UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:19-cv-23420-UU
Criminal Case No.: 1:17-cr-20877-UU

ROBERT DEXTER WEIR,
DAVID RODERICK WILLIAMS, AND
LUTHER FIAN PATERSON

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER

THIS CAUSE is before the Court on Petitioners' counseled Petition for Issuance of Writs of Error Coram Nobis Vacating Convictions (D.E. 1) (the "Petition").

THE COURT has reviewed the Petition, the pertinent portions of the record, and is otherwise fully advised in the premises. For the reasons stated herein, the Petition is DENIED.

I. Factual Background

On September 14, 2017, a United States Coast Guard cutter spotted a vessel later identified as the *Jossette* WH 478 speeding towards Haiti from the direction of Jamaica. CR-DE 1 (criminal complaint); CR-DE 59, CR-DE 63 (factual proffers). The U.S. Coast Guard then launched an "over the horizon" small boat to investigate and intercept the *Jossette*. CR-DE 1 ¶ 5. The small boat reached within several yards of the *Jossette* and attempted to get it to stop. *Id.* However, the *Jossette* began to flee at a high rate of speed and the small boat gave pursuit. *Id.* While following the *Jossette*, Coast Guard personnel observed crew on the *Jossette* "jettison approximately 20–25

bales of suspected contraband that had been on deck." *Id.* The *Jossette* ultimately came to a stop—in international waters approximately 13 nautical miles off the coast of Navassa Island. *Id.*

Once alongside the *Jossette*, U.S. Coast Guard personnel observed five crewmembers, including Petitioners.[1] *Id.* ¶ 6. The U.S. Coast Guard personnel questioned the crewmembers, one of whom, Petitioner Weir, the captain of the *Jossette*, claimed that the *Jossette* was a Jamaican fishing vessel and registered in Jamaica. *Id.* ¶ 7. The U.S. Coast Guard then contacted the Jamaican government, which confirmed registration of the *Jossette* and authorized the U.S. Coast Guard to board and search the *Jossette*. *Id.* "Jamaica also later waived jurisdiction over the vessel." *Id.*; CR-DE 59.

After receiving permission to board, the U.S. Coast Guard found neither fishing gear nor evidence of controlled substances on the *Jossette*. CR-DE 1 ¶ 8; CR-DE 93 at 23–24. However, the U.S. Coast Guard found "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. The total weight of the marijuana discovered during this interdiction was at least 613 pounds." CR-DE 1 ¶ 8.

The five crewmembers were transferred to the U.S. Coast Guard small vessel and then to the cutter. *Id.* ¶ 9. On October 16, 2017, the crewmembers were taken to the federal detention center in Miami, Florida. *Id.* ¶ 10.

II. Procedural Background

On October 18, 2017, the United States filed a criminal complaint against Petitioners, setting forth facts with the intent of charging Petitioners with one count of conspiracy to possess

[1] The five crewmembers are the five co-defendants in the underlying criminal case. One co-defendant, Patrick W. Ferguson, has a pending 28 U.S.C. § 2255 motion before this Court, with substantively identical legal arguments to those in this Petition. *See* 1:19-cv-22901-UU.

with intent to distribute 100 kilograms or more of marijuana, in violation of the Maritime Drug Law Enforcement Act (the "MDLEA"), 46 U.S.C. §§ 70503(a)(1), 70506(b). CR-DE 1 at 2. However, Petitioners later waived indictment and were charged by information with knowingly providing materially information 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). CR-DE 43.

The information charged the following with regard to the false statement: "[D]efendants represented to a Coast Guard officer that the vessel's destination was the waters near Jamaica when in truth and in fact . . . the vessel's destination was Haiti." CR-DE 43. In their proffers Petitioners stipulated:

> When asked about the destination of the vessel, each of the members of the crew, including the defendant[s], told the 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 the defendant[s], then and there well knew, the vessel's true destination was Haiti.

CR-DE 59, 63.

On January 3, 2018, Petitioners appeared in Court for consolidated plea and sentencing proceedings.[2] Each Petitioner pled guilty to the information pursuant to a written plea agreement. CR-DE 58; CR-DE 62; CR-DE 66. The prosecutor explained during the sentencings of Petitioners Weir and Williams his decision to charge Petitioners with making a false statement in violation of 18 U.S.C. § 2237(a)(2)(B), stating "the Government was not convinced it could prevail at trial to prove that those items, [hundreds of pounds of] marijuana, was in fact connected to this boat" because the marijuana was found "a mile" away from the *Jossette*. CR-DE 93 at 23.

[2] Petitioner Paterson appeared in Court for consolidated plea and sentencing on January 5, 2018. CR-DE 66, 67.

The Court sentenced each Petitioner to 10 months imprisonment and one year of supervised release. CR-DE 67; CR-DE 68; CR-DE 70. Petitioners "were released from custody on July 13, 2018 and subsequently removed to Jamaica on August 30, 2018." CV-DE 1 at 8. Each Petitioner is subject to a ten-year ban on reentry that expires in 2028. *Id.*

On August 15, 2019, Petitioners filed the instant Petition, in which they argue their convictions must be vacated because 18 U.S.C. § 2237(a)(2)(B) is unconstitutional in that Congress lacks the constitutional authority to criminalize the making of a false statement by a foreign national while aboard a foreign flagged vessel located in international waters. They also argue that their convictions violated due process because they did not have adequate notice that their conduct would place them in criminal jeopardy under United States law. The Government responds that the Petition is untimely, Petitioners fail to show that their convictions are causing them a present harm, § 2237(a)(2)(B) is constitutional, and that Petitioners' convictions did not violate due process. The Petition is ripe for disposition.

III. Legal Standard

"A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255." *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002) (per curiam). "[T]he law recognizes that there must be a vehicle to correct errors 'of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid.'" *Id.* (quoting *United States v. Morgan*, 346 U.S. 502, 509 n.15 (1954)).

The All Writs Act, 28 U.S.C. § 1651(a), authorizes federal courts to grant coram nobis relief. *See, e.g., United States v. Denedo*, 556 U.S. 904, 911 (2009). "The writ of error coram nobis is an extraordinary remedy of last resort available only in compelling circumstances where

necessary to achieve justice." *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). "[I]t is difficult to conceive of a situation in a federal criminal case today where coram nobis relief 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 bar for coram nobis relief is high. First, the writ is appropriate only when there is and was no other available avenue of relief. Second, the writ may issue only when 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." *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (per curiam) (internal quotation marks omitted) (citing *Morgan*, 346 U.S. at 512; *Moody v. United States*, 874 F.2d 1575, 1576–78 (11th Cir. 1989)). Jurisdictional errors have long been recognized as fundamental errors "since jurisdictional error implicates a court's power to adjudicate the matter before it." *Peter*, 310 F.3d at 712.

IV. Analysis

A. Timeliness and Procedural Default

"A claim is not facially cognizable on coram nobis review if the defendant could have, but failed to, pursue the claim through other available avenues." *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (per curiam). "Furthermore, district courts may consider *coram nobis* petitions only when the petitioner presents sound reasons for failing to seek relief earlier." *Maye v. United States*, 769 F. App'x 882, 883 (11th Cir. 2019) (citing *United States v. Mills*, 221 F.3d 1201, 1204 (11th Cir. 2000)). "But claims of jurisdictional error have historically been recognized as fundamental, so the doctrine of procedural default does not apply to such claims . . . . Thus, a genuine claim that the district court lacked jurisdiction may be a proper ground for coram nobis relief as a matter of law." *Id.* (citing *Peter*, 310 F.3d at 712–13; *Alikhani*, 200 F.3d at 734). "When

a court without jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception and remain void long after a defendant has fully suffered their direct force." *Peter*, 310 F.3d at 715.

The Government argues that Petitioners' claims are untimely because: allowing them to proceed would undermine the one-year statute of limitations in 28 U.S.C. § 2255(f)(1); the statute of conviction has not been declared unconstitutional since the completion of Petitioners' sentences, as in *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002) (per curiam) (granting coram nobis relief where petitioner argued that the district court lacked jurisdiction over his charged offense in light of a U.S. Supreme Court case decided six months after he completed his term of supervised release); and they have failed to demonstrate sound reasons for not challenging their convictions earlier. CV-DE 15 at 4–8.

The Petition is timely and the claims are cognizable. The Court will not read § 2255's statute of limitations into Petitioners' claim for coram nobis relief. Nor is *Peter* the only conceivable fact pattern that would merit coram nobis relief. While it is true that Petitioners have not previously challenged their convictions on the grounds raised in this Petition, Petitioners' constitutional challenges to § 2237(a)(2)(B) are jurisdictional and not waivable. "A defendant's claim that the indictment failed to charge a legitimate offense is jurisdictional and is not waived upon pleading guilty." *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011) ("The constitutionality of [a federal statute] . . . is a jurisdictional issue that defendants did not waive upon pleading guilty."); *see also Peter*, 310 F.3d at 713–15 (distinguishing claims where a defendant had been charged with alleged conduct that was non-criminal—a jurisdictional defect—from claims involving indictments with omissions, such as a missing element, which are not jurisdictional defects) (citing *United States v. Tomeny*, 144 F.3d 749, 751 (11th Cir. 1998) ("In

arguing that 16 U.S.C. § 1857(1)(I) preempts 18 U.S.C. § 1001 as applied to the facts of this case, appellants effectively claim that the indictment failed to charge a legitimate offense. We hold that this claim is jurisdictional and that appellants did not waive it upon pleading guilty."); *United States v. Caperell*, 938 F.2d 975, 977–78 (9th Cir. 1991) (holding that defendant's claim that the indictment failed to state an offense because methamphetamine was unlawfully included on the schedules of controlled substances was jurisdictional and not waivable)).

Here, Petitioners challenge the constitutionality of the federal statute 18 U.S.C. § 2237(a)(2)(B) that served as the basis for their convictions. Thus, Petitioners' claim is jurisdictional and they need not "show cause" to justify their failure to raise these claims in their trial proceedings or on direct appeal. *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (dismissing five of six claims in the coram nobis petition because petitioner failed to raise them on direct appeal, but addressing the merits of the sixth claim because it was arguably jurisdictional and "[a] genuine claim that the district court lacked jurisdiction to adjudicate the petition guilty may well be a proper ground for coram nobis relief as a matter of law").[3]

B. Present Harm

As the Supreme Court explained in *United States v. Morgan*, 346 U.S. 502 (1954), coram nobis relief is available after a sentence has been served because "the results of the conviction may persist." *Id.* at 512–13. Accordingly, "[o]ne of the requirements for coram nobis relief is that the petitioner show that the challenged conviction is 'causing a present harm' that is 'more than incidental.'" *United States v. Smith*, 644 F. App'x 927, 928 (11th Cir. 2016) (per curiam) (quoting *United States v. Sloan*, 505 F.3d 685, 397 (7th Cir. 2007)). While this Circuit's caselaw interpreting

[3] Whether Petitioners waived their due process claim based on jurisdictional defect is a closer call. Even if Petitioners' due process claim is procedurally barred, the Court denies the claim on the merits for the reasons explained herein.

the "present harm" or "continuing collateral consequence" requirement is slight, in holding that the petitioner was entitled to coram nobis relief in *Peter*, the Court asserted that "it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Peter*, 310 F.3d at 715–16 (quoting *Spencer v. Kemma*, 532 U.S. 1, 12 (1998)).[4]

The Government contends that Petitioners do not sufficiently allege they are suffering from serious collateral consequences. CV-DE 15 at 9. While they are each subject to a ten-year ban on reentry, the Government argues, "no Petitioner asserts, let alone establishes, that he would be able to legally travel to the United States in the absence of any such ban." *Id.* The Government puts forth the argument that "'something more than the stain of conviction is needed to show'" collateral consequences and that a petitioner "'must show that he or she is under a substantial legal disability in order to obtain a writ of error coram nobis.'" *Id.* at 8–9 (quoting *United States v. George*, 676 F.3d 249, 255–56 (1st Cir. 2012) (declining to hold that petitioner's loss of his monthly pension benefits was a continuing collateral consequence because even if it was, "he has failed to persuade [the court] that the circumstances of his case demand coram nobis relief"); *Howard v. United States*, 962 F.2d 651, 653 (7th Cir. 1992)). Petitioners respond that they continue to suffer the adverse effects of their convictions because "putting aside any restrictions imposed on them by the U.S. Department of Homeland Security, [they] are not permitted to reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security." CV-DE 16 at 11. Further, under their orders of removal, Petitioners are

[4] In *United States v. Smith*, 757 F. App'x 838 (11th Cir. 2018) (per curiam), the Eleventh Circuit held that the petitioner was not suffering a present harm because vacating his 1971 conviction for wearing military medals without authorization (a crime he argued was invalidated under a 2012 U.S. Supreme Court case) would not impact his presumptive parole release date for the sentence he was serving in an unrelated first-degree murder case. *Id.* at 839–40.

prohibited from entering the United States "at any time" because they "have been convicted of a crime designated as an aggravated felony." *Id.* (citing CV-DE 16 Ex. 13).

The immigration effects of Petitioners' convictions are more than incidental. *Peter*, 310 F.3d at 715–16. Courts recognize that deportation and bars on reentry are serious collateral consequences of pleading guilty. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010); *Kovacs v. United States*, 744 F.3d 44, 49 (2d Cir. 2014) (asserting that petitioner, an Australian national who was prohibited from reentering the United States, was entitled to coram nobis relief and continued to suffer harm from his conviction because his "likely ineligibility to reenter the United States constitutes a continuing consequence of his conviction"). Absent their convictions, Petitioners would not need the Undersecretary's prior written permission to enter the United States, nor would they be de facto barred from reentry.

C. Constitutional Challenges to 18 U.S.C. § 2237(a)(2)(B)

Petitioners ask this Court to be the first in the nation to declare 18 U.S.C. § 2237(a)(2)(B) an unconstitutional exercise of congressional authority under the High Seas Clause of the United States Constitution.[5] In so doing, Petitioners advance two arguments. First, that the United States' exercise of extraterritorial jurisdiction under the High Seas Clause is unsupported by a principle of extraterritorial jurisdiction recognized by customary international law. CV-DE 1 at 10. Second, that 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 "nexus claim"). *Id.* at 11.

[5] Petitioners do not clearly state whether they are mounting a facial or an as-applied challenge to 18 U.S.C. § 2237(a)(2)(B). However, they state their challenges to § 2237(a)(2)(B) are "as applied to the facts set forth in the charging documents and otherwise before the Court when they entered their guilty pleas." CV-DE 1 at 8. Elsewhere in their briefings they suggest the statute can never be applied constitutionally to occupants of foreign flagged vessels in international waters. *See id.* at 10.

The Government argues that Petitioners' first claim fails because the exercise of extraterritorial jurisdiction is supported by principles of international law. CV-DE 15 at 10–11. The Government further maintains that Petitioners' second claim—the nexus claim—is foreclosed by binding Eleventh Circuit precedent, which Petitioners concede. CV-DE 1 at 5, 9, 10 ("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. Defendants advance this argument which provides a separate basis for vacating their convictions, to preserve it for appellate review."). This Court will not delve into Petitioners' nexus claim because binding Eleventh Circuit precedent expressly rejects it. *United States v. Campbell*, 743 F.3d 802, 809–10 (11th Cir. 2014) (collecting cases and recognizing that Congress' authority to define and punish felonies on the high seas under the MDLEA exists even where the criminal conduct lacks a nexus to the United States); *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."); *id.* at 1210 ("This Court, and our sister circuits, have refused to read a jurisdictional nexus requirement into the [High Seas] Clause."); *see also United States v. Hernandez*, 864 F.3d 1292, 1303 (11th Cir. 2017) ("[T]he MDLEA [i]s a constitutional exercise of Congressional authority under the Felonies [High Seas] Clause, and . . . the conduct proscribed by the MDLEA need not have a nexus to the United States."), *cert. denied*, 138 S. Ct. 1025 (2018).

i. 18 U.S.C. § 2237(a)(2)(B) Comports with Principles of International Law and Does Not Violate the High Seas Clause

The Define and Punish Clause empowers Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. 1, § 8, cl. 10. "The Supreme Court has interpreted the [Define and Punish] Clause 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." *Campbell*, 743 F.3d at 805 (citing *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2002)). The second grant of power—the High Seas Clause—is at issue in this case. Petitioners argue that Congress lacked the constitutional authority under the High Seas Clause to criminalize Petitioners' false statements to the U.S. Coast Guard on a foreign flag vessel in international waters; thus, the Court lacked jurisdiction to convict Petitioners of violating 18 U.S.C. § 2237(a)(2)(B).

Section 2237(a)(2)(B) provides: "It 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) defines "vessel subject to the jurisdiction of the United States" as "ha[ving] the meaning given [to it] in section 70502 of title 46." Section 70502, the definition section of the 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." 46 U.S.C. § 70502(c)(1)(C); *see also United States v. Devila*, 216 F.3d 1009, 1017 (11th Cir. 2000) (per curiam), *vacated in part on other grounds*, 242 F.3d 995 (11th Cir.), *cert. denied*, 534 U.S. 843, 122 S. Ct. 103 (2001) (noting that the jurisdictional requirement that a foreign nation "consent to or waive objection" to United States enforcement under the MDLEA was inserted into the statute "to protect the interest of the flag nation and international comity, not the interest of the individuals aboard the vessel"). Section 2237(a)(2)(B) therefore incorporates the MDLEA's assertion of extraterritorial jurisdiction.

The parties agree that although the High Seas Clause gives Congress the authority to define and punish felonies committed on the high seas outside the jurisdiction of the United States, "international law generally prohibits any country from asserting jurisdiction over foreign vessels on the high seas . . . . subject to recognized exceptions." CV-DE 1 at 12; CV DE 15 at 11 (both quoting *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982)). Petitioners focus on three of these "recognized exceptions": (1) the protective principle of jurisdiction; (2) the objective principle of jurisdiction; and (3) universal jurisdiction. CV-DE 1 at 12–16. Petitioners assert that the "only conceivable basis for the United States to criminalize Defendants' alleged statements to the Coast Guard is through application of the 'protective' principle." *Id.* at 10. The Government contends that a fourth exception, the territorial principle of jurisdiction, which Petitioners do not address in their Petition, is the most relevant. CV-DE 15 at 11.

1. The Territorial Principle

Pursuant to the territorial principle, the Government maintains, the United States could properly exercise jurisdiction over the vessel and its occupants with the consent of the flag nation, Jamaica. CV-DE 15 at 10. "Under the territorial principle, '[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. Ibarguen-Mosquera*, 634 F.3d 1370, 1379 n.6 (11th Cir. 2011) (quoting *United States v. Cardales*, 168 F.3d 548, 554 (1st Cir. 1999); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 25 (AM. LAW INST. 1965)); *see also United States v. Robinson*, 843 F.2d 1, 4 (1st Cir. 1988); *United States v. Suerte*, 291 F.3d 366, 370–71 (5th Cir. 2002). The international agreement does not require a treaty and can be reached "through informal, as well as formal means." *Robinson*, 843 F.2d at 4 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115).

Section 2237(a)(2)(B) adopts the definition of "vessel subject to the jurisdiction of the United States" as provided in the MDLEA, which in turn defines a "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." 46 U.S.C. § 70502(c)(1)(C) (emphasis added). The MDLEA's definition "codifies the . . . generally accepted principle of international law: a flag nation may consent to another's jurisdiction." *Suerte*, 291 F.3d at 375–76 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 522 reporter's note 8 (AM. LAW. INST. 1987); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3-12 n.41 (3d ed. 2001)). Here, Petitioners 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 Proffers (CR-DE 61, 63); Plea Agreements (CR-DE 58, 62, 66). Additionally, the record contains the certification of U.S. Coast Guard Commander Francis J. DelRusso that Jamaica consented to the exercise of jurisdiction by the United States pursuant to 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 (Mar. 10, 1998). CV-DE 15-1.

In their reply, Petitioners argue that the record before the Court when it accepted their guilty pleas 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 Petitioners under the Jamaica Bilateral Agreement. CV-DE 16 at 1–3. Although Petitioners readily admit they pled guilty to the fact that they were "on board a vessel subject to

the jurisdiction of the United States" and that "Jamaica waived jurisdiction over the vessel," they argue that they did *not* expressly admit that Jamaica consented to the application of United States law or that the United States was proceeding under the Jamaica Bilateral Agreement.[6] *Id.* at 3 (citing Jamaica Bilateral Agreement, art. 3, cl. 5) (for the 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"). In making this argument, Petitioners rely on two cases: *Peter*, 310 F.3d at 715, and *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2002). Their reliance is misplaced.

In *Peter*, the petitioner pled guilty to violating the Racketeer Influenced and Corrupt Organization Act (RICO). 310 F.3d at 710. The plea agreement expressly provided that mail fraud based on misrepresentations in license applications the petitioner mailed to a state agency was the

[6] Petitioners seek to constrain the Court's resolution of the issues by stating that they are challenging the constitutionality of § 2237(a)(2)(B) "as applied to the facts set forth in the charging documents and otherwise before the Court *at the time of their guilty pleas*." CV-DE 16 at 2 (emphasis added). Accordingly, Petitioners suggest that the Court should not consider the certification of Commander DelRusso on which the United States relies to demonstrate that Jamaica waived jurisdiction over the vessel and consented to the exercise of jurisdiction by the United States pursuant to the Jamaica Bilateral Agreement.

The undersigned acknowledges that the certification was not part of the record when Petitioners entered their guilty pleas. However, the certification is not necessary to a resolution of the Petition since the charging documents included the allegation that the "vessel [was] subject to the jurisdiction of the United States" and that Jamaica waived jurisdiction of the vessel. CR-DE 1; CR-DE 43. Petitioners also stipulated in their factual proffers that the *Jossette* was "subject to the jurisdiction of the United States." *See* CR-DE 59 at 1. These "facts" are sufficient to establish subject matter jurisdiction, and the specific means by which the United states acquired jurisdiction—*i.e.*, whether Jamaica waived jurisdiction or consented pursuant to the Jamaica Bilateral Agreement—is not a "jurisdictional fact." *See Alikhani v. United States*, 200 F.3d 732, 735 (11th Cir. 2000) (per curiam) ("'Once a defendant pleads guilty in a court which has jurisdiction of the subject matter and of the defendant . . . the court's judgment cannot be assailed on grounds that the government has not met its burden of proving so-called jurisdictional facts.' By analogy, even if the Government had to prove that Alikhani was a U.S. person [a jurisdictional fact], and even if the Government had failed to allege sufficient facts in the indictment to support an assertion was Alikhani was a U.S. person, the district court would still have had subject-matter jurisdiction over the case.") (quoting *United States v. Martin*, 147 F.3d 529, 532 (7th Cir. 1998)) (internal citation omitted). Nonetheless, the certification serves to demonstrate and reinforce the fact that the Court had subject matter jurisdiction when it sentenced Petitioners.

sole predicate crime supporting the RICO conspiracy conviction. *Id.* at 711. Six months after Peter's sentence expired, the Supreme Court decided *Cleveland v. United States*, 531 U.S. 12 (2000), which held that the offense of mail fraud requires that the object of the fraud be property in the hands of the victim and that state and municipal licenses in general do not rank as property for purposes of the statute. *Id.* Therefore, the Eleventh Circuit found that "the facts to which Peter pled guilty did not constitute a crime under *Cleveland*." *Id.* (explaining that "[d]ecisions of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect") (citation omitted). The Court 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.

Here, unlike *Peter*, there has been no subsequent Supreme Court decision holding that the offense conduct does not constitute a crime. Further, Petitioners stand convicted after having admitted in their proffers and plea agreements to making a false statement to law enforcement while onboard a "vessel subject to the jurisdiction of the United States," which the MDLEA defines, *inter alia*, as "a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by United States citizens." 46 U.S.C. § 70502(c)(1)(C).

Bellaizac-Hurtado is also inapposite. The petitioners in *Bellaizac-Hurtado* were arrested for MDLEA violations in the territorial waters of Panama and argued that their convictions violated the Offences Clause of the Define and Punish Clause; the case did not involve the High Seas Clause. 700 F.3d at 1247. The Eleventh Circuit addressed whether Congress has the power under the Offences Clause "to proscribe drug trafficking in the territorial waters of another nation." *Id.* 1249. The Court held that Congress did not: "[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 High Seas Clause is not limited to "offenses against the laws of nations." The Court in *Bellaizac-Hurtado* acknowledged that "Congress possesses additional constitutional authority to restrict conduct on the high seas, including the Piracies Clause, the Felonies [High Seas] Clause, and the admiralty power. And we have always upheld extraterritorial convictions under our drug trafficking laws as an exercise of power under the Felonies Clause." *Id.* at 1257 (citations omitted). Unlike *Bellaizac-Hurtado*, Petitioners' offense conduct occurred on the high seas, in international waters, not within the territorial waters of another nation.

Accordingly, the Court finds no impediment to application of the territorial principle in *Peters* and *Bellaizac-Hurtado*. Pursuant to the territorial principle, the United States is empowered to criminalize conduct on the high seas even if such conduct occurs on a foreign flag vessel, so long as the country in which the vessel is registered "consented or waived objection to the enforcement of United States law by the United States." 46 U.S.C. § 70502(c)(1)(C). Thus, § 2237(a)(2)(B) is constitutional and the United States validly exercised jurisdiction in this case.

2. The Protective and Universal Principles

Although the Court finds the territorial principle to be the most relevant international law principle, the protective and universal principles also support the United States' exercise of extraterritorial jurisdiction in this case. "Congress, under the 'protective principle' of international law, may assert extraterritorial jurisdiction over vessels in the high seas that are engaged in conduct that 'has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.'" *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003) (quoting *United States v. Tinoco*, 304 F.3d 1088, 1108 (11th Cir. 2002)); *see also Saac*, 632 F.3d at 1211. "We also have recognized that the conduct proscribed by the [MDLEA] need not have a nexus to the United States because universal and protective principles support its

extraterritorial reach." *Campbell*, 743 F.3d at 810. Under the universal principle, Congress may criminalize conduct, such as drug trafficking on the high seas, that is "condemned universally by law-abiding nations." *See Saac*, 632 F.3d at 1210 (rejecting petitioners' argument that Congress exceeded its power under the High Seas Clause in enacting the Drug Trafficking Vessel Interdiction Act because the Act was justified under the universal and protective principles); *see also United States v. Estupinan*, 453 F.3d 1336, 1338–39 (11th Cir. 2006) (per curiam) (refusing to "embellish" the MDLEA with a nexus requirement on the basis of the universal principle).

In the MDLEA, Congress outlawed certain narcotics offenses on the high seas. In enacting the MDLEA, Congress expressly found and declared "that . . . trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. § 70501. Accordingly, the Eleventh Circuit has held that enactment of the MDLEA was a constitutional exercise of authority under both the universal principle and the protective principle. *See Campbell*, 743 F.3d at 810; *Estupinan*, 453 F.3d at 1339.

Notably, the Eleventh Circuit has found that the universal principle and the protective principle not only justify the criminalization of high seas narcotics trafficking itself, but also the criminalization of the means of *facilitating* that trafficking. *Saac*, 632 F.3d at 1211; *Ibarguen-Mosquera*, 634 F.3d at 1381. The Drug Trafficking Vessel Interdiction Act of 2008 (the "DTVIA") provides that:

> Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. § 2285(a). In adopting the DTVIA, Congress found and declared:

> [T]hat operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States.

Pub. L. No. 110–407, § 101, 122 Stat. 4296, 4296 (2008). "Congress's findings show that the DTVIA targets criminal conduct that facilitates drug trafficking, which is 'condemned universally by law-abiding nations.'" *Saac*, 632 F.3d at 1211 ("Given Congress's findings, the 'protective principle' . . . provides an equally compelling reason to uphold the DTVIA. Under that principle, a nation may assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operation of its governmental functions.") (citations omitted). The Eleventh Circuit thus held that the DTVIA was justified by both the universal principle and the protective principle. *Id.*

The fact that § 2237 incorporates the MDLEA's definitions of "vessel subject to the jurisdiction of the United States" and "vessel of the United States" demonstrates that the statute contemplated, at least in part, the criminalization of conduct that can facilitate drug trafficking crimes. Petitioners reply that the "lack of any connection between drug trafficking and section 2237(a)(2)(B) is readily apparent from the facts of this case." CV-DE 16 at 5. But the relevant the issue here is whether Congress' passage of § 2237(a)(2)(B), like its passage of the DTVIA, was a valid exercise of its authority to target criminal conduct that facilitates drug trafficking. The DTVIA does not require a showing that the outlawed vessel was actually being used in furtherance of a drug trafficking crime in order to be a valid exercise of congressional authority. *See Ibarguen-Mosquera*, 634 F.3d at 1381 ("Even if Appellants proved that they were not trafficking drugs, they would still be guilty of violating the DTVIA if the government proved, beyond a reasonable doubt, all of the elements of the crime."). The same is true of § 2237(a)(2)(B), which, contrary to

Petitioners' assertion (CV-DE 16 at 6), does not require proof that the false statement was given in furtherance of a drug trafficking crime but serves to protect the United States from drug trafficking by criminalizing conduct that can restrict or impede a drug trafficking investigation in international waters.

D. Due Process

Petitioners argue their convictions violate the Due Process Clause of the Fifth Amendment because they "had no notice that they would be putting themselves in jeopardy in the United States" when they provided materially false information to the U.S. Coast Guard about the *Jossette*'s destination. CV-DE 1 at 22. The crux of Petitioners' argument is that unlike drug trafficking which is "conduct which is contrary to law of all reasonably developed legal systems," providing materially false information about a vessel's destination in international waters is not. *Id.* This argument fails.

Petitioners rely on two cases, both of which are inapposite. First, in *United States v. Campbell*, 743 F.3d 802 (11th Cir. 2014), the Eleventh Circuit affirmed the defendant's drug trafficking convictions and rejected his due process challenge because the MDLEA "provides clear notice that all nations prohibit and condemn drug trafficking." *Id.* at 812. There, however, the defendant's sole argument in support of his due process claim was that his activities lacked a nexus to the United States, an argument that Eleventh Circuit precedent forecloses. *Id.* Second, in *United States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985), the Eleventh Circuit affirmed the denial of the defendant's motion to dismiss the indictment where the defendant claimed that his conviction under the Marijuana on the High Seas Act violated due process because the statute was unconstitutionally vague. *Id.* at 938. In finding there was nothing vague about the statute, the Court explained:

> Both the offense and the intent of the United States are clear. Those embarking on voyages with holds laden with illicit narcotics, conduct which is contrary to 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.

Id. at 941.

Here, Petitioners' due process challenge is based on a lack of notice of being subjected to United States criminal law when they provided materially false information to the U.S. Coast Guard. Unlike *Campbell* and *Gonzalez*, Petitioners are not basing their due process claim on a nexus requirement or vagueness. Neither *Campbell* nor *Gonzalez* support Petitioners' due process challenge that they lacked notice because the offense conduct is not condemned and prohibited by all nations.

As the Government points out, "due process requires only that an exercise of extraterritorial jurisdiction not be arbitrary or fundamentally unfair." *United States v. Baston*, 818 F.3d 651, 669 (11th Cir. 2016). Although this is "a question of domestic law . . . . [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.* (internal quotation omitted). Moreover, "[a] flag nation's consent to a seizure on the high seas constitutes a waiver of that nation's right under international law." *Suerte*, 291 F.3d at 375 (5th Cir. 2002) (citing *United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980)). "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 Cir. 1999); *see also United States v.*

Perez-Oviedo, 281 F.3d 400, 403 (3d 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."). As previously discussed, the MDLEA and § 2237(a)(2)(B) share the definition of "vessel subject to the jurisdiction of the United States."

The Court finds these non-binding decisions persuasive. Where, as here, the flag nation gave consent, there is no due process violation. Jamaica expressly consented to the boarding and searching of the *Jossette* and waived jurisdiction. CR-DE 1 ¶ 7. The Court finds that the exercise of United States jurisdiction over Petitioners was not arbitrary or fundamentally unfair. *Baston*, 818 F.3d at 669.

V. Conclusion

Accordingly, for the reasons stated herein, it is hereby

ORDERED AND ADJUDGED that the Petition, D.E. 1, is DENIED. It is further

ORDERED AND ADJUDGED that the Clerk of Court shall administratively close this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of January, 2020.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies provided:
Counsel of record via CM/ECF