No. 18-374

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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As the government concedes, there is a 3-1 circuit split over whether a criminal defendant convicted of violating the Maritime Drug Law Enforcement Act (MDLEA), 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). The Fifth, Ninth, and Eleventh Circuits have answered that question in the negative, while the D.C. Circuit has answered it in the affirmative.

That question is properly presented in this case. The District Court stated that it was denying Petitioner safety valve relief in light of the Eleventh Circuit's binding decision in *United States v. Pertuz-Pertuz*, 679 F.3d 1327 (11th Cir. 2012), which established that Petitioner was ineligible for such relief. But it stated that it may have granted Petitioner safety valve relief were it not for *Pertuz-Pertuz*. The Eleventh Circuit reaffirmed *Pertuz-Pertuz* and rejected Petitioner's argument that *Pertuz-Pertuz* was so irrational as to violate due process. Thus, whether *Pertuz-Pertuz* is correct is squarely before this Court.

The government's primary argument against certiorari is that Petitioner waived or forfeited his argument because he acknowledged this binding circuit precedent below. This argument is meritless. Petitioner's counsel had an ethical obligation to acknowledge binding circuit precedent. The fact that he did so—in the course of arguing that this precedent was so irrational as to violate due process—was not an implicit acknowledgment that it was correctly decided. Further, to avoid any doubt, Petitioner's counsel

engaged in a colloquy with the District Court explicitly preserving the right to file a certiorari petition to overturn *Pertuz-Pertuz*—the very petition he is now filing. Petitioner has preserved his argument, so the petition should be granted.

ARGUMENT

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT.

There is a 3-1 circuit split over whether a defendant convicted of violating the MDLEA, 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). In the decision below, the Eleventh Circuit followed its prior decision in *United States v. Pertuz-Pertuz*, 679 F.3d 1327 (11th Cir. 2012), which held that MDLEA defendants are ineligible for safety valve relief. The Eleventh Circuit's decision is consistent with decisions from the Fifth and Ninth Circuits, but conflicts with *United States v. Mosquera-Murillo*, 902 F.3d 285 (D.C. Cir. 2018). Pet. 10-15.[1]

The government does not dispute the split, instead characterizing it as "shallow." BIO 8, 14. But as the petition explained, this Court routinely grants certiorari in federal criminal cases with 1-1, 2-1, and 3-1 splits. Pet. 15 n.5. It should do so here as well.

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[1] The government states that the Court has denied two other petitions raising this question. BIO 8. However, those cases were decided before the D.C. Circuit created the circuit split in *Mosquera-Murillo*.

The government also refers to the split as "recent," BIO 8, but it will not go away without this Court's intervention. The government did not seek rehearing en banc or file a certiorari petition in *Mosquera-Murillo*. Instead, on remand, the government argued that the defendant's resentencing should be stayed pending resolution of this petition for certiorari. Joint Status Report at 13-14, *United States v. Mosquera-Murillo*, No. 13-cr-00134-BAH (D.D.C. Nov. 19, 2018), Dkt. #271. The government did not suggest that this Court's review would be premature, or suggest any other mechanism by which the split would be resolved.

Finally, the government argues that this case might not implicate the split because "petitioner did not receive a statutory-minimum sentence," but instead, a sentence of a year more than his co-defendants. BIO 15. The government appears to be saying that Petitioner was not affected by his ineligibility for the safety valve because he did not receive the mandatory minimum anyway. However, during sentencing, the District Court went out of its way to state that Petitioner, too, may have benefited from the safety valve had he been entitled to it: "Had all these defendants qualified for the safety valve, then I very well may have given the [codefendants] less than 120 months in prison. *And if I did that, I may have given [Petitioner] less [than] 120 months in prison*, but it would have been more than the [codefendants] got." Pet. App. 26a (emphasis added). The government ignores this portion of the sentencing transcript even though Petitioner relied on it in the petition. Pet. 7, 14.

II. PETITIONER HAS NOT FORFEITED OR WAIVED HIS ARGUMENT.

The government contends that Petitioner forfeited or waived his argument because, in the proceedings below, he acknowledged that *Pertuz-Pertuz* was binding Eleventh Circuit precedent in the course of arguing that it was so irrational as to violate due process. The government's contention is meritless.

First, this Court has explained that it may review any issue "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (quotation marks omitted); *accord Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41; *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (collecting cases).

Here, both the District Court and Eleventh Circuit "passed upon" the question presented. The District Court acknowledged that binding Eleventh Circuit precedent prevented it from applying the safety valve. D. Ct. Dkt. # 62, at 2 (stating that because Petitioner and his co-defendants were charged under the MDLEA, they were "disqualified from any safety valve benefit"); Pet. App. 26a (noting that "the law on this particular statute as interpreted by the Eleventh Circuit is a very difficult law," and stating that Petitioner might have benefited from the safety valve had he been eligible for it).

The Eleventh Circuit, likewise, expressly

reaffirmed its precedent foreclosing safety valve relief. Although the government now invokes the standard for plain-error review (BIO 16-17), the Eleventh Circuit did not identify any preservation issue or mention plain error. Rather, like the District Court, it explained that Petitioner was ineligible for safety valve relief under circuit precedent. Pet. App. 5a ("This safety valve does not apply to offenses under the [MDLEA]. … 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 [MDLEA]" (citations omitted)). Only after making clear that *Pertuz-Pertuz* was binding circuit precedent did the Eleventh Circuit hold that *Pertuz-Pertuz*'s interpretation of the MDLEA was not so irrational as to violate due process. Pet. App. 6a-8a.

Thus, for that reason alone, the question is properly before the Court. While the government is correct that this Court is "a court of review, not of first view," BIO 19 (quotation marks omitted), that principle does not assist the government here, because this Court would not be taking the "first view." To the contrary, the Eleventh Circuit expressly resolved the question presented in *Pertuz-Pertuz* and reaffirmed that precedent in the decision below. Notably, in a recent case arising from the Eleventh Circuit, this Court granted certiorari to review the Eleventh Circuit's application of its binding circuit precedent, even though the petitioner had not argued in the lower-court proceedings that the precedent should be overruled. *See Lozman v. City of Riviera Beach*, 138 S. Ct. 1945

(2018); Brief in Opposition at 7, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), 2017 WL 4565074 (arguing, unsuccessfully, that certiorari should be denied on this basis). The same course is warranted here.

Further, Petitioner has argued throughout these proceedings that he should be entitled to safety-valve relief. Recognizing that *Pertuz-Pertuz* was binding precedent, however, he made the only argument available to him: that the MDLEA, as construed in *Pertuz-Pertuz*, was irrational.

The government now contends that by making this argument, Petitioner waived the statutory interpretation argument he advances in this Court. It asserts that "[i]n 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." BIO 15. But Petitioner did not affirmatively "contend[] that Section 3553(f) does *not* apply to MDLEA offenses," *id.*; rather, he recognized that binding circuit precedent established this point. Pet. App. 28a-29a (colloquy with district judge acknowledging binding Eleventh Circuit precedent on safety valve); C.A. Br. 11-12 ("In *United States v. Pertuz-Pertuz*, 679 F.3d 1327 (11th Cir. 2012), this Court concluded, as a matter of statutory construction, that defendants sentenced under Title 46 of the United States Code are not entitled to relief" (footnote omitted)). Indeed, it makes no sense to say that Petitioner was somehow advocating for the statutory construction in *Pertuz-Pertuz*, in the course of arguing that *that very statutory*

construction was unconstitutionally irrational.

Petitioner was ethically obligated to acknowledge *Pertuz-Pertuz*. *See* Rules Regulating The Florida Bar, Rule 4-3.3(a)(3) (imposing duty of candor to disclose controlling, directly adverse precedent to tribunal). Indeed, under Eleventh Circuit precedent, Petitioner's counsel risked getting sanctioned if he did not acknowledge *Pertuz-Pertuz*. *See, e.g.*, *DeSisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989) (affirming sanctions against counsel that failed to acknowledge adverse precedent and stating that "[w]e believe that Counsel had a duty to acknowledge at some point … that the binding precedent of this Circuit disfavored Plaintiffs' position"). Petitioner's counsel's adherence to his ethical obligations did not constitute a forfeiture or waiver of Petitioner's argument.

Moreover, Petitioner engaged in a colloquy with the District Court reserving the right to file this very petition for certiorari to overrule *Pertuz-Pertuz*:

> 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.
>
> 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 government now asserts that the purpose of this exchange was to preserve the due-process challenge to Petitioner's conviction that had previously been raised in Petitioner's motion to dismiss. BIO 17-18. The government is simply wrong. Petitioner's counsel said: "No, it's not the motion to dismiss, your Honor. It's the application of the safety valve, which is a sentencing factor[.]" Pet. App. 28a. And the District Court made clear that it understood that Petitioner was preserving a challenge to his sentence, as opposed to his conviction. Pet. App. 29a.

Thus, this colloquy refers directly to a petition for certiorari that would overturn the Eleventh Circuit's

decision in *Pertuz-Pertuz*. The "ruling on vessels" relating to the "application of the safety valve," Pet. App. 28a-29a, discussed in this colloquy is *Pertuz-Pertuz*. After the District Court suggested that the Supreme Court might "change" the ruling in *Pertuz-Pertuz*, Petitioner's counsel agreed, and stated, "So that's why I wanted to make that [objection]." Pet. App. 29a. The District Court then said the record was clear. *Id.* Petitioner is now doing exactly what was discussed in that colloquy—asking the Supreme Court to change the ruling in *Pertuz-Pertuz*. Thus, Petitioner did not waive the right to do so.[2]

III. THE ELEVENTH CIRCUIT'S DECISION IS INCORRECT.

On the merits, Petitioner should have been eligible for safety-valve relief.

The textual analysis is straightforward. It is undisputed that the elements of Petitioner's offenses that resulted in the 10-year mandatory minimum are defined by § 960(b). Therefore, as the D.C. Circuit concluded, Petitioner's offense was "under" § 960 for purposes of obtaining relief from that mandatory minimum under the safety valve. *Mosquera-Murillo*,

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[2] The government observes that *Mosquera-Murillo* was decided before the time to file a petition for rehearing en banc expired, and criticizes Petitioner for failing to scramble to file such a petition. BIO 18. However, no rule states that such a petition must be filed in order to preserve an argument for Supreme Court review. Further, had Petitioner filed such a petition, the government doubtless would have argued that it should be denied, because it would have sought to turn a 3-1 split into a 2-2 split.

902 F.3d at 293.

The government asserts that the MDLEA is not an "offense under" § 960 because no statutory cross-reference to the MDLEA appears in § 960(a). BIO 11-12. However, the government does not explain why the phrase "offense under" § 960 should be construed to mean "offense for which a statutory cross-reference appears in § 960(a)." The more natural interpretation of an "offense under" § 960 is an offense for which the mandatory minimum, subject to the safety valve, is defined by § 960.

Further, there is no indication in the statutory scheme that Congress intended for the MDLEA and the offenses enumerated in § 960(a) to be subject to different sentencing regimes. The MDLEA states that persons who violate that statute "shall be punished as provided in [21 U.S.C. § 960]." *See* 46 U.S.C. § 70506(a). Likewise, § 960(a) states that persons who violate the enumerated offenses "shall be punished as provided in [21 U.S.C. § 960(b)]." Given the parallel language in the two provisions, it is exceedingly unlikely that Congress intended for the latter group to be eligible for safety-valve relief but for the former group to be ineligible.

Finally, Petitioner's interpretation avoids 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. While the government hypothesizes possible reasons that Congress could have desired such a regime (BIO 13), there is no indication in the legislative history that Congress actually did so.

Moreover, the close similarity between the wording of § 70506(a) and § 960(a), noted in the previous paragraph, betrays no intent to treat the two categories differently.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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