No. ____

IN THE

Supreme Court of the United States

LUIS ROLANDO BUENO JIMENEZ,
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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a 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 "safety valve" provision of 18 U.S.C. § 3553(f) (as the D.C. Circuit has held), or not (as the Fifth, Ninth, and Eleventh Circuits have held).

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings in the court of appeals. In the district court, Petitioner was indicted with four co-defendants: Luis Enrique Renteria Granados; Lisimaco Cortez Motta; Carlos Alberto Sinesterra Penalosa; and Nelson Alberto Penagos Molina.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is unpublished but reported at __ F. App'x __, 2018 WL 6264229 and reproduced as Appendix A. App. 1a–16a. The district court's order denying Petitioner's motion to dismiss the indictment is unreported but reproduced as Appendix C. App. 26a–28a. The transcript of the sentencing hearing in the district court is unreported but reproduced as Appendix D. App. 29a–44a.

JURISDICTION

The court of appeals issued its decision on November 29, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in Appendix E. App. 45a–48a.

INTRODUCTION

The question presented is whether defendants convicted of violating the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. § 70501 *et seq*., and subject to a mandatory-minimum sentence under 21 U.S.C. § 960(b), are eligible for relief from that mandatory minimum under the "safety valve" in 18 U.S.C. § 3553(f). The circuits are divided 3–1 on that question of federal statutory interpretation: the D.C. Circuit has held that MDLEA offenders are eligible for such relief; the Fifth, Ninth, and Eleventh Circuits have held that they are not. This Court should resolve that conflict, for it affects whether an entire class of first-time, non-violent drug offenders may seek relief from harsh mandatory-minimum penalties. And this case presents an excellent vehicle to do so: over the government's objection, the district court granted Petitioner's motion for a downward variance to the ten-year mandatory minimum; he otherwise qualified for § 3553(f)'s safety valve and had a compelling argument for relief thereunder; and he repeatedly objected to the circuit precedent that rendered him ineligible for such relief. Lastly, that precedent was contrary to the text, history, and purpose of the controlling statutes. Thus, this Court should grant certiorari and declare Petitioner eligible for safety-valve relief.

STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

The question presented arises from the intersection of three federal statutes.

1. Codified in Title 46, the MDLEA prohibits certain drug-related activities "while on board a covered vessel." 46 U.S.C. § 70503(a). A "covered vessel" includes a "vessel subject to the jurisdiction of the United States." *Id.*

§ 70503(e)(1). And that term broadly includes, *inter alia*, vessels without nationality, vessels registered in a foreign nation if that foreign nation consents or waives objection to the enforcement of U.S. law by the United States, and vessels in the territorial waters of a foreign nation if that nation consents to the enforcement of U.S. law by the United States. *Id.* § 70502(c)(1).

While on board such a covered vessel, individuals are prohibited from, *inter alia*, manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance. *Id.* § 70503(a)(1). The MDLEA provides that first-time offenders "shall be punished as provided in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (**21 U.S.C. 960**)." *Id.* § 70506(a) (emphasis added). And "[a] person attempting or conspiring to violate section 70503 of this title is subject to the same penalties." *Id.* § 70506(b).

2. Section 960 of Title 21 contains two subsections. Subsection (a) lists "[u]nlawful acts" prohibited elsewhere in Title 21, including various drug importation offenses. 21 U.S.C. § 960(a). For example, § 960(a)(2) lists 21 U.S.C. § 955, which prohibits bringing or possessing a controlled substance on board a vessel, aircraft, or vehicle arriving in or departing from the United States or its customs territory. Like the acts prohibited by the MDLEA, the offenses listed in § 960(a) are subject to § 960(b), which prescribes tiers of penalties if certain drug-quantity thresholds are met. As relevant here, that subsection mandates a ten-year minimum penalty, and a maximum penalty of life imprisonment, for offenses involving five kilograms or more of cocaine. *Id.* § 960(b)(1)(B).

3. In 1994, Congress enacted a "safety valve" provision to address the inequitable operation of mandatory-minimum penalties in drug cases. Before the safety valve, the only way for drug offenders to escape a mandatory minimum was to provide "substantial assistance" to the government. *See* U.S.S.G. § 5K1.1; Fed. R. Crim. P. 35(b). But typically only high-level offenders possessed valuable information about the drug-trafficking organization. Thus, while the most culpable offenders could receive a reduction below the mandatory minimum, low-level offenders could not. *See* H.R. Rep. No. 103-460, 1994 WL 107571 (1994); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496 (9th Cir. 2007).

To address that inequity, Congress created "safety valve" from mandatory-minimum penalties for certain drug offenses, including those under 21 U.S.C. § 960. It 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" that five mitigating conditions are met. 18 U.S.C. § 3553(f) (emphasis added); *see also* U.S.S.G. § 5C1.2 (incorporating safety valve into the Sentencing Guidelines).

The five conditions are: "(1) the defendant does not have more than 1 criminal history point"; "(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 . . . and was not engaged in a continuing criminal enterprise"; 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 . . . ." *Id.* § 3553(f)(1)-(5).

B. ELEVENTH CIRCUIT PRECEDENT: *PERTUZ-PERTUZ*

In *United States v. Pertuz-Pertuz*, 679 F.3d 1327 (11th Cir. 2012), the Eleventh Circuit held that, despite being subject to the mandatory-minimum in § 960(b), those convicted under the MDLEA are categorically ineligible for safety-valve relief. Relying on the text of § 3553(f), the court emphasized that "by its terms, the 'safety valve' provision applies only to convictions under five specified offenses: 21 U.S.C. § 841, § 844, § 846, § 960, and § 963." *Id.* at 1328 (citation omitted). And, it reasoned, because "[n]o Title 46 offense appears in the safety-valve statute," "no safety-valve relief applies" to the MDLEA. *Id.*

The court rejected the defendant's argument that the MDLEA "offenses for which he was convicted reference the penalty provisions of 21 U.S.C. § 960," which is "specifically listed in the safety-valve statute." *Id.* at 1329. The court reasoned that "[t]he 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." *Id.* Because the Eleventh Circuit concluded that the MDLEA was not an "offense under" § 960, it concluded that the plain text of § 3553(f) rendered safety-valve relief categorically unavailable. *Id.*

C. PROCEEDINGS BELOW

1. Petitioner and four co-defendants were charged with conspiracy to possess with intent to distribute cocaine on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a), 70506(b). App. 17a–18a. The indictment also included the following allegation: "Pursuant to Title 46, United States Code, Section 70506(a) and Title 21, United States Code, Section 960(b)(1)(B), it is further alleged that this violation involved five (5) kilograms or more of . . . cocaine." *Id.* at 18a. The charge stemmed from the operation of a Colombian-based drug-trafficking organization, led by co-defendant Renteria Granados, which used self-propelled semisubmersible vessels to transport cocaine from Colombia to Central America.

Petitioner moved to dismiss the indictment, arguing that application of the MDLEA was unconstitutional on various grounds. As relevant here, he acknowledged that the Eleventh Circuit had held that, "as a matter of statutory construction," MDLEA offenders were ineligible for safety-valve relief. However, he expressly "disagree[d] with the Eleventh Circuit's conclusion in *Pertuz-Pertuz*, and maintain[ed] a challenge thereto for purposes of further review." Dist. Ct. Dkt. Entry 139 at 19–20. Given that circuit precedent, Petitioner argued that his

statutory ineligibility for safety-valve relief denied him equal protection of law, contending that there was no rational basis for making safety-valve relief unavailable to MDLEA offenders but available to those who commit the same drug-trafficking offense within the territorial United States or its waters. For those two reasons, Petitioner sought an order "declaring him statutorily eligible for safety value relief." *Id.* at 17, 23. The district court denied Petitioner's motion as "foreclosed by Eleventh Circuit precedent." App. 27a. As for his "complain[t] about being ineligible for the safety valve," the court cited *Pertuz-Pertuz*. *Id.*

2. Petitioner entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss. Dist Ct. Dkt. Entry 162 ¶¶ 1, 3. Given the court's earlier ruling on that motion, the parties agreed for sentencing purposes that there was a ten-year mandatory minimum and that the safety valve was unavailable. *Id.* ¶¶ 4, 7. Notably, however, the government agreed to recommend a two-level reduction to Petitioner's offense level under U.S.S.G. § 2D1.1(b)(17), which applies where the five mitigating safety-valve criteria are satisfied. *Id.* ¶¶ 7–8. Based on that reduction, and other calculations, the parties jointly recommended a guideline range of 135–168 months. *Id.* ¶ 8. The probation officer subsequently agreed with those guideline calculations. *See* PSI ¶¶ 42–52, 77.

Before sentencing, Petitioner filed a motion for a downward variance based on the factors in 18 U.S.C. § 3553(a), emphasizing "the need to avoid unwarranted sentence disparities," § 3553(a)(6). Dist. Ct. Dkt. Entry 181. Petitioner highlighted that his co-defendant, Renteria Granados, was the leader and mastermind of the

conspiracy who secured the cocaine, obtained the financing for the vessels, and recruited Petitioner (a construction worker by trade) to build the vessels—Petitioner's only role in the conspiracy. Yet Renteria Granados, along with co-defendant Sinesterra Penalosa (who oversaw vessel construction and provided molds and blueprints) had both already received ten-year sentences. And no defendant in the conspiracy had received a sentence longer than that. Accordingly, Petitioner argued that sentencing him to more prison time than Renteria Granados (and any other co-defendant) would create an unwarranted sentencing disparity.

At sentencing, the court adopted the parties' guideline calculation of 135–168 months and asked the government for its position on a 10-year sentence. App. 32a. The government opposed Petitioner's request for a downward variance, but acknowledged that he had a "well-founded argument." *Id.* at 32a–33a. The government agreed that Renteria Granados was the leader of the conspiracy and had received a ten-year sentence. *Id.* at 34a. It acknowledged that, of the five defendants charged in the conspiracy, Petitioner was only the fourth most culpable. *Id.* And it volunteered that, although the plea agreement precluded Petitioner from seeking a role reduction, the court had awarded such a reduction to Sinesterra Penalosa, one of the more culpable co-defendants. *Id.* at 33a–34a.

The court concluded that it was "inclined to give Mr. Bueno Jimenez the same sentence that I gave the other people that had to get the mandatory minimum." *Id.* at 34a. After Petitioner allocuted, the court imposed the ten-year mandatory minimum because that it was it had given Renteria Granados. *Id.*

at 35a–36a. Despite receiving the mandatory minimum, Petitioner objected by "reassert[ing] and realleg[ing]" "each and every one" of the arguments made in his motion to dismiss, including "the lack of a safety valve and the equal protection arguments that are contained in there." *Id.* at 39a. In doing so, he reiterated his request that "the safety valve . . . take away the ten-year mandatory minimum." *Id.*

3. On appeal, Petitioner reiterated those arguments. As in the district court, he acknowledged that *Pertuz-Pertuz* had held that, "as a matter of statutory construction," safety-valve relief was unavailable for MDLEA offenders, but he expressly "disagree[d] with the Court's conclusion in *Pertuz-Pertuz*, and maintain[ed] a challenge thereto for purposes of further review." Pet. Initial C.A. Br. 65–66. His primary argument, therefore, was that his statutory ineligibility for safety-valve relief deprived him of equal protection of law.

After briefing was complete, the Eleventh Circuit rejected that constitutional argument in *United States v. Castillo*, 899 F.3d 1208 (11th Cir. 2018), *petition for cert. pending* (U.S. No. 18-374) (filed Sept. 21, 2018). Applying rational-basis review, the court found that "Congress could have rationally concluded that" safety-valve relief was inappropriate for MDLEA offenses yet appropriate for domestic drug offenses. *Id.* at 1212–13. Before so concluding, however, the court reiterated its earlier statutory holding in *Pertuz-Pertuz* that, "because 'the safety valve provision applies only to convictions under five specified offenses,' which do not includes violations of the [MDLEA]," the "safety valve does not apply to offenses under the [MDLEA]." *Id.* at 1212 (quoting *Pertuz-Pertuz*, 679 F.3d at 1328).

Due to that circuit precedent, the court of appeals rejected Petitioner's argument that he was "entitled to a reduction of his sentence under the safety valve." App. 7a. Given *Pertuz-Pertuz*, the panel took it as a given that Petitioner was statutorily "ineligib[le] for relief from a mandatory minimum sentence under the safety valve." *Id*. at 14a. And his constitutional argument was foreclosed by *Castillo*. *Id*. at 14a–15a. Accordingly, it affirmed his sentence. *Id*. at 15a–16a.

REASONS FOR GRANTING THE PETITION

The circuits are openly divided over whether MDLEA offenders like Petitioner are eligible for safety-valve relief under § 3553(f). That divisive question of statutory interpretation affects whether harsh mandatory-minimum penalties will constrain federal courts when sentencing an entire class of first-time, non-violent drug offenders. This case provides an ideal vehicle to resolve that important and recurring question. And the courts below erroneously deemed Petitioner ineligible for safety-valve relief. Accordingly, this Court should grant certiorari.

I. THE CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED

The Fifth, Ninth, and Eleventh Circuits have held that MDLEA offenders are ineligible for safety-valve relief under § 3553(f). Recently breaking that uniformity, the D.C. Circuit has expressly disagreed. Only this Court can resolve that conflict.

a. As explained above, the Eleventh Circuit has held that safety-valve relief is categorically unavailable to MDLEA offenders. Again, it reasoned that, "by its terms, the safety valve provision applies only to convictions under five specified offenses: 21 U.S.C. § 841, § 844, § 846, § 960, and § 963," and "[n]o Title 46 offense

appears in the safety-valve statute." *Pertuz-Pertuz*, 679 F.3d at 1328–29 (citation omitted). Although the MDLEA cross-referenced § 960, the court found that violations of the MDLEA were not "offenses under" § 960. *Id.* at 1329 (quoting § 3553(f)). *See Castillo*, 899 F.3d at 1212 (reaffirming holding of *Pertuz-Pertuz*).

In *United States v. Gamboa-Cardenas*, 508 F.3d 491 (9th Cir. 2007), a divided panel of the Ninth Circuit reached the same conclusion. Employing similar reasoning, it emphasized that the plain text of "§ 3553(f) states that the safety valve applies to 'an offense under' a limited number of statutes," and the MDLEA "is not included in the offenses listed in 18 U.S.C. § 3553(f) or 21 U.S.C. § 960(a)." *Id.* at 497. Like the Eleventh Circuit, the court rejected the defendant's argument that, by directing that offenders be punished pursuant to § 960, the MDLEA constituted an "offender under § 960" for purposes of § 3553(f). *Id.* at 498–99. The court also relied on the history of the MDLEA to support its holding. *Id.* at 499–502.

Judge Fisher dissented from that holding. He opined that, because the MDLEA required punishment "in accordance with the penalties set forth in section 960," and because the penalties set forth in that section "are subject to safety valve relief," "[o]ne could understand the combination of these provisions to mean that [MDLEA] offenses should be penalized the same as offenses under § 960, which is expressly listed in the safety valve statute." *Id.* at 507 (Fisher, J., concurring in part, dissenting in part). He acknowledged that the majority's contrary reading was plausible, rendering the statute ambiguous. *Id.* at 506–07. As a result, he looked to the history and purpose of the MDLEA and found nothing to indicate "that when

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 those two classes of drug offenders. *Id*. at 507. "Rather," he "believe[d] the most plausible reading of the relevant statutes is that [MDLEA] offenses should be penalized in the same manner as offenses under § 960." *Id*. at 507–08.

Notwithstanding Judge Fisher's opinion, the Fifth Circuit recently joined the Eleventh and Ninth Circuits in *United States v. Anchundia-Espinoza*, 897 F.3d 629, 632–34 (5th Cir. 2018), *petition for cert. pending* (U.S. No. 18-6482) (filed Oct. 25, 2018). After summarizing *Petruz-Petruz* and *Gamboa-Cardenas*, as well as its own circuit precedent on § 3553(f), the court "decline[d] to accept Anchundia-Espinoza's invitation to steer away from th[at] court's strict interpretation of the statute—and the lead of circuits that have addressed this issue." *Id*. at 633–34. Following their lead, the court reasoned: "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* 'offenses penalized under' and not "sentences under." *Id*. at 634 (citing *Pertuz-Pertuz*, 679 F.3d at 1329) (brackets omitted).

b. Shortly after the Fifth Circuit issued its opinion, a unanimous panel of the D.C. Circuit in *United States v. Mosquera-Murillo*, 902 F.3d 285 (D.C. Cir. 2018) reached the contrary conclusion, holding that MDLEA offenders are eligible for safety-valve relief. *Id*. at 292–96. The court reasoned that MDLEA offenders *are* "convicted of 'an offense under' § 960, and they therefore satisfy the threshold

condition for safety-valve eligibility." *Id.* at 292. The court explained that "[o]ffenses are defined by the provisions that supply their elements." *Id.* at 293. And while "the MDLEA supplies the elements that make the defendants' conduct unlawful," "§ 960 supplies the offense elements of drug-type and drug-quantity—5 or more kilogram of cocaine." *Id.* Those facts were "elements" of the offense under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013), because the drug-type and drug-quantity determination under § 960(b) established the statutory maximum and a mandatory minimum penalty. *Id.* Thus, "the crime is 'an offense under' *both* the MDLEA *and* § 960, drawing offense elements from each," a conclusion confirmed by the indictment and judgment in that case, which listed both the MDLEA and § 960(b). *Id.* at 293–94.

The court rejected the contrary textual argument advocated by the government and other circuits. It explained that, while the MDLEA was not listed in § 960(a), the safety-valve "statute speaks in terms of an 'offense under' § 960 without limitation—not an offense under only § 960(a). Plus, the structure of § 960 demonstrates that the defendants' crime qualifies as an 'offense under' § 960 no less than the crimes listed in § 960(a)." *Id.* at 294. That was so, the court reasoned, because § 960(a) "does not lay out any element of . . . any criminal offense," but "merely lists certain offenses established elsewhere in the code" that are then subject to the penalties in § 960(b). *Id.* "The MDLEA offense . . . interacts with § 960(b) in exactly the same way as the offenses listed in § 960(a)." *Id.* Thus, because "the offenses listed in § 960(a) and the relevant offenses under the MDLEA

are (i) established outside of § 960, and (ii) make use of the drug-type and drug-quantity elements and associated penalties set forth in § 960(b), then there is no reason to conclude . . . that the former qualify as 'offenses under' § 960 for purposes of safety-valve eligibility whereas the latter do not." *Id.* at 295.

The court found that conclusion also "align[ed] with Congress' nearly unbroken pattern of setting identical penalties for drug crimes committed in domestic waters and drug crimes committed on the high seas." *Id.* After reviewing that "century-long pattern of identical penalties," the court found no basis to conclude that Congress had "broken its 100-year pattern of penalty parity" by rendering MDLEA offenses ineligible for safety-valve relief. *Id.*

Lastly, the court acknowledged that the Eleventh and Ninth Circuits had reached a contrary conclusion. *Id.* (citing *Pertuz-Pertuz* and *Gamboa-Cardenas*). (The court did not mention the Fifth Circuit's decision in *Anchundia-Espinoza*, which had issued less than a month earlier.). Knowingly creating a circuit split, the "respectfully reach[ed] the opposite conclusion." *Id.* at 295–96. The court emphasized that "[n]either of those decisions expressly assess[ed] whether the drug-type and drug-quantity facts supplied by § 960(b) constitute offense elements, such that an MDLEA offender penalized under § 960(b) should be considered someone who has violated both the MDLEA and § 960." *Id.* at 296. Yet that consideration was "pivotal" to its analysis and conclusion. *Id.*

c. In light of the D.C. Circuit's decision, there is no dispute that the circuits are now divided on the question presented. Indeed, the government itself

has recently acknowledged that conflict of authority. *Castillo*, U.S. Br. in Opp. 8, 14 (U.S. No. 18-374) (filed Nov. 21, 2018). And that conflict is here to stay, since the government did not seek rehearing or certiorari review of the D.C. Circuit's opinion. Accordingly, this Court's intervention is necessary to resolve the conflict.

II. THE QUESTION PRESENTED WARRANTS REVIEW

Not only has the question presented divided the circuits, but it is recurring, it is important, and it otherwise warrants review by this Court.

"Over the past six years, more than 2,700 men . . . have been taken from boats suspected of smuggling Colombian cocaine to Central America" and "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).[1] "In the 1990s and through the 2000s, maritime detentions averaged around 200 a year. Then in 2012," the government "launched a multinational military campaign" designed "to shut down smuggling routes in the waters between South and Central America." *Id*. By 2016, it had "detained 585 suspected drug smugglers, mostly in international waters," "80 percent of [whom] were taken to the United States to face criminal charges, up from a third of detainees in 2012. In the 12 months that ended in September 2017, the Coast Guard captured more than 700 suspects and chained them aboard American ships." *Id*.

In addition to the sheer number of MDLEA prosecutions, many of those charged are precisely the sort of drug-offenders that the safety-valve was designed

[1] https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html.

to help. Many brought to the United States for MDLEA prosecution are impoverished men from rural Central and South America in desperate need of money to support their family. *See id*. (describing extreme poverty of one particular defendant). Those low-level offenders seldom possess valuable information about the drug-trafficking organization. Thus, they are "of little use" to the government and, unlike more culpable offenders, are unable to escape the mandatory minimum by providing "substantial assistance" under § 5K1.1. *Id*. That is the precise inequity that the safety valve was designed to ameliorate. *See* H.R. Rep. No. 103-460, 1994 WL 107571 (1994); *Gamboa-Cardenas*, 508 F.3d at 496.

Yet, despite the number of MDLEA offenders who would benefit from the safety valve, the availability of such relief now turns solely on geography. Moving forward, MDLEA defendants will be subject to disparate sentencing treatment based on the jurisdiction of prosecution, not their individualized roles or characteristics. Those prosecuted in Houston, San Diego, and Miami will be required to receive the mandatory-minimum penalty; the sentencing court will lack authority to go lower. Meanwhile, identically-situated defendants prosecuted in the District of Columbia will be eligible for relief from the same mandatory minimum.

Exacerbating that disparate treatment is that, in this context, prosecutors can literally circumnavigate the circuit split. "Unlike domestic arrests, which stipulate that defendants be charged in the jurisdiction of their crime, maritime smugglers can be prosecuted anywhere, as long as it's the first place they land or in the District of Columbia." Wessler, *supra*; *see* 46 U.S.C. § 70504(b) (MDLEA venue

provision). So where, as here, a circuit split emerges on the MDLEA, the government can engage in forum shopping by docking in the friendliest circuit. And that is just what it has done. As this case reflects, "American law-enforcement officials have developed a clear preference for prosecuting maritime smuggling cases in Florida," in part because of favorable case law from the Eleventh Circuit. Wessler, *supra*. The government has gone to great lengths to do so: even though most maritime interdictions occur in the Pacific Ocean, it avoids bringing cases in the Ninth Circuit—since that Circuit's case law requires a "nexus" to the United States, *see United States v. Perlaza*, 439 F.3d 1149, 1168–69 (9th Cir. 2006)—and detains individuals for weeks and even months at sea before they are brought to the United States. *Id.* Given the particular circuit split here, the government can now avoid bringing MDLEA cases in D.C.—the one venue that Congress always made available, § 70504(b)(2)—whenever it seeks to avoid the specter of the safety valve.

In sum, the question presented here warrants review. It is recurring given the sharp uptick in MDLEA prosecutions over the last several years, for which there is no end in sight. The question is important because it affects whether an entire class of countless low-level, first-time drug offenders will be eligible for relief from harsh mandatory-minimum penalties. And this Court has never before considered the MDLEA, even though it has been on the books for decades and accounts for hundreds of prosecutions each year. The discrete statutory question presented here provides an excellent opportunity for the Court to enter the fray.

III. THIS CASE IS AN EXCELLENT VEHICLE

This particular case affords the Court an ideal opportunity to do so.

Procedurally, Petitioner repeatedly preserved his argument that he was statutorily eligible for safety-valve relief. Because the Eleventh Circuit had squarely held otherwise in *Pertuz-Pertuz*, Petitioner did the only thing he could: he repeatedly argued that this circuit precedent was wrong, and he expressly preserved his contrary position for further review in this Court. Petitioner did so at every stage: in his motion to dismiss the indictment, Dist. Ct. Dkt. Entry 139, at 19–20; at the sentencing hearing, App. 39a; and on appeal, Pet. Initial C.A. Br. 65–66. And both the district court and the court of appeals considered his argument foreclosed by circuit precedent. The district court relied exclusively on *Pertuz-Pertuz*. App. 27a. And, given that precedent, the Eleventh Circuit took it as a given that Petitioner was statutorily ineligible for the safety valve; and it rejected his constitutional argument based on *Castillo*, which expressly reaffirmed *Pertuz-Pertuz*'s statutory holding. App. 14a–15a. Thus, the question is cleanly presented.

Factually too, this case is an excellent vehicle. Over the government's objection, the district court granted Petitioner's motion for a downward variance to the ten-year mandatory minimum. And, in addition to actually receiving the mandatory minimum, there is no dispute that Petitioner satisfied § 3553(f)'s five safety-valve criteria: the government itself recommended, and the district court imposed, a two-level reduction under U.S.S.G. § 2D1.1(b)(17), which incorporates those criteria. Dist. Ct. Dkt. Entry 162 ¶¶ 7–8.

And not only did Petitioner satisfy the five mitigating criteria in § 3553(f), but he otherwise had a compelling basis for relief. The leader and mastermind of the conspiracy, Renteria Granados, had received a ten-year sentence. Yet, by the government's own admission at sentencing, Petitioner was far less culpable than Renteria Granados. Indeed, the government acknowledged that, of the five co-defendants, Petitioner was only the fourth most culpable. And Renteria Granados had recruited Petitioner to construct the vessels, his only role in the conspiracy. The government further acknowledged that another co-defendant, Sinesterra Penalosa, was also more culpable than Petitioner, yet he too had received a ten-year sentence (and a minor-role reduction). App. 33a–34a. Thus, Petitioner would have had a compelling disparity argument for a lower sentence had the court not been constrained to impose the ten-year mandatory minimum.[2]

IV. PETITIONER WAS ELIGIBLE FOR SAFETY-VALVE RELIEF

Although constrained by Eleventh Circuit precedent, the courts below erred by deeming Petitioner ineligible for safety-valve relief under § 3553(f). The text, history, and purpose of the relevant statutory provisions compel the conclusion that Petitioner was indeed eligible for such relief.

a. As for § 3553(f)'s statutory text, the D.C. Circuit correctly explained that, when subject to the mandatory minimum in § 960(b), an unlawful act under the MDLEA is also an "offense under" § 960. *Mosquera-Murillo*, 902 F.3d at 292–

[2] Given the procedural and factual circumstances discussed in the text, this case is a superior vehicle than the pending petitions in both *Castillo* and *Anchundia-Espinoza*. Nonetheless, should the Court grant review in one of those cases (or another case presenting the same question), the Court should hold this petition.

93. Because § 960(b) creates a statutory-maximum and mandatory-minimum penalty based on drug type and quantity, those facts constitute "elements" of the offense under this Court's decisions in *Apprendi* and *Alleyne*. And, as elements, they necessarily form part of "offense" of conviction. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) ("'Elements' are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction.") (quotation omitted).

Thus, while the MDLEA itself supplies some of the elements of the offense (*i.e.*, the prohibited conduct), § 960(b) supplies additional elements that must be proven beyond a reasonable doubt before a defendant can be subject to § 960's mandatory minimum. That is why, as in *Mosquera-Murillo*, the indictment here alleged not only that Petitioner violated the MDLEA, but that he also violated § 960(b)(1)(B) because the offense involved five kilograms or more of cocaine. App. 18a. The government *had* to allege and prove that fact in order to subject him to the very mandatory minimum from which he now seeks relief.

The contrary textual interpretation embraced by the Fifth, Ninth, and Eleventh Circuits is unpersuasive. Those Circuits have assumed that, because § 960(b) prescribes only penalties, an MDLEA offense subject to those penalties is not an "offense under" § 960. *See Anchundia-Espinoza*, 897 F.3d at 634; *Pertuz-Pertuz*, 679 F.3d at 1329; *Gamboa-Cardenas*, 508 F.3d at 497–99. But none of those courts recognized, let alone considered, whether the drug-type and drug-quantity thresholds in § 960(b) are "elements" under *Apprendi*, and thus form part of the

"offense" of conviction. And while those courts emphasized that the MDLEA is not one of the unlawful acts listed in § 960(a), they overlooked that § 3553(f) includes *all* offenses under § 960; it is not limited to the offenses listed in § 960(a). In that regard, those courts failed to recognize that the drug-type and drug-quantity facts in § 960(b) are elements of the § 960(a) offenses as well. So the MDLEA "interacts with § 960(b) in exactly the same way as the offenses listed in § 960(a)": both are "(i) established outside of § 960, and (ii) make use of the drug-type and drug-quantity elements and associated penalties set forth in § 960(b)." *Mosquera-Murillo*, 902 F.3d at 294. Thus, as a matter of statutory text, "there is no reason to conclude . . . that the former qualify as 'offenses under' § 960 for purposes of the safety-valve eligibility whereas the latter do not." *Id*. at 295.

b. Nor does the statutory history provide any reason to so conclude. To the contrary, drug offenses on the high seas have always been subject to penalties equal to, or less than, those applicable to drug offenses within U.S. territorial waters or the contiguous customs zone. The D.C. Circuit's opinion in *Mosquera-Murillo*, 902 F.3d at 295, as well as the district court's opinion in *United States v. Olave-Valencia*, 371 F. Supp. 2d 1224, 1227–28 1230–32 (S.D. Cal. 2005), set out that century of history in detail.

The Eleventh and Fifth Circuits failed to consider that history at all, and the Ninth Circuit did not dispute it. Yet the latter court nonetheless speculated that Congress might have wanted MDLEA offenses, but not domestic importation offenses, to be ineligible for safety-valve relief. *See Gamboa-Cardenas*, 508 F.3d

at 501–02. But whatever theoretical basis for doing so may be conjured up, the court identified nothing showing that Congress actually did so. To the contrary, "[n]o statutory language or legislative history" demonstrates that Congress sought to subject MDLEA offenders to § 960's mandatory minimums, but then exempt them from the safety valve specifically encompassing § 960. *Id*. at 507 (Fisher, J., concurring in part, dissenting in part); *see also Olave-Valencia*, 371 F. Supp. 2d at 1232 ("there exists no statutory language or legislative history to support the idea that § 3553(f) was intended to create a historic change where, for the first time, certain § 955 (United States waters) offenders would be subject to a more lenient penalty than [MDLEA] (high seas) offenders with similar characteristics").

c. The contrary conclusion is belied not only by the statutory text and history but by common sense. Section 960(a) lists drug offenses that occur within U.S. territory and waters, including those like 21 U.S.C. § 955 that prohibit the importation of drugs *into* the United States. All of those offenses are eligible for safety-valve relief under § 3553(f). Yet, in the Fifth, Ninth, and Eleventh Circuits, the drug trafficking prosecuted under the MDLEA will not be eligible for the safety valve, even where (as here) the offense occurs on the high seas and does not have any nexus to the United States at all. It simply does not "follow that the further the vessel is apprehended from the United States coastline, the greater the seriousness of the offense." *Olave-Vlanceia*, 371 F. Supp. 2d at 1232. If anything, the Title 21 offenses committed within U.S. territorial waters should be considered more, not less, serious than MDLEA offenses committed half-way around the world.

The contrary approach would also have troubling practical consequences. Most notably, drawing that counter-intuitive distinction between MDLEA offenses and those listed in § 960(a) would allow prosecutors to pick and choose which MDLEA defendants will be eligible for safety-valve relief. That is so because many Title 46 cases may be charged instead under Title 21. Thus, in the Fifth, Ninth, and Eleventh Circuits, prosecutors alone may now determine which first-time, non-violent MDLEA offenders—including those who satisfy the mitigating criteria in § 3553(f)(1)-(5)—may seek a sentence below the mandatory minimum. That discretion would displace the role of the courts and individualized sentencing.

This case illustrates that dynamic. The fifth co-defendant charged with Petitioner, Penagos Molina, received a 70-month sentence solely because the government dismissed the original MDLEA charge, filed a superseding information charging him with a Title 21 offense, and then recommended relief under the safety valve. Dist. Ct. Dkt. Entries 3, 74, 83 (¶¶ 3, 8), 123. That unreviewable charging determination was made exclusively by the prosecution, and it effectively reduced that co-defendant's sentence to nearly half the ten-year mandatory minimum. Petitioner did not receive that benefit because the government insisted on charging him with a Title 46 offense. Thus, the law in the Fifth, Ninth, and Eleventh Circuits not only departs from statutory text and history, but it enlarges the already-expansive discretion of federal prosecutors, permitting them alone—and not federal courts—to determine which low-level, first-time, non-violent drug offenders may even be judicially considered for sentences below the mandatory minimum.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14694
Non-Argument Calendar

D.C. Docket No. 1:13-cr-20801-WPD-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS ROLANDO BUENO JIMENEZ,
a.k.a. El Mono,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(November 29, 2018)

Before WILLIAM PRYOR, JORDAN and FAY, Circuit Judges.

PER CURIAM:

Luis Jimenez, who conditionally pleaded guilty to conspiring to violate the Maritime Drug Law Enforcement Act by possessing with intent to distribute five kilograms or more of cocaine on board a vessel subject to the jurisdiction of the United States, 46 U.S.C. §§ 70503(a), 70506(b), appeals the denial of his motions to dismiss his indictment. The district court denied Jimenez's motion to dismiss based on the denial of a speedy trial under the Sixth Amendment after applying the balancing test outlined in *Barker v. Wingo*, 407 U.S. 514 (1972). The district court also denied as foreclosed by precedent Jimenez's omnibus motion to dismiss that challenged the validity of the Act. We affirm.

I. BACKGROUND

Agents of the Drug Enforcement Agency working with a cooperating source and law enforcement officers in Colombia, South America, learned that Jimenez constructed self-propelled semisubmersible submarines for the Renteria Granados organization to transport large quantities of cocaine to Central America. The international task force thrice interrupted the activities of Renteria Granados. In March 2012, an aircraft operated by the United States Marines Corps discovered a submarine used by the organization in Honduran waters and succeeded in rescuing the four man crew after they scuttled the ship, one of whom confessed that the ship was transporting cocaine from Colombia. In July 2012, members of Renteria Granados burned a submarine they had stored in a remote jungle area as they were

being converged on by Colombian law enforcement. Within two weeks, federal agents recorded a telephone call in which Jimenez bemoaned having "more bad luck than who knows what." In December 2012, federal agents recorded Jimenez lamenting the loss of a third submarine in Panamanian waters that its crew scuttled when trapped by agents of the United States, Costa Rica, and Panama.

On October 17, 2013, a federal grand jury indicted Jimenez and four cohorts in Renteria Granados for conspiring to engage in maritime drug trafficking between February 1 and December 31, 2013. The government moved immediately to seal the indictment to protect witnesses, to prevent flight by the defendants, and to safeguard the ongoing investigation. The district court granted the motion.

The ongoing investigation proved fruitful. With the aid of several informants and 71 wiretaps, the task force discovered that Jimenez was assisting other drug trafficking organizations to build semisubmersible submarines to transport cocaine internationally. On August 13, 2014, the task force seized a submarine that Renteria Granados constructed to transport multiple tons of cocaine from Guyana to Europe. In December 2014, federal agents learned that Renteria Granados paid Jimenez to build a submarine to replace the one seized in August.

The government declined to pursue a superseding indictment, and on March 10, 2015, it moved to unseal the indictment to apply for provisional arrest warrants to obtain the extradition of Jimenez and his codefendants from Colombia. In July

2015, the U.S. State Department received provisional arrest warrants and forwarded them to the Colombian government. During August 2015, federal agents met with Colombian law enforcement and naval intelligence about locating and arresting the defendants. By December 2015, the task force had located all the defendants, but the Colombian authorities postponed the arrests until after the Christmas and New Years holidays.

On January 24, 2016, agents arrested Jimenez. On February 27, 2017, Jimenez arrived in Florida and appeared for arraignment. Jimenez entered a plea of not guilty to the conspiracy charge.

On March 27, 2017, Jimenez moved to dismiss his indictment based on the denial of his right to a speedy trial. Jimenez argued that the delay preceding his arrest and initial appearance was presumptively prejudicial, that the government failed to act with due diligence, that he had promptly asserted his right to a speedy trial, and that he did not need to prove actual prejudice. The government opposed dismissal and attached to its opposition a nine-page chronology of its investigation and its collaboration with Colombian authorities.

Jimenez also filed an omnibus motion to dismiss. Jimenez argued that Congress exceeded its authority in enacting the Maritime Drug Law Enforcement Act; the Act violated his right to due process under the Fifth Amendment; and the Act violated his rights to have a jury find each element of the crime charged and to

confront the preparer of a testimonial certificate under the Sixth Amendment. Jimenez also argued that the exclusion of the Act from safety valve relief, 18 U.S.C. § 3553(f), violated his right to equal protection under the Fifth Amendment. The district court denied Jimenez's omnibus motion.

After an evidentiary hearing, the district court denied Jimenez's motion to dismiss for lack of a speedy trial. The district court determined that the first and third *Barker* factors "weigh[ed] heavily against the government" because the delay was sufficient to trigger a speedy trial inquiry and because Jimenez timely had invoked his right to a speedy trial. The district court determined that the second *Barker* factor involving the reason for the delay weighed "in favor of the government" or "only slightly against it" even though Jimenez bore no "responsibility for the delay." The district court found that delays were "appropriate to continue the investigation of the drug trafficking organization" with the Colombian government, to coordinate the arrests of "all defendants simultaneously," and to "locate[] defendants in Colombia and extradit[e] them." Because the government "unsealed the indictment as soon as the legitimate need for delay had been completed," the district court determined that the "postponement of the prosecution [was not] to gain some impermissible advantage at trial." The district court ruled that Jimenez's speedy trial claim failed because

the first three *Barker* factors "did not weigh heavily against the government" and he failed to prove actual prejudice.

Jimenez pleaded guilty to conspiring to engage in maritime drug trafficking, 46 U.S.C. §§ 70503(a), 70506(b), and reserved the right to appeal the denial of his motions to dismiss. He admitted that he assisted Renteria Granados in constructing submarines used to transport large quantities of cocaine from Colombia to Central America; that the submarines could store up to three tons of cocaine; and that law enforcement recorded multiple telephone conversations that implicated him in the maritime drug trafficking. The district court sentenced Jimenez to 120 months of imprisonment. *See id.* § 70506(a); 21 U.S.C. § 960(b)(1)(B).

II. STANDARDS OF REVIEW

The denials of Jimenez's motions to dismiss involve mixed questions of fact and law. *See United States v. Villarreal*, 613 F.3d 1344, 1349 (11th Cir. 2010) (speedy trial); *United States v. Cruickshank*, 837 F.3d 1182, 1187 (11th Cir. 2016) (Maritime Drug Law Enforcement Act). We review factual findings for clear error and will reverse only if "we are left with the definite and firm conviction that a mistake has been committed." *Villarreal*, 613 F.3d at 1349 (internal quotation marks and citation omitted). We review *de novo* the application of the law to the facts. *Id.*

III. DISCUSSION

Jimenez contends that the district court should have dismissed his indictment. Jimenez argues that the government intentionally delayed his prosecution and, because the second *Barker* factor weighed heavily against the government, he was excused from having to prove actual prejudice to prevail on his speedy trial claim. Jimenez also argues that the Maritime Drug Law Enforcement Act is unconstitutional and that he is entitled to a reduction of his sentence under the safety valve. These arguments fail.

A. The District Court Did Not Err in Weighing the Barker *Factors and Denying Jimenez's Motion to Dismiss.*

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. To determine whether a delay between indictment and trial violates a defendant's right to a speedy trial, "the conduct of the Government must be weighed against the conduct of the defendant." *United States v. Carter*, 603 F.2d 1204, 1207 (5th Cir. 1979). In *Barker*, the Supreme Court instructed courts to evaluate whether a delay deprived the defendant of a speedy trial based on four factors: the length of the delay between indictment and trial, the reason for that delay, when the defendant asserted his right to a speedy trial, and whether he was prejudiced by the delay. *Barker*, 407 U.S. at 530–33. If the length of the post-indictment delay is sufficiently long to trigger consideration of the other factors, and if the reason for the delay and

assertion of the right to a speedy trial also "weigh heavily" against the Government, the defendant is not required to prove actual prejudice to succeed on his speedy trial claim. *United States v. Oliva*, 904 F.3d 910, 916 (11th Cir. 2018). We review the determination of the district court with respect to each factor "with considerable deference." *Doggett v. United States*, 505 U.S. 647, 652 (1992).

The weight to be accorded a delay varies with its cause. *Barker*, 407 U.S. at 531. A deliberate attempt to delay trial to hamper the defense weighs heavily against the government. *Id.* Neutral reasons for delay, such as negligence, weigh less heavily against the government. *Villareal*, 613 F.3d at 1351. But neutral reasons do "not necessarily tip the scale in favor of the defendant, particularly where [he] was at liberty and outside the jurisdiction where the indictment was returned." *United States v. Bagga*, 782 F.2d 1541, 1544 (11th Cir. 1986). A valid reason that serves a legitimate government purpose justifies reasonable delay. *See Doggett*, 505 U.S. at 656 ("pretrial delay is often both inevitable and wholly justifiable," for instance, when "[t]he government . . . need[s] time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down."). When weighing a factor "there is no hard and fast rule to apply . . ., and each case must be decided on its own facts." *United States v. Clark*, 83 F.3d 1350, 1354 (11th Cir. 1996).

The government does not dispute that the first and third *Barker* factors weigh heavily against it. The 40-month delay between Jimenez's indictment and his initial appearance was sufficiently lengthy to entitle him to a presumption of prejudice. *See id.* at 1352. And Jimenez's prompt assertion of his right to a speedy trial tilted in his favor. *See id.* at 1353. Because of the weight that the district court assigned to those two factors, Jimenez's right to relief turns on the second *Barker* factor—the reason for the delay.

Jimenez accuses the government of "inaction" between his indictment and initial appearance, but the district court did not clearly err in making a contrary finding. The government "establish[ed] valid reasons for the delay" in its response to Jimenez's motion and an attached nine-page report that described an ongoing international investigation that led to the search for and apprehension of Jimenez and his codefendants. *See Villarreal*, 613 F.3d at 1351. The report described the international investigation that began in December 2012 and continued after the government unsealed Jimenez's indictment. Pages 3 through 6 of the report catalogue—from Jimenez's indictment on October 17, 2013, through mid-December 2014—the use of informants and wiretaps to collect information about Jimenez's work with Renteria Granados and other drug trafficking organizations and their affiliations with paramilitary commanders, financiers, and cocaine

suppliers; the seizure of a submarine constructed to transport multiple tons of cocaine; and the discovery of a plot for Jimenez to construct another submarine.

It is undisputed that the investigation ended when the government declined to pursue a superseding indictment, yet that decision dovetailed with the motion of the government to unseal the indictment. Page 6 of the report reflects that federal agents met with confidential sources during December 2014 and obtained permission on January 15, 2015, to tap a cellular telephone in Colombia for 180 days. That wiretap overlapped with the filing on March 10, 2015, of the motion to unseal Jimenez's indictment to apply for provisional arrest warrants.

The record supports the finding that the government was actively involved in Jimenez's case until his initial appearance. As stated on page 7 of the report, on July 9, 2015, the State Department received provisional arrest warrants and forwarded them to the Colombian government on July 23, 2015. Pages 7 and 8 of the report describes meetings between federal agents and Colombian authorities during August 2015 to locate and arrest the defendants and to collect additional intelligence. The government stated on page 15 of its response that the "[t]he last defendant [was] located . . . around December 2015" and that Colombian authorities "delayed the arrests until the end of January 2016." Jimenez was arrested on January 24, 2016, his arrest warrant states that he was extradited to the

United States in February 2017, and the docket sheet reflects that he appeared for arraignment on February 27, 2017.

The government had, at a minimum, neutral reasons for its delay. The district court identified three activities that delayed Jimenez's prosecution: the "ongoing investigation," the "coordination of [the defendants'] arrests," and "the logistics of locating defendants in Colombia and extraditing them." We readily dispose of the latter two activities based on our precedents holding that delays attributable to seeking the assistance of a foreign government and to marshaling codefendants for trial weigh minimally against the government. In *United States v. Hayes*, 40 F.3d 362 (11th Cir. 1994), we held that the government had a valid reason for sealing the indictment and delaying the defendant's trial for almost five years while working with the United Kingdom and the government of Zimbabwe to locate, arrest, and extradite a codefendant who might have "frustrated . . . attempts to secure his arrest and deportation if he [had been] aware of [the indictment]." *Id.* at 365–66. And in *United States v. Davenport*, 935 F.2d 1223, 1239–40 (11th Cir. 1991), we held that a delay of almost two years "inherent to the government's good faith effort to conduct a complex . . . trial involving nineteen codefendants" in a manner consistent with this Circuit's "judicial policy favoring joint trials" in conspiracy cases provided "at worst, neutral reasons" for the delay. *Id.* at 1239–40. The delays owing to the collaboration with Colombian authorities

to coordinate the defendants' arrests and to extradite the defendants "will not be held against the Government." *See Hayes*, 40 F.3d at 366.

The district court did not err in classifying the ongoing international investigation, at worst, as a neutral reason that weighed "only slightly against" the government. As the Supreme Court stated when addressing whether an investigation that contributes to preindictment delay violates the Due Process Clause of the Fifth Amendment, "investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused, precisely because investigative delay is not so one-sided." *United States v. Lovasco*, 431 U.S. 783, 795 (1977) (internal quotation marks and citation omitted). Investigative delay can involve "fully exploit[ing] . . . potentially fruitful sources of information," *id.* at 792, and protecting those informants, *see id*. at 796 n.19, and those matters may be "beyond the control of the prosecuting authorities." *Id.* The government had to balance its "duty to make a diligent, good faith effort to bring an indicted defendant to trial promptly," *Hayes*, 40 F.3d at 365, with its needs to discover the full scope of drug trafficking by Jimenez and his cohorts, to protect informants, and to assist Colombian authorities with their investigation. As the district court stated, the government sensibly "decided [not] to jeopardize [its] investigations and relations with Colombia by unsealing the indictment earlier." While Jimenez's indictment was sealed, the task force amassed evidence of

international drug trafficking and interrupted those illegal activities. Because the government postponed action for the investigation, and "[t]here is absolutely no evidence of bad faith by the government," *Davenport*, 935 F.2d at 1240, the delay attributable to the investigation counts marginally against the government.

The district court did not err by denying Jimenez's motion to dismiss for lack of a speedy trial. The Supreme Court "has consistently been of the view that '[t]he right of a speedy trial is necessarily relative.'" *United States v. Ewell*, 383 U.S. 116, 120 (1966) (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)). "It secures rights to a defendant" while guarding "the rights of public justice." *Id.* (quoting *Beavers*). The government provided compelling reasons for its delay: to protect the maritime drug trafficking investigation and its informants, to preserve amity with Colombian authorities, and to arrest and extradite Jimenez and his codefendants. Jimenez offered no evidence that the government delayed prosecution to prejudice him or to gain a tactical advantage for itself. *See Barker*, 407 U.S. at 531. Although the first and third *Barker* factors—the length of the delay and Jimenez's prompt assertion of his right to a speedy trial—weigh heavily against the government, the second factor—the reasons for the delay—weighs "only slightly against it." When "the reasons for the delay do not weigh heavily against the government [, the defendant is] . . . not excuse[d] from . . . showing . . . actual prejudice." *Davenport*, 935 F.2d at 1240. Jimenez never alleged that he was

prejudiced by the delay. A balancing of the *Barker* factors establishes that the government did not deprive Jimenez of his right to a speedy trial.

B. The District Court Also Did Not Err by Denying Jimenez's Omnibus Motion to Dismiss.

Jimenez argues that his conviction under the Maritime Drug Law Enforcement Act is unconstitutional in four ways. He also argues that his ineligibility for relief from a mandatory minimum sentence under the safety valve, 18 U.S.C. § 3553(f), violates his constitutional right to equal protection of the law under the Fifth Amendment.

Our precedents foreclose Jimenez's four challenges to his conviction for violating the Act. First, Jimenez argues that the power of Congress to punish maritime felonies does not extend to drug trafficking offenses that lack a nexus to the United States, but "we have repeatedly held that Congress has the power, under the Felonies Clause, to proscribe drug trafficking on the high seas," *United States v. Campbell*, 743 F.3d 802, 812 (11th Cir. 2014); *see Cruickshank*, 837 F.3d at 1188. Second, Jimenez argues that the district court violated the Due Process Clause of the Fifth Amendment by exercising jurisdiction over his offense without proof of a domestic nexus, but in *Campbell* we held that "the conduct proscribed by the Act need not have a nexus to the United States because universal and protective principles support its extraterritorial reach," 743 F.3d at 810. Third, Jimenez argues that the Act violates his right to due process under the Fifth

Amendment and his right to a jury trial under the Sixth Amendment because it removes the factual basis of the jurisdictional requirement from a jury's consideration, but the Court in *Campbell* also held that the Fifth and Sixth Amendments do not require a jury to determine whether extraterritorial jurisdiction exists under the Maritime Act, 743 F.3d at 809. Fourth, Jimenez argues that the acceptance by the district court of a certificate from the Secretary of State as conclusive proof of jurisdiction under the Act violates his right of confrontation under the Sixth Amendment, but we explained in *Cruickshank* that a "certification of jurisdiction under the [Act] does not implicate the Confrontation Clause because it does not affect the guilt or innocence of a defendant," 837 F.3d at 1191.

Our recent decision in *United States v. Castillo*, 899 F.3d 1208 (11th Cir. 2018), also forecloses Jimenez's challenge to his sentence. In *Castillo*, we held that "international concerns" provided Congress a rational basis to "mete out [more] hefty sentences to maritime drug runners" than to their domestic counterparts. *Id.* at 1213. We concluded that "Congress has legitimate reasons to craft strict sentences for violations of the Act" because, "[i]n contrast with domestic drug offenses, "international drug trafficking raises pressing concerns about foreign relations and global obligations," as evidenced by our commitment by treaty to thwart maritime drug trafficking, and because the more severe penalty for maritime trafficking could "deter would-be offenders." *Id.*

IV. CONCLUSION

We **AFFIRM** Jimenez's conviction and sentence.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-20801

46 U.S.C. § 70506(b)
21 U.S.C. § 853

CR - DIMITROULEAS

MAGISTRATE JUDGE
SNOW

UNITED STATES OF AMERICA

vs.

LUIS ENRIQUE RENTERIA GRANADOS,
a/k/a "El Viejo,"
a/k/a "El Tio,"
a/k/a "Señor,"
LISIMACO CORTEZ MOTTA,
a/k/a "Socito,"
CARLOS ALBERTO SINESTERRA PEÑALOSA,
a/k/a "Winny,"
a/k/a "Juanca,"
LUIS ROLANDO BUENO JIMENEZ,
a/k/a "El Mono,"
and
NELSON ALBERTO PENAGOS MOLINA,
a/k/a "El Papi,"

Defendants.
_____/

INDICTMENT

The Grand Jury charges that:

Beginning at least as early as on or about February 1, 2012 and continuing until on or about December 31, 2012, the defendants,

LUIS ENRIQUE RENTERIA GRANADOS,
a/k/a "El Viejo,"
a/k/a "El Tio,"
a/k/a "Señor,"
LISIMACO CORTEZ MOTTA,
a/k/a "Socito,"

CARLOS ALBERTO SINESTERRA PEÑALOSA,
a/k/a "Winny,"
a/k/a "Juanca,"
LUIS ROLANDO BUENO JIMENEZ,
a/k/a "El Mono,"
and
NELSON ALBERTO PENAGOS MOLINA,
a/k/a "El Papi,"

did knowingly and willfully combine, conspire, confederate and agree with each other and with other persons known and unknown to the Grand Jury and with known persons on board a vessel subject to the jurisdiction of the United States, to possess with intent to distribute a controlled substance, in violation of Title 46, United States Code, Section 70503(a); all in violation of Title 46, United States Code, Section 70506(b).

Pursuant to Title 46, United States Code, Section 70506(a) and Title 21, United States Code, Section 960(b)(1)(B), it is further alleged that this violation involved five (5) kilograms or more of a mixture and substance containing a detectable amount of cocaine.

CRIMINAL FORFEITURE

a. The allegations of this Indictment are realleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendants have an interest.

b. Upon conviction of the violation alleged in this Indictment, the defendants shall forfeit to the United States any property constituting or derived from any proceeds which the defendants obtained, directly or indirectly, as the result of such violation, and any property which the defendants used or intended to be used in any manner or part to commit or to facilitate the commission of such violation.

All pursuant to Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON

WIFREDO A. FERRER
UNITED STATES ATTORNEY

DUSTIN M. DAVIS
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA **CASE NO.** _____

vs.

CERTIFICATE OF TRIAL ATTORNEY*

LUIS ENRIQUE RENTERIA GRANADOS, et al.,

Defendants.

_____/

Superseding Case Information:

Court Division: (Select One)

_X_ Miami _____ Key West
_____ FTL _____ WPB _____ FTP _____

New Defendant(s) Yes _____ No _____
Number of New Defendants _____
Total number of counts _____

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.
3. Interpreter: (Yes or No) _Y_
   List language and/or dialect Spanish
4. This case will take _____ days for the parties to try.
5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	_____	Petty	_____
II	6 to 10 days	_X_	Minor	_____
III	11 to 20 days	_____	Misdem.	_____
IV	21 to 60 days	_____	Felony	_____
V	61 days and over	_____		

6. Has this case been previously filed in this District Court? (Yes or No) _No_ If yes:
   Judge: _____ Case No. _____
   (Attach copy of dispositive order)
   Has a complaint been filed in this matter? (Yes or No) _No_ If yes:
   Magistrate Case No.: _____
   Related Miscellaneous number: _____
   Defendant(s) in federal custody as of: _____
   Defendant(s) in state custody as of: _____
   Rule 20 from the District of: _____
   Is this a potential death penalty case? (Yes or No) _No_
7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? _____ Yes _X_ No
8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? _____ Yes _X_ No

_____
DUSTIN M. DAVIS
ASSISTANT UNITED STATES ATTORNEY
COURT ID NO. A5501193

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: LUIS ENRIQUE RENTERIA GRANADOS

Case No: _____

Count #: 1

Conspiracy to Possess with Intent to Distribute Cocaine On Board a Vessel Subject to the Jurisdiction of the United States

Title 46, United States Code, Section 70506(b)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: LISIMACO CORTEZ MOTTA

Case No: _____

Count #: 1

Conspiracy to Possess with Intent to Distribute Cocaine On Board a Vessel Subject to the Jurisdiction of the United States

Title 46, United States Code, Section 70506(b)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: CARLOS ALBERTO SINESTERRA PEÑALOSA

Case No: _____

Count #: 1

Conspiracy to Possess with Intent to Distribute Cocaine On Board a Vessel Subject to the Jurisdiction of the United States

Title 46, United States Code, Section 70506(b)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: LUIS ROLANDO BUENO JIMENEZ

Case No: _____

Count #: 1

Conspiracy to Possess with Intent to Distribute Cocaine On Board a Vessel Subject to the Jurisdiction of the United States

Title 46, United States Code, Section 70506(b)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: NELSON ALBERTO PENAGOS MOLINA

Case No: _____

Count #: 1

Conspiracy to Possess with Intent to Distribute Cocaine On Board a Vessel Subject to the Jurisdiction of the United States

Title 46, United States Code, Section 70506(b)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LUIS ROLANDO BUENO-JIMENEZ,

Defendant.
_____/

CASE NO. 13-20801-CR-DIMITROULEAS

O R D E R

THIS CAUSE is before the Court on Defendant Bueno-Jimenez's May 12, 2017 Motion to Dismiss Indictment [DE-139]. The Court has considered the Government's June 25, 2017 Response [DE-147] and no timely reply having been filed, finds as follows:

1. On October 17, 2013, Bueno-Jimenez along with four (4) co-defendants, was indicted and charged with Conspiracy to Possess with Intent to Distribute Five (5) kilograms or more of Cocaine while on Board a Vessel Subject to the Jurisdiction of the United States, pursuant to 46 U.S.C. § 70506(a) and 21 U.S.C. § 960(b)(1)(B). [DE-3]. The conspiracy allegedly occurred in 2012.

2. On or about March 29, 2012, a United States marine patrol aircraft located and tracked a self-propelled semi submersible submarine (SPSS) in international waters in the Caribbean Sea. After receiving permission from Honduran authorities, the United States Coast Guard (USCG) pursued the SPSS into the territorial waters of Honduras and attempted to interdict the SPSS. The USCG was able to video record the SPSS sinking and thereafter rescued four crew members on board. Because the SPSS was scuttled in 3,000 feet of water, no cargo was recovered. However, one crew member informed law enforcement authorities that cocaine was loaded onto the SPSS prior to departing Colombia.

3. On or about July 26, 2012, Columbian law enforcement authorities conducted surveillance in a remote jungle area of Necocli, Colombia, based on information obtained from a confidential source

and intercepted telephone conversations. During this surveillance, drug trafficking organization (DTO) members became aware of the law enforcement authorities' presence and burned the SPSS.

4. On or about December 4, 2012, a US marine patrol aircraft spotted a motionless SPSS approximately 40 nautical miles from the coast of Bocas del Toro, Panama, with three crew members on the deck. As the USCG, together with Costa Rican and Panamanian law enforcement officers arrived, the SPSS was scuttled. Seventy-Four (74) kilograms of cocaine were recovered.

5. Bueno-Jimenez was arrested about twenty-seven (27) months later in Columbia pursuant to a warrant issued out of the Southern District of Florida. Bueno-Jimenez was brought to the United States on February 27, 2017. His case is set for trial on August 7, 2017.

6. In this Motion to Dismiss, Defendant claims that 46 U.S.C. § 70501-70505 are unconstitutional as applied to him as his alleged offenses have no nexus to the United States. He also complains about being ineligible for the safety valve. Finally, he complains that the certification process for determining jurisdiction is unconstitutional.

7. Defendant's complaints are foreclosed by Eleventh Circuit precedent. *U.S. v. Solis-Cortes*, 2017 WL 2645543 (11th Cir. June 20, 2017); *U.S. v. Tinoco*, 304 F. 3d 1088, 1106 (11th Cir. 2002); *U.S. v. Pertuz-Pertuz*, 679 F. 3d 1327 (11th Cir. 2012); *U.S. v. Campbell*, 743 F. 3d 802, 806 (11th Cir.) *cert. denied*, 135 S. Ct. 704 (2014).

Wherefore, Defendant's Motion to Dismiss [DE-159] is Denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 7th day of June, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

FORT LAUDERDALE DIVISION

CASE NO. 13-20801-CR-WPD

UNITED STATES OF AMERICA,	
Plaintiff,	Fort Lauderdale, Florida
	October 12, 2017
v.	1:29 p.m.
LUIS ROLANDO BUENO JIMENEZ,	
Defendant.	

- - - - -

Transcript of Sentencing Hearing had before the Honorable William P. Dimitrouleas, United States District Judge.

- - - - -

APPEARANCES:

For the Government: Donald F. Chase, II
Assistant U.S. Attorney
United States Attorney's Office
500 E. Broward Boulevard, 7th Floor
Fort Lauderdale, FL 33301-3002

For the Defendant: Timothy Day
Assistant Federal Public Defender
Federal Public Defender's Office
One East Broward Boulevard
Suite 1100
Fort Lauderdale, FL 33301-1842

Court Reporter: Francine C. Salopek, RMR, CRR
Official Court Reporter
United States District Court
299 E. Broward Blvd., Room 205F
Fort Lauderdale, Florida 33301

- - - - -

Proceedings recorded by mechanical stenography, transcript produced by computer.

THURSDAY, OCTOBER 12, 2017, 1:29 P.M.

(The Judge entered the courtroom)

THE COURT: Please be seated.

United States vs. Nicaya Cooper.

If counsel would announce their appearances for the record.

MR. DAY: I don't see her here yet, your Honor.

THE COURT: All right. We'll keep the case on recall.

United States vs. Luis Rolando Bueno Jimenez.

If counsel would announce their appearances for the record.

MR. CHASE: Good afternoon, Judge. Don Chase, Assistant United States Attorney, on behalf of the United States of America.

MR. DAY: Good afternoon, your Honor. Tim Day from the federal defender's office on behalf of Mr. Bueno Jimenez, who's present in court.

THE COURT: All right. Mr. Bueno Jimenez -- do we have a stipulation that the interpreters are qualified interpreters?

MR. CHASE: Yes, your Honor.

MR. DAY: Yes, we do, your Honor.

THE COURT: And is the interpreting equipment working properly, Mr. Bueno Jimenez?

THE DEFENDANT: Yes, sir. Good morning *(sic)*.

THE COURT: Good morning. I guess it's good afternoon.

And if you don't understand something, you'll let me know?

THE DEFENDANT: Okay. Yes, sir.

THE COURT: All right. Mr. Bueno Jimenez is before the Court having pled guilty to conspiracy to possess with the intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States. I adjudicated him guilty, deferred sentencing, ordered a Presentence Investigation Report that I've received and reviewed.

Have counsel had an opportunity to review the Presentence Investigation Report?

Mr. Chase?

MR. CHASE: Yes, your Honor.

THE COURT: Mr. Day?

MR. DAY: Yes, your Honor.

THE COURT: Mr. Bueno Jimenez, have you read the Presentence Investigation Report or had it translated to you to your satisfaction?

THE DEFENDANT: Yes, sir.

THE COURT: And have you discussed the Presentence Investigation Report with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Any objection to the Presentence Investigation Report from the government?

MR. CHASE: No, your Honor.

MR. DAY: No objection, your Honor.

THE COURT: Mr. Day?

So, we come up with an offense level 33, criminal history category I, for a range of 135 to 168 months, is that correct?

MR. DAY: That's correct, your Honor.

MR. CHASE: Yes, your Honor.

THE COURT: Any legal cause to show why sentence should not be imposed?

MR. DAY: Your Honor, no legal cause, but I filed a motion for a *Booker* variance.

THE COURT: What's the government's position on a 120-month sentence?

MR. CHASE: Judge, I've been directed to oppose it based upon a reason that you previously denied in the codefendants, based upon the weight, for being nine tons of cocaine, that the ten-year minimum mandatory that the Court is being requested to impose by defense counsel is triggered at five kilograms. In this case, you had nine tons of cocaine. But the Court denied that argument the government made against the downward variances in the prior defendants.

THE COURT: And I guess Mr. Day's gonna argue that to

prevent disparate sentences, I ought to be consistent with the way I ruled before.

MR. CHASE: I understand that, Judge. It's a well-founded argument. Also, Judge, there's another consideration that happened since the guilty plea.

In the plea agreement, the parties agreed that there would be no arguments regarding role, whether it be upward or downward. At that time, when we entered the plea agreement, Judge, I was opposing the minor role for the third defendant listed on the indictment, Mr. Sinesterra Peñalosa, based upon the fact, Judge, that he was the one that provided the molds or the blueprints to build the SPSS.

As the Court will probably remember, my argument was that all these defendants were dependent upon each other, that you could not build the SPS *(sic)* to transport the cocaine without the blueprints. This defendant was the builder. He didn't provide the blueprints. I viewed the provider of the blueprints, that being Mr. Sinesterra Peñalosa, as having a special skill. The Court overruled my objection and granted the minor role that was being requested.

In the court docket, Judge, it doesn't really show that you granted that minor role, because of the fact that since it's a Title 46 case, there's a ten-year mandatory minimum, no safety valve. So that was the ruling the Court made based upon possible changes in the law in the future, as

well as an appeal that was pending.

But, Judge, as you know, the government sets out defendants in order on indictments from the top to the bottom based upon liability and culpability. Mr. Renteria Granados was the leader. He recruited this defendant. You gave him 120 months.

Mr. Cortez Motta, he's the number two defendant listed.

Mr. Sinesterra Peñalosa, you gave the number three defendant listed in the indictment a minor role reduction.

The fourth defendant is this defendant that's in front of you today.

And the fifth defendant, Mr. Penagos Molina, the government a filed superseding indictment, and the plea agreement recommended minor role for him, and you granted it.

So, defendants three and four, which appear above and below Mr. Bueno Jimenez in the indictment, as well as on page 10 of the PSI, received minor role.

So, Mr. Day is precluded by a plea agreement from arguing minor role, but then, again, the Court does not have to adopt that particular provision of the plea agreement.

THE COURT: All right. I'm inclined to give Mr. Bueno Jimenez the same sentence that I gave the other people that had to get the mandatory minimum.

Anything further, Mr. Day?

MR. DAY: Nothing, your Honor.

THE COURT: Anything you want to say, Mr. Bueno Jimenez, before I impose sentence?

THE DEFENDANT: Yes. Good afternoon, everyone.

I want to apologize to the entire United States and to everyone who is here today. I know that I cannot fix the past. However, but I do want to make a change in my life, and I do know that what I did was not a good thing to do.

And the truth is that I apologize again. And I don't want to ever go through something like this again in my life.

And the truth is that in going through this has opened my eyes and helped me to reflect on the fact that I want a good future for my family and for myself, also.

And it is not easy to see that sometimes we -- that we harm people and sometimes we, uhm, harm others. However... and I want to fix my life so that in the future, I won't do the same thing again, and I can be with my family again.

Thank you all for hearing me and listening to me.

THE COURT: Anything further before I impose sentence?

MR. DAY: Nothing, your Honor.

MR. CHASE: No, your Honor.

THE COURT: All right. Having considered the sentencing guidelines, having considered the factors in 18 United States Code, Section 3553(a), it's up to the Court to determine what a reasonable and sufficient sentence is.

And it seems to me that Mr. Bueno Jimenez should get the same sentence that I gave Mr. Renteria Granados. So it will be judgment of Court and sentence of law that Mr. Bueno Jimenez be sentenced to 120 months in prison. Upon his release from prison, I place him on five years of supervised release.

While on supervised release, he shall not commit any crimes; he shall be prohibited from possessing a firearm or other dangerous device; he shall not possess any controlled substances; he shall comply with the standard conditions of supervised release, including the special condition that if he's removed or deported, that he not reenter the United States without the express written permission of the Secretary of Homeland Security. If he's removed or deported, the remainder of the supervised release will be nonreporting while he's outside the United States.

If he should reenter the United States during the period of the supervised release, he's to report to the nearest probation office within 72 hours of his arrival. If for some reason he's not removed or deported, I order that he submit to a reasonable search of his person or property conducted at a reasonable time and manner by his probation officer.

I find that he's not able to pay a fine. I waive the fine, impose a hundred dollar special assessment.

Mr. Bueno Jimenez, it's my duty to inform you that you have 14 days within which to appeal the judgment and the

sentence of this Court. Should you desire to appeal and be without funds with which to prosecute an appeal, an attorney will be appointed to represent you in connection with that appeal. Should you fail to appeal within that 14-day period, it will constitute a waiver of your right to appeal.

And there was a reservation of appellate rights in this case, is that correct?

MR. DAY: Yes, there was, your Honor.

First of all, one thing I would like to ask the Court to do, to include in your sentencing is that, as the Court knows, we had a hearing on my motion to dismiss for post-indictment delay, and I'll preserve that in just a moment.

But, your Honor, I'm asking that the judgment and sentence order from the Court indicate that Mr. Bueno Jimenez was arrested January the 24th in 2016 in Colombia. He was arrested on the warrant that was -- a provisional warrant that was issued from this Court. There was nothing else that was holding him. He was not under -- he was not in custody for any other thing.

THE COURT: Let me interrupt you for a second.

Mr. Chase, do you have any objection to my recommending credit for time served back to January 24th, 2014 *(sic)*?

MR. CHASE: No, Judge. That's been done in the other defendants' cases.

THE COURT: Okay.

MR. DAY: That's the only thing that I wanted to speak to the Court about before I preserved my objections.

THE COURT: Also, it's my duty to elicit from counsel for all parties fully articulated objections to the Court's findings of fact and conclusions of law as announced at the sentencing hearing, and to further elicit any objection which any party may have to the manner in which the sentence was imposed in this case.

Are there any objections from the government?

MR. CHASE: No, your Honor.

THE COURT: Mr. Day?

MR. DAY: Yes, your Honor. As is contained in the plea agreement that you went over with Mr. Bueno Jimenez at his plea, at this time, your Honor, there are two pretrial motions that we reserve the right to appeal. The first is Docket Entry 125 entitled "motion to dismiss indictment due to post-indictment delay, in violation of the Sixth Amendment right to speedy trial," Mr. Bueno Jimenez's Sixth Amendment right to speedy trial.

As the Court knows, there was a 27-month delay between the arrest in January of 2014 *(sic)* -- excuse me -- between the indictment in June -- June 24th of 2016 *(sic)* -- he was arrested approximately 27 months after the indictment was returned.

And we have set forth our arguments. We had oral argument here in front of the Court. I want to renew and remake all of the arguments that I made at that particular point in time. And I reassert and reallege each of the factual allegations and the principles of law that are set forth in Docket Entry 125, the motion to dismiss based on post-indictment delay.

THE COURT: All right. Well, my rulings are the same.

MR. DAY: Your Honor, in addition to that, I also filed a second motion, which the government has agreed that we reserved our right to on appeal. And that is the Docket Entry 139. That was our omnibus motion to dismiss the indictment, contesting that there's no subject matter jurisdiction. All of the arguments for that are contained within that particular motion. I reassert those at this particular point in time.

Also, your Honor, the lack of a safety valve and the equal protection arguments that are contained in there, as well, the safety valve such that it would take away the ten-year mandatory minimum. Each and every one of those arguments that I made in Docket Entry 139, I reassert and reallege to the Court at this point in time.

THE COURT: All right. My rulings are the same.

All right. I'll recommend credit for time served back to January 24th of 2014 *(sic)*. The marshal will execute the

sentence of the Court.

Good luck to you, Mr. Bueno Jimenez.

MR. DAY: Judge, if I could just have just a moment.

THE COURT: All right.

(Discussion had off the record between counsel and client)

MR. DAY: Your Honor, I would ask that the Court recommend to the Bureau of Prisons that Mr. Bueno Jimenez be housed in a facility in the Southern District of Florida.

THE COURT: I'll recommend a south Florida facility, realizing that recommendation is persuasive not controlling on the Bureau of Prisons, but I make it for whatever it's worth.

Mr. Chase, did you have something?

MR. CHASE: Yes, Judge. I just want to double-check the credit for time served in Colombia. The arrest date was January 24th, 2016.

THE COURT: '16, not '14.

MR. DAY: I'm sorry. I think I said 2014. That's correct.

THE COURT: Because that would make sense, if the indictment was in '13 --

MR. DAY: Right.

THE COURT: -- and it was 27 months afterwards --

MR. DAY: Right.

THE COURT: -- then it would be in six -- '15 or '16.

So, I'll recommend credit for time served back to January 24th of 2016.

MR. CHASE: Thank you, sir.

MR. DAY: Thank you.

THE COURT: And the marshal will execute the sentence of the Court.

Good luck to you, Mr. Bueno Jimenez.

(Proceedings concluded at 1:45 p.m.)

- - - - -

C E R T I F I C A T E

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

/S/Francine C. Salopek — 11-26-17

Francine C. Salopek, RMR-CRR
Official Court Reporter

Date

APPENDIX E

STATUTORY PROVISIONS INVOLVED

46 U.S.C. § 70503(a) provides:

> **(a) Prohibitions**.—While on board a covered vessel, an individual may not knowingly or intentionally—
>
> (1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;
>
> (2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or
>
> (3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

46 U.S.C. § 70506 provides in relevant part:

> **(a) Violations**.—
>
> A person violating paragraph (1) of section 70503(a) of this title shall be punished as provided in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960). However, if the offense is a second or subsequent offense as provided in section 1012(b) of that Act (21 U.S.C. 962(b)), the person shall be punished as provided in section 1012 of that Act (21 U.S.C. 962).
>
> **(b) Attempts and Conspiracies**.—
>
> A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503.

21 U.S.C. § 960 provides in relevant part:

(a) Unlawful acts Any person who—

(1) contrary to section 825, 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,

shall be punished as provided in subsection (b).

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving—

(A) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(B) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 280 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

(D) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(E) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(G) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana; or

(H) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.[1]

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

18 U.S.C. § 3553(f) provides:

> **(f) Limitation on Applicability of Statutory Minimums in Certain Cases**.—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.