No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROGER A. ANCHUNDIA-ESPINOZA,
Petitioner,

-v-

UNITED STATES OF AMERICA, *Respondent.*

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

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).

STATEMENT REGARDING PARTIES TO THE CASE

The names of all parties to the case are contained in the caption of the case.

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Mr. Anchundia-Espinoza was sentenced on May 23, 2017 to 175 months to which he filed an appeal. The Court of Appeals affirmed Mr. Anchundia-Espinoza's sentence via unpublished opinion on July 27, 2018. Pet. App. 12a. The judgment was issued on August 20, 2018. Pet. App. 25a.

STATEMENT OF JURISDICTION

This petition is being filed within 90 days after entry of that judgment, pursuant to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 3553(f) provides district court judges the ability to sentence below the mandatory minimum if the defendant meets certain criteria. It states as follows:

> "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..."18 U.S.C.A. § 3553 (West) (emphasis added).

This provision allows low-level, first-time, non-violent drug offenders to receive a sentence below the otherwise statutorily authorized minimum. It also allows for a two-level decrease within the sentencing guidelines. U.S.S.G. §§ 5C1.2, 2D1.1(b)(17)

STATEMENT OF THE CASE

On December 30, 2015, a criminal complaint was filed in the Eastern District of Texas, Sherman Division, which charged Appellant Roger Alfredo Anchundia-Espinoza ("Espinoza") with various drug trafficking violations. Specifically, the complaint alleged violations of: 21 U.S.C. § 846; 21 U.S.C. § 963; 21 U.S.C. § 959 and 18 U.S.C. § 2; and 46 U.S.C. § 70503(a) and 70506(a) & (b). ROA.11. On January 13, 2016 the Grand Jury for the Eastern District of Texas, Sherman Division returned a one count Indictment against Espinoza and six codefendants. Count 1 charged all codefendants with Conspiracy to Distribute and Possess with Intent to Distribute Cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. § 70503(a) and 70506(a) & (b). Pet. App. 56a.

On January 27, 2017, Appellant appeared before United States Magistrate Judge Christine Nowak and entered a plea of guilty to Count 1 of the Indictment without the benefit of a plea agreement.

Appellant Espinoza appeared before United States District Judge Amos L. Mazzant, III for sentencing on May 23, 2017. Pet. App. 27a. After hearing arguments

from counsel, Judge Mazzant overruled Appellant's filed objections to the presentence report one of which was the denial of the "safety valve" provision contained within both the sentencing guidelines as well as 18 U.S.C. § 3553(f). Pet. App. 34a – 35a. Judge Mazzant denied the application of safety valve stating that the provision didn't apply, because the charged offense was not one of the enumerated offenses set forth in 18 U.S.C 3553(f). Pet. App. 34a-35a. Judge Mazzant further went on to add the following:

> Now, you can take this issue up to the Fifth Circuit and so you can see -- I've had this issue come up I think in every one of these cases and I don't know if anyone has filed an appeal on the issue or not, but you certainly have that right to see and get the Fifth Circuit to decide it. But unfortunately, this Court can't create new law, and specifically, the statute doesn't provide for it in this situation.

Pet. App. 35a.

Judge Mazzant calculated Mr. Espinoza's offense as being a 37 with a criminal history category of I leading to an advisory guideline range of 210 to 262 months. Pet. App. 42a. After hearing sentencing arguments from counsel for Mr. Espinoza as well as the Government, the trial court sentenced Mr. Espinoza to a term of imprisonment of 175 months. Pet. App. 53a.

The Court of Appeal affirmed Mr. Anchundia-Espinoza's sentence via unpublished opinion on July 27, 2018. Pet. App. 12a.

REASONS FOR GRANTING THE WRIT

A circuit split has developed on whether 18 U.S.C. 3553(f), also known as "safety valve" applies to 46 U.S.C § 70503(a). The Ninth Circuit was the first Circuit to address this issue. The Ninth Circuit ruled that the plain statutory language indicates that the safety valve provision in 18 U.S.C. § 3553(f) does not apply to violations of 46 App. U.S.C. § 1903.[1]

> First, 46 App. U.S.C. § 1903 is not listed in the safety valve statute or 21 U.S.C. § 960. Second, a plain reading of 46 App. U.S.C. § 1903(g)(1) demonstrates that the safety valve is inapplicable as a matter of law. Furthermore, we find that the evidence relating to the statutory history of 46 App. U.S.C. § 1903 confirms our plain language reading of the statute.

United States v. Gamboa-Cardenas, 508 F.3d 491, 496 (9th Cir. 2007).

However, in *Gamboa-Cardenas,* there was a dissent. Circuit Judge Fisher would rule that safety valve applies to 46 U.S.C. § 1903 and stated the following:

> I respectfully disagree, however, with the majority's conclusion that the safety valve provision of 18 U.S.C. § 3553(f) unambiguously does not apply to offenses under 46 U.S.C. app. § 1903 (repealed 2006). The majority's reading of the relevant statutes is plausible, but it is not the only plausible reading and this demonstrates that the statutory language is ambiguous. Section 1903 required "punish[ment] in accordance with the penalties set forth in section ... 960." Since 1994, all penalties set forth in § 960 are subject to safety valve relief. One could understand the combination of these provisions to mean that § 1903 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 § 1903 penalties. No statutory language or legislative history compels a conclusion that when

[11] 46 U.S.C. § 70503 was formerly cited as 46 App. U.S.C. § 1903

> Congress created a safety valve under § 3553(f) that applied to offenses under § 960 it intended § 3553(f) to create a disparity between the effect of penalties for § 955 offenders and § 1903 offenders with similar characteristics.

United States v. Gamboa-Cardenas, 508 F.3d 491, 507 (9th Cir. 2007)

The Eleventh Circuit followed the Ninth Circuit's lead and held the following:

> 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. But Defendant says that he is nevertheless entitled to sentencing relief because 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. We reject Defendant's contention. The 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. Although 46 U.S.C. § 70506(a) references section 960 as the penalty provision for violations of 46 U.S.C. § 70503, section 960 does not incorporate section 70503 by reference as an "offense under" section 960. Therefore, 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.

United States v. Pertuz-Pertuz, 679 F.3d 1327, 1328–29 (11th Cir. 2012).

In a case of first impression with the Fifth Circuit, Mr. Anchundia-Espinoza invited the Fifth Circuit to follow the reasoning of the dissent in *Gamboa-Cardenas* rather than follow the Ninth and Eleventh Circuit's precedent. The Fifth Circuit declined the invitation. The Fifth Circuit held as follows:

> We decline to accept Anchundia-Espinoza's invitation to steer away from this court's strict interpretation of the statute—and the lead of circuits that have addressed this issue. Instead, we follow this court's precedent in strictly construing the safety valve provision. To hold otherwise would run afoul of this court's decision that § 3553(f) is unambiguous. Not 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). As the Eleventh Circuit explained, § 3553(f) applies to "offenses under", *not* "offense[s] penalized under" and not "sentence[s] under."

United States v. Anchundia-Espinoza, 897 F.3d 629, 634 (5th Cir. 2018). Pet. App. 12a.

The D.C. Circuit Creates a Circuit Split

The D.C. Circuit created a circuit split when is ruled that offenses under 46 U.S.C. § 70503 are eligible for safety valve. The D.C. Circuit ruled the following:

> The defendants' crime of conviction, though, involved more than a violation of (or, equivalently, an offense under) the MDLEA. It also involved a violation of (or, equivalently, an offense under) 21 U.S.C. § 960. Offenses are defined by the provisions that supply their elements. *See Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). And here, the defendants' offense draws certain elements from the relevant MDLEA provisions, 46 U.S.C. §§ 70503(a)(1), 70506(b), and draws other elements from 21 U.S.C. § 960.
>
> In particular, the MDLEA supplies the elements that make the defendants' conduct unlawful: (i) conspiring, (ii) to intentionally or knowingly, (iii) distribute or possess with intent to distribute, (iv) a controlled substance, (v) while on board a vessel. 46 U.S.C. §§ 70503(a)(1), 70506(b). Meanwhile, § 960 supplies the offense elements of drug-type and drug-quantity—5 or more kilograms of cocaine, and 100 or more kilograms of marijuana—which bear on the degree of culpability and determine the statutory sentencing range. 21 U.S.C. § 960(b)(1)(B), (b)(2)(G). In that light, the defendants' crime is "an offense under" *both* the MDLEA *and* § 960, drawing offense elements from each. The understanding that § 960 supplies offense

> elements coheres with the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Under *Apprendi*, "any fact that increases the prescribed statutory maximum" penalty to which a defendant is exposed amounts to an offense element that "must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348; *see Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 2157, 186 L.Ed.2d 314 (2013) (plurality). The drug-type and drug-quantity elements set out in § 960(b) qualify as elements for purposes of *Apprendi* because they establish the maximum sentence. *See* 21 U.S.C. § 960(b)(1)(B)(ii) ("In the case of a violation ... involving ... 5 kilograms or more of ... cocaine ... the [defendant] shall be sentenced to a term of imprisonment of ... not more than life."); *see also United States v. Fields*, 251 F.3d 1041, 1043 (D.C. Cir. 2001). And because the drug-type and drug-quantity criteria in § 960 constitute some of the elements of the defendants' offense (with the other elements supplied by the MDLEA), their cases involve "an offense under" § 960 for purposes of safety-valve eligibility. 18 U.S.C. § 3553(f).

United States v. Mosquera-Murillo, 902 F.3d 285, 293 (D.C. Cir. 2018).

ARGUMENT AND AUTHORITIES

The Decision Below was wrongly decided because they did not have the benefit of the D.C. Circuit's reasoning in *United States v. Mosquera-Murillo.*

1. The Application of "Safety Valve" to 46 U.S.C. §70503 offenses is consistent with the intent of Congress.

The D.C. Circuit adequately reasoned that Congress' intent has been to always treat domestic and international drug offenses the same. The court opined that:

> Treating the defendants as having violated § 960, and thus as eligible for safety-valve relief, 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. When Congress criminalized opium possession on the high seas in 1914, it set the maximum penalty at two years, which at the time was

the maximum penalty for importing opium into the United States. Act of Jan. 17, 1914, Pub. L. No. 63-46, §§ 2, 4, 38 Stat. 275, 276. In 1922, Congress simultaneously raised the maximum penalties for both offenses from two to ten years. Narcotic Drugs Import and Export Act, Pub. L. No. 67-227, § 2(c), 42 Stat. 596, 596 (1922). Then, in 1951, Congress simultaneously decreased the maximum penalties for both offenses from ten to five years. Boggs Act, Pub. L. No. 82-255, § 2(c), 65 Stat. 767, 767 (1951).

In 1970, Congress overhauled the drug code, repealing the statutes that define the offenses discussed above, and establishing a new prohibition—codified at 21 U.S.C. § 955—against importing drugs via the customs waters of the United States. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1007, 84 Stat. 1236, 1288. Congress provided that the penalties applicable to that offense were those set forth in 21 U.S.C. § 960. *Id.* § 1010, 84 Stat. at 1290. Shortly thereafter, Congress enacted what is now known as the MDLEA, including its prohibition against possession with intent to distribute on the high seas. Pub. L. No. 96-350, § 1, 94 Stat. 1159, 1159 (1980). And Congress provided that § 960 also supplied the penalties for that offense. *Id.* § 1(g)(1), 94 Stat. at 1159.

In light of the century-long pattern of identical penalties for drug offenses committed in domestic waters and on the high seas, it is notable that, as both parties agree, offenders who violate § 955 are eligible for safety-valve relief. 21 U.S.C. § 960(a) (listing violations of § 955 as offenses punishable under § 960(b)). So 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. We do not understand Congress to have done so.

United States v. Mosquera-Murillo, 902 F.3d 285, 295 (D.C. Cir. 2018)

2. The failure to apply "Safety Valve" to 46 U.S.C. § 70503 will lead to disparate sentences for similar offenses.

It is Mr. Anchundia-Espinoza's contention that a "plain-text" reading of 18 U.S.C. § 3553(f) would lead to the absurd result of two identical defendants being sentenced differently simply because one was in a boat and one was in a car.

Allowing this logic to hold would also allow prosecutors to essentially pick and choose which low level drug offenders would be given safety valve. Mr. Espinoza could have easily been charged and convicted of a 21 U.S.C. § 960 offense, such as the one initially listed in Count 1 of the Criminal Complaint. Had the indictment been returned for this count, rather than that vessel count, Espinoza would have been able to avail himself of safety-valve relief. However, the Government chose to prosecute him on an offense with essentially the same elements, save for the specific provision that the criminal activity took place on a boat. Moving forward, should a prosecutor wish for a low-level offender to be punished without the benefit of safety valve, all they need do is charge them with a highly specific offense that is punishing the exact same conduct, yet not specifically enumerated within the safety valve statute. This is surely not the intention of Congress in creating the safety valve provision.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari and definitively resolve the question of whether "safety valve" applies to 46 U.S.C. § 70503 offenses. Anchundia-Espinoza respectfully asks the Court to grant a writ of certiorari.

Respectfully submitted this 25th day of October 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAILING

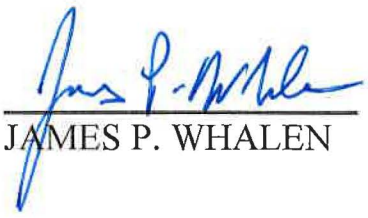
I hereby certify that, on the 25th day of October 2018, eleven (11) copies of the foregoing Petition and its Appendix, **as well as the Motion to Proceed In Forma Pauperis,** were sent to the Court by overnight mail.

I also certify that on the same day, one copy of both the Petition and its Appendix were sent to Roger A. Anchundia-Espinoza, at:

FCI Oakdale II
2105 East Whatley Road
Oakdale, LA 71463

Lastly, I hereby certify that, on the same day, a true and correct copy of this petition and appendix was sent by overnight mail, as well as email, to:

Solicitor General of the United States
950 Pennsylvania Ave., N.W.; Room 5616
Washington, DC 20530-0001



JAMES P. WHALEN

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 27, 2018
Lyle W. Cayce
Clerk

No. 17-40584

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROGER ALFREDO ANCHUNDIA-ESPINOZA,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas

Before CLEMENT, HIGGINSON, and HO, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Roger Alfredo Anchundia-Espinoza pleaded guilty to conspiracy to possess, with the intent to distribute, cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a)(1), 70506(a) & (b) and 21 U.S.C. § 960. The district court denied Anchundia-Espinoza's requests for safety-valve and minor participant reductions. Anchundia-Espinoza appeals those denials. For the reasons set forth below, we AFFIRM.

I.

Roger Alfredo Anchundia-Espinoza, a citizen of Ecuador, and three others were contracted by an unknown individual to transport cocaine. They

were each paid $1,000 up front for the service. They were also promised an additional $9,000 and a plane ticket once they reached their destination. On December 10, 2015, the group left the Esmeraldas area of Ecuador on a small boat. After traveling a number of miles in open waters and being provided additional fuel by two other boats, they met a larger boat, which contained the shipment of cocaine and two occupants. Anchundia-Espinoza and the three other men boarded the larger boat, and the two men on the larger boat took their smaller one (presumably back to Ecuador, although it is unclear). The four men traveled for five days, and each drove the boat at different times.

On December 15, 2015, the group met up with a boat named *Imemsa* and transferred the shipment of cocaine and their equipment to it. They intentionally sank the boat they had been traveling on and drove the *Imemsa* toward Mexico at a high rate of speed. There was a total of seven occupants on the *Imemsa*. Within two hours, a U.S. Marine Patrol Aircraft detected the *Imemsa*, and the U.S. Coast Guard sought to intercept it. The boat failed to comply with numerous demands to stop; after two warning shots, however, it finally stopped approximately 95 nautical miles southwest of the Mexico/Guatemala boarder. The driver of the boat made no claim of nationality for the vessel, so it was treated as without nationality, and U.S. officials boarded the boat. They found 35 bales of cocaine on board and another bail floating in the water attached to a line over the side of the boat. A later laboratory report prepared by the DEA revealed that the cocaine weighed 681.6 kilograms.

In January 2016, Anchundia-Espinoza and the six other men were indicted for conspiring to possess, with intent to distribute, five or more kilograms of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a)(1), 70506(a) & (b), and 21 U.S.C. § 960. Anchundia-Espinoza pleaded guilty without a plea agreement.

The punishment guidelines for § 70503 are provided at 21 U.S.C. § 960(b)(1)(B)(ii); the offense carries a statutory minimum sentence of 10 years' imprisonment and a maximum of life.

Using the 2016 Sentencing Guidelines, the Pre-sentence Report ("PSR") determined that Anchundia-Espinoza had a base offense level of 38 because he was responsible for 681.6 kilograms of cocaine—well above the 450 kilogram minimum in U.S.S.G. § 2D1.1, the provision providing the base offense levels for conspiracies. The offense level was increased by two levels under U.S.S.G. § 2D1.1(b)(3), which provides for an adjustment when the defendant acted as a captain or navigator aboard a vessel carrying a controlled substance. The defendant was then lowered to an offense level of 37 for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a) and (b). Finally, he had a criminal history category of I, and faced an advisory sentencing range of 210 to 262 months of imprisonment. And relevant to this appeal, the PSR provided that, "[s]ince the defendant was convicted of a 46 U.S.C. § 70503(a)(1) offense, the safety valve does not apply."

Anchundia-Espinoza filed two objections to the PSR. First, he objected to the denial of the safety valve reduction. Second, he objected to the denial of the "minor participant" reduction under U.S.S.G. § 3B1.2. The probation office disagreed with both objections.

The district court denied Anchundia-Espinoza's first objection because the safety valve provision applies only to the five offenses specified in 18 U.S.C. § 3553(f), and 46 U.S.C. § 70503 is not one of those offenses. The district court similarly denied Anchundia-Espinoza's request for the "minor participant" adjustment. The district court concluded that the average participants in this offense were Anchundia-Espinoza and his co-defendants, rather than the unknown number of unidentified and uncharged participants in the

conspiracy. It found that he was not substantially less culpable than those co-defendants.

The district court ultimately varied downward from the 210-month advisory minimum and sentenced Anchundia-Espinoza to 175 months in prison.[1]

II.

On appeal, Anchundia-Espinoza challenges the district court's denial of two sentencing reductions by erring in its application of two relevant statutes. The district court's legal interpretation of a statutory provision is reviewed de novo. *United States v. Flanagan*, 80 F.3d 143, 145 (5th Cir. 1996). Factual findings made during sentencing, however, are reviewed for clear error. *United States v. Kiekow*, 872 F.3d 236, 247 (5th Cir. 2017). "Whether a defendant 'was a minor or minimal participant is a factual determination that we review for clear error.'" *United States v. Torres-Hernandez*, 843 F.3d 203, 207 (5th Cir. 2016) (quoting *United States v. Gomez-Valle*, 828 F.3d 324, 327 (5th Cir. 2016)). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, this court may not reverse, even if, had we been sitting as trier of fact, we might have weighed the evidence differently." *Kiekow*, 872 F.3d at 247 (quoting *United States v. Harris*, 740 F.3d 956, 967 (5th Cir. 2014)).

III.

Anchundia-Espinoza first appeals the district court's denial of "safety valve" relief. The safety valve provision of U.S.S.G. § 5C1.2 allows a court to sentence a defendant below the statutory minimum sentence in certain instances. *United States v. Treft*, 447 F.3d 421, 426 (5th Cir. 2006). A defendant may qualify for a sentence below the statutory minimum if he meets the five

[1] The court expressed that it wanted to give him the same 168-month sentence that his co-defendants got, but it felt he should receive more time because he rejected the plea offer that his co-defendants accepted.

criteria set forth in 18 U.S.C. § 3553(f) (and also provided at § 5C1.2). *See United States v. Lopez*, 264 F.3d 527, 529–30 (5th Cir. 2001). In these circumstances, the defendant is also entitled to a two-level reduction in his offense level. *See id.* at 530; U.S.S.G. § 2D1.1(b)(17). The defendant bears the burden of establishing eligibility for the safety valve reduction. *Flanagan*, 80 F.3d at 146–47.

The safety valve provision set forth in 18 U.S.C. § 3553(f) provides:

> 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.

(Emphasis added). U.S.S.G. § 5C1.2(a) similarly explains that § 3553(f) applies to specific offenses, including 21 U.S.C. § 960. The crux of the issue here is whether § 70503 falls under the safety valve relief because 21 U.S.C. § 960—which provides the penalties for § 70503—is enumerated in § 3553(f). Importantly, § 70503 is not an "offense under" § 960; section 960 merely provides the penalties for § 70503.

This issue presents a case of first impression for this circuit. As a general matter, however, this court has strictly limited the safety valve's application to the statutes listed in § 3553(f). *See, e.g.*, *United States v. Phillips*, 382 F.3d 489, 499–500 (5th Cir. 2004). 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. *See United States v. Pertuz-Pertuz*, 679 F.3d 1327, 1328–29 (11th Cir. 2012); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496–97 (9th Cir. 2007). Anchundia-Espinoza argues that § 3553(f) is ambiguous, and he relies on the dissenting opinion in *Gamboa-Cardenas*, which reasoned that a plausible reading of § 3553(f) is that all of the crimes punishable under § 960 are subject to the safety valve. *See Gamboa-Cardenas*, 508 F.3d at 506–08 (Fisher, J., concurring in part and dissenting in part). The Eleventh Circuit rejected Anchundia-Espinoza's argument by explaining that the safety valve applies only to an "offense under" § 960 and not to a "sentence under" § 960. *Pertuz-Pertuz*, 679 F.3d at 1329.

The Supreme Court has instructed that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Our court, and other circuits, have confirmed "that there is no 'ambiguity concerning the

ambit of" § 3553(f)." *Phillips*, 382 F.3d at 500 (quoting *United States v. Kakatin*, 214 F.3d 1049, 1052 (9th Cir. 2000)). This court addressed a similar issue in *United States v. Phillips*. There, the defendant was convicted under 21 U.S.C. § 860. *Id.* at 492–93. Phillips urged that he was entitled to the safety valve reduction because his violation under § 860, although not enumerated in § 3553(f), was "merely a 'sentence enhancement,'" and § 21 U.S.C. § 841, which *is* specifically enumerated, is a lesser-included offense of § 860. *Id.* at 499. This court, similar to other circuits, rejected the argument. *Id.* at 499–500. It reasoned that it was "clear that § 841 and § 860 are separate substantive offenses, and that there is no ambiguity concerning the ambit of § 3553(f)." *Id.* at 500 (internal quotations omitted); *see also United States v. Anderson*, 200 F.3d 1344, 1348 (11th Cir. 2000) (reasoning that "[t]he selection of these five [enumerated] statutes reflects [a Congressional] intent to exclude others, including 21 U.S.C. § 860").

The Ninth Circuit, relying in part on this court's *Phillips* decision, addressed whether a conviction under § 70503[2] was entitled to the safety valve reduction. *Gamboa-Cardenas*, 508 F.3d at 496–99. It held that the statutes enumerated in § 3553(f) presented an exhaustive list. *Id.* at 498. Moreover, it explained that § 3553(f) was codified *after* the statute in question, so "Congress could have included [§ 70503] as easily as it included the other statutes specifically listed in § 3553(f). The timing of Congress's actions indicates that it consciously chose *not* to include [§ 70503] offenses on the safety valve list." *Id.* at 497–98. Finally, § 3553(f) applies to offenses *under* the enumerated statutes. *See id.* at 497. Section 70503 is an offense *penalized* by an enumerated statute, and therefore it is not subject to the safety valve provision. *See id.*

[2] The court actually considered whether § 70503's predecessor, 46 U.S.C. § 1903, was applicable.

Likewise, the Eleventh Circuit held that, because the defendant was not convicted under a statute appearing in § 3553(f), the defendant was not entitled to its relief. *Pertuz-Pertuz*, 679 F.3d at 1328. It reiterated that the safety valve statute was to apply *only* to those statutes specifically provided in § 3553(f). *Id.* "The safety valve statute . . . refers to an 'offense under' section 960—not to an 'offense penalized under' section 960 and not to a 'sentence under' section 960." *Id.* at 1329. Accordingly, it concluded § 3553(f) was unambiguous and applied only to the statutes enumerated.

We decline to accept Anchundia-Espinoza's invitation to steer away from this court's strict interpretation of the statute—and the lead of circuits that have addressed this issue. Instead, we follow this court's precedent in strictly construing the safety valve provision. To hold otherwise would run afoul of this court's decision that § 3553(f) is unambiguous. Not 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). As the Eleventh Circuit explained, § 3553(f) applies to "offenses under", *not* "offense[s] penalized under" and not "sentence[s] under." *See Pertuz-Pertuz*, 679 F.3d at 1329.

IV.

Anchundia-Espinoza also contends that he should have received a two-level reduction in his offense level for playing a minor role in the conspiracy. He argues, as he did in the district court, that the district court erred by comparing him only to the co-defendants who played the same role he did, rather than comparing him to all of the other participants in the conspiracy. He asserts that the district court committed, "at the very least, a legal error in the interpretation" of the Guidelines such that remand is required. Generally, the factual determination of whether a defendant played a minor role in the offense is reviewed for clear error. *See Torres-Hernandez*, 843 F.3d at 207.

The defendant bears "the burden of proving by a preponderance of the evidence that the adjustment [was] warranted." *United States v. Castro*, 843 F.3d 608, 612 (5th Cir. 2016) (quoting *United States v. Miranda*, 248 F.3d 434, 446 (5th Cir. 2001)). "A minor participant adjustment is not appropriate simply because a defendant does less than other participants; in order to qualify as a minor participant, a defendant must have been peripheral to the advancement of the illicit activity." *Miranda*, 248 F.3d at 446–47.

Determining minor participation is a "sophisticated factual determination[]" to be made by the sentencing judge. *United States v. Gallegos*, 868 F.2d 711, 713 (5th Cir. 1989). Here, the district court meticulously compared Anchundia-Espinoza's participation to that of his co-defendants—the only members of the conspiracy about whom the district court had concrete knowledge. Indeed, the only reference to unindicted co-conspirators was defense counsel's statement and the government's acknowledgement that there presumably were other participants in this conspiracy. The district court determined that Anchundia-Espinoza and his co-defendants all played similar roles by accepting money to complete a portion of this drug transaction and by captaining multiple boats to transport very substantial amounts of cocaine. None was the "mastermind" behind the operation, and all seemed to participate for the same amount of time and held the same type of responsibilities. Accordingly, there appears to be no clear error in the district court's fact-finding that Anchundia-Espinoza was not a minor participant. In fact, he appears to have been a part of the conspiracy for even longer than some of his co-defendants. As this court has explained, "[e]ven if [the defendant] played a relatively smaller role in the offense as compared to his other co-defendants, viewing the record[] as a whole[,] the district court did not commit clear error in finding that" Anchundia-Espinoza was "not deserving of a downward adjustment." *United States v. Angeles-Mendoza*, 407 F.3d 742, 754

(5th Cir. 2005). Even if the district court misspoke that the minor-participant inquiry permits comparisons only among co-defendants, Anchundia-Espinoza did not meet his burden to prove his minor role because his participation was so substantial—captaining multiple boats to transport such substantial quantities of drugs—and because he failed to present any evidence challenging the government's denominator of co-conspirators. As such, Anchundia-Espinoza certainly has not met his burden to prove by a preponderance of the evidence that he should have received the minor participant reduction.

Accordingly, the judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

July 27, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 17-40584 USA v. Roger Anchundia-Espinoza
USDC No. 4:16-CR-3-7

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

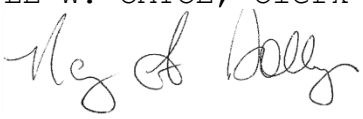
Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Ernest Gonzalez
Mr. James Patrick Whalen

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40584

D.C. Docket No. 4:16-CR-3-7

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROGER ALFREDO ANCHUNDIA-ESPINOZA,

Defendant - Appellant

Appeal from the United States District Court for the
Eastern District of Texas

Before CLEMENT, HIGGINSON, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

Certified as a true copy and issued as the mandate on Aug 20, 2018

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	:	DOCKET NO. 4:16CR3-7
	:	
VS.	:	SHERMAN, TEXAS
	:	MAY 23, 2017
ROGER ALFREDO ANCHUNDIA ESPINOZA	:	10:13 A.M.
	:	

SENTENCING HEARING
BEFORE THE HONORABLE AMOS L. MAZZANT, III,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:	MS. LESLEY BROOKS U.S. ATTORNEY'S OFFICE 600 E. TAYLOR, SUITE 2000 SHERMAN, TEXAS 75090
FOR THE DEFENDANT:	MR. STARLING MARSHALL MCCALLUM ATTORNEY AT LAW 2828 ROUTH, SUITE 850 LB-120 DALLAS, TEXAS 75201
INTERPRETER:	MS. MELIDA AILSHIRE SHERMAN, TEXAS
COURT REPORTER:	MS. JAN MASON OFFICIAL REPORTER U.S. DISTRICT COURTHOUSE 101 E. PECAN SHERMAN, TEXAS 75090

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

THE COURT: Very good. Our next case is 4:16CR3, the seventh Defendant, United States of America versus Roger Alfredo-Espinoza.

DEPUTY U.S. MARSHAL: He's on his way down, Judge.

THE COURT: Very good. Mr. McCallum, do you need time to talk to your client? Go ahead. I know he just got brought down and so take the time you need and I'll recall the case.

(Pause in proceedings.

THE COURT: Okay. Let me go ahead and recall 4:16CR3, United States of America versus Roger Alfredo Espinoza. And for the Government?

MS. BROOKS: Lesley Brooks for the Government.

MR. MCCALLUM: Marshall McCallum for Mr. Espinoza.

THE COURT: Very good. And then we have Ms. Ailshire again serving as our court interpreter.

Then, sir, you're here for your sentencing pursuant to your final Presentence Report that was filed on April 17, 2017. Have you had a chance to review the final Presentence Report, sir, and have it translated into your own language?

MR. ESPINOZA (Through Interpreter): It was not translated. However, my attorney read that to me.

THE COURT: Well, do you speak English?

MR. ESPINOZA (Through Interpreter): No.

THE COURT: So when your attorney read it to you, he

read it to you in English or he read it to you in Spanish?

MR. ESPINOZA (Through Interpreter): He translated for me verbally into Spanish.

THE COURT: Okay. So, Mr. McCallum, you speak Spanish?

MR. MCCALLUM: Yes, Your Honor, I do.

THE COURT: So you did translate it for him?

MR. MCCALLUM: I did.

THE COURT: Okay. And so, Mr. Espinoza, do you understand the Presentence Report?

MR. ESPINOZA (Through Interpreter): Yes.

THE COURT: And then do you believe the report adequately covers your background?

MR. ESPINOZA (Through Interpreter): Not 100 percent.

THE COURT: Okay. Why don't you think it covers your background appropriately?

MR. ESPINOZA (Through Interpreter): There are a couple of points that are not specifically pointed out how it took place.

THE COURT: Can you be a little more specific for the Court?

MR. ESPINOZA (Through Interpreter): I mean, how can I explain this to you? The version that it stated about me having a conversation with the federal agents, the entire conversation is not there, what took place with those agents.

THE COURT: Mr. McCallum, do you know what he's pointing to, what paragraph?

MR. MCCALLUM: I do, Your Honor. I believe -- can I have just a second?

THE COURT: Yes.

MR. MCCALLUM: I think we're ready to proceed, Your Honor.

THE COURT: Okay. So, Mr. McCallum, can you shed some light on this for the Court?

MR. MCCALLUM: Your Honor, I just -- I explained to him that the meeting, those are not reflected in the PSR, the final PSR, and so I explained that to him and I think he understands why that's not in there.

THE COURT: Okay. So, Mr. Espinoza, do you understand what your counsel has explained?

MR. ESPINOZA (Through Interpreter): Yes, Your Honor.

THE COURT: So any other issues you have about whether the report adequately covers your background?

MR. ESPINOZA (Through Interpreter): No, Your Honor.

THE COURT: Then what about, do you believe the report -- are you satisfied with the accuracy of the report? I know your counsel has filed some objections and we'll deal with those, but other than the objections, are you satisfied with the accuracy of the report?

MR. ESPINOZA (Through Interpreter): Yes, Your Honor.

THE COURT: Mr. McCallum, have you had a chance to review the final Presentence Report with your client and do you believe he understands it?

MR. MCCALLUM: I have had time to review the report with him as well as the addendum and I do believe that he understands it.

THE COURT: Then do you have any comments, additions or corrections to the report?

MR. MCCALLUM: I do not, Your Honor.

THE COURT: And on behalf of the Government, Ms. Brooks, any comments, additions or corrections to the report?

MS. BROOKS: No, thank you, Your Honor.

THE COURT: And the Government had no objections but, Mr. McCallum, you had some objections, correct?

MR. MCCALLUM: Yes, Your Honor.

THE COURT: Okay. Let's go ahead and deal with your objections, if you want to go ahead and address your objection number one.

MR. MCCALLUM: Your Honor, in objection number one I believe the Defendant, as set forth, meets all the criteria for the Safety Valve provision. There's obviously a lot of dispute under this Section 46 USC 70503, that Safety Valve is not applicable.

I looked at some case law and cited some case law in my objections. The Fifth Circuit has not, to my understanding,

has not ruled on this issue specifically. Some of the other Circuits have. The Ninth Circuit did rule that it did not apply.

However, talking about the dissent, his -- his statement and basically what he talks about is -- a 21 USC 960 offense is -- that is covered by Safety Valve. Safety Valve does apply to those offenses, and this case that's cited is a 1903 offense. The statute says that it is to be punished in accordance with a 21 USC 960 offense.

On the first page of the PSR this as well shows that the statute that Mr. Espinoza is charged with is to be punished under 21 USC 960.

The way the dissent rises is that in accordance with 960 could mean that Congress's intent was that the Safety Valve apply as well to these type offenses. I think that the majority came and just said, well, it's just the punishment range when it's talking about 960 should be -- punished in accordance with 960, that it's only talking about the punishment range. But the dissent goes on to say the legislative intent is very unclear.

Prior to this case the Government agreed -- they never really -- they kind of assumed that Safety Valve did apply to these type cases and it was I think this case that came out and said it does not apply. But nonetheless, this issue is not settled in the Fifth Circuit.

The dissent also talks about the 1903 statute, which is kind of like what Mr. Espinoza is charged with. It talks about bringing drugs on a vessel.

And then there's also a 955 statute which also talks about possession of drugs on a boat and Safety Valve applies to 955 but not 1903, and the dissent points out -- it says there's no way the legislative intent of Congress could have come out and wanted 955 offenders to get the Safety Valve provision but not the 1903 offenders get the Safety Valve. There could not be -- there's no way they intended for that disparity to result.

So because he's met all the criteria, we think that the dissent's reasoning in that opinion is sound and we would ask that the Safety Valve apply in this case.

THE COURT: Thank you, Mr. McCallum. Would the Government like to respond?

MS. BROOKS: The response is that it's not an enumerated offense where the Safety Valve applies. There is no court precedent here, as Mr. McCallum says, in the Fifth Circuit that would support its application.

The cited case from the Ninth Circuit actually held that it didn't, and so we would continue our position that Safety Valve does not apply in this matter.

THE COURT: Thank you. And, Mr. McCallum and Mr. Espinoza, I agree with the Government. The Safety Valve

statute specifically states that the Safety Valve provision applies only to the five specified offenses listed in 18 USC Section 3553(f), and unfortunately the offense you've been convicted of, 46 USC Section 7503, was not specifically listed in 18 USC Section 3553(f), so the Satisfy Valve does not apply in your case.

Then I know your counsel points to the case out of the Ninth Circuit, which is United States versus Cardenas, 508 F3d 491, Ninth Circuit, a 2007 decision. The Government again correctly points out, the majority in that case found that the Safety Valve did not apply, and Mr. McCallum is asserting that I should try to apply the dissent.

Now, you can take this issue up to the Fifth Circuit and so you can see -- I've had this issue come up I think in every one of these cases and I don't know if anyone has filed an appeal on the issue or not, but you certainly have that right to see and get the Fifth Circuit to decide it. But unfortunately, this Court can't create new law, and specifically, the statute doesn't provide for it in this situation. And you can ask the Fifth Circuit on appeal whether or not that is the case and try to have it extended, but it's not really in the power of the Court to do that at this stage. So I'll overrule objection number one.

Your second objection?

MR. MCCALLUM: Your Honor, the second objection falls

under the Sentencing Guideline 3B1.2 requesting that the Defendant be viewed as a minor participant before the Court in the scope of this conspiracy.

If you look at the factors set out under 3B1.2, comment 3(c), it gives a non-exhaustive list of factors. It talks about the degree to which the Defendant understood the scope, the degree that he participated in planning, the degree that he exercised decision making authority, the nature and extent of his participation in the commission of the criminal activity, the degree to which he stood to benefit. Those are some of the factors that we're to look at.

When you look at the facts and apply the facts to this comment note, Your Honor, Mr. Espinoza was approached on the beach, asked by someone if he would want to participate in this activity. He declined.

The following day he runs into the same person. He agrees to go forth and help them out. He was paid a thousand dollars. He was going to be paid $9,000 later.

But he had no decision making authority. He merely helped drive or transport the contraband to the final destination. He didn't have any decision making ability that I'm aware of. He didn't have any proprietary interest in the drugs that were transported.

I think the analysis that the Court has to look at is

who's an average participant and was he substantially less culpable. Your Honor, I would argue that most of these fishermen that were brought onboard, these were the minor participants, that the Mexicans, if you look at the facts, seem like they had more decision making authority, more control over the contraband.

The person on the beach, that person is a co-conspirator. We don't know who he is, but people like that as well as the suppliers, obviously those people had more proprietary interest, more decision making authority. They understood the scope of the conspiracy. Thus, we would argue that they're the average participant and that Mr. Espinoza was merely a minor participant under 3B1.2.

THE COURT: Thank you. And response from the Government?

MS. BROOKS: Yes, Your Honor. This Defendant was in a role of trust. As you are aware, these -- this was a large amount of drugs. This is somebody who was trusted to get those drugs to where they were supposed to go.

You will also note that there were at least three other Defendants that are similarly situated to this Defendant who did not receive the mitigating role in this case.

I would agree with Mr. McCallum that the conspirators or the people in charge of the drugs initially and hiring, yeah, they probably did have a higher role. But this

Defendant is no less culpable than the other three co-defendants that have already been sentenced that did not get the mitigating role and played an equal part. So we would ask that it not be applied to this Defendant.

THE COURT: Thank you. Mr. McCallum, of course, you correctly point out in your objection the non-exhaustive list of factors under the comment, Section 3B2.2.

The Court has to consider -- these are some of the things the Court should consider: The degree to which the Defendant understood the scope and structure of the criminal activity, the degree to which the Defendant understood the scope and structure of the criminal activity -- well, that's the same one. The degree to which the Defendant participated in planning or organizing the criminal activity, the degree to which the Defendant exercised decision making authority or influenced the -- or exercised decision making authority, the nature and extent of the Defendant's participation in the commission of the criminal activity and the degree to which the Defendant stood to benefit from the criminal activity.

And the final thing the Court looks at is whether you have established and met the burden of showing that you were substantially less culpable than the average participant in the criminal activity.

In this case the facts show that on December 10th,

2015, you and three other of the co-defendants were contacted by an unknown individual to transport cocaine. These individuals left the area you were at somewhere near the area of Ecuador on a small boat.

Each of you and the other co-defendants in this case were paid a thousand dollars and told you would be paid an additional 9,000 and a plane ticket upon your arrival at your destination.

After traveling a number of miles in the open waters and being provided additional fuel by two other boats, you and the other three Defendants met up with a larger boat which contained a shipment of cocaine and two additional occupants.

You and the other Defendants boarded the larger boat and the two people driving the boat boarded the smaller boat.

You and the other co-defendants continued to travel north for five days to the Pacific Ocean, and then ultimately you arrived at your designation, transferred the shipment of cocaine and I guess boarded another ship, and then you -- you and the other Defendants intentionally sunk the boat in which you arrived and then continued toward Mexico.

Then all seven of the individuals who were on the other vehicle or other boat for approximately two hours before

coming in contact with the Coast Guard.

So it requires in this analysis that you be substantially less culpable than the average participant. In this case you and the other co-defendants that started out on December 10th were all equally culpable and played the same role, which means none of you deserve a mitigating role adjustment.

Now, I understand and the Government does concede that you're less culpable than some of the other co-conspirators in the case that hired you to take the shipment, but that's not the way the Court looks at it. The Court looks at what is the average participant, and based on the evidence before the Court and what's contained in the Presentence Report, the average participants are the other three co-defendants that participated when you left Ecuador.

So they didn't receive it and also my belief is they currently did not receive a mitigating role adjustment, so I'll overrule the objection in this case.

And I find by a preponderance of the evidence that there's sufficient evidence to support that you not receive the mitigating role adjustment. I don't think you met your burden to be entitled to it.

Mr. McCallum, that's -- from my understanding, that's the only objections you had.

MR. MCCALLUM: That's it. I would just like to point

out, Your Honor, just for the record, those other Defendants took an 11(c)(1)(C) agreement so the Court never really addressed whether or not they could have been minor participants. I know that the Court has today, but I just want that clear for the record.

THE COURT: I don't think that's entirely true. I think that -- and I'll ask the Government. I do believe that at least one of the Defendants objected and asked for the minor role adjustment even though they had the 11(c)(1)(C) agreement, but I don't want -- I would have to go back and check.

MS. BROOKS: I cannot speak to that, Your Honor, but I do know that they were offered -- or they did plea under an 11(c)(1)(C), but my understanding from Mr. Gonzalez is that this Defendant was made the same offer of an 11(c)(1)(C) to the same amount of 168 months and he chose not to take it.

THE COURT: Well, that issue is not -- that's relevant more to sentencing but not to the issue of the minor role adjustment.

I do want to check because I don't want to misrepresent, so I do want to check and see.

(Pause in proceedings.

THE COURT: Okay. So I stand corrected. None of the co-defendants similar to him, none of them filed objections, but it's true none of them did receive the minor role adjustment.

But, again, I think that's proper. None of them should have received it, but I did not take up that issue. You're correct, Mr. McCallum. So your record will be clear, I did not take that issue up.

But, again, I'm required to correctly analyze and determine the guidelines whether it's raised or not, and I believe it was correct then and it's correct today.

But, otherwise, any other objections?

MR. MCCALLUM: No other objection, Your Honor.

THE COURT: Okay. Of course, the Defendant pleaded guilty without a plea agreement. To the extent I haven't fully accepted the plea agreement, I'll certainly do that now.

So the Court finds the information contained in the Presentence Report has sufficient indicia of reliability to support its probable accuracy. The Court adopts the factual findings, undisputed facts and the guideline applications in the Presentence Report.

Based upon a preponderance of the evidence presented and the facts in -- and considering the facts in the report, while viewing the Sentencing Guidelines as advisory, the Court concludes as follows: Your total offense level is a 37. Your criminal history category is a I, which provides for an advisory guideline range of 210 months to 262 months of imprisonment.

Let me first call upon Mr. McCallum, if you would like

to comment on what you believe the appropriate sentence should be in this case.

MR. MCCALLUM: Thank you, Your Honor. May it please the Court.

Your Honor, indeed we were offered the 14 month -- 168 month offer. As the three Defendants who have pled, we were offered that same 11(c)(1)(C) offer.

I consulted with my client, and if you look at -- you know, we filed these objections and we thought there was some basis to them, but we thought there was a good chance the Court would probably overrule.

But I think, Your Honor, really the crux of this hearing is looking at the factors under 18 USC 3553. The variance obviously, as the Court knows, when you look at the Defendant, his history and background, the letters detail it. He -- first off, he has no criminal history whatsoever. That would be brought before the Court if anyone was aware of it. There's no criminal history.

He was a fishermen since he was 12. I can't imagine how hard of a life that must have been in Ecuador. Then his brothers were killed on a boat that he was supposed to be on. He was supposed to be at sea that day with his brothers when they were attacked by pirates and killed.

I can't imagine the guilt that Mr. Espinoza must live with every day, that he should have been on that boat as

well. And looking at the letters, you see that his family suffered greatly. I'm sure to this day they still suffer, and that his father in particular went into great depression during this time, and I believe his sister writes that Mr. Espinoza became the father head of the family, that he tried to support the family through fishing. He became a security guard. He did whatever he could.

And the letter that I recall specifically from his sister said that he supported her through school and that now she's a professional down in Ecuador. I'm not sure what her job is but she described herself in the letter as a professional and she gives all that thanks to her brother for making those sacrifices.

Your Honor, I know that aberrant behavior doesn't apply to serious drug cases. As the Court is aware, it's a specific departure ground under the 5K section. It doesn't apply to serious drug offenses, but I think the Court can look at the Defendant and see that if it did apply to serious drug offenses, he's probably the poster child for getting that downward departure.

He was approached on the beach. He said no. And then, for whatever reason, it came over him to take part in this, and he regrets it. I can see it in his face. I've been up to see him now, Your Honor -- I've been on this case since January of last year. I've had many, many meetings with

him, and I can honestly look at the Court and say he's one of the most respectful clients that I've ever had.

He reads. He loves to read. That's one of his favorite hobbies. He reads the Bible. He never complains. I won't -- there were times I couldn't go see him and every few months I would get a letter, Mr. McCallum, God bless you, I hope God is with you, and would you please come and see me. But he never -- he never seemed frustrated. He always wanted to accept responsibility. He knew he was guilty and he knows he has to pay for this, Your Honor.

But if you take into consideration all the factors under 18 USC 3553, I think 168 months is severe in his case. I think this was aberrant behavior.

It certainly was a serious crime, but I think our position is 120 months is sufficient in this case to provide deterrence, provide just punishment, rehabilitation for the Defendant.

So considering his background, this is a one time incident, Your Honor, I would ask that 120 months be assessed in this case.

Thank you.

THE COURT: The Government's position, Ms. Brooks?

MS. BROOKS: The Government's position is that Mr. Espinoza certainly should not get less than the other similarly situated Defendants. They got 168 months but they did so in an

11(c)(1)(C). It's a negotiated tit-for-tat plea agreement in which they waive their right to appeal, and there is some benefit to do that.

This Defendant, whether he thought he would get the Safety Valve or not, made a choice not to do that. So I ask that certainly if you're going to consider a variance from the 210, which is the minimum of the range, that he not be given anything less than 168, which is what the others pled to.

And, quite frankly, I don't think he should get 168 because he has not given up his right to appeal and that is a part of the negotiated 11(c)(1)(C) process. So we would ask for more than 168 months.

THE COURT: Mr. McCallum, explain to me why I should give the Defendant anything less than I gave the other Defendants similarly situated who decided to enter into a plea agreement to an agreed upon sentence, which the Court accepted, when it looks like you decided to proceed with some objections and reserve your right to appeal? Which that's not a problem from the Court's perspective, but you were offered the same deal. And so, you know, when the Court -- because I've already on three other Defendants who were similarly situated as your client, I accepted the 11(c)(1)(C) agreement, which the range would have been similar to his range or should have been the same range. I didn't look at that, but it should have been the

same range. I wouldn't accept the 11(c)(1)(C) agreement if I didn't believe that was an appropriate sentence for the conduct.

And so I'm in this quandary. I agree with you that a variance is probably warranted, but I don't see how I can give him the same sentence -- I can't give him 120 months. I'm not going to do that. That's not appropriate, considering I've already in three other Defendants said this was appropriate. But I don't know that he should get the same thing, so give me your best argument on that, because you reserved the right so you can appeal everything up to the Fifth Circuit that's allowable.

MR. MCCALLUM: Your Honor, I've had multiple conversations with my client. I don't know the history and background of those other three Defendants that took this 11(c)(1)(C) agreement.

I thought, just based on his character and background, that this was a one time deal, I thought that perhaps something less than 168 months might be appropriate in this case.

I think when you look at the factors under 18 USC 3553, that he fits those factors. And when we take into consideration everything about his background, when you look at the letters --

THE COURT: And I have reviewed the letters.

MR. MCCALLUM: Right. I -- I think at least 168 months is appropriate. I think that's the appropriate sentence. It was just -- Your Honor, not to breach the attorney/client privilege, but we had a lot of discussions and --

THE COURT: I mean, Mr. McCallum, I'll tell you, I'm not happy with the situation I find myself in at all. I'm not. Because I want to give him 160. I want to give him the same thing as the other Defendants, but in good conscience I can't do that because he should not get a better deal than the others entered into. And he could have entered in that same deal, so I just can't do it.

And I'm one that believes in variances, so I'm not opposed to variances in any way when appropriate, but I also have to be fair to the entire case and what I've already accepted with the other Defendants.

And so I'm still in this quandary of where to go. So I can't give him 160. I can't give him the same sentence, so the question -- and I'm not going to. So argue me your plan B or plan C.

MR. MCCALLUM: Your Honor, he clearly accepted responsibility. He interviewed with the agents from the get-go. Not to get into the proffer, but it was 100 percent accurate.

He never made the Government prepare for trial. He

never had them do anything like that. So based on those factors, we would ask -- the Court said they're not going to give 168 months. We would ask somewhere in the neighborhood, Your Honor.

THE COURT: Ms. Brooks, do you have any thoughts from the Government's perspective of what would be a fair sentence considering -- considering the other three Defendants I've already sentenced?

MS. BROOKS: To put a number on it I think is difficult, for me to suggest a number for you.

THE COURT: It's difficult for me too. I do it every day and this is hardest part of my job.

MS. BROOKS: Right. I would tell you, I agree with Mr. McCallum as far as his cooperation. He did interview and admit his role, so that did occur.

I would suggest somewhere in the 172 maybe, 175 range. I mean --

THE COURT: Thank you.

And then, Mr. Espinoza, would you like to address the Court?

MR. ESPINOZA (Through Interpreter): Yes.

THE COURT: Please go ahead.

MR. ESPINOZA (Through Interpreter): First of all, good morning, Your Honor, prosecutor, attorneys and individuals here present.

I know and I accept that I made a mistake, but at the same time I'm very regretful. I know that I offended your country. I offended myself as an individual. And I'm just asking you for your forgiveness, that you give me a second opportunity so I can get back with my family.

I'm not asking you for one or two years. I'm asking you for something fair. Same thing, whatever is your decision.

I'm asking that God bless you all and that God will give you all his blessings among for you and all your families. Thank you.

THE COURT: Thank you, sir.

Any reason why the Court should not pronounce sentence at this time?

MS. BROOKS: No, Your Honor.

MR. MCCALLUM: No, Your Honor.

THE COURT: Then, of course, Mr. Espinoza, as I already indicated, although I think it's the most important thing that District Judges have to do in terms of determining what the appropriate sentence is, I also find it to be the most difficult.

And the first step in that process is for the Court to determine correctly what the guideline range is and that's the starting point. Of course, I believe that the guideline range is correct, the 210 to 262 months. Then that's the

first step of the process.

The next step the Court looks at is the Court has to look and see what is the -- we must impose a sentence that is sufficient but not greater than necessary to serve the purposes of what sentencing goes for in terms of the guidelines under 18 USC Section 3553(a) and considering those factors, and I have to consider your history and characteristics, the nature and circumstances of the offense, the need to protect the public from further crimes of the Defendant, the need to provide adequate deterrence and the need to avoid unwarranted sentencing disparities.

Of course, as I've already mentioned in your case, in reaching your sentence I have fully and thoroughly considered all the ramifications of the guidelines and I make an individual assessment regarding your case.

Now, when I consider your role in the offense, which in this situation at least it was a one time offense, your lack of criminal history, your acceptance of responsibility, your cooperation, that you're a non-violent offender, you're showing remorse for the situation, and also when I look at the issue of the cost for the Bureau of Prisons to house you, it's in the same range of approximately 31,000, because -- I believe you're here illegally, so you'll be deported at the end. So the issue of re-offense is probably more limited.

So, again, in determining what sentence is sufficient but not greater than necessary, in your situation I have to also evaluate how you compare to the other defendants, and the other three co-defendants that are similarly situated as you entered into an 11(c)(1)(C) agreement, which you were offered, and unfortunately, I wish you had accepted it because I would have given you that same sentence. I would have determined that was the appropriate sentence for those defendants. However, I can't give you the same sentence as that.

So for the reasons I've just stated, I'm going to grant a variance down but I'm not going to go to the level that you're asking and I'm going to go down -- I wasn't sure what I would do, I'll be candid, in terms of figuring what the appropriate sentence would be. I will go down to 175 months, which was the high end of what the Government suggested, but in figuring out what an appropriate sentence for someone in your situation, and I have to compare how you come to the Court as the other Defendants did, and I'm probably, in my mind, probably being over generous. I probably shouldn't go that far down, but I think considering all the factors, that would be the appropriate sentence for you.

So pursuant to the Sentencing Reform Act of 1984, having considered the factors noted in 18 USC Section

3553(a) and having consulted the advisory Sentencing Guidelines, it is the judgment of the Court that the Defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for 175 months on count one of the indictment, which again is a variance down from the range of 210 to 262.

The guideline range -- the sentence is within the advisory guideline range that is greater than 24 months and this specific sentence is imposed after consideration of the factors set forth in 18 USC Section 3553(a).

The Court finds you don't have the ability to pay a fine and I'll waive a fine in this case.

You are ordered to pay to the United States a special assessment of $100, which is due and payable immediately.

And you're ineligible for all federal benefits listed in 21 USC Section 862(d) for a period of one year from the date of the order.

Upon release from imprisonment you shall be placed on supervised release for a term of five years. Within 72 hours of release from the custody of the Bureau of Prisons you shall report in person to the probation office in the district to which you're released.

And you shall not commit another federal, state or local crime and you shall comply with the standard conditions that have been adopted by the Court.

In addition, you must comply with the mandatory and special conditions and instructions that have been set forth in your Presentence Report.

Also, even if I'm wrong on the guideline interpretation, I do believe, considering all the factors in this entire case and what your involvement was, that the 175 months is the appropriate sentence that I would impose.

Now, sir, you do have a right to appeal. If you're unable to pay the costs of the appeal, you can apply for leave to appeal in forma pauperis, which is without payment of fees.

The clerk of the court will prepare and file a notice of appeal if you make that request. And with few exceptions, any notice of appeal must be filed within 14 days of the judgment being entered in this case.

Now, your Presentence Report is already part of the record and it's under seal. It will remain under seal unless needed for purposes of appeal.

Then are there any charges -- I guess he pled open so there are no charges to dismiss, I presume.

MS. BROOKS: That's correct.

THE COURT: Then is there anything further from the Government?

MS. BROOKS: No, Your Honor. Thank you.

THE COURT: Then, Mr. McCallum, I didn't ask you.

Would you like me to include a recommendation for a location? It's not binding on the Bureau of Prisons but I'll include that if you have a request. I didn't know if he has family somewhere in the United States.

MR. MCCALLUM: He wanted to make a request for Seagoville, Your Honor.

THE COURT: Well, I don't usually do specific -- he won't qualify for Seagoville. It's a sex offender unit really, but I can include North Texas if you would like me to.

MR. MCCALLUM: North Texas. Thank you.

THE COURT: Then anything further from the Government?

MS. BROOKS: No, Your Honor.

THE COURT: Anything further from defense?

MR. MCCALLUM: No, Your Honor.

THE COURT: Then, sir, you'll go back into the custody of the marshals pending your placement by the Bureau of Prisons. Thank you.

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

/s/_____ _____
Jan Mason Date

APPENDIX D

IN THE UNITED STATES OF AMERICA
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 4:16CR 03
	§	Judge Mazzant
ALBERTO HERNANDEZ-CHAVEZ (1)	§	
DIEGO ARMANDO ALVAREZ-PINA (2)	§	
FRANCISCO JAVIER CRUZ-GONZALEZ (3)	§	
JESUS ANGULO-TORRES (4)	§	
EDWARD LAERCIO GONGORA-AGUINO (5)	§	
RICHARD MOISES QUIJIJE-CHAVEZ (6)	§	
ROGER ALFREDO ANCHUNDIA-ESPINOZA (7)	§	

INDICTMENT

THE UNITED STATES GRAND JURY CHARGES:

Count One

Violation: 46 U.S.C. §§ 70503 (a) and 70506(a) & (b) (Conspiracy to Possess with the Intent to Distribute Cocaine while on board a vessel subject to the jurisdiction of the United States)

That from sometime in or about January 2015, and continuously thereafter up to and including January 13, 2016, in the Eastern District of Texas and elsewhere,

Alberto Hernandez-Chavez
Diego Armando Alvarez-Pina
Francisco Javier Cruz-Gonzalez
Jesus Angulo-Torres
Edward Laercio Gongora-Aguino
Richard Moises Quijie-Chavez
Roger Alfredo Anchundia-Espinoza

defendants, did knowingly and intentionally combine, conspire, and agree with each other and other persons known and unknown to the United States Grand Jury, to knowingly and intentionally possess with the intent to distribute five kilograms or more of a mixture

or substance containing a detectable amount of cocaine, a schedule II controlled substance, while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a) and 70506(a) and (b) and 21 U.S.C. §§ 960 (b)(1)(B)(ii).

NOTICE OF INTENTION TO SEEK CRIMINAL FORFEITURE

From their engagement in the violation alleged in Count ONe of this Indictment, the defendants, shall forfeit to the United States, pursuant to 46 U.S.C. § 70507, 21 U.S.C. § 881(a), and 28 U.S.C. § 2461(c), all of their rights, titles, and interests in any property described in 21 U.S.C. § 881(a)(1) through (11), that was used or intended for use to commit, or to facilitate the commission of, such violation.

If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendant:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third person;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty,

The United States of America shall be entitled to forfeiture of substitute property under the provisions of 21 U.S.C. § 853(p), and as incorporated by 28 U.S.C. § 2461(c).

A TRUE BILL

GRAND JURY FOREPERSON

JOHN M. BALES
UNITED STATES ATTORNEY

ERNEST GONZALEZ
Assistant United States Attorney

1-13-16
Date

IN THE UNITED STATES OF AMERICA
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 4:16CR____
	§	Judge _____
ALBERTO HERNANDEZ-CHAVEZ (1)	§	
DIEGO ARMANDO ALVAREZ-PINA (2)	§	
FRANCISCO JAVIER CRUZ-GONZALEZ (3)	§	
JESUS ANGULO-TORRES (4)	§	
EDWARD LAERCIO GONGORA-AGUINO (5)	§	
RICHARD MOISES QUIJIJE-CHAVEZ (6)	§	
ROGER ALFREDO ANCHUNDIA-ESPINOZA (7)	§	

Count One

Violation: 46 U.S.C. §70503(a) and 70506 (a) & (b)

Penalty: Imprisonment for not less than ten years or more than life, a fine not to exceed $10 million or both. A term of supervised release of at least five years

Special Assessment: $100.00