

IN THE SUPREME COURT OF THE UNITED STATES

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DIEGO PORTOCARRERO VALENCIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

Petitioner was convicted of committing drug-related offenses while on board a vessel in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq. The questions presented are:

1. Whether petitioner was entitled under the Fifth and Sixth Amendments to a jury determination that the vessel at issue was "subject to the jurisdiction of the United States," 46 U.S.C. 70503(e)(1) (Supp. IV 2016), when the MDLEA specifies that the jurisdictional question "is not an element of an offense" but a "preliminary question[] of law to be determined solely by the trial judge," 46 U.S.C. 70504(a).

2. Whether 46 U.S.C. 70502(d)(2), which provides that a foreign nation's response to a claim of registry "is proved conclusively" by a certification of the Secretary of State or his designee, violates petitioner's rights under the Confrontation Clause, U.S. Const. Amend. VI.

3. Whether a defendant convicted of violating 46 U.S.C. 70503(a)(1) (Supp. IV 2016) and 70506(b) before the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (enacted Dec. 21, 2018), is eligible for relief under the safety-valve statute, 18 U.S.C. 3553(f).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Portocarrero Valencia, No. 16-cr-10052 (Aug. 4, 2017)

United States Court of Appeals (11th Cir.):

United States v. Portocarrero Valencia, No. 17-13535 (Feb. 12, 2019)

Supreme Court of the United States:

Valencia v. United States, No. 18-9263 (filed May 9, 2019)

Valois v. United States, No. 19-5166 (filed Apr. 24, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

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No. 18-9328

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 915 F.3d 717. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2019. The petition for a writ of certiorari was filed on May 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess with the intent to distribute more than five kilograms of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70506(b), and possession with the intent to distribute more than five kilograms of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a) (Supp. IV 2016). Pet. App. 29. He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Id. at 30-31. The court of appeals affirmed. Id. at 1-28.

1. The Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq., makes it unlawful for any person to possess a controlled substance with the intent to distribute it, or to attempt or conspire to do so, on board "a vessel subject to the jurisdiction of the United States." 46 U.S.C. 70503(a) and (e)(1) (Supp. IV 2016), 46 U.S.C. 70506(b). Congress enacted the MDLEA because it found that "trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. 70501(1). Congress accordingly provided that the MDLEA would apply to any "vessel subject to the jurisdiction of the United States," 46

U.S.C. 70503(e) (1), "even though the act is committed outside the territorial jurisdiction of the United States," 46 U.S.C. 70503(b).

As relevant here, the MDLEA defines a "vessel subject to the jurisdiction of the United States" to include "a vessel without nationality." 46 U.S.C. 70502(c) (1) (A). A "vessel without nationality" is defined to include "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." 46 U.S.C. 70502(d) (1) (C). The MDLEA provides that the foreign nation's "response \* \* \* to a claim of registry \* \* \* 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." 46 U.S.C. 70502(d) (2). The MDLEA further provides that "[j]urisdiction 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." 46 U.S.C. 70504(a).

2. One morning in November 2016, U.S. Coast Guard personnel encountered a suspicious "go-fast" boat in international waters off the coasts of Panama and Costa Rica. Pet. App. 5; see 5/8/17 Tr. 112. As the Coast Guard pursued the boat, two men on the boat began throwing packages overboard. 5/8/17 Tr. 112. The Coast

Guard caught up to the boat after a brief chase, but by then, no more packages remained on board. Ibid. The Coast Guard later retrieved 16 jettisoned packages, which were found to contain approximately 640 kilograms of cocaine. Id. at 112, 115.

The Coast Guard found three men on the boat: Henry Vazquez Valois, Luis Felipe Valencia, and petitioner. 5/8/2017 Tr. 110-111. Valois "identified himself as the master of the vessel and claimed Colombian nationality for the vessel," but the vessel "did not display a hailing port and was not flying a national flag," and the Government of Colombia "could neither confirm nor deny the vessel's registry or nationality." D. Ct. Doc. 43, at 2 (Apr. 13, 2017).

3. A grand jury in the Southern District of Florida indicted Valois, Valencia, and petitioner on one count of conspiring to possess with the intent to distribute five kilograms or more of cocaine, in violation of 46 U.S.C. 70506(a), (b), and 21 U.S.C. 960(b)(1)(B), and one count of possessing with the intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a)(1), 21 U.S.C. 960(b)(1)(B), and 18 U.S.C. 2. Indictment 1-2.

In a pretrial order, the district court found that the MDLEA's jurisdictional requirements were satisfied because the go-fast boat was "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.” D. Ct. Doc. 43, at 3 (quoting 46 U.S.C. 70502(d)(1)(C)); see id. at 1-6. The court explained that “a certification by the Secretary of State or the Secretary’s designee concerning a vessel’s registry or lack thereof constitutes rebuttable prima facie evidence of the facts certified.” Id. at 3 (quoting United States v. Tinoco, 304 F.3d 1088, 1114 (11th Cir. 2002), cert. denied, 538 U.S. 909 (2003)). And it observed that the government had provided a certification from the Department of State that the Government of Colombia “could neither confirm nor deny the vessel’s registry or nationality.” Id. at 2.

In the same order, the district court also rejected petitioner’s objections to its exercise of jurisdiction. First, citing the Eleventh Circuit’s decision in United States v. Campbell, 743 F.3d 802, 810, cert. denied, 135 S. Ct. 704 (2014), it rejected petitioner’s contention that the government was required to “establish a jurisdictional nexus” between the conduct at issue and the United States. D. Ct. Doc 43, at 4. Second, citing the Eleventh Circuit’s decision in United States v. Tinoco, supra, the court rejected petitioner’s contention that the resolution of “a jurisdictional determination under the MDLEA \* \* \* by the district court \* \* \* violat[ed] the defendant’s constitutional jury trial rights.” Id. at 5. Finally, citing Tinoco, the court rejected petitioner’s contention that “the



admission of a State Department Certification” “without an opportunity for [petitioner] to first cross-examine the declarant” would violate the Confrontation Clause. Ibid.

Following a three-day trial, the jury found petitioner and his co-defendants guilty of the charged offenses. D. Ct. Doc. 63 (May 12, 2017). Before sentencing, Valencia (but not petitioner) sought the benefits of the safety-valve statute, which allows a court to impose a sentence without regard to a statutory minimum in certain circumstances. See 18 U.S.C. 3553(f); D. Ct. Doc. 96, at 3-4 (July 5, 2017). The district court determined that Valencia was ineligible for such relief. See Sent. Tr. 8. The court sentenced petitioner to 120 months of imprisonment. Pet. App. 30-31.

4. The court of appeals affirmed. Pet. App. 1-28.

The court of appeals rejected four constitutional challenges to the MDLEA, explaining that “each of these arguments is foreclosed by binding [circuit] precedent.” Pet. App. 2; see id. at 2-4. First, relying on its previous decision in Campbell, the court rejected petitioner’s contention that “Congress’s authority to define and punish felonies on the high seas does not extend to felonies without any connection to the United States.” Id. at 2; see id. at 2-3. Second, relying on its previous decision in United States v. Rendon, 354 F.3d 1320 (11th Cir. 2003), cert. denied, 541 U.S. 1035 (2004) the court rejected petitioner’s contention that “due process prohibits the prosecution of foreign nationals

for offenses that lack a nexus to the United States.” Pet. App. 2; see id. at 3. Third, relying on its previous decision in Tinoco, the court rejected petitioner’s contention that “the MDLEA violates the Fifth and Sixth Amendments by removing the determination of jurisdictional facts from the jury,” explaining that “the MDLEA jurisdictional requirement” need not be submitted to the jury because it “goes to the subject-matter jurisdiction of courts and is not an essential element of the MDLEA substantive offense.” Id. at 2-3. Fourth, relying on Campbell, the court rejected petitioner’s contention that “the admission of a certification of the Secretary of State to establish extraterritorial jurisdiction violates the Confrontation Clause,” explaining that the jurisdictional requirement “‘does not implicate the Confrontation Clause’” because it is “not an element of [the] MDLEA offense to be proved at trial.” Id. at 2, 4 (citation omitted).

The court of appeals also rejected the argument raised by Valencia and adopted by petitioner that the safety-valve provisions of 18 U.S.C. 3553(f) violate “equal-protection guarantees.” Pet. App. 18-19. The court noted at the outset that it “need not decide” whether the relevant arguments were adequately presented in the district court, “because the defendants’ constitutional claims fail in any event.” Id. at 19 n.7. The court then observed that Valencia and petitioner “[we]re not eligible for safety-valve relief” under the statute because

Congress had made such relief available only for certain “domestic drug offenses,” not for the “international drug trafficking” crimes at issue here. Id. at 19-20 (citation omitted). And the court explained that Congress’s decision “does not violate the equal-protection guarantee of the Fifth Amendment” because Congress had “legitimate reasons” to “craft strict[er] sentences” for international drug crimes than for domestic ones. Id. at 20 (citation omitted).

#### ARGUMENT

Petitioner contends (Pet. 9-22) that the MDLEA violates the Fifth and Sixth Amendments by allowing the judge rather than the jury to determine U.S. jurisdiction over a vessel and that the admission of a certification from the Secretary of State to prove jurisdiction violates the Confrontation Clause. Those contentions lack merit, and this Court has recently and repeatedly declined to review each of those issues. The same result is warranted here, particularly because this case would be a poor vehicle to consider the questions presented. Petitioner also contends (Pet. 23-24) that he is entitled to safety-valve relief pursuant to the terms of 18 U.S.C. 3553(f). That contention lacks merit, lacks prospective importance because of changes to the applicable statute, and has in all events been forfeited here.<sup>1</sup>

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<sup>1</sup> Similar issues are raised by the petition for a writ of certiorari in No. 18-9263, Valencia v. United States.

1. Petitioner principally contends (Pet. 9-22) that the MDLEA violates the Fifth and Sixth Amendments by providing that the United States' jurisdiction over a vessel is a "preliminary question[] of law to be determined solely by the trial judge" and "is not an element of an offense." 46 U.S.C. 70504(a). That contention lacks merit, and, despite some disagreement in the courts of appeals, this Court has repeatedly declined to review the question. See Mejia v. United States, 139 S. Ct. 593 (2018) (No. 18-5702); Carrasquilla-Lombada v. United States, 139 S. Ct. 480 (2018) (No. 18-5534); Cruickshank v. United States, 139 S. Ct. 96 (2018) (No. 17-8953); Cruickshank v. United States, 137 S. Ct. 1435 (2017) (No. 16-7337); Campbell v. United States, 135 S. Ct. 704 (2014) (No. 13-10246); Tam Fuk Yuk v. United States, 565 U.S. 1203 (2012) (No. 11-6422); Sanchez-Salazar v. United States, 556 U.S. 1185 (2009) (No. 08-8036); Aguilar v. United States, 556 U.S. 1184 (2009) (No. 08-7048); Moreno v. United States, 549 U.S. 1343 (2007) (No. 06-8332); Estupinan v. United States, 549 U.S. 1267 (2007) (No. 06-8104). And in any event, this case would not be an appropriate vehicle in which to consider the question presented because no court of appeals would require a jury finding in the circumstances presented here.

a. The Constitution affords "a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511 (1995). That principle does not apply here, however,

because the MDLEA expressly provides that “[j]urisdiction of the United States with respect to a vessel subject to [the MDLEA] is not an element of an offense” and is instead a “preliminary question [] of law to be determined solely by the trial judge.” 46 U.S.C. 70504(a). Because the question whether a vessel is subject to the jurisdiction of the United States is a preliminary question of law and not an element of the offense, a defendant has no constitutional right to have a jury decide that issue. See, e.g., United States v. Vilches-Navarrete, 523 F.3d 1, 20 (1st Cir.) (“This issue is not an element of the crime \* \* \* and may be decided by a judge.”), cert. denied, 555 U.S. 897 (2008); United States v. Tinoco, 304 F.3d 1088, 1109-1110 (11th Cir. 2002) (“[The MDLEA’s] jurisdictional requirement is not an essential ingredient or an essential element of the MDLEA substantive offense, and, as a result, it does not have to be submitted to the jury for proof beyond a reasonable doubt.”), cert. denied, 538 U.S. 909 (2003).

This Court’s decision in Ford v. United States, 273 U.S. 593 (1927), confirms that conclusion. In Ford, the defendants were charged with conspiring to violate the National Prohibition Act when their British vessel, laden with liquor, was seized “in the high seas off the Farallon Islands, territory of the United States, twenty-five miles west from San Francisco.” Id. at 600. The defendants argued that it was “error \* \* \* to refuse to submit to the jury on the trial the issue as to the place of the [ship’s] seizure,” but the Court disagreed. Id. at 606. The Court reasoned

that a jury trial was not required because "[t]he issue whether the ship was seized within the prescribed [territorial] limit did not affect the question of the defendants' guilt or innocence," but instead "only affected the right of the court to hold [them] for trial." Ibid.

That reasoning applies equally here. The question whether a vessel is subject to the jurisdiction of the United States "does not raise factual questions that traditionally would have been treated as elements of an offense under the common law." Tinoco, 304 F.3d at 1108. As in Ford, whether the United States has jurisdiction over the vessel does not pertain to petitioner's participation in, or blameworthiness for, his drug-related offenses, but instead to the court's authority to try him for those offenses. Id. at 1108-1109 (explaining that the MDLEA's jurisdictional determination "does not go to the actus reus, causation, or the mens rea of the defendant"; nor does it "affect the defendant's blameworthiness or culpability"). "Congress inserted the requirement that a vessel be subject to the jurisdiction of the United States into the statute as a matter of diplomatic comity," not to define the defendant's culpability. Vilches-Navarrete, 523 F.3d at 22 (Lynch and Howard, J.J., opinion of the court in part and concurring in part); see Tinoco, 304 F.3d at 1109 ("[T]he statutory jurisdictional requirement \* \* \* is unique because it is not meant to have any bearing on the individual defendant, but instead is meant to bear only on the

diplomatic relations between the United States and foreign governments."); cf. S. Rep. No. 530, 99th Cong., 2d Sess. 16 (1986) ("In the view of the Committee, only the flag nation of a vessel should have a right to question whether the Coast Guard has boarded that vessel with the required consent. The international law of jurisdiction is an issue between sovereign nations. Drug smuggling is universally recognized criminal behavior, and defendants should not be allowed to inject these collateral issues into their trials.").

That result is consistent with this Court's holdings in other contexts that factual issues bearing on a defendant's susceptibility to prosecution may be resolved by the trial judge rather than the jury when they are not elements of the offense. For example, the determination whether a defendant has previously been placed in jeopardy for the charged offense, has been denied the right to a speedy trial, or has been selected for prosecution on an impermissible basis may all turn in part on findings of historical fact. Those factual questions, however, are routinely entrusted to judicial resolution. See, e.g., Wayte v. United States, 470 U.S. 598, 606-610 (1985); Oregon v. Kennedy, 456 U.S. 667, 669-670, 679 (1982); Barker v. Wingo, 407 U.S. 514, 530-536 (1972).

b. As petitioner notes (Pet. 10-14), the courts of appeals have taken different approaches to the submission of jurisdictional issues under the MDLEA to juries. In addition to

the court below, the First Circuit has upheld the constitutionality of submitting the jurisdictional issue to the judge. See Vilches-Navarrete, 523 F.3d at 19-23 (Lynch and Howard, J.J., opinion of the court in part and concurring in part); Tinoco, 304 F.3d at 1107-1112. The Ninth Circuit agrees that the jurisdictional issue may be submitted to a judge when it poses only a question of law, but has concluded that, when the issue depends on a "disputed factual question," that question must be submitted to a jury. United States v. Perlaza, 439 F.3d 1149, 1165 (2006); see id. at 1164-1168; cf. United States v. Zakharov, 468 F.3d 1171, 1176 (9th Cir. 2006) (finding that the jurisdictional issue could be submitted to the judge in that case because there was "no factual question pertaining to statutory jurisdiction for the jury to decide"), cert. denied, 550 U.S. 927 (2007).

c. This case would be an unsuitable vehicle for addressing the disagreement in the courts of appeals, because this case does not implicate that disagreement. As just noted, the Ninth Circuit has required the submission of the jurisdictional issue to the jury only where the issue depends on the resolution of a "disputed factual question." Perlaza, 439 F.3d at 1165. The Ninth Circuit applied that requirement in a case involving conflicting evidence about whether the vehicle at issue was stateless. See id. at 1165-1166. In this case, by contrast, no conflicting evidence has raised any factual dispute. The government introduced a certification from the Department of State establishing that the



Government of Colombia had informed the United States that it was unable to confirm or deny the registry of the vessel in Colombia, see D. Ct. Doc. 43, at 2, and that certification was sufficient to satisfy the statutory jurisdictional requirement because "claimed nation of registry" did not "affirmatively and unequivocally assert that the vessel [wa]s of its nationality." 46 U.S.C. 70502(d)(1)(C). Petitioner did not object to the authenticity of the certification at trial, and he has not argued that it was deficient in any way. Accordingly, it is likely that no jury determination would have been required even in the Ninth Circuit.

2. Petitioner asserts in his question presented and a section heading (Pet. i, 9) that the admission of a certification from the Department of State to prove a vessel's statelessness, see 46 U.S.C. 70502(d)(2), violates the Confrontation Clause. Petitioner has failed to develop any argument under that Clause "in the body of [his] petition," Sup. Ct. R. 14.2, and has accordingly forfeited that contention. In any event, this Court has previously declined to review similar issues raised in other petitions, and the same result is appropriate here. See Cruickshank, supra (No. 17-8953); Cruickshank, supra (No. 16-7337); Campbell, supra (No. 13-10246); Tam Fuk Yuk, 565 U.S. 1203; Mina v. United States, 554 U.S. 905 (2008) (No. 07-9435).

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right \* \* \* to be confronted with the witnesses against him." U.S. Const. Amend.

VI. This Court has described a defendant's right under the Confrontation Clause as "a trial right." Barber v. Page, 390 U.S. 719, 725 (1968); see Crawford v. Washington, 541 U.S. 36, 42-43 (2004) ("One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between.") (citations omitted); Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (opinion of Powell, J.) ("The opinions of this Court show that the right to confrontation is a trial right.") (emphasis omitted). The Court has held that the Confrontation Clause does not apply at preliminary proceedings such as a probable-cause hearing, see Gerstein v. Pugh, 420 U.S. 103, 120-122 (1975), or a suppression hearing, see McCray v. Illinois, 386 U.S. 300, 305, 313-314 (1967). And all of the Court's Confrontation Clause decisions since Crawford v. Washington, supra -- which focused the Confrontation Clause inquiry largely on an out-of-court's "testimonial" nature -- have involved trial settings. See Ohio v. Clark, 135 S. Ct. 2173, 2177 (2015); Williams v. Illinois, 567 U.S. 50, 56 (2012) (plurality opinion); Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009).

As just discussed, the United States' jurisdiction over a vessel for purposes of the MDLEA "is not an element of an offense" to be established at trial, but is instead a "preliminary question[] of law to be determined solely by the trial judge." 46 U.S.C. 70504(a). Petitioner does not identify any basis for

extending the Confrontation Clause's protections to such a jurisdictional question. The First Circuit, which appears to be the only other court of appeals apart from the court below to have considered the issue, agrees that the Confrontation Clause does not extend to "the MDLEA's jurisdiction determination." United States v. Mitchell-Hunter, 663 F.3d 45, 50-51 (1st Cir. 2011). In the absence of any disagreement in the courts of appeals, further review of petitioner's claim under the Confrontation Clause is unwarranted.

3. Finally, petitioner argues (Pet. 23-24) that he qualified for safety-valve relief under 18 U.S.C. 3553(f) (2012). This Court has repeatedly denied review of petitions raising that issue. See Castillo v. United States, 139 S. Ct. 796 (2019) (No. 18-374); Rolle v. United States, 572 U.S. 1102 (2014) (No. 13-7467); Morales v. United States, 572 U.S. 1063 (2014) (No. 13-7429). It should follow the same course here.

For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Castillo, supra (No. 18-374), petitioner's argument lacks merit.<sup>2</sup> By its plain terms, the version of Section 3553(f) that was in effect at petitioner's sentencing applied only when a defendant was convicted "of an offense under" 21 U.S.C. 841, 844, 846, 960, or 963. 18 U.S.C. 3553(f) (2012). Petitioner was not convicted of any offense under

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<sup>2</sup> The government has served petitioner with a copy of its brief in opposition in Castillo.

any of those listed provisions, and Section 3553(f) was not applicable to other offenses, including violations of 46 U.S.C. 70503(a)(1) (2012). See Br. in Opp. at 8-13, Castillo, supra (No. 18-374). The decision below is therefore correct, and its approach is consistent with the decisions of most courts of appeals to consider the issue. See id. at 13-14 (citing cases).

The D.C. Circuit reached a different conclusion in United States v. Mosquera-Murillo, 902 F.3d 285 (2018). The defendants in Mosquera-Murillo received ten-year statutory-minimum sentences after pleading guilty to conspiring to distribute, and to possess with intent to distribute, five or more kilograms of cocaine and 100 or more kilograms of marijuana on board a covered vessel. Id. at 287, 294. The indictment, plea agreements, and judgment in that case all stated the defendants committed that offense "in violation of" both the MDLEA and 21 U.S.C. 960(b)(1)(B) and (2)(G). 902 F.3d at 293-294. The D.C. Circuit concluded that "[t]he defendants' crime of conviction \* \* \* involved a violation of (or, equivalently, an offense under) 21 U.S.C. § 960" and that the defendants in that case were eligible for safety-valve relief from their ten-year statutory-minimum sentences. Id. at 293-295. The shallow conflict between Mosquera-Murillo and the decisions of other courts of appeals, in which the majority view favors the approach taken in this case, does not warrant review here.

The question presented is of diminishing importance. Title IV of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat.

5220 (enacted Dec. 21, 2018; see S. 756, 115th Cong., 2d Sess. (2018)), amends Section 3553(f) by adding offenses under "section 70503 or 70506 of title 46" to the list of offenses eligible for safety-valve relief under that statute. § 402(a)(1)(A), 132 Stat. 5221; see 18 U.S.C. 3553(f) (2012). And contrary to petitioner's suggestion (Pet. 23-24) that the Act should support his view of the prior version of Section 3553(f), Congress specified that the amendment would "apply only to a conviction entered on or after the date of enactment of th[e] Act." First Step Act § 402(b), 132 Stat. 5221; 18 U.S.C. 3553 note. As a result of that provision, future defendants who are convicted under Section 70503(a)(1) will qualify for safety-valve relief.

In all events, this case would be a poor vehicle for reviewing the question presented because petitioner has failed to preserve his contention that he is eligible for safety-valve relief. In the district court, petitioner's co-defendant Valencia asserted eligibility for safety-valve relief, but petitioner did not. See D. Ct. Doc. 96, at 3-4; D. Ct. Doc. 99, at 1-2 (July 14, 2017); see also Pet. App. 19 n.7 (noting that "[t]he parties debate what was raised in the district court"). And in the court of appeals, Valencia and petitioner "challenge[d] the constitutionality of the 'safety-valve' provisions," Pet. App. 18, but did not argue (as petitioner does now) that they were eligible for safety-valve relief under the statute itself. No sound basis exists for this Court -- which is a "court of review, not first view," Cutter v.

Wilkinson, 544 U.S. 709, 718 n.7 (2005) -- to consider those contentions in the first instance.

This case would also be a poor vehicle for reviewing the question presented because petitioner does not claim that he otherwise satisfies the requirements of the safety valve, most notably that he "truthfully provided to the Government all information and evidence" that he had concerning the offense. 18 U.S.C. 3553(f)(5). Therefore, even if the safety valve were to apply to petitioner's convictions under the MDLEA, it would not make any difference to the outcome of petitioner's case. No further review is warranted.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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