UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Case No.: 19-CV-22901-UNGARO/O'SULLIVAN
Criminal Case No.: 17-CR-20877-UNGARO

PATRICK W. FERGUSON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOVANT'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE OR SET ASIDE CONVICTION

Movant Patrick W. Ferguson respectfully submits this reply memorandum of law in further support of his motion (Dkt. 1[1]) 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.

PRELIMINARY STATEMENT

Although the Court would never know it after reading the Government's opposition, Mr. Ferguson was not convicted of any drug-related offense, his conviction had nothing to do with the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501, *et seq.* ("MDLEA"), and the Government *admitted* that it would have required a miracle for it to prove the drug charges it initially brought against Mr. Ferguson. Instead, Mr. Ferguson pled guilty to providing false information about a vessel's destination. Congress lacks the constitutional authority to apply this "false information" statute extraterritorially to a foreign national. His motion should be granted.

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

A. The Territorial Principle Does Not Support Mr. Ferguson's Conviction

Lacking any textual basis in the Constitution to support the extraterritorial reach of section 2237(a)(2)(B), the Government primarily relies on application of the so-called "territorial principle" of jurisdiction as the constitutional basis supporting its prosecution of Mr. Ferguson. (*See* Dkt. 15 at 9-11.) But the record before the District Court when it accepted Mr. Ferguson's guilty plea contradicts the Government's current claims that Jamaica "consented or waived objection to the enforcement of United States law by the United States," and that the United States prosecuted Mr. Ferguson "under the bilateral Agreement Between the Government of the United States of America and the Government of Jamaica Concerning Cooperation in

[1] Unless otherwise indicated, citations to "Dkt." are to documents filed in 19-CV-22901.

Suppressing Illicit Maritime Drug Trafficking ('the Jamaica Bilateral Agreement'), State Dept. No. 98-57, 1998 WL 190434." (Dkt. 15 at 10-11.) The Information only charges that Mr. Ferguson was "on board a vessel subject to the jurisdiction of the United States" (Dkt. 1-4), and in his Factual Proffer, Mr. Ferguson and the Government agreed that "Jamaica . . . waived jurisdiction over the vessel" (Dkt. 1-6). The Government did *not* charge and Mr. Ferguson did *not* admit that Jamaica consented to application of United States law or that the United States was proceeding under the Jamaica Bilateral Agreement. *See* Jamaica Bilateral Agreement, art. 3, cl. 5, 1998 WL 190434 at *2 (for Jamaica Bilateral Agreement to apply, Jamaica must "waive its right to exercise jurisdiction and authorize the [United States] to enforce its laws against the . . . persons on board"). The Government's post-conviction attempt to alter its charging document and the agreed upon factual basis for Mr. Ferguson's guilty plea should be rejected. *See United States v. Peter*, 310 F.3d 709, 715 (11th Cir. 2002) (granting petition for issuance of writ of coram nobis where "the Government affirmatively alleged a specific course of conduct that is outside the reach of the [charged] statute").

Further, contrary to the Government's suggestion, the Eleventh Circuit has never held that the limits placed on Congress by the Define and Punish Clause's three distinct grants of power (including the High Seas Clause) can be overcome merely by relying on the consent of a foreign nation. The Eleventh Circuit held the exact opposite the one time it was presented with this question. In *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012), the Court held that Congress could not criminalize drug trafficking in the territorial waters of Panama because the Define and Punish Clause (specifically, the Offences Clause) did not authorize Congress to criminalize that conduct in foreign territories. According to a majority of the Court, it made no difference that Panama had consented to the prosecution because "Congress exceeded

its power, under the Offences Clause, when it proscribed the defendants' conduct in the territorial waters of Panama." *Id.* at 1258. Adopting the Government's argument would render *Bellaizac-Hurtado* a nullity. Regardless of whether a federal crime (such as the drug trafficking at issue in *Bellaizac-Hurtado*) occurred in the territorial waters of Panama, in the mountains of Bolivia, or on a foreign-flagged vessel on the high seas, according to the Government, once the foreign nation consents, the United States has jurisdiction to prosecute. *Bellaizac-Hurtado* rejected that outcome, and this Court should too.

Further the Government's proposed rule would eviscerate any limits imposed on Congress by the Define and Punish Clause. As Judge Barkett made clear in her special concurrence in *Bellaizac-Hurtado*, "[t]he government's argument that . . . authority [to proscribe conduct under Article I, Section 8, Clause 10 of the Constitution] can be supplied by another nation's consent to United States jurisdiction is without merit." *Id.* at 1162 (Barkett, J., concurring); *see also United States v. Cardales-Luna*, 632 F.3d 731, 741 (1st Cir. 2011) (Tourella, J., dissenting) (rejecting argument that Congress could prosecute "the conduct of Colombian nationals in Bolivia traveling over its mountain roads carrying a load of coca leaves destined for Peru . . . with the consent of Bolivia" because "Bolivia cannot grant Congress powers beyond those allotted to it by the Constitution"). Mr. Ferguson respectfully submits that the views expressed by Judge Barkett and Judge Tourella should be adopted.

B. The Universal and Protective Principles Do Not Support the Conviction

The Government also argues, in conclusory fashion, that section 2237(a)(2)(B) is constitutional under the universal and protective principles because "Section 2237 cross-references the MDLEA," which, according to the Government, "demonstrates that it was targeting, at least in part, conduct that facilitates universally condemned drug trafficking crimes." (Dkt. 15 at 13.) The mere fact that Congress defined the phrase "vessel subject to the jurisdiction

of the United States," as used in section 2237(a)(2)(B), by incorporating the definition of the identical phrase from the MDLEA, *see* 18 U.S.C. § 2237(e)(3), does not in any way support the Government's position.[2] There is nothing in the text of the statute or its legislative history to suggest that section 2237(a)(2)(B) was targeting drug trafficking crimes, or, more importantly, that providing false information about a vessel's destination facilitates drug trafficking. Accordingly, section 2237(a)(2)(B) is demonstrably different from the Drug Trafficking Vessel Interdiction Act of 2008, which the Eleventh Circuit upheld under the universal and protective principles based on "*Congress's findings* show[ing] that the [Act] targets criminal conduct that *facilities drug trafficking*." *United States v. Saac*, 632 F.3d 1203, 1210-11 (11th Cir. 2011) (emphasis added) (quoting congressional finding that the Act criminalized conduct that "facilitates transnational crime, including drug trafficking").

The lack of any connection between drug trafficking and section 2237(a)(2)(B) is readily apparent by the facts of this case. Although Mr. Ferguson was initially charged with a drug-related crime, the Government eventually admitted that "it would have required a miracle" to prove that marijuana that the Coast Guard recovered in the water a mile from where the Coast Guard stopped the *Jossette* was onboard that vessel, one which the Government admitted it "could not have pulled off." (Dkt. 1-10 at 24:4-7.) Mr. Ferguson's conviction cannot be sustained by some vague reference to a drug connection, especially where, as here, the Government admitted that it could not have proven that connection at trial.[3]

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[2] Mr. Ferguson assumes this is the "cross-reference" relied on by the Government. The Government did not elaborate on the so-called cross-reference and that is the only applicable reference to the MDLEA in section 2237.

[3] The Government claims that Mr. Ferguson's motion confuses the "universal principle" of jurisdiction with the "doctrine of universal jurisdiction," although the difference the Government believes exists between these two supposedly distinct concepts is unclear. (*See* Dkt. 15 at 11 n.6.) There is no distinction between the "universal principle" described by the Government, and

C. Mr. Ferguson's Charged Conduct has No Nexus to the United States

Mr. Ferguson agrees that binding precedent forecloses his argument "that the High Seas Clause only permits Congress to outlaw conduct on the high seas if that conduct has some nexus to the United States." (Dkt. 15 at 13.) But the Government is incorrect in arguing that a nexus "requirement would be satisfied in this case under the territorial principle of jurisdiction." (*Id.*) The argument is circular. The United States and Jamaica cannot agree for purposes of the U.S. Constitution that conduct with no nexus to the United States actually has one. And the only authority the Government cites in support of this argument relies on "the foreign flag nation's authorization to apply U.S. law to the defendants" *coupled with* "the congressional finding that drug trafficking aboard vessels threatens the security of the United States." (*Id.* at 13-14.) No such finding exists for section 2237(a)(2)(B). More fundamentally, as explained above, the Government and Mr. Ferguson agreed that Jamaica "waived jurisdiction over the vessel" (Dkt. 1-6), not that Jamaica authorized application of U.S. law to prosecute Mr. Ferguson. The Government cannot now change those agreed upon facts to cure defects in the record.

II. Mr. Ferguson's Conviction Violates the Due Process Clause

In his motion, Mr. Ferguson cited controlling Eleventh Circuit precedent setting forth the standards to be applied to his Due Process Clause challenge. (*See* Dkt. 1 at 20.) Specifically, in *United States v. Campbell*, 743 F.3d 802 (11th Cir. 2014), the Eleventh Circuit held that a statute criminalizing drug trafficking on the high seas did *not* violate the Due Process Clause because the statute in question "provides clear notice *that all nations* prohibit and condemn drug trafficking aboard stateless vessels on the high seas." *Id.* at 812 (emphasis added). And, in

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the doctrine of universal jurisdiction discussed in Mr. Ferguson's motion. Regardless, without conceding the point, even if drug trafficking *might* be covered by the "universal principle" because it "is condemned universally by law-abiding nations" (Dkt. 15 at 11), the same is not true of providing false information about a vessel's destination.

United States v. Gonzalez, 776 F.2d 931 (11th Cir. 1985), the Eleventh Circuit similarly held that a statute criminalizing "possession of marijuana on the high seas with intent to distribute" did *not* violate the Due Process Clause because the statute applied to "conduct which is contrary to laws of *all reasonably developed legal systems*." *Id.* at 941 (emphasis added).

Statutes criminalizing *drug trafficking* activities of foreign nationals on the high seas might be contrary to laws of all reasonably developed legal systems. But even if so, the same is not true of the only crime Mr. Ferguson was convicted of—providing false information about a vessel's destination. 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." (Dkt. 1 at 4.) The Government did not address the cases Mr. Ferguson cited, come forward with examples of other nations criminalizing comparable conduct, or otherwise challenge the actual grounds Mr. Ferguson relied on in support of his Due Process claim. Instead, it cited inapplicable or out-of-circuit case law and misleadingly quoted from the Eleventh Circuit's decision in *United States v. Rendon*, 354 F.3d 1320 (11th Cir. 2003). (*See* Dkt. 15 at 14-15.) Mr. Ferguson's Due Process claim should be granted.

First, the Government's reliance on *United States v. Batson*, 818 F.3d 651 (11th Cir. 2016), is misplaced. There, the Court rejected a Due Process challenge because the defendant's "contacts with the United States [were] 'legion.'" *Id.* at 669. Specifically, the Court cited numerous examples of the defendant's contacts with the United States, including that the defendant "resided in Florida," opened bank accounts in Florida, was arrested "in New York," "used a Florida driver's license and a United States passport to facilitate his criminal activities," trafficked at least one victim in the United States, and wired proceeds from his crimes "back to Miami." *Id.* at 669-70. Thus, the Court concluded, the defendant "used this country as a home

base and took advantage of its laws; he cannot now complain about being subjected to those laws." *Id.* at 670. In stark contrast to the defendant in *Batson*, Mr. Ferguson lacks any connection with the United States whatsoever apart from the fact that officers in the United States Coast Guard intercepted him on the high seas while he was traveling from Jamaica towards Haiti.

Second, the Government's reliance on non-binding, out-of-circuit cases to support its contention that a foreign nation's "consent[] to the application of United States law" cures any potential Due Process violation "because the flag nation's consent eliminates any concern that the application of United States law may be arbitrary or fundamentally unfair" is likewise misplaced. (Dkt. 15 at 14 (citing *United States v. Cardales*, 168 F.3d 548, 554 (1st Cir. 1999); *United States v. Perez Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002).) The *Eleventh Circuit* confronted this very question in *Gonzalez* and rejected the Government's apparent position that consent alone is enough to satisfy the Due Process Clause. There, the defendants, Honduran nationals, were convicted in the United States of trafficking marijuana, and they challenged their convictions under the Due Process Clause because they were caught while on the high seas. The Eleventh Circuit rejected the defendants' Due Process claims because Honduras consented to the prosecution *and* because the statute at issue criminalized "conduct which is contrary to laws of all reasonably developed legal systems." 776 F.2d at 941. Thus, under Eleventh Circuit case law, Jamaica's consent on its own is not enough to sustain Mr. Ferguson's conviction. The Government must also show that the making of false statements to a government official during a boarding of a vessel on the high seas is contrary to laws of all reasonably developed legal systems. The Government did not even attempt to make such a showing here.[4]

[4] It is not even clear that application of the law of the First and Third Circuits would compel a contrary result. *See Perez-Oveido*, 281 F.3d at 403 (relying on fact that "drug trafficking is condemned universally by law-abiding nations"); *United States v. Robinson*, 843 F.2d 1, 5 (1st

Finally, the Government misleadingly quotes *Rendon* to support its argument that "the text of the statute itself provides notice that the United States intends to enforce that law on vessels within its jurisdiction, including '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.'" (Dkt. 15 at 14-15.) According to the Government, *Rendon* stands for the proposition that Mr. Ferguson's Due Process claim should be rejected because "the 'statute provided clear notice' that the United States would exercise jurisdiction over his extra-territorial offense against the laws of the United States." (Dkt. 15 at 15.) But this quote is from a parenthetical explaining the *Rendon* court's reliance on *Gonzalez*: "[T]here was no due process violation when predecessor statute provided clear notice that drug trafficking aboard vessels was prohibited *and conduct prohibited was condemned by all nations*." *Rendon*, 354 F.3d at 1326 (emphasis added). The Government omitted the emphasized language from its opposition, language which reinforces Mr. Ferguson's principal Due Process claim—the fact that all nations do not criminalize the making of false statements to a government official during a boarding of a vessel on the high seas renders section 2237(a)(2)(B) unconstitutional.

III. Mr. Ferguson's Due Process Claim is Not Subject to Procedural Default

The Government's conclusory and unsupported argument that Mr. Ferguson's Due Process claim is subject to procedural default should be rejected. (*See* Dkt. 15 at 7.[5]) Mr. Ferguson's Due Process claim is based on the uncontested fact that, in the Eleventh Circuit, extraterritorial application of a federal statute must reach "conduct which is contrary to laws of all reasonably developed legal systems" to comport with the Due Process Clause. (Dkt. 1 at 20

Cir. 1988) (upholding convictions of Panamanian nationals, in part, because "[p]ossessing drugs is as illegal under the laws of Panama as it is under the laws of the United States") (Breyer, J.).

[5] The Government concedes that Mr. Ferguson's High Seas Clause claims are not defaulted.

(quoting *Gonzalez*, 776 F.2d at 941).) Because the making of false statements to a government official during a boarding of a vessel is not contrary to laws of all reasonably developed legal systems, its purported extraterritorial application is "void" and, therefore, Mr. Ferguson's alleged "procedural default could be excused under the fundamental miscarriage of justice exception because [he] is actually innocent of a crime where the underlying statute is without force or effect." *Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir. 1994); *see also Blackledge v. Perry*, 417 U.S. 21, 30 (1974) (Due Process Clause claim implicating "right not to be haled into court" reviewable in federal habeas proceeding despite guilty plea); *United States v. Walker*, 59 F.3d 1196, 1198 (11th Cir. 1995) (no waiver where charging statute was "void *ab initio*"). Moreover, Mr. Ferguson's Due Process claim is jurisdictional because it "can be resolved by examining the face of the indictment or the record at the time of [his] plea without requiring further proceedings" and because Mr. Ferguson argues that the Information and Factual Proffer "failed to charge a legitimate offense." *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011). And "jurisdictional defects . . . *cannot* be procedurally defaulted." *Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) (emphasis in original).

IV. Mr. Ferguson's Motion is Timely, or, in the Alternative, the Court Should Convert the Motion to a Petition for Issuance of a Writ of Error Coram Nobis

The Government does not dispute that Mr. Ferguson had 90-days from the date the Eleventh Circuit dismissed his appeal to seek certiorari review, nor does it dispute that, measured from that date, his motion is timely. Had Mr. Ferguson sought certiorari review in the Supreme Court, that Court would have had authority to review the entirety of his case. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.") Under these circumstances, the

Court should apply the general rule that Mr. Ferguson's one-year limitations period for filing a section 2255 motion did not begin to run until his time to seek Supreme Court review expired. *See Kaufmann v. United States*, 282 F.3d 1336, 1338 (11th Cir. 2002).

Alternatively, Mr. Ferguson respectfully requests that the Court convert his section 2255 motion to a petition for issuance of a writ of error coram nobis and grant the petition vacating his conviction. Mr. Ferguson's supervised release ended on July 13, 2019. (Dkt. 1-7, 1-11.) Accordingly, he is no longer in custody and has the ability to seek relief from his conviction via a coram nobis petition. *See Peter*, 310 F.3d at 712. His co-defendants Robert Weir, David Williams, and Luther Paterson have all filed a currently pending petition for issuance of writs of error coram nobis vacating their convictions, which raises substantively identical grounds for relief as Mr. Ferguson's section 2255 motion. (*See* Civil Case No. 1:19-cv-23420, Dkt. 1.) In the event the Court agrees that Mr. Ferguson's section 2255 motion is untimely, judicial economy would be served by converting Mr. Ferguson's motion now rather than requiring him to commence a new action seeking identical relief. *See Lewis v. United States*, 902 F.2d 576, 577 (7th Cir. 1990) (in case where federal sentence expired, the court "treat[ed] [the movant's] 2255 motion as if it were a motion for writ of coram nobis").

CONCLUSION

For all the foregoing reasons and the reasons set forth in his motion (Dkt. 1), Mr. Ferguson respectfully requests that the Court vacate or set aside his conviction.

Dated: September 10, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on September 10, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Paul A. Shelowitz