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.

MOVANT'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE HONORABLE JOHN J. O'SULLIVAN

Movant Patrick W. Ferguson respectfully submits these objections to the Report and Recommendation of the Honorable John J. O'Sullivan (the "R&R"). (D.E. 17.[1])

PRELIMINARY STATEMENT

Mr. Ferguson is a Jamaican national. He was in international waters traveling on a fishing vessel from the direction of Jamaica towards Haiti when he was intercepted by the U.S. Coast Guard. He admitted at his criminal trial that he told Coast Guard officers that his vessel's destination was the waters near the coast of Jamaica even though he knew the vessel's true destination was Haiti. The Coast Guard took Mr. Ferguson into custody, kept him onboard multiple Coast Guard vessels for more than thirty days, and then delivered him to the Southern District of Florida for criminal prosecution. Although the Government initially charged Mr. Ferguson with a drug-related offense, it eventually admitted that it could not prove that charge. Instead, Mr. Ferguson pled guilty to one count of providing materially false information to a federal law enforcement officer during the boarding of a vessel regarding the vessel's destination, in violation of 18 U.S.C. § 2237(a)(2)(B).

Mr. Ferguson's conviction is unconstitutional and should be vacated or set aside under 28 U.S.C. § 2255 for three distinct reasons. First, under the Eleventh Circuit's interpretation of the High Seas Clause, the extraterritorial application of United States law to a foreign national on the high seas must be supported by a principle of jurisdiction recognized by customary international law. No such principle of jurisdiction supports Mr. Ferguson's conviction, and the Chief Magistrate Judge's finding that Jamaica's consent, on its own, served as a constitutionally sufficient basis to exercise jurisdiction was in error. Second, although foreclosed by existing Eleventh Circuit precedent, Mr. Ferguson maintains and preserves his argument that the original

[1] Citations to (D.E. [#]) are to documents filed on CM/ECF in this action.

understanding of the High Seas Clause renders his conviction unconstitutional because his conduct lacked any nexus to the United States. Third, under Eleventh Circuit precedent, for Mr. Ferguson's conviction to satisfy the requirements of the Due Process Clause, his conduct must be contrary to laws of all reasonably developed legal systems. The crime Mr. Ferguson was convicted of—making a false statement about his vessel's destination during a boarding—is *not* contrary to laws of all reasonably developed legal systems. The Chief Magistrate Judge's refusal to apply binding precedent to Mr. Ferguson's due process claim should not be adopted.

The Chief Magistrate Judge also erred by finding that Mr. Ferguson's section 2255 motion was untimely. And, even if this Court disagrees with Mr. Ferguson, the Chief Magistrate Judge further erred by finding that Mr. Ferguson could not obtain relief by treating his section 2255 motion as a coram nobis petition. Mr. Ferguson's motion raised jurisdictional challenges to his conviction. Those claims are not subject to a procedural bar and, as a matter of law, can be reviewed via a coram nobis petition.

BACKGROUND

On October 18, 2017, Mr. Ferguson was charged in a Criminal Complaint with one count of conspiracy to possess with intent to distribute a controlled substance. (D.E. 1-3; D.E. 17 at 3.) The affidavit submitted in support of the Criminal Complaint states that the Coast Guard stopped the *Jossette* "in international waters approximately 13 nautical miles off the coast of the Navassa island." (D.E. 1-3 ¶ 5; D.E. 17 at 2.) According to the affiant, while in pursuit of the *Jossette*, "Coast Guard personnel observed the crew . . . jettison approximately 20-25 bales of suspected contraband that had been on deck," and Coast Guard personnel subsequently retrieved "several jettisoned bales in the surrounding waters that matched the appearance and size of the bales seen thrown from the [*Jossette*], which tested positive for marijuana." (D.E. 1-3 ¶¶ 5, 8; D.E. 17 at 2.) As the United States acknowledged at sentencing, however, the Coast Guard also performed an

ion scan to "test[] for illicit substances onboard the vessel," which tested negative for marijuana. (D.E. 1-10 at 23:23-24:4; D.E. 17 at 2 n.3)

On December 13, 2017, the United States filed an Information, which charged Mr. Ferguson with "knowingly and intentionally provid[ing] materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination." (D.E. 1-4; D.E. 17 at 3-4.) According to the Information, "while on board a vessel subject to the jurisdiction of the United States, . . . the defendants [(including Mr. Ferguson)] represented to a Coast Guard officer that the vessel's destination was the waters near Jamaica, when in truth and in fact, and as the defendants then and there well knew, the vessel's destination was Haiti." (D.E. 1-4; D.E. 17 at 3-4.) Mr. Ferguson pled guilty pursuant to a plea agreement and, as part of his agreement, he signed a factual proffer with the Government. (D.E. 1-5; D.E. 1-6; D.E. 17 at 4.) According to the proffer, Mr. Ferguson and the United States agreed that "[i]f this matter proceeded to trial the Government would have proved beyond a reasonable doubt" several facts including that: "Jamaica also later waived jurisdiction over the vessel. Therefore, the vessel [the *Jossette*] was subject to the jurisdiction of the United States." (D.E. 1-6.) On January 3, 2018, Mr. Ferguson pled guilty pursuant to his plea agreement. (D.E. 1-10 at 20:9-21:4; D.E. 17 at 4.) During the hearing, the United States admitted that the Coast Guard found no drugs onboard the *Jossette* and that ion scans confirmed the absence of any indication that marijuana had ever been onboard the vessel or on its crew members. (D.E. 1-10 at 23:8-24:7.) The United States also admitted that, although marijuana was found one mile from the *Jossette*, "[it] would have required a miracle" to prove that the marijuana recovered was onboard the *Jossette*, one which the United States admitted it "could not have pulled off." (*Id.* at 24:4-7.)

Mr. Ferguson was sentenced to ten months' imprisonment and one year of supervised release. (D.E. 1-7; D.E. 17 at 4.) He was released from custody on July 13, 2018, and removed from the United States to Jamaica. (D.E. 1-11; D.E. 17 at 4.) While he is residing outside of the United States, Mr. Ferguson's supervised release is "non-reporting," but, if Mr. Ferguson "reenters the United States within the term of supervised release," he is required "to report to the nearest U.S. Probation Office within 72 hours of [his] arrival." (D.E. 1-7; D.E. 17 at 4-5.)

Mr. Ferguson filed a notice of appeal, which he subsequently moved to dismiss. (D.E. 1-8; D.E. 17 at 4.) On April 24, 2018, the United States Court of Appeals for the Eleventh Circuit entered an order dismissing Mr. Ferguson's appeal. (D.E. 1-9; D.E. 17 at 4.) Mr. Ferguson filed a motion to vacate or set aside his conviction under 28 U.S.C. § 2255 on July 12, 2019. (D.E. 17 at 5.) His sentence expired the next day. (*Id.)* The Honorable Ursula Ungaro referred Mr. Ferguson's motion "to Chief United States Magistrate Judge John J. O'Sullivan . . . for a Report and Recommendation in accordance with 28 U.S.C. § 636(b)." (D.E. 17 at 1; D.E. 4.) The Chief Magistrate Judge entered the R&R on December 16, 2019. (D.E. 17.)

Mr. Ferguson objects to one factual finding in the background section of the R&R. The Chief Magistrate Judge found that "[t]he vessel was subject to the jurisdiction of the United States," and, in support of that finding, cited Mr. Ferguson's factual proffer. (D.E. 17 at 3 (citing D.E. 1-6).) Mr. Ferguson admits that he agreed in his factual proffer that, "[i]f this matter proceeded to trial the Government would have proved beyond a reasonable doubt" that: "Jamaica also later waived jurisdiction over the vessel. Therefore, the vessel was subject to the jurisdiction of the United States." (D.E. 1-6.) For the reasons discussed below, as a legal matter, Mr. Ferguson was not "subject to the jurisdiction of the United States," within the meaning of section 2237(a)(2)(B), when he made the statement about the vessel's destination while aboard the

Jossette. *See infra* at 6-10. Accordingly, Mr. Ferguson objects to the Chief Magistrate Judge's factual finding insofar as the Chief Magistrate Judge relied on that finding to support the conclusion that Mr. Ferguson's admissions in his factual proffer gave the United States jurisdiction to prosecute him.

ARGUMENT

Pursuant to Fed. R. Civ. P. 72(b)(3), "[t]he district judge must determine de novo any part of the magistrate judge's disposition [of a prisoner's petition] that has been properly objected to." *See also* 28 U.S.C. § 636(b)(1). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1).

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

Mr. Ferguson raised two independent claims under the High Seas Clause. First, he argued that, under existing precedent interpreting the High Seas Clause, the Eleventh Circuit has consistently recognized that extraterritorial application of United States law on the high seas must be supported by a principle of extraterritorial jurisdiction recognized by customary international law. Because no such principle of extraterritorial jurisdiction applies to Mr. Ferguson's conduct, his conviction is unconstitutional. Second, although foreclosed by existing precedent, Mr. Ferguson also argued that his conviction is unconstitutional under the original understanding of the High Seas Clause because his conduct lacked a nexus to the United States. The Chief Magistrate Judge recommended that the Court deny both claims. On his first claim, the Chief Magistrate Judge found that the territorial principle of jurisdiction applied, rendering Mr. Ferguson's conviction constitutional. (*See* D.E. 17 at 16-22.) On his second claim, the Chief Magistrate Judge did not address Mr. Ferguson's claim because it is foreclosed by existing precedent. (*See id.* at 15.) Mr. Ferguson objects to those recommendations as follows.

A. The United States Lacked Jurisdiction to Prosecute Mr. Ferguson

In finding that Mr. Ferguson's conviction is constitutional, the Chief Magistrate Judge relied on two main findings. First, the Chief Magistrate Judge found that, because Mr. Ferguson agreed in his factual proffer "that he 'was on board a vessel subject to the jurisdiction of the United States' and that 'Jamaica waived jurisdiction over the vessel,'" Mr. Ferguson "implicitly" agreed that Jamaica had "consented or waived objection to the enforcement of United States law by the United States." (D.E. 17 at 20-21 (emphasis omitted).) Second, the Chief Magistrate Judge found that the territorial principle of international law validly authorized the "exercise of United States jurisdiction pursuant to Section 2237(a)(2)(B)" because Jamaica consented to the application of United States law over Mr. Ferguson. (D.E. 17 at 22.) Both findings are erroneous and should not be adopted.

1. The Factual Proffer Did Not Confer Jurisdiction Over Mr. Ferguson

As to the first finding, the factual proffer does not support a finding that the United States validly exercised jurisdiction over Mr. Ferguson when he made the statements to the Coast Guard on board the *Jossette*. Mr. Ferguson respectfully submits that the statements in his factual proffer are immaterial to the Court's consideration of whether the United States had jurisdiction to prosecute him. Neither Congress nor the Government has the authority to expand the jurisdictional reach of federal criminal law outside the bounds of the Constitution. Mr. Ferguson raised a jurisdictional challenge to his conviction. He could not stipulate—in his factual proffer or otherwise—that the United States had jurisdiction to prosecute him when the United States, in fact, lacked the jurisdiction to do so. *See United States v. DiFalco*, 837 F.3d 1207, 1215 (11th Cir. 2016) ("Because the federal courts are courts of limited jurisdiction, deriving their power from Article III of the Constitution and from the legislative acts of Congress, the parties cannot confer upon the courts a jurisdictional foundation that they otherwise lack."). The statements in

Mr. Ferguson's factual proffer—to the extent those statements purport to implicitly support the exercise of jurisdiction to prosecute him, as the Chief Magistrate Judge found—are a nullity.

Further, Mr. Ferguson objects to the R&R insofar as the Chief Magistrate Judge found that Mr. Ferguson *implicitly* agreed to facts that are not expressly contained in his factual proffer. (*See* D.E. 17 at 21.) Instead of confining itself to relying on those agreed-upon facts to support the exercise of jurisdiction over Mr. Ferguson, the Government introduced extrajudicial support into the record, arguing (i) that Jamaica "consented or waived objection to the enforcement of United States law by the United States"; and (ii) that, in prosecuting Mr. Ferguson, the United States was proceeding under a bilateral agreement with Jamaica. (D.E. 15 at 10-11.) The Government cannot alter the factual predicate underlying Mr. Ferguson's conviction during post-conviction proceedings to cure jurisdictional defects apparent from the record when he entered his plea. *See United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002). And the Chief Magistrate Judge erred by ignoring the jurisdictional defects and instead finding that Mr. Ferguson implicitly agreed that the Government would have proven certain facts beyond a reasonable doubt even though those facts were neither contained in his factual proffer, nor reasonably inferred from the agreed-upon facts. *See United States v. Wright*, 862 F.3d 1265, 1276 (11th Cir. 2017) (use of phrase "numerous" in factual proffer did not support inference that "'numerous' . . . meant approximately 4,900").

The Chief Magistrate Judge's attempt to distinguish *Peter* is unavailing. Although it is true, as the Chief Magistrate Judge found, that *Peter* involved application of a new Supreme Court decision, the fact that the Supreme Court's decision was issued subsequent to the defendant's conviction did not compel the Eleventh Circuit's holding that a "jurisdictional error . . . can never be waived." 310 F.3d at 712. The Government's proof that "Jamaica . . . waived

jurisdiction over the vessel" (D.E. 1-6), no matter how overwhelming, would not have proven that Mr. Ferguson was onboard a vessel subject to the jurisdiction of the United States because it would not have shown that Jamaica "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* 18 U.S.C. 2237(e)(3). Under *Peter*, that is a jurisdictional defect that cannot be waived. 310 F.3d at 715. *Peter* does not require Mr. Ferguson to show that an intervening decision by the Supreme Court established the basis for his jurisdictional claim. *See Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000). The Chief Magistrate Judge erred by finding otherwise.

2. The Territorial Principle Does Not Support the Conviction

As to the second finding, assuming Mr. Ferguson could consent to the United States' exercise of jurisdiction to prosecute him (he cannot), and assuming Mr. Ferguson implicitly agreed in his factual proffer that Jamaica consented to the enforcement of United States law by the United States (he did not), his conviction is *still* unconstitutional because the territorial principle of jurisdiction does not support Mr. Ferguson's conviction. Contrary to the Chief Magistrate Judge's finding, the United States cannot constitutionally prosecute Mr. Ferguson just because Jamaica consented to that prosecution. 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. It held the exact opposite the one time it was presented with this question. *See United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1258 (11th Cir. 2012). The Chief Magistrate Judge erred by trying to distinguish Mr. Ferguson's case from *Bellaizac-Hurtado*.

In *Bellaizac-Hurtado*, 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. The Chief Magistrate Judge determined that *Bellaizac-Hurtado* does not apply to Mr. Ferguson because *Bellaizac-Hurtado* involved the Offences Clause whereas Mr. Ferguson's motion involves the High Seas Clause. But the Chief Magistrate Judge's determination that Jamaica's consent, *on its own*, authorized the United States to exercise jurisdiction over Mr. Ferguson would render *Bellaizac-Hurtado* a nullity and should, therefore, not be adopted.

Under the finding relied on in the R&R, the United States has jurisdiction under the territorial principle "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." (D.E. 17 at 17.) If that were true, then the Eleventh Circuit never would have reached the question of whether drug trafficking could be criminalized under the Offences Clause because Panama's consent would have ended the inquiry and resort to the authority conferred by the Offences Clause would have been unnecessary. In the Chief Magistrate Judge's view, 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, once the foreign nation consents, the United States has jurisdiction to prosecute *any* federal crime covered by the consent. *Bellaizac-Hurtado* rejected that outcome, holding that the limits imposed on Congress in the Offences Clause could not be overcome by the consent of a foreign sovereign alone. This Court should apply the same rule to the High Seas Clause and hold, consistent with *Bellaizac-Hurtado*, that a foreign nation's consent, *on its own*, is not enough to give the United States jurisdiction to prosecute conduct that occurs outside its borders on the high seas.

In short, adopting the Chief Magistrate Judge's R&R 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 1262 (Barkett, J., concurring); *see also United States v. Cardales-Luna*, 632 F.3d 731, 741 (1st Cir. 2011) (Torruella, 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 Torruella should be adopted, and this Court should find that the territorial principle does not support the exercise of U.S. jurisdiction here.

3. Drug Trafficking Cases are Irrelevant to Mr. Ferguson's Conviction

Finally, to bolster the second finding that the territorial principle provided jurisdiction over Mr. Ferguson, the Chief Magistrate Judge relied on the Eleventh Circuit's statement in *Bellaizac-Hurtado* that the Court has "always upheld extraterritorial convictions *under our drug trafficking laws* as an exercise of power under the Felonies Clause." (D.E. 17 at 22 (citing 700 F.3d at 1257 (emphasis added)).) Although the Eleventh Circuit's statement might be true as applied to drug trafficking laws, Mr. Ferguson was not convicted of a drug trafficking offense, nor did his crime of conviction have anything to do with drug trafficking. He was convicted of making a false statement about his destination during a boarding of a vessel. No court has held that Mr. Ferguson's crime of conviction is a valid exercise of power under the High Seas Clause. Respectfully, this Court should not be the first.

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

Because the Chief Magistrate Judge determined that the territorial principle of jurisdiction applied, the R&R did not "address the government's additional arguments regarding applicability of the universal principle and the protective principle." (D.E. 17 at 22.) Under the protective principle of jurisdiction, states may "assert jurisdiction over foreign vessels on the high seas that threaten their security or governmental functions." *United States v. Marino-Garcia*, 679 F.2d 1373, 1381 (11th Cir. 1982). For the protective principle to apply, the Eleventh Circuit requires the United States to demonstrate that the charged conduct "has a potentially adverse effect [in the United States] and is generally recognized as a crime by nations that have reasonably developed legal systems." *United States v. Gonzalez*, 776 F.2d 931, 939 (11th Cir. 1985). And universal jurisdiction authorizes a state to criminalize only a limited subset of universally proscribed conduct "such as the slave trade or piracy." *Marino-Garcia*, 679 F.2d at 1381-82. Neither principle supports Mr. Ferguson's conviction for making a false statement about the vessel's destination. (*See* D.E. 1 at 10-14.)

In arguing otherwise, the Government claimed, 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." (D.E. 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. 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").

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

Mr. Ferguson acknowledges that his independent claim that his conviction is unconstitutional under the High Seas Clause because his charged conduct lacked a nexus to the United States is foreclosed by Eleventh Circuit precedent. He, therefore, objects to the Chief Magistrate Judge's refusal to address his claim (*see* D.E. 17 at 15) only for purposes of continuing to preserve the merits of the claim for further appellate review. For the reasons set forth in his motion, Mr. Ferguson's conduct lacked a nexus to the United States and, under an original understanding of the High Seas Clause, the lack of any such nexus renders his conviction unconstitutional. (*See* D.E. 1 at 15-20; *see also* D.E. 16 at 5.)

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

Mr. Ferguson's due process claim is straightforward and based on binding precedent. In the Eleventh Circuit, for a statute to be applied extraterritorially to a foreign national consistent with the Due Process Clause, the statute must criminalize "conduct which is contrary to laws of all reasonably developed legal systems." *United States v. Gonzalez*, 776 F.2d 931, 940-41 (11th Cir. 1985); *see also United States v. Campbell*, 743 F.3d 802, 812 (11th Cir. 2014) (statute criminalizing drug trafficking on the high seas did *not* violate the Due Process Clause because the statute "provides clear notice that *all nations* prohibit and condemn drug trafficking aboard stateless vessels on the high seas") (emphasis added); *United States v. Rendon*, 354 F.3d 1320,

1326 (11th Cir. 2003). The Chief Magistrate Judge correctly identified this standard as "the crux" of Mr. Ferguson's due process claim and correctly determined that "[t]he government [did] not address the movant's cases regarding due process." (D.E. 17 at 23-24.) But, instead of recommending that the Court sustain Mr. Ferguson's due process claim, as required by Eleventh Circuit precedent, the Chief Magistrate Judge inexplicably found that *Campbell* and *Gonzalez* did not apply and then rejected their clear holdings in favor of perceived "persuasive" authority from the First and Third Circuits. (*Id.* at 24-25.) The Court should not adopt this finding.

First, the Chief Magistrate Judge narrowly read *Gonzalez* and *Campbell* as only applying to due process arguments based "on a nexus requirement or vagueness," and, because the Chief Magistrate Judge stated that Mr. Ferguson's due process argument was based on a lack of notice, not a nexus requirement or vagueness, the Chief Magistrate Judge determined that *Gonzalez* and *Campbell* did not apply. (D.E. 17 at 24.) But neither *Gonzalez* nor *Campbell* is limited in its application to arguments based on a nexus requirement or vagueness. Quite the opposite. In those cases, the Eleventh Circuit *rejected* due process arguments based on a nexus requirement (*Campbell*) and vagueness (*Gonzalez*) because those standards did *not* apply in this context. According to the Eleventh Circuit, the proper question to ask to resolve challenges under the Due Process Clause is whether the statute criminalizes conduct that "all nations prohibit and condemn," not whether a statute has a nexus requirement or is vague (as the defendants argued in *Campbell* and *Gonzalez*). *Campbell*, 743 F.3d at 812. That is the argument Mr. Ferguson made. The Chief Magistrate Judge erred by not applying *Campbell* and *Gonzalez* to resolve it.

Similarly, the Chief Magistrate Judge misinterpreted *Campbell* and *Gonzalez* by finding that neither case applied to a "due process challenge [based on a] lack of notice because the offense conduct is not condemned and prohibited by all nations." (D.E. 17 at 24.) Contrary to the

R&R, both cases addressed notice. In *Campbell*, for example, the Eleventh Circuit found that the statute at issue did not violate the Due Process Clause because it "provide[d] *clear notice* that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas." 743 F.3d at 812 (emphasis added). The reverse is also true. A statute that does *not* provide the same clear notice violates the Due Process Clause. *See id.*; *see also Gonzalez*, 776 F.3d at 940-41 (no due process violation where statute "provided *clear notice* of what conduct is forbidden," and that "conduct . . . is contrary to laws of all reasonably developed legal systems") (emphasis added); *Rendon*, 354 F.3d at 1326 ("[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.") (emphasis added). Unlike in *Campbell* and *Gonzalez*, Mr. Ferguson's conduct—making a false statement about his destination during a boarding—is *not* prohibited and condemned by all nations. He did not receive the clear notice mandated by the Eleventh Circuit. His conviction violates the Due Process Clause.

Second, the Chief Magistrate Judge erred by refusing to apply *Campbell* and *Gonzalez* and instead adopting out-of-circuit cases as persuasive. (D.E. 17 at 25 (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 fact that the First and Third Circuits have supposedly relied on "consent" from "the flag nation" alone to reject due process arguments (*id.*) should not result in the denial of Mr. Ferguson's due process claim because, even assuming that is the law in those circuits (and, as discussed below, it is not), it is not the law in the Eleventh Circuit. *See Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) ("[A] district court in this circuit is bound by this court's decisions."). The Eleventh Circuit confronted this very issue in *Gonzalez*. There, Honduran nationals were convicted 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 denied the defendants' due process claims because "[b]oth the offense and the intent of the United States are clear." 776 F.2d at 941. According to the Court, "[t]hose 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." *Id.* And, the Court held, "[d]ue 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.* In *Gonzalez*, it was the nature of the crime—that it was "contrary to laws of all reasonably developed legal systems"—not Honduras' consent, that rendered the convictions constitutional. Thus, Jamaica's consent on its own is not enough to sustain Mr. Ferguson's conviction. The conduct at issue—making a false statement about a vessel's destination—must also be contrary to laws of all reasonably developed legal systems. Mr. Ferguson's conduct does *not* satisfy that standard, and the R&R should be rejected because it found that indisputable fact irrelevant when resolving Mr. Ferguson's due process claim.

In any event, the Chief Magistrate Judge further erred in interpreting *Perez-Oviedo* and *Cardales* because, even under those cases, the flag nation's consent, on its own, did not render the challenged convictions constitutional. In *Perez-Oviedo*, the Third Circuit relied on Panama's consent, not as its main holding, but only to further support its conclusion that there was no due process violation. *See* 281 F.3d at 403 ("Perez-Oviedo's state of facts presents an even stronger case for concluding that no due process violation occurred [because t]he Panamanian government expressly consented to the application of the MDLEA."). For its main holding, the court relied on its prior determination that, "[s]ince drug trafficking is condemned universally by

law-abiding nations, . . . there was no reason for us to conclude that it is fundamentally unfair for Congress to provide for the punishment of a person apprehended with narcotics on the high seas." *Id.* (internal quotation marks omitted). Similarly, in *Cardales*, the First Circuit relied on Venezuela's consent *and* on its conclusion that "Congress has determined that all drug trafficking aboard vessels threatens our nation's security." 168 F.3d at 553. Thus, the court held, "when individuals *engage in drug trafficking aboard a vessel*, due process is satisfied when the foreign nation in which the vessel is registered authorizes the application of United States law to the persons on board the vessel." *Id.* (emphasis added). Mr. Ferguson was not engaged in drug trafficking nor was he engaged in any other offense that is condemned universally by law-abiding nations. Neither *Perez-Oviedo* nor *Cardales* supports the Chief Magistrate Judge's determination that, Jamaica's consent, *on its own*, cured any potential due process violation arising from Mr. Ferguson's conviction.

Finally, in discussing Mr. Ferguson's due process claim, the Chief Magistrate Judge noted that Mr. Ferguson "concedes in his constitutional challenge[that] Eleventh Circuit binding precedent forecloses his nexus challenge." (D.E. 17 at 23.) The import the Chief Magistrate Judge placed on this alleged concession is not clear. But, to the extent the Chief Magistrate Judge relied on the "concession" determination in recommending the denial of Mr. Ferguson's due process claim, Mr. Ferguson objects because he never conceded that any portion of his due process claim was foreclosed by Eleventh Circuit precedent. Although Mr. Ferguson acknowledges that one of his two High Seas Clause arguments is foreclosed (*see* D.E. 1 at 15 n.4), he made no such concession on his independent due process claim (*see id.* at 20).

III. Mr. Ferguson's Section 2255 Motion Is Timely

Mr. Ferguson filed a pro se notice of appeal that was entered on March 30, 2018. (*See* D.E. 1-8.) He then moved to voluntarily dismiss his appeal, and, on April 24, 2018, the Eleventh

Circuit entered an Order of Dismissal, which was "issued as a mandate of [the] court." (D.E. 1-9.) Mr. Ferguson had ninety days to file a petition for writ of certiorari seeking Supreme Court review of the Eleventh Circuit's Order. *See* Sup. Ct. R. 13(1). And, had Mr. Ferguson sought certiorari review in the Supreme Court, that Court would have had the authority to review the entirety of his conviction, including the jurisdictional challenges Mr. Ferguson makes now. *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).

The Chief Magistrate Judge found that *Garvey* and *Kaufman* were inapposite because neither case involved an untimely notice of appeal. (*See* D.E. 17 at 10.) But neither case *required* that a litigant timely file a notice of appeal to obtain the benefit of the holdings. The timeliness of a criminal defendant's notice of appeal "is not jurisdictional," and the issue is, therefore, subject to waiver if not raised on appeal. *United States v. Lopez*, 562 F.3d 1309, 1313 (11th Cir. 2009). Mr. Ferguson respectfully submits that the Chief Magistrate Judge erred by not applying *Garvey* and *Kaufman* simply because he did not file a timely notice of appeal. When measured from the expiration of his time to seek Supreme Court review of the Eleventh Circuit's Order—July 23, 2018—his section 2255 motion filed on July 12, 2019, was timely.

IV. Coram Nobis Relief Is Available To Mr. Ferguson

Alternatively, even if this Court were to agree that Mr. Ferguson's section 2255 motion is untimely, which it is not, the Chief Magistrate Judge erred by finding that coram nobis relief is not available to Mr. Ferguson. In so finding, the Chief Magistrate Judge relied on two rationales:

(i) Mr. Ferguson filed his motion while he was still in custody and, therefore, "habeas relief [via a section 2255 motion] was [Mr. Ferguson's] exclusive remedy"; and (ii) Mr. Ferguson "has not provided 'sound reasons for failing to seek relief earlier.'" (D.E. 17 at 12.) Neither rationale supports the Chief Magistrate Judge's conclusion that coram nobis relief is not available to Mr. Ferguson.

First, the Chief Magistrate Judge erred in determining that Mr. Ferguson could not seek relief via coram nobis because section 2255 is his "exclusive remedy." Although Mr. Ferguson was "in custody" within the meaning of section 2255 when he filed his motion on July 12, 2019, his sentence expired the next day. (*See* D.E. 17 at 5.) Thus, at any point after July 12, 2019, Mr. Ferguson was free to file a coram nobis petition raising the same substantive challenges to his conviction. *See Peter*, 310 F.3d at 712 ("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."). Three of his co-defendants have already done so. *See* Petition, *Weir v. United States*, Civil Case No. 1:19-cv-23420-UNGARO (S.D. Fl. Aug. 15, 2019). The Court has the authority to treat Mr. Ferguson's section 2255 motion as a coram nobis petition, and it should exercise that authority to the extent it agrees with the R&R that Mr. Ferguson's section 2255 motion is untimely. *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"); *see also United States v. Brown*, 117 F.3d 471, 475 (11th Cir. 1997) ("We have already held that pleadings erroneously styled as coram nobis petitions should be treated as § 2255 motions, and vice versa."). Absent the Court doing so, Mr. Ferguson would need to file a new action petitioning for coram nobis relief and raising identical grounds in support. It would be a waste of judicial resources to require

him to do that when the Court has the authority to treat his pending motion as if it were filed as a petition for coram nobis relief.

Second, the Chief Magistrate Judge erred by denying Mr. Ferguson coram nobis relief based on the finding that Mr. Ferguson did not provide "'sound reasons for failing to seek relief earlier.'" (D.E. 17 at 12.) The Government conceded that Mr. Ferguson's challenges under the High Seas Clause are not subject to procedural default. (*See* D.E. 15 at 6-8.) And the Chief Magistrate Judge correctly found that Mr. Ferguson's "due process claim based on a jurisdictional defect is not procedurally barred." (D.E. 17 at 14.) Accordingly, Mr. Ferguson does *not* need to show sound reasons for failing to seek relief earlier. The Chief Magistrate Judge erred by finding that Mr. Ferguson could not seek coram nobis relief on that basis.

Jurisdictional claims, like Mr. Ferguson's, "can never be waived by parties to litigation" and, where an error is jurisdictional, "collateral relief" via a coram nobis petition is "available." *Peter*, 310 F.3d at 712-13. Were this Court to adopt the Chief Magistrate Judge's finding and deny Mr. Ferguson's claims for failing to seek relief earlier, it would be doing so on the basis of a procedural default, one that, under *Peter*, cannot be applied to Mr. Ferguson's jurisdictional claims. *See Peter*, 310 F.3d at 712-13; *see also Moody v. United States*, 874 F.2d 1575, 1578 (11th Cir. 1989) (declining to review claim on petition for writ of error coram nobis because "[petitioner], unlike the petitioner in *Morgan*, has not proved that *sound reasons exist for [his] procedural default*") (emphasis added); *Alikhani*, 200 F.3d at 734 (dismissing five of six claims asserted in coram nobis petition because petitioner failed to raise them on direct appeal, but addressing merits of the sixth because it was arguably jurisdictional and "[a] genuine claim that the district court lacked jurisdiction to adjudicate the petitioner guilty may well be a proper ground for coram nobis relief *as a matter of law*") (emphasis added).

On this issue, *Alikhani* and *Peter* are particularly instructive. In *Alikhani*, the Court first determined whether a particular claim was jurisdictional and, only *after* determining it was not, rejected it because a nonjurisdictional claim is not "properly raised for the first time in a collateral proceeding when [it] could have been raised earlier." 200 F.3d at 735. And, in *Peter*, the Court held that "coram nobis relief affords a procedural vehicle through which [a jurisdictional] error may be corrected" because "[w]hen 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." 310 F.3d at 715. According to the Court, "a writ of error coram nobis *must* issue to correct [a] judgment that the court never had the power to enter" because "coram nobis relief is available in this circumstance *as a matter of law*." *Id.* at 716 (emphasis added); *see also United States v. Marchesseault*, 692 F. App'x 601, 603 (11th Cir. 2017) (stating "that errors the petitioner could have raised earlier—but failed to—do not warrant *coram nobis* relief," but nevertheless confirming that "jurisdictional errors are fundamental errors warranting *coram nobis* relief because they render the proceedings irregular and invalid"). Contrary to the Chief Magistrate Judge's finding (D.E. 17 at 21), there is no requirement that a jurisdictional claim be based on a subsequent Supreme Court decision. Although that was the case in *Peter*, the relevant factor driving the Court's decision was that the defendant's claim was jurisdictional, not that it was predicated on a newly issued Supreme Court decision. *See Peter*, 310 F.3d at 715-16; *Alikhani*, 200 F.3d at 734. Because Mr. Ferguson's claims are jurisdictional, as a matter of law, they can be raised now via a coram nobis petition regardless of whether Mr. Ferguson demonstrated sound reasons for not raising them sooner.

CONCLUSION

For all the foregoing reasons, Mr. Ferguson respectfully requests that the Court sustain his objections to the R&R and grant his motion to vacate or set aside his conviction.

Dated: December 30, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on December 30, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Paul A. Shelowitz