

# United States Court of Appeals For the First Circuit

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No. 18-1803

UNITED STATES,

Appellee,

v.

RAFAEL ESPINAL-MIESES,

Defendant - Appellant.

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Before

Barron, Chief Judge,  
Lynch and Howard, Circuit Judges.

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## JUDGMENT

Entered: June 26, 2023

Defendant-appellant Rafael Espinal-Mieses appeals from a conviction and sentence imposed after entering a straight plea of guilty to various counts of an indictment, including a count under the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70503, 70502(c)(1), for conspiracy to possess cocaine "on board a vessel subject to the jurisdiction of the United States."

After carefully reviewing the briefing and the record below, we affirm. Defendant first challenges jurisdiction under the MDLEA, asserting that the government failed to perfect statelessness jurisdiction. This argument fails, as the record indicates that the government was proceeding under "customs water" jurisdiction-- not statelessness jurisdiction--and that theory of jurisdiction is supported by facts to which defendant admitted at his plea hearing. See 46 U.S.C. § 70502(c)(1)(D) ("[T]he term 'vessel subject to the jurisdiction of the United States' [also] includes . . . a vessel in the customs waters of the United States . . . ."); United States v. Santana-Rosa, 132 F.3d 860, 863–64 (1st Cir. 1998) ("[T]he customs waters of the United States extend for four leagues, or twelve miles, from United States territory unless another distance has been established by treaty."). With his briefing before this court, defendant has failed to demonstrate any error as to the foregoing conclusion.

Defendant also challenges the district court's conclusion that the safety valve provision, as it existed at the time of sentencing, did not cover his MDLEA offense. This argument is now foreclosed by this court's decision in United States v. De La Cruz, 998 F.3d 508, 509 (1st Cir. 2021) ("We now join the majority of circuits in holding that MDLEA offenses were not safety-valve eligible under the then-applicable safety valve provision and so affirm.").

Affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:

Michael March Brownlee  
Rafael Espinal-Mieses  
Desiree Laborde-Sanfiorenzo  
Mariana E. Bauzá-Almonte  
Antonio Perez-Alonso

## UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA ) **JUDGMENT IN A CRIMINAL CASE**  
 v. )  
 RAFAEL ESPINAL-MIESES ) Case Number: 3:17-cr-00396-1(FAB)  
 ) USM Number: 50359-069  
 ) Edgar L. Sanchez-Mercado  
 ) Defendant's Attorney

**THE DEFENDANT:**

pleaded guilty to count(s) One (1), Two (2), Three (3) and Four (4) on April 2, 2018.

pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.

was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
46:70502, 960(b)(1)(B)	Conspiracy to possess controlled substance aboard a vessel of US.	6/26/2017	One (1)
21:952, 960(b)(1)(B)	Conspiracy to import five (5) or more kilograms of cocaine.	6/26/2017	Two (2)
46:70503(a)(2), 70506(d)	Conspiracy to destroy property subject to forfeiture.	6/26/2017	Three (3)
18:2237, 2237(b)(1) Failure to heave.		6/26/2017	Four (4)

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) \_\_\_\_\_

Count(s) \_\_\_\_\_  is  are dismissed on the motion of the United States.

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

July 31, 2018  
Date of Imposition of Judgment

s/Francisco A. Besosa  
Signature of Judge

Francisco A. Besosa, U.S. District Judge  
Name and Title of Judge

July 31, 2018  
Date

DEFENDANT: RAFAEL ESPINAL-MIESES  
CASE NUMBER: 3:17-cr-00396-1(FAB)

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One Hundred Eighty-Eight (188) months as to Counts 1 and 2, One Hundred Eighty (180) months as to Count 3 and Sixty (60) months as to Count 4, all to be served concurrently with each other

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

That defendant be designated to an institution in the State of Florida.

That defendant participate in courses leading to a high school degree and in courses to learn English as a second language.

That defendant participate in the 500-hour drug and alcohol treatment program, if he qualifies.

That defendant be allowed to participate in any vocational training in which he may have an interest.

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

The defendant shall surrender to the United States Marshal for this district:

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on \_\_\_\_\_.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RAFAEL ESPINAL-MIESES

CASE NUMBER: 3:17-cr-00396-1(FAB)

**SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of :

Five (5) years as to Counts 1 and 2, Three (3) years as to Counts 3 and 4  
to be served concurrently with each other

**MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6.  You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7.  You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: RAFAEL ESPINAL-MIESES  
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## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: RAFAEL ESPINAL-MIESES  
CASE NUMBER: 3:17-cr-00396-1(FAB)

### **SPECIAL CONDITIONS OF SUPERVISION**

1. He shall observe the standard conditions of supervised recommended by the United States Sentencing Commission and adopted by this Court.
2. He shall not commit another Federal, state or local crime.
3. He shall not possess firearms, destructive devices, or other dangerous weapons.
4. He shall not possess controlled substances unlawfully
5. If deported or granted voluntary departure, defendant shall remain outside the United States, and all places subject to its jurisdiction unless prior written permission to re-enter is obtained from the pertinent legal authorities and he notifies the Probation Officer of the permission, in writing.
6. He shall cooperate in the collection of a DNA sample, as directed by the Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code Section 3563(a)(9).

DEFENDANT: RAFAEL ESPINAL-MIESES  
CASE NUMBER: 3:17-cr-00396-1(FAB)

## CRIMINAL MONETARY PENALTIES

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

<b>TOTALS</b>	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 400.00	\$ 0.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>TOTALS</b>	\$ 0.00	\$ 0.00	

Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the  fine  restitution.

the interest requirement for the  fine  restitution is modified as follows:

\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\* 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.

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## 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 \$ 400.00 due immediately, balance due  
 not later than \_\_\_\_\_, or  
 in accordance with  C,  D,  E, or  F below; or

B  Payment to begin immediately (may be combined with  C,  D, or  F below); or

C  Payment in equal \_\_\_\_\_ (*e.g., weekly, monthly, quarterly*) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (*e.g., months or years*), to commence \_\_\_\_\_ (*e.g., 30 or 60 days*) after the date of this judgment; or

D  Payment in equal \_\_\_\_\_ (*e.g., weekly, monthly, quarterly*) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (*e.g., months or years*), to commence \_\_\_\_\_ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E  Payment during the term of supervised release will commence within \_\_\_\_\_ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F  Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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.

Joint and Several

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

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:  
**All property used or intended for use to commit, or facilitate the commission of the offense.**

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

**Plaintiff,**

v.

**Criminal No. 17-396 (FAB)**

RAFAEL ESPINAL-MIESES, *et al.*,

**Defendants.**

**OPINION AND ORDER**

Before the Court are defendants Rafael Espinal-Mieses ("Espinal")'s and Francisco Batista-Reyes ("Batista")'s respective motions for application of the safety valve provision set forth in 18 U.S.C. § 3553(f) ("section 3553(f)," or "statutory safety valve") and U.S.S.G. § 5Cl.2. (Docket Nos. 138 and 142.) Batista also moves for a two-level reduction in the computation of his sentencing guidelines pursuant to U.S.S.G. § 2D1.1(b)(17) ("section 2D1.1(b)(17)"). (Docket No. 142.) For the reasons set forth below, the Court **DENIES** Espinal and Batista's motions for application of the statutory safety valve, and reserves judgment regarding Batista's request for a two-level reduction pursuant to section 2D1.1(b)(17).

**I. Background**

On June 28, 2017, a federal grand jury sitting in the District of Puerto charged Espinal, Batista, and Alberto De Los Santos ("De

Los Santos") with drug trafficking offenses in a four-count indictment. (Docket No. 14.) Counts one and three charge the defendants with violations of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. § 70501 *et seq.* ("Title 46"). (Docket No. 14.) Count one alleges that the defendants conspired to possess with intent to distribute in excess of five kilograms of cocaine on board a vessel subject to the jurisdiction of the United States in violation of 46 U.S.C. § 70502(c)(1). Id. Count three charges the defendants with conspiracy to destroy property subject to forfeiture pursuant to the Comprehensive Drug Abuse Prevention and Control Act in violation of 46 U.S.C. § 70503(a)(2).<sup>1</sup> Id.

Of the three defendants, only De Los Santos entered into a plea agreement with the United States. (Docket Nos. 37 and 38.) On September 14, 2017, De Los Santos pled guilty to count two of the indictment. (Docket No. 37.) At sentencing, the Court imposed a 120-month prison sentence, the minimum statutory term of imprisonment. (Docket Nos. 80 and 81.)

Espinal and Batista elected to proceed to trial, which the Court set for April 2, 2018. (Docket No. 113.) On the day of trial, however, Espinal and Batista each entered a straight plea

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<sup>1</sup> The remaining counts are not MDLEA offenses. Count two charges the defendants with conspiracy to import in excess of five kilograms of cocaine in violation of 21 U.S.C. §§ 952, 960 and 963. Id. Lastly, count four charges the defendants with failure to heave in violation of 18 U.S.C. § 2237. Id.

to all four counts of the indictment. (Docket No. 132.) Espinal and Batista move for application of the safety valve provisions provided in sections 3553(f) and 5C1.2. (Docket Nos. 138 and 142.) Batista also requests a two-level reduction in the computation of his sentencing guidelines pursuant to section 2D1.1(b)(17). (Docket No. 142 at p. 1.) The United States contends that the safety valve is unavailable to Espinal and Batista. (Docket No. 138.) The Court agrees.

## **II. The Maritime Drug Enforcement Act**

The MDLEA enables law enforcement to foil the illicit operations of "international drug traffickers, who constantly refine their methods for transporting illegal narcotics from country to country." United States v. Carvajal, 924 F. Supp. 2d 219, 224 (D.D.C. 2013). Congress enacted the MDLEA "to facilitate increased enforcement by the Coast Guard of laws relating to the importation of controlled substances." §§ 1-4, Pub. L. 96-350, 94 Stat. 1159. The MDLEA recognizes explicitly that "controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. § 70501.

Among other things, the MDLEA prohibits individuals onboard vessels subject to the jurisdiction of the United States from

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possessing with intent to distribute any controlled substance, or to destroy property subject to forfeiture pursuant to the Comprehensive Drug Abuse Prevention and Control Act of 1970. 46 U.S.C. § 70503(a). First time offenders of the MDLEA are punished as provided in 21 U.S.C. § 960.<sup>2</sup> 46 U.S.C. § 70506(a). Accordingly, because Espinal and Batista conspired to possess with intent to distribute in excess of five kilograms of cocaine, they are subject to a mandatory minimum term of imprisonment of ten years pursuant to 46 U.S.C. § 70506 (a) and 21 U.S.C. § 960. The parties dispute whether the Court may impose a sentence below the mandatory minimum pursuant to the safety valve.

### **III. The Statutory Safety Valve - Section 3553(f)**

Congress enacted section 3553(f) pursuant to the Mandatory Minimum Sentencing Reform Act of 1994. 18 U.S.C. § 3553(f). In enacting section 3553(f), Congress intended to

permit a narrow class of defendants, those who are the least culpable participants in such offenses, to receive strictly regulated reductions in prison sentences for mitigating factors currently recognized under the federal sentencing guidelines.

H.R. No. 103-460 (1994). The statutory safety valve serves to "mitigate the harsh effect of mandatory minimum sentences on first-

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<sup>2</sup> All subsequent offenses of section 70503 are punishable pursuant to 21 U.S.C. § 963. 46 U.S.C. § 70506(a). Simple possession of controlled substances on a vessel subject to the jurisdiction of the United States entails a civil penalty of no more than \$5,000 for each violation. Id. § 70506(c)(1).

time, low-level offenders in drug trafficking schemes." United States v. Padilla-Colón, 578 F.3d 23, 30 (1st Cir. 2009) (internal citation and quotation omitted).

Defendants seeking to avail themselves of the statutory safety valve must satisfy five requirements. 18 U.S.C. § 3553(f). The defendant must demonstrate that:

- (1) [he or she] does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) [he or she] 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) [he or she] 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 [21 USCS § 848]; and
- (5) not later than the time of the sentencing hearing, [he or she] 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 [he or she] 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 [he or she] has complied with this requirement.

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18 U.S.C. § 3553(f). Satisfaction of every requirement is a precondition for the Court to disregard the applicable mandatory minimum sentence. See, e.g., United States v. Matos, 328 F.3d 34, 44 (1st Cir. 2003) ("Congress designed the safety valve statute, 18 U.S.C. § 3553(f), with the view that a defendant who satisfies the first four prongs of the statute must prove himself deserving of the safety valve by providing true and complete information to the government prior to the commencement of his sentencing hearing" pursuant to the fifth prong). The trial court must render factual findings concerning each requirement before determining whether to disregard the mandatory minimum sentence. United States v. Harakaly, 734 F.3d 88, 98 (1st Cir. 2013).

Satisfying the five requirements, however, is a pyrrhic victory in terms of the mandatory minimum sentence if the offense of conviction falls beyond the scope of section 3553(f). This is so because the statutory safety valve enables courts to set aside mandatory minimum sentences only in "certain cases." 18 U.S.C. § 3553(f). Notably, 18 U.S.C. § 3553(f) provides that:

[n]otwithstanding any other provision of law, **in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963)**, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 **without regard to any statutory minimum sentence**.

(Emphasis added). See also U.S.S.G. § 5C1.2(a). Should the sentencing court find that the defendant fulfilled each of the five requirements and that the offense of conviction is safety valve-eligible, application of the safety valve is obligatory. United States v. Ortiz-Santiago, 211 F.3d 146, 152 (1st Cir. 2000) ("Congress provided in clear language that, if a defendant satisfies the statutory criteria (virtually all of which are objective), the court shall disregard the mandatory minimum and fashion the sentence accordingly.").

**IV. The Statutory Safety Valve Does Not Apply to the MDLEA as a Matter of Law**

Espinal and Batista contend that they may avail themselves of the statutory safety valve despite the fact that section 3553(f) does not enumerate Title 46 offenses. (Docket No. 138 at p. 3; Docket No. 142 at p. 4.) The statutory safety valve applies, they argue, because section 3553(f) references section 960 – the same statutory provision that sets forth the penalties for violations of the MDLEA pursuant to 46 U.S.C. § 70506(a). Id. Defendants' arguments are unavailing. A statutory construction of sections 3553(f) and 960 compels the Court to conclude that the safety valve is inapplicable to MDLEA offenses.

**A. Section 3553(f)**

Espinal and Batista request that the Court augment the list of enumerated offenses in section 3553(f) by including MDLEA offenses. (Docket Nos. 138 and 142.) "In interpreting the meaning of the statute, [the Court's] analysis begins with the statute's text." United States v. Vidal-Reyes, 562 F.3d 43, 50 (1st Cir. 2009). "[I]f the meaning of the text is unambiguous" the Court's interpretive task ends, and the Court must apply the statute's plain meaning. See Correa-Ruiz v. Fortuño, 573 F.3d 1, 9 (1st Cir. 2009).

Section 3553(f) enumerates specific offenses that are eligible for safety valve relief. None of the offenses enumerated in section 3553(f) is an offense pursuant to the MDLEA. "The maxim 'expressio unius est exclusion alterius' - which translates roughly as 'the expression of one thing is the exclusion of other things' is a venerable canon of statutory construction, and that maxim is directly applicable here." See, e.g. United States v. Hernández-Ferrer, 599 F.3d 63, 67-68 (1st Cir. 2010) (holding that "when Congress explicitly allows for tolling in a particular circumstance, there is a strong presumption that Congress did not intend to allow tolling in other circumstances") (internal citation omitted.) Had Congress intended the statutory safety valve to encompass MDLEA offenses, Congress could have so stated

when it enacted section 3553(f). It is apparent that by enumerating only certain offenses in section 3553(f), Congress manifested an intent to exclude offenses not listed in the statute. See United States v. Philips, 382 F.3d 489, 499 (5th Cir. 2004) (holding that "safety valve provision does not apply to a § 860 offense," and concluding that "the safety valve is explicitly limited to the following offenses: 21 U.S.C. §§ 841, 844, 846, 960 and 963.");<sup>3</sup> see also López v. Soto-Hawayek, 175 F.3d 170, 173 (1st Cir. 1999) ("Congress intended all words and provisions contained within a statute to have meaning and effect, and we will not readily adopt any construction that renders such words or phrases meaningless, redundant, or superfluous"). The Court will not subvert legislative intent by expanding the list of enumerated offenses in section 3553(f).

Espinal and Batista assert that application of the statutory safety valve to MDLEA offenses is necessary to "avoid the absurd result under which MDLEA defendants are subject to more

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<sup>3</sup> See also United States v. McQuilkin, 78 F.3d 105, 108 (3rd Cir. 1996) ("In clear and unambiguous language, therefore, 18 U.S.C. § 3553(f) does not apply to convictions under 21 U.S.C. § 860, the 'schoolyard' statute."); United States v. Koons, 300 F.3d 300, 993 (8th Cir. 2002) ("Congress specified particular offenses for which a § 3553(f) reduction may be considered, and § 860 is not listed as one of them."); United States v. Kakatin, 214 F.3d 1049, 1051 (9th Cir. 2000) (holding that "Congress reasonably could have intended that the safety valve be available to those convicted of violating § 841, but not be available to those convicted of committing the more serious § 860 offense"); United States v. Anderson, 200 F.3d 1344, 1348 (11th Cir. 2000) (holding that because "the selection of these five statutes [in section 3553(f)] reflects an intent to exclude others [. . .] a defendant convicted and sentenced for violating section 860 is not eligible for the 'safety valve'").

severe punishment that [sic] defendants who commit equivalent offenses in domestic waters." (Docket No. 138 at p. 4; See Docket No. 142 at p. 4.) Defendants premise this argument on the assumption that Congress inadvertently omitted MDLEA offenses from section 3553(f). The Court rejects this flawed assumption because it conflicts with the legislative history of the MDLEA.

President Ronald Reagan signed the MDLEA into law in 1986, eight years before Congress enacted the statutory safety valve. See Pub. L. 99-570, 100 Stat. 3207; United States v. Montanez, 82 F.3d 520, 522 (1st Cir. 1996) (Congress enacted the statutory safety valve in 1994 to grant sentencing relief for "less culpable street dealers or 'mules' who merely transport drugs."). Although the MDLEA was already in existence when Congress enacted the statutory safety valve, Congress excluded MDLEA offenses from section 3553(f) along with a multitude of other offenses requiring the imposition of mandatory minimum sentences. Legitimate reasons exist for excluding the MDLEA from section 3553(f). As the Eleventh Circuit Court of Appeals has observed:

Congress may have viewed transnational drug trafficking as more serious threat than domestic drug trafficking. These reasons include transnational drug trafficking's potential to facilitate and fund transnational crime and terrorism, destabilize and spread violence throughout the international community, proliferate and stimulate domestic drug trafficking, and bypass and undercut domestic drug crime prevention efforts.

United States v. Guizamano-Cortés, No. 17-13819, 2018 U.S. App. LEXIS 9391 at \*1 (11th Cir. Apr. 12, 2018) (rejecting defendant's argument that "Congress had no reasonable basis for distinguishing between offenses of Title 21 and Title 46" regarding section 3553(f)).

A comparison of section 3553(f) and the substantial assistance provision set forth in 18 U.S.C. § 3553(e) ("section 3553(e)") bolsters the Court's conclusion that the statutory safety valve is inapplicable to the MDLEA.<sup>4</sup> Similar to section 3553(f), the substantial assistance provision permits courts to impose a sentence below the relevant mandatory minimum in certain instances. 18 U.S.C. § 3553(e). See United States v. Ahlers, 305 F.3d 54, 58 (1st Cir. 2012) ("[W]e compare the language of section 3553(e) (the provision at issue in this case) with the language of section 3553(f) (the only other proviso in section 3553 dealing with mandatory minimum sentences".) Unlike section 3553(f), section 3553(e) sets no limit to the offenses that fall within its purview. 18 U.S.C. § 3553(e). That section 3553(e) does not

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<sup>4</sup> 18 U.S.C. § 3553(e) provides that:

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

contain language limiting its application underscores the proposition that Congress tailored section 3553(f) for a discrete set of drug-related offenses, none of which is an MDLEA offense.

**B. Section 960**

Espinal and Batista attempt to circumvent the text of section 3553(f) by relying on the statute's reference to section 960. Both argue that "individuals convicted under the MDLEA are eligible for safety-valve sentencing relief under § 3553(f) because violations of the MDLEA are punished in accordance with the penalties set forth in 21 U.S.C. § 960(b)." (Docket No. 138 at p. 4; See Docket No. 142 at p. 4.) According to Espinal and Batista, an "offense under" section 960 includes offenses pursuant to the MDLEA. Espinal and Batista misconstrue section 960.

Section 960 consists of two sections: "unlawful acts" in subsection (a) and "penalties" in subsection (b). 21 U.S.C. § 960(a)-(b). Section 960(a) enumerates various controlled

substance offenses. 21 U.S.C. § 960(a).<sup>5</sup> Section 960(b) prescribes penalties in differing degrees of severity for violations of section 960(a), depending on the type and quantity of controlled substance underlying the conviction. 21 U.S.C. § 960(b). In accordance with 42 U.S.C. §§ 70506, 960(b) governs Espinal and Batista's sentences stemming from their convictions for the MDLEA offenses.

Espinal and Batista seize on the MDLEA's cross-reference to section 960. (Docket No 138 at p. 4; Docket No. 142 at p. 4.) They predicate their argument on a *non-sequitur*: because the MDLEA incorporates by reference the penalties provided in section 960, and the safety valve in section 3553(f) applies to offenses committed pursuant to section 960, the safety valve must be available to those who violate the MDLEA. (Docket Nos. 138 and 142.)

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<sup>5</sup> Pursuant to 21 U.S.C. § 960(a):

Any person who —

- (1) contrary to section 305, 1002, 1003, or 1007 [21 USCS § 825, 952, 953 or 957], knowingly or intentionally imports or exports a controlled substance,
- (2) contrary to section 1005 [21 USCS § 955], knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or
- (3) contrary to section 1009 [21 USCS § 959], manufactures, possesses with intent to distribute, or distributes a controlled substance,

shall be punished as provided in subsection (b).

But MDLEA offenses are not section 960 offenses. Section 960 makes no reference to the MDLEA despite enumerating several drug-related offenses, including the prohibition of controlled substances "on board any vessel or aircraft [. . .] arriving or departing from the United States." 21 U.S.C. § 960(a) (citing 21 U.S.C. § 955). In 1970, Congress enacted section 960 as a component of the Comprehensive Drug Abuse Prevention and Control Act. P.L. 91-513 (Oct. 27, 1970). Following the passage of the MDLEA in 1986, Congress repeatedly omitted MDLEA offenses from section 960. Indeed, Congress amended section 960(a) two years after enacting the MDLEA, and again in 1990.<sup>6</sup> In both instances and in all subsequent amendments, Congress refrained from listing any MDLEA offense in section 960. The consistent lack of reference to MDLEA offenses in section 960 reinforces the Court's conclusion that no MDLEA offense may be properly considered as a section 960 offense for purposes of the statutory safety valve. The MDLEA appropriates the penalties set forth in section 960, but it is not an offense pursuant to section 960.

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<sup>6</sup> In 1988, Congress amended section 960(a)(3) by substituting "manufactures, possesses with intent to distribute, or distributes a controlled substance" for "manufactures or distributes a controlled substance." P.L. 100-690 (Nov. 18, 1988). Moreover, in 1990 Congress revised the punctuation in 960(b) and replaced the misspelled word "supervised [sic]" with "supervised." P.L. 101-647 (Nov. 29, 1990).

The First Circuit Court of Appeals has not addressed directly whether a defendant convicted of an MDLEA offense is eligible for safety valve relief pursuant to section 3553(f).<sup>7</sup> The Ninth and Eleventh Circuit Court of Appeals, however, have rejected arguments identical to those advanced by Espinal and Batista. United States v. Gamboa-Cardenas, 508 F.3d 491 (9th Cir. 2007) ("The safety valve provision in 18 U.S.C. § 3553(f) does not apply to offenses under [the MDLEA]."); United States v. Pertuz-Pertuz, (11th Cir. 2012) (The "plain text of the statutes shows that convictions under Title 46 of the U.S. Code - like Defendants - entitle a defendant to no safety-valve sentencing relief.").<sup>8</sup>

In Pertuz-Pertuz, the Eleventh Circuit Court of Appeals concluded, as this Court has, that application of section 3553(f)

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<sup>7</sup> Espinal and Batista cite United States v. Bravo, 489 F.3d 1 (1st Cir. 2007), for the proposition that "the First Circuit has already implicitly determined that the safety valve provision applies to Title 46 offenses." (Docket No. 138 at p. 4; Docket No. 142 at p. 2.) Although Bravo involved a defendant convicted of an MDLEA offense, this precedent is inapposite. See 489 F.3d 1. The First Circuit Court of Appeals merely held that the trial court failed to articulate its reasons for denying safety valve relief pursuant to section 3553(f) without addressing whether the statutory safety valve encompasses the MDLEA. Id. See also United States v. Rodríguez-Durán, 507 F.3d 749, 773 (finding no error when the district court denied safety valve relief pursuant to section 3553(f) in a MDLEA criminal action). On remand, the trial court in Bravo again denied defendant's request for a sentence below the mandatory minimum pursuant to section 3553(f). United States v. Bravo-Alfre, No. 04-205, Docket No. 274 (D.P.R. Aug. 10, 2007) (Fusté, J.).

<sup>8</sup> The United States District Court for the District of Columbia joined the Ninth and Eleventh Circuit Courts of Appeals in holding "that the plain language of the MDLEA and 18 U.S.C. § 3553(f) unambiguously foreclose safety-valve relief for defendants convicted under the substantive or conspiracy provision of [the] MDLEA." United States v. Mosquera-Murillo, 172 F. Supp. 3d 24, 33 (D.D.C. 2016).

is limited to specifically enumerated offenses. Id. at 1328. The defendant in Pertuz-Pertuz violated the MDLEA, and was precluded from seeking safety valve relief pursuant to section 3553(f) because "by its terms, the 'safety valve' provision applies only to convictions under five specified offenses." Id. The defendant, nevertheless, argued that section 3553(f) applied "because the [MDLEA] offenses for which he was convicted reference the penalty provisions of 21 U.S.C. § 960: section 960 is specifically listed in the safety-valve statute." Id. This Court concurs with the Eleventh Circuit Court of Appeals that while section 3553(f) refers to an "offense under" section 960, it does not include "offenses penalized under" section 960. Id.

In sum, the statutory safety valve is inapplicable to the MDLEA as a matter of law. Accordingly, neither section 3553(f) nor section 960 provides a basis for this Court to sentence Espinal and Batista below the ten-year mandatory minimum sentence applicable to the MDLEA offense charged in count one of the indictment.

#### **IV. The Two-Level Reduction in U.S.S.G. § 2D1.1(b)(17)**

Because the statutory safety valve in section 3553(f) is unavailable to Espinal and Batista, only section 2D1.1(b)(17) remains as a potential ground for this Court to reduce Espinal and Batista's guidelines offense level. Section 2D1.1(b)(17) states

that a defendant who satisfies the requirements set forth in section 5C1.2 is entitled to a two-level reduction in his or her total offense level. U.S.S.G. § 2D1.1(b)(17). Section 5C1.2, for its part, "sets forth the relevant provisions of 18 U.S.C. § 3553(f)." Section 5C1.2(a) provides that:

Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines **without regard to any statutory minimum sentence**, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5). U.S.S.G. § 5C1.2 (emphasis added).

Background Note to U.S.S.G. § 5C1.2. The United States Sentencing Commission promulgated section 5C1.2 and its corresponding Application Notes "to provide guidance in the application of 18 U.S.C. § 3553(f)." Id. The MDLEA is absent from the list of qualifying offenses in section 5C1.2(a).

Contrary to the statutory safety valve, section 2D1.1(b)(17) does not grant courts the discretion to disregard applicable mandatory minimum sentences. Compare U.S.S.G. § 2D1.1(b)(17), with 18 U.S.C. 3553(f) ("[T]he 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."). Section 2D1.1(b)(17) provides that when "a defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (1) of § 5C1.2 (Limitation of Applicability

for Statutory Minimum Sentences in Certain Cases), decrease by 2 levels."<sup>9</sup> U.S.S.G. § 2D1.1(b)(17). Section 2D1.1(b)(17) does not limit the offenses to which the two-level reduction may apply if a defendant meets the five criteria set forth in U.S.S.G. section 5C1.2 (1-5), id., but does not include the phrase "without regard to any statutory minimum sentence."

While a defendant convicted of an MDLEA offense cannot receive a sentence below the applicable mandatory minimum pursuant to the statutory safety valve, the same defendant may be eligible for a two-level reduction pursuant to section 2D1.1(b)(17) of the federal sentencing guidelines. See Pertuz-Pertuz, 679 F.3d at 1327 (affirming sentence imposed in a MDLEA criminal action that denied safety valve relief pursuant to section 3553(f) but granted defendant a two-level reduction pursuant section 2D1.1(b)(17)); United States v. Pushania, 705 Fed. Appx. 853, 855 (11th Cir. Aug. 15, 2017) ("Pushania's offense of conviction [pursuant to the MDLEA] does not bar application of the reduction under § 2D1.1(b)(17)."); see generally, United States v. Trinidad, 839 F.3d 112 (5th Cir. 2016) (affirming sentence in which the district court granted a two-level reduction to a defendant convicted of

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<sup>9</sup> The federal sentencing guidelines specify that section 2D1.1(b)(17) may apply "without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment." Application Note to U.S.S.G. § 2D1.1(b)(17).

violating the MDLEA pursuant to section 2D1.1(b)(17) without further analysis). Indeed, the United States "concedes that a defendant *may* qualify for a 2-level reduction pursuant to U.S.S.G. § 2D1.1(b)(17)," but argues that Espinal and Batista fail to satisfy the five requirements in section 5(C)1.2(a)(1)-(5) that are necessary for a defendant to qualify for a two-level reduction. (Docket No. 143 at p. 2.)

The Court reserves judgment on whether Espinal and Batista have satisfied the five requirements that would entitle them to a two-level reduction in their respective guidelines offense levels pursuant to section 2D1.1(b)(17). Any reduction pursuant to section 2D1.1(b)(17), however, will have no effect on the applicable statutorily required minimum sentence that this Court must impose on Espinal and Batista because section 2D1.1(b)(17) does not include the phrase "without regard to any statutory minimum sentence."

#### **V. Conclusion**

For the reasons set forth above, the Court **DENIES** Espinal's and Batista's motions for application of the statutory safety valve provision, and reserves judgment regarding the two-level reduction in section 2D1.1(b)(17). (Docket Nos. 138 and 142.)

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**IT IS SO ORDERED.**

San Juan, Puerto Rico, May 30, 2018.

s/ Francisco A. Besosa  
FRANCISCO A. BESOSA  
UNITED STATES DISTRICT JUDGE