UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-22901-CV-UNGARO/O'SULLIVAN

PATRICK W. FERGUSON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION

THIS MATTER came before the Court on the movant, Patrick W. Ferguson's Motion under 28 U.S.C. § 2255 to Vacate or Set Aside Conviction and Incorporated Memorandum of Facts and Law in Support (DE# 1, 7/12/19). This matter was referred to Chief United States Magistrate Judge John J. O'Sullivan by the Honorable Ursula Ungaro for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). (DE# 4, 7/15/19). Having carefully considered this motion, the Government's Answer and Memorandum in Opposition to the Movant's Motion to Vacate Sentence under 28 U.S.C. § 2255 (DE# 15, 8/27/19), the petitioner's Reply Memorandum of Law in Further Support of Movant's Motion under 28 U.S.C. § 2255 to Vacate or Set Aside Conviction (DE# 16, 9/10/19), the court file and applicable law, the undersigned respectfully recommends that the petitioner's Motion under 28 U.S.C. § 2255 to Vacate or Set Aside Conviction and Incorporated Memorandum of Facts and Law in Support (DE# 1, 7/12/19) be DENIED.

Factual Background[1]

"On September 14, 2017, a United States Coast Guard cutter [("USCGC")] spotted the wake of a vessel [later identified as the *Jossette* WH 478,] speeding towards Haiti, from the direction of Jamaica." Factual Proffer (CR-DE# 61; DE# 1-6); see Criminal Complaint (CR-DE# 1, 10/18/17).[2] "The [USCGC] launched a small boat to investigate. When the USCG small boat closed the distance to the vessel down to several yards, the [*Jossette*] initially refused to stop. After the USCG small boat crew drew their weapons and the crew of the [*Jossette*], the [movant and his crew mates], observed the drawn weapons, the vessel stopped." Id. During the pursuit of the *Jossette*, USCG personnel observed the crew of the *Jossette* jettison approximately 20-25 bales of suspected contraband that had been on deck.[3] After USCG crew drew their weapons and the crewmembers of the vessel observed the drawn weapons, the *Jossette* stopped in international waters approximately 13 nautical miles off the coast of Navassa Island. See Probable Cause Affidavit ¶ 5 attached to the Criminal Complaint (CR-DE# 1, 10/18/17).

While alongside the *Jossette*, USCG personnel observed five crewmembers including the movant. Id. at ¶ 6. As part of the boarding process, USCG personnel questioned the members of the crew. One individual claimed that the vessel was

[1] In the underlying criminal case, the government made a Factual Proffer asserting facts that "[i]f the matter proceeded to trial the Government would have proved beyond a reasonable doubt." Factual Proffer (CR-DE# 61, 1/4/18); (DE# 1-6, Exhibit 8; 7/12/19). The movant and his attorney signed the Factual Proffer and agreed with the facts contained in the Factual Proffer. Id.; see Transcript of Plea Colloquy and Sentencing Proceedings on January 3, 2018 at pp. 19-20. (DE# 93, 5/18/18).

[2] References to the docket entries in the underlying criminal case, *United States v. Robert Dexter Weir, Patrick W. Ferguson, et al.*, Case No. 17-cr-20877-Ungaro, will be designated "CR-DE#__."

[3] At sentencing, the United States acknowledged that the United States Coast Guard performed an ion scan to "test for illicit substances onboard the vessel," which tested negative for marijuana. Transcript of Plea Colloquy and Sentencing Proceedings (CR-DE# 93 at 23:23-25; 24; 1-4); (DE# 1-10 at 23:23-25; 24:1-4).

Jamaican, and that the vessel was registered in Jamaica. Factual Proffer (CR-DE# 61; DE# 1-6). When the USCG personnel contacted Jamaica, Jamaica confirmed the registration of the vessel and authorized the USCG to board and search the *Jossette*. Id. Jamaica later waived jurisdiction over the *Jossette*. Id. The vessel was subject to the jurisdiction of the United States. Id.

"When asked about the destination of the vessel, each of the members of the crew, including the [movant,] told the [USCG] 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 the [movant,] then and there well knew, the vessel's true destination was Haiti." Id. The crew members were transferred to the small USCG vessel for their safety and subsequently transferred to the USCGC. Probable Cause Affidavit ¶ 9 attached to the Criminal Complaint (CR-DE# 1, 10/18/17). The movant and his crewmates were brought from outside the United States to the Federal Detention Center in Miami, Florida. Id. at ¶ 10. The movant is a Jamaican national. Id. at ¶ 9.

Procedural Background

The movant and his co-defendants were originally charged by way of Criminal Complaint with conspiring to possess with intent to distribute 100 kilograms or more of marijuana, in violation of 46 U.S.C. §§ 70503(a)(1) and 70506, the Maritime Drug Law Enforcement Act ("MDLEA"). Criminal Complaint (CR-DE# 1; 10/18/17). The movant later waived indictment (CR-DE# 46, 12/13/17) and was charged, along with his four co-defendants, by way of an Information with knowingly providing a materially false statement to a Federal law enforcement officer during a boarding while on a vessel

subject to the jurisdiction of the United States, in violation of 18 U.S.C. § 2237(a)(2)(B) Information (CR-DE# 43, 12/12/17).

On January 3, 2018, pursuant to a written Plea Agreement (CR-DE# 60, 1/3/18) and Factual Proffer (CR-DE# 61, 1/3/18), the movant pled guilty to the Information. See Transcript of Plea Colloquy and Sentence Proceedings (CR-DE# 93, 5/18/18). On January 3, 2018, in accordance with the parties' joint recommendation (CR-DE# 60 ¶ 7), the Court sentenced the movant to a term of ten (10) months of imprisonment, to be followed by a term of one (1) year supervised release. See Judgment (CR-DE# 69, 1/10/18); and Transcript of Plea Colloquy (CR-DE# 93, 5/18/18).

The Judgment was docketed by the Clerk of the Court on January 10, 2018. (CR-DE# 69, 1/10/18). Eleven (11) weeks later, the movant filed a *pro se* notice of appeal on March 27, 2018 (CR-DE# 80, 3/27/18), which was docketed by the Clerk of the Court on March 30, 2018. The movant's court-appointed attorney filed a motion to withdraw (CR-DE# 82). At the April 10, 2018 hearing on the motion to withdraw, the movant advised the Court that he did not want to appeal his conviction or sentence and that he wanted to withdraw his *pro se* notice of appeal. See Order (CR-DE# 87, 4/10/18). The Court denied as moot the attorney's motion to withdraw. Id. On April 24, 2018, pursuant to the movant's motion for voluntary dismissal, the Eleventh Circuit dismissed the appeal. (CR-DE# 89, 4/24/18).

On July 13, 2018, the movant was released from custody (DE# 1-11, 7/12/19), and subsequently removed from the United States to Jamaica on August 30, 2018. While residing outside the United States, the movant's supervised release is "non-reporting," but if the movant "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 [his] arrival." (DE# 1-7, 7/12/19).

On July 12, 2019, the movant filed the subject motion for habeas relief. (DE# 1, 7/12/19).

On July 13, 2019, the movant's sentence expired.

On August 27, 2019, the government filed its response in opposition to the movant's motion for habeas relief. (DE# 15, 8/27/19).

On September 10, 2019, the movant filed his reply. (DE# 16, 9/10/19). In his reply, the movant requested the Court to treat his habeas motion as a petition for writ of coram nobis because he is no longer in custody due to the expiration of his sentence on July 13, 2019.

The motion is ripe for disposition.

LEGAL ANALYSIS

I. Standard of Review

A. Habeas Relief under 28 U.S.C. § 2255

A prisoner seeking post-conviction relief by filing a motion to vacate, set aside, or correct the sentence must allege as a basis for relief that: (1) the sentence was imposed in violation of the Constitution or laws of the United States, (2) the court was without jurisdiction to impose such sentence, (3) the sentence was in excess of maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C.A. § 2255.

B. Coram Nobis Relief

The Supreme Court held that coram nobis relief is available in federal court. United States v. Morgan, 346 U.S. 502, 511-12 (1954). The All Writs Act authorizes federal courts to grant a writ of coram nobis. See, United States v. Denedo, 556 U.S. 904, 911 (2009) (citing 28 U.S.C. § 1651(a)). In Morgan, the Supreme Court explained that "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." Morgan, 346 U.S. at 511. "[C]oram nobis included errors 'of the most fundamental character.'" Id. at 512 (quoting United States v. Mayer 235 U.S. 55, 67-69 (1914)) (footnote omitted). The Supreme Court explained that "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate.'" Carlisle v. United States, 517 U.S. 416, 429 (1996) (quoting United States v. Smith, 331 U.S. 469, 475 n.4 (1947)).

The Eleventh Circuit recognizes that "the bar for coram nobis relief is high." Alikhani v. United States, 200 F.3d 732, 734 (11th Cir. 2000). Coram nobis relief is appropriate only when: (1) "there is no and was no other available avenue of relief;" and (2) "the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." Id. (citing Morgan, 346 U.S. at 512; Moody v. United States, 874 F.2d 1575, 1576-78 (11th Cir. 1989)); see United States v. Peter, 310 F.3d 709, 715 (11th Cir. 2002) (reversing district court's dismissal of Peter's coram nobis petition after sentence expired where subsequent Supreme Court decision held that conduct to which Peter

pled guilty did not constitute a crime). In Peter, the Eleventh Circuit explained that "[coram nobis relief affords a procedural vehicle through which [jurisdictional] error may be corrected." United States v. Peter, 310 F.3d 709, 715

"[C]ourts may consider coram nobis petitions only where no other remedy is available and the petitioner presents sound reasons for failing to seek relief earlier." United States v. Mills, 221 F.3d 1201, 1204 (11th Cir. 2000) (citing Morgan,346 U.S. at 512) (footnote omitted); see United States v. Brown, 117 F.3d 471, 475 (11th Cir. 1997) (finding that "[b]ecause Brown was in custody within the meaning of § 2255 when he filed his petition in the district court, coram nobis relief was unavailable to him, and § 2255 was his exclusive remedy").

II. Movant Is Not Entitled to Habeas Relief or Coram Nobis Relief

A. Untimely Habeas Claims

The movant filed his habeas motion on July 12, 2019. Habeas motions under Section 2255 are subject to a one-year statute of limitations that runs from the latest of four specified dates. 28 U.S.C. § 2255(f). In the present case, the only relevant date is "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). The Supreme Court explained that "[b]y 'final', we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987); see also Clay v. United States, 537 U.S. 522 (2003); and Kaufman v. United States, 282 F.3d 1336 (11th Cir. 2002). "In most cases, a judgment of conviction becomes final when the time for filing a direct appeal expires... For federal prisoners, the time for filing a direct appeal expires [fourteen] days after the

written judgment of conviction is entered on the criminal docket." Ramirez v. United States, 146 Fed. App'x 325, 326 (11th Cir. 2005) (unpublished).

The parties argue that the movant's judgment of conviction became final on two different dates that are six months apart. The government argues the judgment became final on January 24, 2018, fourteen (14) days after the Court docketed the judgment of conviction and the deadline within which to file a timely notice of appeal. See Fed. R. App. P. 4(b)(1). The movant argues the judgment became final on July 23, 2018, ninety (90) days after the Eleventh Circuit dismissed his appeal which was filed late.

The Court docketed the movant's judgment of conviction on January 10, 2018. The fourteen-day deadline to file a notice of appeal expired on January 24, 2081. More than two months later, the movant filed his *pro se* notice of appeal on March 27, 2017, which was docketed on March 30, 2017. Pursuant to the movant's motion for voluntary dismissal, the Eleventh Circuit dismissed the appeal on April 24, 2018. Generally, a petition for certiorari must be filed within the ninety-day period following a determination by the appellate court. The movant did not file a petition for certiorari. The movant contends that July 23, 2018 is the date his judgment of conviction became final because it is ninety days after the Eleventh Circuit dismissed his appeal. The movant argues that his July 12, 2019 habeas motion is timely because he filed it less than one year after his judgment of conviction became final. See 28 U.S.C. § 2255. None of the cases upon which the movant relies addresses the ninety-day period for certiorari in the context of an untimely direct appeal. The movant's cases are factually distinguishable and inapposite.

The government maintains that the movant cannot extend the period within which to seek certiorari review from an untimely filed notice of appeal. The undersigned agrees. The government relies on cases from the Fifth, Sixth and Tenth Circuits to support its position. See, Gillis v. United States, 729 F.3d 641, 644 (6th Cir. 2013) (citing Sanchez-Castellano v. United States, 358 F.3d 424, 427 (6th Cir. 2004)); United States v. Plascencia, 537 F.3d 385, 387-90 (5th Cir. 2008) (finding that judgment became final when the deadline to file a timely notice of appeal expired rather than 90 days after the Court of Appeals dismissed the untimely notice of appeal); United States v. Terrones-Lopez, 447 Fed. App'x 882, 885 (10th Cir. 2011) (unpublished) ("Defendant's untimely notices of appeal did not delay the onset of the limitations period" under Section 2255(f).) While the government's cases are not binding precedent, the undersigned finds the reasoning of the Fifth, Sixth and Tenth Circuits persuasive. The parties have not cited and the undersigned has not found an Eleventh Circuit decision on point.

The movant does not address the government's argument or distinguish the government's cases that the movant's judgment of conviction became final on January 24, 2018, when the fourteen-day period to file a timely notice of appeal expired. Fed. R. App. P. 4. Instead, the movant argues that the government does not dispute that his habeas motion was filed within 90 days of the Eleventh Circuit's dismissal of his appeal, that is the period within which to seek certiorari review.

None of the cases cited in movant's Reply address the issue presented here: when does the one-year statute of limitations for a habeas petition commence if the

notice of appeal was not filed timely. Because the cases were raised in movant's reply, the government did not have an opportunity to address the cases.

The movant's reliance on Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) and Kaufman v. United States, 282 F.3d 1336, 1338 (11th Cir. 2002) is misplaced. In Garvey, the Supreme Court rejected the appellee's argument that it could not consider issues resolved in the underlying *Garvey I* decision. The Supreme Court explained that the petition for a writ of certiorari was timely filed for it to consider *Garvey II* and that the Supreme Court is authorized to "consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent judgments of the Court of Appeal." Garvey, 532 U.S. at 508 n.1. Garvey is inapposite. Garvey does not address the situation presented here where the underlying notice of appeal was filed untimely.

Kaufman is also inapposite. In Kaufman, the Eleventh Circuit "[held] that a 'judgment of conviction becomes final' within the meaning of § 2255 as follows: (1) if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for filing such a petition expires." Kaufman, 282 F.3d at 1339. Kaufman does not address the issue of finality when a petitioner fails to file a timely notice of appeal.

Alternatively, the movant relies on United States v. Peter, 310 F.3d 709, 712 (11th Circ. 2002), to support his argument that he may seek relief from his conviction via a coram nobis petition because he is no longer in custody. Peter is factually distinguishable. Peter pled guilty and never appealed his conviction. After Peter's

sentence expired the Supreme Court decided Cleveland v. United States, 531 U.S. 12 (2000), and held that "the conduct with which [the defendant] was charged is not proscribed by the statute he was convicted of violating." Id. at 710 (citing Cleveland v. United States, 531 U.S. 12 (2000)). Peter argued that Cleveland "established that the acts forming the basis of his guilty plea did not constitute the predicate crime of mail fraud." Id. at 711. In Peter, the Eleventh Circuit held that "a writ of coram nobis must issue to correct a judgment that the court never had power to enter." Id. at 716.

Unlike Peter, the movant does not rely on an intervening Supreme Court decision to support his position that his conviction should be vacated. Peter does not address the issue of "finality" regarding his conviction and the timeliness of seeking habeas relief. In the present case, the movant failed to file a timely notice of appeal. The movant's judgment of conviction became final on January 24, 2018. The movant filed his habeas motion on July 12, 2019, more than five months late. The undersigned finds that the movant's habeas petition is untimely and should be dismissed as time-barred.

B. Alternative Request for Writ of Coram Nobis Is Not Available

In his Reply, the movant alternatively requests that this Court treat his habeas motion as a petition for issuance of a writ of coram nobis because the movant's sentence expired on July 13, 2019, the day after he filed his habeas motion. Reply at 11 (DE# 16, 9/10/19). "The writ of coram nobis is an extraordinary writ, limited to cases in which 'no statutory remedy is available or adequate.'" United States v. Brown, 117 F.3d 471, 474-475 (11th Cir. 1997) (quoting Lowery v. United States, 956 F.2d 227, 228-29 (11th Cir. 1992) (citations and internal quotation marks omitted)). In Brown, the Eleventh Circuit found that "[b]ecause Brown was in custody within the meaning of §

2255 when he filed his petition in the district court, coram nobis relief was unavailable to him, and § 2255 was his exclusive remedy". Id. at 475.

Likewise, coram nobis relief is unavailable in the present case because the movant's habeas motion was filed before the movant's supervised release portion of his sentence expired. See, Jones v. Cunningham, 371 U.S. 236, 240-43 (1963); Brown, 117 F.3d at 475 ("conclud[ing] that, as a person serving a term of supervised release, Brown was 'in custody' within the meaning of § 2255 when he filed his petition in the district court"). In Brown, the Eleventh Circuit construed Brown's *pro se* coram nobis petition as a § 2255 motion. Id. Similarly, in the present case, coram nobis is unavailable and § 2255 is the movant's exclusive remedy irrespective of whether it is time-barred.

Additionally, although the Supreme Court in Carlisle found that a writ of coram nobis must issue in that case, the Supreme Court acknowledged that "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate.'" Carlisle v. United States, 517 U.S. 416, 429 (1996) (quoting United States v. Smith, 331 U.S. 469, 475 n.4 (1947)); see Lowery v. United States, 956 F.2d 227, 229 (11th Cir. 1992) (same). Because the movant's sentence expired after the movant filed his habeas motion, habeas relief was the movant's exclusive remedy. A writ of coram nobis is not available. Additionally, the movant has not provided "sound reasons for failing to seek relief earlier." United States v. Mills, 221 F.3d 1201, 1204 (11th Cir. 2000) (citing Morgan, 346 U.S. at 512) (footnote omitted); see Brown, 117 F.3d at 475. This Court should deny the movant's alternative request to treat his habeas motion as a petition for issuance of a writ of coram nobis.

C. Procedurally Barred Claims

The government argues that the movant's claims are procedurally barred because he did not raise any of the claims raised in his habeas motion with this Court in the underlying criminal action or on direct appeal. Response at 6-7 (DE# 15, 8/27/19); Massaro v. United States, 538 U.S. 500, 504 (2003); Murray v. Carrier, 477 U.S. 478, 490-92 (1986). "Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." Lynn v. United States, 365 F.3d 1225, 1234 (11th Cir. 2004) (citations omitted); Mills v. United States, 36 F.3d 1052, 1056 (11th Cir. 1994). Generally, the procedural default rule "applies to all claims, including constitutional claims." Id. "Where the petitioner—whether a state or federal prisoner—failed to properly raise his claim on direct review, the writ is available only if the petitioner establishes cause for the waiver and shows actual prejudice resulting rom the alleged violation." Reed v. Farley, 512 U.S. 339, 354 (1994) (internal quotation marks, punctuation and citations omitted); Lynn, 365 F.3d at 1234.

To avoid the procedural bar regarding his constitutional claims, the movant must establish one of two exceptions. The first exception requires the movant to show cause for not raising the claim of error on direct appeal *and* actual prejudice from the alleged error. Lynn, 365 F.3d at 1234 (citing Bousley v. United States, 523 U.S. 614, 622 (1998)); Mills, 36 F.3d at 1055; (other citations omitted)). The second exception applies if "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Mills, 36 F.3d at 1055 (quoting Murray, 477 U.S. at 496) (other citations omitted).

The government maintains that the movant cannot overcome the procedural default of his due process claim because the movant cannot show cause and prejudice for his failure to raise the due process claim on direct appeal and he is not innocent of the offense conduct. The government argues that the movant does not establish cause, prejudice or innocence.

The movant contends that his 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 the Information and Factual Proffer "failed to charge a legitimate offense." Response at 10 (DE# 16, 9/10/19) (quoting United States v. Saac, 632 F.3d 1203, 1208 (11th Cir. 2011)). The Saac decision does not address procedural default. Rather, in Saac, the Eleventh Circuit determined that "[a] defendant's claim that the indictment failed to charge a legitimate offense is jurisdictional and is not waived by pleading guilty. Id. (citations omitted). "[A] jurisdictional defect cannot be waived or procedurally defaulted and … a defendant need not show cause and prejudice to show his failure to raise [a jurisdictional defect]." Howard v. United States, 374 F.3d 1068, 1071 (11th Cir. 2004) (citation omitted); see Harris v. United States, 149 F.3d 1304, 1308 (11th Cir. 1998). The undersigned finds that the movant's due process claim based on a jurisdictional defect is not procedurally barred.

D. Merits

Even if the Court finds that the movant's habeas motion was filed timely, this Court should deny habeas relief on the merits. The movant raises two claims as to why Section 2237(a)(2)(B) is not a valid exercise of Congressional authority under the

Felonies Clause of the United States Constitution. First, the United States' exercise of extraterritorial jurisdiction under the Felonies Clause must be supported by a principle of extraterritorial jurisdiction recognized by customary international law. Second, Congress' authority to define and punish felonies on the high seas is limited to instances where the conduct subject to punishment has a nexus to the United States.

The government argues that the movant's first claim fails because the exercise of extraterritorial jurisdiction is supported by principles of international law. The movant concedes that his second claim is foreclosed by binding Eleventh Circuit precedent. See Motion at 3, 8-9 (DE# 1, 7/12/19) ("The Eleventh Circuit's prior interpretation of the High Seas Clause rejecting [the nexus requirement for defining and punishing felonies] is incorrect and should be overruled. Mr. Ferguson advances this argument to preserve it for appellate review.") The undersigned will not address the movant's nexus argument because binding Eleventh Circuit precedent rejects it. See United States v. Campbell, 743 F.3d 802, 809-810 (11th Cir. 2014) and cases cited therein; see also 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.") and United States v. Suerte, 291 F.3d 366, 373 (5th Cir. 2002) (discussing early cases and legislation). In Saac, the Eleventh Circuit stated that "[t]his Court, and our sister circuits, have refused to read a jurisdictional nexus requirement into the [High Seas Clause.]" Saac, 632 F.3d at 1210.

1. Section 2237(a)(2)(B) Comports with Principles of International Law and Is Constitutional

The Define and Punish Clause "empowers Congress '[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.'" U.S. Const. Art. 1, § 8, cl. 10. The movant argues that Congress lacked the constitutional authority under the Define and Punish Clause to criminalize the movant's false statements to the United States Coast Guard, and that the Court lacked jurisdiction to prosecute and convict the movant of violating 18 U.S.C. § 2237(a)(2)(B).

Section 2237(a)(2)(B) provides that "[i]t shall be unlawful for any person on board a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to … 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) (emphasis added).

Section 2237(e)(3) provides that "the term 'vessel subject to the jurisdiction of the United States' has the meaning given the term in Section 70502 of title 46." Section 70502, the definition section of the Maritime Drug Law Enforcement Act ("MDLEA"), defines "vessel subject to the jurisdiction of the United States" to include "a vessel registered to a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States." 18 U.S.C. § 70502(c)(1)(C). Section 2237(a)(2)(B) criminalizes conduct that obstructs the United States Coast Guard's ability to enforce the MDLEA and incorporates its assertion of extra-territorial jurisdiction.

The government argues that the movant's constitutional challenge is without merit. The government argues further that "[t]he Supreme Court has interpreted the

Define and Punish Clause of the Constitution to contain three distinct grants of power: to define and punish piracies; to define and punish felonies committed on the high seas, and to define and punish offenses against the law of nations." United States v. Campbell, 743 F.3d 802, 805 (11th Cir. 2014) (citing United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1248 (11th Cir. 2012)). As in Campbell, the government maintains that the second grant of power, to define and punish felonies committed on the high seas, is at issue in the present case.

The parties agree that although the Felonies Clause empowers Congress to define and punish felonies committed on the high seas outside the jurisdiction of the United States, "international law generally prohibits countries from asserting jurisdiction over foreign vessels on the high seas … subject to recognized exceptions." United States v. Marino-Garcia, 679 F.2d 1373, 1380 (11th Cir. 1982). The movant focuses on three of the recognized exceptions: (1) the protective principle of jurisdiction; (2) the objective principle of jurisdiction; and (3) universal jurisdiction. See Motion at 11-15 (DE# 1, 7/12/19). The government contends that a fourth exception, the territorial principle of jurisdiction, which the movant does not address in his motion, is the most relevant.

The government argues that in the present case, the United States exercised jurisdiction over the vessel and its occupants with the consent of the flag nation. Answer at 10 (DE# 15, 8/27/19). "It is clear, under international law's 'territorial principle,' that a 'state has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent provided by international agreement with the other state." United States v. Robinson, 843 F.2d 1, 4 (1st Cir. 1988) (citing *Restatement*

(Second) of Foreign Relations Law of the United States § 25 91965); see also United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1379 n.6 (11th Cir. 2011); United States v. Suerte, 291 F.3d 366, 370-71 (5th Cir. 2002); United States v. Cardales, 168 F.3d 548 553 (1st Cir. 1999). The international agreement does not require a treaty but can be reached "through informal, as well as formal means." Robinson, 843 F.2d at 4 (citing *Restatement (Second)* § 115 & comment a). Section 2237(a)(2)(B) adopts the definition of "vessel subject to jurisdiction of the United States" as provided in 46 U.S.C. § 70502, the definitions section of the Maritime Drug Law Enforcement Act ("MDLEA"). The relevant definition in the present case is "a vessel registered in a foreign nation if that nation consents to the enforcement of United States law by the United States." 46 U.S.C. § 70502(c)(1)(C); see Suerte, 291 F.3d at 375-76 (explaining that the subject definition in the MDLEA "codifies the … generally accepted principle of international law: a flag nation may consent to another's jurisdiction") (citing *Restatement (Third) of Foreign Relations Law of the United States* § 522 reporters note 8 and Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3-12 n.41 (3d ed. 2001)).

In the present case, the movant stipulated that: 1) the *Jossette* was a Jamaican-registered vessel; 2) Jamaica authorized the United States to board and search the vessel; 3) Jamaica waived jurisdiction over the vessel; and 4) the vessel was subject to the jurisdiction of the United States. Factual Proffer (CR-DE# 61, 1/4/18); see Plea Agreement ¶ 1 (CR-DE# 60; 1/4/19) ("The defendant agrees to plead guilty to the sole count of the information, which charges the defendant with providing materially false information to a federal law enforcement officer during a boarding of a vessel subject to

the jurisdiction of the United States, in violation of Title 18, United States Code, Section 2237(a)(2)(B).").

The government maintains that the MDLEA enforcement process was conducted under the bilateral Agreement Between the Government of the United States of America and the Government of Jamaica Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking ("the Jamaica Bilateral Agreement"), State Dept. No. 98-57, 1998 WL 190434 (March 10, 1998). Pursuant to the Jamaica Bilateral Agreement, Jamaica and the United States "cooperate in combatting illicit maritime drug traffic to the fullest extent possible…." Jamaica Bilateral Agreement, art. 1, 1998 WL 190434; see United States v. Gonzalez, 776 F.2d 931, 939 (11th Cir. 1985) ("Apparently, foreign nations such as Honduras recognize the reasonableness of current United States enforcement efforts, for consent has been given.").

In the present case, the government argues that the United States exercised its jurisdiction under the territorial principle. See Cardales, 168 F.3d at 553 (finding the United States' exercise of jurisdiction over a Venezuelan vessel consistent with the territorial principle of international law where the Venezuelan government authorized the United States to apply United States law to the persons on board); see also Robinson, 843 F.2d at 4; Suerte, 291 F.3d at 375-76.

In his reply, the movant argues that the record before the District Court when it accepted the movant'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 the movant "under the bilateral Agreement Between the Government of the United States of America and the

Government of Jamaica Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking ('the Jamaica Bilateral Agreement'), State Dept. No. 98-57, 1998 WL 190434." Although the movant readily admits that he pled guilty to the fact that he "was on board a vessel subject to the jurisdiction of the United States" and that "Jamaica waived jurisdiction over the vessel," he argues that he did not admit that Jamaica consented to the application of United States law or that the United States was proceeding under the Jamaica Bilateral Agreement. Reply at 3 (DE# 16, 9/10/19) (emphasis added) (citing 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 undersigned finds that the territorial principle applies and subjected the *Jossette* to the jurisdiction of the United States when it was boarded by the United States Coast Guard in international waters.

The movant's reliance on United States v. Peter, 310 F.3d 709, 715 (11th Cir. 2002), and United States v. Bellaizac-Hurtado, 700 F.3d 1245 (11th Cir. 2012), is misplaced. Peter and Bellaizac-Hurtado are factually distinguishable.

In Peter, the petitioner pled guilty to violating the Racketeer Influenced and Corrupt Organizations Act (RICO). The plea agreement expressly provided that mail fraud based on misrepresentations in license applications he mailed to the Florida Division of Alcoholic Beverages and Tobacco was the sole predicate crime supporting the RICO conspiracy conviction. Six months after Peter's sentence expired, the Supreme Court decided Cleveland v. United States, 531 U.S. 12. "In Cleveland, the Supreme Court held that the offense of mail fraud … requires that the object of the fraud

'be property in the hands of the victim. State and municipal licenses in general … do not rank as 'property,' for purposes of § 1341, in the hands of the official licensor.'" Peter, 310 F.3d at 711 (quoting Cleveland, 531 U.S. at 15). The Eleventh Circuit found that "the facts to which Peter pled guilty did not constitute a crime under *Cleveland*." Id. The Eleventh Circuit explained that "[d]ecisions of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect." Id. (citation omitted). In Peter, the Eleventh Circuit held that "a writ of coram nobis must issue to correct the judgment that the court never had the power to enter." Id. at 716. Peter is inapposite.

Unlike Peter, there has been no subsequent Supreme Court decision holding that the offense conduct does not constitute a crime. The movant admitted that he was on onboard a "vessel subject to the jurisdiction of the United States." The relevant MDLEA definition of "vessel subject to the jurisdiction of the United States" is "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." 18 U.S.C. § 2237(a)(2)(B), cross-referencing 46 U.S.C. § 70502(c)(1)(C). The Factual Proffer and the Plea Agreement implicitly included the meaning of that statutory phrase. By pleading guilty to the charge in the Information and stipulating to the facts of the Factual Proffer, the movant admitted that he was subject to the jurisdiction of the United States.

The movant's reliance on Bellaizac-Hurtado is misplaced. Bellaizac-Hurtado is factually distinguishable and inapposite. Bellaizac-Hurtado did not involve Congress's exercise of authority under the Felonies Clause. In Bellaizac-Hurtado, the Eleventh Circuit addressed "whether Congress has the power under the Offences Clause to

proscribe drug trafficking in the territorial waters of another nation." Bellaizac-Hurtado, 700 F.3d 1245, 1249 (11th Cir. 2012). The Eleventh Circuit held Congress did not and held "[t]he power to 'define' offenses against the law of nations does not grant Congress the authority to punish conduct that is not a violation of the law of nations." Id. By contrast, the Felonies Clause is not limited to "offenses against the laws of nations." In Bellaizac-Hurtado, the Eleventh Circuit acknowledged that "Congress possesses additional constitutional authority to restrict conduct on the high seas, including the Piracies Clause; the Felonies Clause; and the admiralty power. And [the Eleventh Circuit] ha[s] always upheld extraterritorial convictions under our drug trafficking laws as an exercise of power under the Felonies Clause." Id. at 1257 (internal citations omitted).

Unlike Bellaizac-Hurtado, the movant's offense conduct in the present case occurred on the high seas, in international waters, not within the territorial waters of another State (e.g. Jamaica). The movant's conviction is constitutional under the Felonies Clause, which empowers the United States to criminalize conduct on the high seas.

The undersigned rejects the movant's arguments because the territorial principle applies. In the present case, there is a valid exercise of the United States jurisdiction pursuant to Section 2237(a)(2)(B). The undersigned finds it unnecessary to address the government's additional arguments regarding applicability of the universal principle and the protective principle. The Court should deny habeas relief because the movant's conviction under Section 2237(a)(2)(B) is constitutional.

2. Movant's Conviction Did Not Violate Due Process

The movant argues that his conviction violates the Due Process Clause of the Fifth Amendment because he "had no notice that he would be putting himself in jeopardy in the United States" when he provided materially false information to the United States Coast Guard regarding the destination of the *Jossette* while in international waters. Motion at 21 (DE# 1, 7/12/19). The crux of the movant's argument is that unlike drug trafficking which is "'conduct which is contrary to laws of all reasonably developed legal systems'" providing materially false information about a vessel's destination in international waters is not. Id. The movant's due process argument lacks merit.

The movant relies on two cases that are factually distinguishable and inapposite. In United States v. Campbell, 743 F.3d 802, 812 (11th Cir. 2014), the Eleventh Circuit affirmed Campbell's convictions and rejected his due process challenge on the ground that his drug trafficking conviction lacked a nexus to the United States. As the movant concedes in his constitutional challenge, Eleventh Circuit binding precedent forecloses his nexus challenge. Campbell does not support the movant's due process challenge.

In United States v. Gonzalez, 776 F.2d 931 (11th Cir. 1985), the Eleventh Circuit affirmed the denial of Gonzalez's motion to dismiss the indictment. Gonzalez argued that his conviction of the Marijuana on the High Seas Act violated due process because the "customs enforcement area" language in the statute was vague and "'[did] not give fair notice of what conduct violates the law and what conduct does not….'" Id. at 938 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). In Gonzalez, the Eleventh Circuit found that there was nothing vague about the statute:

> Both the offense and the intent of the United States is clear. Those embarking on voyages with holds laden with illicit narcotics, conduct which is contrary to the laws of all reasonably developed legal systems, do so with the awareness of the risk that their government may consent to enforcement of the United States' laws against the vessel. Due process does not require that a person who violates the law of all reasonable nations be excused on the basis that his own nation *might* have requested that he not be prosecuted by a foreign sovereign.

Gonzalez, 776 F.2d at 941.

In the present case, the movant's due process challenge is based on a lack of notice of being subjected to United States criminal law when he provided materially false information to the United States Coast Guard. Unlike Campbell and Gonzalez, the movant is not basing his due process claim on a nexus requirement or vagueness. Neither Campbell nor Gonzalez support the movant's due process challenge of lack of notice because the offense conduct is not condemned and prohibited by all nations.

The government does not address the movant's cases regarding due process. Instead, the government contends that "due process requires only that an exercise of extraterritorial jurisdiction not be arbitrary and fundamentally unfair, a question of *domestic* law." United States v. Baston, 818 F.3d 651, 669 (11th Cir. 2016) (citing United States v. Davis, 905 F.2d 245, 248-49 & n.2 (9th Cir. 1990)) (emphasis in original). "[C]ompliance with international law satisfies due process because it puts a defendant on notice that he could be subjected to the jurisdiction of the United States." Id. "But compliance with international law is not *necessary* to satisfy due process. Id. (citing Hartford Fire Ins. Co. v. California, 509 U.S 764, 815 (1993)).

"A flag nation's consent to a seizure on the high seas constitutes a waiver of that nation's right under international law." United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002) (citing United States v. Williams, 617 F.2d 1063, 1090 (5th Cir. 1980) (en

banc) and Restatement (Third) of Foreign Relations of Law of the United States § 522 cmt. e (1987)). "When [a] foreign flag nation consents to the application of the United States law, jurisdiction attaches under the statutory requirements of the MDLEA without a violation of due process or the principles of international law because the flag nation's consent eliminates any concern that the application of United States law may be arbitrary or fundamentally unfair." United States v. Cardales, 168 F.3d 548, 554 (1st Cr. 1999); see United States v. Perez Oviedo, 281 F.3d 400, 403 (3rd Cir. 2002) ("Perez-Oviedo's state of facts presents an even stronger case for concluding that no due process violation occurred. The Panamanian government expressly consented to the application of the MDLEA … Such consent from the flag nation eliminates a concern that the application of the MDLEA may be arbitrary or fundamentally unfair."). The undersigned finds the reasoning of these non-binding decisions persuasive. Section 2237(a)(2)(B) has the same definition of a vessel subject to the jurisdiction of the United States as the MDLEA.

Where, as here, the flag nation gave consent, there is no due process violation. Jamaica expressly consented to the boarding, questioning and application of United States law to the persons on board the *Jossette*, a Jamaican vessel in international waters. The undersigned finds that the exercise of United States jurisdiction over the movant with Jamaica's express consent satisfied due process. Because the movant's conviction did not violate due process, this Court should deny his claim for habeas relief.

Conclusion

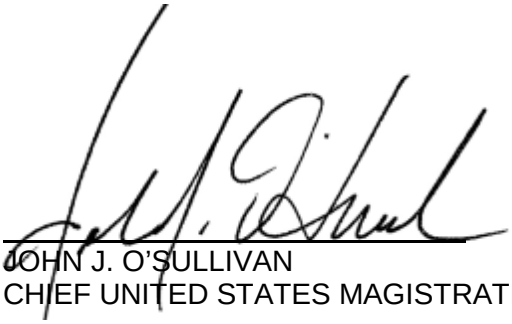
Having carefully reviewed and considered the motion, the response, the reply, and the record in this matter, the undersigned finds that the movant is not entitled to federal habeas relief and is not entitled to coram nobis relief. The undersigned respectfully recommends that movant's request for habeas relief to vacate his sentence be DENIED. The movant's alternative request for issuance of writ of coram nobis should be DENIED as well.

RECOMMENDATION

Based on the foregoing, the undersigned respectfully **RECOMMENDS** that the movant's Motion under 28 U.S.C. § 2255 to Vacate or Set Aside Conviction and Incorporated Memorandum of Facts and Law in Support (DE# 1, 7/12/19) be DENIED.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Ursula Ungaro, United States District Court Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F. 2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED at Miami, Florida, this 16th day of December, 2019.



JOHN J. O'SULLIVAN
CHIEF UNITED STATES MAGISTRATE JUDGE