

No. 18-6482

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IN THE SUPREME COURT OF THE UNITED STATES

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ROGER ALFRED ANCHUNDIA-ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner was convicted of conspiracy to possess with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a) (2012), a provision of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 *et seq.* Judgment 1. That offense carries a statutory-minimum sentence of ten years of imprisonment, 21 U.S.C. 960(b)(1)(B); 46 U.S.C. 70506(a)-(b) (2012 & Supp. IV 2016), and in 2017, the district court sentenced petitioner to 175 months of imprisonment, Judgment 2. Petitioner contends (Pet. 4-9) that, as a matter of statutory construction, he was eligible for relief under a prior version of the statutory

"safety valve," 18 U.S.C. 3553(f) (2012), which at that time provided that, "in the case of an offense under \* \* \* 21 U.S.C. 841, 844, 846[] or \* \* \* 21 U.S.C. 960, 963[] \* \* \* the court shall impose a sentence pursuant to [the Sentencing G]uidelines \* \* \* without regard to any statutory minimum sentence." 18 U.S.C. 3553(f) (2012). That issue -- which is not relevant to the current version of the statute -- does not warrant this Court's review. The Court has recently denied review of the same issue. See Castillo v. United States, No. 18-374, 2019 WL 113114 (Jan. 7, 2019); see also Rolle v. United States, 572 U.S. 1102 (2014) (No. 13-7467); Morales v. United States, 572 U.S. 1063 (2014) (No. 13-7429). It should follow the same course here.

1. For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Castillo v. United States, supra (No. 18-374), petitioner was ineligible for safety-valve relief under 18 U.S.C. 3553(f) (2012). By its plain terms, that version of Section 3553(f) applied only when a defendant was convicted "of an offense under" 21 U.S.C. 841, 844, 846, 960, or 963. 18 U.S.C. 3553(f) (2012). Petitioner was not convicted of any offense under any of those listed provisions, see Judgment 1, and the provision was not applicable to other offenses, including violations of 46 U.S.C. 70503(a)(1) (2012). See Gov't

Br. in Opp. at 8-13, Castillo, supra (No. 18-374).<sup>1</sup> The decision below is therefore correct, and its approach is consistent with the decisions of most courts of appeals to consider the issue. See id. at 13-14 (citing cases).

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

The shallow conflict between Mosquera-Murillo and the decisions of other courts of appeals, in which the majority view

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<sup>1</sup> We have served petitioner with a copy of the government's brief in opposition in Castillo.

favors the approach taken in this case, does not warrant review here. Unlike the defendants in Mosquera-Murillo, petitioner did not receive a statutory minimum sentence of ten years of imprisonment. Rather, the district court sentenced petitioner to 175 months of imprisonment, a term above the statutory minimum and below petitioner's advisory Guidelines range of 210 to 262 months of imprisonment.<sup>2</sup> Pet. App. 15a-16a. As the district court explained, it selected that sentence based in part on its determination that petitioner should receive a longer term of imprisonment than his co-defendants because petitioner had rejected the plea offer that those co-defendants had accepted. Id. at 16a n.1, 46a-47a, 52a. In the absence of that consideration, the court stated, it would have given petitioner the same 168-month sentence as his co-defendants. Id. at 16a n.1, 52a. The consideration that drove petitioner's sentence thus was not the ten-year statutory minimum but rather the 168-month sentences of his co-defendants (which were also above the statutory minimum).

2. In any event, the petition for a writ of certiorari does not present an issue of prospective importance to future

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<sup>2</sup> If petitioner had qualified for a two-level reduction under the "safety-valve" provision in Sentencing Guidelines § 2D1.1(b)(17) (2016), his advisory Guidelines range would have been 168-210 months of imprisonment, based on a total offense level of 35 and a criminal history category of I. See Pet. App. 15a-16a & n.1; Sentencing Guidelines Ch. 5, Pt. A (Sentencing Table).

defendants. Title IV of the First Step Act of 2018, Pub. L. No. 115-391 (enacted Dec. 21, 2018; see S. 756, 115th Cong., 2d Sess.), amends Section 3553(f) by adding offenses under "section 70503 or 70506 of title 46" to the list of offenses eligible for safety-valve relief under that statute. First Step Act § 402(a)(1)(A); see 18 U.S.C. 3553(f) (2012). As a result, future defendants who are convicted under Section 70503(a)(1) will qualify for safety-valve relief. Certiorari is thus unwarranted.

Respectfully submitted.

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