No. 18-374

In the Supreme Court of the United States

WUILSON ESTUARDO LEMUS CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant convicted of violating 46 U.S.C. 70503(a)(1) (Supp. IV 2016) and 70506(b) (provisions of the Maritime Drug Law Enforcement Act) is eligible for relief under the safety-valve statute, 18 U.S.C. 3553(f).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 899 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2018. The petition for a writ of certiorari was filed on September 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70506(b); and possession with intent to distribute five kilograms or more of cocaine while on a vessel subject to the jurisdiction of the

United States, in violation of 46 U.S.C 70503(a)(1) (Supp. IV 2016). Judgment 1. He was sentenced to 132 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-18a.

1. On August 20, 2016, petitioner and four co-conspirators were aboard a fishing vessel off the coast of Guatemala, transporting large quantities of cocaine. Pet. App. 2a-3a; D. Ct. Doc. 82 (Factual Proffer), at 1-2 (Dec. 2, 2016). When the Coast Guard approached the vessel approximately 105 nautical miles from the western coast of Guatemala, the vessel's crew began throwing bales of cocaine overboard. Pet. App. 2a-3a. The Coast Guard recovered 17 of the bales, which together contained approximately 850 kilograms of cocaine. Factual Proffer 3.

A grand jury returned an indictment charging petitioner with conspiring to possess with intent to distribute a controlled substance while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70506(b); and possessing with intent to distribute a controlled substance while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a)(1) (Supp. IV 2016) and 18 U.S.C. 2. Pet. App. 31a-33a. The indictment further alleged that each offense involved five kilograms or more of cocaine, in violation of 46 U.S.C. 70506(a) (Supp. IV 2016) and 21 U.S.C. 960(b)(1)(B). Pet. App. 32a-33a. Sections 70503 and 70506 are provisions of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 *et seq.*, and each count carries a statutory minimum sentence of ten years of imprisonment. 21 U.S.C. 960(b)(1); 46 U.S.C. 70506(a)-(b) (2012 & Supp. IV 2016).

Petitioner moved to dismiss the indictment, arguing in part that "the MDLEA violates the Due Process Clause because it does not require proof of a nexus between the United States and a defendant." D. Ct. Doc. 52, at 3 (Nov. 21, 2016). Petitioner acknowledged that "the Eleventh Circuit has previously rejected this argument," but he contended the due-process issue "is still viable" and thus preserved it "for appellate purposes." *Ibid.*

The district court denied petitioner's motion to dismiss in a written order. D. Ct. Doc. 62, at 1-2 (Dec. 1, 2016). The court rejected petitioner's due-process claim, citing circuit precedent. *Id.* at 1. The court further noted that it "ha[d] not been asked to opine on the effect the safety valve has on these defendants." *Id.* at 2. The safety-valve statute, 18 U.S.C. 3553(f), provides that, "in the case of an offense under * * * 21 U.S.C. 841, 844, 846[] or * * * 21 U.S.C. 960, 963[] * * * the court shall impose a sentence pursuant to [the Sentencing G]uidelines * * * without regard to any statutory minimum sentence." *Ibid.* The district court stated that petitioner and his co-defendants were "disqualified from any safety valve benefit" because they had been charged under the MDLEA. D. Ct. Doc. 62, at 2.

Petitioner pleaded guilty to both counts pursuant to a written plea agreement. Plea Agreement ¶ 1. In the plea agreement, petitioner acknowledged that a ten-year statutory minimum applied to each count of conviction. *Id.* ¶ 3.

2. Before sentencing, the Probation Office prepared a presentence report that calculated an advisory Guidelines sentencing range of 151 to 188 months, based on a total offense level of 34 and a criminal history category of I. Presentence Investigation Report (PSR) ¶ 56; Pet.

App. 22a. That calculation incorporated a two-level reduction in petitioner's offense level pursuant to the safety-valve provision set forth in Sentencing Guidelines 2D1.1(b)(17) (2016). PSR ¶ 23. The presentence report further noted that petitioner faced a statutory-minimum sentence of at least 120 months. PSR ¶¶ 20, 55.

Petitioner did not object to the presentence report. See Addendum to PSR 1. In his sentencing memorandum, petitioner acknowledged that, "because this is a Title 46 offense," he did not qualify for safety-valve relief under Section 3553(f), and the district court could not depart below the statutory minimum. D. Ct. Doc. 99, at 3 (Jan. 31, 2017). Petitioner asserted that this result "simply does not make sense" because he could "receive a substantially lower sentence due to the safety valve" if he had "committed a similar Title 21 narcotics offense in this country (as opposed to the crime being committed in international waters)." *Ibid.* Petitioner asked the court "to impose a sentence of the statutory minimum of 120 months." *Id.* at 4.

At sentencing, the district court determined that petitioner's advisory Guidelines range was 151 to 188 months, a calculation that petitioner agreed was "correct." Pet. App. 22a; see Addendum to PSR 1. Petitioner asked the court to vary downward from that calculation and sentence him to the same 120-month term of imprisonment that the court was imposing on two of his co-conspirators. Pet. App. 23a-25a. In making that argument, petitioner's counsel again noted petitioner's "unfortunate[]" ineligibility for safety-valve relief. *Id.* at 24a. Petitioner's counsel stated that, "had this been a different crime involving the same type of drugs here

in the U.S.," he "could have come in with a good argument" for imposing a sentence below the statutory minimum. *Ibid.*

The district court declined to impose a 120-month sentence, finding that petitioner was differently situated from the two co-conspirators who had received ten-year statutory-minimum terms because petitioner "didn't accept responsibility as quickly as they did" and thus had a higher advisory Guidelines range. Pet. App. 25a-26a. The court further stated that, if petitioner and his two co-conspirators had qualified for safety-valve relief under Section 3553(f), the court might have sentenced all of them to less than 120 months of imprisonment, but it would still have given petitioner a higher sentence than his two co-conspirators. *Id.* at 26a. After determining that the "fair and just sentence" for petitioner was "one year more" than his two co-conspirators received, the court sentenced petitioner to 132 months. *Ibid.*

Petitioner's counsel objected to the sentence, stating, "[T]he 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." Pet. App. 28a. The district court asked, "Wasn't that the basis of your motion to dismiss?" *Ibid.* Petitioner's counsel responded, "Yes. But it has to be reraised as a sentencing issue as well." *Ibid.* When petitioner's counsel sought to reserve the right to appeal that point, the court asked how petitioner could "reserve the denial of a motion to dismiss when he pled guilty." *Ibid.* Petitioner's counsel explained that petitioner was seeking to challenge "the application of the safety valve," rather than the denial of the motion to

dismiss, and intended to "ask the Eleventh Circuit to change [its] ruling" regarding the MDLEA because this Court might overrule that circuit precedent. *Id.* at 28a-29a.

3. Petitioner appealed. Petitioner again raised his due-process challenge to the MDLEA, arguing that "the United States' exercise of jurisdiction in this case is unreasonable and violates Due Process because neither [petitioner] nor his offense had any ties to the United States." Pet. Corrected C.A. Br. (Pet. C.A. Br.) 17. Petitioner also asserted that the safety-valve statute "exclu[des] defendants convicted under the MDLEA from eligibility" and argued that the statute is therefore unconstitutional. *Id.* at 9; see also *id.* at 1, 10, 13, 15-16; Pet. C.A. Reply Br. 1-3; Pet. App. 6a. In particular, petitioner contended that "the exclusion of 46 U.S.C. § 70503 from the safety valve statute" violates equal-protection principles 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 our borders." Pet. C.A. Br. 15-16; see *id.* at 13-16; Pet. App. 6a.

Petitioner informed the court of appeals that his challenge to Section 3553(f) was "different" than the challenge that court had considered in *United States* v. *Pertuz-Pertuz*, 679 F.3d 1327 (11th Cir. 2012) (per curiam). Pet. C.A. Br. 12 n.1. Petitioner explained that, in *Pertuz-Pertuz*, the court had determined that MDLEA offenders were ineligible for safety-valve relief "*solely* as a matter of statutory construction." *Ibid.* Petitioner asserted that because *Pertuz-Pertuz* "did not address [his] equal protection challenge" to Section 3553(f), the court could consider his claim "as a matter

of first impression." *Id.* at 12. Petitioner did not contend that, as a matter of statutory construction, he was eligible for safety-valve relief under Section 3553(f). See Pet. C.A. Br. 1-23; Pet. C.A. Reply Br. 1-8.

4. The court of appeals affirmed. Pet. App. 1a-18a. Recognizing that petitioner had raised only constitutional claims on appeal, *id.* at 2a., the court rejected petitioner's "conten[tion] that the equal protection guarantee of the Fifth Amendment entitles him to the kind of relief that the safety valve provides." *Id.* at 6a; see *id.* at 5a-8a. The court determined that "Congress is entitled to deny the safety valve to offenders convicted under the [MDLEA]" because "Congress is entitled to mete out hefty sentences to maritime drug runners" and "could have rationally concluded that harsh penalties are needed to deter would-be offenders." *Id.* at 8a.

In addressing petitioner's equal-protection claim, the court of appeals noted that the safety valve in Section 3553(f) "does not apply to offenses under the [MDLEA]." Pet. App. 5a. "As we explained in *Pertuz-Pertuz*," the court stated, "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 [MDLEA]." *Ibid.* (citations omitted).

Judge Martin filed an opinion concurring in the judgment. Pet. App. 13a-18a. As relevant here, Judge Martin "agree[d] 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." *Id.* at 13a.

ARGUMENT

Petitioner contends (Pet. 15-16) that, as a matter of statutory construction, he is eligible for safety-valve relief under 18 U.S.C. 3553(f). Section 3553(f) does not apply to petitioner's offenses, and petitioner's case is an unsuitable vehicle for resolving a shallow and recent circuit conflict regarding the proper construction of Section 3553(f) because petitioner has waived the issue presented in the petition by taking the opposite position below. This Court has previously denied at least two petitions for writs of certiorari raising the same issue. See *Rolle* v. *United States*, 572 U.S. 1102 (2014) (No. 13-7467); *Morales* v. *United States*, 134 S. Ct. 1872 (2014) (No. 13-7429). It should follow the same course here.[1]

1. Petitioner is ineligible for safety-valve relief under Section 3553(f). Section 3553(f) provides that, "in the case of an offense under * * * 21 U.S.C. 841, 844, 846[] or * * * 21 U.S.C. 960, 963[] * * * the court shall impose a sentence pursuant to [the Sentencing G]uidelines * * * without regard to any statutory minimum sentence." 18 U.S.C. 3553(f). A defendant is eligible for the protection of the safety-valve provision only when he meets five other specified criteria. See 18 U.S.C. 3553(f)(1)-(5).[2] The government does not dispute that

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[1] Another petition for a writ of certiorari that presents a similar question is currently pending. See *Anchundia-Espinoza* v. *United States*, No. 18-6482 (filed Oct. 25, 2018).

[2] Those criteria are: "(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;

petitioner satisfies those criteria. The court of appeals has correctly recognized, however, that Section 3553(f) does not apply to a defendant such as petitioner who was not convicted of violating any of the many provisions enumerated as potential predicates for safety-valve relief.

a. The unambiguous text of Section 3553(f) refutes petitioner's argument. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, * * * judicial inquiry is complete.") (citation and internal quotation marks omitted). By its plain terms, Section 3553(f) applies only when a defendant was convicted "of an offense under" 21 U.S.C. 841, 844, 846, 960, or 963. 18 U.S.C. 3553(f). Petitioner was not convicted of any offense under any of those listed provisions. The court of appeals correctly recognized in *United States* v. *Pertuz-Pertuz*, 679 F.3d 1327 (11th Cir. 2012) (per curiam), and petitioner does not dispute, that Section 3553(f)'s list of offenses eligible for safety-valve relief is exhaustive and that the provision is not applicable to other offenses even when a defendant would satisfy the other criteria set forth in

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(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." 18 U.S.C. 3553(f)(1)-(5).

Section 3553(f)(1)-(5). See 679 F.3d at 1328 ("[B]y its terms, the 'safety valve' provision applies only to convictions under five specified offenses: 21 U.S.C. § 841, § 844, § 846, § 960, and § 963. The selection of these five statutes reflects an intent to exclude others.") (brackets and citations omitted). And petitioner was not convicted of any of the offenses on the list.

Petitioner was instead convicted of violating provisions of the MDLEA codified at 46 U.S.C 70503(a)(1) (Supp. IV 2016) and 70506(b). See Judgment 1. Section 70503(a)(1) makes it unlawful to "knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board * * * a vessel subject to the jurisdiction of the United States," 46 U.S.C. 70503(a)(1) (Supp. IV 2016). Section 70506(b), in turn, makes it unlawful to conspire to violate Section 70503(a)(1). Because Sections 70503 and 70506 are not included in the list of offenses enumerated in 18 U.S.C. 3553(f), convictions for violating those statutes are not eligible for safety-valve relief. See *Pertuz-Pertuz*, 679 F.3d at 1328 ("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.").

In 1986, Congress initially codified the current prohibitions in the MDLEA in a materially identical provision at 46 U.S.C. App. 1903. See *United States* v. *Gamboa-Cardenas*, 508 F.3d 491, 494 nn.1-2, 497-498 (9th Cir. 2007). When Congress enacted the safety-valve statute in 1994 (eight years later), it "could have included § 1903 as easily as it included the other statutes specifically listed in § 3553(f)," but chose not to. *Id.*

at 497-498. Congress's decision not to include the offenses that are now codified at 46 U.S.C. 70503(a)(1) (Supp. IV 2016) and 70506(b) confirms the court of appeals' conclusion that Section 3553(f) does not apply to convictions under the MDLEA.

b. Petitioner contends (Pet. 16-17), for the first time in this Court, that he qualifies for safety-valve relief under Section 3553(f) on the theory that he was convicted of an offense under 21 U.S.C. 960. That contention is incorrect.

As petitioner's judgment states, petitioner was "adjudicated guilty" of two MDLEA offenses: one violation of 46 U.S.C. 70506(b) and one violation of 46 U.S.C. 70503(a)(1) (Supp. IV 2016). Judgment 1. Section 70506 provides that "[a] person violating [Section 70503(a)(1) (Supp. IV 2016)] * * * shall be punished as provided in * * * 21 U.S.C. 960" and that "[a] person * * * conspiring to violate section 70503 * * * is subject to the same penalties as provided for violating section 70503." 46 U.S.C. 70506(a)-(b) (2012 & Supp. IV 2016). The penalty provisions set forth in 21 U.S.C. 960 (2012 & Supp. IV 2016) thus apply to petitioner's MDLEA offenses.

As noted above, the safety-valve provision applies to "offense[s] under * * * 21 U.S.C. 960." 18 U.S.C. 3553(f). Section 960 is divided into multiple subsections. Section 960(a) describes certain "[u]nlawful acts"; Section 960(b) describes "[p]enalties" applicable to the substantive crimes described in Subsection (a). 21 U.S.C. 960(a)-(b).[3] Petitioner did not commit an offense described in Section 960(a). He therefore did not

[3] Section 960(d) defines and provides penalties for certain importation and exportation crimes. It does not prescribe any statutory-minimum penalties, and it therefore would not be relevant to the application of Section 3553(f).

commit an "offense under * * * 21 U.S.C. 960" for purposes of 18 U.S.C. 3553(f). Rather, he committed offenses under 46 U.S.C. 70503(a)(1) (Supp. IV 2016) and 70506(b) that are subject to penalties described in 21 U.S.C. 960(b).

The cross-reference in Section 70506(a) to the penalty provision of 21 U.S.C. 960(b) does not transform an offense committed in violation of Section 70503(a)(1) or Section 70506 into an offense under Section 960(a). As the court of appeals correctly recognized in *Pertuz-Pertuz*, Section 3553(f) applies only "in the case of an offense under * * * 21 U.S.C. 960," 18 U.S.C. 3553(f), but "not to an 'offense penalized under' section 960 and not to a 'sentence under' section 960." *Pertuz-Pertuz*, 679 F.3d at 1329. Congress's use of such language elsewhere, see 21 U.S.C. 962(a) (referring to "an offense punishable under section 960(b)"), belies petitioner's suggestion (Pet. 15-16) that an offense is "under" not only the provision that identifies the acts as punishable, but also any section that sets forth a penalty-enhancing fact.

The plain language of Section 3553(f) thus indicates that Congress intended that drug traffickers who violate the MDLEA will be ineligible for safety-valve relief from any statutory-minimum sentences that apply to their MDLEA offenses. Petitioner's assertion (Pet. 16) that Congress could not have intended that result lacks merit in light of the unambiguous statutory text. See, *e.g.*, *United States* v. *McQuilkin*, 78 F.3d 105, 108 (3d Cir.) ("[N]othing in the legislative history of § 3553(f) provides a basis for interpreting the statute other than as the clear language provides."), cert. denied, 519 U.S. 826 (1996). By providing that only offenses under cer-

tain provisions could qualify for the safety valve, Congress plainly and permissibly distinguished among drug crimes for purposes of safety-valve eligibility.

And, as the court of appeals explained, Congress "has legitimate reasons to craft strict sentences" for MDLEA offenses. Pet. App. 8a. For example, "[i]n contrast with domestic drug offenses, international drug trafficking raises pressing concerns about foreign relations and global obligations," including the United States' treaty obligations. *Ibid.* In addition, "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." *Ibid.* Accordingly, there is nothing "bizarre" (Pet. 16) about Congress's decision to exclude MDLEA offenses from safety-valve relief under Section 3553(f), and petitioner's evident disagreement with that decision cannot defeat the plain text of the statute.

2. The court of appeals' interpretation of Section 3553(f) is consistent with the decisions of most courts of appeals to consider the issue. Those courts have determined that violations of criminal prohibitions not specifically enumerated in the safety-valve provision do not qualify for safety-valve relief. See, *e.g.*, *United States* v. *Anchundia-Espinoza*, 897 F.3d 629, 634 (5th Cir. 2018), petition for cert. pending, No. 18-6482 (filed Oct. 25, 2018) (determining that safety-valve relief under Section 3553(f) is unavailable for a Section 70503 offense because Section 70503 is "not specifically provided for under § 3553(f)" and "is also not an 'offense under' § 960"); *Gamboa-Cardenas*, 508 F.3d at 498 ("[T]he safety valve provision in 18 U.S.C. § 3553(f) is only applicable to the statutes specifically enumerated

therein."); *United States* v. *Phillips*, 382 F.3d 489, 499 (5th Cir. 2004) (same); *United States* v. *Koons*, 300 F.3d 985, 993 (8th Cir. 2002) (same); see also, *e.g.*, *United States* v. *Paseur*, 148 Fed. Appx. 404, 408 (6th Cir. 2005) (addressing the analogous safety-valve provision set forth at Section 5C1.2 and holding that, because the defendant "pled guilty to, and was convicted of, violating 21 U.S.C. § 843(a)(6), a crime that is not enumerated in § 5C1.2, he may not avail himself of the 'safety valve'"), cert. denied, 546 U.S. 1119 (2006); *McQuilkin*, 78 F.3d at 108 (same).

Ten days after the court of appeals issued the decision below, the D.C. Circuit reached a different conclusion in *United States* v. *Mosquera-Murillo*, 902 F.3d 285 (D.C. Cir. 2018). The defendants in *Mosquera-Murillo* received ten-year statutory-minimum sentences after pleading guilty to conspiring to distribute, and to possess with intent to distribute, five or more kilograms of cocaine and 100 or more kilograms of marijuana on board a covered vessel. *Id.* at 287, 294. The indictment, plea agreements, and judgments in that case all stated the defendants committed that offense "in violation of" both the MDLEA—specifically, 46 U.S.C. 70503 and 70506(b)—and 21 U.S.C. 960(b)(1)(B) and (2)(G). 902 F.3d at 293-294. The D.C. Circuit found that "[t]he defendants' crime of conviction * * * involved a violation of (or, equivalently, an offense under) 21 U.S.C. § 960" and held that the defendants in that case were eligible for safety-valve relief from their ten-year statutory-minimum sentences. *Id.* at 293-295.

The shallow conflict between *Mosquera-Murillo* and the decisions of other courts of appeals, which favors the approach taken in this case, does not warrant review here because it is not clear that even the D.C. Circuit

would conclude that petitioner is eligible for relief from his sentence. Unlike the defendants in *Mosquera-Murillo*, petitioner did not receive a statutory-minimum sentence. Rather, the district court sentenced petitioner to 132 months of imprisonment, a term above the statutory minimum and below petitioner's advisory Guidelines range, because that court determined that the "fair and just sentence" for petitioner was "one year more" than his two co-conspirators received. Pet. App. 26a. The consideration that drove petitioner's sentence thus was not his own ten-year statutory minimum but rather the statutory-minimum sentences of his co-defendants, which petitioner could not and did not himself challenge on appeal. Given those circumstances, the D.C. Circuit might find that petitioner has already received what the safety-valve statute promises: "a sentence pursuant to [the Sentencing G]uidelines * * * without regard to any statutory minimum." 18 U.S.C. 3553(f).

3. In any event, petitioner's case is an unsuitable vehicle for reviewing the question presented because petitioner has waived or, at minimum, forfeited his current statutory claim.

a. Petitioner now contends (Pet. 15-16) that Section 3553(f), by its terms, provides safety-valve relief to defendants convicted of violating Sections 70503(a)(1) and 70506(b) of the MDLEA and that the court of appeals' contrary holding in *Pertuz-Pertuz*, *supra*, was incorrect. But petitioner took the opposite position during the proceedings below. In both the district court and the court of appeals, petitioner contended that Section 3553(f) does *not* apply to MDLEA offenses, and that understanding provided the foundation for his equal-protection claim. See D. Ct. Doc. 99, at 3; Pet. C.A. Br. 1,

9-10, 13, 15-16; Pet. C.A. Reply Br. 1-3; Pet. App. 6a, 24a, 28a-29. Because petitioner took that position below, he is not entitled to advance a contrary construction of Section 3553(f) for the first time in this Court. See *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993).

At minimum, petitioner has forfeited any claim that, as a matter of statutory construction, he is eligible for safety-valve relief under Section 3553(f). See *Puckett* v. *United States*, 556 U.S. 129, 134-136 (2009); Fed. R. Crim. P. 51(b). His claim of error would thus, at best, qualify only for plain-error review. See *Puckett*, 556 U.S. at 135; Fed. R. Crim. P. 52(b). And even assuming that the courts below did err in accepting the joint position of the parties that, as a matter of statutory construction, Section 3553(f) is inapplicable to petitioner's case, petitioner has not attempted to show that he satisfies the other requirements of the plain-error standard. Under that standard, petitioner would have the burden to establish (i) error that (ii) was "clear or obvious, rather than subject to reasonable dispute," (iii) "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings,'" and (iv) "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Puckett*, 556 U.S. at 135 (citations omitted). The uniformity of the circuits on this issue at the time of the court of appeals' decision indicates that any error was not "clear" or "obvious." See *Olano*, 507 U.S. at 734. Because petitioner received a sentence that was keyed to his coconspirators' sentences and was above his statutory minimum and below his advisory Guidelines range, it is

not evident that he has established the final two plain-error elements. *Puckett*, 556 U.S. at 135.

b. Petitioner contends (Pet. 14) that "the question of whether [he] is eligible for safety-valve relief is squarely teed up in this case" because he "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 * * * *Pertuz-Pertuz*." *Ibid.* (citing Pet. 7-8). Petitioner conflates the due-process and equal-protection claims he raised below with the statutory-interpretation claim he has raised for the first time in this Court.

During the district court proceedings, petitioner's counsel repeatedly acknowledged petitioner's ineligibility for safety-valve relief under Section 3553(f). See D. Ct. Doc. 99, at 3 ("Defendant is otherwise eligible for the safety valve, but because this is a Title 46 offense, this Court cannot depart below the mandatory minimum of 10 years."); see also Pet. App. 24a ("[U]nfortunately, safety valve doesn't necessarily apply the same way for this type of offense. * * * 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."). Although he "expressly objected to the District Court's refusal to apply the safety valve," Pet. 14, petitioner did not object on statutory-interpretation grounds, arguing instead that petitioner's ineligibility for safety-valve relief was "a due process and equal protection violation," Pet. App. 28a. And as opposed to "previewing the possibility of filing this very petition for certiorari to overturn * * * *Pertuz-Pertuz*," Pet. 14, his counsel's allusion to the possibility of a future petition

for a writ of certiorari in this case, Pet. App. 29a, occurred in reference to the due-process objection that he was "rerais[ing]" from his motion to dismiss, *id.* at 28a, which was also contrary to circuit precedent—not to a statutory argument he never made. See also D. Ct. Doc. 52, at 3.

The appellate proceedings further undermine petitioner's contention that this case "squarely tee[s] up" (Pet. 14) the question presented. In the court of appeals, petitioner argued that Section 3553(f) "exclu[des] defendants convicted under the MDLEA from eligibility," Pet. C.A. Br. 9, and assured the court that his safety-valve claim was "different" than the claim at issue in *Pertuz-Pertuz*, which, petitioner stated, addressed safety-valve eligibility "*solely* as a matter of statutory construction," *id.* at 12 n.1. And even though the D.C. Circuit issued its decision in *Mosquera-Murillo*, *supra*, 11 days before the deadline for filing a rehearing petition below, petitioner did not seek rehearing. See 11th Cir. R. 35-2, 40-3 (Aug. 1, 2016). Instead, petitioner elected to ask this Court to be the first to consider his arguments, filing his petition for a writ of certiorari less than a month after the issuance of *Mosquera-Murillo*.

At a minimum, a substantial threshold question exists whether and to what extent petitioner may challenge the court of appeals' statutory interpretation of Section 3553(f). This case therefore does not clearly present the question and would not provide a suitable vehicle to address it. See *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (explaining that arguments not raised below are waived); *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (explaining that the Court's usual practice is to decline review of issues not

pressed or passed upon below); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is "a court of review, not of first view.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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