And the Fourth Restatement provides that the protective principle only covers "a limited class of other *fundamental* state interests, such as espionage, certain acts of terrorism, murder of government officials, counterfeiting of the state's seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate immigration or customs laws." Restatement (Fourth) of Foreign Relations Law of the United States § 412 (emphasis

added). The Fourth Restatement's addition of "the word 'fundamental' [was, in fact, intended] to emphasize the *limited class of interests covered*" by protective jurisdiction. *Id.* § 412, cmt. 3 (emphasis added).

In all of the instances where the Eleventh Circuit or the various Restatements have recognized the protective principle as providing a valid basis for the exercise of extraterritorial jurisdiction, the potentially adverse effect in the United States is obvious. The offender affirmatively seeks out, and interacts with, United States officials or United States documents in an attempt to enter the country under false pretenses (*e.g.*, by applying for a Visa at a U.S. Consulate) or in an attempt to obtain some other benefit in a foreign nation with the imprimatur of the United States (*e.g.*, by forging an official United States document while in a foreign country). *See, e.g.*, *United States v. Pizzarusso*, 388 F.2d 8, 9 (2d Cir. 1968) (defendant made false statements in visa application). They sign documents under penalty of perjury and are aware, or reasonably should be aware, that the provision of false information carries criminal consequences.

Conversely, in no instance has the protective principle of jurisdiction been applied to authorize the extraterritorial application of a general "false statement" offense, like section 2237(a)(2)(B). For good reason. Such an offense is fundamentally different than the types of offenses commonly cited as examples of cases in which the protective principle *does* apply. During a boarding of a foreign-flagged vessel on the high seas, like the Coast Guard's boarding of the *Jossette*, the *federal officials* initiate contact with foreign nationals. From the foreign nationals' perspective, their contact with the United States is pure happenstance, dependent on the fortuitous presence of federal officials in the same vicinity of the high seas. When responding to the federal officials' general questions regarding the destination of their vessels, the foreign

nationals are not sworn to tell the truth under penalty of perjury, nor would they have any reason to know that they are subject to United States law. Mr. Ferguson, for example, was standing on the deck of a Jamaican-flagged vessel on the high seas off the coast of Haiti. No one in Mr. Ferguson's position would reasonably understand that he was subject to criminal jeopardy in the United States when he allegedly responded to the Coast Guard's questions.

And, assuming for purposes of this motion that Mr. Ferguson made a material false statement when he allegedly told the Coast Guard "that the vessel's destination was the waters near the coast of Jamaica, where [he and his fellow crew members] intended to fish," when he "then and there well knew, the vessel's true destination was Haiti," (Ex. 4), it defies all conceivable logic to suggest that this false statement could have any potential adverse effect in the United States. This is especially true where, as here, the United States claims that Mr. Ferguson's intended destination was Haiti, and the Coast Guard observed, pursued, and then intercepted the *Jossette* while it was traveling *towards Haiti*. The United States cannot credibly argue that the facts set forth in the Information and Mr. Ferguson's factual proffer warrant application of the protective principle of jurisdiction because of their "potential adverse effect" in the United States.

Second, as set forth above, for the protective principle to apply, the conduct at issue, in addition to having "a potentially adverse effect [in the United States]," must also be "generally recognized as a crime by nations that have reasonably developed legal systems." *Gonzalez*, 776 F.2d at 939. Mr. Ferguson is aware of no other nation that has criminalized the making of false statements to government officers during a boarding of a vessel on the high seas regarding the vessel's destination. This apparent lack of consensus on the criminality of the proscribed conduct among nations that have reasonably developed legal systems is, standing alone, an independent

ground sufficient to show that the protective principle does not justify the United States criminalization of the conduct at issue here.

2. The Objective Principle Does Not Apply to Mr. Ferguson

Under the objective principle, "a vessel engaged in illegal activity intended to have an effect in a country is amenable to that country's jurisdiction." *Marino-Garcia*, 679 F.2d at 1380-81. The facts set forth in the Information and Mr. Ferguson's factual proffer provide no indication that the *Jossette* or Mr. Ferguson were engaged in any activity intended to have an effect in the United States, let alone illegal activity. When the Coast Guard intercepted the *Jossette*, that vessel was traveling in international waters toward Haiti. The only allegedly false statement Mr. Ferguson made had to do with the *Jossette*'s destination and, specifically, whether it was destined for Jamaica or Haiti. The United States, therefore, cannot justify Mr. Ferguson's prosecution and conviction based on the objective principle of jurisdiction.

3. Universal Jurisdiction Does Not Apply to Mr. Ferguson

Universal jurisdiction authorizes a state to criminalize only a limited subset of universally proscribed conduct "such as the slave trade or piracy." *Marino-Garcia*, 679 F.2d at 1381-82. General false statements statutes, like section 2287(a)(2)(B), do not address universally prohibited crimes like the slave trade or piracy. *See Bellaizac-Hurtado*, 700 F.3d at 1260-61 (Barkett, J., concurring) ("Although '[i]nternational criminal law evidences the existence of twenty-seven categories[,]' only the so-called *jus cogens* crimes of 'piracy, slavery and slave-related practices, war crimes, crimes against humanity, genocide, apartheid, and torture' have thus far been identified as supporting universal jurisdiction."). Accordingly, the United States was not authorized by universal jurisdiction principles to prosecute and convict Mr. Ferguson.

B. Mr. Ferguson's Conviction Violates the Original Understanding of the Define and Punish Clause[4]

The Define and Punish Clause "contain[s] three distinct grants of power": (1) "the power to define and punish piracies" (the Piracies Clause); (2) "the power to define and punish felonies committed on the high seas" (the High Seas Clause); and (3) "the power to define and punish offenses against the law of nations" (the Offences Clause). *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2012) (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-59 (1820)). Because the Clauses are distinct, they should be interpreted in such a way as to give each of them an independent effect—*i.e.*, an effect that grants Congress a non-redundant power to define and punish specific conduct not covered by the others. *See Marbury v. Madison*, 1 Cranch 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect."). Making a false statement to a federal officer is not an act of piracy, *see Bellaizac-Hurtado*, 700 F.3d at 1248 ("piracy is, by definition, robbery on the high seas"), nor is it an offense against the law of nations, *see id.* at 1251 ("the 'law of nations' . . . means customary international law"). To justify the constitutionality of Mr. Ferguson's conviction, the United States must, therefore, rely on the High Seas Clause. But the Framers' original understanding of that Clause does not support Mr. Ferguson's conviction.

Few courts have explored the limits placed on Congress's ability to legislate pursuant to the High Seas Clause. And it is now assumed—in this Circuit at least—that the High Seas Clause gives Congress the power to criminalize conduct occurring on the high seas even in cases where there is no nexus between the crime, its perpetrators and victims, and the United States. *See*

[4] Mr. Ferguson acknowledges that components of this argument are contrary to existing Eleventh Circuit precedent, *see Saac*, 632 F.3d at 1209; *Estupinan*, 453 F.3d at 1338-39, and that this Court is bound by that precedent. He makes this argument to preserve the issue for appellate review.

Saac, 632 F.3d at 1209 ("While there is a dearth of authority interpreting the scope of Congress's power under the High Seas Clause, early Supreme Court opinions intimate that statutes passed under the High Seas Clause may properly criminalize conduct that lacks a connection to the United States."). For the reasons that follow, this interpretation of the High Seas Clause is incorrect and contrary to the Framers' understanding of the Clause's limitations. The power conferred by the High Seas Clause can only be exercised when the proscribed conduct has a nexus to the United States. Because there was no such nexus here, Mr. Ferguson's conviction is unconstitutional.

To properly understand the limits of the High Seas Clause, the Court should first consider Congress's power pursuant to the Piracies Clause. At the time of the founding, "[p]iracy was the only [universal jurisdiction] offense" commonly recognized in international law, meaning it was the only offense "that a nation [could] prosecute . . . even though it [had] no connection to the conduct or participants." Eugene Kontorovich, "Beyond the Article I Horizon, Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes," 93 Minn. L. Rev. 1191, 1192, 1209 (2009); *see also United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (recognizing the "general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [the] offense [of piracy] against any persons whatsoever"); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-60 (1795) ("All piracies and trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation."). Accordingly, pursuant to its authority under the Piracies Clause, Congress could define and punish acts of piracy even in cases where the acts had no nexus to the United States. *See United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820) (recognizing that piracy "is considered as an offence within the criminal jurisdiction of all nations" because "[i]t is against

all, and punished by all"); *see also United States v. Dire*, 680 F.3d 446, 455 (4th Cir. 2012) (recognizing that "general piracy" punishable under the Piracies Clause "is created by international consensus" and is therefore "restricted in substance to those offenses that the international community agrees constitute piracy").

Congress's power under the Piracies Clause is not, however, unlimited. Piracy has a specific and commonly recognized definition—"robbery on the high seas." *Bellaizac-Hurtado*, 700 F.3d at 1248; *see also Furlong*, 18 U.S. (5 Wheat.) at 196-97. Congress cannot simply define any offense—such as making a false statement to the Coast Guard—as an act of piracy punishable without regard to its nexus (or lack thereof) to the United States. *See Dire*, 680 F.3d at 455 (favorably discussing distinction drawn by district court between "general piracy" punishable as a universal jurisdiction offense under the Piracies Clause and "municipal piracy" punishable under the High Seas Clause, the latter of which "is flexible enough to cover virtually any overt act Congress chooses to dub piracy," but "is necessarily restricted to those acts that have a jurisdictional nexus with the United States"). The Supreme Court made this limiting principle on Congress's power clear in *Furlong*. The Court held that the United States could not punish murder "committed by a foreigner upon a foreigner in a foreign ship." *Furlong*, 18 U.S. (5 Wheat.) at 197. In so holding, the Court relied on the "well-known distinctions between the crimes of piracy and murder, both as to the constituents and incidents." *Id.* at 196-97. According to the Court, murder, unlike the crime of piracy, "is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within [the] universal jurisdiction" of all nations. *Id.* at 197. Thus, the Court determined, "punishing [murder] when committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation, has not been acknowledged as a right, much less an obligation." *Id.* In other words, the "felony"

of murder was not a universal jurisdiction offense and could not be punished in this country absent a demonstrable nexus to the United States. *See Bellaizac-Hurtado*, 700 F.3d at 1249 (citing *Furlong* for the proposition "that Congress may not define murder as 'piracy' to punish it under the Piracies Clause").

The distinction relied on in *Furlong* between piracy and murder should control the Court's interpretation of the Piracies and High Seas Clauses. Congress has the authority to define and punish an act of piracy without regard to whether the act has a nexus to the United States, and it has the separate and distinct authority to define and punish additional, non-piracy felonies committed on the high seas to the extent those felonies have a nexus to the United States. *See* Kantorovich, "Beyond the Article I Horizon," 93 Minn. L. Rev. at 1251 ("In general, the Constitution does not empower Congress to legislate over foreigners in international waters or abroad. If Congress could do so, its powers would be unlimited."); *see generally United States v. Cardales-Luna*, 632 F.3d 731, 739-47 (1st Cir. 2011) (Torruella, J., dissenting). This interpretation gives both the Piracies Clause and the High Seas Clause independent, non-redundant meanings. The Piracies Clause applies to a limited subset of "felonies," but is expansive in its territorial reach. The High Seas Clause, conversely, covers the broad spectrum of felonies defined by Congress, but is limited by the nexus requirement, a requirement that does not constrain Congress when acting pursuant to the Piracies Clause.

Further, interpreting the High Seas Clause to incorporate a nexus requirement is consistent with founding-era practices implying such a limitation, which provides additional support for this interpretation. *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government . . . give meaning to the Constitution."); *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (reiterating that "postfounding practice is

entitled to 'great weight'" in interpreting the Constitution). Most notably, as detailed by Professor Eugene Kontorovich, "[i]n 1820 Congress went further than it or any other nation had ever gone before by declaring the slave trade a form of piracy punishable by death." Eugene Kontorovich, "The 'Define and Punish' Clause and the Limits of Universal Jurisdiction," 103 Nw. U. L. Rev. 149, 194 (2009). Although Congress "wanted to end the slave trade globally," it nevertheless cabined the reach of the statute to "only punish [the slave trade] to the extent that it had a demonstrable U.S. nexus." *Id.* Congress in 1820 recognized that its authority to criminalize conduct not traditionally understood to be piracy was limited. The fact that Congress did *not* extend its anti-slave trade statute to reach conduct regardless of its nexus to the United States is a strong indication that it perceived itself as lacking the authority under the Felonies Clause to do so. *See id.* at 196 ("In short, only if the conduct were a universally cognizable offense in international law did the [House Committee on the Slave Trade] feel it could cast a universal net.").

Mr. Ferguson is a foreign national. At the time the Coast Guard stopped him and his fellow crew members, they were lost on the high seas and the *Jossette* was heading towards Haiti.[5] The record is clear that Mr. Ferguson had no connection to the United States whatsoever. It is also clear that neither he nor any other member of the crew was engaged in an offense, like piracy or slave-trading, that can constitutionally be punished without such a nexus. Congress lacked the constitutional authority to criminalize Mr. Ferguson's statements to the Coast Guard,

[5] The fact that the *Jossette* was travelling towards Haiti at the time it was intercepted by the Coast Guard is demonstrably true. Although Mr. Ferguson pled guilty to making a false statement, he did not know where the *Jossette* was heading at the time of his interaction because he and his crew members had been blown off course in a storm and were lost. Regardless, Mr. Ferguson does not here challenge the factual basis for his plea that he made a material false statement to the Coast Guard.

and the Court, therefore, lacked jurisdiction to prosecute and convict Mr. Ferguson of violating 18 U.S.C. § 2237(a)(2)(B).

III. Mr. Ferguson's Conviction Violated the Due Process Clause

Mr. Ferguson's conviction also violated the Due Process Clause of the Fifth Amendment. In *Campbell*, the Eleventh Circuit reiterated that extraterritorial application of a federal statute criminalizing drug trafficking did not violate the Due Process Clause because "the [statute] *provides clear notice that all nations prohibit and condemn drug trafficking*." 743 F.3d at 812 (emphasis added); *see also Gonzalez*, 776 F.2d at 941 (statute did not violate due process because it criminalizes "conduct which is contrary to laws of all reasonably developed legal systems"). The same cannot be said for the crime of providing false information about a vessel's destination. Mr. Ferguson had no notice that he would be putting himself in jeopardy in the United States when he told the Coast Guard the *Jossette*'s "destination was the waters near the coast of Jamaica" after the Coast Guard intercepted the *Jossette* in international waters while it was traveling towards Haiti.

CONCLUSION

For all the foregoing reasons, Mr. Ferguson respectfully requests that the Court grant his motion under 28 U.S.C. § 2255 to vacate or set aside his conviction for knowingly providing a materially false statement to a federal law enforcement officer, during a boarding, while on board a vessel subject to the jurisdiction of the United States, in violation of 18 U.S.C. § 2237(a)(2)(B).

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Respectfully submitted,

By: /s/ Paul A. Shelowitz

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*Application for admission *pro hac vice* forthcoming

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CERTIFICATE OF SERVICE

I HEREBY certify that on July 12, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel identified below via U.S. mail.

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