NO:

IN THE
SUPREME COURT OF THE UNITED STATES

DIEGO PORTOCARRERO,

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

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Maritime Drug Law Enforcement Act ("MDLEA") unconstitutional because no minimum contacts between the accused and the United States are required to establish jurisdiction and the MDLEA procedures, which preclude the jury's consideration of, and limit the accused's right to contest, jurisdiction over a purported "stateless vessel," violate the accused's fundamental due process and confrontation rights?

2. Does denial of eligibility for safety valve relief under 18 U.S.C. § 3553(f) to defendants sentenced under 21 U.S.C. § 960(b) for high seas drug offenses result in irrationally severe punishment, particularly in light of the First Step Act amendments which suggest that any ambiguity relied on by some circuits to bar safety valve relief was likely misinterpreted?

INTERESTED PARTIES

The parties interested in the proceeding other than those named in the caption of the appellate decision are the following co-petitioners seeking a writ of certiorari:

Luis Felipe Valencia

Henry Vazquez Valois

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PETITION FOR WRIT OF CERTIORARI

Diego Portocarrero respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-13535 in a decision published at *United States v. Valois*, 915 F.3d 717 (11th Cir. 2019), by that court on February 12, 2019, affirming the judgment and commitment order of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on February 12, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V (due process clause):

> No person shall ... be deprived of life, liberty, or property, without due process of law.

U.S. Const., amend. VI (confrontation clause):

> In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him ... .

18 U.S.C. § 3553(f) (2017):

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that –

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

46 U.S.C. § 70502(c)(1)(A):

In this chapter, the term "vessel subject to the jurisdiction of the United States" includes – a vessel without nationality.

46 U.S.C. § 70502(d)(1)(C):

In this chapter, the term "vessel without nationality" includes – 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)(2):

The response of a foreign nation to a claim of registry . . . is proved conclusively by certification of the Secretary of State or the Secretary's designee.

46 U.S.C. § 70503(a)(1):

(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.

46 U.S.C. § 70504(a):

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.

46 U.S.C. § 70506(a), (b):

(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.

STATEMENT OF THE CASE

Petitioner and co-defendants Henry Vazquez Valois ("Vazquez") and Luis Felipe Valencia ("Valencia"), were charged by indictment in the Southern District of Florida with conspiring, while on board a vessel subject to the jurisdiction of the United States, to possess five kilograms or more of cocaine with intent to distribute in violation of 46 U.S.C. §§ 70503(a)(1), 70506(a) (Count 1); and possessing, while on board a vessel subject to the jurisdiction of the United States, five kilograms or more of cocaine with intent to distribute, in violation of 46 U.S.C. § 70506(a)(1) (Count 2).

The indictment did not allege a factual basis for the jurisdictional claim of statelessness. Accordingly, the defendants moved to dismiss the indictment on jurisdictional grounds and further sought a determination that the issue of whether their vessel was a "stateless" vessel on the high seas (and therefore subject to the jurisdiction of the United States under the Maritime Drug Law Enforcement Act or MDLEA) was an issue of fact that required jury determination at trial. Petitioner also sought an evidentiary hearing on the grounds raised by the motion to dismiss.

Invoking jurisdiction under § 70502(d)(1)(C), the government asserted in the district court that in petitioner's case, the Government of Colombia could neither confirm nor deny the vessel's registry. The government added that jurisdiction can be established by a Department of State Certification, and provided the district court with a Department of State Certification, dated January 11, 2017, which stated that a Coast Guard Liaison Officer certified that on November 25, 2016, United States law

enforcement personnel detected a go-fast vessel seaward of the territorial sea of any State, that the vessel was suspected of drug trafficking, and that U.S. personnel questioned the crew, during which the master made a verbal claim of Colombian nationality for the vessel. The Certification stated that the United States requested that Colombia verify the nationality of the vessel, and, if confirmed, grant authorization to board and search it. The Certification stated that Colombia replied on that date that it could neither confirm nor deny the vessel's nationality.

On that basis the government declared the vessel subject to the jurisdiction of the United States, pursuant to 46 U.S.C. § 70502(c)(1)(A) and the district court, in its pretrial ruling, found that the go-fast vessel on which the defendants were seized was without nationality and subject to the jurisdiction of the United States. Without holding an evidentiary hearing, the district court denied the motion to dismiss, and granted the government's motion for a pre-trial determination of jurisdiction, finding that "a jurisdictional determination under the MDLEA may be resolved by the district court [before trial] without violating the defendant's constitutional jury trial rights." Order denying motion to dismiss, at 5 (citing *United States v. Tinoco*, 304 F.3d 1088, 1108–09 (11th Cir. 2002)). As a result, the question whether the vessel was "stateless" was not submitted to the jury; and the Department of State Certification was not introduced in evidence at trial.

In its final instructions to the jury, the district court told the jury that the two charged offenses involved drug trafficking while on board a vessel subject to the

jurisdiction of the United States. The district court instructed further that the vessel at issue in petitioner's case has been determined to be a vessel subject to the jurisdiction of the United States.

Petitioner was convicted, along with his co-defendants. At sentencing, the district court imposed the statutory minimum of 10 years imprisonment for offenses punishable under 21 U.S.C. § 960(b)(1)(B). App. 29.

On appeal to the Eleventh Circuit, petitioner and his co-defendants raised multiple challenges to the vagaries of 46 U.S.C. §§ 70503 & 70506, contending that denial of eligibility for sentence mitigation under the safety valve was contrary to the statute or otherwise unconstitutional and that removing the crucial factual issues relating to the assertion of foreign jurisdiction over the mariners in this case violated the Fifth and Sixth Amendments and misinterpreted the criminal statute.

The Eleventh Circuit failed to discuss the intervening First Step Act, in which Congress rectified (prospectively) the ambiguous statutory language that had led to a circuit split on foreign maritime defendants' eligibility for the safety valve; the Eleventh Circuit nevertheless held "Congress had 'legitimate reasons'" to justify that court's reading of the statute to exclude maritime defendants from safety valve eligibility. *See* App. 20 (quoting *United States v. Castillo*, 899 F.3d 1208, 1213 (11th Cir. 2018)).

As to the constitutional and jurisdictional issues raised by barring the defense from contesting jurisdictional at trial, the Eleventh Circuit rejected petitioner's arguments that:

> (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.

App. 2. The Eleventh Circuit found that with regard to authority to punish high seas crimes, 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." App. 2–3 (citing *United States v. Campbell*, 743 F.3d 802, 810 (11th Cir. 2014); *United States v. Cruickshank*, 837 F.3d 1182, 1187–88 (11th Cir. 2016)). The court of appeals rejected petitioner's nexus claim as to foreign nationals, concluding that the Due Process Clause "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." App. 3 (citing *United States v. Rendon*, 354 F.3d 1320, 1326 (11th Cir. 2003)).

The Eleventh Circuit also approved removing determination of jurisdictional facts from the jury because "the subject-matter jurisdiction of courts ... is not an essential element of the MDLEA substantive offense." App. 3 (citing *United States*

v. Tinoco, 304 F.3d 1088, 1109–12 (11th Cir. 2002)). The court of appeals also rejected petitioner's Confrontation Clause argument, concluding that the admission of a purported certification of the Secretary of State regarding purported communications with another country does not address "an element of [the] MDLEA offense to be proved at trial." App. 4 (citing *United States v. Campbell*, 743 F.3d at 806).

REASONS FOR ISSUING THE WRIT

This case is an appropriate candidate for resolving questions regarding the scope of application and constitutionality of prosecution and sentencing under the MDLEA.

1. The MDLEA Jurisdictional Basis Extends Beyond the Minimum Contacts Limitations for United States Courts, and MDLEA Procedures for Determining Jurisdiction Violate Due Process and Confrontation Rights. The Maritime Drug Law Enforcement Act (MDLEA) provides that a vessel subject to the jurisdiction of the United States includes a vessel without nationality." 46 U.S.C. § 70502(c)(1)(A). The MDLEA further provides that a vessel without nationality includes "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 response of a foreign nation to a claim of registry . . . is proved conclusively by certification of the Secretary of State or the Secretary's designee." 46 U.S.C. § 70502(d)(2).

It is a federal offense to possess a controlled substance with intent to distribute, or to conspire to possess a controlled substance with intent to distribute, while on board a "covered vessel." 46 U.S.C. §§ 70503(a), 70506(b). A "covered vessel" is defined to include a "vessel subject to the jurisdiction of the United States." 46 U.S.C. § 70503(e)(1). In 1996, Congress amended the MDLEA to provide that jurisdiction as to a vessel "is not an element of an offense," and that "[j]urisdictional issues . . . are questions of law to be determined solely by the trial judge." 46 U.S.C. § 70504(a).

In *United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006), the Ninth Circuit recognized that once a vessel is found to be "stateless," there is no Due Process requirement to demonstrate a "nexus" between those on board and the United States. 439 F.3d at 1161. But the Ninth Circuit found that the issue whether the vessel was "stateless" presented a "disputed factual question." 439 F.3d at 1165 (noting the conflicting testimony of the Navy personnel and the defendants regarding whether the boat was from Colombia). *Perlaza* reasoned that disputed factual questions are the type of questions that a jury must resolve. *Id.* at 466 (citing *Brosseau v. Haugen*, 543 U.S. 194, 206 (2004) ("This is a quintessentially 'fact-specific' question, not a question that judges should try to answer 'as a matter of law.'") (citation omitted)). *Perlaza* noted that Due Process "gives 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." *Id.* at 1166 (quoting *United States v. Booker*, 543 U.S. 220, 230 (2005) (quoting *United*

States v. Gaudin, 515 U.S. 506, 511 (1995)). *Perlaza* also noted that Congress "may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt." *Id.* (citing *Harris v. United States*, 536 U.S. 545, 561 (2002)).[1] *Perlaza* further noted that when the Supreme Court holds that the Constitution requires that an offense have an added element in order to narrow its scope, the Sixth Amendment's guarantees apply to this new element. *Id.* at 1166–67.

Perlaza concluded: "[w]hen [a] jurisdictional inquiry turns on 'factual issue[s]," such as . . . in this case, whether the Go-Fast was stateless, the jurisdictional inquiry *must* be resolved by a jury." *Id.* (emphasis in original). Accordingly, the Ninth Circuit vacated the defendants' convictions, and directed the district court to dismiss the indictment against them. *Id.*

With the exception of the Ninth Circuit, the courts of appeals to address the issue have held that the government is not required to establish a nexus between the offense conduct and the United States in order to support a prosecution under the MDLEA. *See*, *e.g.*, *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003); *United States v. Suerte*, 291 F.3d 366, 370–75 (5th Cir. 2002); *United States v.*

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[1] *Harris* was subsequently overruled by *Alleyne v. United States*, 133 S.Ct. 2151 (2013). But in so overruling *Harris, Alleyne* strongly reaffirmed the portion of *Harris* quoted in *Perlaza*. *See Alleyne*, 133 S.Ct. at 2155 (holding that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury.").

Cardales, 168 F.3d 548, 552–53 (1st Cir. 1999); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 & n.6 (3d Cir. 1993).

Tinoco recognized that "[g]enerally speaking, the legislature cannot relieve the government of proving beyond a reasonable doubt an 'essential ingredient of the offense.'" 304 F.3d at 1106–07 (citing *Jones v. United States*, 526 U.S. 227, 241 (1999)). *Tinoco* assumed, however, that "elements" of an offense refer only "to each component of the actus reus, causation, and the mens rea that must be proved in order to establish that a given offense has occurred." *Id.* at 1108 (citing Black's Law Dictionary 520 (6th ed. 1990) and *Morissette v. United States*, 342 U.S. 246, 251–52 (1952)). *Tinoco* reasoned that "[t]he requirement [of the MDLEA] that a vessel be subject to the jurisdiction of the United States . . . does not to go the actus reus, causation, or the mens rea of the defendant." *Id.* Instead, *Tinoco* reasoned, Congress inserted a jurisdictional requirement in the MDLEA "as a diplomatic courtesy to foreign nations and as a matter of international comity to avoid 'friction with foreign nations.'" *Id.* (citing *United States v. Gonzalez*, 776 F.2d 931, 940 (11th Cir. 1985)).

In addition, *Tinoco* pointed out that in *Ford v. United States*, 273 U.S. 593 (1927), which involved the criminal offense of carrying contraband, the Supreme Court held that the question whether a ship had been seized at sea within an area delineated by a treaty was for the judge, not the jury, to decide, because it was an issue of jurisdiction, and "did not affect the question of the defendants' guilt or innocence." *Id.* (citing *Ford*, 273 U.S. at 606).

Tinoco recognized that *United States v. Gaudin*, 515 U.S. 506, 511–15, 522–23 (1995) "stands for the proposition that *elements* of an offense that involve factual determinations, or mixed determinations of law and fact, must go to the jury." *Id.* at 1110 (emphasis in original). However, *Tinoco* reasoned that whether an issue involves factual determinations is not "talismanic" with respect to whether Congress can remove this question from the jury's determination. *Id.* *Tinoco* pointed out that "even after *Gaudin*, many factual determinations still can be made by the judge, as in the context of '[p]reliminary questions in a trial regarding the admissibility of evidence, the competency of witnesses, the voluntariness of confessions, the legality of searches and seizures, and the propriety of venue." *Id.* at 1110 (citing *Gaudin*, 515 U.S. at 525–26) (Rehnquist, C. J., concurring).

Based on the above reasoning, *Tinoco* concluded that "Congress had the flexibility under the Constitution" to remove the MDLEA jurisdictional question from the jury's determination because this provision was not "an essential ingredient" of a criminal offense. *Id.* at 1112.

Tinoco placed undue weight on *Ford*, a 1927 case involving the then-prohibited transportation of liquor into the United States. *Ford* had noted that the "proper way of raising the issue of fact of the place of seizure was by a plea of jurisdiction . . . which must precede [the] plea of not guilty." 273 U.S. at 605 The Supreme Court noted that such a plea "was not filed," and the effect of this failure to file "was to waive the question of the jurisdiction of the persons of the defendant." *Id.* Thus, the

defendants waived the question of jurisdiction, and *Ford*'s subsequent suggestion that this did not present a jury question, relied on in *Tinoco*, was mere *dicta*.

Moreover, in recent years, the Court has significantly strengthened the Sixth Amendment's guarantee of jury trial, re-examining and overturning its own precedent in the process. *See Gaudin*, 515 U.S. at 521, *overruling Sinclair v. United States*, 279 U.S. 263 (1929); *Ring v. Arizona*, 636 U.S. 584 (2002), *overruling Walton v. Arizona*, 497 U.S. 639 (1990); *Alleyne*, 570 U.S. 99 (2013), *overruling Harris*, 536 U.S. 545 ; *Hurst v. Florida*, 136 S.Ct. 616 (2016), *overruling Spaziano v. Florida*, 468 U.S. 447 (1984). In light of the sea change in Sixth Amendment law since 1927, *Ford*'s dicta is certainly not immune from re-examination.

Tinoco acknowledged that the interstate commerce element of federal criminal statutes (as well as elements that bring a statute into compliance with due process restraints) may trigger the constitutional safeguards of the right to jury trial. But *Tinoco* did not acknowledge that the question of a defendant's guilt or innocence, which it had assumed was the touchstone for whether a factual question must be submitted to the jury, does not bear at all on the "interstate commerce" element of federal statutes. *See*, *e.g.*, *United States v. Feola*, 420 U.S. 671, 677 n. 9 (1975) ("the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.").[2]

[2] *Accord United States v. Muncy*, 526 F.2d 1261, 1263–64 (5th Cir. 1976) (no error in district court's instruction that it was not necessary for the jury to find that the defendant

Tinoco noted mistakenly that only facts that involve "guilt or innocence" give rise to the "essential ingredients" of an offense that must be submitted to the jury.

In *Alleyne v. United States*, 133 S.Ct. 2151, the Court explained why facts that increase a mandatory minimum must be treated as part of a substantive offense:

> [Requiring facts that increase a mandatory minimum to be submitted to a jury] preserves the historic role of the jury [is to act] *as an intermediary between the State and criminal defendants*. *See United States v. Gaudin*, 515 U.S. at 510-11, 115 S.Ct. at 2315 ("This right was designed 'to guard against a spirit of oppression and tyranny on the part of rules,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." (quoting 2 J. Story, Commentaries on the Constitution of the United States §§ 1779, 1780, pp. 540-541 (4th ed. 1873))); *Williams v. Florida*, 399 U.S. 78, 100, 90 S.Ct. 1893, 1904 (1970) ("[T]he essential feature of a jury obviously lies in [its] interposition between the accused and his accuser"); *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S.Ct. 1444, 1449 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

Alleyne, 133 S.Ct. at 2161; *see id.* at 2171 (Roberts, C.J., dissenting) (noting that the Sixth Amendment limits legislative power when it "infringes on the province of the jury."). The Constitution requires issues of fact to be submitted to the jury *when these facts call into question the limits of Congress' constitutional power to criminalize conduct*.

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knew that the stolen property had moved in interstate commerce because "knowledge of jurisdictional facts is not required in determining guilt"); *United States v. Darby*, 37 F.3d 1059, 1067 (4th Cir. 1994) ("Numerous cases have held that criminal statutes based on the government's interest in regulating interstate commerce do not generally require that an offender have knowledge of the interstate nexus of his actions.").

The interstate commerce nexus preserves the federal-state balance in the exercise of the police power. In *United States v. Bass*, 404 U.S. 336, 339 (1971), the Court rejected the government's proposed interpretation of the federal criminal statute that criminalized the possession of a firearm by a convicted felon that would have required "no connection with interstate commerce." In so ruling, *Bass* noted that "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States," adding that this policy is rooted in the "concepts of American federalism." *Id.* at 349 (citing *Younger v. Harris*, 401 U.S. 37 (1971)). *Bass* rejected the government's interpretation because it would "assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* at 349.

Thus, *Bass* recognized that the requirement that the government prove that a firearm "has previously traveled in interstate commerce" gives force to the limitations on Congressional power reflected in federalist concepts of comity. *Id.* at 350. This is, of course, not the only instance when principles of federalism limit Congress' police power. *Cf. United States v. Ballinger*, 395 F.3d 1218, 1248–52 (11th Cir. 2005) (en banc) (Birch, J., dissenting) (discussing cases, such as *United States v. Lopez*, 514 U.S. 549 (1995), which recognize that federalism limits Congress' power to criminalize conduct under the Commerce Clause); *New York v. United States*, 505 U.S. 144 (1992) (Congressional statute requiring States to take ownership of radioactive waste violated federalism, and therefore was unconstitutional).

Tinoco reasoned that because the jurisdictional requirement of the MDLEA "was inserted into the statute as a diplomatic courtesy to foreign nations and as a matter of international comity in order to avoid friction with foreign nations," this jurisdictional requirement was a mere "ancillary consideration," and not an element of the offense that was required to be submitted to the jury. 304 F.3d at 1109 (citation omitted). But the jurisdictional requirement of the MDLEA is no more "ancillary" to the exercise of Congressional power to criminalize conduct on the High Seas, under U.S. Const. Art. I, § 8, cl. 10, than the interstate commerce nexus is to avoiding encroachment on State police powers offenses when criminalizing conduct Congress' Commerce Power pursuant to U.S. Const. Art. I, § 8, cl. 3.

The MDLEA arises out of Congress' power "[t]o define and punish Piracies and Felonies on the high Seas." *See United States v. Estupinan*, 453 F.3d 1336, 1338–39 (11th Cir. 2006) (citing U.S. Const., Art. I, § 8, cl. 10); *accord United States v. Saac*, 632 F.3d 1203, 1210 (11th Cir. 2011); *United States v. Moreno-Morillo*, 334 F.3d 819, 824 (9th Cir. 2013). This power to define felonies on the High Seas is not unlimited. *See United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1262 (11th Cir. 2012) (holding that the drug trafficking conduct at issue was beyond Congress' authority to proscribe under Art.1, § 8, cl. 10).

The definitions of vessels "without nationality" in § 70502(d) give force to international law limitations on Congress' power to criminalize high seas conduct. *See United States v. Rosero*, 42 F.3d 166, 171 n. 7 (3rd Cir. 1994) (Alito, J.) (noting

that the legislative history of the definitions of vessels without nationality indicates that the terms were "defined so as to comport with international law") (citing H.R. Rep. No. 323, 96th Cong. 2d Sess. (1980), at 22). In fact, one definition of a "vessel subject to the jurisdiction of the United States" expressly incorporates international law. *See* 46 U.S.C. § 70502(c)(1)(B) (defining a vessel "subject to the jurisdiction of the United States" as "a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas").

As the First Circuit stated in *United States v. Matos-Luchi*, the MDLEA definitions of "stateless" vessel "are not departures from international law but merely part of a pattern consistent with it." 627 F.3d 1, 6 (1st Cir. 2010); *accord United States v. Suerte*, 291 F.3d 366, 375–76 (5th Cir. 2002) (noting that a definition of "vessel subject to the jurisdiction of the United States" in the MDLEA "codifie[d] . . . generally accepted principle of international law.").

Thus, just as the jury is required to decide facts that determine whether Congress, out of respect for comity toward the police power of the States, criminalized conduct in accord with its limited power to regulate interstate commerce, *see Tinoco*, 304 F.3d at 1110, n. 21, out of respect for comity to other Nations and for international law, the jury is required to decide facts that determine whether Congress criminalized conduct in accord with its limited power to punish felonies on the High Seas. Compliance by Congress with international law could no more be dismissed as a mere "courtesy to foreign nations," *Tinoco*, 304 F.3d at 1108, than

federalism can be trivialized as "a mere poetic ideal." *Presley v. Etowah County Com'n*, 502 U.S. 491, 510 (1992).

The MDLEA provides: "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 to be determined solely by the trial judge." 46 U.S.C. § 70504(a). The MDLEA's requirement that a defendant be "on board a vessel subject to the jurisdiction of the United States" is a congressionally imposed limit on the court's subject matter jurisdiction.

"[A] mandatory conclusive presumption simply removes the defendant from the evidentiary process and requires the factfinder to find an ultimate or elemental fact as true once the prosecution has offered sufficient proof of the basic fact." *Miskel v. Karnes*, 397 F.3d 446, 456 (6th Cir. 2005) (citing *Francis v. Franklin*, 471 U.S. 307, 314 n.2 (1985)). Under the holding of the Eleventh Circuit, a certification by the designee of the Secretary of State as to the statement made by the claimed nation of registry not only proves conclusively the response from that government, but also creates a mandatory conclusive presumption of subject matter jurisdiction. Such a presumption relieves the government of its burden to prove that the district court had subject matter jurisdiction and prevents defendants from challenging the lack of subject matter jurisdiction. Such a mandatory conclusive presumption violates due process. *See Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).

The holding of the Eleventh Circuit converts the MDLEA into a procedurally unfair statute and violates constitutional protections through its contrary-to-fact analysis of jurisdiction. The MDLEA provides that "[t]he response of a foreign nation to a claim of registry . . . is proved conclusively by certification of the Secretary of State or the Secretary's designee." 46 U.S.C. § 70502(d)(2). Under the statute, the ***response*** is proved conclusively by the certification. In this case, that means that the certification filed by the government proved conclusively that the government of Guatemala responded and that the government of Guatemala could neither confirm nor deny the claim of registry. That is all that the statute provides as having been proven conclusively by virtue of the certification filed by the government. Such a provision obviates the need for a mini-trial as to the existence and accuracy of the response itself only.

At least one circuit has held that for a defendant prosecuted under the MDLEA, the defendant may refute the government's evidence of subject matter jurisdiction, but the defendant cannot challenge the *response* of the foreign government based on the certification provided under the MDLEA:

> As [the defendant] points out, our cases distinguish between claims of a failure to comply with international law (as that term is contemplated in the MDLEA), which a defendant may not raise, and claims of a failure to comply with United States law, which a defendant may raise. For example in *United States v. Maynard*, 888 F.2d 918 (1st Cir.1989), we held that the defendant had standing to challenge the district court's finding of MDLEA jurisdiction based on the fact that the USCG had failed to contact British Virgin Islands ("BVI") authorities before seizing

> his vessel, even though he was flying a BVI flag and had likely made a verbal claim of BVI nationality. *Id.* at 925–27. We reasoned that the defendant could bring such a challenge because he sought to prove that the USCG failed to comply with the MDLEA, a United States statute, by not making contact with the BVI authorities. Id. at 927. In contrast, in *United States v. Cardales–Luna,* 632 F.3d 731 (1st Cir.2011), we held that a defendant could not argue that a USCG certification was insufficient to confer MDLEA jurisdiction merely because it omitted certain details about the process by which the USCG contacted Bolivian authorities following the defendant's claim of nationality. *Id.* at 737. We reasoned that the MDLEA does not permit a defendant to "look behind the State Department's certification to challenge its representations and factual underpinnings." *Id.* (quoting *United States v. Guerrero,* 114 F.3d 332, 341 (1st Cir.1997)).

United States v. Martinez, 640 Fed. App'x 18, 23 (1st Cir. 2016) (unpublished). The First Circuit's precedent does not run afoul of the right to due process because it does not create an impermissible mandatory conclusive presumption on a legal issue, subject matter jurisdiction.

The circuit split on such a key legal issue is magnified by the fact the government can control venue in MDLEA prosecutions by virtue of the port the government selects to bring defendants in order to enter the United States. *See* 46 U.S.C. § 70504(b). Accordingly, this Court should grant the petition to ensure uniform compliance with the MDLEA and ensure that defendants prosecuted under that law are afforded due process.

This Court has not held that the accused, or even litigants collectively, may relieve the federal government of jurisdictional limitations under Article III. To the

contrary, an affirmative attempt to alter the structure that Article III imposes on federal courts, or to enlarge the jurisdiction of a federal court, by agreement or omission of the litigants invariably has failed. *See*, *e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (to the extent that the structural principle of preserving the constitutional system of checks and balances is affected, "the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2"); *Nguyen v. United States*, 539 U.S. 69, 80–81 (2003) (declining to apply plain error doctrine to appellate panel that did not include three Article III judges at the outset, even though petitioners never objected to composition of appellate panel until petition for certiorari in Supreme Court); *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) ("federal courts, in adopting rules, were not free to extend or restrict the jurisdiction conferred by a statute.... Such a caveat applies a fortiori to any effort to extend by rule the judicial power of the United States described in Article III of the Constitution"; therefore, Federal Rules of Civil Procedure apply only if their application will not impermissibly expand the judicial authority that Article III confers); *see also Peretz v. United States*, 501 U.S. 923, 936–37 (1991) (only personal right to Article III adjudicator is at issue when magistrate judge conducts voir dire in criminal trial, so no Article III problem if defendant expressly consents; no structural aspects of Article III at stake there). The MDLEA issues in petitioner's case warrant review.

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

By failing to address the plight of those convicted under § 70503 prior to December 21, 2018, the First Step Act left it to this Court whether to save previously-sentenced defendants such as petitioner, who had the misfortune of being brought first to the Southern District of Florida for prosecution, rather than to the District of Columbia. *See United States v. Mosquera-Murillo*, 902 F.3d 285 (D.C. Cir. 2018).

The defendants in *Mosquera-Murillo* received ten-year statutory-minimum sentences after pleading guilty to conspiring to distribute, and to possess with intent to distribute, five or more kilograms of cocaine and 100 or more kilograms of marijuana on board a covered vessel. *Id.* at 287, 294. The indictment, plea agreements, and judgment in that case all stated the defendants committed that offense "in violation of" both the MDLEA—specifically, 46 U.S.C. 70503 and 70506(b)—and 21 U.S.C. 960(b)(1)(B) and (2)(G). 902 F.3d at 293–94. 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 293–95.

The Court has denied review of the safety valve disparity in cases of petitioners whose appeals were decided prior to the First Step Act. *See*, *e.g.*, *Castillo v. United States*, No. 18-374, 2019 WL 113114 (Jan. 7, 2019); *Rolle v. United States*, 572 U.S. 1102 (2014) (No. 13-7467); *Morales v. United States*, 572 U.S. 1063 (2014) (No. 13-7429). Thus, the conflict between the D.C. Circuit and the Fifth (*United States v. Anchundia-Espinoza*, 897 F.3d 629 (5th Cir. 2018)), Ninth (*United States v. Gamboa-Cardenas*, 508 F.3d 491 (9th Cir. 2007)), and Eleventh Circuits remains.

Although petitioner's case would allow the Court only the opportunity to remedy the excessive sentences of defendants convicted prior to the First Step Act, this Court's review is warranted given the extreme effect of mandatory minimum sentencing statutes and the importance of avoiding irrational disparities in the application of such provisions.

CONCLUSION

The Eleventh Circuit's decision warrants review by the Court.

Respectfully submitted,

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Counsel for Petitioner

Miami, Florida
May 2019

APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, *United States v. Portocarrero,* No. 17-13535 (Feb. 12, 2019) . . . . . App. 1

Judgment imposing sentence, United States District Court, S.D. Fla., *United States v. Portocarrero,* No. 16-10052-Cr-JIC (Aug. 4, 2017) . . . . . App. 29

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13535

D.C. Docket No. 4:16-cr-10052-JIC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

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

Defendants-Appellants.

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

(February 12, 2019)

Before JORDAN, GRANT, and HULL, Circuit Judges.

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 and sentences. We address each issue in turn.

I. MDLEA

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

[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.*

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.

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 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

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

[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).

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.

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 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

[3]The 16 bales totaled 640 kilograms of cocaine.

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 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.

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.

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.

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 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

[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.

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.

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).

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

[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).

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.*

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 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.

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.

IV. SAFETY-VALVE ISSUES

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

[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).

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]

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.

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.

[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.

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.), *cert. denied*, 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 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

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

[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.

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 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.

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 be described as minimal." *Id.* § 3B1.2, cmt. n.5.

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).

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.

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.

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 court did not clearly err in denying the defendants minor-role reductions under § 3B1.2.

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.

UNITED STATES DISTRICT COURT

Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA
v.

DIEGO PORTOCARRERO VALENCIA

JUDGMENT IN A CRIMINAL CASE

Case Number: **4:16-10052-CR-COHN-2**

USM Number: **14405-104**

Counsel For Defendant: **Juan De Jesus Gonzalez, 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 the United States	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 Senior District Judge

Date: August 4, 2017

DEFENDANT: **DIEGO PORTOCARRERO VALENCIA**
CASE NUMBER: **4:16-10052-CR-COHN-2**

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: **DIEGO PORTOCARRERO VALENCIA**
CASE NUMBER: **4:16-10052-CR-COHN-2**

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: **DIEGO PORTOCARRERO VALENCIA**
CASE NUMBER: **4:16-10052-CR-COHN-2**

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: **DIEGO PORTOCARRERO VALENCIA**
CASE NUMBER: **4:16-10052-CR-COHN-2**

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: **DIEGO PORTOCARRERO VALENCIA**
CASE NUMBER: **16-10052-CR-COHN**

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.