No. 21-

IN THE

Supreme Court of the United States

ÁNGEL DE LA CRUZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Pre-First Step Act Safety Valve was widely applied to the Maritime Drug Law Enforcement Act (MDLEA), a statute whose punishment criteria and elements were derived from 21 U.S.C. § 960. The First Circuit, however, joined a circuit split to interpret Safety Valve as not applying to the MDLEA because it did not expressly list the MDLEA even though it did list Section 960.

Terry v. United States, 141 S. Ct. 1858 (2021) reiterated that offenses are defined by provisions supplying their elements. Thus, under *Terry*, does pre-First Step Act Safety Valve cover MDLEA offenses since those offenses' punishment elements are defined by Section 960?

PARTIES

Ángel De la Cruz, petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the plaintiff-appellant below.

PROCEEDINGS

The following proceedings are directly related to this case.

- *United States v. De la Cruz*, No. 18-1710 (1st Cir. May 26, 2021) (reported at 998 F.3d 508) (motion to recall mandate and petition for reh'g denied July 9, 2021)
- *United States v. De la Cruz*, No. 3:17-cr-00648-FAB (D.P.R. July 12, 2018)

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Ángel De la Cruz respectfully petitions for a writ of certiorari to review the judgment of the First Circuit in this case.

OPINIONS BELOW

The opinion of the First Circuit is reported at 998 F.3d 508. Pet. App. 1a-12a. Petitioner's motion to recall the mandate — following publication of *Terry v. United States*, 141 S. Ct. 1858 (2021) — and to extend the time to file a petition for rehearing was denied July 9, 2021. *Id.* at 13a. The District Court's opinion is not reported. *Id.* at 14a-21a.

JURISDICTIONAL STATEMENT

The First Circuit entered judgment on May 26, 2021. On March 19, 2020, and July 19, 2021, this Court by general order extended the deadline to petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Although many federal statutes carry minimum sentences, Congress has long provided a statutory "Safety Valve" to allow courts to make exceptions for qualifying defendants to be sentenced below such minimum sentences. 18 U.S.C. § 3553(f). That Safety Valve is critically important in drug-trafficking offenses as they account for over two-thirds of all mandatory-minimum-offense prosecutions.

In such instances, Safety Valve lets courts disregard a statutory minimum sentence for the benefit of a low-level, non-violent, cooperative defendant with minimal or no prior criminal record. In addition, the offense of conviction must meet the statutory criteria listed in Section 3553(f).

This case concerns how federal courts should interpret Congress's inclusion of 21 U.S.C. § 960's punishment provisions in Section 3553(f) where the mandatory minimum from Section 960 is triggered by a Maritime Drug Law Enforcement Act (MDLEA) charge. *See* 46 U.S.C. § 70501 *et seq*. This is because the MDLEA — which, as applicable, does not contain its own punishment structure — incorporates Section 960's punishment provision. *See United States v. Mosquera-Murillo*, 902 F.3d 285 (D.C. Cir. 2018).

As the D.C. Circuit observed when holding that MDLEA offenses were covered by Safety Valve, the Safety Valve "statute speaks in terms of an 'offense under' Section 960 without limitation – not an offense under only § 960(a)." *Id.* at 294. That court applied this Court's longstanding understanding that "[o]ffenses are defined by the provisions that supply their elements." *See Patterson v. New York*, 432 U.S. 197, 210 (1977).

The First Circuit rejected this argument, holding that Congress should have used narrower language, like an "offense punishable under" or "offenses penalized under" Section 960 if it wanted safety valve to cover MDLEA offenses. Pet. App. 7a. As discussed below, the First Circuit sided with the Fifth, Ninth and Eleventh Circuits, adopting the opposing position of the D.C. Circuit.

While the First Step Act of 2018 clarified that Safety Valve applies to MDLEA offenses, the First, Fifth, Ninth, and Eleventh Circuits' holding perpetuates an injustice against petitioner and any others similarly situated. Denial of safety valve for a drug courier recruited from an impoverished Third World community adds years of un-called for imprisonment, is antithetical to sentencing goals of proportionality, and costs the American taxpayers hundreds of thousands of dollars to pay for the resultant excessive sentences.

STATEMENT

A. Legal Background

For decades, drug offenses with mandatory minimums have been a driver of mass incarceration. Most were passed as part of the Sentencing Reform Act of 1984[1] and the Anti-Drug Abuse Act of 1986, which tested a theory that American drug consumers could prevented from harming themselves if the government simply could catch and imprison the "kingpins" who were making profits by providing these consumers their drugs. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

Congress, at the time, presumed the government would identify kingpins deserving of harsh mandatory minimums by the quantity of drugs they had. *See* Barbara Meierhoefer, *The Severity of Drug Sentences: A Result of Purpose or Chance?*, 12 Fed. Sentencing Rep. 34, 34 (1999).

It has turned out, however, in the thirty-five years since mandatory minimum drug laws were created, they have been a driver of mass incarceration not for kingpins but for drug couriers, "mules," street-level dealers, and others. Indeed, the

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[1] Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act. Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (2006) & 28 U.S.C. §§ 991-998 (2006)); Pub. L. No. 98-473, 98 Stat. 1837, 1976 (codified as amended in scattered sections of Title 18 and 28 of the United States Code).

U.S. Sentencing Commission estimates the most culpable drug traffickers, including high-level suppliers and importers, and managers and supervisors account for only 10.9% and 1.1% of drug cases, respectively. *See* U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 167, 262 (2011).[2]

The Sentencing Commission has, thus, warned that "mandatory minimum penalties for drug offenses may apply more broadly than Congress may have originally intended." *Id.* at 169. And even the Attorney General has at times shifted away from alleging mandatory-minimum-triggering drug quantities against low-level drug-trafficking defendants. *See, e.g.*, Memorandum from Att'y Gen. Eric Holder to the U.S. Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013).[3]

The nation's first ten years with the mandatory-minimum drug sentencing regime led to grave concerns that mandatory minimum laws were forcing low-level offenders to serve disproportionally long sentences. Congress, in 1994, responded with safety salve, 18 U.S.C. § 3553(f), as part of the Violent Crime Control and Law Enforcement Act. Pub. L. 103-322, 108 Stat. 1796, 1985-86 (1994).

The statute created five requirements that defendants have to meet to qualify for a reduced sentence. § 3553(f). The first four requirements are that the defendant must not be a

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[2] Available at https://bit.ly/CertDelaCruz1.
[3] Available at https://bit.ly/CertDelaCruz2.

leader of the drug conspiracy, must not have used violence or a firearm in the conspiracy, and must have a criminal history designation that falls below a specified criminal history number. The fifth factor states that a defendant is eligible for a sentence reduction if the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses.

Not only are statutory limits set for very severe drug-offense sentences, but the Sentencing Guidelines have also followed suit, pegging guideline sentencing ranges to the quantity, and type, of drugs involved.

The MDLEA involve analogous conduct to stateside drug offenses but punish conduct that takes place in international waters. *See* 46 U.S.C. § 70501 *et seq*. Prisoners convicted for such offenses have not occupied significant space in public debates. Most are foreign nationals who will be deported after their term of imprisonment.

The MDLEA "makes it unlawful for an individual to 'knowingly, or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board . . . a vessel . . . subject to the jurisdiction of the United States.'" *United States v. Nueci-Peña*, 711 F.3d 191, 197 (1st Cir. 2013) (first ellipsis in original) (quoting 46 U.S.C. § 70503(a)(1)). Defendants convicted of violating the MDLEA, or attempting or conspiring to do so, are punished pursuant to the provisions of the Comprehensive Drug Abuse

Prevention and Control Act of 1970, codified at § 960.[4] *See* 46 U.S.C. § 70506.

Section 960(b) prescribes mandatory minimum sentences for certain drug offenses, depending on the type and weight of the drugs involved. Subsection (a), in turn, lists several controlled substance offenses to which the penalties of Section 960(b) apply. A violation of a listed offense involving five kilograms or more of cocaine, for instance, triggers a ten-year mandatory minimum sentence. *See* § 960(b)(1)(B)(ii).

Under Section 3553(f)'s "safety valve" provision, sentencing courts have discretion to sentence a defendant below the otherwise applicable mandatory minimum sentence if the court "makes five specific factual findings."[5] *United States v. Harakaly*, 734 F.3d 88, 92 n.2 (1st Cir. 2013).

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[4] Pub. L. No. 91-513, § 1010, 84 Stat. 1236, 1290 (1970).

[5] At the time of Mr. De la Cruz's conviction, those five factual findings, which are not at issue in this appeal, were:

> (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 . . . 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, …

Aside from its factual criteria, Section 3553(f) conditions relief on a legal requirement: The provision only applies "in the case of an offense under . . . 21 U.S.C. 841, 844, 846[ ] or . . . 21 U.S.C. 960, 963[ ]." § 3553(f). A defendant is thus eligible for safety-valve relief to the extent her offense was "under" one of the statutes listed at the outset of Section 3553(f).

So framed, the question across appellate courts has been whether MDLEA offenses are "offense[s] under . . . 21 U.S.C. 960 . . . ." *Id.* If MDLEA offenses qualify for safety valve, courts may sentence under any applicable mandatory minimum.

Safety valve as affects the Guidelines offense, providing a two-level reduction under U.S.S.G. § 2D1.1(b)(18). For defendants determined ineligible for safety valve, a significant gulf can exist between the resulting sentencing guideline range and minimum statutory sentence.

> and was not engaged in a continuing criminal enterprise . . . .; and
> (5) . . . 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 . . . .

18 U.S.C. § 3553(f)(1)-(5). As discussed further below, the safety-valve provision underwent significant amendments recently.

B. Proceedings Below

In December 10, 2017, petitioner Ángel De la Cruz and two others Dominican nationals, working at the behest of an international drug-trafficking organization, were at sea transporting bails of narcotics on a small vessel. Pet. App. 2a. The U.S. Coast Guard intercepted the boat in the waters north of Puerto Rico, seized a large amount of cocaine,[6] and arrested petition and the two other men onboard. *Id.* 2a.

They were charged in a three-count District of Puerto Rico indictment. *Id.* 2a. The first count alleged that the defendants did knowingly combine, conspire, and agree with each other to possess with intent to distribute five kilograms or more of cocaine aboard a vessel subject to the jurisdiction of the United States, in violation of the MDLEA, 46 U.S.C. §§ 70503 and 70506. *Id.* 2a. The MDLEA offenses carried a mandatory minimum sentence of ten years' imprisonment. *See id.*; 21 U.S.C. § 960(b)(1)(B) (2018). Count two alleged aiding and abetting with respect to the first count. *Id.* 2a-3a. Count three charged defendants with conspiring to import five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 952, 960, and 963. *Id.* 3a.

Petitioner pleaded guilty to all counts and proceeded to sentencing. Petitioner argued that he qualified for Safety Valve relief, which authorizes a district court to impose a sentence below the statutorily prescribed mandatory minimum sentence for certain enumerated offenses if the court makes

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[6] About 1,325 kilograms.

several specific factual findings at sentencing. *See* § 3553(f) (2018). *Id.* 3a. Petitioner also asked the court to apply an offense level reduction for mitigating role.

The district court — relying on other circuit precedent and a District of Puerto Rico case — concluded that petitioner was ineligible for safety valve based on a conclusion that Congress had not intended it apply to MDLEA offenses because they were not listed in Section 3553(f). *Id.* 3a.

The court did apply a two-level reduction to petitioner's Sentencing Guidelines offense level. *Id.* 3a n.1; U.S.S.G. § 2D1.1(b)(18) (providing a two-level reduction if the defendant met the five fact-based criteria under Section 3553(f), even if the defendant did not qualify for the safety valve relief authorizing a sentence below the statutory minimum. *Id.*; *see id.* § 5C1.2(a)(1)-(5). *Id.*

On appeal, petitioner argued that the district court erroneously determined that the Safety Valve provision did not cover MDLEA offenses. *Id.* 3a. Petitioner relied on *United States v. Mosquera-Murillo*, 902 F.3d 285, 292-96 (D.C. Cir. 2018), which held that, as a matter of statutory construction, an offense under the MDLEA is an "offense under" Section 960 because the MDLEA relies on Section 960 to supply its punishment elements. *Id.* 4a, 7a.

The First Circuit rejected that interpretation, and instead joined the other side of a circuit split. *See United States v. Anchundia-Espinoza*, 897 F.3d 629, 633-34 (5th Cir. 2018); *United States v. Pertuz-Pertuz*, 679 F.3d 1327, 1328-29 (11th

Cir. 2012); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496-502 (9th Cir. 2007). Pet. App. 4a.

While the First Circuit acknowledged that the MDLEA derives its punishment provision from Section 960, an offense listed in Section 3553(f), the court concluded that the plain language of Safety Valve did not include the MDLEA because it did not expressly list it. *Id.* 6a.

Nor did the First Circuit agree that the MDLEA is any "offense under" Section 960 since, as the court reasoned, Safety Valve talks of "offenses under" rather than "offenses penalized under" or "offenses sentenced under" Section 3553(f)'s list of provisions. *Id.* 7a.

Unlike the D.C. Circuit in *Mosquera-Murillo*, the First Circuit was unmoved by Supreme Court precedent that offenses "are defined by the provisions that supply their elements" *Mosquera-Murillo*, 902 F.3d at 293 (citing *Patterson*, 432 U.S. at 210).

Going further still, the First Circuit reasoned that even if drug type and drug amount are elements of an MDLEA offense punishment purposes under Section 960(b), and so those facts must be proven to a jury beyond a reasonable doubt pursuant to this Court's precedent, those cases do not say anything about what "offense under" means for purposes of safety valve relief as a matter of statutory interpretation. Pet. App. 8a.

In order to eschew a definition based on *Patterson, Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and *Alleyne*

v. United States, 570 U.S. 99, 105-06 (2013), the First Circuit looked to a case that was overruled by *Apprendi*: *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Pet. App. 8a. *McMillan*'s concept of offense, as the First Circuit assessed it did not consider sentencing-increase-triggering drug type and quantity to be elements of an offense. *Id.* 8a. So for the First Circuit, Congress's use of the term "offense under" Section 960 would not encompass an offense that exclusively relied on Section 960 for its punishment provisions. *Id.* 8a-9a. The First Circuit would demand that Congress use more specific language if it wanted to include offenses that relied on Section 960 for their punishment elements. The First Circuit's preferred phrasing is: "'offenses punishable under,' 'offenses penalized under,' or 'sentences under'" Section 960. *Id.* 7a (citations omitted).

The Court further bolstered its conclusion by pronouncing that the history and structure of the MDLEA, Safety Valve, and related provision "confirm" that safety does not apply to the MDLEA. *Id.* 9a. The MDLEA was enacted before safety valve, Section 960 had been amended several times after the MDLEA was passed, and neither statute listed the MDLEA by name. *Id.* 9a.

Just after the due date passed to submit a petition for rehearing, this Court issued its opinion in *Terry v. United States*, 141 S. Ct. 1858 (2021). Petitioner then moved to recall the First Circuit's mandate and extend the time for him to petition for rehearing en banc. Pet. App. 13a.

Petitioner argued that though *Terry* dealt with a different piece of sentence reduction legislation, § 404(b) of the First

Step Act of 2018, it reflects a more expansive definition of a covered offense than that which was utilized by the First Circuit. *Id.* 30a; First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221 (2018). *Terry* began with the Act's definition of "covered offense" as "'a violation of a Federal criminal statute, the statutory penalties for which were modified by' certain provisions in the Fair Sentencing Act"[7]; it then interpreted "statutory penalties" as inextricably linked to "the entire, integrated phrase 'a violation of a Federal criminal statute.'" *Terry*, 14 S. Ct. at 1862 (citing *United States v. Jones*, 962 F.3d 1290, 1298 (11th Cir. 2020)). *Id.* 30a.

The Court looked to the broader definition of "offense," perceiving a violation of a criminal statute whose penalties were modified as synonymous with the phrase "offense." *Ibid.* The *Terry* Court thus rejected a claim that the Fair Sentencing Act modified Terry's statutory penalties because it did not alter the elements of his offense under the two subsections of 21 U.S.C. § 841.

Petitioner posited therefore that *Terry* is relevant because it conceives of the punishment provision of Section 841(b) as supplying elements of the offense: "Subsection (b) lists additional facts that, if proved, trigger penalties." 14 S. Ct. at 1862. The statute addressed in *Terry* was not an offense modified by the Fair Sentencing Act because its punishment provisions had not been modified as was true of other subsections

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[7] Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

of Section 841. *Id.* at 1863. In so conceiving of offenses as including the statutes supplying their punishment elements, the Court rejected an argument that what the First Step Act referred to was a separate concept of a "penalty statute" or a "penalty scheme." *Id.* at 1863-64.

Terry distinguished between offenses that triggered statutory mandatory minimums and those that did not. *See ibid.*

Just as Section 2(a) of the First Step Act modified certain "offenses" by modifying their penalties, petitioner argued that the pre-First Step Act Safety Valve reached MDLEA offenses when it modified the MDLEA's punishment elements as expressly referenced in Section 960(b). Petitioner's final argument, thus, was that *Terry*'s expansive definition of "offense" — as used to interpret another ameliorative piece of legislation — warranted reconsideration of the First Circuit's narrow reading of "offense under" in the Safety Valve. Pet. App. 31a.

The First Circuit denied petitioner's motion. Pet. App. 13a. This timely petition follows.

REASONS FOR GRANTING THE PETITION

This petition presents a circuit split that has been recognized by both the First and D.C. Circuits.

One Circuit has held that pre-First Step Act safety valve allowed defendant's relief from mandatory minimum sentences triggered by combined MDLEA/§ 960 offense; three other circuits have held the provision excludes MDLEA.

In addition to preserving the uniformity of federal law, this petition implicates the paramount need for this Court to clarify its precedent. As the decision below demonstrates, lower courts are confused about whether they can rely on this Court's broad proposition that offenses are defined by the provisions supplying their elements or whether they should use cases providing an alternative definition before being overruled.

That debate should have been resolved by *Terry*, but still persists and will repeat unless clarified or remanded in consideration of *Terry*.

While Safety Valve was amended by subsequent ameliorative legislation, certiorari should be granted to provide guidance in any pending cases and to spell out the law going forward for future laws that amend highly punitive sentencing statutes. A decision is needed to promote fairness and proportionality and to reduce the expense and liability associated with excessive terms of imprisonment.

I. THE DECISION BELOW ACKNOWEDGED A CLEAR AND IRREMEDIABLE CIRCUIT SPLIT.

A. One circuit relies on this Court's precedent to interpret Safety Valve's "offense under" phrasing to include statutes supplying offenses' punishment provisions.

The D.C. Circuit held in *United States v. Mosquera-Murillo*, 902 F.3d 285, 292-96 (D.C. Cir. 2018), that, as a matter of statutory construction, an offense under the MDLEA is an "offense under" Section 960 because the MDLEA relies on Section 960 to supply its punishment elements.

B. Four circuits interpret "offense under" using their own criterion to exclude the MDLEA from Safety Valve coverage.

Four Circuits have now held that people convicted of MDLEA offenses before the First Step Act cannot obtain relief from applicable mandatory minimums through safety valve. Pet. App. 2a (*United States v. De la Cruz*, 998 F.3d 508, 509 (1st Cir. 2021)); *United States v. Anchundia-Espinoza*, 897 F.3d 629, 633-34 (5th Cir. 2018); *United States v. Pertuz-Pertuz*, 679 F.3d 1327, 1328-29 (11th Cir. 2012); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496-502 (9th Cir. 2007).

C. This split cannot develop further.

The First Step Act of 2018 amended Section 3553(f) to expressly include MDLEA offense. Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221 (2018). Prospectively, all MDLEA offense

now qualify for safety. Under the First Step Act, the revised provision applies to any "conviction entered on or after the date of enactment of this Act." *Ibid.*

D. Sentencing data reveals an extraordinary split among district courts even where circuits had held the MDLEA was not covered or had not held one way or another.

The Ninth Circuit purported to exclude MDLEA from safety valve in 2007. *Gamboa-Cardenas*, 508 F.3d at 496-502. Next came the Eleventh Circuit in 2012, *Pertuz-Pertuz*, 679 F.3d at 1328-29, the Fifth Circuit in 2018, *Anchundia-Espinoza*, 897 F.3d at 633-34, and the First Circuit this year. Pet. App. 2.

Nevertheless, the Sentencing Commission's sentencing data paints a picture of widespread application of safety valve throughout the nation. Data analysis commissioned by the Federal Public Defender in the District of Puerto Rico reveals that between 2010 and 2018, 76 percent of MDLEA cases received some safety valve benefit. Pet. App. 36a.[8]

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[8] Michael T. Light, Ph.D., An Empirical Analysis of Federal Cases Sentenced under the Maritime Drug Law Enforcement Act (Motion for Hearing to Resentence Johnvanny Aybar-Ulloa, Exh. 2, ECF No. 232-2, *United States v. Aybar-Ulloa*, No. 3:13-cr-00518-JAG (D.P.R.) (Sept. 17, 2021). On remand, Aybar-Ulloa's sentence was reduced from 135 months to time served, equivalent to roughly 118 months. *See id.* ECF No. 247 (minute entry) (Oct. 20, 2021).

Indeed, in the Eleventh Circuit, despite the *Pertuz-Pertuz* decision, the vast majority of MDLEA offenses, 83 percent, received safety valve benefits from 2010 to 2018. *Id.* And hundreds of cases saw the imposition of below-the-applicable-mandatory-minimum sentences (31 percent of 2,007 cases). Pet. App. 37a.

The practical, on-the-ground reality is that across nearly a decade before the First Step Act, hundreds of MDLEA cases were charged, vetted for a safety-valve reduction, and received that reduction. *Id.* 36a. A colossal number cases, relatively, got the benefit of this ameliorative provision, and were sentence beneath the applicable mandatory minimum. *See id.* 37a.

This includes petitioner's fellow First Circuit defendant's, 54 percent of whom received below-mandatory-minimum sentences. *Ibid.* The D.C. Circuit's take on MDLEA qualification prevailed so widely that hundreds upon hundreds of defendants received safety valve.[9] Correction of the split of author-

[9] The First Circuit even previously had assumed without deciding that safety valve may apply to MDLEA offenses. *See, e.g.*, *United States v. Rodríguez-Durán*, 507 F.3d 749 (1st Cir. 2007) (observing, in MDLEA case: "It is undisputed that these defendants have satisfied the other safety valve requirements," while stressing that "the only issue before us" is whether defendants satisfied one of § 3553(f)'s factual requirements); *see also United States v. Bravo*, 489 F.3d 1 (1st Cir. 2017) (remanding denial of safety valve for reconsideration in

ity will speak volumes on the potential injustice of denying consideration to petitioners and hundreds like him.

II. THE DECISION BELOW IS WRONG AND THIS PETITION IS AN IDEAL VEHICLE TO ADDRESS THIS IMPORTANT QUESTION PRESENTED.

A. As a matter of statutory interpretation, an "offense under" Section 960 must include MDLEA offenses, which are sentenced under Section 960.

As a matter of statutory construction, an offense "under" an eligible provision must also include offenses punishable under that provision. As the D.C. Circuit observed, "[t]he statute speaks in terms of an 'offense under' § 960 without limitation — not an offense under only § 960(a)." *Mosquera-Murillo*, 902 F.3d at 294.

Not only is that the better reading of the statutory language, it also makes sense since " Section 960 does not describe an *offense* itself, but rather prescribes the *penalty* for a number of drug offenses prohibited by other statutes." *Gamboa-Cardenas*, 508 F.3d at 497 (emphases in original). Given that Section 960 is simply a punishment provision — not an *offense* — the only way a crime could constitute "an offense under" Section 960 is if it is penalized under that provision. Viewed through that lens, the phrase "an offense under

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MDLEA case where sentencing court failed to articulate reasons for denying relief).

[an eligible provision]" cannot plausibly mean defined by one of the five offenses specified in Section 3553(f).

If that were the case, the six drug offenses covered by Section 960 would not meet that definition, and yet they are safety-valve eligible. *See Gamboa-Cardenas*, 508 F.3d at 497 ("[T]he safety valve also applies to offenses committed in violation of 21 U.S.C. §§ 952, 953, 955, 957, and 959."); *Pertuz-Pertuz*, 679 F.3d at 1329 ("[S]ection 960(a) lists unlawful acts that actually do qualify as 'offenses under' section 960.").

Even assuming a narrow reading of the term "under" is appropriate, the district court's interpretation of an "an offense under" remains problematic for one additional reason: It does not account for the fact that the elements of a criminal "offense" include any fact that increases the statutory maximum sentence. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Consequently, the D.C. Circuit concluded – as this Court should here – that a defendant convicted of violating the MDLEA is also convicted of "an offense under" § 960 since the crime of conviction "draw[s]" statutory elements from both provisions:

> [T]he MDLEA supplies the elements that make the defendants' conduct unlawful: (i) conspiring, (ii) to intentionally or knowingly, (iii) distribute or possess with intent to distribute, (iv) a controlled substance offense, (v) while on board a vessel. Meanwhile, § 960 supplies the offense elements of drug-type and drug-quantity — 5 or more kilograms of cocaine . . . — which bear on the degree of culpability and determine the

> statutory sentencing range. In that light, the defendants' crime is 'an offense under' *both* the MDLEA *and* § 960, drawing offense elements from each.

Mosquera-Murillo, 902 F.3d at 293 (internal citations omitted) (emphases in original). Thus, "just as a person who commits one of the offenses listed in § 960(a) violates both the provision establishing the offense (e.g., 21 U.S.C. § 955) and § 960(b), [petitioner] . . . violated both the MDLEA and § 960(b)." *Id.* at 295.

Significantly, the D.C. Circuit further observed, this statutory interpretation accords with Supreme Court precedent in *Apprendi* and *Alleyne v. United States*, 570 U.S. 99, 109 (2013), which hold that "drug-type" and "drug-quantity" facts that increase the statutory maximum constitute elements of the offense. *Mosquera-Murillo*, 902 F.3d at 293 (citations omitted). "As further confirmation that § 960 supplies elements of [Mr. De la Cruz's] offense, the government's indictment charged [him] with violating both the MDLEA and § 960, not just the former." *Ibid.*

More specifically, petitioner's indictment charged violations of two MDLEA offenses along with violations of Sections 952, 960, and 963. Indictment, ECF No. 12, *United States v. De la Cruz*, No. 3:17-cr-00648 (D.P.R. Dec. 20, 2017). By listing statute broadly — including all offense "under" Section 960 — Congress intended to cover MDLEA offense.

The First Circuit is wrong to demand that Congress use more specific language to include offenses that relied on

Section 960 for their punishment elements. The First Circuit's preferred phrasing — including "'offenses punishable under,' 'offenses penalized under,' or 'sentences under'" Section 960, *id.* 7a (citations omitted) — is too specific for a provision meant simply to give court the *option* not to impose a minimum sentence meant to punish drug kingpins.

The First Step Act confirms, rather than rejects, a conclusion that Congress originally intended to provide safety-valve relief to MDLEA defendants. The Act underscores Congress's intent to afford safety-valve relief to people convicted of the MDLEA.

The First Circuit's attempt to read some other intent from legislation history, Pet. App. 516-519, sees a big explosion of legislative subtext where there is not so much as a match in sight. For example, it perceives Congress as enacting Safety Valve at a time it was "especially concerned about drug trafficking over the seas . . . ." Pet. App. 6a.

Yet, the broader context of Congress's passing and amending mandatory minimums reflects no reason to believe the broadly worded Safety Valve provision meant to leave out just one statute criminalizing at-sea trafficking. All major drugs are manufactures internationally and must be delivered to U.S. consumers over land, sea, or air. And the lawmaking record simply does not support such an isolated concern over a select transportation-by-sea provision.

Rather, Congress was more focused on separating out drug-trafficking roles not geographic regions, centering its

focus on "*major* drug offenders." Meierhoefer, *supra*, 12 Fed. Sentencing Rep. at 34 . As Senator Robert Byrd stated:

> [A major drug offender] must know that there will be no escape hatch through which he can avoid a term of years in the penitentiary. . . . We divide these major drug dealers into two groups for purposes of fixing what their required jail terms shall be: For the kingpins — the master-minds who are really running these operations — and they can be identified by the amount of drugs with which they are involved — we require a jail term upon conviction.

Id. (quoting 132 Cong. Rec. § 14301 (daily ed. Sept. 30, 1986) (statement of Sen. Byrd)). Congress's Safety Valve, an amendment to offenses' punishments, must be read to apply to any of the similar offenses, including the MDLEA, whose punishment elements are derived from offenses listed in the amending statute. Naturally, for a Congress that had misjudged drug quantity as a be-all-end-all proxy for culpability, amending the quantity-based statutes is a logical action to support the aim of making kingpin-length sentences nonmandatory for all offenses predicating such sentences on drug quantity.

As such, it is appropriate to look to this Court's vast line of authority defining an offense based on the provisions supplying its elements. But the First Circuit, instead, mistakenly fixated on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), a case overruled by *Apprendi*. To be fair it does not contend to disregard *Apprendi* but insists Congress would have been

more specific and instead cherrypicked MDLEA for exclusion through non-inclusion.

Again, though, his is not consistent with a Congress facing grave concerns that mandatory minimum laws were forcing low-level offenders to serve disproportionally long sentences. In 1994, when safety salve was passed as part of the Violent Crime Control and Law Enforcement Act, it is too much of a stretch to imagine the broad provision would quietly excise other offenses that inextricably rely on Section 960 when Section 960 is engraved on the face of safety valve.

What is more, the notion that Congress was silently singling out at-sea offense is belied by the inclusion of 21 U.S.C. § 955, which similarly punishes at-sea offenses that arguable pose a greater risk to the United States because the offense, unlike MDLEA offenses, must take place in U.S. jurisdictions. *See* § 955.

Finally, if the First Circuit's decision left any droplets of possibility it could be right about safety valve's "offense under" language, they were evaporated by *Terry v. United States*, 141 S. Ct. 1858 (2021).

Terry's analysis of Section 404(b) of the First Step Act applies a more expansive definition of a covered offense than the First Circuit and one consistent with the *Mosquera-Murillo*. *Id.* 30a.

Though the First Step Act defines a "covered offense" as "'a violation of a Federal criminal statute, the statutory penalties for which were modified by' certain provisions in the Fair

Sentencing Act," this Court interpreted "statutory penalties" as inextricably linked to "the entire, integrated phrase 'a violation of a Federal criminal statute.'" *Terry*, 14 S. Ct. at 1862 (citing *Jones*, 962 F.3d at 1298). *Id.* 30a.

The Court understood a violation of a criminal statute whose penalties were modified as synonymous with the phrase "offense." *Ibid.* The operative units of analysis were the statutes defining the offenses' elements. As such, the Court rejected a claim that a prior act modified Terry's statutory penalties because — unlike safety valve did to the MDLEA — it did not alter the elements of his offense under the relevant portions of 21 U.S.C. § 841.

Terry, thus, conceived of the punishment provision of Section 841(b) as supplying elements of the offense: "Subsection (b) lists additional facts that, if proved, trigger penalties." 14 S. Ct. at 1862. In so conceiving of offenses as including the statutes supplying their punishment elements, the Court rejected an argument that what the First Step Act referred to was a separate concept of a "penalty statute" or a "penalty scheme." *Id.* at 1863-64.

And so, just like the First Step Act modified certain "offenses" when it modified their penalties, Act safety valve reached MDLEA offenses when it modified the MDLEA's punishment elements as expressly referenced in § 960(b). *Terry*'s expansive definition of "offense" — as used to interpret another ameliorative piece of legislation — warrants rejection of the First Circuit's narrow reading of "offense under" in the safety valve. Pet. App. 31a.

B. The First Circuit's analysis is flawed and too strained for examining an ameliorative measure intended to apply broadly.

Obtaining Safety Valve, as data shows, is not a get-out-of-jail-free card but rather a path for judges to exercise discretion regarding a range of other guideline and statutory sentencing considerations. A much smaller portion of qualifying defendants actually were sentenced below the applicable statutory minimum. *See id.* 36a-37a. After all, getting a defendant "out of the mandatory minimum frying pan" still only gets her "into the Guidelines fire." Memorandum Explaining a Policy Disagreement with the Drug Trafficking Offense Guideline at 2, *United States v. Díaz*, No. 11-CR-00821-2-JG, 2013 WL 322243, at *9, *18 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.).

Indeed, left intact, overly restrictive reading of Safety Valve will shield other important issues from review like mitigating role, U.S.S.G. § 3B1.2. Pet. App. 3a. The role issue in petitioner's case was rendered moot by the First Circuit's conclusion on safety valve. *Id.* Yet a closer analysis shows how Safety Valve and role are two integral parts of a punishment regime that aims to separate out kingpins who run drug enterprises from defendants like petitioner who are offered piecemeal payments for their drug-transporting labor.

The lack of an on-the-merits minor role decisions conceals inter-circuit role disparity left uncorrected by the Sentencing Guidelines. *See* U.S. Sentencing Guidelines Manual, supp. to app. C, amend. 794, at 115 (effective Nov. 1, 2015). For example, Amendment 794 — based on observations that

"mitigating role [was] applied inconsistently and more sparingly than the Commission intended" — saw vastly different circuit responses.

The First Circuit has scarcely seen any significance in the amendment despite the commentary's aimed to expand application and the provision of five factors, guiding courts to analyze the role of low-level drug-trafficking defendants like petitioner. *See* § 3B1.2, cmt. n.3(C).

After the amendment, the First Circuit decided *United States v. Carela*, 805 F.3d 374 (1st Cir. 2015), a case that did not acknowledge the amendment. In 2018, the First Circuit affirmed a minor role denial in *United States v. Arias-Mercedes*, 901 F.3d 1 (1st Cir. 2018). Despite Amendment 794's overt focus on the "scope and structure" of the overall criminal activity and its five factors' focus on comparing defendants to broader criminal scheme, the First Circuit found it perfectly okay for district courts to compare a drug-transportation-boat crewmember with no one besides the rest of the boat crew. *Id.* at 7-8.

In cases that qualify for a role reduction and safety valve, the resulting guidelines calculation can be a difference of many years and can even be a difference between life and death.[10] Petitioner was sentenced based on a calculated sen-

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[10] The defendant denied a role adjustment in *Arias-Mercedes*, 901 F.3d at 7-8, died following a heart attack and Covid-19 complications while serving his sentence on September 7, 2021. *See* University of Iowa College of Law

tencing range of 135 to 168 months.[11] This is based on a total offense level of 33. Had a two-level reduction for role been applied, a four-level reduction, for "role cap," would have kicked in to lessen the effect of the quantity-based calculation. *See* § 2D1.1(a)(5). The calculation would have gone as follows:

Base Offense Level **U.S.S.G. § 2D1.1(c)(1)**	38
BOL Role-Cap **U.S.S.G. § 2D1.1(a)(5)**	34
Minor Role **U.S.S.G. § 3B1.2**	-2
Acceptance of Responsibility	-3
Safety Valve **U.S.S.G. § 2D1.1(b)(18)**	-2
Total Offense Level & Guideline Range in CHC I	27 ***70 to 87 Months***

Thus, for similar first-time MDLEA defendants, the combined impact of safety valve and mitigating role is staggering, cutting the guideline range roughly in half — from 135 to 168 months to 70 to 87 months. Needless to say, but for the First Circuit's holding, petitioner could have very well faced a sentencing range with a lower end that is 50 months less than

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Federal Criminal Defense Clinic, Report: 257 Deaths in BOP Custody, An Incalculable Loss, June 18, 2021, https://bit.ly/DelaCruzCertArias-MercedesDeath.

[11] Sentencing Hearing Tr., ECF No. 108, *United States v. De la Cruz*, No. 3:17-cr-00648 (D.P.R. July 12, 2018).

the mandatory-minimum-limited sentence imposed. Pet. App. 3a.

And this or similar ranges have been faced by defendants throughout the nation from 2010 to 2018, including the roughly 32% of all MDLEA defendant sentenced below the otherwise germane mandatory minimum. *See id.* 37a.

This shocking split and disparity between district courts comes out even more senseless when viewed in light of murky discretion exercised by the Department of Justice to channel MDLEA cases. A person charged with violating the MDLEA on the high seas may be tried in any of the ninety-four federal districts. *See* 46 U.S.C. § 70504(b)(2).

So while the government concentrates its prosecutions in a handful of districts, circuit splits on material issues manifest a great offense to the goals of uniformity and proportionality. For whether the government shops venues based on the local sentencing law or brings cases based on administrative parameters, fairness in sentencing is undermined.

And secretive government operations surrounding the very origin of these cases does not inspire any belief that prosecutors can or would attempt to pursue uniformity or fairness among MDLEA defendants.

Reporting on the U.S. government's drug-seeking investigations describes the redirecting national-security-focused techniques to make drug-transportation arrests. This has included the use of special D.E.A. operations that conceal how investigations begin. John Shiffman & Kristina Cooke,

Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans, Reuters (Aug. 5, 2013: 5:19 a.m.).[12] And reporting has described similar operations using C.I.A. intelligence. *See* Ronan Farrow, *How a C.I.A. Coverup Targeted a Whistle-Blower*, The New Yorker (Oct. 30, 2020).[13] In the case of the C.I.A., whistle-blowers allege that primary source intelligence — after an arrest — is scrubbed of detail, labeled as another agency's work, and provided to federal prosecutors without their knowledge of its true origin. *Id.*

As such, not only does the split in local law give the Department of Justice vast discretion to select the sentencing policy that will apply to a given case, all parties and the sentencing court face a risk of not seeing the full scope of a drug-trafficking offense, a scope that is relevant to applying the ameliorative provisions at issue in MDLEA and other drug-trafficking offenses.

III. AT THE VERY LEAST, THIS COURT SHOULD GRANT, VACATE, AND REMAND PETITIONER'S CASE UNDER *TERRY*.

As discussed above, petitioner seeks plenary review of the First Circuit's decision. Nevertheless, *Terry*, has delivered a reasoning that should clarify how courts should conceive of covered offenses when assessing broadly worded remedial statutes.

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[12] Available at https://bit.ly/CertDelaCruz3.
[13] Available at https://bit.ly/CertDelaCruz4.

Offenses addressing revised "statutory penalties" are inextricably linked to statutes supplying offenses' elements. *See Terry*, 14 S. Ct. at 1862. Modification of an offense's penalty statutes — as safety valve did to Section 960 — affects any offense that is inextricably linked to those penalty statutes.

Therefore, even if this Court does not grant plenary review it should grant, vacate and remand to the First Circuit for reconsideration of *Terry*'s expansive view of "offense" — as used to interpret another ameliorative piece of legislation.

CONCLUSION

Based on the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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