

No. 18-374

IN THE
Supreme Court of the United States

WILSON 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

PETITIONER'S SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

This supplemental brief¹ addresses the government’s letter of December 28, 2018, informing the Court of the First Step Act, S. 756, enacted on December 21, 2018. Section 402 of the First Step Act reads:

SEC. 402. BROADENING OF EXISTING SAFETY VALVE.

(a) AMENDMENTS.—Section 3553 of title 18, United States Code, is amended—

(1) in subsection (f)—

(A) in the matter preceding paragraph (1)—

(i) by striking “or section 1010” and inserting “, section 1010”; and

(ii) by inserting “, or section 70503 or 70506 of title 46” after “963”;

(B) by striking paragraph (1) and inserting the following:

¹ This supplemental brief was originally submitted as a letter brief on December 28, 2018, so as to respond expeditiously to the government’s letter dated December 28, 2018. It is now being submitted as a supplemental brief in compliance with Supreme Court Rule 33.1.

“(1) the defendant does not have—

“(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

“(B) a prior 3-point offense, as determined under the sentencing guidelines; and

“(C) a prior 2-point violent offense, as determined under the sentencing guidelines;”; and

(C) by adding at the end the following:

“Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.”; and

(2) by adding at the end the following:

“(g) DEFINITION OF VIOLENT OFFENSE.—As used in this section, the term ‘violent offense’ means a crime of violence, as defined in section 16, that is punishable by imprisonment.”.

(b) APPLICABILITY.—The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.

As the government states, Section 402(a)(1)(A) of the First Step Act expressly provides that MDLEA defendants (*i.e.*, defendants convicted under “section 70503 or section 70506 of title 46”) will be eligible for safety valve relief. The First Step Act, however, should not be a basis for denying certiorari in this case.

Section 402 of the First Step Act does not affect Petitioner’s case, or any other currently pending case, because it applies “only to a conviction entered on or after the date of enactment of this Act.” First Step Act § 402(b). Nor does it eliminate the circuit split: even as to currently pending cases, the circuit split remains live. The decision below (which arises from the Eleventh Circuit) is consistent with *United States v. Anchundia-Rodriguez*, 897 F.3d 629 (5th Cir. 2018), for which a certiorari petition is currently pending. *Anchundia-Rodriguez v. United States*, No. 18-6482 (filed Oct. 25, 2018). However, the decision below conflicts with *United States v. Mosquera-Murillo*, 902 F.3d 285 (D.C. Cir. 2018). That case remains pending and would be affected by the outcome of this case; the district court in that case postponed resentencing until March 2019 so as to await a decision on this petition for certiorari. Memorandum and Order at 16, *United States v. Mosquera-Murillo*, No. 13-cr-00134-BAH (D.D.C. Nov. 30, 2018), Dkt. #272.

Moreover, a decision in Petitioner’s favor would affect a substantial volume of cases. First, it would affect all currently-pending cases. Petitioner has been unable to obtain an exhaustive list, but in addition to the Fifth Circuit and D.C. Circuit cases cited above,

Petitioner is aware of at least nine such cases that were either recently decided by the Eleventh Circuit or have been briefed in the Eleventh Circuit and are awaiting decision.² Moreover, the number of currently-pending cases raising this issue is likely much greater, as this list does not include cases pending in any federal district court; cases pending in other circuits; and cases pending in the Eleventh Circuit that have not been briefed.

Second, a decision in Petitioner’s favor would allow MDLEA offenders whose convictions are final to obtain resentencing under 28 U.S.C. § 2255. Such a decision would operate retroactively because it would be substantive, not procedural: it would “narrow the scope of a criminal statute by interpreting its terms.” *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (citation omitted). Further, a decision by this Court with retroactive application would restart a one-year statute of limitations for any MDLEA defendant to reopen his sentence. 28 U.S.C. § 2255(f)(3).

Although Petitioner has been unable to locate exact statistics from publicly-available sources, there is

² *United States v. Diaz*, -- F. App’x --, 2018 WL 6574961 (11th Cir. Dec. 13, 2018); *United States v. Jimenez*, -- F. App’x --, 2018 WL 6264229 (11th Cir. Nov. 29, 2018), *petition for cert. pending*, No. 18-7000 (filed Dec. 7, 2018); *United States v. Torres*, 742 F. App’x 493 (11th Cir. Nov. 15, 2018); *United States v. Palacios-Solis*, No. 17-14294; *United States v. Pena-Valois*, No. 17-13982; *United States v. Quijije-Napa*, No. 18-11471; *United States v. Quiroz Mastarreno*, No. 18-10136; *United States v. Valois*, No. 17-13535; *United States v. Vargas*, No. 18-13175.

reason to believe that there are hundreds, if not thousands, of such cases. “Over the past six years, more than 2,700 men . . . have been taken from boats suspected of smuggling Colombian cocaine to Central America,” and “nearly all” have been “delivered to the United States to face criminal charges” under the MDLEA. Seth Freed Wessler, *The Coast Guards’ ‘Floating Guantanamos,’* N.Y. Times Magazine (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html>. In 2016, the Coast Guard detained 585 suspected drug smugglers, 80 percent of whom were taken to the United States to face criminal charges. *Id.* In the 12 months that ended in September 2017, the Coast Guard captured more than 700 such suspects. *Id.*

Resolving the circuit split in this case would also be consistent with prior practice. In the past, this Court has resolved circuit splits that apply only to final and pending cases. For instance, in *Nichols v. United States*, 136 S. Ct. 1113 (2016), this Court resolved a circuit split over the interpretation of the Sex Offender Registration and Notification Act, even though, while the case was pending, Congress enacted prospective legislation criminalizing the defendant’s conduct. *See Nichols v. United States*, No. 15-5238, Supplemental Brief for the United States (filed Feb. 10, 2016). In that case the amendment occurred after certiorari was granted; the Court could have dismissed the petition as improvidently granted, but instead decided the case on the merits. In *Dorsey v. United States*, 567 U.S. 260 (2012), this Court resolved a circuit conflict over whether the Fair Sentencing Act applied to offenders

whose crimes preceded the Act's enactment. The existence of a live circuit split was sufficient to persuade the Court to grant certiorari, notwithstanding the fact that the question presented did not apply prospectively. *See also Johnson v. United States*, 529 U.S. 694 (2000) (granting certiorari to decide whether new supervised release statute applied to pending cases and resolving split by construing prior version of law). Here, where there is a live 2-1 circuit split of pending cases, plus numerous defendants who would be affected by a decision in Petitioner's favor, certiorari is similarly warranted.

There are two additional reasons that certiorari is warranted notwithstanding the First Step Act's enactment. *First*, the First Step Act's amendment applies only to "a conviction entered on or after the date of enactment of this Act." If the Court denies certiorari in this case, the First Step Act would have the anomalous effect of causing eligibility for safety-valve relief to turn on the happenstance of whether a conviction was docketed before or after December 21, 2018. Thus, if certiorari is denied, defendants indicted in federal judicial districts with clogged dockets would be better off than defendants indicted in federal judicial districts for which cases could proceed to trial more speedily. Even more oddly, criminal defendants who plead guilty will be rendered worse off from a sentencing perspective than criminal defendants who go to trial. Consider two criminal defendants caught on the same ship on the same day. One pleads guilty, and his conviction is docketed before December 21, 2018; thus, he is not eligible for the safety valve. Another

insists on going to trial, and as a result of clogged judicial dockets, his trial is scheduled after December 21, 2018; he would be eligible for the safety valve, even if he is convicted. This result contravenes the basic sentencing principle that defendants who take responsibility for their crimes should be better off, not worse off, when they are sentenced.

Of course, Congress is entitled to enact statutes creating such bizarre results if it wishes to do so. But the problem is that if the Court denies certiorari, the bizarre results will apply *inconsistently*. In the D.C. Circuit, there will be no temporal anomaly—MDLEA defendants will be entitled to safety valve relief regardless of the date of their convictions. In the Eleventh, Fifth, and Ninth Circuits, however, this temporal anomaly will arise. A decision in Petitioner’s favor would eliminate the temporal anomaly nationwide—and if the government wins this case, the temporal anomaly would persist, but it at least it would be consistent across all districts.

Second, the First Step Act reflects the recognition by Congress that, as a policy matter, MDLEA defendants *should* be eligible for the safety valve. Thus, Congress eliminated the regrettable sentencing disparities that arose under the pre-existing regime, in which eligibility for sentencing relief turned on whether the defendant was found on land or on a boat. Congress elected for its amendment to apply prospectively—but nothing in the First Step Act indicates that Congress intended to *prevent* Petitioner, and similarly situated individuals, from obtaining relief

from this Court that they would otherwise have obtained if the First Step Act had not been enacted. Indeed, it would be truly ironic if the First Step Act—which stems from Congress’s recognition of the unfairness of the pre-existing regime—would be a basis for *denying* certiorari, and hence condemning Petitioner and other similarly situated defendants to lengthy mandatory minimum sentences that this Court would otherwise have reviewed and potentially reversed.

Although Petitioner believes that the First Step Act’s enactment is laudable, it should not have been necessary. The D.C. Circuit correctly held that MDLEA defendants were entitled to safety valve relief under pre-existing law, and the Court should resolve the circuit split and vindicate that position in this case.

Respectfully submitted,

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