

No.

In the Supreme Court of the United States

OCTOBER TERM, 2018

YEISON VALENCIA TORRES, 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

Israel Jose Encinosa, Esq.
Attorney of record for Petitioner
(Appointed pursuant to C.J.A.)
9100 S. Dadeland Blvd., Suite 1500
Miami, FL 33156
Tel. (786) 497-7241
E-Mail: encilaw@aol.com

QUESTIONS PRESENTED

I

The exclusion of the Maritime Drug Law Enforcement Act (46 U.S.C. § 70503) from eligibility for safety valve violates equal protection, because there is no rational basis to make safety valve relief unavailable to offenders who commit wholly foreign drug offenses, while making it available to those who commit the same offense within the territorial United States. Furthermore, the Supreme Court should also grant certiorari because there exists a conflict between the D.C. Circuit and the Ninth and Eleventh Circuit Court of appeals.

PARTIES TO THE PROCEEDING

Petitioner, Yeison Valencia Torres was the Defendant in the District Court for the Southern District of Florida (District Court), and the Appellant before the Eleventh Circuit Court of Appeals. The United States of America, was the Plaintiff in the District Court for the Southern District of Florida, and the Appellee before the Eleventh Circuit Court of Appeals.

CERTIFICATE OF COMPLIANCE

The Petitioner has complied with the requirements set forth in Rule 33 of the Supreme Court. In particular, Petitioner certifies that a 12-point Times Roman font was used in this petition, and pursuant to Supreme Court Rule the petition for certiorari contains 4,722 words or less excluding, the questions presented, list of parties and corporate disclosure statement, the table of content, the table of cited authorities, the listing of counsel at the end of document, or any appendix.

<u>TABLE OF CONTENTS</u>	PAGE
QUESTIONS PRESENTED.....	ii
PARTIES TO THE PROCEEDING.....	ii
CERTIFICATE OF COMPLIANCE (RULE 33).....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION INVOLVED.....	1
COURSE AND PROCEEDING BEFORE DISTRICT COURT.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING PETITION	6
I. The exclusion of the Maritime Drug Law Enforcement Act (46 U.S.C. § 70503) from eligibility for safety valve violates equal protection, because there is no rational basis to make safety valve relief unavailable to offenders who commit wholly foreign drug offenses, while making it available to those who commit the same offense within the territorial United States Furthermore, the Supreme Court should also grant certiorari because there exists a conflict between the D.C. Circuit and and the Ninth and Eleventh Circuit Court of appeals.....	6
CONCLUSION.....	14
 <u>APPENDIX:</u>	
APPENDIX-A Indictment (November 12, 2017).....	15

APPENDIX B - District Court Criminal Judgment	
(March 15, 2018).....	16
APPENDIX C- Transcript of Sentencing Hearing	
(March 12, 2018).....	17
APPENDIX D- Eleventh Circuit Court of Appeals Publish Opinion	
(November 15, 2018-Case No.: 18-11134).....	18

TABLE OF AUTHORITIES	PAGE
<u>Anders v. Hometown Mortg. Servs., Inc.</u> , 346 F.3d 1024, 1031 (11th Cir. 2003).....	11
<u>Johnson v. Robinson</u> , 415 U.S. 361, 366, 94 S. Ct. 1160 (1974).....	6
<u>Pyler v. Doe</u> , 457 U.S. 202, 217, 102 S. Ct. 2382, 2396 (1982).....	11
<u>United States v. Alexander</u> , No. 16-16921 (11th Cir., 11/14/2017).....	9
<u>United States v. Booker</u> , 543 U.S. 220, 239-40, 125 S. Ct. 738, 753 (2005).....	11
<u>United States v. Ferreira</u> , 275 F.3d 1020 (11th Cir. 2001).....	12
<u>United States v. Gamboa</u> , 508 F.3d 491, 496 (9th Cir. 2007).....	1, 13
<u>United States V. Mosquera-Murillo</u> , 902 F.3d 285 (D.C. Cir. 2018).....	1, 13
<u>United States v. Pertuz-Pertuz</u> , 679 F.3d 1327 (11th Cir. 2012).....	1, 10, 13

United States v. Windsor,

--- U.S. ---, 133 S. Ct. 2672, 2698 (2013)..... 6

Constitution, Statutes and Other Authorities

Due Process Clause..... 1, 6

Equal Protection Clause..... 1, 2, 5, 6, 9, 11, 12, 13

Fifth Amendment..... 1, 6

Fourteenth Amendment..... 6

18 U.S.C. § 3231..... vi

18 U.S.C. § 3553(f)..... 6, 7, 8, 9, 10, 11

18 U.S.C. § 3742(a)(1)..... vi

21 U.S.C. § 841..... 8, 9, 10

21 U.S.C. § 844..... 8, 9, 10

21 U.S.C. § 846..... 8, 9, 10

21 U.S.C. § 955..... 13

21 U.S.C. § 960..... 8, 9, 10, 11

21 U.S.C. § 960(a)(1)..... 13

21 U.S.C. § 960(a)(2)..... 13

21 U.S.C. § 960(b)(1)(B)..... 2, 5, 7

21 U.S.C. § 963..... 8, 9, 10, 13

28 U.S.C. § 994..... 9

18 U.S.C. § 1257.....	1
28 U.S.C. § 1291.....	vi
46 U.S.C. §70503.....	ii, iii, 1, 6, 11, 13
46 U.S.C. §70503(a)(1).....	2, 5, 7, 9, 10
46 U.S.C. § 70506(a).....	10, 11, 13
46 U.S.C. § 70506 (b).....	2, 5, 7, 9
Rule 33, Supreme Court.....	ii

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals was entered on November 15, 2018, on Case No. 18-11134 and is attached hereto as Appendix-D.

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was entered on November 15, 2018. [Appendix-D] This Court has jurisdiction to review this case under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS/CONFLICT BETWEEN CIRCUIT

The Fifth Amendment of the United States Constitution mandates that no person shall be deprived of life, liberty, or property without due process of law and implicit guarantees that each person receive **equal protection** of the laws. There is also conflict between the Circuit D.C. Circuit decision of United States v. Mosquera-Murillo, 902 F.3d 285 (D.C. Cir. 2018) and The Ninth Circuit decision of United States v. Gamboa, 508 F.3d 491, 496 (9th Cir. 2007), and the Eleventh Circuit decision of United States v. Pertruz-Pertruz, 679 F.3d 1327, 1329 (11th Cir. 2012) on this issue.

STATEMENT OF COURSE AND PROCEEDING

On October 20, 2017 the Appellant was detained on narcotic related charges, along with Jose Angel Ramos Flores, Vicente Salazar Guapi, and Heriberto Monyoma Diaz in the Pacific Ocean, approximately 140 NM southwest of Malpelo Island, Colombia by crew members of the Coast Guard Cutter (CGC) *Thetis*. Thereafter, Mr. Valencia Torres, and all Co-Defendants were brought to face charges in the Southern District of Florida. [DE-1:2-4]

On November 12, 2017 the Grand Jury returned a two-count indictment against, JOSE ANGEL RAMOS FLORES, VICENTE SALAZAR GUAPI, HERIBERTO MONYOMA DIAZ, and Appellant, YEISON VALENCIA. [Appendix-A], [DE-8]

The indictment charged all defendants as follows:

a. **Count-1** of the Indictment, conspiracy to possess with the intent to distribute cocaine aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. § 70503 (a)(1), 46 U.S.C. § 70506 (b); and 21 U.S.C. § 960(b)(1)(B).

b. **Count-2** of the Indictment, intentionally possess with the intent to distribute cocaine, 46 U.S.C. § 70503 (a)(1), 46 U.S.C. § 70506 (b), and 21 U.S.C. § 960(b)(1)(B).
[Appendix-A],[DE-8]

On December 18, 2018, Appellant pled guilty to both count-1 of the indictment [PH-21:21:8-12], & [DE-73:21:8-12]

The revised Pre-Sentence Investigation Report (PSI) was filed by U.S. Probation on March 6, 2018. [DE-41] In the revised PSI, the Probation Department recommended to the District Court that Mr. Valencia Torres be given a 2 levels downward departure for Safety Valve, pursuant to

U.S.S.G. 5C1.2 [DE-41] At the sentencing hearing the Court agreed and awarded Mr. Valencia-Torres the 2-level reduction for safety valve. [Appendix-C, 4:15], [SH-4:15] However, despite receiving safety valve, the Court did not sentenced Appellant to less than 120 months in prison.

It should be noted that Mr. Valencia Torres, properly preserved the Equal Protection issue for appeal by setting for his argument in his Objections to the pre-Sentence Investigation report.

[DE-43] The Appellant also preserved this issue at the end of his sentencing hearing, by objecting to his sentence. [SH-5:13]

Appellant was sentenced on March 12, 2018, to 120 months in prison, 5-years Supervised Release, and a Special Assessment of \$100.00. [Appendix-D], [DE-51], [SH-8:15-16],

On March 19, 2018 Appellant timely filed his Notice of Appeal. [DE-53]

Mr. Valencia-Torres is currently serving his 120-months prison sentence at Rivers CI, Winton, NC 27986.

STATEMENT OF FACTS

On October 20, 2017, a United States Coast Guard (USCG) Maritime Aircraft located a suspect vessel dead in the water approximately 140 NM southwest of Malpelo Island, Colombia. The Coast Guard Cutter (CGC) *Thetis* was approximately 11 NM south and diverted to investigate the suspect vessel. Upon observing the vessel, the *Thetis* launched it's Over the Horizon boats (OTH). When the OTH was approximately 2 NM away from the suspect vessel, it started to move and remained underway for a short period of time, then stopped again. The crew of the OTH observed 4 persons on board the suspect boat. The crew of the OTH also observed, three outboard engines, and bales and packages on deck. The crew of the OTH observed no flag,

no registration documents, and no registration number on the GFV. The master of the vessel refused to answer any questions. The USCG District Headquarters granted permission to the USCG officers to treat the vessel as without nationality, subject to U.S. jurisdiction, and granted authorization for a full lawful boarding. [DE-1:2-4]

The other individual aboard the suspect vessel were identified as, JOSE ANGEL RAMOS FLORES, A Mexican National, VICENTE SALAZAR GUAPI, HERIBERTO MONYOMA DIAZ, and the Appellant, YEISON VALENCIA TORRES, all three were Colombian nationals. Onboard the vessel, the USCG crew found numerous bales and packages, which two Narcotics Identification Kit (NIK) tests of the bales yielded positive result for the presence of cocaine. In total, there were 30 bales of cocaine, which contained approximately 1,060 kilograms of suspected cocaine. In addition, the USCG crew also recovered eight packages that tested positive for marijuana. The approximate weight of the marijuana was 14 pounds. As a result of this information all on board the vessel were arrested for possession with the intent to distribute 5-kilograms or more of cocaine, while on board of a vessel subject to the jurisdiction of the United States. The vessel was then sunk because it was not towable and hazardous to navigation. All arrested were brought to the Southern District of Florida on October 30, 2017. [DE-1:2-4]

On November 2, 2017 the Grand Jury returned a two-count indictment against, JOSE ANGEL RAMOS FLORES, VICENTE SALAZAR GUAPI, HERIBERTO MONYOMA DIAZ, and Appellant, YEISON VALENCIA. [DE-8]

The indictment charged all defendants as follows:

a. **Count-1** of the Indictment, conspiracy to possess with the intent to distribute

cocaine aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. § 70503 (a)(1), 46 U.S.C. § 70506 (b); and 21 U.S.C. § 960(b)(1)(B).

b. **Count-2** of the Indictment, intentionally possess with the intent to distribute cocaine, 46 U.S.C. § 70503 (a)(1), 46 U.S.C. § 70506 (b), and 21 U.S.C. § 960(b)(1)(B). [DE-8]

On December 18, 2018, Appellant pled guilty to both count-1 of the indictment. [PH-21:21:8-12], & [DE-73:21:8-12]

The revised Pre-sentence Investigation report (PSI) was filed by U.S. Probation on March 6, 2018. [DE-41] In the Revised PSI, the Probation Department recommended to the District Court that Mr. Valencia-Torres be given a 2 levels downward departure for Safety Valve, pursuant to U.S.S.G. 5C1.2 [DE-41] At the sentencing hearing the Court agreed and awarded Mr. Valencia-Torres the 2-level reduction for safety valve. However, despite receiving safety valve, the Court did not sentenced Appellant to less than 120 months in prison.

It should be noted that Mr. Valencia Torres, properly preserved the Equal Protection issue for appeal by setting for his argument in his Objections to the pre-Sentence Investigation report. [DE-43] The Appellant also preserved this issue at the end of his sentencing hearing, by objecting to his sentence. [SH-74:8:17-23], & [DE-74:8:17-23]

Appellant was sentenced on March 12, 2018, to 120 months in prison, 5-years Supervised Release, and a Special Assessment of \$100.00. [DE-51], [SH-7:20-25], & [DE-74:7:20-25]

On March 19, 2018 Appellant timely filed his Notice of Appeal. [DE-53]

Mr. Valencia-Torres is currently serving his 120-months prison sentence at Rivers CI, Winton, NC 27986.

REASONS FOR GRANTING THE PETITION

I

The exclusion of the Maritime Drug Law Enforcement Act (46 U.S.C. § 70503) from eligibility for safety valve violates equal protection, because there is no rational basis to make safety valve relief unavailable to offenders who commit wholly foreign drug offenses, while making it available to those who commit the same offense within the territorial United States. Furthermore, the Supreme Court should also grant certiorari because there exists a conflict between the D.C. Circuit and the Ninth and Eleventh Circuit Court of appeals.

The federal drug statutes at issue in this case have created an arbitrary and irrational classification between persons who commit identical offenses based solely on the geographic location of their crimes. By denying eligibility for safety valve relief under 18 U.S.C. § 3553(f) to defendants who commit their offenses outside the territorial jurisdiction of the United States, while making relief available to those who commit the same offense within our borders – and even to those who bring drugs from outside the nation into the territorial United States -- Congress has created an arbitrary classification of persons without any rational basis, in violation of Due Process Clause of the Fifth Amendment and the equal protection of the laws. See United States v. Windsor, --- U.S. ---, 133 S. Ct. 2672, 2698 (2013) (“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”) (citations omitted); Johnson v. Robinson, 415 U.S. 361, 366, 94 S. Ct. 1160 (1974) (“[I]f a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.”).

During Appellant’s sentencing hearing, the Court first calculated the applicable sentencing guidelines. The Court determined that the base offense level was 38. [SH-16:5] Then the Court reduced 2-levels for safety valve and 3-levels for acceptance of responsibility. [SH-4:15] These reductions placed Appellant at a total offense level 33. [SH-4:13-17] In light of Appellant having a criminal history category of I, the Court determined that Appellant advisory guideline range was 135 to 168 months.[SH-4:15-19] The Court then granted Appellant’s motion for downward variance and sentenced him to 120 months in prison.[SH-4:20-23] The Court should note that in order to get down to a sentencing guideline of 120 month, at the very least would require the Court to lower Appellant’s guideline level by 2, thus putting the Appellant in a Total Offense level of 31, which calls for a guideline range of 108 to 135 months in prison. However, in the case at bar, the Court sentenced Appellant to the mandatory minimal sentence of 120 months in prison. [SH-4:21]

Typically, in all cases dealing with “possession of cocaine with the intent to distribute”, if the defendant meets all 5 factors of 18 U.S.C. § 3553(f) then the court can sentence such a defendant to less than the 10 years mandatory minimum sentence. However, some courts have determine that Title 46 does not allow a defendant to be sentence to less than the minimum mandatory sentence of 10 years, because Title 46 is not one of the 5 enumerated statutes listed under the Maritime Drug Law Enforcement Act, (MDLEA).

In the case at bar, Appellant pled guilty to conspiracy to “possess with the intent to distribute” 5 kilograms or more of cocaine, in violation of 46 U.S.C. § 70503 (a)(1), 46 U.S.C. § 70506 (b); and 21 U.S.C. § 960(b)(1)(B). Typically, all crimes dealing with possession with the intent to

distribute 5 kilograms or more of cocaine are safety valve eligible. Thus, the question then becomes whether a defendant has meet all requirements to become safety valve eligible.

In order to determine whether a defendant is “safety valve eligible” the Court must first turn to 18 U.S.C. § 3553(f), which reads as follows:

(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 fire- arm or other dangerous weapon (or induce another participant to do so) in connection with the offense;**
- (3) the offense did not result in death or serious bodily injury to any person;**
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and**
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement. [Emphasis added]**

In the case at bar, Mr. Valencia-Torres met all 5 requirements of 18 U.S.C. § 3553(f).

Appellant was even fully debriefed and gave a complete truthful statements to the

Government. Thus, had Appellant been charged under one of the enumerated statutes drug trafficking statute, such as 21 U.S.C. § § 841, 844, 846 960 or 963 then Appellant would be safety valve eligible to received a sentence of less than 10 years. However, because he was charged with violating 46 U.S.C. § 70503 (a)(1), and 46 U.S.C. § 70506 (b) of the Maritime Drug Law Enforcement Act (MDLE) Appellant was not safety valve eligible. Accordingly, Appellant's sentence under the MDLEA violates the Equal Protection clause of the United States Constitution.

A case that is worth noting is that of United States v. Alexander, No. 16-16921 (11th Cir., 11/14/2017). It should be noted that in Alexander, this Court was recently asked to determine whether or not Mr. Alexander's Equal protection right were violated because he was also sentence under the MDLEA. In Alexander, this Court rejected Mr. Alexander's arguments and concluded that there was no violation of the Equal Protection clause of the United States Constitution. However, Alexander was decided under the "plain error" standard of review because Mr. Alexander did not present his Equal Protection objection at the time that his sentence was imposed. This standard of review gives defense to the district court's findings. However, in the case at bar, Appellant noted his Equal Protection objection at the time that his sentenced was pronounced. [SH-20:2-15] Therefore, the standard of review in this case is a neutral one, in that it requires this Court to perform a *de novo* review.

The "safety valve" provision of 18 U.S.C. § 3553(f) provides an escape from harsh mandatory minimum sentences for drug offenders who meet five enumerated criteria. That

section states: “[n]otwithstanding 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 defendant meets the listed criteria.

In United States v. Pertuz-Pertuz, 679 F.3d 1327 (11th Cir. 2012), this Court concluded, as a matter of statutory construction, that defendants sentenced under Title 46 of the United States Code are not entitled to safety valve relief under 18 U.S.C. § 3553(f). The Court had previously “said 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.’” Pertuz-Pertuz, 679 F.3d 1327 (11th Cir. 2012)(citation omitted). The court rejected the argument that the safety valve should apply because 46 U.S.C. § 70506(a) specifically “references section 960 as the penalty provision.” See Pertuz-Pertuz, 679 F.3d at 1329. While this is true, the Court noted that the converse is not: “Although 46 U.S.C. § 70506(a) references section 960 as the penalty provision for violations of 46 U.S.C. § 70503, section 960 does not incorporate section 70503 by reference as an ‘offense under’ section 960.” Pertuz-Pertuz, 679 F.3d at 1329. Therefore, solely as a matter of statutory construction, the Court held that MDLEA offenses are ineligible for safety valve.

The defendant in Pertuz-Pertuz did not challenge the constitutionality of his sentence, and the court did not address the Equal Protection challenge that Appellant raises herein. Therefore, this

Court may consider this Equal Protection challenge as a matter of first impression. See United States v. Booker, 543 U.S. 220, 239-40, 125 S. Ct. 738, 753 (2005) (rejecting government’s argument that *stare decisis* applied, where prior Guidelines cases had not addressed the relevant constitutional challenge); Anders v. Hometown Mortg. Servs., Inc., 346 F.3d 1024, 1031 (11th Cir. 2003) (“The prior panel precedent rule obligates us to follow the holdings of an earlier decision, but the holdings of a prior decision can reach only as far as the facts and circumstances presented to the court in the case which produced that decision.”)(citations, quotation marks, and alterations omitted).

The exclusion of 46 U.S.C. § 70503 from safety-valve relief violates equal protection. By excluding Appellant’s convicted under the MDLEA from eligibility for safety valve relief, Section 3553(f) violates the constitution, because there is no conceivable rational basis for such exclusion. Defendants convicted under the MDLEA have committed the same offense and, importantly, are subject to the same penalty provision as defendants who are entitled to safety valve. See 46 U.S.C. § 70506(a)(incorporating penalties set forth in 21 U.S.C. § 960). The exclusion of safety valve relief thus creates a distinction between similarly-situated offenders based on no more than the geographical location where the offense was committed. This is irrational, and thus unconstitutional.

“The Equal Protection Clause directs that ‘all persons similarly circumstanced shall be treated alike.’” Pyler v. Doe, 457 U.S. 202, 217, 102 S. Ct. 2382, 2396 (1982) (citation omitted).

In applying the Equal Protection Clause to classifications among persons, the Court must seek “the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.” Id.

Because the classification in this case is based on geography, and not on any suspect classification, Appellant concedes that it is subject to the deferential rational basis standard. Cf. United States v. Ferreira, 275 F.3d 1020 (11th Cir. 2001) (subjecting Hostage Taking Act, which creates distinctions based on alienage, to rational basis review). The Eleventh Circuit applies “a two-step analysis” in determining whether that standard is met. Id. First, the Court must identify “a legitimate government purpose — a goal — which the enacting government body could have been pursuing.” Id. (citations omitted). The “actual motivations of the enacting governmental body are entirely irrelevant,” as long as such a goal could have been envisioned. See id. (citations omitted). “The second step of rational-basis scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose.” Id. (citations omitted). Again, “[a]s long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives rational basis scrutiny.” Id. (citations omitted).

Even under this deferential standard, the statute at issue here fails. There is no rational reason to subject defendants who commit drug trafficking offenses outside the United States to harsher penalties than those who traffic drugs within our borders.

Further defying explanation, the safety valve provision includes defendants who are convicted

under “section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. § 960, 963).” 46 U.S.C. § 70503. Thus even defendants who import drugs into the country (21 U.S.C. § 960(a)(1)), or possess an illicit drug while “on board a vessel arriving in . . . the United States.” 21 U.S.C. § 955 (incorporated into 21 U.S.C. § 960(a)(2)). There is no conceivable reason why a defendant who commits a similar offense half a world away, without any direct effect on the United States, should be denied the same relief. It simply makes no sense that Congress would punish such foreign, extraterritorial offenders more harshly than those who are trafficking within the United States or found bringing drugs to U.S. shores.

The omission of 46 U.S.C. § 70503 from the safety valve statute appears at best to have been an oversight, and at worst an irrational and arbitrary distinction. However, this oversight was recently corrected by the First Step Act of 2018. Section 402 (a) (1) (A) (ii), of the First Step Act broaden the existing “safety valve” by inserting Title 46 sections 70503 and 70506. All though the First Step Act does not apply retro actively, by its enactment, the First Step Act cures the Equal Protection violation and inequities of Title 46.

There is also seems to be a conflict between the D.C. Circuit decision of United States v. Mosquera-Murillo, 902 F.3d 285 (D.C. Cir. 2018), and The Ninth Circuit decision of United States v. Gamboa, 508 F.3d 491, 496 (9th Cir. 2007), and the Eleventh Circuit decision of United States v. Pertruz-Pertruz, 679 F.3d 1327, 1329 (11th Cir. 2012) on this same issue.

Wherefore, the exclusion of 46 U.S.C. § 70503 from the safety valve statute lacks a rational basis, and violates Equal Protection.

CONCLUSION

For the reasons stated herein, Mr. Valencia Torres asks this Honorable Court to grant his petition for certiorari and that his sentence be vacate and remand to the to the district court for further proceedings.

Respectfully submitted,

By: *Israel Jose Encinosa*
Israel J. Encinosa, Esq.

APPENDIX A

Nov 2, 2017

STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
17-20786-CR-UNGARO/O'SULLIVAN

Case No. _____

46 U.S.C. § 70506(b)

46 U.S.C. § 70503(a)(1)

46 U.S.C. § 70507(a)

UNITED STATES OF AMERICA

vs.

**JOSE ANGEL RAMOS FLORES,
YEISON VALENCIA TORRES,
VICENTE SALAZAR GUAPI,
and
HERIBERTO MANYOMA DIAZ,**

Defendants.

INDICTMENT

The Grand Jury charges that:

COUNT 1

Beginning on an unknown date and continuing through on or about October 20, 2017, while on board a vessel subject to the jurisdiction of the United States, with Miami-Dade County in the Southern District of Florida being the district at which the defendants entered the United States, the defendants,

**JOSE ANGEL RAMOS FLORES,
YEISON VALENCIA TORRES,
VICENTE SALAZAR GUAPI,
and
HERIBERTO MANYOMA DIAZ,**

knowingly and willfully combined, conspire, and agreed with each other and other persons

unknown to the Grand Jury, to possess with intent to distribute a controlled substance, in violation of Title 46, United States Code, Section 70503(a)(1); all in violation of Title 46, United States Code, Section 70506(b).

With respect to all defendants, the controlled substance involved in the conspiracy attributable to them as a result of their own conduct, and the conduct of other conspirators reasonably foreseeable to them, is five kilograms or more of a mixture and substance containing a detectable amount of cocaine, and a detectable amount of marijuana, in violation of Title 46, United States Code, Section 70506(a) and Title 21, United States Code, Section 960(b)(1)(B) and (b)(4).

COUNT 2

On or about October 20, 2017, while on board a vessel subject to the jurisdiction of the United States, with Miami-Dade County in the Southern District of Florida being the district at which the defendants entered the United States, the defendants,

**JOSE ANGEL RAMOS FLORES,
YEISON VALENCIA TORRES,
VICENTE SALAZAR GUAPI,
and
HERIBERTO MANYOMA DIAZ,**

knowingly and intentionally possessed with intent to distribute a controlled substance, in violation of Title 46, United States Code, Section 70503(a)(1) and Title 18, United States Code, Section 2.

Pursuant to Title 46, United States Code, Section 70506(a) and Title 21, United States Code, Section 960(b)(1)(B) and (b)(4), it is further alleged that this violation involved five kilograms or more of a mixture and substance containing a detectable amount of cocaine, and a detectable amount of marijuana.

FORFEITURE ALLEGATIONS

1. The allegations of Counts 1 and 2 of this Indictment are re-alleged and incorporated herein for the purpose of alleging criminal forfeiture to the United States of America of property in which one or more of the defendants have an interest.

2. Upon conviction of either of the violations alleged in Counts 1 and 2 of this Indictment, the defendants shall forfeit to the United States any property that is used or intended for use to commit, or facilitate the commission of, such violations.

All pursuant to Title 46, United States Code, Section 70507(a), and the procedures set forth at Title 21, United States Code, Section 853 as made applicable by Title 28, United States Code, Section 2461(c).

A TRUE BILL

<

F



BENJAMIN G. GREENBERG
ACTING UNITED STATES ATTORNEY



FRANK H. TAMEN
ASSISTANT UNITED STATES ATTORNEY

APPENDIX B

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA**JUDGMENT IN A CRIMINAL CASE****v.****Case Number - 1:17-20786-CR-UNGARO-****YEISON VALENCIA TORRES**

USM Number: 15101-104

Counsel For Defendant: Israel Encinosa, Esq.
Counsel For The United States: Frank Tamen, AUSA
Court Reporter: William Romanishin

The defendant pleaded guilty to Count(s) Two of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
Title 46 USC 70503(a)(1)	Possession with intent to distribute five kilograms or more cocaine a detectable amount of marijuana while on board a vessel subject to the jurisdiction of the United States	10/20/17	Two

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

All remaining Count(s) are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
3/12/2018


URSULA UNGARO
United States District Judge

March 15, 2018

DEFENDANT: **YEISON VALENCIA TORRES**
CASE NUMBER: 1:17-20786-CR-UNGARO-

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **ONE HUNDRED AND TWENTY (120) MONTHS.**

The Court makes the following recommendations to the Bureau of Prisons:

A facility where the defendant can receive an education and a trade

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: **YEISON VALENCIA TORRES**
CASE NUMBER: 1:17-20786-CR-UNGARO-

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: YEISON VALENCIA TORRES
CASE NUMBER: 1:17-20786-CR-UNGARO-

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

DEFENDANT: YEISON VALENCIA TORRES
CASE NUMBER: 1:17-20786-CR-UNGARO-

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment

\$100.00

Total Fine

\$

Total Restitution

\$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **YEISON VALENCIA TORRES**
CASE NUMBER: 1:17-20786-CR-UNGARO-

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of \$ due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 17-20786-Cr-UNGARO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
-v-)	
)	
YEISON VALENCIA TORRES,)	
VICENTE SALAZAR GUAPI and)	
HERIBERTO MANYOMA DIAZ,)	
)	Miami, Florida
Defendants.)	March 12, 2018
-----)	11:15 a.m.

Pages 1-17

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE URSULA UNGARO
U.S. DISTRICT JUDGE

APPEARANCES:

For the Government	FRANK TAMEN Assistant U.S. Attorney 99 Northeast 4th Street Miami, Florida 33132-2111
For Defendant Valencia Torres	ISRAEL J. ENCINOSA, ESQ. 9100 South Dadeland Boulevard Suite 1500 Miami, Florida 33156
(continued)	

(Interpreters present)

REPORTED BY: (305) 523-5558	WILLIAM G. ROMANISHIN, RMR, FCRR, CRR Official Court Reporter 400 North Miami Avenue Miami, Florida 33128
--------------------------------	--

1 APPEARANCES (continued):

2 For Defendant DANIEL ECARIUS
3 Salazar Guapi Assistant Federal Public Defender
4 150 West Flagler Street
5 Miami, Florida 33130-1556

6 For Defendant PHILIP R. HOROWITZ, ESQ.
7 Manyoma Diaz 9130 South Dadeland Boulevard
8 Suite 1910 - Two Datan Center
9 Miami, Florida 33156

10 (Call to order of the Court)

11 THE COURT: Good morning.

12 The case before the Court is 17-20786-Criminal for
13 sentencing.

14 Who's here for the United States?

15 MR. TAMEN: Good morning, Your Honor. Frank Tamen
16 representing the United States.

17 THE COURT: Okay. Good morning. You can have a
18 seat.

19 And who's from Probation?

20 THE PROBATION OFFICER: Good morning, Your Honor.
21 Mercedes Sarnoza and Alejandro Fernandez, a new colleague,
22 from U.S. Probation.

23 THE COURT: Okay. Thank you. You can have a seat.

24 Who's here for Mr. Salazar Guapi?

25 MR. ECARIUS: Good morning, Your Honor. Daniel
Ecarius from the Federal Defenders on behalf of Mr. Salazar
Guapi, who's standing next to me.

THE COURT: And have you reviewed the PSI with your

1 client?

2 MR. ECARIUS: Yes, I have.

3 THE COURT: And do you know of any reason we
4 shouldn't proceed with the sentencing?

5 MR. ECARIUS: No.

6 THE COURT: Okay. He's the only defendant in the
7 case who did not get safety valve credit.

8 Is that still the situation, Mr. Tamen?

9 MR. TAMEN: Yes, Your Honor. He declined to provide
10 a statement explaining his involvement in the offense. So his
11 situation is that puts him in a different level than the other
12 two.

13 THE COURT: Yes, it does. We'll talk about it in a
14 minute. You can have a seat, Mr. Ecarius.

15 Who's here for Heriberto Manyoma Diaz?

16 MR. HOROWITZ: Good morning, Your Honor. Phil
17 Horowitz on his behalf, and Mr. Manyoma Diaz is present with
18 the assistance of the Spanish interpreter.

19 THE COURT: And have you been over the PSI with your
20 client?

21 MR. HOROWITZ: I have, Your Honor.

22 THE COURT: And do you know of any reason we
23 shouldn't proceed with the sentencing?

24 MR. HOROWITZ: No, Your Honor.

25 THE COURT: Okay. Fine. You can have a seat.

1 And who's here for Yeison Valencia Torres?

2 MR. ENCINOSA: Yes. Good morning, Your Honor.

3 Israel Encinosa on behalf of Yeison Valencia Torres. He is
4 present and he also has the assistance of a Spanish-speaking
5 interpreter.

6 THE COURT: And have you been over the PSI with your
7 client?

8 MR. ENCINOSA: Yes, Your Honor.

9 THE COURT: And do you know of any reason we
10 shouldn't proceed with the sentencing?

11 MR. ENCINOSA: No, Your Honor.

12 THE COURT: Okay. Fine. So have a seat.

13 So I think we should take up Mr. Valencia Torres and
14 Mr. Salazar Guapi first.

15 So both of them got safety valve credit and they each
16 are guidelining to 135 to 168 months, total offense level 33,
17 criminal history category 1. And they fall into the category
18 of the fishermen that get fished out of the gulf or the
19 Pacific.

20 So what we've been doing with these people is
21 basically sentencing them to the minimum-mandatory.

22 Do you have a problem with that, Mr. Tamen?

23 MR. TAMEN: No, Your Honor.

24 I have no reason to say that these defendants, those
25 two defendants, should be treated differently than any of the

1 other defendants caught on a boat with a ton of dope in the
2 middle of the ocean.

3 THE COURT: Okay. Fine.

4 So, Mr. Encinosa, what would you like to say for your
5 client?

6 MR. ENCINOSA: Your Honor, on behalf of my client,
7 first of all, I'd like just to renew the only objection that I
8 have left, and this is just for the record, Your Honor.

9 Basically, the charge against Mr. Valencia Torres
10 doesn't allow the Court to go below the safety valve ten
11 years' minimum-mandatory.

12 THE COURT: Yes, that's true.

13 MR. ENCINOSA: And I just want to preserve that. In
14 my opinion, that's a violation of the equal protection rights,
15 because other trafficking offenses, such as importation, the
16 Court has discretion to go below the ten years' minimum-
17 mandatory, and I think that violates equal protection.

18 THE COURT: Well, I can think of a number of reasons
19 that makes it not violate the equal protection clause, such as
20 the fact that these people tend to bring in very large
21 quantities of narcotics. And so they may be illiterate and
22 they may be poor but, nonetheless, what they do is extremely
23 offensive to the United States. And so there is a difference
24 between them and the garden variety of importers that we see.
25 So they may risk their lives. They may be poor. They may be

1 illiterate and they may be desperate. But this is a lot of
2 cocaine.

3 MR. ENCINOSA: Okay, Your Honor.

4 THE COURT: And typically, that's what we see in the
5 cases.

6 So do you wish to say anything before the Court
7 imposes sentence, Mr. Valencia Torres?

8 DEFENDANT VALENCIA TORRES (all through the
9 interpreter): Yes.

10 THE COURT: Okay. What would you like to say?

11 DEFENDANT VALENCIA TORRES: First of all, I'd like to
12 apologize to all of you for what I have done. I am actually
13 very remorseful for what I have done.

14 THE COURT: Okay.

15 DEFENDANT VALENCIA TORRES: I promise, though, that I
16 will never, ever do it again. And from the bottom of my
17 heart, I do apologize for what I have done. I did it for
18 financial reasons.

19 I was raised without a mother. I wasn't able to
20 study. I have no studies at all. I was raised from home to
21 home with my family, my grandmother. There was never any
22 resources for me to study. I was also raised by an aunt. I
23 have no roof of my own over my head, never had, and I thought
24 that with this I was able to do something like that, and I
25 have a sister of mine. She's been with me since she was 8.

1 And so I did this also for my sister. My sister, I
2 didn't want her grow up like I did, and I wanted her to have a
3 home where she would rest, a home where she would be with me
4 and my wife. Her father died and her mom was an alcoholic.

5 That is all. And from the bottom of my heart, I
6 apologize and I promise I will never do it again. Thank you.

7 THE COURT: Well, your remorse and all of these
8 circumstances are certainly a reason for the Court to find
9 that a sentence of ten years would be sufficient but not
10 greater than necessary in your case. So, if you'll stand with
11 Mr. Encinosa, the Court will sentence you now.

12 The Court has considered the statements of the
13 parties, the presentence report containing the advisory
14 guidelines and the statutory factors. Having considered all
15 of the factors, the Court finds a sentence at the mandatory-
16 minimum is sufficient but not greater than necessary to impose
17 just punishment in this case.

18 The Court further finds that the defendant is not
19 able to pay a fine.

20 It is the judgment of the Court that the defendant,
21 Jason Valencia Torres, is committed to the Bureau of Prisons
22 to be imprisoned for 120 months as to Count 2.

23 Upon release from imprisonment the defendant shall be
24 placed on supervised release for a term of five years as to
25 Count 2. Within 72 hours of release the defendant shall

1 report in person to the probation office in the district where
2 released.

3 While on supervised release the defendant shall
4 comply with the mandatory and standard conditions of
5 supervised release, which include not committing any crimes;
6 being prohibited from possessing a firearm or other dangerous
7 device; not unlawfully possessing a controlled substance and
8 cooperating in the collection of DNA.

9 The defendant shall also comply with the following
10 special conditions: Surrendering to Immigration for removal
11 after imprisonment, and the payment of any unpaid assessments
12 as stated in Part G of the presentence report.

13 It is further ordered that the defendant shall
14 immediately pay to the United States an assessment of \$100.

15 So the total sentence is 120 months' imprisonment,
16 five years' supervised release, and a \$100 assessment.

17 And now that sentence has been imposed, does the
18 defendant or his counsel object to the Court's findings of
19 fact or to the manner in which sentence was pronounced?

20 MR. ENCINOSA: Your Honor, only insofar as that issue
21 of equal protections that we discussed a little while ago.
22 And also, to save time, I'll adopt Mr. Horowitz's arguments on
23 this point.

24 THE COURT: Okay. Fine.

25 Now, Mr. Valencia Torres, you may have some rights to

1 take an appeal from the sentence I just imposed. If you want
2 to take an appeal, the notice of appeal has to be filed within
3 14 days of entry of the judgment of conviction.

4 Also, if you wish to take an appeal and you cannot
5 afford a lawyer to represent you on appeal or cannot afford
6 the costs of the appeal, the Court will waive the costs and
7 appoint a lawyer upon the filing of a proper motion.

8 Anything else?

9 MR. ENCINOSA: Your Honor, if you can recommend to
10 the Bureau of Prisons that he be housed in a facility -- and
11 I'm sorry, I don't have any names -- where he can actually get
12 an education and learn how to read and write.

13 THE COURT: So recommended.

14 MR. ENCINOSA: Okay. Thank you.

15 THE COURT: Okay. Fine. And maybe learn a trade
16 even.

17 MR. ENCINOSA: Learn a trade, exactly.

18 THE COURT: Yes.

19 All right. Mr. Horowitz, your client is also at 135
20 to 168 months. It's the Court's intention to sentence him to
21 the minimum-mandatory.

22 What do you want to say?

23 MR. HOROWITZ: Judge, I want to adopt the same
24 argument that Mr. Encinosa made regarding equal protection. I
25 understand Mr. Manyoma Diaz did receive the two extra levels

1 under 2D1.1(b)(17), plus he did qualify for the safety valve.
2 However, we believe that he's not getting equal protection
3 under the law and that it doesn't give the Court the ability
4 to impose a sentence below the ten-year minimum-mandatory as
5 permitted under 3553(f).

6 THE COURT: I want to ask you something actually
7 looking ahead to the next sentencing.

8 MR. HOROWITZ: Yes, Your Honor.

9 THE COURT: So, in providing a safety valve
10 statement, what is it that your client did? What was the
11 safety valve statement?

12 MR. HOROWITZ: Your Honor, he was debriefed by the
13 agents.

14 THE COURT: He was debriefed.

15 MR. HOROWITZ: Yes, Your Honor, for about two hours
16 and told them everything that he knew. And that satisfied the
17 fifth prong. That's usually the most difficult part.

18 THE COURT: Okay.

19 MR. HOROWITZ: The first four prongs he clearly
20 satisfied. He's not an organizer/leader.

21 THE COURT: No, that's fine. I just wanted to know
22 how liberal the Government was being in construing the
23 obligation to come forward with a full statement.

24 MR. HOROWITZ: Judge, "liberal" wouldn't be a term I
25 would use. But I would use that term for Mr. Manyoma Diaz and

1 that he did qualify for the fifth prong.

2 THE COURT: Mr. Manyoma Diaz, is there anything you'd
3 like to say before the Court imposes sentence?

4 DEFENDANT MANYOMA DIAZ (through the interpreter):
5 Yes, Your Honor.

6 First of all, I'd like to apologize. I'd like to
7 apologize first to God and I'd also like to apologize to the
8 United States. I apologize for this wrongdoing. But the fact
9 is that I did it because I needed the financial means. My mom
10 needed the financial means because she had to have some
11 surgery done and she didn't have the resources.

12 The reason why I was tempted to do this, the reason
13 why I was forced to do this is because I didn't the means. My
14 kids are studying and I didn't have any resources, and that is
15 the reason why I accepted this job. My wife has a little
16 house, and financially, we were not doing well. But with the
17 little money that I received, we were able to kind of organize
18 our little house.

19 I am very remorseful for having done this and I swear
20 I will not do it again. And thank you.

21 THE COURT: Okay. Thank you very much.

22 So, in light of the defendant's remorse and his
23 personal circumstances that he claims drove him to engage in
24 this conduct, the Court is content to find that a sentence of
25 120 months is sufficient but not greater than necessary to

1 address the criminal conduct in this case.

2 So, if the defendant will stand with you,
3 Mr. Horowitz, the Court is going to impose sentence.

4 The Court has considered the statements of the
5 parties, the presentence report containing the advisory
6 guidelines and the statutory factors. The Court finds that a
7 sentence at the mandatory-minimum is sufficient to provide
8 just punishment and deterrence in this case and is sufficient
9 but not greater than necessary to achieve all sentencing
10 goals.

11 The Court also finds that the defendant is not able
12 to pay a fine.

13 It is the judgment of the Court that the defendant,
14 Heriberto Manyoma Diaz, is committed to the Bureau of Prisons
15 to be imprisoned for 120 months as to Count 2.

16 Upon release from imprisonment the defendant shall be
17 placed on supervised release for a term of five years as to
18 Count 2. Within 72 hours of release the defendant shall
19 report in person to the probation office in the district where
20 released.

21 While on supervised release the defendant shall
22 comply with the mandatory and standard conditions of
23 supervised release, including not committing any crimes; being
24 prohibited from possessing a firearm or other dangerous
25 device; not unlawfully possessing a controlled substance and

1 cooperating in the collection of DNA.

2 The defendant shall also comply with the following
3 special conditions: Surrendering to Immigration for removal
4 after imprisonment, and payment of any unpaid assessments.

5 It is further ordered that the defendant shall
6 immediately pay to the United States an assessment of \$100.

7 So the total sentence is 120 months' imprisonment,
8 five years' supervised release, and a \$100 assessment.

9 And now that sentence has been imposed, does the
10 defendant or his counsel object to the Court's findings of
11 fact or to the manner in which sentence was pronounced?

12 MR. HOROWITZ: Yes, Your Honor. I just want to renew
13 my objection regarding any relief from the minimum-mandatory
14 sentence that the Court must impose.

15 THE COURT: Okay. Thanks.

16 Now, Mr. Manyoma Diaz, you may have some rights to
17 take an appeal from the sentence I just imposed. If you want
18 to take an appeal, the notice of appeal has to be filed within
19 14 days of entry of the judgment of conviction.

20 Also, if you wish to take an appeal and you cannot
21 afford a lawyer to represent you on appeal or cannot afford
22 the costs of the appeal, the Court will waive the costs and
23 appoint a lawyer upon the filing of a proper motion.

24 MR. HOROWITZ: Your Honor, I apologize. Before you
25 turn to the last case, can you make recommendations for

1 Mr. Manyoma Diaz, someplace where he can get an education,
2 learn how to read and write, the same issues.

3 THE COURT: So recommended.

4 MR. HOROWITZ: Thank you so much, Your Honor.

5 THE COURT: Okay. So now let's turn to Mr. Salazar
6 Guapi, who did not make a safety valve statement and who, as a
7 consequence, is looking at 168 to 210 months.

8 What's your position, Mr. Tamen? Low end?

9 MR. TAMEN: Judge, the guidelines provide an
10 approximately 33-month differential between those who provide
11 a safety valve statement and those who don't. In this case,
12 in accordance with my usual policy, they have to be debriefed.

13 So those who got the safety valve credit provided
14 information on how they got involved, where they were, what
15 they were doing, which is information that is of value to the
16 Government and also tends to make sure that the defendants are
17 being truthful in their admissions and not covering up things.

18 So I think, with these defendants having received 120
19 months, that there certainly should be a significant
20 difference between them and the person who did not.

21 THE COURT: Can I ask you a question?

22 MR. TAMEN: Yes.

23 THE COURT: So these fellows are Colombians, right?

24 MR. TAMEN: Yes.

25 THE COURT: And normally we see Ecuadorians. So

1 what's going on here?

2 MR. TAMEN: Well, Ecuador borders on Colombia.

3 THE COURT: So it's like a common beach basically.

4 MR. TAMEN: Right. And it's a transshipment point.

5 THE COURT: On the border.

6 MR. TAMEN: I guess the traffickers recruit people
7 from wherever they can find them. Both countries have
8 extensive sea coasts. Ecuador has probably a lot of people
9 who are used to boating and fishing. A lot of people earn
10 their livings doing that. So there's a ready supply of people
11 who are willing to do that there.

12 But I think that a difference of two years between
13 those who gave a safety valve statement and the one who did
14 not would be a fair distinction between the two.

15 THE COURT: Okay. What do you want to say,
16 Mr. Ecarius? So two years would be 144 months, right? 148, I
17 guess. No. Let's see. 144 months. So you're still
18 advocating a below-the-guideline sentence, Mr. Tamen.

19 MR. TAMEN: I have no objection to a below-the-
20 guideline sentence because I think consistency amongst the
21 defendants is important. The only difference between them is
22 the safety valve. So that should be the only factor that
23 accounts for a difference.

24 THE COURT: Okay. That was generous.

25 Okay. Mr. Ecarius.

1 MR. ECARIUS: Your Honor, I would ask that you
2 consider giving him the same ten years.

3 THE COURT: I'm not going to do it.

4 MR. ECARIUS: I would ask that you consider that.

5 THE COURT: I'm not going to it. I've considered it
6 and I'm not going to do it.

7 MR. ECARIUS: The fact is he didn't debrief because,
8 first of all, I think that he was intimidated by the process.
9 He's illiterate.

10 THE COURT: Well, is he asking for another
11 opportunity? Is he over his intimidation?

12 MR. ECARIUS: I mean, I think he is. But he also
13 felt he had minimal information to give. I've spoken to
14 Mr. Tamen and he didn't have anything additional in addition
15 to these other two gentlemen.

16 THE COURT: Well, does he want to debrief or not?

17 MR. ECARIUS: Well, if that's the difference, yes.

18 THE COURT: Well, I don't know. Let me hear it from
19 your client. Does he want to debrief?

20 MR. ECARIUS: He says yes.

21 THE COURT: Okay. When can you debrief him?

22 MR. TAMEN: I have to find out when we can get an
23 interview room at the grand jury suite when the agents are
24 available. It usually takes at least a week's advance notice
25 just to book the rooms.

1 THE COURT: All right. Let's just reschedule him for
2 two weeks from now.

3 MR. TAMEN: Can we make that three weeks, just so I
4 can get a report back from the agents on what he said and what
5 is consistent?

6 THE COURT: Fine.

7 THE COURTROOM DEPUTY: March 30th at 11:00.

8 THE COURT: All right. Let's try to do it March 30th
9 at 11:00.

10 MR. ECARIUS: Thank you.

11 THE COURT: Okay.

12 * * * * *

13 C E R T I F I C A T E

14
15 I certify that the foregoing is a correct transcript
16 from the record of proceedings in the above-entitled matter.
17
18
19
20
21
22
23
24
25

APPENDIX D

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11134
Non-Argument Calendar

D.C. Docket No. 1:17-cr-20786-UU-2

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

YEISON VALENCIA TORRES,

Defendant - Appellant.

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

(November 15, 2018)

Before MARTIN, JILL PRYOR and BLACK, Circuit Judges.

PER CURIAM:

Yeison Torres appeals his 120-month sentence following his conviction for possession with intent to distribute more than five kilograms of cocaine while onboard a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 *et seq.* (MDLEA). Torres contends the MDLEA’s exclusion from safety-valve relief provided in 18 U.S.C. § 3553(f) violates his right to equal protection under the Fifth Amendment. Because Torres’ sole argument is foreclosed by this Court’s decision in *United States v. Castillo*, 899 F.3d 1208, 1213 (11th Cir. 2018), we affirm. *See United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) (“Under the prior precedent rule, we are bound to follow a prior binding precedent unless and until it is overruled by this court en banc or by the Supreme Court.” (quotation omitted)).

AFFIRMED.