No. _____

IN THE
Supreme Court of the United States

_____

WUILSON ESTUARDO LEMUS CASTILLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether a criminal defendant convicted of violating the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 *et seq.*, and subject to a mandatory minimum sentence under 21 U.S.C. § 960, is eligible for relief from that mandatory minimum under the statutory "safety valve" of 18 U.S.C. § 3553(f).

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PETITION FOR WRIT OF CERTIORARI

Wuilson Estuardo Lemus Castillo petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the Eleventh Circuit (Pet. App. 1a-18a) is reported at 899 F.3d 1208. The transcript of the District Court's sentencing hearing (Pet. App. 19a-30a) is unreported.

JURISDICTION

The judgment of the Eleventh Circuit was entered on August 14, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are quoted at Pet. App. 34a-39a.

INTRODUCTION

This case concerns the interplay between three statutes: the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. § 70501 *et seq.*; the mandatory minimum sentences for certain drug offenses in 21 U.S.C. § 960; and the statutory exemption from mandatory minimum sentences in 18 U.S.C. § 3553(f), commonly referred to as the "safety valve."

The Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. § 70501 *et seq.*, prohibits certain drug-related activities while aboard a "covered vessel." 46 U.S.C. §§ 70503(a), 70506. It further provides that persons who violate the MDLEA "shall be punished as

provided in" 21 U.S.C. § 960. *See* 46 U.S.C. § 70506(a).

21 U.S.C. § 960(a) lists a series of drug offenses that "shall be punished as provided in subsection (b)." 21 U.S.C. § 960(b) prescribes ten-year and five-year mandatory minimum sentences that depend on the quantity of drugs at issue.

Finally, 18 U.S.C. § 3553(f) provides a "safety valve" that prevents the application of mandatory minimums in certain cases. It provides that "[n]otwithstanding any other provision of law, in the case of an offense under" certain provisions—including "section 1010 … of the Controlled Substances Import and Export Act (21 U.S.C. § 960)"—a court may impose a sentence below the statutory mandatory minimum if certain mitigating conditions are met.

This case presents the question whether a criminal defendant convicted of violating the MDLEA, and subject to a mandatory minimum sentence under 21 U.S.C. § 960, is entitled to relief from that mandatory minimum under the "safety valve" in 18 U.S.C. § 3553(f). The circuits are in conflict over that question. In the decision below, the Eleventh Circuit reaffirmed its decision in *United States v. Pertuz-Pertuz*, 679 F.3d 1327 (11th Cir. 2012), that defendants convicted of violating the MDLEA are ineligible for the "safety valve." The Eleventh Circuit's decision is consistent with decisions from the Ninth and Fifth Circuits. *See United States v. Gamboa-Cardenas*, 508 F.3d 491, 496 (9th Cir. 2007); *United States v. Anchundia-Espinoza*, 897 F.3d 629, 634 (5th Cir. 2018). But the Eleventh Circuit's decision conflicts with *United States v. Mosquera-Murillo*, No. 16-3096, __ F.3d __, 2018 WL

4050250 (D.C. Cir. Aug. 24, 2018). This Court should grant certiorari to resolve the circuit split.

STATEMENT OF THE CASE

A. Statutory Background

The MDLEA prohibits an individual from engaging in certain activities "[w]hile on board a covered vessel." 46 U.S.C. § 70503(a). A "covered vessel" is defined to include a "vessel subject to the jurisdiction of the United States." *Id.* § 70503(e). That term is defined broadly to include, among other things, United States vessels, vessels in American waters, and any "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." *Id.* § 70502(c)(1).

As relevant here, the MDLEA makes it illegal for an individual, "while aboard a covered vessel," to "manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance." *Id.* § 70503(a)(1); *see* Pet. App. 34a. A person who violates that statute "shall be punished as provided in" 21 U.S.C. § 960. *See* 46 U.S.C. § 70506(a). The MDLEA also states that "[a] person attempting or conspiring to violate" § 70503 "is subject to the same penalties as provided for violating § 70503." 46 U.S.C. § 70506(b).

21 U.S.C. § 960 includes two subsections. The first subsection, 21 U.S.C. § 960(a), states that "[a]ny person who" commits certain enumerated offenses defined elsewhere in the U.S. Code "shall be punished as provided in subsection (b)." *See* Pet. App. 34a-35a. The MDLEA is not enumerated in 21 U.S.C. § 960(a); the

MDLEA's statutory cross-reference to 21 U.S.C. § 960(b) is codified in the MDLEA itself, at 46 U.S.C. § 70506(a). The second subsection, 21 U.S.C. § 960(b), enumerates a series of penalties for drug-related offenses, including a ten-year mandatory minimum if certain drug quantity thresholds are met. *See* 21 U.S.C. § 960(b)(1); Pet. App. 35a-37a.

Finally, 18 U.S.C. § 3553(f) provides a safety valve against the application of mandatory minimums in certain cases. It provides that "[n]otwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. §§ 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation," that five mitigating conditions are met. Pet. App. 38a-39a.

B. *Pertuz-Pertuz*

In *United States v. Pertuz-Pertuz*, 679 F.3d 1327 (11th Cir. 2012) (per curiam), the Eleventh Circuit concluded that persons convicted of violating the MDLEA, and subject to the mandatory minimum penalties of 21 U.S.C. § 960(b), are not eligible for the statutory safety valve of 18 U.S.C. § 3553(f). The court explained that "by its terms, the 'safety valve' provision applies only to convictions under five specified offenses: 21 U.S.C. § 841, § 844, § 846, § 960,

and § 963." *Id.* at 1328 (quotation marks omitted). "Here, Defendant was charged with and convicted for violations under Title 46 of the U.S. Code. No Title 46 offense appears in the safety-valve statute. Therefore, pursuant to the plain text of the safety-valve statute, no safety-valve sentencing relief applies." *Id.*

The court rejected the defendant's argument that "the Title 46 offenses for which he was convicted reference the penalty provisions of 21 U.S.C. § 960: section 960 is specifically listed in the safety-valve statute." *Id.* at 1329. It reasoned that "[t]he safety valve statute, section 3553(f), refers to an 'offense under' section 960 — not to an 'offense penalized under' section 960 and not to a 'sentence under' section 960. Furthermore, section 960(a) lists unlawful acts that actually do qualify as 'offenses under' section 960. But still, no Title 46 offense appears in the section 960(a) list." *Id.* The court concluded that "the plain text of the statutes shows that convictions under Title 46 of the U.S. Code — like Defendant's — entitle a defendant to no safety-valve sentencing relief." *Id.*

C. Proceedings below

On August 20, 2016, the Coast Guard intercepted a ship known as the *Cap Caleb* off the coast of Guatemala. Pet. App. 2a. When the Coast Guard approached the ship, its crew began to jettison bales of cocaine. *Id.* Five Guatemalan nationals, including Petitioner, were on board. Pet. App. 2a-3a.

All five crew members, including Petitioner, were indicted on two counts. The first count stated that the defendants

> did knowingly and willfully combine, conspire, confederate and agree with each other and other persons unknown to the Grand Jury, to possess with intent to distribute a controlled substance, in violation of Title 46, United States Code, Section 70503(a)(1); all in violation of Title 46, United States Code, Section 70506(b).
>
> With respect to all defendants, the controlled substance involved in the conspiracy attributable to each of them as a result of their own conduct, and the conduct of other conspirators reasonably foreseeable to each of them, is five (5) kilograms or more of a mixture and substance defendants, the controlled substance involved in the conspiracy containing a detectable amount of cocaine, in violation of Title 46, United States Code, Section 70506(a) and Title 21, United States Code, Section 960(b)(1)(B).

Pet. App. 32a. The second count stated that the defendants:

> did knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 46, United States Code, Section 70503(a)(1) and Title 18, United States Code, Section 2.
>
> Pursuant to Title 46, United States Code, Section 70506(a) and Title 21, United States Code, Section 960(b)(1)(B), it is further alleged that this violation involved five kilograms or more of a mixture and substance containing a

detectable amount of cocaine.

Pet. App. 32a-33a.

Both counts of the indictment alleged that Petitioner's violations involved sufficient cocaine to trigger 21 U.S.C. § 960(b)(1)(B), which carries a mandatory minimum sentence of 120 months. Thus, because *Pertuz-Pertuz* made Petitioner ineligible for relief under the safety valve, Petitioner's mandatory minimum sentence was 120 months.

Petitioner pleaded guilty to both counts of the indictment. At sentencing, the Court stated that "the law on this particular statute as interpreted by the Eleventh Circuit is a very difficult law." Pet. App. 26a. It stated: "Had all these defendants qualified for the safety valve, then I very well may have given the [co-defendants] less than 120 months in prison. And if I did that, I may have given [Petitioner] less 120 months in prison, but it would have been more than the [co-defendants] got." Pet. App. 26a. It found that the "fair and just sentence in this case is one year more than the [co-defendants] got." Pet. App. 26a. Because the District Court had imposed a 120-month sentence (the mandatory minimum) on Petitioner's co-defendants, the District Court imposed a 132-month sentence on Petitioner. Pet. App. 23a, 26a.

The Court then invited the parties to object to the sentence. Petitioner's counsel objected to the District Court's refusal to apply the safety valve, precipitating this exchange with the District Court:

> MR. RODRIGUEZ: … It's the application of the safety valve, which is a sentencing factor as

to --

THE COURT: You're gonna ask the Eleventh Circuit to change their ruling on vessels --

MR. RODRIGUEZ: On that other case?

THE COURT: -- on board a vessel subject to the jurisdiction of the United States?

MR. RODRIGUEZ: Yes. But I don't expect them to change their ruling. But I --

THE COURT: Maybe the Supreme Court will.

MR. RODRIGUEZ: Yeah, who knows, with today's day and age. So that's why I wanted to make that --

THE COURT: No, I think your objection is an allowed objection, because you're objecting to the sentence; you're not objecting to the conviction. It's the sentence.

MR. RODRIGUEZ: Yes, your Honor.

THE COURT: Okay.

MR. RODRIGUEZ: That's what I wanted to make clear for the record.

THE COURT: All right. So I think the record's clear.

Pet. App. 28a-29a.

The Eleventh Circuit affirmed Petitioner's sentence. The court held that Petitioner "is not entitled to the safety valve." Pet. App. 5a (capitalization omitted). The court explained that "[o]ther federal laws that concern domestic drug

offenses provide similar mandatory minimums, but a statutory safety valve grants courts the authority to impose sentences below the statutory safety valve grants courts the authority to impose sentences below the statutory minimum for certain less-culpable defendants." *Id.* (citations omitted). But "[t]his safety valve does not apply to offenses under the [MDLEA]." *Id.* "As we explained in *Pertuz-Pertuz*, the 'plain text' of the statute compels this disparate treatment, because 'the safety valve provision applies only to convictions under five specified offenses,' which do not include violations of the Act." *Id.* (citation omitted).

The court then held that *Pertuz-Pertuz*'s interpretation of the safety valve provision was not so irrational as to violate due process. The court acknowledged that the effect of *Pertuz-Pertuz* is that offenders who commit drug trafficking offenses on vessels outside the United States are subject to harsher penalties than drug traffickers within American borders. Pet. App. 6a. But applying rational basis review, the court held that "Congress has legitimate reasons to craft strict sentences for violations of the [MDLEA]." Pet. App. 8a. It reasoned that "international drug trafficking raises pressing concerns about foreign relations and global obligations," and "the inherent difficulties of policing drug trafficking on the vast expanses of international waters suggest that Congress could have rationally concluded that harsh penalties are needed to deter would-be offenders." Pet. App. 8a.[1]

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[1] The panel also rejected Petitioner's arguments that the MDLEA

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the circuit split over whether persons who violate the MDLEA, and are subject to the mandatory minimum penalties in 21 U.S.C. § 960(b), are eligible for the safety valve in 18 U.S.C. § 3553(f).

I. THERE IS A CIRCUIT SPLIT ON THE QUESTION PRESENTED.

In the decision below, the Eleventh Circuit reaffirmed its decision in *Pertuz-Pertuz* that the "safety valve does not apply to offenses under the [MDLEA]." Pet. App. 5a. Relying on *Pertuz-Pertuz*, the court reasoned that "the plain text of the statute compels this disparate treatment, because the safety valve provision applies only to convictions under five specified offenses, which do not include violations of the Act." *Id.* (citation and quotation marks omitted).

The Ninth Circuit and Fifth Circuit have reached the same conclusion as the Eleventh Circuit. In *United States v. Gamboa-Cardenas*, 508 F.3d 491 (9th Cir. 2007), a divided Ninth Circuit panel held that the statutory safety valve does not apply to offenses under the MDLEA.[2] The Ninth Circuit relied on the same

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is unconstitutional as applied to him, and that his pretrial detention was excessively long. Pet. App. 8a-12a; *see also* Pet. App. 13a-18a (Martin, J., concurring) (expressing additional views on the latter issue).

[2] At the time of the offense in *Gamboa-Cardenas*, the MDLEA was codified at 46 App. U.S.C. § 1903. The MDLEA was then "reenacted without relevant changes in 46 U.S.C. §§ 70501-07." *Gamboa-Cardenas*, 508 F.3d at 494 n.1.

reasoning as the Eleventh Circuit in *Pertuz-Pertuz*: "18 U.S.C. § 3553(f)'s reference to 'an offense under... 21 U.S.C. § 960' invokes the statutes listed in 21 U.S.C. § 960(a), and thus the safety valve also applies to offenses committed in violation of 21 U.S.C. §§ 952, 953, 955, 957 and 959," but the MDLEA "is not included in the offenses listed in 18 U.S.C. § 3553(f) or 21 U.S.C. § 960(a)." *Gamboa-Cardenas*, 508 F.3d at 497. The court held that the omission of the MDLEA "from the statutes listed in 18 U.S.C. § 3553(f) and 21 U.S.C. § 960(a) indicates that [MDLEA] offenses are excluded from safety valve relief." *Id.* The court also offered a detailed explanation of why its interpretation was consistent with the MDLEA's statutory history. *Id.* at 499-502. The dissent pointed out that the MDLEA requires "punish[ment] in accordance with the penalties set forth in section ... 960," which could be understood to mean that MDLEA offenses "should be penalized the same as offenses under § 960, which is expressly listed in the safety valve statute, and thus that the safety valve applies to [MDLEA] penalties." *Id.* at 507 (Fisher, J., dissenting). Finding the statute ambiguous, the dissent would have held that the "history and purpose" of the MDLEA supported applying the safety valve provision to MDLEA offenses. *Id.*

Likewise, in *United States v. Anchundia-Espinoza*, 897 F.3d 629 (5th Cir. 2018), the Fifth Circuit followed the Ninth and Eleventh Circuits and found that offenses under the MDLEA are not eligible for safety-valve relief. *Id.* at 633 ("Notably, the Eleventh and Ninth Circuits have addressed the issue presented

here, and both courts held that the safety valve does not apply to violations of § 70503."). The court explained that "[n]ot only is § 70503 not specifically provided for under § 3553(f), but it is also not an 'offense under' § 960, which does, in fact, list other statutes. *See* 21 U.S.C. § 960(a)." 897 F.3d at 634. "As the Eleventh Circuit explained, § 3553(f) applies to 'offenses under', not 'offense[s] penalized under' and not 'sentence[s] under.'" *Id.* (quoting *Pertuz-Pertuz*, 679 F.3d at 1329).

The D.C. Circuit, however, reached the contrary conclusion in *United States v. Mosquera-Murillo*, No. 16-3096, __ F.3d __, 2018 WL 4050250 (D.C. Cir. Aug. 24, 2018).[3] The court held that an MDLEA offense "is 'an offense under' § 960 for purposes of safety-valve eligibility." *Id.* at *6. The court explained that "the MDLEA supplies the elements that make the defendants' conduct unlawful"—*i.e.*, drug distribution—while "§ 960 supplies the offense elements of drug-type and drug-quantity … which bear on the degree of culpability and determine the statutory sentencing range." *Id.* "In that light, the defendants' crime is 'an offense under' *both* the MDLEA and § 960, drawing offense elements from each." *Id.* The court rejected the government's argument that "'an offense under' § 960 means only those specific offenses listed in § 960(a)," pointing out that "[t]he statute speaks in terms of an 'offense under' § 960 without limitation—

[3] *Mosquera-Murillo* is a published and precedential decision. Because it was issued very recently, its volume and page number within the Federal Reporter have not yet been determined as of this filing.

not an offense under only § 960(a)." *Id.* at *7-8.

The court also held that "the structure of § 960 demonstrates that the defendants' crime qualifies as 'an offense under' § 960 no less than the crimes listed in § 960(a)." *Id.* at *8. It pointed out that "[t]he MDLEA offense of which the defendants were convicted interacts with § 960(b) in exactly the same way as the offenses listed in § 960(a). Just as those offenses are established outside of § 960 and 'shall be punished as provided in subsection (b)' of § 960, *id.* § 960(a), the MDLEA also establishes offenses outside of § 960, which likewise are punished under the penalty scheme set out in § 960(b)." *Id.* Thus, "just as a person who commits one of the offenses listed in § 960(a) violates both the provision establishing the offense (*e.g.*, 21 U.S.C. § 955) and § 960(b), the defendants in these cases violated both the MDLEA and § 960(b)." *Id.*

The court explained that its interpretation "would align with Congress's nearly unbroken pattern of setting identical penalties for drug crimes committed in domestic waters and drug crimes committed on the high seas." *Id.* at *8. It noted that "if offenders who violate the MDLEA were ineligible for safety-valve relief, then, by enacting the safety-valve provision, Congress would have broken its 100-year pattern of penalty parity." *Id.* at *9. It did "not understand Congress to have done so." *Id.*

The court acknowledged the Eleventh Circuit's decision in *Pertuz-Pertuz* and the Ninth Circuit's decision in *Gamboa-Cardenas*, both of which held that MDLEA defendants are not eligible for safety-valve

relief.[4] *Id.* But it "respectfully reach[ed] the opposite conclusion." *Id.*

II. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE.

The Court should grant certiorari to resolve the circuit split. This case is a strong vehicle, because the Eleventh Circuit's interpretation of the safety valve provision was outcome-determinative. At sentencing, the District Court explicitly stated that it might have given Petitioner and his co-defendants sentences below the 120-month mandatory minimum, had it not been bound by Eleventh Circuit precedent foreclosing application of the safety valve. *Supra*, at 7. Petitioner then expressly objected to the District Court's refusal to apply the safety valve, even previewing the possibility of filing this very petition for certiorari to overturn the Eleventh Circuit's decision in *Pertuz-Pertuz*. *Supra*, at 7-8. On appeal, the Eleventh Circuit expressly reaffirmed *Pertuz-Pertuz*. *Supra*, at 8-9. It further held that the MDLEA, as construed in *Pertuz-Pertuz*, is not so irrational as to violate due process—thus solidifying *Pertuz-Pertuz* as the law of the Eleventh Circuit. *Supra*, at 9. Thus, the question of whether Petitioner is eligible for safety-valve relief is squarely teed up in this case.

There is no need for additional percolation. The

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[4] The D.C. Circuit did not mention the Fifth Circuit's decision in *Anchundia-Espinoza*; this may have been because *Anchundia-Espinoza* was issued long after the *Mosquera-Murillo* oral argument, and less than a month before *Mosquera-Murillo* was issued.

detailed opinions addressing the question presented ensure that the arguments on both sides have been fully aired. Moreover, the circuit split will not go away without this Court's intervention. The D.C. Circuit expressly acknowledged it was creating a circuit split, and the government did not seek en banc review.

This Court frequently grants certiorari to resolve 1-1, 2-1, and 3-1 splits in federal criminal cases.[5] It should grant certiorari to resolve this 3-1 split.

III. THE DECISION BELOW IS INCORRECT.

Pertuz-Pertuz is wrongly decided. Petitioner should have been eligible for safety-valve relief.

Petitioner was convicted of an "offense under … § 960" for purposes of the safety-valve provision. *See* 18 U.S.C. § 3553(f). As the D.C. Circuit explained, the elements of Petitioner's offenses that resulted in the 10-year mandatory minimum are defined by § 960(b). Petitioner's offense was therefore "under § 960" for purposes of obtaining relief from that mandatory minimum under the safety valve.

The Eleventh Circuit appeared to rely on the intuition that an "offense under … § 960" means an offense for which *all* elements are defined in § 960. But as the D.C. Circuit noted, that is a null set. § 960(a)

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[5] *See, e.g.*, *Dahda v. United States*, 138 S. Ct. 1491 (2018) (2-1 split); *Koons v. United States*, 138 S. Ct. 1783 (2018) (3-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split); *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split); *Nichols v. United States*, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split).

does not define any offenses; it simply enumerates a series of offenses that are defined in other parts of the U.S. Code.

Thus, the Eleventh Circuit's opinion implies that "offense under … § 960" means "offense under other parts of the U.S. Code for which statutory cross-references appear in § 960(a)." This is not a plausible interpretation of the text. Nothing in the phrase "offense under … § 960" suggests that Congress distinguished between offenses depending on whether the statutory cross-reference to § 960(b) appear in § 960(a) or in the underlying statute itself. It is far more plausible for "offense under … § 960" to encompass all offenses for which the elements establishing the mandatory minimum are defined in § 960—particularly given that the point of § 3553(f) is to provide relief from those very mandatory minimum sentences.

The Eleventh Circuit's opinion also creates the bizarre outcome that drug dealers in the United States are subject to the safety valve, while drug dealers found aboard foreign vessels in international or foreign water are not. Although the Eleventh Circuit hypothesized theoretical reasons that such an outcome is rational, there is no indication from the text or legislative history that Congress actually intended to draw this distinction. In light of "Congress's nearly unbroken pattern of setting identical penalties for drug crimes committed in domestic waters and drug crimes committed on the high seas," *Mosquera-Murillo*, 2018 WL 4050250, at *8, the Court should construe the safety valve to apply equally to both types of crimes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10830

D.C. Docket No. 0:16-cr-60241-WPD-4

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WUILSON ESTUARDO LEMUS CASTILLO,
Defendant-Appellant.

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

(August 14, 2018)

Before WILLIAM PRYOR and MARTIN, Circuit Judges, and WOOD,[*] District Judge.

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[*] Honorable Lisa Wood, United States District Judge for the Southern District of Georgia, sitting by designation.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide three questions about Wuilson Estuardo Lemus Castillo's conviction and sentence for drug trafficking under the Maritime Drug Law Enforcement Act: whether the Fifth Amendment entitles Castillo to relief from his mandatory minimum sentence; whether the Act exceeds the powers of Congress; and whether the government violated Castillo's constitutional rights when it detained him for 19 days before presenting him to a magistrate judge. The Coast Guard stopped Castillo's vessel in international waters on suspicion of drug trafficking. The Coast Guard and the Department of Homeland Security then detained Castillo for over two weeks while they transported him to Florida, where he received a hearing before a magistrate judge. The government charged Castillo under the Act, and Castillo moved to dismiss the indictment on the grounds that the Act and his detention were unconstitutional. After the district court denied the motion, Castillo pleaded guilty without reserving the right to complain about his detention on appeal. The district court then sentenced him to 132 months of imprisonment after ruling that it could not give Castillo judicial relief from the statutory mandatory minimum sentence for his crimes. We affirm.

I. BACKGROUND

On August 20, 2016, the Coast Guard intercepted the *Cap Caleb* approximately 105 nautical miles from the western coast of Guatemala. When Coast guardsmen approached the *Cap Caleb*, its crew began to jettison neon green bales that later tested positive

for cocaine. Five people, including Wuilson Estuardo Lemus Castillo, were aboard the vessel, and all five asserted Guatemalan nationality. The Coast Guard informed Guatemala about the stop, and Guatemala confirmed the nationality of the vessel and gave the Coast Guard permission to board the *Cap Caleb*. Guardsmen then boarded the vessel and detained its crew members.

The government held Castillo between August 20 and September 9 while it transported him to the United States and coordinated prosecution with Guatemala. On September 8, the Coast Guard dropped Castillo at Guantanamo Bay, and the Department of Homeland Security airlifted Castillo to Florida on the same day. The next day, the government presented Castillo for an appearance before a magistrate judge.

After the government charged Castillo with drug-trafficking crimes under the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70503(a)(1), 70506(b), Castillo moved to dismiss for lack of jurisdiction on three grounds. First, he contended that the Act "violates the Due Process Clause because it does not require proof of a nexus between the United States and a defendant." He underscored that the Coast Guard intercepted the *Cap Caleb* far from the United States and that he "is a Guatemalan national . . . [who] has no connection to the United States whatsoever." Second, he argued that the Act is "beyond the authority granted to Congress under Article I." Third, he complained that his detention violated the Due Process Clause of the Fifth Amendment.

The district court denied Castillo's motion to dismiss, and Castillo pleaded guilty in a written agreement with the government. Castillo's plea agreement contained no reservation of a right to appeal any issue about his detention.

At the sentencing hearing, the district court explained that it could not give Castillo and his codefendants the benefit of a statutory safety valve, which permits relief from a mandatory minimum sentence for other kinds of drug offenses, *see* 18 U.S.C. § 3553(f), because this Court has held that the safety valve does not apply to the Act, *see United States v. Pertuz-Pertuz*, 679 F.3d 1327, 1329 (11th Cir. 2012). The district court stated that, had the safety valve applied, it "very well may have given" Castillo and his fellow crew members "less than [the] 120 month[ ] [mandatory minimum]." But it instead sentenced Castillo to 132 months of imprisonment. The district court explained that this sentence was necessary to punish Castillo more than other crew members who had received the minimum sentence after they "quickly" "accept[ed] responsibility" for their actions.

II. STANDARD OF REVIEW

We review constitutional questions *de novo*. *See United States v. Osburn*, 955 F.2d 1500, 1503 (11th Cir. 1992).

III. DISCUSSION

We divide our discussion in three parts. First, we explain that Castillo is not entitled to judicial relief from the mandatory minimum sentence. Second, we explain that our precedents foreclose Castillo's

arguments about the constitutionality of the Act and its application to him. Third, we explain that Castillo cannot object to his detention on appeal.

A. Castillo Is Not Entitled to the Safety Valve.

The Maritime Drug Law Enforcement Act grants the United States 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), and it forbids individuals on such vessels from both "possess[ing] with intent to . . . distribute . . . a controlled substance," *id.* § 70503(a), and conspiring to do the same, *id.* § 70506(b). First-time offenders are subject to a mandatory minimum penalty of 10 years of imprisonment for a violation that "involv[es] . . . [five] kilograms or more of a mixture or substance containing a detectable amount of [cocaine]." 21 U.S.C. § 960(b)(1)(B); see also 46 U.S.C. § 70506(a).

Other federal laws that concern domestic drug offenses provide similar mandatory minimums, *see, e.g.*, 21 U.S.C. §§ 841(a) & (b)(1)(A), 960(a) & (b), but a statutory safety valve grants courts the authority to impose sentences below the statutory minimum for certain less-culpable defendants, *see* 18 U.S.C. § 3553(f). This safety valve does not apply to offenses under the Act. *See id.* (specifying offenses eligible for the safety valve). As we explained in *Pertuz-Pertuz*, the "plain text" of the statute compels this disparate treatment, 679 F.3d at 1329, because "the safety valve provision applies only to convictions under five specified offenses," which do not include violations of the Act, *id.*

at 1328 (citation and internal quotation marks omitted); *see also id.* ("No Title 46 offense appears in the safety-valve statute.").

Castillo contends that the equal protection guarantee of the Fifth Amendment entitles him to the kind of relief that the safety valve provides because "[t]here is no rational reason to subject defendants who commit drug trafficking offenses outside the United States to harsher penalties than those who traffic drugs within [its] borders." He underscores that "even defendants who import drugs into the country" or possess "illicit drug[s] while on board a vessel arriving in the United States" may benefit from the safety valve if they are convicted of a domestic trafficking offense, while "a defendant who commits a similar offense half a world away, without any direct effect on the United States, [is] denied the same relief." Castillo concludes that the distinction between domestic and extraterritorial offenders is "at best . . . an oversight, and at worst an irrational and arbitrary distinction." We disagree.

The Due Process Clause of the Fifth Amendment, U.S. Const. amend. V, forbids the federal government from "denying to any person the equal protection of the laws," *United States v. Windsor*, 570 U.S. 744, 774, (2013), but not all allegations of discrimination are created equal. Instead, the rigor of judicial review depends on the kind of classification at issue. When "the classification infringes fundamental rights or concerns a suspect class," we apply heightened scrutiny. *Doe v. Moore*, 410 F.3d 1337, 1346 (11th Cir. 2005). But other kinds of classifications are subject to a

weaker "rational basis test [that asks only] whether they are 'rationally related to a legitimate governmental purpose.' " *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985)).

Under rational basis review, we apply "a strong presumption of validity," *Heller v. Doe*, 509 U.S. 312, 319 (1993), and narrowly inquire if the "enacting government body could have been pursing" "a legitimate government purpose," *United States v. Ferreira*, 275 F.3d 1020, 1026 (11th Cir. 2001) (quoting *Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000)). If we discern a legitimate goal, we then ask only "whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose." *Id.* (quoting *Joel*, 232 F.3d at 1358). This inquiry occurs entirely in the abstract because "[t]he *actual* motivations of the enacting governmental body are entirely irrelevant," as is whether the legitimate "basis was actually considered by the legislative body." *Id.* (quoting *Joel*, 232 F.3d at 1358). Indeed, the government "has no obligation to produce evidence to sustain the rationality of a statutory classification," *Heller*, 509 U.S. at 320, and the complaining party has the burden to "negat[e] every conceivable basis which might support it," *id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Unsurprisingly, "[a]lmost every statute subject to the very deferential rational basis standard is found to be constitutional." *Moore*, 410 F.3d at 1346–47 (alteration adopted) (quoting *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001)).

Congress is entitled to deny the safety valve to offenders convicted under the Act. We apply rational basis review to the distinction between the Act and other statutes that punish domestic drug offenses because this distinction does not "infringe[ ] fundamental rights or concern[ ] a suspect class." *Id.* at 1346. And Congress has legitimate reasons to craft strict sentences for violations of the Act. In contrast with domestic drug offenses, international drug trafficking raises pressing concerns about foreign relations and global obligations. Indeed, the United States has signed a treaty that obliges it to "co-operate to the *fullest extent possible* to suppress illicit traffic by sea, in conformity with the international law of the sea." United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 17(1), Dec. 20, 1988, 1582 U.N.T.S. 95 (emphasis added). And the Act explains that "trafficking in controlled substances aboard vessels is a serious international problem" that is "universally condemned." 46 U.S.C. § 70501. In the light of these international concerns, Congress is entitled to mete out hefty sentences to maritime drug runners. Moreover, the inherent difficulties of policing drug trafficking on the vast expanses of international waters suggest that Congress could have rationally concluded that harsh penalties are needed to deter would-be offenders.

B. The Act and Its Application to Castillo Are Constitutional.

Castillo contends that the Act both "exceeds Congress'[s] enumerated powers" and "violates due process by subjecting foreign nationals to prosecution

for offenses bearing no nexus to the United States," but our precedents foreclose his arguments. On the question of the constitutionality of the Act, "we have repeatedly held that Congress has the power, under the Felonies Clause, to proscribe drug trafficking on the high seas." *United States v. Campbell*, 743 F.3d 802, 812 (11th Cir. 2014); *see also* U.S. Const. art. 1, § 8, cl. 10 (granting Congress the power "[t]o define and punish . . . Felonies committed on the high Seas"). And on the question of its application to Castillo despite his lack of connection to the United States, we have rejected the argument that the Due Process Clause requires the government to prove a "nexus between the United States and a defendant" in a prosecution under the Act. *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016); *accord Campbell*, 743 F.3d at 812. These precedents resolve Castillo's arguments because "only the court of appeals sitting en banc, an overriding United States Supreme Court decision, or a change in the statutory law can overrule a previous panel decision." *United States v. Hanna*, 153 F.3d 1286, 1288 (11th Cir. 1998) (italics omitted).

C. Castillo Cannot Challenge His Detention on Appeal.

Castillo invokes two constitutional amendments to challenge his detention. First, he contends that his detention violated the Due Process Clause of the Fifth Amendment. Second, he argues that his detention also violated his right under the Fourth Amendment to "a prompt judicial determination of probable cause." But we cannot consider either argument.

Castillo's guilty plea forecloses his argument "that the 19 day delay before [he] appeared before a magistrate [judge] . . . [was] unreasonable" and "violate[d] due process." As the Supreme Court recently explained in *Class v. United States*, "[a] valid guilty plea . . . renders irrelevant—and thereby prevents [a] defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered." 138 S. Ct. 798, 805 (2018). Castillo does not dispute the validity of his plea, so he cannot complain about the specific facts of his detention.

Castillo nonetheless attempts to raise his detention on appeal by framing his complaint as a challenge to the constitutionality of the Act under the theory that "a guilty plea by itself [does not] bar[ ] a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal," *id.* at 803, but we reject his arguments. Castillo suggests that the Act facially "violates substantive due process because the pretrial detention it authorizes . . . constitutes impermissible punishment before trial." But this facial challenge fails because Castillo has not "establish[ed] that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987). Even assuming that the government occasionally enforces the Act in a manner that causes unconstitutional detentions, Castillo points to no evidence of detentions beyond the facts of this appeal. Castillo also suggests that the Act "as applied [to him] . . . violates substantive due process because it caused [him] to be

detained a total of 19 days." But this challenge "focus[es] upon [a] case-related constitutional defect[ ] that occurred prior to the entry of the guilty plea." *Class*, 138 S. Ct. at 804–05 (citation and internal quotation marks omitted). His guilty plea bars this argument.

Our colleague's concurring opinion would ignore the plea agreement and reach the merits of Castillo's detention, but "we can affirm the district court's judgment on any ground supported by the record." *United States v. Gill*, 864 F.3d 1279, 1280 (11th Cir. 2017). The effect of the plea agreement was raised at oral argument, where Castillo conceded that "if it's not jurisdictional . . . the guilty plea waives this issue." Oral Argument at 5:14–24. The government too agreed, *see id.* at 11:25–55, that Castillo's guilty plea waived non-jurisdictional issues about "case-related government conduct," *Class*, 138 S. Ct. at 805. And the detention of a particular defendant is case-related. Although the concurring opinion suggests that "unlawful detention" may not be "the kind of 'case-related government conduct' that cannot be challenged after a guilty plea," Concurring Op. at 3 (citation omitted), it nonetheless proceeds to explain why it would affirm the conviction *based on its analysis of the specific facts of Castillo's detention*, *see id.* at 4-6. For example, it considers the communications between the United States and Guatemala, *id.* at 5, the dates and length of the detention, *id.*, and the exact distance between where Castillo was apprehended and Key West, Florida, *id.* at 5-6. Castillo's guilty plea eliminates the need for this fact-specific inquiry.

Castillo also contends that his detention violated his right under the Fourth Amendment to "a prompt judicial determination of probable cause," but this argument fails for two reasons. First, Castillo failed to make this argument in his opening brief, and "[a]n appellant in a criminal case may not raise an issue for the first time in a reply appellate brief." *United States v. Fiallo-Jacome*, 874 F.2d 1479, 1481 (11th Cir. 1989). Second, Castillo waived his right to complain about this "case-related government conduct" when he pleaded guilty. *Class*, 138 S. Ct. at 805. We need not address the merits of his argument.

IV. CONCLUSION

We **AFFIRM** Castillo's judgment of conviction and sentence.

MARTIN, Circuit Judge, Concurring in the Judgment.

I agree with the panel's treatment of Mr. Castillo's constitutional challenges to the Maritime Drug Law Enforcement Act. His challenges are foreclosed by Eleventh Circuit precedent. I also agree with the panel's ruling that there is a rational basis for the "safety valve" statute, which gives sentencing relief to certain defendants, to limit that relief to exclude those who commit drug trafficking offenses on the high seas. I am writing separately, however, because I do not join the majority's ruling that, by pleading guilty, Mr. Castillo waived his argument that his nineteen-day detention between his arrest and his first appearance violated the Due Process Clause of the Fifth Amendment. The government never made this argument and neither party briefed it. Because I believe the majority should have decided the issue of the pretrial detention on the merits, I do not join its opinion. Even so, I recognize my separate opinion has no real impact on Mr. Castillo. Despite my differences with one aspect of how the majority arrived at its result, I agree that Mr. Castillo's conviction and sentence should be affirmed.

I. The Panel Erred by Holding Mr. Castillo Waived Any Challenge to His Detention

Mr. Castillo entered into a plea agreement with the government, but it included no appeal waiver. Nothing in his plea agreement contemplated that Mr. Castillo would be barred from raising the issue of his pretrial detention on appeal. Perhaps because Mr. Castillo had no appeal waiver, the government never argued in its brief that his plea agreement foreclosed his ability to

bring his pretrial detention claim. To the contrary, the government argued that Mr. Castillo's 19-day detention was justified on the merits. But rather than reaching the merits of the government's argument regarding Mr. Castillo's nineteen-day detention, the panel concluded his claim was barred by his guilty plea.

In holding Mr. Castillo waived his right to challenge his pretrial detention, the panel opinion relies on and cites only to *Class v. United States*, 583 U.S. ——, 138 S. Ct. 798, 200 L.Ed.2d 37 (2018). But *Class* does not provide the basis for the majority's ruling. In fact, I read the central holding of *Class* to be that when a defendant pleads guilty, he *does not* waive his right to challenge the constitutionality of his statute of conviction. *Id.* at 803. In the *Class* opinion, the Supreme Court recounted the development of the idea that "a guilty plea bars appeal of many claims, including some antecedent constitutional violations related to events (say, grand jury proceedings) that had occurred prior to the entry of the guilty plea." *Id.* at 803 (quotations omitted). True, the *Class* opinion gave examples of rulings finding waivers in earlier cases, including objections to grand jury proceedings and "to challenge the admissibility of evidence obtained in violation of the Fourth Amendment." *Id.* at 803, 805 (quotation omitted) (citing *Haring v. Prosise*, 462 U.S. 306, 320, 103 S. Ct. 2368, 2377 (1983) and *Tollett v. Henderso*n, 411 U.S. 258, 266–67, 93 S. Ct. 1602, 1607–08 (1973)). And the *Class* opinion generally recognizes that certain constitutional claims may be raised after a guilty plea, although I acknowledge the opinion doesn't address claims regarding pretrial detention one way or

the other. *Id.* at 806. I do not therefore read *Class* to opine on whether unlawful detention is the kind of "case-related government conduct" that cannot be challenged after a guilty plea. *See id.* Because the panel cites only to *Class* in making precisely that decision, I gather the panel does.

As for Eleventh Circuit precedent, we have said that "a guilty plea waives all non-jurisdictional defects occurring prior to the time of the plea." *Tiemens v. United States*, 724 F.2d 928, 929 (11th Cir. 1984) (per curiam). Yet I am not aware that this Court has ever ruled that a claim of unlawful detention for a defendant apprehended outside the United States is a non-jurisdictional defect that has occurred before the plea. Thus I do not read precedent from either our Circuit or the Supreme Court to require the ruling the majority opinion makes in this regard. I believe the better part of valor would have been to wait until one of the parties before us asked us to make this ruling, and to have the benefit of adversarial testing before taking this leap.

And in addition to valor, it seems worth mentioning that since the government never argued on appeal that Mr. Castillo had waived his right to raise his claims regarding pretrial detention, it is the government who faces a waiver. *See United States v. Jacobo Castillo*, 496 F.3d 947, 954–57 (9th Cir. 2007) (en banc) (holding that the court could consider a claim that might otherwise be barred by entry of a guilty plea where the government failed to raise the issue on appeal and instead argued based on the underlying merits). While the majority seems to say the issue was raised because it came up at oral argument, this is not in keeping with

our precedent. Arguments not raised in the initial briefs "are considered abandoned." *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542 (11th Cir. 1994).

II. Mr. Castillo's Pre-Trial Detention Does Not Warrant Reversal

Since I believe the panel should have addressed the merits of Mr. Castillo's argument about pretrial detention, I will do so here. Again, Mr. Castillo argues there was an unreasonable delay between when he was seized on board the *Cap Caleb* until his appearance before the Magistrate Judge in Miami. Mr. Castillo contends the delay violated substantive due process because it constituted punishment before trial.

While it is true that a person cannot be punished with imprisonment before an adjudication of guilt, it is also true that the government, "may detain [a defendant] to ensure his presence at trial . . . so long as th[e] conditions and restrictions [of detention] do not amount to punishment, or otherwise violate the Constitution." *Jacoby v. Baldwin Cty.*, 835 F.3d 1338, 1344–45 (11th Cir. 2016) (quoting *Bell v. Wolfish*, 441 U.S. 520, 536-37, 99 S. Ct. 1861, 1873 (1979)). "[W]hether a condition of pretrial detention amounts to punishment turns on whether the condition is imposed for the purpose of punishment or whether it is incident to some legitimate government purpose." *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004).

Under Federal Rule of Criminal Procedure 5(a)(1)(B), a person arrested outside the United States must be brought before a Magistrate Judge "without unnecessary delay." In deciding whether there has

been unnecessary delay, courts look to the distance from the place of arrest to the United States; the time between arrival in the United States and presentment to a magistrate; whether the defendant was improperly interrogated or otherwise mistreated; and whether exigent circumstances contributed to any delay. *See United States v. Purvis*, 768 F.2d 1237, 1239 (11th Cir. 1985) (per curiam).

The Coast Guard boarded the *Cap Caleb* and detained Mr. Castillo on August 20, 2016. On August 26, the United States asked Guatemala to waive its jurisdiction over the ship and its crew. On August 29, Guatemala agreed to waive jurisdiction. On September 8, the Coast Guard brought Mr. Castillo to Cuba, and he was flown to Miami that same day. On September 9, he appeared before a Magistrate Judge in Miami.

A 19-day total delay is reasonable in this case. This Court has previously affirmed a five-day delay for a defendant apprehended 350 miles from Key West, Florida, *Purvis*, 768 F.2d at 1239, and a five-day delay for a defendant arrested in the Yucatan Straits, approximately 200 miles from the United States, *United States v. Odom*, 526 F.2d 339, 340, 343 (5th Cir. 1976).[1] The Pacific coast of Guatemala is significantly

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[1] Other courts have allowed longer delays for defendants arrested further away from the United States. *See United States v. Zakharov*, 468 F.3d 1171, 1174, 1180 (9th Cir. 2006) (allowing for 11-day delay for defendant apprehended "1620 nautical miles" from the United States); *United States v. Torres-Iturre*, No. 15CR2586-GPC, 2016 WL 2757283, at *3 (S.D. Cal. May 12, 2016) (finding 21-day delay was not unreasonable for defendant arrested "2439 nautical miles from San Diego"); *United States v. Savchenko*,

further from the United States than the location discussed in these earlier cases. Indeed, even ignoring the need to go through the Panama Canal, Mr. Castillo was taken into custody approximately 1,000 miles from the port of Miami. And of course there was an added delay caused by the wait for the Guatemalan government to waive jurisdiction. Mr. Castillo does not allege he could have been taken to a closer port or that the journey could have been made more quickly. There is no allegation he was interrogated or mistreated during that time. And he was presented to a Magistrate Judge the day after his arrival in the United States. *See Purvis*, 768 F.2d at 1239 ("[T]he delay of less than one day after arriving at Key West was reasonable because of the magistrate's brief absence."). Therefore the pre-trial delay was reasonable, and Mr. Castillo's conviction should stand.

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201 F.R.D. 503, 506 (S.D. Cal. 2001) ("[T]he [delay of] 16 days is more than reasonable for the transport of the fishing vessel from the high seas approximately 500 nautical miles from Mexico to this district."); *United States v. Greyshock*, 719 F.Supp. 927, 930–33 (D. Haw. 1989) (finding nine-day delay after arrest "600 miles northeast of Oahu" was reasonable because ship "proceeded directly to Honolulu").

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 16-60241-CR-WPD

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff.	.	Fort Lauderdale,
	.	Florida
v.	.	February 10, 2017
	.	2:24 p.m.
WUILSON ESTUARDO LEMUS CASTILLO,	.	
	.	
	.	
Defendant.	.	
. . . . .		

– – – – –

Transcript of Sentencing Hearing had
before the Honorable William P. Dimitrouleas,
United States District Judge.

– – – – –

APPEARANCES:

For the Government: Scott Behnke
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Official Court Reporter United
States District Court' 299 E.
Broward Blvd., Room 205F Fort
Lauderdale, Florida 33301 (954)
769-5657

– – – – –

Proceedings recorded by mechanical stenography,
transcript produced by computer.

[Page 2] FRIDAY, FEBRUARY 10, 2017, 2:24 P.M.

(The Judge is presently on the bench)

THE COURT: United States vs. Wuilson Estuardo Lemus Castillo.

If counsel would announce their appearances for the record.

MR. BEHNKE: Scott Behnke for the government, your Honor.

MR. RODRIGUEZ: Val Rodriguez, your Honor, for the defendant, who's present.

THE COURT: And do we have a stipulation that the interpreters are qualified interpreters?

MR. BEHNKE: Yes, your Honor.

MR. RODRIGUEZ: Yes, your Honor.

THE COURT: And is the interpreting equipment working properly, Mr. Lemus Castillo?

THE DEFENDANT: Yes.

THE COURT: And if you don't understand something, you'll let me know?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. Mr. Lemus Castillo's before the Court having pled guilty to conspiracy to possess five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States and possession with the intent to distribute five kilograms or more of cocaine [Page 3] while on board a vessel subject to the jurisdiction of the United States.

I adjudicated him guilty, deferred sentencing, ordered a Presentence Investigation Report that I've received and reviewed.

Have counsel had an opportunity to review the Presentence Investigation Report?

Mr. Behnke?

MR. BEHNKE: Yes, your Honor.

THE COURT: Mr. Rodriguez?

MR. RODRIGUEZ: Yes, your Honor.

THE COURT: Mr. Lemus Castillo, have you read the Presentence Investigation Report or had it translated to you to your satisfaction?

THE DEFENDANT: Yes, your Honor.

THE COURT: And have you discussed the Presentence Investigation Report with Mr. Rodriguez?

THE DEFENDANT: Yes, your Honor.

THE COURT: Any objections to the Presentence Investigation Report from the government?

MR. BEHNKE: No, sir.

THE COURT: Mr. Rodriguez?

MR. RODRIGUEZ: No, your Honor.

THE COURT: So we come up with an offense level 34, criminal history category I, for a range of 151 to 188 months, is that correct?

[Page 4] MR. RODRIGUEZ: That's correct, your Honor.

THE COURT: Any legal cause to show why sentence should not be imposed?

MR. RODRIGUEZ: No, your Honor.

THE COURT: Anything you want to say, Mr. Lemus Castillo, before I impose sentence?

THE DEFENDANT: Well, good afternoon, your Honor.

First of all, I would like to apologize to you, your Honor, and to the prosecutor for the mistake I made. I want to ask forgiveness from your country and to all humanity for the mistake I made. I want to ask forgiveness from everybody here. And I hope to God that the punishment that you impose will be the one I deserve.

THE COURT: Anything further before I impose sentence?

MR. RODRIGUEZ: Your Honor, may I be heard?
Or —

THE COURT: Sure.

Let me hear from the government first. You're gonna recommend more than 120 months on Mr. Lemus Castillo. Are you being specific about your recommendation, Mr. Behnke?

MR. BEHNKE: Yes, your Honor. We would recommend in light of the fact that the Court is varying down to 120 for the others, we would recommend a sentence of 135 months, which is the low end, if he were to get all the benefits. The others would have been

sentenced at the low end. And I think that's — that would be our recommendation to the Court, your [Page 5] Honor.

THE COURT: Mr. Rodriguez.

MR. RODRIGUEZ: Yeah, thank you, your Honor, just briefly.

I filed a sentencing memo. I think 120 months more than adequately reflects the issues here. As the Court noted in your order in this case, when we litigated the issue of the constitutionality of the statute, that, you know, unfortunately, safety valve doesn't necessarily apply the same way for this type of offense. And I think I could have come in with a good argument had this been a different crime involving the same type of drugs here in the U.S. to give my client a sentence under the ten-year mandatory minimum.

Your Honor, the government spends $83.69 a day to house these prisoners. It will cost the government $305,000 per defendant to house them for the next ten years for a crime that did not occur in this country.

My client will be not be able to earn money for ten years for his family. As you know, he has a 12-year-old daughter, who now — her and her mother now sell food to make a living.

He made a stupid mistake, agreeing to go with his stepsons and this captain, who talked him into this. I think you read what I wrote. Basically he showed up, he really believed he was being — fishing. He's a fisherman. He makes [Page 6] 500-and-something dollars a month, and that's it. And I — it's really a

shame the way people use persons like these defendants in this case to do their dirty deeds out in international waters, thousands of miles from here.

So, I'd ask your Honor to find that the 120 months is more than sufficient in the circumstances of this case. Yes, he did decide to plead guilty the weekend before — or the night before, I believe, calendar call, when he learned that the captain was gonna say what he was gonna say, and what he was gonna say basically implicated him and his two sons.

And we did challenge the statute, your Honor, as well. We felt that was necessary, because I thought maybe the Court may have had a different view. But I understand what the law is, and we don't agree with it, but it is the law. So I'd ask the 120 months be more than sufficient for the circumstances of this case.

And, your Honor, you've had many cases in front of you, I'm certain, with a person with no background, no drug problems, never did anything wrong in their life, and just made one little error, and the error was he said yes and went on the boat and helped. And I'd ask that you consider those factors in the sentence you're going to impose.

THE COURT: All right. Having considered the sentencing guidelines, having considered the factors in 18, United States Code, Section 3553(a), it's up to the Court to [Page 7] determine what a reasonable and sufficient sentence is.

And I think that what Mr. Behnke said merits some consideration, that there is some difference between Mr. Lemus Castillo and the Aguilar Alvarado brothers

in that he didn't accept responsibility as quickly as they did. And because of that, his guidelines are higher.

And I agree that the law on this particular statute as interpreted by the Eleventh Circuit is a very difficult law. Had all these defendants qualified for the safety valve, then I very well may have given the Aguilar Alvarados less than 120 months in prison. And if I did that, I may have given Mr. Lemus Castillo less 120 months in prison, but it would have been more than the Aguilar Alvarado brothers got. Because I think they're not similarly situated. I think there's a reason that the government has the option of giving a defendant that third point for acceptance of responsibility in that it makes the system more efficient when people are able to plead guilty more quickly and thereby avoid the expense necessary for preparing for trial.

So, having said all that, it's a lot of cocaine involved. I think a sentence needs to promote respect for the law, but I think that it also should take into account any differences between defendants and try to impose similar sentences on similar defendants. And when I balance the aggravating and mitigating circumstances, it seems to me the [Page 8] fair and just sentence in this case is one year more than the Aguilar Alvarados got.

So it will be judgment of Court and sentence of law that Mr. Lemus Castillo be sentenced to 132 months in prison.

Upon his release from prison, I place him on five years of supervised release. While on supervised

release, he shall not commit any crimes; he shall be prohibited from possessing a firearm or other dangerous device; he shall not possess any controlled substances; he shall comply with the standard conditions of supervised release, including the special condition that if he's removed or deported, that he not reenter the United States without the express written permission of the Secretary of Homeland Security.

If he's removed or deported, the remainder of the supervised release will be nonreporting while he's outside the United States.

If he should reenter the United States during the period of the supervised release, he's to report to the nearest probation office within 72 hours of his arrival.

If for some reason he's not removed or deported, I order that he submit to a reasonable search of his person or property conducted at a reasonable time and manner by his probation officer.

I run both sentences concurrent.

I impose a $200 special assessment.

[Page 9] I find that he's not able to pay a fine. I waive the fine.

Mr. Lemus Castillo, it's my duty to inform you that you have 14 days within which to appeal the judgment and sentence of this Court. Should you desire to appeal and be without funds with which to prosecute an appeal, an attorney will be appointed to represent you in connection with that appeal. Should you fail to appeal within that 14-day period, it will constitute a waiver of your right to appeal.

Also, it's my duty to elicit from counsel for all parties fully articulated objections to the Court's findings of fact and conclusions of law as announced at the sentencing hearing, and to further elicit any objection which any party may have to the manner in which the sentence was imposed in this case.

Are there any objections from the government?

MR. BEHNKE: No, sir.

THE COURT: Mr. Rodriguez?

MR. RODRIGUEZ: Yeah. Your Honor, the objection that we just lodged is that there's a due process and equal protection violation in the application of not being able to apply the safety valve to this particular charge under the circumstances for this particular defendant.

THE COURT: Wasn't that the basis of your motion to dismiss?

[Page 10] MR. RODRIGUEZ: Yes. But it has to be reraised as a sentencing issue as well, because —

THE COURT: Did you reserve that as a point on appeal?

MR. RODRIGUEZ: I am now. I think I can do that now because of the finding you made.

THE COURT: He pled guilty. How can you reserve the denial of a motion to dismiss when he pled guilty?

MR. RODRIGUEZ: No, it's not the motion to dismiss, your Honor. It's the application of the safety valve, which is a sentencing factor as to —

THE COURT: You' re gonna ask the Eleventh Circuit to change their ruling on vessels —

MR. RODRIGUEZ: On that other case?

THE COURT: — on board a vessel subject to the jurisdiction of the United States?

MR. RODRIGUEZ: Yes. But I don't expect them to change their ruling. But I —

THE COURT: Maybe the Supreme Court will.

MR. RODRIGUEZ: Yeah, who knows, with today's day and age. So that's why I wanted to make that —

THE COURT: No, I think your objection is an allowed objection, because you're objecting to the sentence; you're not objecting to the conviction. It's the sentence.

MR. RODRIGUEZ: Yes, your Honor.

THE COURT: Okay.

[Page 11] MR. RODRUGUEZ: That's what I wanted to make clear for the record.

THE COURT: All right. So I think the record's clear.

MR. RODRIGUEZ: Thank you.

THE COURT: All right. The marshal will execute the sentence of the Court.

Good luck to you, Mr. Lemus Castillo.

THE DEFENDANT: Thank you, your Honor.

(Proceedings concluded at 2:35 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/Francine C. Salopek
Francine C. Salopek, RMR-CRR
Official Court Reporter

3-31-17
Date

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

16-60241-CR-
DIMITROULEAS/SNOW

Case No. _____

46 U.S.C. § 70506(b)
46 U.S.C. § 70503(a)(1)
46 U.S.C. § 70507(a)

UNITED STATES OF AMERICA

vs. Sept. 15, 2016

JOSE MARIA CALDERON ROMERO,
ANGEL OMAR CASTILLO CHINCHILLA,
LUIS ALFONSO AGUILAR ALVARADO,
WUILSON ESTUARDO LEMUS CASTILLO
and ALAN ALEXSI AGUILAR ALVARADO,

Defendants.
_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

Beginning on an unknown date and continuing through on or about August 20, 2016, while on board a vessel subject to the jurisdiction of the United States,

with the Southern District of Florida being the district at which the defendants entered the United States, the defendants,

JOSE MARIA CALDERON ROMERO,
ANGEL OMAR CASTILLO CHINCHILLA,
LUIS ALFONSO AGUILAR ALVARADO,
WUILSON ESTUARDO LEMUS CASTILLO and
ALAN ALEXSI AGUILAR ALVARADO,

did knowingly and willfully combine, conspire, confederate and agree with each other and other persons unknown to the Grand Jury, to possess with intent to distribute a controlled substance, in violation of Title 46, United States Code, Section 70503(a)(1); all in violation of Title 46, United States Code, Section 70506(b).

With respect to all defendants, the controlled substance involved in the conspiracy attributable to each of them as a result of their own conduct, and the conduct of other conspirators reasonably foreseeable to each of them is five (5) kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of Title 46, United States Code, Section 70506(a) and Title 21, United States Code, Section 960(b)(1)(B).

COUNT 2

On or about August 20, 2016, while on board a vessel subject to the jurisdiction of the United States, with the Southern District of Florida being the district at which the defendants entered the United States, the defendants,

JOSE MARIA CALDERON ROMERO,
ANGEL OMAR CASTILLO CHINCHILLA,
LUIS ALFONSO AGUILAR ALVARADO,
WUILSON ESTUARDO LEMUS CASTILLO and
ALAN ALEXSI AGUILAR ALVARADO,

did knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 46, United States Code, Section 70503(a)(1) and Title 18, United States Code, Section 2.

Pursuant to Title 46, United States Code, Section 70506(a) and Title 21, United States Code, Section 960(b)(1)(B), it is further alleged that this violation involved five kilograms or more of a mixture and substance containing a detectable amount of cocaine.

Appendix D

STATUTORY PROVISIONS INVOLVED

46 U.S.C. § 70503(a) provides:

> (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;
>
> (2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or
>
> (3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

21 U.S.C. § 960(a) provides:

> (a) Unlawful acts
>
> Any person who—
>
> (1) contrary to section 825, 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,

shall be punished as provided in subsection (b).

21 U.S.C. § 960(b)(1) provides:

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving—

(A) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(B) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 280 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

(D) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(E) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(G) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana; or

(H) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.[1]

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury results from the use of

such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

18 U.S.C. § 3553(f) provides:

> (f) Limitation on Applicability of Statutory Minimums in Certain Cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—
>
> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal

enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.