No. 16-___

IN THE

Supreme Court of the United States

MARIO WILCHCOMBE, NATHANIEL ERSKINE ROLLE, AND ALTEME HIBERDIEU BEAUPLANT,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners—Bahamian and Haitian residents—were on a boat registered in the Bahamas that was transporting cocaine and marijuana from Haiti to the Bahamas. The boat was stopped and Petitioners were arrested by the U.S. Coast Guard in international water between Haiti and the Bahamas. For five days, Petitioners were kept in leg shackles on Coast Guard vessels as they were transported to Miami. Although not given *Miranda* warnings, Petitioners remained silent during the trip. Upon arriving in the United States, Petitioners were charged with violations of the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70503 and 70506.

This case presents two critical questions that have split the lower courts. The questions presented are:

1. Whether the Government violated the Petitioners' Fifth Amendment rights by using their post-arrest, pre-*Miranda* silence as substantive evidence of their guilt in the Government's case-in-chief?

2. Whether the Maritime Drug Law Enforcement Act may constitutionally be applied in a foreign-bounded case involving the foreign transport of drugs to foreign shores by foreign residents on a foreign vessel, without a sufficient nexus to the United States?

PARTIES TO THE PROCEEDING

All parties appear on the caption to the case on the cover page. Messrs. Mario Wilchcombe, Nathaniel Erskine Rolle, and Alteme Hiberdieu Beauplant were Appellants below. The United States was the Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Messrs. Mario Wilchcombe, Nathaniel Erskine Rolle, and Alteme Hiberdieu Beauplant, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a–32a) is reported at 838 F.3d 1179. The judgments of the district court against Messrs. Alteme Hiberdieu Beauplant (Pet. App. 33a-40a), Mario Wilchcombe (Pet. App. 41a-48a), and Nathaniel Erskine Rolle (Pet. App. 49a-57a) are unreported.

JURISDICTION

The court of appeals entered a final judgment on October 4, 2016. On December 28, 2016, Justice Thomas extended the time for filing this petition for certiorari to and including March 3, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides in pertinent part that "No person . . . shall be compelled in any criminal case to be a witness against himself."

The Maritime Drug Law Enforcement Act, codified at 46 U.S.C. § 70503, provides in pertinent part:

> (a) Prohibitions.—While on board a covered vessel, an individual may not knowingly or intentionally—
>
> (1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;

> . . .
>
> (b) Extension beyond territorial jurisdiction. —Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.
>
> . . .
>
> (e) . . . In this section the term "covered vessel" means—
>
> (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States

The phase "vessel subject to the jurisdiction of the United States" is defined in 46 U.S.C. § 70502(c)(1) as, in pertinent part:

> (C) 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

STATEMENT OF THE CASE

This case presents two fundamental and frequently recurring questions over which the state and federal courts are openly and intractably divided: first, if a defendant is silent after he is arrested, but before he is read his *Miranda* rights, does the Government's subsequent use of that silence in its case-in-chief violate the defendant's right under the Fifth Amendment's Self-Incrimination Clause? And second, can the Maritime Drug Law Enforcement Act (the "MDLEA" or the "Act") be constitutionally applied to a foreign defendant transporting foreign drugs on a foreign vessel from one foreign country to

another, absent a sufficient nexus to the United States? Each presents a crucial constitutional question at the core of our criminal justice system.

Acknowledging the circuit splits over each question, the Eleventh Circuit below held that (1) "it was permissible for the government" to use the Petitioners' post-arrest, pre-*Miranda* silence as substantive evidence of their guilt in its case-in-chief, and (2) a conviction under the MDLEA need not have a nexus to the United States to comport with due process. Pet. App. 8a-9a, 16a-20a.

1. Petitioners Mario Wilchcombe, Nathaniel Erskine Rolle, and Alteme Hiberdieu Beauplant, are foreign citizens and residents of Haiti and the Bahamas. *Id.* at 3a, 5a-7a. Shortly after Petitioners and others departed Haiti for the Bahamas in Mr. Rolle's Bahamian-registered boat, the U.S. Coast Guard received a tip that a boat which had recently departed from Haiti was transporting drugs. The Coast Guard stopped Petitioners approximately 25 nautical miles off of Haiti. *Id.* at 3a-4a, 24a. As the Coast Guard approached, some individuals on the boat tossed packages of drugs overboard. *Id.* at 6a.

After the Bahamian government confirmed that the boat was registered in the Bahamas and gave its permission for the Coast Guard to board, Petitioners were placed into leg irons and transferred to a Coast Guard vessel, where they remained for two to three days before being transferred to another vessel, which took them to Miami. *Id.* at 5a-7a. In total, Petitioners were held at sea for five days. *Id.* at 25a. At no point during the journey were Petitioners ever read their *Miranda* rights, but they nevertheless

remained silent, with two minor exceptions.[1] *Id.* at 6a.

2. Petitioners were charged with conspiring to possess with intent to distribute, and possessing with intent to distribute, five kilograms or more of cocaine and 100 kilograms or more of marijuana while on a vessel subject to the jurisdiction of the United States[2] in violation of the MDLEA, 46 U.S.C. §§ 70503(a) and (b) and 70506(a). Pet. App. 7a.

At trial, in its case-in-chief the Government put on numerous witnesses who testified repeatedly about Petitioners' post-arrest, pre-*Miranda* silence. *Id.* at 16a-17a. The Government noted in response to an objection that it was specifically eliciting testimony about the Petitioners' silence before they were given *Miranda* warnings, "and therefore we are allowed to comment on their silence and remark on it," even though that silence came while the Government admitted the Petitioners were "shackled . . . on the Coast Guard cutter." *Id.* at 60a.

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[1] At one point, Mr. Rolle "expressed his belief that Petty Officer Irigoyen was the boss and asked him to cut him some slack." *Id.* at 6a. And after the men were transferred to the boat that would take them to Miami, Mr. Beauplant "told an interpreter that he was Haitian, that he had been stranded, and that the Bahamians had offered him a ride." *Id.* at 6a-7a.

[2] The vessel was registered in the Bahamas and stopped 25 miles off of Haiti's coast, but the Bahamian government granted the Coast Guard's request to board, thus making the vessel "subject to the jurisdiction of the United States" as that phrase is used in the statute. *See* Pet. App. 5a-6a, 24a; 46 U.S.C. § 70502(c)(1)(C).

During Petitioners' case, only Mr. Rolle testified. *Id.* at 7a. He stated that one of the other men on the boat (not either of the other Petitioners) had forced him and Mr. Wilchcombe at gunpoint to bring the drugs from Haiti to the Bahamas. *Id.* He also testified that Mr. Beauplant—the only Petitioner with a prior criminal record for drug trafficking—was a stowaway on his boat, whom he did not discover until the journey was well underway. *Id.* Neither Mr. Wilchcombe nor Mr. Beauplant took the stand.

In both its initial closing argument and during rebuttal summation, the Government repeatedly referred to Petitioners' silence "to make the argument that, if the defendants were on the ship under duress, as Rolle had testified, they would have sought help by trying to speak with members of the Coast Guard." *Id.* at 16a-17a. *See also id.* at 25a (Jordan, J., concurring) (Government argued in summation "that, had [Messrs. Beauplant and Wilchcombe] not been involved in the drug-smuggling venture, they would have said something to the Coast Guard officers after they were arrested and while they were at sea").

Petitioners moved for a mistrial on the basis of the testimony and the Government's repeated comments regarding their choice to remain silent. The trial court denied their motions. *See id.* at 16a; *see also* Order, *United States v. Rolle et al*, Case No. 14-20367-CR-Altonaga (S.D. Fla. July 29, 2014) (ECF No. 95). Petitioners were convicted on all charges. Pet. App. 8a.

3. On appeal, Petitioners claimed, among others, two errors.

a. First, Petitioners argued that the Government's use of their post-arrest, pre-*Miranda* silence as substantive evidence of their guilt violated the Fifth Amendment. *Id.* at 16a-20a. A majority of the panel agreed with Petitioners that the Fifth Amendment prohibited the Government from using as substantive evidence of guilt a defendant's pre-*Miranda* silence in its case-in-chief, but nevertheless the panel held that it was bound by prior Eleventh Circuit caselaw to the contrary. *Id.* at 24a (Jordan, J., joined by Walker, J.[3], concurring) (citing *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991)).

The panel acknowledged the deep circuit split over the issue, with seven circuits prohibiting the use of some pre-*Miranda* silence as substantive evidence of guilt, while three circuits "permit the government to comment on a defendant's silence at any time prior to the issuance of *Miranda* warnings." *Id.* at 18a-19a. The concurring judges believed that the Fifth Amendment prohibited the Government from commenting on post-arrest, pre-*Miranda* silence in its case-in-chief, for the same reasons that the Government is prohibited from commenting on a defendant's decision not to testify at trial. *See id.* at 26a-27a (citing *Griffin v. California*, 380 U.S. 609, 613 (1965)). Whether the Petitioners were given *Miranda* warnings was irrelevant, according to the concurring judges, because the right to remain silent comes from the Fifth Amendment, which is triggered by custody, not when an officer gives an individual

[3] Honorable John M. Walker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

Miranda warnings. *Id.* at 29a-30a. And because none of the Petitioners had testified when the Government introduced Petitioners' silence in its case-in-chief, the only purpose the Government could have had in doing so was to use the Petitioners' silence as substantive evidence of their guilt—something that is prohibited by the Fifth Amendment. *Id.*

b. Second, Petitioners argued that their convictions under the MDLEA violated due process because the Government did not establish a sufficient nexus between Petitioners or their actions and the United States. *Id.* at 8a-9a. As to this argument, the panel also identified a Circuit split over whether due process required a nexus to the United States. *Id.* at 9a (noting the Ninth Circuit's disagreement with the First, Third, Fifth, and Eleventh Circuits). Finding that it was bound by previous Eleventh Circuit precedent, the panel rejected Petitioners' argument that due process required such a nexus. *Id.* at 8a (citing *United States v. Campbell*, 743 F.3d 802, 810 (11th Cir. 2014)).

REASONS FOR GRANTING THE PETITION

This case presents two issues that have split the circuit courts, each of which warrants this Court's review.

First, whether the government may introduce evidence in its case-in-chief of, or comment on, a defendant's pre-*Miranda* silence is a question that has sharply divided the lower courts. This Court has previously granted certiorari to resolve the widely acknowledged circuit split over this issue, but ultimately decided that case on other grounds,

leaving the split in place. *See Salinas v. Texas*, —— U.S. ——, 133 S. Ct. 2174, 2179 (2013). Since *Salinas*, the split has become deeper and further entrenched in the lower courts: three circuits, including the Eleventh Circuit below, permit the Government to use a defendant's pre-*Miranda* silence as substantive evidence of his guilt in its case-in-chief, while seven circuits prohibit it as a violation of the Fifth Amendment's Self-Incrimination Clause. State courts are similarly divided and looking to this Court for guidance.

Second, the Eleventh Circuit's decision also presents a substantial circuit conflict over the due process limitations on extraterritorial criminal prosecutions under the MDLEA in a foreign-bounded case where the four important jurisdictional facts (location, destination, nationality, and country of vessel registration) are exclusively foreign. The Ninth Circuit and lower courts in the Second Circuit have held that the Government must demonstrate that a criminal prosecution under the MDLEA has a "sufficient nexus" to the United States to comport with due process, while four circuits have rejected the "sufficient nexus" test.

The Eleventh Circuit's decision below squarely presents both conflicts. Resolution of these issues is important: the circuits have solidified their conflicting positions on both issues, and both issues result in criminal prosecutions that violate the U.S. Constitution. And the Eleventh Circuit's decision is wrong: using a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of his guilt violates the Fifth Amendment, and to comport with due process principles the Government must prove a

sufficient nexus to the United States for a criminal prosecution under the MDLEA. This Court should grant the petition.

I. THERE IS A SUBSTANTIAL AND INTRACTABLE SPLIT OVER THE GOVERNMENT'S USE OF PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT

The Fifth Amendment's Self-Incrimination Clause guarantees "the right of a person to remain silent . . . and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Accordingly, the Government may not comment on a defendant's refusal to testify, which would be "a penalty imposed by courts for exercising" the privilege. *Griffin*, 380 U.S. at 614. Nor may the Government comment on a defendant's silence after he has been read his *Miranda* rights, which contain an implicit promise "that silence will carry no penalty." *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

This Court has not resolved, however, the extent to which the Fifth Amendment protects defendants from the Government's use in its case-in-chief of their pre-*Miranda* silence as substantive evidence of their guilt.[4] This Court was prepared to address this question in *Salinas*, but decided that case on other

[4] If a defendant testifies, the prosecution may use pre-*Miranda* silence for impeachment purposes. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam) (post-arrest, pre-*Miranda* silence); *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (pre-arrest, pre-*Miranda* silence).

grounds without resolving the split. *See* 133 S. Ct. at 2179. It should do so now.

A. Numerous State And Federal Courts Are Split Over The Use Of Pre-*Miranda* Silence As Evidence Of Guilt

There is an entrenched, openly acknowledged split in state and federal courts over the Government's use of a defendant's pre-*Miranda* silence in its case-in-chief as evidence of his guilt.

1. Two Circuits and some state courts have held specifically that the Fifth Amendment prohibits the Government from using post-arrest, pre-*Miranda* silence as evidence of guilt. *See United States v. Hernandez*, 476 F.3d 791, 796-97 (9th Cir. 2007); *United States v. Moore*, 104 F.3d 377, 389 (D.C. Cir. 1997); *Hartigan v. Commonwealth*, 522 S.E.2d 406, 409-10 (Va. 1999); *Akard v. State*, 924 N.E.2d 202, 209 (Ind. Ct. App.), *aff'd in part and rev'd in part on other grounds*, 937 N.E.2d 811 (Ind. 2010).

Moreover, numerous federal and state courts broadly prohibit the Government from using even pre-arrest silence as substantive evidence of guilt in its case-in-chief. *See, e.g.*, *United States v. Okatan*, 728 F.3d 111, 120 (2d Cir. 2013) ("[W]here, as here, an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt."); *Ouska v. Cahill–Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001) ("[T]he State used her pre-arrest, pre-*Miranda* silence as an improper inference of her guilt, in violation of her constitutional rights."); *Combs v. Coyle*, 205 F.3d 269,

283 (6th Cir. 2000) ("[T]he use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination."); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *State v. Lovejoy*, 89 A.3d 1066, 1073-75 (Me. 2014); *Baumia v. Commonwealth*, 402 S.W.3d 530, 536 (Ky. 2013); *State v. Boston*, 663 S.E.2d 886, 895-96 (N.C. Ct. App. 2008); *State v. Remick*, 829 A.2d 1079, 1081 (N.H. 2003); *People v. Welsh*, 58 P.3d 1065, 1070 (Colo. App. 2002); *State v. Moore*, 965 P.2d 174, 180 (Idaho 1998); *State v. Easter*, 922 P.2d 1285, 1291–92 (Wash. 1996); *State v. Palmer*, 860 P.2d 339, 349 (Utah Ct. App. 1993); *State v. Fencl*, 325 N.W.2d 703, 710-11 (Wis. 1982). *Cf. also State v. Horwitz*, 191 So. 3d 429, 442 (Fla. 2016) (under Florida Constitution); *Commonwealth v. Molina*, 104 A.3d 430, 432 (Pa. 2014) (under Pennsylvania Constitution); *Taylor v. Commonwealth*, 495 S.E.2d 522, 527-29 (Va. Ct. App. 1998) (under Virginia Constitution); *Tortolito v. State*, 901 P.2d 387, 390 (Wyo. 1995) (under Wyoming Constitution).[5]

These courts reason that the Fifth Amendment's right to remain silent is not limited to in-court proceedings, nor to only those persons in custody or charged with a crime. *See, e.g.*, *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (Fifth Amendment is not "dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It

[5] Some of these decisions may have been modified in part by *Salinas*. *See infra.*

applies alike to civil and criminal proceedings."); *Moore*, 104 F.3d at 385 ("[N]either *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody."). If pre-*Miranda* silence were admissible as substantive evidence of guilt, a defendant could not avoid the introduction of past silence by refusing to testify, and thus would be under pressure to waive the privilege against self-incrimination to explain the prior silence. And because police control the timing of reading *Miranda* warnings, a holding that the Fifth Amendment does not apply to pre-*Miranda* silence "would encourage improper police tactics" such as "delay[ing] administering *Miranda* warnings so that they might use the defendant's . . . silence to encourage the jury to infer guilt." *State v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004).

2. On the other hand, three circuits, including the Eleventh Circuit below, and two states, have held that the Government may use post-arrest, pre-*Miranda* silence in its case-in-chief as substantive evidence of guilt. *See* Pet. App. 19a; *United States v. Cornwell*, 418 F. App'x 224, 227 (4th Cir. 2011) (per curiam); *United States v. Frazier*, 408 F.3d 1102, 1110-11 (8th Cir. 2005); *State v. Fisher*, 373 P.3d 781, 790 (Kan. 2016) ("A defendant's silence before given [sic] *Miranda* warnings . . . are fair game."); *State v. Mitchell*, 876 N.W.2d 1, 11-12 (Neb. Ct. App. 2016) ("Because his silence occurred pre-*Miranda* [but post-arrest], the prosecutor's comment utilizing Mitchell's silence as evidence of his guilt was not improper."). *See also Crayton v. State*, 463 S.W.3d 531, 535 (Tex. Crim. App. 2015) (noting that "[c]ommentary on

appellant's pre-arrest and post-arrest, pre-*Miranda* silence is permissible").[6]

These courts reason that before *Miranda* warnings are given, there is no governmental coercion to speak and thus the Fifth Amendment is not triggered, following the reasoning of Justice Stevens' concurrence in *Jenkins v. Anderson*. *See* 447 U.S. 231, 243-44 (1980) (Stevens, J., concurring) ("When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment."). *See, e.g.*, *Frazier*, 408 F.3d at 1111 (noting that because "an arrest by itself is not governmental action that implicitly induces a defendant to remain silent," admitting post-arrest, pre-*Miranda* silence does not violate the Fifth Amendment). The view that the Fifth Amendment is not triggered before *Miranda* warnings are read, however, was implicitly rejected by *Salinas*, which "appeared to accept the principle that the Fifth Amendment was applicable to the [pre-*Miranda*] interrogation of Salinas, notwithstanding its 'voluntary' nature." Tracey

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[6] Like Texas, some state courts also allow the Government to introduce evidence of pre-arrest silence as substantive evidence of guilt in the Government's case-in-chief. *See State v. Lopez*, 279 P.3d 640, 645 (Ariz. Ct. App. 2012) ("[T]he protections of the Fifth Amendment do not prohibit the state's comment on that defendant's pre-arrest, pre-*Miranda* silence."); *State v. Borg*, 806 N.W.2d 535, 543 (Minn. 2011); *State v. LaCourse*, 716 A.2d 14, 16-17 (Vt. 1998); *People v. Schollaert*, 486 N.W.2d 312, 315 (Mich. Ct. App. 1992); *State v. Leecan*, 504 A.2d 480, 484 (Conn. 1986); *State v. Helgeson*, 303 N.W.2d 342, 348–49 (N.D. 1981).

Maclin, *The Right to Silence v. The Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 279 (2016).

B. This Case Is An Excellent Vehicle For Resolving This Important And Recurring Constitutional Issue

This Court should resolve the split in the lower courts over this important constitutional issue, and this case presents no obstacles for review.

1. Resolving the divide in the lower courts over the use of a defendant's pre-*Miranda* silence inarguably presents an important issue for this Court. Justice Jackson once noted that when advising a suspect, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). While that advice may be sound in most areas of the country, it is not in the Fourth, Eighth, and Eleventh Circuits, where a suspect can have his silence used against him by the Government as substantive evidence of his guilt.[7]

Thus, if Petitioners had been brought by the Coast Guard not to Miami (within the Eleventh Circuit),

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[7] Likewise, during plea colloquies, district court judges routinely advise defendants that if they were to go to trial, they would not be required to testify and, if they were to choose not to do so, their silence could not be used against them. *See, e.g.*, *Ephion v. LeBlanc*, No. CIVA 06-912-JJB-DLD, 2009 WL 728543, at *7 (M.D. La. Mar. 19, 2009) (recounting colloquy); Fed. R. Crim. P. 11(b)(1)(E). Were a defendant to agree to go to trial in the Fourth, Eighth, or Eleventh Circuit after hearing this advice, he would be surprised to find that his silence (before he received *Miranda* warnings, at least) could indeed be used against him.

but instead to Los Angeles (within the Ninth Circuit) or Boston (within the First Circuit), the Government would not have been able to introduce their post-arrest, pre-*Miranda* silence as substantive evidence of their guilt. *Compare* Pet. App. 19a, *with Hernandez*, 476 F.3d at 796-97, *and Coppola*, 878 F.2d at 1568. Indeed, in many states, whether the Government may use a defendant's post-arrest, pre-*Miranda* silence as evidence of his guilt turns on the happenstance of whether the defendant is being prosecuted in state or federal court. *Compare, e.g.*, Pet. App. 19a (Florida federal court, Government may use silence as evidence of guilt), *with, e.g.*, *Horwitz*, 191 So. 3d at 442 (Florida state court, Government prohibited from commenting on silence). Such arbitrary and disparate treatment is intolerable in light of the important constitutional interests at stake. *See, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 761-62 (1994) (noting that certiorari was granted to resolve conflict between Eleventh Circuit and Florida Supreme Court over which First Amendment standard of review applied to a disputed injunction).

2. This Court has recognized previously the importance of resolving the circuit split over the use of a defendant's pre-*Miranda* silence when it granted certiorari in *Salinas*, 133 S. Ct. 2174. However, the *Salinas* fractured plurality decision did not resolve the split. There, Salinas was not in custody at the time he was questioned, which was central to this Court's determination that his silence could be used as substantive evidence of guilt. *See id.* at 2178, 2180. Because Salinas was not in custody, he could (and, according to the plurality, did) voluntarily forgo

the Fifth Amendment's privilege against self-incrimination. *Id.* at 2180.

Salinas thus did not resolve the entrenched split in the lower courts. Indeed, the split has persisted and gotten deeper since *Salinas*. *Compare, e.g.*, *Okatan*, 728 F.3d at 120, *Lovejoy*, 89 A.3d at 1073-75, *Horwitz*, 191 So. 3d at 442, *and Molina*, 104 A.3d at 432 (post-*Salinas*, Government may not use pre-*Miranda* silence in its case-in-chief), *with, e.g.*, Pet. App. 19a, *Crayton*, 463 S.W.3d at 535, *Fisher*, 373 P.3d at 790, *and Mitchell*, 876 N.W.2d at 11-12 (post-*Salinas*, Government may use post-arrest, pre-*Miranda* silence as evidence of guilt).

3. Numerous States have called for this Court to resolve the split and provide needed certainty and uniformity to criminal prosecutions. For example, in support of the State of Ohio's petition for a writ of certiorari in *Bagley v. Combs*, 531 U.S. 1035 (2000), sixteen states as amici called for this Court to resolve the conflict because the continuing uncertainty impacts the states' "significant interest" in criminal prosecutions, and the issue "demands uniform treatment among all federal and state courts." Br. for Illinois et al. as Amici Curiae at 1, 14, *Combs*, 531 U.S. 1035 (No. 00-312). *See also, e.g.*, Pet. for a Writ of Certiorari at 19, *Combs*, 531 U.S. 1035 (No. 00-312) (describing the issue as one that is "important and unresolved . . . on which the circuits are sharply divided").[8]

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[8] *Combs*, however, was a poor vehicle for resolving this issue because the lower court there had also granted the individual relief on an independent and adequate Sixth Amendment

4. This case squarely presents for this Court's resolution whether the Government may introduce evidence in its case-in-chief of a defendant's post-arrest, pre-*Miranda* silence.[9] In Petitioners' trial, the Government put on numerous witnesses who testified to Petitioners' silence while they were shackled in leg irons for five days en route to Miami. Pet. App. 16a-17a, 25a. The Government then repeatedly referenced Petitioners' silence in both its initial closing argument and during rebuttal, arguing "to the jury that, had [Messrs. Beauplant and Wilchcombe] not been involved in the drug-smuggling venture, they would have said something to the Coast Guard officers after they were arrested and while they were at sea." *Id.* Petitioners objected, sought mistrials, and raised and fully litigated the issue before the Eleventh Circuit.[10]

(continued…)
ground, and thus this Court denied certiorari. *See* 531 U.S. 1035.

[9] The Fifth Amendment privilege protects an individual whenever "he is under police custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966). For simplicity, we focus here on post-arrest, pre-*Miranda* silence, as there can be no question that after arrest, an individual is in custody. *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam).

[10] Messrs. Beauplant and Rolle claimed in their Eleventh Circuit briefs that the Government's comments violated the Fifth Amendment. Mr. Wilchcombe, who had already filed his brief by the time Messrs. Beauplant and Rolle filed their briefs, subsequently adopted Messrs. Beauplant and Rolle's Fifth Amendment argument by way of an unopposed motion granted by the Eleventh Circuit on July 30, 2015 pursuant to Eleventh Circuit Rule 28.3. *See* Mot. to Adopt Portions of Initial Brs. of

A majority of the judges on the Eleventh Circuit panel thought that the Government had violated Petitioners' Fifth Amendment rights, *see id.* at 31a-32a (two judge concurrence), but recognized that the panel was bound by contrary prior Eleventh Circuit precedent, *id.* at 19a. The panel opinion did not call for en banc review because it believed that other evidence may have made the Government's error harmless with respect to Messrs. Beauplant and Rolle. *Id.* at 21a-22a. But the panel did not identify any reason why the error was not harmless with respect to Mr. Wilchcombe, who also raised the issue and sought a mistrial. *See id.* (addressing only Messrs. Beauplant and Rolle).

Furthermore, the Government's error was not harmless beyond a reasonable doubt. As to Mr. Rolle, for example, the Eleventh Circuit suggested that the Government's error was harmless because Mr. Rolle testified, permitting the Government to impeach his testimony with his pre-*Miranda* silence under *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993). *See* Pet. App. 20a. That would be persuasive if the Government had introduced Mr. Rolle's silence for impeachment purposes after he testified, but it did not. Instead, the Government introduced Petitioners' silence as evidence of their guilt "in its case-in-chief." *Id.* at 25a. Mr. Rolle testified only after the error had

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(continued…)
Co-Appellants Beauplant and Rolle, *United States v. Wilchcombe*, No. 14-14991 (11th Cir. July 27, 2015) (adopting *Miranda* argument); Order, *United States v. Wilchcombe*, No. 14-14991 (11th Cir. July 30, 2015) (granting Motion).

been committed, in an effort to respond to the Government's evidence of his silence.

The choice Mr. Rolle and the other Petitioners were put to by the Government demonstrates that, as a matter of law, its error was not harmless. When the Government uses "pre-arrest silence in [its] case-in-chief," defendants are forced to make an untenable decision "either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior silence." *Leach*, 807 N.E.2d at 341. *See also Welsh*, 58 P.3d at 1071. That is because "[t]oo many, even those who should be better advised, view [the Fifth Amendment] privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime." *Ullman v. United States*, 350 U.S. 422, 426 (1956). Thus, whether defendants choose to waive the privilege and testify, or remain silent, they are punished for exercising their Fifth Amendment right in direct contravention of its guarantees. *Malloy*, 378 U.S. at 8 (Fifth Amendment guarantees that a defendant will "suffer no penalty" for remaining silent); *Griffin*, 380 U.S. at 614 (noting same).

Forcing a defendant to decide between remaining silent and being punished for that decision infects an entire trial. *Cf. Carter v. Kentucky*, 450 U.S. 288 (1981) (refusal to give instruction indicating defendant was not obligated to testify found to be reversible error). That is why, for example, a court's failure to properly instruct the jury that silence is not to be used against a defendant is not a mere "technical erro[r] . . . which do[es] not affect . . . substantial rights," because the privilege to remain

silent is "[o]f a very different order of importance" from the "mere etiquette of trials and . . . the formalities and minutiae of procedure." *Bruno v. United States*, 308 U.S. 287, 293-94 (1939).

Here, Petitioners were forced to choose between waiving their valid Fifth Amendment privilege against self-incrimination to explain their silence, which the Government had introduced as evidence of their guilt, or remain silent and have the Government's testimony and closing statement commentary about their silence used against them. That is no choice at all.

C. The Fifth Amendment Prohibits The Government From Introducing Evidence In Its Case-In-Chief Of A Defendant's Post-Arrest, Pre-*Miranda* Silence

As a majority of the Eleventh Circuit panel below recognized, the Eleventh Circuit's decision is wrong as a matter of the Fifth Amendment and this Court's decision in *Griffin*. *Griffin*'s holding that the Government may not comment on a defendant's refusal to testify at trial also dictates that the Government may not comment on a defendant's earlier post-arrest, pre-*Miranda* decision to remain silent.

The Fifth Amendment guarantees that a defendant who refuses to testify will "suffer no penalty . . . for such silence." *Malloy*, 378 U.S. at 8. Accordingly, the Government may not comment on a defendant's refusal to testify, because that would be "a penalty imposed by courts for exercising" the privilege. *Griffin*, 380 U.S. at 614. Thus, "*Griffin* prohibits the

judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976).

If it is to have any meaning, this penalty-free guarantee must extend beyond the defendant's refusal to testify at trial, to actions before trial as well. After all, the privilege not to testify at trial and to be free from penalty for invoking the privilege is meaningless if the Government is allowed to introduce evidence of, and comment on, a defendant's post-arrest, pre-*Miranda* silence. "[I]f [a defendant] could not be made a self-accusing witness by coerced answers, he should not be made a witness against himself by unspoken assumed answers." *Molina*, 104 A.3d at 446.

That is why "the protection of the fifth amendment is not limited to those in custody or charged with a crime." *Coppola*, 878 F.2d at 1566. Nor is it dependent upon when a police officer gives *Miranda* warnings. *See, e.g.*, *Miranda*, 384 U.S. at 468 n.37 (noting that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation"). Indeed, *Miranda* warnings are merely an explanation of the Fifth Amendment privilege that the individual *already possesses*, *see id.* at 469, so "[i]t simply cannot be the case that a citizen's protection against self-incrimination only attaches when officers recite" those explanations, *Moore*, 104 F.3d at 386.

Allowing the Government to put on witnesses to testify to Petitioners' silence, and then to comment

during closing statements that their silence suggests guilt, eviscerates the protections the Fifth Amendment provides.

II. THERE IS A SUBSTANTIAL SPLIT OVER THE DUE PROCESS LIMITATIONS ON PROSECUTIONS UNDER THE MDLEA IN FOREIGN-BOUNDED CASES WITHOUT A SUFFICIENT NEXUS TO THE UNITED STATES

"The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011) (plurality op.). Thus, in civil litigation, this Court has long required a nexus, or "minimum contacts," between a defendant and the United States before he can be haled into court here. *Id.* at 883.

This Court has never addressed, however, whether due process makes similar demands in the context of criminal statutes with extraterritorial application, such as the MDLEA. The circuits are divided over whether the Due Process Clause requires defendants or their actions to have a nexus to the United States under the MDLEA. This is an important issue that should be resolved. This case squarely presents that issue in the context of a foreign-bounded prosecution: Petitioners are foreign citizens and residents, stopped in international waters, and accused of using a foreign-registered vessel to transport foreign-sourced drugs to another foreign country. This Court should grant certiorari.

A. Lower Courts Are Divided Over Whether Due Process Requires That Criminal Proceedings Under The MDLEA Have A Sufficient Nexus To The United States

Under the MDLEA, "[w]hile on board a covered vessel, an individual may not knowingly or intentionally . . . possess with intent to . . . distribute, a controlled substance," even if "the act is committed outside the territorial jurisdiction of the United States." 46 U.S.C. § 70503. As the Eleventh Circuit panel below acknowledged, there is a split in the circuits over whether, despite this statutory extraterritoriality, due process requires that prosecutions under the Act have some nexus to the United States. Pet. App. 9a. (The Government, too, has previously acknowledged this circuit split. *See* Br. for the United States in Opp'n at 7, 11, *Al Kassar v. United States*, 132 S. Ct. 2374 (2012) (No. 11-784) ("To the extent that petitioners identify a conflict within the courts of appeals, that conflict involves a narrower question under the Maritime Drug Law Enforcement Act. . . . Petitioners are correct that a long-standing conflict exists about that narrow question between the Ninth Circuit and several other circuits.").) This Court should grant certiorari to resolve this entrenched split.

1. In the Ninth Circuit and other lower courts, the Government must show a nexus to the United States for a prosecution under the Act to comport with due process when, as here, the defendants are foreign nationals on a ship registered in another country, accused of transporting drugs from one foreign country to another. *See United States v. Perlaza*, 439

F.3d 1149, 1160 (9th Cir. 2006) ("[W]here the MDLEA is being applied extraterritorially . . . due process requires the Government to demonstrate that there exists a sufficient nexus between the conduct condemned and the United States."); *United States v. Klimavicius–Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (requiring nexus). *See also United States v. Greer*, 956 F. Supp. 531, 536 (D. Vt. 1997) (requiring a nexus to the United States under the Act "to satisfy the requirements of the due process clause").

These courts reason that although as a textual matter, "[t]he MDLEA contains no nexus requirement," as a matter of constitutional principles, courts must find a nexus to the United States to "ensure that a defendant is not improperly haled before a court for trial" by a court lacking lawful authority to do so. *Klimavicius-Viloria*, 144 F.3d at 1257. "A defendant [on a ship registered in a foreign country] would have a legitimate expectation that because he has submitted himself to the laws of [that foreign country], other nations will not be entitled to exercise jurisdiction without some nexus." *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995). Thus, in these courts, "[t]he nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction." *Klimavicius-Viloria*, 144 F.3d at 1257.

Though the Second Circuit has not decided the issue under the Act, it has held for other extraterritorial criminal prosecutions that due process requires that the Government show a nexus to the United States. *See, e.g.*, *United States v. Yousef*, 327 F.3d 56, 111-112 (2d Cir. 2003). Subsequent to *Yousef*, lower courts in the Second

Circuit have analyzed whether a prosecution under the Act comports with the due process nexus requirement in *Yousef*, suggesting that the Second Circuit would join the Ninth Circuit in requiring a nexus for prosecutions under the Act as well. *See, e.g.*, *United States v. Prado*, 143 F. Supp. 3d 94, 97-98 (S.D.N.Y. 2015) (rejecting as "insufficient to satisfy *Yousef*'s nexus test" Congress's statement in the Act that drug trafficking threatens the United States), *appeal pending* Nos. 16-1055, 16-1212, & 16-1214 (2d Cir.). *See also Greer*, 956 F. Supp. at 536 (applying nexus requirement to Act pre-*Yousef*).

Likewise, although the Fourth Circuit has found it unnecessary to decide "whether a showing of sufficient nexus is either adequate or required to satisfy due process in the prosecution of a foreign national in U.S. courts," *United States v. Brehm*, 691 F.3d 547, 552 n.7 (4th Cir. 2012), it has cited favorably the Ninth Circuit's approach and suggested that a nexus might be required to comport with due process, *see United States v. Mohammad-Omar*, 323 F. App'x 259, 261-62 (4th Cir. 2009) (per curiam) (applying Ninth Circuit's test from *Klimavicius-Viloria*).

2. On the other hand, four circuits, including the Eleventh Circuit below, have held that the Act may constitutionally be applied in the absence of a nexus to the United States, Pet. App. 9a (citing *Campbell*, 743 F.3d at 810); *United States v. Suerte*, 291 F.3d 366, 369–72 (5th Cir. 2002); [11] *United States v.*

[11] More recently, in the context of a different drug statute with similar extraterritorial application, 21 U.S.C. § 959, the Fifth

Cardales, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Martinez–Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (same). *See also United States v. Mosquera–Murillo*, 153 F. Supp. 3d 130, 165–67 (D.D.C. 2015) (noting that the D.C. Circuit had not decided the matter, but holding that no nexus was required for prosecution under the Act in foreign-bounded situation with no nexus to the United States).

These courts reason that due process only requires that application of the Act "must not be arbitrary or fundamentally unfair." *Cardales*, 168 F.3d 553. *Cf. United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378 (11th Cir. 2011) (rejecting challenge to Drug Trafficking Vessel Interdiction Act on same grounds). And, those courts reason, that test is met for prosecutions under the Act because "[t]hose subject to [the Act's] reach are on notice" that the United States

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(continued…)
Circuit appeared to adopt the position of the Ninth Circuit and require that the Government show a nexus to the United States for prosecutions of non-U.S. citizens. *See United States v. Lawrence*, 727 F.3d 386, 396 (5th Cir. 2013) (quoting the Ninth Circuit in noting that "[i]n the context of non-U.S. citizens, 'due process requires the Government to demonstrate that there exists 'a sufficient nexus between the conduct condemned and the United States,'" but finding that the nexus requirement was met in that case because Lawrence, a non-U.S. citizen, lived in Houston). That statute, however, only applies when the defendant "intend[s], know[s], or ha[s] reasonable cause to believe that [the prohibited substance] will be unlawfully imported into the United States," or is using a U.S.-registered or -owned aircraft, and thus as a statutory matter incorporates the nexus requirement. *See* 21 U.S.C. § 959(a).

could exercise jurisdiction over them if the country in which their vessel is registered gives its consent for the United States to exercise jurisdiction, and that engaging in drug smuggling is recognized as illegal by most countries. *Suerte*, 291 F.3d at 376-77. *See United States v. Perez Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002); *Cardales*, 168 F.3d at 552-53. *But see* Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1224 nn. 226 & 229 (2009) (recognizing that drug trafficking is not a universally cognizable offense under international law (citing cases and Antonio Cassese, International Law 426 (2d ed. 2005))); Restatement (Third) of Foreign Relations Law § 404 (drug trafficking not on list of universal jurisdiction offenses).

B. The Court Should Resolve This Important And Recurring Constitutional Issue

This Court should resolve the split in the lower courts over this important constitutional issue, and this case presents no obstacles for review.

1. Resolving the divide in the lower courts over the due process requirements for extraterritorial criminal prosecutions in foreign-bounded cases under the Act inarguably presents an important issue for this Court. The aim of the Due Process Clause is ensuring fairness. *See, e.g.*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Fundamental fairness is not advanced by disparate treatment based solely on which port of entry a defendant is brought to—a decision over which he often has no

control. *See* 46 U.S.C. § 70504 (venue "shall be . . . the district at which the person enters the United States"). Under the current lower court split, the Government would have to demonstrate a nexus to the United States to obtain a conviction of a defendant who is brought by the Coast Guard to Los Angeles or Manhattan, but it would not be put to that burden if the Coast Guard landed in Boston or Miami instead. *Compare Perlaza*, 439 F.3d at 1160 (nexus required in Ninth Circuit); *Yousef*, 327 F.3d at 111-112; *and Prado*, 143 F. Supp. 3d at 97-98 (nexus required in S.D.N.Y.), *with Cardales*, 168 F.3d at 553 (no nexus required in First Circuit) *and* Pet. App. 8a-9a (no nexus required in Eleventh Circuit).

2. The issue is also important because prosecutions involving extraterritorial application of U.S. criminal laws have been increasing in frequency in recent years. Take, for example, Coast Guard drug interdictions at sea: in FY 2016 the Coast Guard seized or destroyed more than 416,000 pounds of cocaine being transported by ships from other countries. Christopher Woody, *The US Coast Guard Hauled in a Record Amount of Cocaine This Year*, Business Insider (Nov. 2, 2016), http://www.businessinsider.com/us-coast-guard-record-cocaine-drug-seizures-2016-11. The majority of suspects detained during these operations are transported to the United States for prosecution. *See id.* (noting that of 585 suspects detained in FY 2016, 465 were transported to the United States for prosecution). Both the amount of drugs seized and the number of suspects transferred to the U.S. in FY 2016 set records. *Id.* And because many, if not most, of those interdictions occur in international waters, it

is often the case that, as here, the suspects are placed into custody but not read their *Miranda* warnings until days or weeks later when they are transported to the United States. *See, e.g.*, Hunter Atkins, *Drug War on the High Seas: Behind the Coast Guard's Billion-Dollar Busts*, Men's Journal, http://www.mensjournal.com/adventure/articles/drug-war-on-the-high-seas-behind-the-coast-guards-billion-dollar-busts-w213087 ("Once apprehended, detainees can be held at sea for weeks or months until they get transferred to the U.S. for prosecution. Some may not touch land for 100 days.").

Not only have the number of criminal proceedings based on extraterritorial applications of U.S. criminal statutes been increasing in recent years, but the number of statutes with extraterritorial application similar to the MDLEA have also been increasing. *See, e.g.*, Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175; Explosives Transportation Acts, 18 U.S.C. § 832; Antiterrorism and Effective Death Penalty Act of 1996, 18 U.S.C. §§ 2332, 2332A, 2339B, 2339C, & 2339D; USA Patriot Improvement and Reauthorization Act of 2005, 18 U.S.C. § 2283; Trafficking Victims Protection Reauthorization Act of 2005, 18 U.S.C. § 3271; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. § 1596. As the number of both criminal statutes with extraterritorial application and prosecutions under those statutes increase, it becomes increasingly important for this Court to provide clarity about the due process limits on each.

3. Previous cases to present this "long-standing conflict" over the due process requirements when the MDLEA is applied extraterritorially had fatal vehicle

flaws not present here. Br. for the United States in Opp'n at 11, *Al Kassar*, 132 S. Ct. 2374 (No. 11-784) (acknowledging the "long-standing conflict . . . between the Ninth Circuit and several other circuits"). For example, some cases raised the question presented in the context of drug trafficking on a stateless vessel. *See, e.g.*, *Campbell*, 743 F.3d at 804 (stateless vessel), *cert. denied* 135 S. Ct. 704 (2014); *United States v. Chun Hei Lam*, , 430 F. App'x 794, 794 (11th Cir. 2011) (same), *cert. denied sub nom Tam Fuk Yuk v. United States*, 565 U.S. 1203 (2012); *Martinez-Hidalgo*, 993 F.2d at 1056 (same), *cert. denied* 510 U.S. 1048 (1994). But there is no circuit split over whether due process requires a nexus for prosecutions of stateless vessels. *See Perlaza*, 439 F.3d at 1161 ("[I]f a vessel is deemed stateless, there is no requirement that the government demonstrate a nexus between those on board and the United States before exercising jurisdiction over them.")

Other petitions were denied because the petitioners had failed to raise and adequately preserve the due process argument below. *See* Br. for the United States in Opp'n at 10, *Cardales v. United States*, 528 U.S. 838 (1999) (No. 98-9526) ("[T]his case is inappropriate for review because petitioner failed to raise his claim that the Maritime Act required proof of a nexus . . . in district court."), *cert. denied* 528 U.S. 838 (1999).

This case, by contrast, squarely presents for this Court's resolution the issue of the due process limits of extraterritorial application of the MDLEA. Petitioners are foreign residents who were operating a foreign-registered vessel and transporting foreign-purchased drugs to a foreign country. Pet. App. 3a-

7a, 24a. The juries were not instructed that in order to convict Petitioners, they needed to find beyond a reasonable doubt that the Government had demonstrated a sufficient nexus to the United States. Finally, Petitioners preserved their argument before the trial court and on appeal to the Eleventh Circuit. Therefore, this case presents an ideal vehicle to resolve the split.

C. Due Process Requires That The Government Demonstrate A Sufficient Nexus Between A Defendant And The United States For Criminal Prosecutions Under The MDLEA

1. The Fifth Amendment provides that "[no] person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Unlike the Fourth Amendment, which applies only to "the people" of the United States, the Fifth Amendment applies to "persons" broadly, suggesting that it accompanies extraterritorial extensions of U.S. criminal law to foreign persons abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 271-72 (1990) (plurality op.) (holding that the Fourth Amendment's "the people" "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community," in part by contrasting "the people" with the broader "person[s]" language of the Fifth Amendment).

2. In the civil context, this Court has warned that due process precludes federal courts from exercising jurisdiction to adjudicate foreign-bounded disputes

because due process requires a nexus to the forum. *See, e.g.*, *DaimlerChrysler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (suit in California by foreign plaintiffs against foreign defendant for actions taken abroad would violate due process). In the criminal context, due process should require no less. *See Klimavicius–Viloria*, 144 F.3d at 1257 (analogizing role of due process clause in criminal context to the "'minimum contacts' test in personal jurisdiction"); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1242 (1992) (arguing that due process should restrict the extraterritorial application of U.S. jurisdiction).

In civil litigation, due process requires that a defendant have the requisite "minimum contacts" with the forum to justify haling him into court there. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). This requirement stemmed from concerns about comity between the states and providing adequate notice to a defendant, such that courts may only hear those disputes that will not "offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

The same principles require a nexus to the United States—the equivalent of minimum contacts—for extraterritorial criminal prosecutions. *See Perlaza*, 439 F.3d at 1168 ("The nexus requirement . . . . serves the same purpose as the minimum contacts test in personal jurisdiction."). Just as the Due Process Clause's personal jurisdiction requirement limits the ability of a federal court in one state to resolve a dispute involving a resident of a different

state if that resident has insufficient connections to the forum state, *see Helicopteros Nacionales*, 466 U.S. at 414, its nexus requirement limits a federal court's ability to adjudicate a criminal complaint involving a citizen of a foreign country, absent a sufficient nexus between that individual or his conduct and the United States, *see Caicedo*, 47 F.3d at 372 ("A defendant [on a ship registered in a foreign country] would have a legitimate expectation that because he has subjected himself to the laws of [that foreign country], other nations will not be entitled to exercise jurisdiction without some nexus.").

That the nation in which the vessel is registered consents to the United States' exercise of jurisdiction "does not eliminate the nexus requirement," which is a constitutional limitation on the federal courts. *Perlaza*, 439 F.3d at 1169. *See also United States v. Angulo-Hernández*, 576 F.3d 59, 60 (1st Cir. 2009) (Torruella, J., dissenting from denial of en banc review) (calling for the First Circuit to join the Ninth Circuit in requiring a nexus, and arguing that "[t]he consent of the flag nation is not material to a due process analysis focused on our government's power over a foreign individual defendant").

Here, the United States may not constitutionally exercise jurisdiction over Petitioners. Petitioners are citizens and residents of Haiti and the Bahamas. The boat they were on was registered in the Bahamas and transporting drugs from Haiti to the Bahamas when Petitioners were stopped in international waters 25 miles off of the coast of Haiti. Pet. App. 3a-7a, 24a. Absent a sufficient nexus to the United States, Petitioners' convictions violated due process. *Perlaza*, 439 F.3d at 1160. Were it otherwise, the

Coast Guard could patrol all the international waters of the world and transport back to the United States for prosecution anyone found transporting drugs. If that is insufficient to grant federal courts jurisdiction over civil matters, *see DaimlerChrysler AG*, 134 S. Ct. at 751, it is insufficient to sustain criminal prosecutions as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2017

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14991

D.C. Docket No. 1:14-cr-20367-CMA-2

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARIO WILCHCOMBE, NATHANIEL ERSKINE ROLLE, ALTEME HIBERDIEU BEAUPLANT,

Defendants - Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(October 4, 2016)

Before MARCUS, JORDAN and WALKER,* Circuit Judges.

*Honorable John M. Walker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

WALKER, Circuit Judge:

Defendants Mario Wilchcombe, Nathaniel Erskine Rolle, and Alteme Hiberdieu Beauplant appeal from a judgment entered in the United States District Court for the Southern District of Florida (Altonaga, *J*.) following a jury trial convicting (1) all defendants of conspiring to possess with intent to distribute and possessing with intent to distribute five kilograms or more of cocaine and 100 kilograms or more of marijuana while on board a vessel subject to U.S. jurisdiction, in violation of 46 U.S.C. §§ 70503(a) and (b) and 70506(a), 21 U.S.C. §§ 960(b)(1)(B) and (2)(G) and 18 U.S.C. § 2; and (2) Rolle individually of failing to obey a lawful order to heave to his vessel of which he was the master, operator, and person in charge, in violation of 18 U.S.C. § 2237(a)(1). The district court sentenced Beauplant and Wilchcombe principally to 120 months' imprisonment and Rolle to 135 months' imprisonment.

On appeal, the defendants argue that (A) the district court lacked subject matter jurisdiction over the prosecution; (B) the evidence was insufficient to support Wilchcombe's conviction; (C) the district court erred in failing to declare a mistrial based on improper prosecutorial comment on Rolle's and Beauplant's post-custody, pre-*Miranda* silence; (D) the district court erred in denying Beauplant's motion to dismiss on the basis of the unavailability of favorable evidence; and (E) the district court abused its discretion in admitting uncharged misconduct evidence against Beauplant. Finding no merit in any of these arguments, we AFFIRM.

I.

A.

Keno Wade Russell, a Bahamian fisherman and cooperating witness, and members of the Coast Guard testified to the following facts.

In April 2014, Russell met in the Bahamas with a drug smuggler known as Kool Aid, Rolle, and two other men. During the meeting, Rolle agreed to use his small fishing boat, located in Haiti, to bring drugs from Haiti to the Bahamas. Kool Aid gave Rolle money to fly to Haiti and arranged to travel with Russell to Haiti via freighter. The men agreed that once Kool Aid and Russell arrived in Haiti, they would meet with Rolle; Mario Wilchcombe, a longtime acquaintance of Russell; and another drug smuggler named Enoch.

After arriving in Haiti, Kool Aid and Russell met Enoch, Rolle, Wilchcombe, and Beauplant on the Île de la Tortue, where they remained for a week. Russell, Rolle, Beauplant, and others (not including Wilchcombe) loaded cocaine and marijuana onto Rolle's boat, stacking the bales on the deck and placing drugs in the center console. When the boat was ready for departure, a 17-year-old Haitian named either Pepe Anri or Pepe Henri ("Henri"), arrived at the boat, and Enoch told Rolle to bring Henri to the Bahamas.

On May 3, 2014, at around seven or eight in the evening, Rolle's boat left Haiti with Rolle, Wilchcombe, Beauplant, Russell, and Henri on board. A few hours later, the crew of the United States Coast Guard cutter *Charles Sexton*, which was

patrolling the ocean between Cuba and Haiti, received a tip that a boat carrying drugs had recently departed from the Île de la Tortue. Shortly thereafter, the *Charles Sexton* began tracking Rolle's boat, which was powered by two engines and was heading north at 10 to 15 knots per hour. Because of the boat's relatively high speed, Lieutenant Scott Nichols and four other crewmen left the cutter to pursue the target in a small rubber chase boat.

As the chase boat approached, Rolle's boat increased its speed and continued to travel with its lights off. The chase boat turned on its lights, spotlight, flashing blue lights, and siren. After the chase boat fixed Rolle's boat in its spotlight, its crewmembers saw that Rolle's boat was not flying a flag. At that point, Petty Officer Michael Irigoyen ordered Rolle's boat to stop. Instead, Rolle further increased the speed of his boat and made a series of evasive turns while repeatedly looking back at the chase boat. During the pursuit, two men in addition to Rolle stood on the deck of Rolle's boat and spent approximately 10 minutes throwing large packages into the water. After they finished, Rolle slowed his boat.

After the chase boat pulled alongside Rolle's boat, Lieutenant Nichols saw two men on board in addition to Rolle and the two men who had been jettisoning packages. One of the newly-spotted men was near the front and the other was near the back by the engines. It appeared to Lieutenant Nichols that the man near the engines, later identified as Wilchcombe, had been laying on the deck. Russell explained at trial that Wilchcombe had been holding a loose wire in place so that one of the engines, which had

malfunctioned during the trip, could continue to function.

Two members of the Coast Guard boarded Rolle's boat and turned off the engines. They returned to the chase boat and Lieutenant Nichols questioned the men on Rolle's boat to determine the identity of the captain, the boat's country of registration, and its destination. Rolle responded that he was from the Bahamas and owned the boat, which was registered in the Bahamas. He said that two of the other men on the boat were Bahamian and that the other two were Haitian. He said that he was traveling between Bahamian islands. To Lieutenant Nichols, the men on Rolle's boat appeared calm and relaxed. None asked to speak with him privately.

Lieutenant Nichols radioed the information provided by Rolle back to the cutter, and the Coast Guard requested that the Bahamian Government provide a statement of no objection ("SNO"), which would allow the Coast Guard to board Rolle's Bahamian-registered boat for law-enforcement reasons. The time between the request and the response was approximately two hours. While the crew of the chase boat waited, Lieutenant Nichols saw Rolle speaking with the man later identified as Russell and directed them to stop.

After receiving word from the cutter that the Bahamian Government had confirmed that the target vessel was registered in the Bahamas and had provided the SNO, Lieutenant Nichols and Petty Officer Irigoyen boarded Rolle's boat, frisked the occupants, and found several pocketknives on the men and nearly $2,000 in cash in Rolle's waistband. In response to a question, Rolle said that he and two

friends were giving a ride to two other friends. The Coast Guard took the passengers into custody and Lieutenant Nichols and Petty Officer Irigoyen searched the boat. During the search, Lieutenant Nichols and Petty Officer Irigoyen took photos and seized personal effects. They also inspected Rolle's boat to determine whether it could be towed to port. After determining that this would be neither feasible nor safe, the Coast Guard sank the boat.

By the time that Lieutenant Nichols and Petty Officer Irigoyen completed the search and returned to the cutter with the suspects, the cutter's crew had recovered 40 packages that had been thrown overboard, along with two duffel bags and a GPS. The packages contained 35 kilograms of cocaine and 860 kilograms of marijuana. The Coast Guard detained the men aboard the cutter for a few days during which time they learned their identities.

Throughout their detention on the chase boat and the *Charles Sexton*, the men were placed in leg irons. They were not read their *Miranda* rights. None were interrogated nor did any ask to speak privately with any members of the Coast Guard. However, at one point, when Petty Officer Irigoyen and Rolle were alone together, Rolle expressed his belief that Petty Officer Irigoyen was the boss and asked him to cut him some slack. Similarly, Russell told Petty Officer Irigoyen that he had fallen on hard times after his fishing boat broke down and he was unable to provide for his family.

After a few days, the men were transferred from the *Charles Sexton* to a second Coast Guard cutter, the *Paul Clark*, and Henri was repatriated to Haiti. After the transfer, Beauplant told an interpreter that

he was Haitian, that he had been stranded, and that the Bahamians had offered him a ride. He also said he had been traveling with Henri, an orphan from his village, to whom he was not related.

At trial, Rolle, the only defendant to testify, told a very different story. He claimed that Russell had tricked him and then forced him and Wilchcombe at gunpoint to bring the drugs from Haiti to the Bahamas. He also testified that Beauplant and Henri had stowed away in his boat and that he did not know they were there until after the journey was well underway.

B.

On May 22, 2014, Rolle, Wilchcombe, Beauplant, and Russell were indicted for conspiring to possess with intent to distribute and possessing with intent to distribute five kilograms or more of cocaine and 100 kilograms or more of marijuana while on a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70503(a) and (b) and 70506(a), 21 U.S.C. §§ 960(b)(1)(B) and (2)(G) and 18 U.S.C. § 2. Rolle was also charged with failing to obey a lawful order to heave to his vessel, of which he was the master, operator, and person in charge, in violation of 18 U.S.C. §2237(a)(1).

Russell pleaded guilty to conspiracy to distribute cocaine and marijuana and agreed to cooperate with the government by testifying at the trial of Rolle, Wilchcombe, and Beauplant.

On July 28, 2014, the trial of Rolle, Wilchcombe, and Beauplant began. The district court empaneled two juries, one for Rolle and Wilchcombe and the

other for Beauplant, to avoid any potential prejudice that could result from evidence of Beauplant's prior criminal trafficking. All three men were convicted on all charges. The district court sentenced Beauplant and Wilchcombe principally to 120 months' imprisonment and Rolle to 135 months' imprisonment.

II.

A.

The defendants advance multiple arguments in urging us to conclude that the district court lacked jurisdiction over this case. We review de novo "a district court's interpretation and application of statutory provisions that go to whether the court has subject matter jurisdiction" and review factual findings related to jurisdiction for clear error. *United States v. Tinoco*, 304 F.3d 1088, 1114 (11th Cir. 2002) (internal quotation marks omitted).

1.

Wilchcombe and Rolle first argue that the MDLEA violates the Due Process Clause because it does not require proof of a nexus between the United States and a defendant. Because we have previously rejected this argument, *United States v. Campbell*, 743 F.3d 802, 810 (11th Cir. 2014), *cert. denied,* 135 S. Ct. 704 (2014), they seek en banc review.

We cannot reconsider this issue, nor do we support en banc review. The text of the MDLEA does not require a nexus between the defendants and the United States; it specifically provides that its prohibitions on drug trafficking are applicable "even

though the act is committed outside the territorial jurisdiction of the United States." 46 U.S.C. § 70503(b). The Constitution and principles of international law support our interpretation of the MDLEA, *Campbell*, 743 F.3d at 810, and Wilchcombe and Rolle make no convincing arguments to the contrary. Further, of the other circuits to have considered this question, all but one share our view. *Compare United States v. Suerte*, 291 F.3d 366, 369-72 (5th Cir. 2002) (stating that the due process does not require a nexus for the MDLEA to apply outside the territorial jurisdiction of the United States), *and United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (same), *and United States v. Martinez- Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (same), *with United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (stating that the MDLEA requires a nexus). Accordingly, we reject Wilchcombe's and Rolle's arguments that our interpretation of the MDLEA violates due process.

2.

Rolle, Wilchcombe, and Beauplant argue that the government failed to establish jurisdiction over Rolle's boat because the SNO obtained from the Bahamian Government does not conform to the requirements of 46 U.S.C. § 70502(c)(1)(C).

The MDLEA permits the United States to exercise jurisdiction over "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." 46 U.S.C. § 70502(c)(1)(C). Under the MDLEA, a foreign nation can consent or waive objection "by radio, telephone, or similar oral

or electronic means[,] and [this consent or waiver] is proved conclusively by certification of the Secretary of State or the Secretary's designee," *id.* at § 70502(c)(2), although courts must still determine whether the MDLEA's jurisdictional requirements have been met, *see United States v. McPhee,* 336 F.3d 1269, 1272 (11th Cir. 2003).

The defendants focus specifically on claimed defects in the language of the SNO, but we have never required the language in SNOs to precisely mirror the language contained in the MDLEA; to the contrary, we have approved of SNOs that did not. For example, in *United States v. Brant-Epigmelio*, 429 F. App'x 860, 862 (11th Cir. 2011) (unpublished), we considered the effect of two SNOs, one of which "waived objection to the enforcement of U.S. law by the United States," and the other of which "waived objection to the enforcement of U.S. law by the United States over the Colombian crewmember of the . . . vessel." We held that the variation in language between the two was "immaterial," as long as "both show that the [foreign] government . . . waived objection to the enforcement of United States law." *Id.* at 863. In *United States v. Persaud*, 605 F. App'x 791, 795 (11th Cir. 2015) (unpublished), we stated that the district court's receipt of an "[SNO] stating that Jamaica waived primary jurisdiction over" the defendant meant that the district court did not err in concluding that it had jurisdiction under the MDLEA.

Here, Coast Guard Commander Fazio, a designee of the Secretary of State, certified to the district court that "the Government of the United States requested the [Bahamian Government] consent to the United

States exercising jurisdiction over the vessel" and the Bahamian Government "notified the Government of the United States that it waived its right to exercise primary jurisdiction over the vessel." The language informing the United States that the Bahamian Government "waived its right to exercise primary jurisdiction over the vessel" is similar to the language in the SNO that we approved in *Persaud*, differing only in that it mentions the vessel instead of the specific defendants. In fact, the SNO in this case actually hews closer to the MDLEA than the *Persaud* SNO, because both this SNO and the MDLEA speak of a waiver of jurisdiction over the vessel and not the defendants.

Although *Persaud* and *Brant-Epigmelio* do not bind us because they are unpublished opinions, we are persuaded that their approach is correct. Accordingly, we reiterate that, as long as the substance of the consent or waiver is communicated, the language contained in SNOs need not exactly track the language contained in § 70502(c)(1)(C) to satisfy the requirements of the MDLEA. The SNO in this case was sufficient to inform the United States that the Bahamian Government consented to the United States' exercise of jurisdiction over Rolle's vessel.

3.

Beauplant and Rolle argue here, as they did to the trial court, that the evidence at trial demonstrated that the Coast Guard misled the Bahamian Government about the documentation of the registration status of Rolle's boat that was available to the Coast Guard when it was seeking the SNO. If

the Bahamian Government had been accurately informed of the existing documentation, the defendants argue, the Coast Guard would have had to await the arrival of a Bahamian law enforcement officer before boarding the boat.

We agree with Beauplant and Rolle that the evidence presented at trial suggests that the Coast Guard may have incorrectly informed the Bahamian Government about the registration documents provided by Rolle to the Coast Guard. An affidavit from Commander Fazio, on which the district court relied before trial to determine whether the U.S. had jurisdiction over Rolle's boat, states that when the Coast Guard initially contacted the Bahamian Government, the Coast Guard stated that they had found the registration number painted on the hull of the boat. The affidavit also states that no other registration information was provided to the Coast Guard at this time. Lieutenant Nichols' trial testimony supports this version of events. He testified that he recovered the registration documents in one of the bags thrown overboard, and therefore the documents would not have been available to Commander Fazio when he contacted the Bahamian Government for the SNO.

At trial, Russell provided contradictory testimony. He asserted that Rolle showed his registration card to the Coast Guard before the officers boarded the boat. This version of events is supported by the fact that the registration card was listed in the inventory of objects found on Rolle when he was searched.

There are multiple reasons why this inconsistency does not lead us to fault the district court's decision to exercise jurisdiction over the defendants. First,

given the contradictory evidence in the record, we cannot say that the district court committed "clear error," *Tinoco*, 304 F.3d at 1114, in concluding that the facts here supported the exercise of jurisdiction. Second, even if we accept the defendants' claim that Commander Fazio had seen Rolle's registration card but told the Bahamian Government that he had not, this fact, in the context of this case, does not render the exercise of jurisdiction improper. The Coast Guard cannot have obtained an advantage from any such misrepresentation because Commander Fazio informed the Bahamian Government that Rolle's boat had the registration number painted on its hull, thus permitting the Bahamian Government to check the boat's registration if it wished to do so. Finally, despite the defendants' assertions to the contrary, there is also no evidence in the record of bad faith or intentional misrepresentations on the part of the Coast Guard, a fact which a district court may take into account when determining whether a foreign government has consented to the United States' exercise of jurisdiction pursuant to the MDLEA. *See id.* (considering whether the Coast Guard had acted in bad faith in providing inaccurate information to the Colombian government about a vessel's registration and concluding that it did not matter because the inaccurate information did not affect the Colombian government's response).

We accordingly reject this challenge to the district court's exercise of jurisdiction.

B.

Wilchcombe argues that the government's evidence only proved that he was present at the scene of the

drug trafficking conspiracy, not that he participated in it. Put another way, he asserts that the government did not disprove his "mere presence" defense to the charges of conspiring to possess with intent to distribute and possessing with intent to distribute five kilograms or more of cocaine and 100 kilograms or more of marijuana.

We review de novo challenges to the sufficiency of the evidence supporting a criminal conviction. *United States v. Dominguez*, 661 F.3d 1051, 1061 (11th Cir. 2011). The evidence, viewed in the light most favorable to the government, must be such that "a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted). "We assume that the jury made all credibility choices in support of the verdict and accept all reasonable inferences that tend to support the government's case." *Id.* (internal quotation marks omitted).

In maritime drug-trafficking cases, "[a] jury may find knowledgeable, voluntary participation from presence when the presence is such that it would be unreasonable for anyone other than a knowledgeable participant to be present." *United States v. Cruz-Valdez*, 773 F.2d 1541, 1546 (11th Cir. 1985). In making this determination, a jury may consider factors such as

> (1) [the] probable length of the voyage, (2) the size of the contraband shipment, (3) the . . . close relationship between captain and crew, (4) the obviousness of the contraband, and (5) other factors, such as suspicious behavior or diversionary maneuvers before apprehension, attempts to flee, inculpatory statements made

> after apprehension, witnessed participation of the crew, and the absence of supplies or equipment necessary to the vessel's intended use.

Tinoco, 304 F.3d at 1123. The government bears a heavier burden where the quantity of drugs is smaller; if the quantity of drugs is "large," the government need only prove any one of the additional factors listed above. *Id.*

Here, the evidence is sufficient to sustain Wilchcombe's convictions for conspiring to possess with intent to distribute and possessing with intent to distribute under the MDLEA. *See id.* at 1123-24 (stating that "the circumstances that were sufficient to support the appellants' conspiracy conviction also support their conviction on the possession count" under the MDLEA). Plainly, given the relatively small size of the boat, 895 kilograms, or nearly one ton, of narcotics is a "large quantity." *See id*. But even if that were not the case, ample additional evidence defeats the insufficiency argument. As Russell testified, some of the drugs were stored on deck. A reasonable jury could have inferred on the basis of this testimony that the drugs would have been obvious to Wilchcombe at the start of the voyage. Testimony from both Russell and members of the Coast Guard permitted the jury to find that Wilchcombe had aided the boat's attempts to evade capture by lying on the deck and holding a wire in place so that the second engine could operate. Finally, Russell's testimony provided evidence that Wilchcombe had close relationships with Rolle, who captained the boat; with Beauplant; and with Russell himself. Russell specifically testified that he had

known Wilchcombe for a long time and that Wilchcombe had spent time before the voyage getting to know the other passengers. The relationships between Wilchcombe and the crew members made it more likely that Wilchcombe knew of the presence of the drugs on the boat.

In sum, because a reasonable jury could have concluded from the government's evidence that Wilchcombe was not simply present on Rolle's boat but was a knowing participant in the conspiracy, we reject Wilchcombe's argument that the evidence was insufficient to support his convictions.

C.

Beauplant and Rolle argue that the district court erred when it refused to declare a mistrial based on the government's comments at trial on their silence after they were taken into custody.

The defendants did not receive a *Miranda* warning at any point while they were in the custody of the Coast Guard and government witnesses testified about the defendants' silence at several points after their boat had been intercepted. For the purposes of this discussion, we assume that the defendants were in custody from the time that the Coast Guard crew first boarded Rolle's boat, turned off the motor, and returned to their own boat. At this time the defendants were kneeling on board their boat with their hands draped over the gunnel so that the Coast Guard could watch them. Petty Officer Irigoyen testified that the Coast Guard "made it clear that we had no intent on having a conversation" with them but did not entirely stop them from talking to the Coast Guard or to each other. The government

elicited testimony that the defendants remained quiet and did not attempt to talk to the Coast Guard. Later, after the Coast Guard transferred the defendants to the *Charles Sexton* and took their photographs, two crewmembers testified that the detainees did not attempt to talk to them. In summation, the government repeatedly referred to the defendant's silence aboard their own boat and aboard the *Charles Sexton* to make the argument that, if the defendants were on the ship under duress, as Rolle had testified, they would have sought help by trying to speak with members of the Coast Guard.

A district court's decision not to grant a mistrial on the basis of comments regarding a defendant's choice to remain silent is reviewable for abuse of discretion. *United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999). A defendant in custody after receiving *Miranda* warnings indisputably has the right under the Fifth Amendment to remain silent. *See Oregon v. Elstad*, 470 U.S. 298, 304 (1985). The Supreme Court has stated, however, that it is constitutionally permissible to use a defendant's post-arrest, pre-*Miranda* silence to impeach a defendant. *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993). The Eleventh Circuit goes a step further. We permit the prosecution to use a defendant's post-arrest, pre-*Miranda* silence as direct evidence that may tend to prove the guilt of the defendant. *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) ("[T]he government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given."). *See also United States v. Valencia*, 169 F. App'x 565, 574-75 (11th Cir. 2006) (unpublished) (citing *Rivera* for the proposition that

the government could comment on the silence of defendants who were in custody but who had not received *Miranda* warnings). *But see United States v. Campbell*, 223 F.3d 1286, 1290 (11th Cir. 2000) (acknowledging a challenge to *Rivera*'s statement regarding the "broad use of pre-*Miranda* silence" but declining to "sort out this confusion").

The defendants correctly point out that the circuit courts do not agree as to when the government may comment on a defendant's silence. The First, Second, Sixth, and Seventh Circuits prohibit the use of even pre-arrest silence as substantive evidence of guilt. *United States v. Okatan*, 728 F.3d 111, 120 (2d Cir. 2013); *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001); *Seymour v. Walker*, 224 F.3d 542, 560 (6th Cir. 2000); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989). *But see United States v. Zarauskas*, 814 F.3d 509, 515-16 (1st Cir. 2016) (We assume "without deciding, that prosecutorial comment on the defendant's pre-custodial silence violates the Fifth Amendment."). The Ninth, Tenth, and D.C. Circuits prohibit the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt. *United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007); *United States v. Moore*, 104 F.3d 377, 389 (D.C. Cir. 1997); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991). In addition to the Eleventh Circuit, the Fourth and Eighth Circuits permit the government to comment on a defendant's silence at any time prior to the issuance of *Miranda* warnings. *United States v. Cornwell*, 418 F. App'x 224, 227 (4th Cir. 2011) (unpublished); *United States v. Osuna-Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005). *See also United States v. Pando Franco*, 503 F.3d 389,

395 n.1 (5th Cir. 2007) (describing circuit split on this issue).

Although the Supreme Court once granted certiorari to resolve this question, the Court ultimately decided the case on other grounds, leaving the circuit split in place. *Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013). In *Salinas*, the Court held that a defendant's silence in response to a question in a non-custodial interview by a law-enforcement officer was admissible as substantive evidence of his guilt because the defendant did not "expressly invoke the privilege against self-incrimination in response to the officer's question." *Id.* at 2178. The fact that the *Salinas* defendant was not in custody at the time of his silence was central to the Court's determination that his silence could be used as substantive evidence of guilt. *Id.* at 2178, 2180. Where, as here, a suspect is in custody, he "cannot be said to have voluntarily forgone the privilege [against self-incrimination] unless he fails to claim it after being suitably warned." *Id.* at 2180 (alterations and internal quotation marks omitted). *Salinas* therefore does not provide support for the prosecution's comments in this case.

Given our precedent on this issue, however, we cannot conclude that the district judge abused her discretion in declining to declare a mistrial on the basis of the challenged conduct. Whatever the state of the law in other circuits, in our circuit it was permissible for the government to comment on Beauplant's silence.

In any event, any error caused by the government's comment on Beauplant's and Rolle's pre-*Miranda* silence that might have occurred would not warrant reversal. As to Beauplant, any such error would have

been harmless in light of the ample evidence of his guilt that was presented at trial. *See United States v. Davila*, 749 F.3d 982, 992 (11th Cir. 2014). As for Rolle, who did testify at trial, *Brecht*, 507 U.S. at 628, permitted the government to use his pre-*Miranda* silence to impeach his trial testimony to the effect that Russell had coerced him into carrying the drugs and that he was frightened of Russell.

Therefore, the district court did not abuse its discretion in declining to grant a mistrial as to Beauplant and Rolle.

D.

Beauplant argues that the government violated his due process rights both by destroying the boat without photographing the central console and by repatriating Henri, whose version of what happened could have aided his defense. Because Rolle testified that Beauplant and Henri had stowed away in the boat's center console, Beauplant believes that an examination of the boat and Henri's testimony would have supported Rolle's testimony.

We will not pause to address the government's assertion that Beauplant has waived this argument based on his failure to raise it before trial because we agree with the government on the merits. *See United States v. Mathis*, 767 F.3d 1264, 1277 n.6 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1448 (2015). Whether there was a due process violation as a result of the government's destruction of evidence or failure to preserve evidence is a mixed question of law and fact. *United States v. Revolorio-Ramo*, 468 F.3d 771, 774 (11th Cir. 2006). We review the district court's

factual determinations for clear error and its legal conclusions de novo. *Id.*

To establish that the destruction of evidence constitutes a violation of due process, "[a] defendant must show that the evidence was likely to significantly contribute to his defense." *Id.* (internal quotation marks omitted). This means that the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* (internal quotation marks omitted). The defendant must also demonstrate that the government acted in bad faith. *Id.* To prove a violation of a defendant's constitutional rights resulting from the government's deportation of a witness, a defendant must "show that there was a reasonable basis to believe that the testimony would be material and favorable to him, and that the government had acted in bad faith in repatriating the alien[]." *United States v. De La Cruz Suarez*, 601 F.3d 1202, 1212-13 (11th Cir. 2010).

Beauplant cannot satisfy the bad faith requirement here. Nothing in the record suggests that the Coast Guard, in destroying the boat without photographing it or in repatriating Henri, acted in bad faith. In support of his claim regarding the boat's destruction, Beauplant asserts nothing beyond the fact that the Coast Guard misallocated its resources in choosing to collect the drug bales rather than measuring and photographing the center console where Russell testified that Beauplant hid. Such a typical and reasonable law enforcement decision about how to allocate limited resources and manpower does not

permit an inference of bad faith. As for the decision to repatriate Henri, Beauplant has not made any showing that, in deciding to allow Henri to return to Haiti, the Coast Guard believed that he would provide exculpatory testimony. Speculation to that effect cannot support his claim that the Coast Guard acted in bad faith.

Accordingly, we conclude that the district court properly denied Beauplant's motion to dismiss on this basis.

E.

Beauplant argues that the district court erred by permitting a DEA agent to testify that in 2010, the Bahamian authorities arrested Beauplant because he was the captain of a Haitian freighter that had arrived in the Bahamas carrying 165 kilograms of cocaine and some marijuana. Beauplant asserts that, in violation of Federal Rule of Evidence 404(b), this evidence was used to establish propensity and bad character, rather than knowledge or motive.

We review for "clear abuse of discretion" a district court's choice to admit evidence under Rule 404(b). *United States v. Sterling*, 738 F.3d 228, 234 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 2682 (2014) (internal quotation marks omitted).

Evidence of prior crimes is admissible under 404(b) as long as (1) it is "relevant to an issue other than defendant's character," (2) the government has introduced "sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question," and (3) the probative value of the evidence is not "substantially

outweighed by undue prejudice." *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007).

In concluding that the evidence satisfied these three requirements, the court did not clearly abuse its discretion. First, Beauplant's defense, as presented in Rolle's testimony, was that he was merely a stowaway and lacked the knowledge that there were drugs on the boat and thus the intent to smuggle them. The agent's testimony was relevant as tending to prove Beauplant's knowledge that drugs were present and that he intended to smuggle them. The fact that he was previously arrested for captaining a boat used to smuggle drugs makes his defense less plausible, because it makes it more likely that Beauplant could recognize when a boat is smuggling drugs. Second, the DEA agent's testimony was sufficient to prove Beauplant's prior involvement in smuggling by a preponderance of the evidence. Captains are in a "special position to know of the vessel's contents," *United States v. Garate-Vergara*, 942 F.2d 1543, 1548 (11th Cir. 1991), *amended sub nom. United States v. Lastra*, 991 F.2d 662 (11th Cir. 1993) (per curiam), and the jury could infer that because Beauplant was the captain of the earlier boat he knew that the boat was carrying drugs. And, third, the probative value of the evidence to show Beauplant's knowledge and intent was not substantially outweighed by its prejudice. Moreover, the district court's standard limiting instruction mitigated whatever prejudice may have resulted from the admission of evidence. *Edouard*, 485 F.3d at 1346.

Accordingly, the defendants' **CONVICTIONS** are **AFFIRMED**.

JORDAN, Circuit Judge, concurring, in which WALKER, Circuit Judge, joins:

As the court explains, *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991), allows the government, in its case-in-chief at trial, to use the post-arrest/pre-*Miranda*[1] silence of a defendant as substantive evidence of guilt. We are bound by *Rivera,* but its reading of the Fifth Amendment is misguided and should be reconsidered en banc in an appropriate case.

* * * * * * * * *

Just before midnight on May 3, 2014, about 25 nautical miles from Haiti, Coast Guard officers approached Nathaniel Rolle's boat with their firearms drawn. The officers ordered the boat's occupants, including Mario Wilchcombe and Alteme Beauplant, to get on their knees with their hands behind their heads (and later with their hands on the gunnel of the boat). The officers also told the men on the boat that they were not free to move around and made it clear to them that they "had no intent on having a conversation at that point." D.E. 175 at 333.

Several hours later, after the Coast Guard had received authorization to board, and after the boat was searched, the officers put the occupants in leg irons and transferred them to a Coast Guard vessel. The occupants were told to write down their names, dates of birth, and nationalities on cards and were then photographed holding those cards. After about two to three days, the occupants, still shackled, were

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

taken to a second Coast Guard vessel. They arrived in Miami after five days at sea.

The Coast Guard officers never told Mr. Wilchcombe and Mr. Beauplant that it was permissible for them to speak, and did not give them *Miranda* warnings. Mr. Wilchcombe and Mr. Beauplant were not questioned by the officers, and aside from asking if they could have food and water, they did not speak (or ask to speak) to the Coast Guard officers while at sea. While on the second Coast Guard vessel, Mr. Beauplant told a Creole interpreter that he was from Haiti, that he had been stranded on one of the islands, and that the Bahamians on the boat had offered him a ride home.

Mr. Wilchcombe and Mr. Beauplant did not testify at trial. The government, in its case-in-chief and over defense objection, elicited from several of the Coast Guard officers that Mr. Wilchcombe and Mr. Beauplant did not say anything to them while in custody aboard the Coast Guard vessels and that they did not ask to speak to any of the officers in private. The district court denied defense motions for mistrial based on the testimony pertaining to their post-arrest/pre-*Miranda* silence.

In its initial closing argument, the government argued to the jury that, had the two men not been involved in the drug-smuggling venture, they would have said something to the Coast Guard officers after they were arrested and while they were at sea. The government also returned to the post-arrest silence of Mr. Wilchcombe and Mr. Beauplant in its rebuttal closing argument, telling the jury that, although the Coast Guard officers did not ask the men any questions, they were able to make statements if they

wished, as shown by Mr. Beauplant's conversation with the Creole interpreter.

* * * * * * * * *

About 50 years ago, the Supreme Court held that comments by the prosecution and instructions by the trial court on inferences which can be drawn from a defendant's failure to testify at trial violate the Fifth Amendment, even if the jury is also instructed that a defendant has a constitutional right to not take the stand in his own defense:

> It is in substance a rule of evidence that allows the State a privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance.

Griffin v. California, 380 U.S. 609, 613 (1965). The Court explained that "[c]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Id.* at 614 (citation omitted). The Fifth Amendment, the Supreme Court concluded, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615.

A decade later, the Supreme Court explained that "*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). So, "[w]here the prosecutor, on his own initiative asks the jury to draw an adverse influence from a

defendant's silence, *Griffin* holds that the privilege against self-incrimination is violated." *United States v. Robinson*, 485 U.S. 25, 32 (1988).[2]

As I see it, the government here did what the Fifth Amendment, as interpreted in *Griffin*, forbids. It elicited testimony about the post-arrest silence of Mr. Wilchcombe and Mr. Beauplant in its case-in-chief, and then suggested to the jury in closing argument that their silence should be considered as substantive evidence of guilt.

Rivera, citing only to *Fletcher v. Weir*, 455 U.S. 603, 607 (1980), held that "the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given," *Rivera*, 944 F.2d at 1568. *Fletcher*, however, cannot bear the weight *Rivera* placed on it.

First, *Fletcher* was decided under the "fundamental fairness" standard of the Due Process Clause of the Fourteenth Amendment, and not under the Self-Incrimination Clause of the Fifth Amendment. *See Fletcher*, 455 U.S. at 602, 607. Due process (whether of the Fifth or Fourteenth Amendment varieties) and the privilege against self-incrimination (located in

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[2] I recognize that *Griffin* has its critics. *See, e.g., Mitchell v. United States*, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting); Albert Alschuler, "A Peculiar Privilege in Historical Perspective," in **THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENTS** 199-202 (1997). But it also has its supporters. *See, e.g.*, **AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES** 52, 73-74 (1997); Stephen J. Shulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 **U. VA. L. REV**. 311, 330-35 (1991). More importantly for us, however, *Griffin* has not been overruled, and remains binding precedent.

the Fifth Amendment) "are not co-extensive, nor do they have the same underlying rationales. There is, therefore, no principled reason . . . [for the] application of a due process analysis to an inquiry about the privilege against self-incrimination." Maria Noelle Berger, *Defining the Scope of the Privilege Against Self-Incrimination: Should Prearrest Silence be Admissible as Substantive Evidence of Guilt?*, 1999 **U. ILL. L. REV.** 1015, 1025.

Second, *Fletcher* addressed the use of silence to impeach a defendant during cross-examination, and not the use of silence in the government's case-in-chief. It held that the due process clause—as interpreted in *Doyle v. Ohio*, 426 U.S. 610 (1976)—permitted the use of post-arrest/pre-*Miranda* silence on cross-examination of a defendant who took the stand at trial: "In the absence of the sort of affirmative assurance embodied in the *Miranda* warnings, we do not believe it violates due process of law for a State to permit cross-examination as to post[-]arrest silence when a defendant chooses to take the stand." *Fletcher*, 455 U.S. at 607. Later cases have explained that *Fletcher* was decided on due process grounds using a "fundamental fairness" standard. *See, e.g.*, *Wainright v. Winfield*, 474 U.S. 284, 290 (1988) ("Since *Fletcher* . . . we have continued to reiterate our view that *Doyle* rests on 'the fundamental unfairness of implicitly assuring a subject that his silence will not be used against him and then using that silence to impeach an explanation offered at trial.'") (citation omitted). Here, of course, we are not dealing with the use of silence for impeachment during a defendant's cross-examination.

* * * * * * * * *

Although the Supreme Court has held that a voluntary custodial statement taken in violation of *Miranda* may be used on cross-examination to impeach a testifying defendant, the rationale for this rule is that a defendant who testifies at trial, and who places his credibility on the line, cannot use the Fifth Amendment as "a shield against contradictions of his untruths." *Harris v. New York*, 401 U.S. 222, 224 (1971) (citation and internal quotation marks omitted). *See also id.* at 226 ("The shield of *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."). Significantly, when evidence is offered in this manner, it is probative not of the defendant's guilt but of his credibility. The two factual premises underlying the *Harris* rationale—(1) a defendant who makes a statement to the police, and (2) then testifies in a way that contradicts that statement—are missing here. Mr. Wilchcombe and Mr. Beauplant made no statements to the Coast Guard officers in the five days they were in custody, and did not testify at trial.

I agree with what Judge Sentelle wrote for the D.C. Circuit in holding that the Fifth Amendment prohibits the government from using post-arrest/pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief:

> [N]either *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody. While a defendant who chooses to volunteer an

> unsolicited admission or statement to the police before questioning may be held to have waived the protection of that right, the defendant who stands silent must be treated as having asserted it.

United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997).

If there is going to be a trigger for the constitutional protection of silence, that trigger should be custody and not the recitation of *Miranda* warnings. The right to remain silent comes from the Fifth Amendment, not *Miranda*, and exists independently of *Miranda* warnings. *See United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) (explaining that *Miranda* warnings "protect[ ]" the fundamental right secured by the Self-Incrimination Clause of the Fifth Amendment). Accordingly, "[i]t simply cannot be the case that a citizen's protection against self-incrimination only attaches when officers recite a certain litany of his rights." *Moore*, 104 F.3d at 385.

But if we want to talk about *Miranda*, that decision contains broad language which supports the view that it is custody that matters when the issue is the use of a defendant's silence as substantive evidence: "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of an accusation." *Miranda*, 384 U.S. at 468 n.37.

The Court in *Miranda* also made clear that the warning was just that: a warning that informs the suspect of the privilege against self-incrimination that he already possesses while in police custody and of the consequences of forgoing it. *See id.* at 469 ("The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest."). Nothing in *Miranda* suggests that the warning is the source of the right to remain silent. It thus makes no sense to conclude, as *Rivera* did, that whether a defendant possesses the privilege against self-incrimination is derived from issuance of the warning and not whether he is in custody. Even Justice Scalia, a critic of *Griffin*, viewed *Miranda* as a broad prohibition against the use of post-arrest silence by the government in its case-in-chief. *See Mitchell*, 526 U.S. at 338 n.2 ("[W]e did say in *Miranda* . . . that a defendant's post-arrest silence could not be introduced as substantive evidence against him at trial.").

* * * * * * * * *

In this case the Coast Guard officers chose not to give *Miranda* warnings to Mr. Wilchcombe and Mr.

Beauplant while they were kept in shackles for five days at sea, and after they were told that the officers were not interested in having a conversation. In my view, the Fifth Amendment's privilege against self-incrimination did not permit the government to use the post-arrest silence of Mr. Wilchcombe and Mr. Beauplant—neither of whom testified at trial—as substantive evidence of their guilt in its case-in-chief. *Cf. United States v. Hale*, 422 U.S. 171, 176 (1975) (federal case decided on evidentiary grounds: "In most circumstances silence is so ambiguous that it is of little probative force.").

I join Judge Walker's opinion for the court with the hope that, one day, we will revisit *Rivera*.[3]

[3] Given the other evidence presented against Mr. Wilchcombe and Mr. Beauplant, I do not think this case is a good vehicle for en banc reconsideration of *Rivera*.

APPENDIX B

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

ALTEME HIBERDIEU BEAUPLANT

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:14-20367-CR-ALTONAGA-3

USM Number: 02343-104

Counsel For Defendant: Simon P. Dray, Esq.
Counsel For The United States: Kurt K. Lunkenheimer, Esq.
Court Reporter: Stephanie McCarn

The defendant was found guilty on Counts 1 and 2 of the Indictment.

The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER 46 U.S.C. § 70506(b)

NATURE OF OFFENSE Conspiracy to Possess With Intent to Distribute Cocaine and Marihuana on Board a Vessel Subject to the Jurisdiction of the United States

OFFENSE ENDED May 3, 2014

COUNT 1

TITLE/SECTION NUMBER 46 U.S.C. § 70503(a)

NATURE OF OFFENSE Possession With Intent to Distribute Cocaine and Marihuana on Board a Vessel Subject to the Jurisdiction of the United States

OFFENSE ENDED May 3, 2014

COUNT 2

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:

October 30, 2014

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITES STATES DISTRICT JUDGE

October 30, 2014

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **120 months** as to each of Counts 1 and 2, with all such terms to run concurrent. Defendant shall be given credit for all time in custody since his arrest on May 4, 2014.

The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant is designated to a facility located in or near South Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years** as to each of Counts 1 and 2, with all such terms to run concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant

reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	**$200.00**
Total Fine	**0**
Total Restitution	**0**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$200.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE

ATTN: FINANCIAL SECTION

400 NORTH MIAMI AVENUE, ROOM 8N09

MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

MARIO WILCHOMBE

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:14-20367-CR-ALTONAGA-2

USM Number: 02344-104

Counsel For Defendant: Martin A. Feigenbaum, Esq.
Counsel For The United States: Kurt K. Lunkenheimer, Esq.
Court Reporter: Stephanie McCarn

The defendant was found guilty on Counts 1 and 2 of the Indictment.

The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER 46 U.S.C. § 70506(b)

NATURE OF OFFENSE Conspiracy to Possess With Intent to Distribute Cocaine and Marihuana on Board a Vessel Subject to the Jurisdiction of the United States

OFFENSE ENDED May 3, 2014

COUNT 1

TITLE/SECTION NUMBER 46 U.S.C. § 70503(a)

NATURE OF OFFENSE Possession With Intent to Distribute Cocaine and Marihuana on Board a Vessel Subject to the Jurisdiction of the United States

OFFENSE ENDED May 3, 2014

COUNT 2

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:

October 30, 2014

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

October 30, 2014

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **120 months** as to each of Counts 1 and 2, with all such terms to be served concurrently. The defendant shall receive credit for the time he has been in custody since his arrest on May 4, 2014.

The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant is designated to a facility located in or near South Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years** as to each of Counts 1 and 2, with all such terms to run concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant

reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	**$200.00**
Total Fine	**0**
Total Restitution	**0**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$200.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE

ATTN: FINANCIAL SECTION

400 NORTH MIAMI AVENUE, ROOM 8N09

MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX D

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

NATHANIEL ERSKINE ROLLE

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:14-20367-CR-ALTONAGA-1

USM Number: 02341-104

Counsel For Defendant: Jordan M. Lewin, Esq.
Counsel For The United States: Kurt K. Lunkenheimer, Esq.
Court Reporter: Stephanie McCarn

The defendant was found guilty on Counts 1, 2 and 3 of the Indictment.

The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER 46 U.S.C. § 70506(b)

NATURE OF OFFENSE Conspiracy to Possess With Intent to Distribute Cocaine and Marijuana on Board a Vessel Subject to the Jurisdiction of the United States

OFFENSE ENDED May 3, 2014

COUNT 1

TITLE/SECTION NUMBER 46 U.S.C. § 70503(a)

NATURE OF OFFENSE Possession With Intent to Distribute Cocaine and Marihuana on Board a Vessel Subject to the Jurisdiction of the United States

OFFENSE ENDED May 3, 2014

COUNT 2

TITLE/SECTION NUMBER 18 U.S.C. § 2237(a)(1)

NATURE OF OFFENSE Failure to Heave

OFFENSE ENDED May 3, 2014

COUNT 3

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:

October 30, 2014

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE
October 30, 2014

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **135 months**. This term consists of 135 months as to Counts 1 and 2; and 60 months as to Count 3, with all such terms to run concurrent. The defendant shall be given credit for all time in custody since his arrest on May 4, 2014.

The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant is designated to a facility located in or near South Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years**. This term consists of 5 years as to Counts 1 and 2, and 3 years as to Count 3, with all such terms to run concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain

from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may

be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	**$300.00**
Total Fine	**0**
Total Restitution	**0**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$300.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE

ATTN: FINANCIAL SECTION

400 NORTH MIAMI AVENUE, ROOM 8N09

MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office

are responsible for the enforcement of this order.

The defendant shall forfeit the defendant's interest in the following property to the United States:

Forfeiture of $1,940.00 in U.S. Currency as outlined in the Special Verdict on Forfeiture [ECF No. 105] is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 14-14991

District Court Docket No. 1:14-cr-20367-CMA-2

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARIO WILCHCOMBE, NATHANIEL ERSKINE ROLLE, ALTEME HIBERDIEU BEAUPLANT,

Defendants - Appellants.

Appeals from the United States District Court for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: October 04, 2016
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 14-20367-CR

UNITED STATES OF AMERICA, Plaintiff, vs. NATHANIEL ERSKINE ROLLE, MARIO WILCHOMBE and ALTEME HIBERDIEU BEAUPLANT, Defendants.	Miami, Florida July 28, 2014 10:27 a.m. to 5:42 p.m. Courtroom 12-2 (Pages 1 to 305)

JURY TRIAL – DAY 1
BEFORE THE HONORABLE CECILIA M. ALTONAGA,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:
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MR. LUNKENHEIMER: Your Honor, I made a point of asking if Miranda had been because this is commenting on pre-Miranda silence and I was commenting to see if anyone asked if they said anything or they went to approach the Coast Guard to speak in private. I don't believe it was a something—it was not an interrogation. If they are detained—they were detained, if they were in custody and they might, actually, have been because they are shackled and they are on the Coast Guard cutter as opposed to their boat, but it is not an interrogation to elicit an improper response. It was—I was asking if they asked to speak to them. It's pre-Miranda, they have not been warned of their rights to silence at this point in time and therefore we are allowed to comment on their silence and remark on it. It is not post-Miranda. I am not commenting on their post-

Miranda silence; that would be a violation of their right to remain silent. And I believe—

* * *