NO:

IN THE
SUPREME COURT OF THE UNITED STATES

No:

LUIS FELIPE VALENCIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Martin A. Feigenbaum, Esq.
Counsel for Petitioner
P.O. Box 545960
Surfside, Florida 33154
Telephone: (305) 323-4595
Facsimile: (844) 274-0862
Email: innering@aol.com

QUESTIONS PRESENTED

Petitioner was onboard a boat in international waters in the Eastern Pacific Ocean when the United States Coast Guard ("USCG") detained him for cocaine trafficking. Petitioner is a Colombian citizen, the boat was not registered in the United States, there was no evidence the cocaine was destined for the United States, and there was no nexus between the petitioner and the United States. Petitioner was charged in the Southern District of Florida for two violations of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§70503(a), 70506(b). A jury found him guilty of those two violations. This case presents three critical questions about the constitutionality of the MDLEA:

1. Whether the MDLEA is unconstitutional because the Government is not required to prove any "minimum contacts" between a defendant and the United States to establish jurisdiction over the cause.

2. Whether the MDLEA pretrial procedures to establish jurisdiction over a "stateless vessel" violate the Confrontation Clause of the Sixth Amendment.

3. Whether §70502(d)(1)(C) of the MDLEA is void for vagueness because it does not contain a time limit for a foreign nation to confirm whether a vessel is of its nationality before the United States can declare it "stateless" and subject its occupants to the jurisdiction of United States courts.

PARTIES TO THE PROCEEDING

Respondent United States of America was the plaintiff in the district court, the appellee in the direct appeal to the U.S. Court of Appeals for the Eleventh Circuit, and is an interested party in this Honorable Court. Co-appellants in the direct appeal were Henry Vazquez-Valois and Diego Portocarrero Valencia and are interested parties in this petition. *See United States v. Valois*, 915 F.3d 717 (11th Cir. 2019).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Luis Felipe Valencia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case, *United States v. Valois*, 915 F.3d 717 (11th Cir. 2019).

OPINION BELOW

The Appendix includes copies of: a) *United States v. Valois*, 915 F.3d 717 (11th Cir. 2019); b) indictment; c) judgment of conviction; d) 46 U.S.C. §§70502, 70502, 70504, 70506; e) United States Constitution Amendment V; and f) United States Constitution Amendment VI.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(l) and Part III of the Rules of the Supreme Court of the United States. In the underlying criminal case, the district court asserted jurisdiction because petitioner was charged with a violation of federal criminal statutes, 46 U.S.C. §§70503(a), 70506(b). The court of appeals had jurisdiction in petitioner's direct appeal, pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742, which provide that a United States court of appeals shall have jurisdiction for all final decisions of a United States district court.

STATUTES INVOLVED

This petition arises from the lower tribunal's review of petitioner's

convictions for violations of 46 U.S.C. §§70503(a), 70506(b). A-4.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Lower Tribunal.

On December 13, 2016, Respondent United States of Ameica ("Government") filed a criminal complaint alleging that Defendants Henry Vazquez-Valois ("Vazquez Valois"), Luis Felipe Valencia ("Valencia"), and Diego Portocarrero Valencia ("Portocarrero Valencia)(collectively "Defendants") violated 46 U.S.C. §§70506(b), 70503(a). On December 16, 2016, a grand jury returned an indictment against the Defendants: count 1, conspiracy to possess with the intent to distribute cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §70506(b); count 2, possession with the intent to distribute cocaine while on board a vessel subject to the jurisdiction of United States, in violation of 46 U.S.C. §70503(a). On January 3, 2017, the Defendants entered pleas of not guilty. The Honorable James I. Cohn, ("Judge"), United States District Judge, presided over the case in the district court.

On April 5, 2017, Valencia filed a Motion to Dismiss for Lack of Jurisdiction ("Motion to Dismiss"). On April 11, 2017, the Government filed a Motion for Pretrial Determination of Jurisdiction, attaching a Certification from the Department of State ("Certification"). On April 13, 2017, the Judge denied the

Motion to Dismiss. On April 19, 2017, Valencia filed his First Motion in Limine. Among the issues he raised in that Motion, Valencia asserted the Government should not be permitted to offer evidence of his pre-*Miranda* or post-*Miranda* silence. On May 3, 2017, the Government filed a response in opposition to that First Motion in Limine. On May 8, 2017, trial commenced in Key West and ended on May 10, 2017. On May 10, 2017, the jury returned verdicts of guilty on each count in the indictment as to all three Defendants.

B. Statement Of The Facts.

In November 2016 the USCG Cutter *Dependable* was tasked for counter-narcotics operations in the Eastern Pacific. On November 25, 2016 at around 8:00 a.m. the *Dependable* identified a "target of interest" ("TOI") on its radar and launched a pursuit team to investigate. The pursuit team's craft was designated "*Able 1*." *Able 1* eventually spotted the TOI, a "go-fast vessel" ("GFV"). GFV's usually are between 25-30 feet long with a fiberglass hull and two or three outboard motors. The pursuit team observed three men, one driving, the other two on the bow, and one of the officers said that he "witnessed them throw a package over the right side of the boat." An officer asked "right of approach" questions to the occupants of the GFV, including their destination, last port-of-call, next port-of- call, their individual nationalities, and whether there is a claim of nationality

for the vessel. One of the officers testified there was no evidence the drugs recovered in this interdiction were destined for the United States.

REASONS FOR GRANTING THE WRIT

I. The SUPREME COURT SHOULD GRANT THE WRIT TO DECIDE IF THE MDLEA IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT IS NOT REQUIRED TO PROVE "MINIMUM CONTACTS" BETWEEN A DEFENDANT AND THE UNITED STATES BEFORE A DISTRICT COURT CAN ESTABLISH JURISDICTION OVER THE CAUSE.

To proceed with an MDLEA prosecution the Government first must prove a basis for jurisdiction. This means the GFV had to qualify as a vessel "covered" by 46 U.S.C. §70502. A "covered vessel" is defined as "a vessel subject to the jurisdiction of the United States." 46 U.S.C. §70503(c)(1). A vessel "subject to the jurisdiction of the United States" includes one "without nationality." 46 U.S.C. §70502(c). The Government proceeded under that specific ground and, therefore, it had to prove that: a) one or more individuals on board the GFV made "a verbal claim of nationality or registry" for the vessel, that is Colombia; and b) the "nation of registry [did] not affirmatively and unequivocally assert that the vessel is of its nationality." 46 U.S.C. §70502(d)(1)(C).

The Government had no evidence the cocaine it alleged was being

transported by the GFV was destined for the United States. However, the Eleventh Circuit does not require that the Government prove a "nexus" to the United States. In fact, Eleventh Circuit precedent forecloses that issue as a ground for dismissal in a Title 46 case. *See, e.g., United States v. Cruickshank*, 837 F.3d 1182, 1188 (11th Cir. 2016). Valencia raised on direct appeal that there existed a good-faith basis for a modification of Eleventh Circuit precedent to require a nexus to the United States, but that ground for relief was denied.

In *J. McIntyre Mach., LTD. v. Nicastro,* 564 U.S. 873, 879 (2011)(plurality op.), the Supreme Court held: "The Due Process Clause protects an individual's right to be deprived of life, liberty, or property *only* by the exercise of lawful power." (emphasis supplied). The Supreme Court has handed down a line of cases which require "minimum contacts" in civil litigation. Those minimum contacts fulfill the need for a constitutionally-mandated "nexus" between the United States and a defendant. Without such "minimum contacts," a defendant cannot be "haled into court." However, the Supreme Court has not yet addressed whether the same Due Process protections apply to criminal statutes relying on extraterritorial jurisdiction like the MDLEA.

The Eleventh Circuit does not have a nexus requirement for MDLEA prosecutions. This means the Government can arrest and prosecute: a) foreign

citizens or residents found on the high seas *anywhere* in the world; b) charge them with violating United States drug laws; c) even though they are occupants of a vessel not registered in the United States; d) even though the vessel is not operating within United States territorial waters; and e) even though there is no evidence the drugs were destined for the United States. On the other hand, in the Ninth Circuit, the Government must prove the drugs had a nexus to the United States if the vessel is of a foreign nationality. *See, e.g.*, *United States v. Perlaza,* 439 F.3d 1149, 1160 (9th Cir. 2006).

In *Perlaza*, *supra*, the Ninth Circuit held that Due Process requires the Government to demonstrate that there exists a sufficient nexus between the conduct condemned and the United States. *Id.* at 1168-69; s*ee also United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998)(nexus to United States required); *United States v. Greer,* 956 F. Supp. 531, 536 (D. Vt. 1997)(nexus required "to satisfy the requirements of the Due Process Clause"). Courts which have required a nexus to the United States reason that, even if there is nothing in the statute's text on that issue, constitutional principles cannot be ignored simply because they are not stated in a criminal or civil law.

It must be noted that the above-cited Ninth Circuit cases, holding that the Government must prove a United States nexus, applies only to vessels where a

foreign nation has confirmed their registration. Other Circuits have adopted the nexus requirement. *See, e.g.*, *United States v. Youseff,* 327 F.3d 56, 111-112 (2nd Cir. 2003). Valencia argues that there is no rational difference in a case: a) where a foreign nation confirms registration or nationality of a vessel; and b) and one where the occupants claim registration or nationality which a foreign nation does *not confirm* but also does *not deny*. The reason is so obvious that it can be easily overlooked: constitutionally-mandated protections cannot depend on the efficiency *vel non* of foreign governments, some of which are notoriously tardy, or simply disinterested, in providing United States officials with information about their citizens or residents.[1] A fundamental constitutional right cannot depend on foreign governmental action.

In *United States v. Lawrence,* 727 F.3d 386, 396-97 (5th Cir. 2013), the Fifth Circuit appears to have sided with the Ninth Circuit albeit regarding a different drug statute. In *Lawrence,* the Fifth Circuit found the nexus requirement was met because a non-U.S. citizen was residing in Houston, and the conspiracy was formed in the United States. Here, there is a complete absence of facts to satisfy a

[1] *See* Issue III, *infra*. 46 U.S.C. §70502(d)(1)(C) does not provide for a period of time in which the Government must wait to hear back from a foreign nation before it can declare a vessel "stateless." Because there is no "window" for a foreign nation to respond, the Government can declare a vessel "stateless" within a few hours or even a few minutes.

"minimum contacts" or nexus requirement.

The Circuits which do not agree with the foregoing Due Process analysis in the Ninth and Second Circuits hold the only requirement under the MDLEA is that it not be applied in an "arbitrary or fundamentally unfair" manner. *See, e.g.*, *United States v. Ibarguen-Mosquera,* 634 F.3d 1370, 1378 (11th Cir. 2011). The reasoning is a foreigner prosecuted under the MDLEA is "on notice" the United States could exercise jurisdiction over him if the country of registration gives consent or that engaging in drug smuggling is recognized as illegal anywhere in the world.

Valencia argues this reasoning rests upon a very weak foundation: someone who resides in another country thousands of miles from the United States is not "on notice" about conduct not even *remotely* connected to the United States: a) he can be apprehended by United States law enforcement officials *anywhere* in the world; b) taken to the United States; c) haled into one of its courts; d) convicted of crimes with no nexus to the United States; and e) be severely punished, perhaps with a sentence of imprisonment for the rest of his life or close to it. That scenario has occurred all too often under the MDLEA, resulting in thousands of years of imprisonment being meted out to mostly indigent, uneducated foreign nationals.

II. THE SUPREME COURT SHOULD GRANT THE WRIT TO DECIDE IF MDLEA PROCEDURES TO ESTABLISH JURISDICTION OVER A "STATELESS" VESSEL VIOLATE THE CONFRONTATION CLAUSE.

The Government claimed subject-matter jurisdiction based on a "vessel without nationality" or "stateless vessel" where the "master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality." 46 U.S.C. §70502(d)(1)(C); *see United States v. Perlaza,* 439 F.3d 1149, 1160 (9th Cir. 2006) ("a vessel without nationality" is also commonly referred to as a "stateless vessel"). There is no dispute there was a claim of nationality or registry under one of the statutory grounds. *See* 46 U.S.C. §70502(e)(3)("a verbal claim of nationality or registry by the master or individual in charge of the vessel").

In *United States v. Campbell,* 743 F.3d 802, 806 (11th Cir. 2014), the Eleventh Circuit found that the Confrontation Clause does not bar the admission of hearsay to make a pretrial determination of jurisdiction when that hearsay does not pertain to an element of the offense. In *Campbell*, the Court held that the "statelessness" of the vessel was not an element of the offense to be proved at trial and, therefore, the admission of a State Department certification ("Certification") did not violate the defendant's right to confront witnesses against him. Valencia

argues the reasoning in *United States v. Campbell*, 743 F.3d 802 (11th Cir. 2014), violates Supreme Court precedent barring the use of hearsay when it directly can result in proving guilt.

In *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004), the Supreme Court held the Confrontation Clause "barred the admission of a testimonial statement by 'a witness who did not appear at *trial* unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.'" (emphasis supplied). In *Campbell, surpa*, the Eleventh Circuit rejected the notion that a Certification violated the defendant's right under the Confrontation Clause, relying in part on *United States v. Tinoco,* 304 F.3d 1088 (11th Cir. 2002). In *Tinoco,* the Eleventh Circuit held "that Congress was entitled to remove the jurisdictional requirement from the jury's consideration because it did "not raise factual questions that traditionally would have been treated as elements of an offense other than common law" (e.g. *actus reus*, causation, *mens rea*). *Id*. at 1108. The *Campbell* Court viewed "the jurisdictional requirement" merely as a "diplomatic courtesy to foreign nations and as a matter of international comity." *Id*. The Eleventh Circuit justified its view by concluding that proof of jurisdiction did not affect a defendant's culpability regarding his participation in drug trafficking.

Valencia disagrees with the result in *United States v. Campbell*, *supra*, and

the line of precedent upon which it relied. *Campbell* finds support in *United States v. Nueci-Pena,* 711 F.3d 191, 199 (1st Cir. 2013), and *United States v. Mitchell-Hunter,* 663 F.3d 45, 52 (1st Cir. 2011). However, it goes down the wrong road in relying on them because they contravene Fifth and Sixth Amendment protections: a) in pretrial matters, the issue of jurisdiction is the *most* critical fact because without it there can be no prosecution; and b) in post-trial conviction proceedings, it is nearly impossible to reverse constitutional violations. *See Campbell, supra*, 807-809 (lengthy discussion of Confrontation Clause protections at various phases of proceedings).

As to the specific facts described in *Campbell, supra*, they are different than here as to the issue of constitutional and structural error. More specifically, in *Campbell,* the defendant waived his right to a jury trial and stipulated to material facts which went to the issue of jurisdiction. Second, Eleventh Circuit precedent, in such cases as *Tinoco, supra,* at 1109-10, then foreclosed the defendant's argument as to who conducts the pretrial determination of jurisdiction. *See United States v. Campbell,* 743 F.3d 802, 809 (11th Cir. 2014).

The posture of Valencia's case is different than in *Campbell*, *supra*, because he did not waive his right to a jury determination on all material elements of the crimes charged, including the existence *vel non* of statutory jurisdiction. He

argues that *Crawford v. Washington,* 541 U.S. 36 (2004), bars admission of hearsay statements in a Certification as well as hearsay statements of any other United States and foreign official, without his right to confront them. This would include any and all wire, radio, or telephone communications permitted under 46 U.S.C. §70502(c)(2)(A)(B).

The Government proffered to the Judge a Certification and relied on other hearsay statements to meet its jurisdictional burden of proof. Because Valencia was precluded from cross-examining the declarants who purportedly made those statements, Valencia was denied fundamental constitutional guarantees, including under the Confrontation Clause. Because the Judge denied Valencia's Motion to Dismiss for Lack of Jurisdiction, Valencia's convictions must be *reversed*. This follows because there was harmful, structural error in the proceedings below. *Crawford v. Washington*, *supra*, at 51..

In *Crawford*, the Supreme Court made very clear "*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them. The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused - in other words, those who "bear testimony." *Id.* at 51 (citation omitted). The *Crawford* Court held that "an accuser who makes a formal statement to Government's officers

bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). *Crawford* also mentions there exists a "core class" of "testimonial statements," which include affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements "that declarants would reasonably expect to be used prosecutorially." *Id*. at 51-52 (citations omitted). The Certification clearly is a "testimonial statement."

Justice Scalia, who wrote the *Crawford v. Washington* opinion in which all Justices joined,[2] concluded with this concise central holding: "where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." *Id*. at 68. The day has arrived "to spell out" one of the definitions which should be included under *Crawford*'s protection: a Title 46 Certification. A defendant must be afforded the right to confront all witnesses who have

[2] Chief Justice Rehnquist filed an opinion concurring in the judgment. Justice O'Connor joined in that concurring opinion.

knowledge relating to the issuance of the Certification so that a jury can make a determination about whether the Government has sustained its burden of proof on an essential element of the crime. Otherwise, defendants will continue to be convicted through the admission of a Certification grounded in multiple hearsay never tested under constitutionally-mandated confrontation.[3]

III. THE SUPREME COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER §70502(d)(1)(C) OF THE MDLEA IS VOID FOR VAGUENESS BECAUSE IT DOES NOT CONTAIN A TIME LIMIT FOR A FOREIGN NATION TO CONFIRM WHETHER A VESSEL IS OF ITS NATIONALITY BEFORE THE UNITED STATES CAN DECLARE IT "STATELESS" AND SUBJECT ITS OCCUPANTS TO THE JURISDICTION OF UNITED STATES COURTS.

Sometimes the most obvious flies right past us, especially when it is repeated enough times that we just take for granted that its flight path is authorized. That is what is happening every day under the MDLEA. At this juncture, the words of Justice Marshall call out to us: "Our Constitution assures that the law will ultimately prevail, but it also requires that the law be applied in

---

[3] *See Melendez-Diaz v. Massachusetts*, 559 U.S. 305, 329 (2009)(Sixth Amendment does not permit prosecution to prove its case "via ex-parte out-out-court affidavits").

accordance with lawful procedures." *See Holtzman v. Schlesinger*, 414 U.S. 1304, 1315 (1973).

A "covered vessel" is defined as "a vessel subject to the jurisdiction of the United States." 46 U.S.C. §70503(c)(1). A vessel "subject to the jurisdiction of the United States" includes one "without nationality." 46 U.S.C. §70502(c). The Government proceeded under that specific ground. To satisfy that statute, the Government had to show that: a) one or more individuals on board the GFV made "a verbal claim of nationality or registry" for the vessel, that is Colombia; and b) the "nation of registry [did] not affirmatively and unequivocally assert that the vessel is of its nationality." 46 U.S.C. §70502(d)(1)(C).

A Certification is evidence in a class by itself, compared to ordinary testimonial and physical evidence, of such significance the Government's failure to secure it serves as an absolute bar to an MDLEA prosecution. Yet, this critical evidence never is tested in the heated crucible of cross-examination in violation of bedrock Supreme Court precedent. *See*, *e.g.*, *Delaware v. Van Arsdell*, 475 U.S. 673, 678 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). In Valencia's case, the Government had no burden of proof as to any facts revealing how officials from Colombia communicated with their United States counterparts, and what information was exchanged. This prosecution proceeded without Valencia

ever having the opportunity to examine any information the USCG transmitted to Colombian officials nor their response. The Certification provision simply dispenses with the accused's Sixth Amendment right to confront these most crucial witnesses, those who hold the keys to the courthouse where Valencia was subjected to the deprivation of his liberty.

The Certification procedure violates Due Process because it relieves the Government of its burden of proof to establish jurisdiction. Instead, the Government can use the inaction of a foreign nation within an unspecified time to support a Certification. If a foreign nation completely fails to respond, or seeks more time to either confirm or deny a vessel's nationality[4], a district court has no say about jurisdiction: it still would be obligated to assert jurisdiction as long as the Government provides it with a Certification.

---

[4] Under the MDLEA, the Government has no obligation to turn over to the defense all of its communications with the foreign country. Nor does the MDLEA provide for any time frame regarding how long the Government has to wait for a response from the foreign country before arresting a defendant and going forward with his prosecution. For this reason, the MDLEA is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citation omitted). It also is at odds with "ordinary notions of fair play...and a statute that flouts it 'violates the first essential of due process.'" *Id*. at 2557 (citation omitted).

CONCLUSION

For all of the reasons set forth in this petition, it is prayed this Court accept jurisdiction over this cause for further briefing, oral argument, and consideration for the entry of just relief.

Respectfully submitted,

/ s / Martin A. Feigenbaum
Florida Bar No. 705144
P.O. Box 545960
Surfside, Florida 33154
Telephone: (305) 323-4595
Facsimile: (844) 274-0862
Email: innering@aol.com

Date: May 9, 2019

APPENDIX

A-1

915 F.3d 717
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Henry Vazquez VALOIS, Luis Felipe Valencia, Diego Portocarrero Valencia, Defendants-Appellants.

No. 17-13535
|
(February 12, 2019)

Synopsis

Background: Defendants appealed from orders of the United States District Court for the Southern District of Florida, No. 4:16-cr-10052-JIC-1, convicting and sentencing them for trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA).

Holdings: The Court of Appeals, Hull, Circuit Judge, held that:

[1] convictions did not violate defendants' due process rights even if the offenses lacked a nexus to the United States;

[2] prosecutor's reference in closing arguments to earlier, separate seizure of cocaine in international waters did not amount to prosecutorial misconduct;

[3] District Court's failure to conduct pretrial inquiry to determine whether defendants wished to waive conflict of interest did not warrant reversal;

[4] defense attorneys' dual representation of two groups of defendants did not give rise to actual conflict of interest;

[5] defendants were not deprived of equal protection based on their ineligibility for safety valve relief;

[6] District Court did not clearly err in denying defendants' requests for minor-role reduction under the Sentencing Guidelines; and

[7] District Court's alleged error in guidelines calculation was harmless.

Affirmed.

West Headnotes (29)

[1] Criminal Law
Review De Novo

The Court of Appeals reviews de novo a district court's interpretation of a statute.

Cases that cite this headnote

[2] Criminal Law
Review De Novo

The Court of Appeals reviews de novo whether a statute is constitutional.

Cases that cite this headnote

[3] Constitutional Law
Extraterritorial application of penal laws
Criminal Law
Offenses on the high seas or beyond the jurisdiction of any state

Defendants' convictions under the Maritime Drug Law Enforcement Act (MDLEA) for trafficking cocaine in international waters did not violate their due process rights even if the offenses lacked a nexus to the United States, where MDLEA provided clear notice that all nations prohibited and condemned drug trafficking aboard stateless vessels on the high seas. U.S. Const. Amend. 5; 46 U.S.C.A. § 70501 et seq.

Cases that cite this headnote

[4] Criminal Law
Issues related to jury trial

The Court of Appeals reviews for abuse of discretion the denial of a motion for a mistrial.

Cases that cite this headnote

[5] Criminal Law

Necessity

Criminal Law

Comments on other misconduct by accused

Prosecutor's reference in closing arguments to earlier, separate seizure of cocaine in international waters did not amount to introduction of improper other acts evidence for which no notice had been given, in prosecution of defendants charged with trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), where prosecutor's statements were not evidence, and it was defendant who had interjected earlier seizure, which involved other individuals, into trial as part of his defense. 46 U.S.C.A. § 70501 et seq.; Fed. R. Evid. 404(b).

Cases that cite this headnote

[6] **Criminal Law**

Statements as to Facts and Arguments

Statements and arguments of counsel are not evidence.

Cases that cite this headnote

[7] **Criminal Law**

For prosecution

To support a prosecutorial misconduct claim based on a prosecutor's comments in closing argument, defendants must prove two things: (1) that the remarks were improper, and (2) that the remarks prejudicially affected their substantial rights.

Cases that cite this headnote

[8] **Criminal Law**

Controlled substances

Criminal Law

Inferences from and effect of evidence

Prosecutor's reference in closing arguments to earlier, separate seizure of cocaine in international waters did not amount to prosecutorial misconduct, in prosecution of defendants charged with trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), where prosecutor's remark was not improper, given that defendants had presented evidence about prior seizure to deny presence of cocaine on their boat, and prosecutor's remark was intended to rebut inference that cocaine recovered from water had come from another boat, and, even if improper, remark did not prejudice defendants' substantial rights, since court issued curative instruction that jury could not consider evidence of earlier seizure when deciding whether defendants engaged in activity alleged in indictment. 46 U.S.C.A. § 70501 et seq.

Cases that cite this headnote

[9] **Criminal Law**

Custody and conduct of jury

The Court of Appeals presumes that the jury followed a district court's curative instructions.

Cases that cite this headnote

[10] **Criminal Law**

Prejudice and harm in general

A defendant's Sixth Amendment right to effective assistance of counsel is violated when the defendant's attorney has an actual conflict of interest that impacts the defendant adversely. U.S. Const. Amend. 6.

Cases that cite this headnote

[11] **Criminal Law**

Objections and waiver

A defendant may in some circumstances waive his Sixth Amendment right to conflict-free counsel. U.S. Const. Amend. 6.

Cases that cite this headnote

[12] **Criminal Law**

Objections and waiver

A defendant may waive counsel's actual conflict of interest if the waiver is knowing, intelligent, and voluntary. U.S. Const. Amend. 6.

Cases that cite this headnote

[13] **Criminal Law**

Conflict of interest;joint representation

A district court's failure to conduct an inquiry to determine whether a defendant wishes to waive defense counsel's conflict of interest will not require reversal absent an actual conflict of interest. U.S. Const. Amend. 6.

Cases that cite this headnote

[14] **Criminal Law**

Conflict of interest;joint representation

Criminal Law

Prejudice and harm in general

To obtain reversal based on defense counsel's actual conflict of interest, an appellant must demonstrate inconsistent interests and show that counsel chose between courses of action that were helpful to one client but harmful to the other. U.S. Const. Amend. 6.

Cases that cite this headnote

[15] **Criminal Law**

Conflict of interest;joint representation

Criminal Law

Prejudice and harm in general

Actual conflicts of interest resulting from joint representation of multiple defendants must have a basis in fact; hypothetical conflicts are not enough to warrant reversal for ineffective assistance of counsel. U.S. Const. Amend. 6.

Cases that cite this headnote

[16] **Criminal Law**

Conflict of interest;joint representation

Criminal Law

Advice, inquiry, and determination

District Court's failure to conduct pretrial inquiry to determine whether defendants wished to waive conflict of interest did not warrant reversal of defendants' convictions for trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), in prosecution in which government had separately indicted and was prosecuting seizures of cocaine from two different go-fast vessels on different days as two independent cases against three different individuals in each case, where issue of potential conflict did not arise until testimony during trial, during which one defendant presented evidence disputing that cocaine found in water on second day came from his boat. U.S. Const. Amend. 6; 46 U.S.C.A. § 70501 et seq.

Cases that cite this headnote

[17] **Criminal Law**

Particular cases

Defense attorneys' dual representation of two groups of defendants did not give rise to actual conflict of interest, as would warrant reversal of defendants' convictions for trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), in prosecution in which government had separately indicted and was prosecuting seizures of cocaine from two different go-fast vessels on different days as two independent cases against three different individuals in each case, where defendants found on second boat were not being tried jointly with or for same offenses as their attorneys' other clients found on first vessel, and, during closing arguments, their attorneys implicitly shifted blame for cocaine found in water on second day to other clients found on first vessel. U.S. Const. Amend. 6; 46 U.S.C.A. § 70501 et seq.

Cases that cite this headnote

[18] **Criminal Law**

Constitutional questions

Criminal Law

Review De Novo

The Court of Appeals ordinarily reviews de novo the constitutionality of a statute, because it presents a question of law, but it reviews for plain error when a defendant raises his constitutional challenge for the first time on appeal.

Cases that cite this headnote

[19] **Controlled Substances**

Exceptions to Statutory Minimums; "Safety Valve"

Defendants convicted of offenses under the Maritime Drug Law Enforcement Act (MDLEA) are not eligible for relief under the safety valve provisions of federal sentencing statute and the Sentencing Guidelines. 18 U.S.C.A. § 3553(f); 46 U.S.C.A. § 70501 et seq.; U.S.S.G. § 5C1.2.

Cases that cite this headnote

[20] **Constitutional Law**

Creation and classification of offenses

Controlled Substances

Exceptions to Statutory Minimums; "Safety Valve"

Defendants who were ineligible for safety valve relief on basis of their convictions for trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), were not deprived of equal protection, although such relief was available to defendants convicted of drug trafficking within the United States, since Congress had rational basis for distinction, including concerns about foreign relations and global obligations with respect to international drug trafficking, and inherent difficulties of policing drug trafficking on the vast expanses of international waters. U.S. Const. Amend. 5; 18 U.S.C.A. § 3553(f); 46 U.S.C.A. § 70501 et seq.; U.S.S.G. § 5C1.2.

Cases that cite this headnote

[21] **Criminal Law**

Sentencing

The Court of Appeals reviews a district court's denial of a mitigating role reduction under the Sentencing Guidelines for clear error. U.S.S.G. § 3B1.2.

Cases that cite this headnote

[22] **Criminal Law**

Sentencing

The Court of Appeals will not disturb a district court's findings on a request for a mitigating role reduction under the Sentencing Guidelines unless it is left with a definite and firm conviction that a mistake has been made. U.S.S.G. § 3B1.2.

Cases that cite this headnote

[23] **Criminal Law**

Sentencing

A trial court's choice between two permissible views of the evidence will rarely constitute clear error, as required for the Court of Appeals to disturb the trial court's findings on a request for a mitigating role reduction under the Sentencing Guidelines, so long as the basis of the trial court's decision is supported by the record and the court did not misapply a rule of law. U.S.S.G. § 3B1.2.

Cases that cite this headnote

[24] **Sentencing and Punishment**

Degree of Proof

The defendant seeking a minor-role reduction under the Sentencing Guidelines bears the burden of establishing his minor role in the offense by a preponderance of the evidence. U.S.S.G. § 3B1.2(b).

Cases that cite this headnote

[25] **Sentencing and Punishment**

Minor or minimal participation

The court must consider all of the factors for evaluating a defendant's role in the offense to the extent applicable, and it commits legal error in making a decision on a request for a minor-role reduction under the Sentencing Guidelines based solely on one factor. U.S.S.G. § 3B1.2 cmt. n.3(C).

Cases that cite this headnote

[26] **Sentencing and Punishment**
Minor or minimal participation

In making the ultimate finding as to role in the offense, in considering a minor-role reduction under the Sentencing Guidelines, the district court should look to the defendant's role in the relevant conduct for which he has been held accountable at sentencing, and his role as compared to that of other participants in his relevant conduct, and it should measure the discernable facts against those principles. U.S.S.G. § 3B1.2.

Cases that cite this headnote

[27] **Sentencing and Punishment**
Minor or minimal participation

District Court did not clearly err in denying defendants' requests for minor-role reduction under the Sentencing Guidelines, in sentencing defendants for trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), where all three defendants knowingly participated in illegal transportation of large quantity of cocaine, they were important to that scheme, and they were held responsible only for that conduct, and none of defendants were less culpable than most other participants in the relevant conduct. 46 U.S.C.A. § 70501 et seq.; U.S.S.G. §§ 3B1.2(b), 3B1.2 cmt. n.3(C), 3B1.2, cmt. n.5.

Cases that cite this headnote

[28] **Sentencing and Punishment**
Minor or minimal participation

The fact that a defendant's role may be less than that of other participants engaged in the relevant conduct may not be dispositive in considering a minor-role reduction under the Sentencing Guidelines, since it is possible that none are minor or minimal participants. U.S.S.G. § 3B1.2(b).

Cases that cite this headnote

[29] **Criminal Law**
Sentencing and Punishment

District Court's error in guidelines calculation, if any, was harmless, where defendants convicted for trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), received statutory mandatory minimum sentence and the Court could not have sentenced them to less. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 1010, 21 U.S.C.A. § 960(b)(1)(B); 46 U.S.C.A. § 70506(a).

Cases that cite this headnote

Attorneys and Law Firms

*721 Phillip Drew DiRosa, U.S. Attorney's Office, Fort Lauderdale, FL, Jonathan Colan, Emily M. Smachetti, U.S. Attorney Service - Southern District of Florida, MIAMI, FL, for Plaintiff-Appellee.

Stewart Glenn Abrams, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, MIAMI, FL, Gail M. Stage, Federal Public Defender's Office, Fort Lauderdale, FL, for Defendant-Appellant Henry Vazquez Valois.

Martin Alan Feigenbaum, Martin A. Feigenbaum, Esq., Surfside, FL, Luis Felipe Valencia, FCI Coleman Low - Inmate Legal Mail, Coleman, FL, for Defendant-Appellant Luis Felipe Valencia.

Richard Carroll Klugh, Jr., Law Office of Richard C. Klugh, Miami, FL, Timothy Cone, Law Offices of Timothy Cone, Washington, DC, for Defendant-Appellant Diego Portocarrero Valencia.

Appeals from the United States District Court for the Southern District of Florida, D.C. Docket No. 4:16-cr-10052-JIC-1

Before JORDAN, GRANT, and HULL, Circuit Judges.

Opinion

HULL, Circuit Judge:

Henry Vazquez Valois ("Vazquez"), Luis Felipe Valencia ("Valencia"), and Diego Portocarrero Valencia ("Portocarrero") appeal their convictions and sentences for trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act ("MDLEA"). *See* 46 U.S.C. §§ 70501–70508. Broadly speaking, they raise five issues on appeal. After review and with the benefit of oral argument, we conclude that the defendants have shown no error, and we affirm their convictions ***722** and sentences. We address each issue in turn.

I. MDLEA

[1] **[2]** All three defendants challenge the district court's exercise of extraterritorial jurisdiction under the MDLEA. [1] Collectively, they argue that the MDLEA is unconstitutional for four reasons: (1) Congress's authority to define and punish felonies on the high seas does not extend to felonies without any connection to the United States; (2) due process prohibits the prosecution of foreign nationals for offenses that lack a nexus to the United States; (3) the MDLEA violates the Fifth and Sixth Amendments by removing the determination of jurisdictional facts from the jury; and (4) the admission of a certification of the Secretary of State to establish extraterritorial jurisdiction violates the Confrontation Clause.

As the defendants concede, each of these arguments is foreclosed by binding precedent. Regarding the defendants' first argument, in *United States v. Campbell*, we held that the MDLEA is a valid exercise of Congress's power under the Felonies Clause as applied to offenses without a nexus to the United States. 743 F.3d 802, 810 (11th Cir. 2014); *see also United States v. Cruickshank*, 837 F.3d 1182, 1187-88 (11th Cir. 2016) (following *Campbell* and reaching the same holding). In *Campbell*, we recognized that we have upheld extraterritorial convictions under our drug trafficking laws as an exercise of power under the Felonies Clause. 743 F.3d at 810.

[3] As to the defendants' second contention, in *United States v. Rendon*, we held that the Due Process Clause of the Fifth Amendment does not prohibit the trial and conviction of aliens captured on the high seas while drug trafficking because the MDLEA provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas. 354 F.3d 1320, 1326 (11th Cir. 2003). The defendants' MDLEA convictions do not violate their due process rights even if the offenses lack a nexus to the United States. *Campbell*, 743 F.3d at 812.

Concerning the defendants' third argument, in *United States v. Tinoco*, we held that the MDLEA jurisdictional requirement goes to the subject-matter jurisdiction of courts and is not an essential element of the MDLEA substantive offense, and, therefore, it does not have to be submitted to the jury for proof beyond a reasonable doubt. 304 F.3d 1088, 1109-12 (11th Cir. 2002); *see also Cruickshank*, 837 F.3d at 1192 (following *Tinoco* and reaching the same holding); *Campbell*, 743 F.3d at 809 (following *Tinoco* and *Rendon* and reaching the same holding); *Rendon*, 354 F.3d at 1326-28 (following *Tinoco* and reaching the same holding).

As to the defendants' fourth argument, in *Campbell*, we held that the introduction of a certification of the Secretary of State to establish extraterritorial jurisdiction under the MDLEA does not violate the Confrontation Clause. 743 F.3d at 806-08; *see Cruickshank*, 837 F.3d at 1192 ("A United States Department of State certification of jurisdiction under the MDLEA does not implicate the Confrontation Clause because it does not affect the guilt or innocence of a defendant."). In *Campbell*, we determined that because the stateless nature of the defendant's vessel was not an element of his MDLEA offense to be proved at trial, the admission of the certification ***723** did not violate his right to confront the witnesses against him. 743 F.3d at 806.

Based on our precedent, the district court properly exercised jurisdiction in this case.

II. MOTION FOR MISTRIAL

[4] Next, defendant Valencia argues that the district court abused its discretion when it denied a motion for a mistrial based on the government's reference in closing arguments to a separate drug seizure.[2] Vazquez and Portocarrero adopt this argument.

A.

We begin by summarizing the evidentiary context for the prosecutor's comments. Over a 36-hour period in November 2016, the U.S. Coast Guard Cutter *Dependable* interdicted two separate go-fast vessels, each with three individuals onboard, trafficking cocaine in international waters off the coasts of Panama and Costa Rica. The first vessel was seized overnight on November 23 to November 24. The Coast Guard recovered 16 bales of cocaine from the water after the individuals on the first vessel had jettisoned the bales. This group of individuals was indicted and prosecuted for this drug trip independently from this case.

The three defendants in this case were on a second vessel seized during the day on November 25, about 36 hours after the first vessel was seized. The defendants in this group were the only individuals charged in this indictment. At trial, Valencia tried to sow doubt about whether he, Vazquez, and Portocarrero were trafficking cocaine onboard their vessel. There was testimony at trial that on November 25 the defendants here had jettisoned 16 bales of cocaine, which the Coast Guard retrieved from the water. By the time the Coast Guard got to the defendants' vessel, no cocaine was found onboard the vessel itself. Valencia therefore attempted to show that the Coast Guard mistakenly attributed the cocaine from the first seizure to the defendants in this case.

To that end, Valencia's defense counsel, over the government's objections, repeatedly cross-examined government witnesses about the prior seizure that had happened 36 hours earlier. The government objected on relevance grounds and because the questions were beyond the scope of direct examination. Vazquez and Portocarrero did not object to this line of questioning from Valencia's defense counsel, and the district court overruled the government's objections.

More specifically, on cross-examination, Valencia's defense counsel asked one government witness about how close in time the prior seizure was, whether he was patrolling in the same area, whether individuals were detained, how many packages were retrieved, and whether and when the packages were tested for cocaine. The witness answered that he was involved in another operation with a go-fast boat overnight on November 23 to November 24, approximately 24 to 36 hours before interdicting the defendants' vessel. He stated that the prior seizure occurred in the same area in the Eastern Pacific that he was patrolling and that he had detained individuals. He stated that there were no drugs on the earlier vessel because the vessel was sinking when the Coast Guard approached. He answered that the Coast Guard retrieved 16 bales from the water in the earlier case, and he tested those bales for cocaine on November 24 and 26.

***724** Valencia's defense counsel also asked another government witness whether he personally was able to find the debris field of packages from the prior seizure on November 23 to November 24. The witness answered that he personally was not able to find the debris field, but that the Coast Guard did find the debris field in the vicinity of where the individuals on the earlier vessel jettisoned the bales. The witness also stated that he saw at least one individual jettisoning the bales off the defendants' vessel in this case.

Valencia's defense counsel asked another government witness whether the packages from the prior seizure were packaged similarly to those from this case and whether 16 packages were recovered from each seizure. The witness answered that the bales from the earlier seizure looked very similar and had similar multicolored packaging to the bales in this case. He stated that there were 16 bales recovered from the earlier seizure on November 23 to November 24 and another 16 bales recovered on November 25 as part of the second seizure.

On redirect, the prosecutor invariably tried to make clear that the witnesses were not mistaken that the cocaine retrieved from the water on November 25 had come from the defendants' vessel in this case.

Notably, in addition to not objecting to the cross-examination by Valencia's defense counsel, Vazquez's defense strategy aligned with Valencia's in that Vazquez denied having any cocaine on his boat. Specifically, at trial, Vazquez testified in his defense that he owned

the go-fast vessel and that he had hired Valencia and Portocarrero to help him flee Colombia to escape death threats from individuals who had demanded he pay a "tax" on the boat. Vazquez testified that there was never any cocaine on his vessel and that he did not transport cocaine. In other words, the cocaine found in the water came from the first vessel seized.

With this evidentiary context in mind and Valencia's interjection of the first vessel into evidence in the trial, we now turn to the prosecutor's comments in closing arguments. Responding to Vazquez's testimony, the prosecutor referenced the prior seizure and suggested that both go-fast vessels were part of a "concerted effort" that was "being directed by whoever was orchestrating these deliveries to Central America." The prosecutor asserted that the defendants' vessel "followed the exact same procedures as that first boat had done," including attempting to elude the Coast Guard, jettisoning the cargo, and then scuttling the vessel. These activities, according to the prosecutor, showed that the defendants "were following the instructions of the people who hired them and directed their activities," just like the individuals on the other vessel. The prosecutor also argued that the 640 kilograms of cocaine recovered from the water by the Coast Guard came from the defendants' vessel and not from the prior seizure the night before. [3]

During the prosecutor's argument, defense counsel for Valencia reserved a motion and, once the prosecutor concluded, moved for a mistrial outside of the presence of the jury. Valencia argued that the government appeared to be trying to tie the defendants to a broader conspiracy and to hold them accountable for the first drug seizure. Defense counsel for Vazquez and Portocarrero did not explicitly object to the prosecutor's comments or join in Valencia's mistrial motion on the record. However, Vazquez's defense counsel did ***725** assist Valencia's defense counsel with the argument on the motion.

As to Valencia's mistrial argument, the prosecutor responded that he was simply trying to place the other seizure—which Valencia "interjected into this trial" and made "a primary feature of his defense"—in context of the overall scheme.

After hearing from the parties, the district court found that "an appropriate curative instruction would ameliorate any potential harm to any defendant" and that none of the defendants "ha[d] been deprived [of] their right to a fair and impartial trial." Valencia's counsel conferred with the other defense counsel and prepared a curative instruction. The prosecutor did not object to the instruction. The district court then read the curative instruction to the jury as follows:

> During the trial you heard evidence of acts allegedly done by other individuals on other occasions that may be similar to acts with which the defendants are currently charged. You must not consider any of this evidence to decide whether the defendants engaged in the activity alleged in the indictment.

After the prosecutor's closing argument and the district court's curative instruction, defense counsel gave their closing arguments. Vazquez's defense counsel argued that the Coast Guard did not see the first bale in the water thrown off the defendants' boat, but the Coast Guard immediately attributed it to the defendants' boat. Vazquez's counsel contended that the Coast Guard did not have any video showing any of the 16 bales of cocaine being thrown off the defendants' boat. Vazquez's counsel argued that just because the Coast Guard recovered 640 kilograms of cocaine and Vazquez's boat was in the proximity of where the cocaine was recovered did not put that cocaine on Vazquez's boat or mean that the cocaine was his.

Portocarrero's defense counsel argued that as soon as the Coast Guard saw a bale in the water, the Coast Guard claimed that the defendants were jettisoning the bales from their boat and that the bales belonged to the defendants, even though many of the witnesses did not see bales being tossed off the defendants' boat and the video did not record any jettisoning of bales. Portocarrero's counsel argued that the conflicting evidence and lack of details in the case showed without a doubt that nobody was throwing bales off the defendants' boat. Specifically, he argued that the Coast Guard could not state how many bales they saw jettisoned off the defendants' boat or who was jettisoning the bales, even though the bales were brightly colored. Portocarrero's counsel also contended that the physical evidence showed that the debris field of

bales did not trail the defendants' boat. Also, he argued that there was no evidence the defendants had cocaine in their boat, as there was nothing on their boat that could be connected to the cocaine found in the water. Portocarrero's counsel argued that if there was cocaine on the defendants' boat, there would have been evidence of it.

In turn, Valencia's defense counsel argued that the jury could consider that the government witnesses who he questioned about the prior seizure became defensive or unhappy when he asked them about the prior seizure. Valencia's counsel also argued about the similarities between the prior seizure and the instant case, including that 16 bales were also recovered from the prior seizure and they had the same packaging as those in this case. Valencia's counsel argued that the boat from the prior seizure could have carried 16 bales of cocaine, but the boat in this case would have been over maximum load. He argued that the boat from the prior seizure could have carried and jettisoned all 32 bales of ***726** cocaine, including the 16 bales mistakenly attributed to the defendants. He contended that there was reasonable doubt that Valencia, Vazquez, and Portocarrero were transporting 16 bales of cocaine. Once again, Vazquez's and Portocarrero's counsel did not object to the argument of Valencia's counsel that the cocaine in the water came from the first vessel, not the defendants' boat.

In the prosecutor's rebuttal argument, the prosecutor argued that the government witnesses testified that they did not confuse what happened with the prior seizure with the instant case.

B.

[5] **[6]** The defendants assert that the prosecutor's reference to the earlier seizure amounted to the introduction of improper evidence under Federal Rule of Evidence 404(b), for which no notice had been given. We disagree. For starters, "statements and arguments of counsel are not evidence." *United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009) (quotations omitted). More importantly, it was Valencia who interjected the prior seizure, which involved other individuals, into the trial as part of his defense. Neither Vazquez nor Portocarrero objected to Valencia's introduction of evidence about the prior seizure. Indeed, it was only the government that opposed that effort. Because this evidence was not introduced by the government and did not concern a prior bad act by any of the defendants, Rule 404(b) and its notice requirements did not apply.

[7] **[8]** To the extent the defendants argue more generally that the prosecutor's comments in closing were improper suggestions that the two seizures were connected, they must prove two things: (1) that the remarks were improper; and (2) that the remarks prejudicially affected their substantial rights. *United States v. Reeves*, 742 F.3d 487, 505 (11th Cir. 2014). The prosecutor understandably desired to refute Vazquez's story of no cocaine on his boat and to respond to the considerable testimony Valencia elicited regarding the details of the other seizure and how similarly the cocaine was packaged. Moreover, the prosecutor had objected to the defendants presenting evidence about the prior seizure, but the district court had allowed the evidence, which showed that 16 bales of cocaine similarly packaged had been seized 36 hours earlier. While one possible inference was that the second 16 cocaine bales seized came from the first boat, another possible inference, as the prosecutor argued, was the two vessels were doing the same activity in the same way and were connected. Given the way the trial proceeded, we cannot say the prosecutor's brief comments in closing were improper.

[9] Even if we assume *arguendo* that the prosecutor's comments were somehow improper, the defendants have not proved prejudice to their substantial rights. The district court cured the complained-of remarks through a clear and specific limiting instruction to the jury. *See Lopez*, 590 F.3d at 1256 ("If the district court takes a curative measure, we will reverse only if the evidence is so prejudicial as to be incurable by that measure."). The court told the jury that it could not consider the evidence of the other drug seizure when deciding whether the defendants engaged in the activity of the second vessel alleged in the indictment. "We presume that the jury followed the district court's curative instructions." *Id.* And the defendants "ha[ve] not come close to establishing that the closing argument was so highly prejudicial as to be incurable by the court's instructions." *Reeves*, 742 F.3d at 506. Therefore, the district court did not abuse its discretion ***727** by denying the defendants' motion for mistrial.

III. CONFLICT OF INTEREST

The third issue, raised by defendant Portocarrero, likewise concerns the two seizures. As noted above, the two groups of three defendants were prosecuted independently. A total of three attorneys were appointed for the six defendants, with each attorney representing one defendant within each group.[4] Portocarrero argues that this defense arrangement violated his Sixth Amendment right to conflict-free counsel because he did not validly waive the conflict and the conflict harmed his defense. Portocarrero says that the conflict prevented his attorney from attempting to shift blame to the other group of defendants arrested overnight on November 23 to 24 for the cocaine found in the water on November 25. Vazquez adopts this argument, but Valencia does not raise this claim.

[10] **[11]** **[12]** A defendant's right to effective assistance of counsel is violated when the defendant's attorney has an actual conflict of interest that impacts the defendant adversely. *United States v. Rodriguez*, 982 F.2d 474, 477 (11th Cir. 1993). A defendant, however, may in some circumstances waive his right to conflict-free counsel. *United States v. Garcia*, 517 F.2d 272, 277 (5th Cir. 1975).[5] *Garcia* provides that, in the case of a potential conflict of interest, the court should conduct an inquiry, akin to the plea colloquy under Federal Rule of Criminal Procedure 11, to determine whether a defendant wishes to waive the conflict. *Id.* at 277–78. A defendant may waive an actual conflict of interest if the waiver is "knowing, intelligent, and voluntary." *United States v. Ross*, 33 F.3d 1507, 1524 (11th Cir. 1994).

[13] **[14]** **[15]** However, a district court's failure to comply with *Garcia* will not require reversal absent an actual conflict of interest. *United States v. Mers*, 701 F.2d 1321, 1326 (11th Cir. 1983) (holding that a district court's violation of *Garcia* and Federal Rule of Criminal Procedure 44(c) was harmless error because there was no actual conflict). "Although joint representation of multiple defendants creates a danger of counsel conflict of interest, the mere fact of joint representation will certainly not show an actual conflict." *Id.* (quotation marks omitted). Rather, an appellant must demonstrate inconsistent interests and show that the attorney chose between courses of action that were "helpful to one client but harmful to the other." *Id.* at 1328 (quotation marks omitted). Actual conflicts must have a basis in fact; hypothetical conflicts are not enough. *Id.*

[16] Here, at the time defense counsel were initially appointed, the government had separately indicted and was prosecuting the seizures of two different go-fast vessels on different days as two independent cases against three different individuals in each case. No party or counsel has pointed to any place in the record before trial where anyone alleged or mentioned that the cocaine found in the water on November 25 came from the boat seizure overnight on November 23 to 24. Rather, all of the testimony until Valencia's counsel ***728** cross-examined the government's witnesses at trial was that the Coast Guard had seen that cocaine being thrown from the defendants' boat on November 25.

The issue of a potential conflict did not arise until the testimony during the trial. Thus, we cannot say the district court was required to hold a *Garcia* hearing before the trial began. And before sentencing the district court did hold a *Garcia* hearing.

[17] Even if the *Garcia* hearing was timely enough, Portocarrero and Vazquez argue that it was substantively deficient. Although they expressly waived any potential conflict at the *Garcia* hearing, they allege that the district court did not ask all of the questions it should have. We need not reach that issue because Portocarrero and Vazquez have not shown that their attorneys' dual representation of the two groups presented any actual conflict. Despite the prosecutor's brief reference to a broader conspiracy during closing arguments, the government's case against Portocarrero and Vazquez related solely to their own personal acts of transporting cocaine onboard the vessel on which they were found. They were not being tried jointly with or for the same offenses as their attorneys' other clients on the first vessel. Shifting the blame in Portocarrero's and Vazquez's trial to the first vessel would not have been harmful to Portocarrero and Vazquez, or to the defendants on the first vessel who were being tried separately. In fact, as Portocarrero notes, Valencia's attorney attempted to do just that, despite representing a client in the other group of defendants on the first vessel.

Furthermore, Portocarrero's and Vazquez's counsel did not object when Valencia's counsel cross-examined the government witnesses about the similarity of the cocaine

packaging and other features of the first and second boat seizures. In fact, Vazquez's and Portocarrero's defense counsel later did implicitly shift the blame to the other clients on the first vessel during their closing arguments. Vazquez argued that just because the Coast Guard recovered 640 kilograms of cocaine and Vazquez's boat was in the proximity of where the cocaine was recovered did not put that cocaine on Vazquez's boat or mean that it belonged to him. Portocarrero's counsel argued that nobody was throwing bales off of their boat and there was no evidence that they had cocaine in their boat when the Coast Guard boarded it. Under the particular circumstances here, neither Portocarrero nor Vazquez have demonstrated that there was an actual conflict of interest, and, thus, no reversal is required. [6] *See Mers*, 701 F.2d at 1326.

*729 IV. SAFETY-VALVE ISSUES

[18] As to the fourth issue, Valencia challenges the constitutionality of the "safety-valve" provisions of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2. Valencia says that these provisions both unfairly deny benefits to Title 46 defendants, in violation of equal-protection guarantees, and violate the Fifth Amendment by requiring a defendant to forfeit his right to silence. Portocarrero adopts these arguments. [7]

[19] When the safety valve applies, the district court may impose a sentence without regard to the statutory minimum sentences that would otherwise limit the court's discretion. 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2(a). By its plain terms, the safety valve applies only to convictions under five specified statutes: 21 U.S.C. §§ 841, 844, 846, 960, and 963. *United States v. Pertuz-Pertuz*, 679 F.3d 1327, 1328 (11th Cir. 2012). This Court held in *Pertuz-Pertuz* that, because no Title 46 offense appears in the safety valve, defendants convicted under Title 46 are not eligible for safety-valve relief. *Id.* Therefore, defendants convicted of offenses under the MDLEA, which are Title 46 offenses, are not eligible for safety-valve relief. *See id.* at 1328–29. Thus, as a threshold matter, Valencia and Portocarrero are not eligible for safety-valve relief.

[20] As to their equal-protection claim, Valencia and Portocarrero argue that there is no rational basis to exclude Title 46 defendants from the safety valve when it is available to defendants convicted of drug trafficking within the United States. However, this Court recently held that the safety valve's exclusion of Title 46 defendants does not violate the equal-protection guarantee of the Fifth Amendment. *United States v. Castillo*, 899 F.3d 1208 (11th Cir. 2018), *cert. denied*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2019 WL 113114 (Jan. 7, 2019). Applying rational-basis review, we concluded that Congress had "legitimate reasons to craft strict sentences for violations of the [MDLEA]." *Id.* at 1213. Specifically, "[i]n contrast with domestic drug offenses, international drug trafficking raises pressing concerns about foreign relations and global obligations." *Id.* "Moreover, the inherent difficulties of policing drug trafficking on the vast expanses of international waters suggest that Congress could have rationally concluded that harsh penalties are needed to deter would-be offenders." *Id.* Thus, based on *Castillo*, we reject Valencia's and Portocarrero's equal-protection challenge to the safety valve.

Valencia and Portocarrero also contend that the safety valve violates Fifth Amendment protections against self-incrimination by requiring defendants to provide the government with all information and evidence that they have concerning the offense. 18 U.S.C. § 3553(f)(5); U.S.S.G. § 5C1.2(a)(5). They note that, while they were not eligible to be sentenced below the mandatory minimum, *see Pertuz-Pertuz*, 679 F.3d at 1328, they could have received a two-level reduction in their offense level ***730** for meeting the five safety-valve criteria. *See* U.S.S.G. § 2D1.1(b)(17) (2016).

Although this Court has not addressed in a published opinion this Fifth Amendment issue as to the safety valve, we have concluded that U.S.S.G. § 3E1.1, the acceptance-of-responsibility provision of the Guidelines, does not violate the Fifth Amendment right against self-incrimination. *United States v. Henry*, 883 F.2d 1010, 1011 (11th Cir. 1989). "Section 3E1.1(a) is not a punishment; rather, the reduction for acceptance of responsibility is a reward for those defendants who express genuine remorse for their criminal conduct." *United States v. Carroll*, 6 F.3d 735, 740 (11th Cir. 1993). Several of our sister circuits have concluded that the same is true for the safety valve in 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2(a). *United States v. Cruz*, 156 F.3d 366, 374 (2d Cir. 1998) (conviction under § 841); *United States v. Warren*, 338 F.3d 258, 266-67 (3d Cir. 2003) (conviction under § 846); *United States v. Washman*, 128 F.3d 1305, 1307 (9th Cir. 1997) (conviction

under § 841); *United States v. Arrington*, 73 F.3d 144, 149-50 (7th Cir. 1996) (same).

Although the parties briefed the Fifth Amendment issue, we ultimately do not need to address it given our conclusions above that the safety-valve relief is unavailable to all Title 46 MDLEA defendants, such as Valencia and Portocarrero, and that such unavailability does not violate the Equal Protection Clause and is constitutional. Because Valencia and Portocarrero are not eligible for safety-valve relief in the first place, we need not consider whether these defendants otherwise meet the substantive requirements of safety-valve relief or the defendants' constitutional claim based on the Fifth Amendment.

V. MINOR-ROLE REDUCTION

[21] Finally, Vazquez argues that at sentencing the district court erred in denying him a minor-role reduction under U.S.S.G. § 3B1.2(b).[8] Valencia and Portocarrero purport to adopt this argument.[9] Unlike § 3553(f) and § 5C1.2(a), MDLEA offenders may seek a minor-role reduction under § 3B1.2(b).

As background, Vazquez's, Portocarrero's, and Valencia's presentence investigation reports ("PSI") assigned each of them a base offense level of 38, pursuant to U.S.S.G. § 2D1.1(a)(5) and (c)(1), because their offenses involved at least 450 kilograms of cocaine, specifically 640 kilograms of cocaine.

Vazquez received a two-point enhancement under § 2D1.1(b)(3)(C) because he was the captain of the vessel and a two-point enhancement for obstruction of justice under § 3C1.1 because he made a series of statements during trial that contradicted the evidence. As a result, Vazquez received a total offense level of 42. Portocarrero and Valencia received no enhancements or reductions, and their total offense level remained at 38.

Each defendant received zero criminal history points, placing each of them in criminal history category I. As to Vazquez, with a total offense level of 42 and a ***731** criminal history category of I, he had an advisory guideline range of 360 months to life imprisonment. As to Portocarrero and Valencia, with a total offense level of 38 and a criminal history category of I, each had an advisory guideline range of 235 to 293 months' imprisonment. All three defendants also faced a statutory minimum term of ten years' imprisonment as to their counts.

Each defendant objected to his PSI, arguing that he was entitled to a minor-role reduction. Specifically, Vazquez contended that there was no evidence that he had any ownership interest in the drugs, any decision-making authority, or any role other than transportation. Portocarrero argued that he was not the owner or master of the vessel, was a last-minute addition to the trip, and was the youngest and most inexperienced of the three men on the boat. Valencia asserted that there was no evidence that he had any ownership interest in the cocaine or that he was going to make any money from it.

At the defendants' sentencing hearings, each of them renewed the objection to the lack of a minor-role reduction. Vazquez reiterated that he did not own the drugs or share in the drugs' profits. He contended that he did not participate in planning or organizing the criminal activity or exercise decision-making authority, as he merely provided transportation for the drugs. Portocarrero asserted that he was only 20 years old and was a very small part of the operation.

The district court overruled the defendants' objections to the lack of a minor-role reduction because each defendant failed to establish that he was substantially less culpable than the average participant in the offense.

After overruling the objections, the district court determined that Vazquez's offense level was 42, his criminal history category was I, and his advisory guideline range was 360 months to life imprisonment. After hearing arguments and considering the 18 U.S.C. § 3553(a) factors, the district court sentenced Vazquez to 144 months' imprisonment as to both of his counts, to run concurrently, followed by 5 years' supervised release. The district court noted that Vazquez's punishment should be slightly greater than his codefendants based on his enhancements for being captain of the vessel and obstruction of justice.

The district court determined that Portocarrero's and Valencia's total offense level was 38, their criminal history category was I, and their advisory guideline range was 235 to 293 months' imprisonment. Following arguments from the parties, the court sentenced both Portocarrero and

Valencia to 120 months' imprisonment as to both counts, to run concurrently, followed by 5 years' supervised release.

[22] **[23]** **[24]** As to our review of a district court's denial of a role reduction, we will not disturb a district court's findings unless we are left with a definite and firm conviction that a mistake has been made. *Cruickshank*, 837 F.3d at 1192. The court's choice between two permissible views of the evidence will rarely constitute clear error, so long as the basis of the trial court's decision is supported by the record and the court did not misapply a rule of law. *Id.* "The defendant bears the burden of establishing his minor role in the offense by a preponderance of the evidence." *Id.*

Under § 3B1.2(b), a defendant is entitled to a two-level decrease in his offense level if he was a minor participant in the criminal activity. U.S.S.G § 3B1.2(b). A minor participant is one "who is less culpable than most other participants in the criminal activity, but whose role could not ***732** be described as minimal." *Id.* § 3B1.2, cmt. n.5.

[25] When evaluating a defendant's role in the offense, the district court must consider the totality of the circumstances. *Id.* § 3B1.2, cmt. n.3(C). According to § 3B1.2's commentary, the factors courts should consider include "the degree to which the defendant understood the scope and structure of the criminal activity," "the degree to which the defendant participated in planning or organizing the criminal activity," "the degree to which the defendant exercised decision-making authority," "the nature and extent of the defendant's participation in the commission of the criminal activity," and "the degree to which the defendant stood to benefit from the criminal activity." *Id.* The court must consider all of these factors to the extent applicable, and it commits "legal error in making a minor role decision based solely on one factor." *United States v. Presendieu*, 880 F.3d 1228, 1249 (11th Cir. 2018).

[26] In *United States v. De Varon*, we established two principles to "guide the determination of whether a defendant played a minor role in the criminal scheme: (1) 'the defendant's role in the relevant conduct for which [he] has been held accountable at sentencing,' and (2) '[his] role as compared to that of other participants in [his] relevant conduct.' " *Presendieu*, 880 F.3d at 1249 (quoting *United States v. De Varon*, 175 F.3d 930, 940 (11th Cir. 1999) (en banc)). "In making the ultimate finding as to role in the offense, the district court should look to each of these principles and measure the discernable facts against them." *De Varon*, 175 F.3d at 945.

[27] Here, the district court did not clearly err in denying the defendants' requests for a minor-role reduction. Under *De Varon*'s first principle, the inquiry is whether the defendant "played a relatively minor role in the conduct for which [he] has already been held accountable—not a minor role in any larger criminal conspiracy." *Id.* at 944. The record shows that all three defendants knowingly participated in the illegal transportation of a large quantity of cocaine, they were important to that scheme, and they were held responsible only for that conduct. *See* U.S.S.G. § 3B1.2, cmt. n.3(C); *De Varon*, 175 F.3d at 941-43; *see also United States v. Monzo*, 852 F.3d 1343, 1347 (11th Cir. 2017) (considering, as part of the totality of the circumstances, the facts that the defendant "was responsible only for his direct role in the conspiracy, and that he was important to the scheme"). While these facts do not render the defendants ineligible, they support the court's denial of the role reduction.

[28] Further, under *De Varon*'s second principle, the record supports the district court's finding that none of the defendants were "less culpable than most other participants in the criminal activity." U.S.S.G. § 3B1.2, cmt. n.5. Vazquez was the most culpable of the three defendants because he was the master of the vessel and, according to his own testimony, he recruited Valencia and Portocarrero to accompany him. While Valencia and Portocarrero appear to have had less of a role than Vazquez, that fact alone does not make them minor participants. "The fact that a defendant's role may be less than that of other participants engaged in the relevant conduct may not be dispositive of role in the offense, since it is possible that none are minor or minimal participants." *De Varon*, 175 F.3d at 944. And the defendants here failed to show how they were less culpable than "most other participants" in the criminal activity. *See* U.S.S.G. § 3B1.2, cmt. n.5. Based on the totality of the circumstances, the district ***733** court did not clearly err in denying the defendants minor-role reductions under § 3B1.2.

[29] Alternatively and as an independent ground for affirmance as to Valencia and Portocarrero, we note that both Valencia and Portocarrero received a substantial sentencing variance from their advisory guideline range

of 235 to 293 months' imprisonment to 120 months. The sentencing court did not just mechanically impose the statutory mandatory minimum but did so only after considering the defendants' request for a variance. Nonetheless, 120 months is the statutory mandatory minimum. *See* 21 U.S.C. § 960(b)(1)(B) and 46 U.S.C. § 70506(a). Thus, any error in the guidelines calculation was harmless as both Valencia and Portocarrero received the statutory mandatory minimum sentence and the district court could not have sentenced them to less. *See United States v. Westry*, 524 F.3d 1198, 1221-22 (11th Cir. 2008) (finding no error in district court's application of firearm enhancement and then concluding, in any event, any error in guidelines calculation was harmless where application of enhancement did not affect defendants' overall sentences).

VI. CONCLUSION

For the reasons stated, we reject the defendants' challenges and affirm their convictions and total sentences.

AFFIRMED.

All Citations

915 F.3d 717, 27 Fla. L. Weekly Fed. C 1684

Footnotes

1 We review *de novo* a district court's interpretation of a statute. *United States v. Cruickshank*, 837 F.3d 1182, 1187 (11th Cir. 2016). Likewise, we review *de novo* whether a statute is constitutional. *Id.*

2 We review for abuse of discretion the denial of a motion for a mistrial. *United States v. McGarity*, 669 F.3d 1218, 1232 (11th Cir. 2012).

3 The 16 bales totaled 640 kilograms of cocaine.

4 Attorney Juan Gonzalez represented Portocarrero in this case and a defendant in the other drug case. Attorney Stewart Abrams represented Vazquez in this case and a defendant in the other drug case. Attorney Martin Feigenbaum represented Valencia in this case and a defendant in the other drug case.

5 This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

6 Portocarrero and Vazquez abandoned any argument that an actual conflict existed relating to any post-trial issues and proceedings. *See United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003). In any case, there has been no suggestion that Portocarrero or Vazquez knew the other group of defendants or were interested in cooperating with the government against them. Additionally, before sentencing, the district court held a *Garcia* hearing; because there is no claim in this appeal that the three defendants' waivers given for post-trial issues were deficient, we do not evaluate that *Garcia* hearing.

Although affirming in this case, we observe that, in an abundance of caution, the more careful course next time would likely be for the magistrate judge to consider appointing separate counsel for all defendants on each boat where (1) the two go-fast boats with cocaine are interdicted so close in time and geography and (2) two indictments, although separate, were filed on the same day. A conflict could have arisen here if a defendant on one boat decided to cooperate with the government and testify against the defendants on the other boat. *See Ruffin v. Kemp*, 767 F.2d 748, 749-51 (11th Cir. 1985) (concluding an actual conflict of interest existed where the attorney represented both defendants Ruffin and Brown and actually offered the testimony of Brown against Ruffin in exchange for a lesser penalty for Brown).

7 We ordinarily review *de novo* the constitutionality of a statute, because it presents a question of law, but we review for plain error where a defendant raises his constitutional challenge for the first time on appeal. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). The parties debate what was raised in the district court, but we need not decide that issue because the defendants' constitutional claims fail in any event.

8 We review a district court's denial of a role reduction for clear error. *Cruickshank*, 837 F.3d at 1192.

9 The government maintains that these adoptions were ineffective because minor-role reductions are too individualized to be raised by adoption. *Cf. United States v. Cooper*, 203 F.3d 1279, 1285 n.4 (11th Cir. 2000) (stating that sufficiency arguments are too individualized to be generally adopted). Valencia's and Portocarrero's general adoptions are likely inadequate to properly raise the issue on appeal, but we need not address that issue because they lack merit in any event.

End of Document

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

16-10052-CR-KING/TORRES

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.

HENRY VAZQUEZ VALOIS,
DIEGO PORTOCARRERO VALENCIA,
and
LUIS FELIPE VALENCIA,

Defendants.
_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

Beginning on an unknown date and continuing through on or about November 25, 2016, while on board a vessel subject to the jurisdiction of the United States, with Monroe County in the Southern District of Florida being the district at which the defendants entered the United States, the defendants,

HENRY VAZQUEZ VALOIS,
DIEGO PORTOCARRERO VALENCIA,
and
LUIS FELIPE VALENCIA,

did knowingly and willfully combine, conspire, confederate and agree 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 (5) kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of Title 46, United States Code, Section 70506(a) and Title 21, United States Code, Section 960(b)(1)(B).

COUNT 2

On or about November 25, 2016, while on board a vessel subject to the jurisdiction of the United States, with Monroe County in the Southern District of Florida being the district at which the defendants entered the United States, the defendants,

HENRY VAZQUEZ VALOIS,
DIEGO PORTOCARRERO VALENCIA,
and
LUIS FELIPE VALENCIA,

did knowingly and intentionally possess 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), it is further alleged that this violation involved five kilograms or more of a mixture and substance containing a detectable amount of cocaine.

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

FOREPERSON

WIFREDO A. FERRER
UNITED STATES ATTORNEY

YVONNE RODRIGUEZ-SCHACK
ASSISTANT UNITED STATES ATTORNEY

A-3

UNITED STATES DISTRICT COURT

Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA
v.

LUIS FELIPE VALENCIA

JUDGMENT IN A CRIMINAL CASE

Case Number: **4:16-10052-CR-COHN-3**

USM Number: **14404-104**

Counsel For Defendant: **Martin Feigenbaum, CJA**
Counsel For The United States: **Joseph Schuster**
Court Reporter: **Karl Shires**

The defendant was found guilty on count(s) 1 & 2 of the Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
46, U.S.C. §70506(b)	Conspiracy to possess with intent to distribute more than five kilograms of cocaine while on board a vessel subject to the jurisdiction of the United States	11/25/2016	1
46, U.S.C. §70503(a)	Possession with intent to distribute more than five kilograms of cocaine while on board a vessel subject to the jurisdiction of	11/25/2016	2

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.

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 material changes in economic circumstances.

Date of Imposition of Sentence: **8/4/2017**

JAMES I. COHN
United States District Judge

Date: August 4, 2017

DEFENDANT: **LUIS FELIPE VALENCIA**
CASE NUMBER: **4:16-10052-CR-COHN-3**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **__120__ MONTHS AS TO EACH OF COUNTS 1 & 2 TO RUN CONCURRENTLY.**

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

THE COURT RECOMMENDS THAT THE DEFENDANT BE DESIGNATED TO A FACILITY IN THE MIDDLE DISTRICT OF FLORIDA.

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

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **LUIS FELIPE VALENCIA**
CASE NUMBER: **4:16-10052-CR-COHN-3**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 YEARS AS TO EACH OF COUNTS 1 & 2 TO RUN CONCURRENTLY.**

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 this judgment imposes a fine or 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 with 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 days prior to any change in residence or employment;
7. The defendant shall refrain from 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 of the probation officer;
11. The defendant shall notify the probation officer within seventy-two 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: **LUIS FELIPE VALENCIA**
CASE NUMBER: **4:16-10052-CR-COHN-3**

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.

Unpaid Restitution, Fines, or Special Assessments - 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.

DEFENDANT: **LUIS FELIPE VALENCIA**
CASE NUMBER: **4:16-10052-CR-COHN-3**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$200.00**	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

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

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **LUIS FELIPE VALENCIA**
CASE NUMBER: **4:16-10052-CR-COHN-3**

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of $200.00 due immediately.

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.

This 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 08N09
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.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

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.

A-4

United States Code Annotated
Title 46. Shipping (Refs & Annos)
Subtitle VII. Security and Drug Enforcement (Refs & Annos)
Chapter 705. Maritime Drug Law Enforcement

46 U.S.C.A. § 70502
Formerly cited as 46 App. USCA § 1903

§ 70502. Definitions

Effective: October 13, 2008
Currentness

(a) Application of other definitions.--The definitions in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) apply to this chapter.

(b) Vessel of the United States.--In this chapter, the term "vessel of the United States" means--

(1) a vessel documented under chapter 121 of this title or numbered as provided in chapter 123 of this title;

(2) a vessel owned in any part by an individual who is a citizen of the United States, the United States Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the United States or of a State, unless--

(A) the vessel has been granted the nationality of a foreign nation under article 5 of the 1958 Convention on the High Seas; and

(B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States who is authorized to enforce applicable provisions of United States law; and

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was sold to a person not a citizen of the United States, placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation.

(c) Vessel subject to the jurisdiction of the United States.--

(1) In general.--In this chapter, the term "vessel subject to the jurisdiction of the United States" includes--

(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel in the customs waters of the United States;

(E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and

(F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that--

(i) is entering the United States;

(ii) has departed the United States; or

(iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

(2) Consent or waiver of objection.--Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under paragraph (1)(C) or (E)--

(A) may be obtained by radio, telephone, or similar oral or electronic means; and

(B) is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(d) Vessel without nationality.--

(1) In general.--In this chapter, the term "vessel without nationality" includes--

(A) a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed;

(B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

(2) Response to claim of registry.--The response of a foreign nation to a claim of registry under paragraph (1)(A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(e) Claim of nationality or registry.--A claim of nationality or registry under this section includes only--

(1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas;

(2) flying its nation's ensign or flag; or

(3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.

(f) Semi-submersible vessel; submersible vessel.--In this chapter:

(1) Semi-submersible vessel.--The term "semi-submersible vessel" means any watercraft constructed or adapted to be capable of operating with most of its hull and bulk under the surface of the water, including both manned and unmanned watercraft.

(2) Submersible vessel.--The term "submersible vessel" means a vessel that is capable of operating completely below the surface of the water, including both manned and unmanned watercraft.

CREDIT(S)

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1685; Pub.L. 109-241, Title III, § 303, July 11, 2006, 120 Stat. 527; Pub.L. 110-181, Div. C, Title XXXV, § 3525(a)(6), (b), Jan. 28, 2008, 122 Stat. 601; Pub.L. 110-407, Title II, § 203, Oct. 13, 2008, 122 Stat. 4300.)

Notes of Decisions (72)

46 U.S.C.A. § 70502, 46 USCA § 70502
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-280, 114-282 to 114-288, 114-290 to 114-314, 114-316, 114-318 to 114-321, 114-325, and 114-326. Title 26 current through 114-329.

End of Document

United States Code Annotated
Title 46. Shipping (Refs & Annos)
Subtitle VII. Security and Drug Enforcement (Refs & Annos)
Chapter 705. Maritime Drug Law Enforcement

46 U.S.C.A. § 70503
Formerly cited as 46 App. USCA § 1903

§ 70503. Prohibited acts

Effective: February 8, 2016
Currentness

(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.

(b) Extension beyond territorial jurisdiction.--Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.

(c) Nonapplication.--

(1) In general.--Subject to paragraph (2), subsection (a) does not apply to--

(A) a common or contract carrier or an employee of the carrier who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business; or

(B) a public vessel of the United States or an individual on board the vessel who possesses or distributes a controlled substance in the lawful course of the individual's duties.

(2) Entered in manifest.--Paragraph (1) applies only if the controlled substance is part of the cargo entered in the vessel's manifest and is intended to be imported lawfully into the country of destination for scientific, medical, or other lawful purposes.

(d) Burden of proof.--The United States Government is not required to negative a defense provided by subsection (c) in a complaint, information, indictment, or other pleading or in a trial or other proceeding. The burden of going forward with the evidence supporting the defense is on the person claiming its benefit.

(e) Covered vessel defined.--In this section the term "covered vessel" means--

(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States.

CREDIT(S)

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1687; Pub.L. 114-120, Title III, § 314(a), (b), (e)(1), Feb. 8, 2016, 130 Stat. 59.)

Notes of Decisions (158)

46 U.S.C.A. § 70503, 46 USCA § 70503
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-280, 114-282 to 114-288, 114-290 to 114-314, 114-316, 114-318 to 114-321, 114-325, and 114-326. Title 26 current through 114-329.

End of Document

United States Code Annotated
Title 46. Shipping (Refs & Annos)
Subtitle VII. Security and Drug Enforcement (Refs & Annos)
Chapter 705. Maritime Drug Law Enforcement

46 U.S.C.A. § 70504
Formerly cited as 46 App. USCA § 1903

§ 70504. Jurisdiction and venue

Effective: October 13, 2008
Currentness

(a) Jurisdiction.--Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

(b) Venue.--A person violating section 70503 or 70508 of this title shall be tried in the district court of the United States for--

(1) the district at which the person enters the United States; or

(2) the District of Columbia.

CREDIT(S)

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub.L. 110-407, Title II, § 202(b)(2), Oct. 13, 2008, 122 Stat. 4300.)

Notes of Decisions (21)

46 U.S.C.A. § 70504, 46 USCA § 70504
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-280, 114-282 to 114-288, 114-290 to 114-314, 114-316, 114-318 to 114-321, 114-325, and 114-326. Title 26 current through 114-329.

End of Document

United States Code Annotated
Title 46. Shipping (Refs & Annos)
Subtitle VII. Security and Drug Enforcement (Refs & Annos)
Chapter 705. Maritime Drug Law Enforcement

46 U.S.C.A. § 70506
Formerly cited as 46 App. USCA § 1903

§ 70506. Penalties

Effective: February 8, 2016
Currentness

(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.

(c) Simple possession.--

(1) In general.--Any individual on a vessel subject to the jurisdiction of the United States who is found by the Secretary, after notice and an opportunity for a hearing, to have knowingly or intentionally possessed a controlled substance within the meaning of the Controlled Substances Act (21 U.S.C. 812) shall be liable to the United States for a civil penalty of not to exceed $5,000 for each violation. The Secretary shall notify the individual in writing of the amount of the civil penalty.

(2) Determination of amount.--In determining the amount of the penalty, the Secretary shall consider the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters that justice requires.

(3) Treatment of civil penalty assessment.--Assessment of a civil penalty under this subsection shall not be considered a conviction for purposes of State or Federal law but may be considered proof of possession if such a determination is relevant.

(d) Penalty.--A person violating paragraph (2) or (3) of section 70503(a) shall be fined in accordance with section 3571 of title 18, imprisoned not more than 15 years, or both.

CREDIT(S)

(Pub.L. 109-304, § 10(2), Oct. 6, 2006, 120 Stat. 1688; Pub.L. 111-281, Title III, § 302, Oct. 15, 2010, 124 Stat. 2923; Pub.L. 114-120, Title III, § 314(c), Feb. 8, 2016, 130 Stat. 59.)

Notes of Decisions (18)

46 U.S.C.A. § 70506, 46 USCA § 70506
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-280, 114-282 to 114-288, 114-290 to 114-314, 114-316, 114-318 to 114-321, 114-325, and 114-326. Title 26 current through 114-329.

End of Document

A-5

United States Constitution Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

A-6

United States Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.