

No. _____

IN THE
Supreme Court of the United States

FRANCISCO BATISTA REYES,

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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No. _____
QUESTION PRESENTED

Federal laws must protect all persons equally irrespective of the court of federal jurisdiction were the defendants are prosecuted. The conflicting interpretation of a criminal statute between federal courts results in unreasonable differential treatment depending on the jurisdiction where the crime took place.

This petition of Certiorari seeks to resolve a circuit split between one (1) court of appeals and four (4) others on an important sentencing matter related to the conflicting interpretation of the then applicable 18 U.S.C. § 3553 (f) safety valve provision¹ and the §§ 70503 and 70506 MDLEA and controlled substances (§§ 960 and 963), statutes. This conflict resulted in an unjustified differential sentencing of identically situated individuals, but for the federal jurisdiction where their offenses were committed.

While in the decision of *United States v. Mosquera Murillo*, 902 F. 3d 285 (2018), the Court of Appeals for the District of Columbia Circuit applied the 18 U.S.C. § 3553 (f) safety valve relief to first time offenders charged with §§ 70503 and 70506 MDLEA and §§960, 963 narcotics violations, four (4) other circuits, based on the strict plain language of said statutes, concluded that such offenders do not qualify for the safety valve under the then-applicable safety valve provision. See,

¹ In December of 2018 Congress enacted the First Step Act which, among other matters, amended the § 3553 (f) safety valve provision to explicitly include MDLEA offenses under §§ 70503 and 70506 among offenses eligible for relief from statutory minimums. Pub. L. No. 115-391, § 402(a)(1)(A)(ii), 132 Stat. 5194, 5221 (2018).

United States v. De la Cruz, 998 F. 3d 508, 513-519 (1st Cir 2021); *United States v. Anchundia-Espinoza*, 897 F. 3d 629, 633-634 (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)(Circuit Judge Fisher dissenting, finding that safety valve relief is available for MDLEA offenses).

Only upon the granting of this Petition said differential treatment could be resolved and uniformity could be obtained. Therefore, the Supreme Court should overturn the precedent set by the four (4) other circuits and decide that all first time MDLEA offenders are entitled to safety valve relief as a matter of interpretation of law under § 960. The disagreement among circuits regarding the same matter and the post *Mosquera Murillo* legislation that, amended the safety valve provision to explicitly include MDLEA offenses eligible relief from statutory minimums, clearly demonstrate that the issue cannot be resolved by the then plain language of the then applicable statutory provisions.

The question presented is:

Do the MDLEA first time offenders charged for the violation of both the MDLEA as well as §§ 960 (b) and 963 statutes have a right to safety valve relief under the then applicable statute as a matter of interpretation of the law?

PARTIES

Francisco Batista-Reyes, petitioner on review, was the defendant-appellant below.

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

RELATED PROCEEDINGS

The following proceedings are directly related to this case.

- *United States v. Francisco Batista-Reyes*, No. 18-1765, (1st Cir. June 26, 2023)
- *United States v. Francisco Batista-Reyes*, No. 3:17-cr-00396-FAB (D.P.R. May 30, 2018)

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OPINIONS BELOW

Francisco Batista-Reyes respectfully petitions for a writ of certiorari to review the judgment of the First Circuit. App. 1a-3a.

JURISDICTION

The First Circuit entered judgment on June 26, 2023, and denied a petition for rehearing on October 10, 2023. App. 1a-

3a, 24a. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

46 U.S.C. § 70503 (a)(1), (2016) of the Maritime Law Enforcement Act (“MDLEA”) (in relevant part):

An individual is prohibited from “manufacтур[ing] or distribut[ing], or possess[ing] with intent to manufacture or distribute, a controlled substance” while the individual is “on board a covered vessel.”

46 U.S.C. § 70503 (e)(1), (2016) (in relevant part):

A “covered vessel” is defined as “a vessel of the United States or a vessel subject to the jurisdiction of the United States...”

46 U.S.C. § 70506 (a) (2016) (in relevant part):

“A person violating paragraph (1) of section 70503 (a) of this title shall be punished as provided in ... (21 U.S.C. 960)...”

U.S.C. § 960 (2018) (in relevant part):

(a) The unlawful acts “shall be punished as provided in subsection (b).”

(b) “...”

(1) In the case of a violation of subsection (a) of this section involving-

...

(B) 5 kilograms or more of ...

(ii) cocaine...

...the person ...shall be sentenced to a term of imprisonment of not less than 10 years and not more than life..."

21 U.S.C.§ 963 (2018)

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

18 U.S.C. § 3553(f)(2018) of the MDLEA (in relevant part):

"Notwithstanding any other provision of law, in the case of an offense under ... (21 U.S.C 841, 844, or 846) or ... (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines... without regard to any statutory minimum sentence," if the court finds at sentencing,... that... [the defendant satisfies five criteria].²

² Those five criteria are that:

(1)The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amendment XIV:

“[N]o State shall...deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT

A. General Legal Background

“...[I]n the administration of criminal justice [a person] shall not be subjected, for the same offense, to any greater or different punishment.” *Pace v. State*, 106 U.S. 583, 584 (1883), U.S. S. Ct. 637, *overruled by Mc Laughlin v. State of Florida*, 379 U.S. 184 (1964), 85 S. Ct. 283, 13 L. Ed. 2d 222.

Persuasive authority holds that a claim of improper sentencing basis is reviewed *de novo*, whether or not a contemporaneous objection is made. *See United States v. Kaba*, 480 F.3d 152, 158 (2d Cir. 2007).

The circuit split resulting from the application of the safety valve to the MDLEA first time offenders based on

not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truly 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 defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement. 18 U.S.C. § 3553 (f)(1)-(5) (2018).

different interpretation of the law results in disparate sentencing of identically situated defendants but for the jurisdictions were the offenses were committed. For this reason the Supreme Court should grant this petition and ensure uniformity in the federal sentencing.

B. Factual and Procedural Background

On June 28, 2017, a federal grand jury sitting in the United States District of Puerto Rico charged Mr. Batista-Reyes, along with other two (2) defendants, with a four (4) count indictment related to a conspiracy to distribute and import into the United States five (5) kilograms or more of cocaine on a board vessel in the District of Puerto Rico, United States, beginning on a date unknown but not later than June 26, 2017. He was charged as follows: Count one charged a violation of MDLEA, 46 U.S.C. § 70501, (Conspiracy to Possess a Control Substance on a Board Vessel Subject to the Jurisdiction of the United States); count two charged a violation of 21 U.S.C. §§ 952, 960 and 963 (Conspiracy to Import a Controlled Substance); count three charged a violation of MDLEA, 46 U.S.C., §§ 70503 (a) and 2, (Conspiracy to Destroy Property Subject to Forfeiture Under § 511(a) of the Comprehensive Drug Abuse Prevention Act of 1970) and count four charged a violation of 18 U.S.C. § 2237(Failure to Heave, Aiding and Abetting). The first two counts under MDLEA and §§ 960, 963 carry minimum mandatory sentences of ten (10) years of imprisonment. *See, 21 U.S.C. 960 (b)(1)(B)(ii).*

After the arrest and during the course of the proceedings, Mr. Batista-Reyes rendered a straight guilty plea to all four (4) counts of the indictment.

Later on, Mr. Batista-Reyes, being a first-time offender, filed a motion under the safety valve 18 U.S.C. §3553(f) provision seeking reduction from the 10-year minimum mandatory term provided for the MDLEA and §§ 960 (b) and 963 charges of the indictment (one (1) and two (2) respectively). In doing so, Mr. Batista Reyes rested on precedent of District Court of Puerto Rico Court where the safety-valve provisions were applied to the MDLEA offenses. See, United States v. Justo Elias Matos, Cr. No. 15-699 (GAG) and U.S. v. Alfred Luis Bravo, Cr. No. 04-205 (JAF), remanded in U.S. v. Bravo, 489 F. 3d 1 (1st Cir. 2007). In addition, he relied on the safety valve's Congressional intent to grant relief to first time offenders like himself, who, because of their limited role in the offenses for which they were convicted, were often unable to provide the level of substantial assistance necessary to qualify for departure below an applicable mandatory minimum. Finally, Mr. Batista-Reyes sustained that individuals convicted under MDLEA are eligible for safety valve relief because violations of MDLEA are punished in accordance with the penalties set forth in 21 U.S.C. §960(b), 18 U.S.C. §3553(f). Therefore, he argued that punishments for violations of MDLEA should be the same as those imposed in §960, which necessarily include safety valve relief.

In an Opinion and Order dated May 30, 2018, the District Court denied Mr. Batista-Reyes' request. Based on the District Judge's strict statutory interpretation of the safety valve provision under §3553(f) and their relation to §§ 960, 963 and MDLEA, the District Court decided that the safety valve is inapplicable to MDLEA offenses. The Puerto Rico District Court reasoned that because MDLEA is not expressly included among

the offenses enumerated in §3553(f), the safety valve provision did not apply to Mr. Batista-Reyes. Ap. 4-23 (a).

Consequently, the District Court sentenced Mr. Batista-Reyes to an enhanced sentence of 188 months for counts 1 and 2, 180 months for count 3 and 60 months for count 4, all to be served concurrently.

As a result, Mr. Batista Reyes timely appealed. Resting on the District of Columbia Circuit decision in *United States v. Mosquera Murillo*, 902 F. 3d 285 (D.C. Cir. 2018),³ he submitted that first time MDLEA and §§960 and 963 offenders are eligible to the safety valve as a matter of law like the rest of the narcotics offenders under other federal drug crimes committed in domestic waters and on the high seas. *See, Mosquera Murillo*, at pg. 295 (citing “21 U.S.C. § 955-against importing drugs via the custom waters of the United States. Comprehensive Drug Abusive Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1007, 84 Stat. 1236, 1288. Congress provided that the penalties applicable to that offense were those set forth in 21 U.S.C. § 960. *Id.* § 1010, 84 Stat. at 1290. Shortly thereafter, Congress enacted what is known as the MDLEA, including its prohibition against possession with intent to distribute on the high seas. Pub. L. No. 96-350, § 1, 94 Stat. 1159, 1159 (1980). And Congress provided that §960 also supplied the penalties for that offense. *Id.* § 1(g)(1), 94 Stat. at 1159.” *See, Mosquera Murillo* at pg. 295.

³ This decision was rendered on August 24, 2018, after the Puerto Rico District Court denied the safety valve relief to Mr. Batista Reyes.

The Court of Appeals for the First Circuit denied Mr. Batista Reyes' request based on its *United States vs. De la Cruz*'s decision, 998 F. 3d 508 (1st Cir. 2021). Ap. 1-3(a).

In *De la Cruz*, the First Circuit disregarded the *Mosquera Murillo*'s District of Columbia Circuit ruling and joined the other three (3) Circuits' strict interpretation of the MDLEA statute. See De la Cruz, at pg. 510 (citing *United States v. Anchundia-Espinoza*, 897 F. 3d 629, 633-634 (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)). In doing so, the First Circuit Court, based on the plain language of the statute, reached the same conclusion of said Circuits and determined that the language of the statute "*plainly and unambiguously did not apply to offenses under the MDLEA.*" *Id.* at pg. 512. The First Circuit Court's rationale was that MDLEA was not among the offenses expressly enumerated in the safety valve provision -18 U.S.C. §3553 (f) (2018).

Based on the same reasoning, the First Circuit concluded, like the other three (3) Circuits, that MDLEA is not an "*offense(s) under §960, which was one of the statutes expressly included in the safety valve provision*" because "*[t]he MDLEA is not one of the statutes expressly listed under 960 (a).* *Id.* at pg. 514. Furthermore, the First Circuit sustained that although 960 (b) establishes the penalty applicable to first time MDLEA's offenders, that provision in and of itself is not sufficient to conclude that MDLEA is a 960 offense. The First Circuit reasoning was that "*MDLEA [like the other statutes cited in 960 (a)] provides its own offense conduct which is not incorporated into §960.*" *Id.* at pg. 514.

Furthermore, the First Circuit disregarded the argument posed by De la Cruz, based on Supreme Court precedent, (*Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L.Ed.2d 281 (1977), *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 105-06, 133 S. Ct. 2151, 186 L. Ed.2d 314 (2013)) that the penalties provided in §960 (b) establishing the drug type and drug amount of a MDLEA offense constituted an element of the offense that should be considered as a basis for the safety valve eligibility. In support of said conclusion, the First Circuit determined that none of the Supreme Court cases above cited “*addresses the statutory interpretation issue here* [regarding the safety valve].” *Id.* at pg. 514.

Finally, acknowledging the recent 2018 amendment to the safety valve statute [§3553 (f)], Pub. L. No. 115-391, §402, 132 Stat. 5194, 5221 (2018) “*to explicitly include offenses under MDLEA*,” the First Circuit Court in *De la Cruz*, concluded that said action from the part of Congress “*is entitled to weight, and it reinforces our conclusions based on the language of the statute.*” *Id.* at pg. 517. Consequently, the First Circuit disregarded the conclusion that with said amendment Congress incorporated the *Mosquera-Murillo*’s decision for the purpose of expressly clarifying in the statute the safety valve coverage to MDLEA’s first time offenders thus, resolving the ambiguity on the application of §960 that existed before the amendment.

Mr. Batista-Reyes asked for panel and en banc rehearing, noting that the First Circuit failed to analyze that he was charged and punished for violations under §§ 960, 963 and also,

MDLEA, therefore, he should be eligible to the safety valve under §960 as a matter of law.

The First Circuit denied rehearing. App. 24-a. This petition follows.

REASONS TO GRANT CERTIORARI

There is a one (1) to four (4) Court of Appeals Circuit split regarding the applicability of the then applicable safety valve relief to defendants such as petitioner charged as first-time drug offenders under MDLEA and §§960 (b), 963. While the Fifth, Ninth, Eleventh and First Circuits held, based on the plain language of the law, that first time offenders charged under MDLEA and §§960 (b), 963 are not entitled to safety valve relief, *See, United States v. De la Cruz*, 998 F. 3d 508, 513-519 (1st Cir 2021); *United States v. Anchundia-Espinoza*, 897 F. 3d 629, 633-634 (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)(Circuit Judge Fisher dissenting, finding that safety valve relief is available for MDLEA offenses), the District of Columbia, based on the interpretation of the law, determined that those defendants are eligible. *See, United States v. Mosquera Murillo*, 902 F. 3d 285 (D.C. Cir. 2018).

However, there should be uniformity in sentencing all first-time offenders under MDLEA. They should be treated equally at sentencing. “[I]n the administration of criminal justice [a person] shall not be subjected, for the same offense, to any greater or different punishment.” *Pace v. State*, 106 U.S. 583, 584

(1883), *overruled by Mc Laughlin v. State of Florida*, 379 U.S. 184 (1964), 85 S. Ct. 283, 13 L. Ed. 2d 222.

MDLEA prohibits individuals from “manufactur[ing], distribut[ing] or possess[ing] with intent to manufacture or distribute, a controlled substance” while “on board a covered vessel” subject to the jurisdiction of the United States. 46 U.S.C. § 70503 (a)(1), (2016). Likewise, §963 prohibits the conspiracy to possess with intent to distribute controlled substances. 21 U.S.C. § 963 (2018)

Section 960 establishes the penalties applicable to both MDLEA and §963, depending on the drug quantity and type involved. All of these violations, either under MDLEA or §§960, 963, provide for 10-year minimum imprisonment terms. See, 46 U.S.C. § 70506 (a)-(b); 21 U.S.C. § 960 (b)(1)(B) (2018).

In addition, a first-time offender under MDLEA is subject to the penalties provided in §960, like any other offender who committed a narcotic violation. *See, Mosquera Murillo*, at pg. 295 (citing “21 U.S.C. § 955-against importing drugs via the custom waters of the United States. Comprehensive Drug Abusive Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1007, 84 Stat. 1236, 1288. Congress provided that the penalties applicable to that offense were those set forth in 21 U.S.C. § 960. *Id.* § 1010, 84 Stat. at 1290.”) In addition, the Violent Crime Control and Law Enforcement Act applies to §§ 841, 844 and 846 (2018) against drug violations which penalties are also established in 21 U.S.C. § 960.

Considering the above, the Controlled Substance Import and Export Act (CSIEA), 18 U.S.C. §3553 (f)(2018) was approved by

Congress to provide relief to nonviolent first-time drug offenders so that they could be sentenced below the mandatory minimum established by law for the particular drug offense.

18 U.S.C. §3553 (f)(2018) provides, in relevant part, “Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C 841, 844, or 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,...” 18 U.S.C. §3553 (f)(2018)(emphasis added).

The District of Columbia Circuit in *Mosquera Murillo*, taking on to account the “long pattern of identical penalties for drug offenses committed on domestic waters and on the high seas” and that §960 (b) establishes the drug type and quantity which are elements of the offense that must be charged and met for the constitution of the drug violations, decided that first time offenders under MDLEA qualify as offenders “under §960” for the purposes of sentencing and safety valve eligibility like any other first time drug offender. *Mosquera Murillo* at 295.

The District of Columbia Circuit, citing *Patterson v. New York*, 432 U.S. 197, 210 (1977), (“[O]ffenses are defined by the provisions that supply their elements”) concluded that because the crime of conviction under MDLEA also involved a violation of 21 U.S.C. §960, the “offense draws certain elements from the MDLEA provisions, 46 U.S.C. §§ 70503 (a)(1), 70506 (b), and

draws other elements from 21 U.S.C. §960.” Therefore, it determined that because the penalties for the first time MDLEA offenses established in 21 U.S.C. §960 are elements of said offenses, and 21 U.S.C. §960 is one of the statutes explicitly included among the statutes qualifying for safety valve relief, “the defendant’s crime is ‘an offense under’ both the MDLEA and §960.” *Mosquera Murillo* at 293.

Moreover, citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. ed.2d 435 (2000) and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 2157, 186 L. Ed.2d 314 (2013), the District of Columbia Circuit noted that since the drug quantity and type elements for the MDLEA offense prescribed in § 960 raise the maximum sentence that could be imposed to a first-time offender, they constitute “offense elements” under *Apprendi*. *Mosquera Murillo* at 293.

Because all the drug offenses, including the ones expressly listed in § 960 (a), MDLEA and 21 U.S.C. § 955, apply the drug type and quantity elements and their respective penalties prescribed in § 960 (b), there is no reason to conclude, as the Fifth, Ninth, Eleventh and First Circuits did in their decisions, that the offenses expressly enumerated in § 960 (a) as a matter of plain language of the MDLEA statute, are the only ones that qualify as “offense under” § 960 for the purposes of safety valve eligibility while drug related offenses like MDLEA do not. *Mosquera Murillo* at 295.

There is no doubt that the District of Columbia Circuit *Mosquera Murillo*’s decision brings uniformity to the sentences of all drug crimes, independently of the federal jurisdiction

where they were committed. The same clears out the ambiguity on the question of whether offenses such as MDLEA crimes qualify as an “offense under § 960” when the penalty for said offenses are enumerated in § 960 (b).

The Supreme Court should adopt the *Mosquera Murillo*’s District of Columbia Circuit of Appeals’ interpretation and determine that 21 U.S.C. § 960 not only historically provides the penalties for first time drug offenders, including those charged for the first time with MDLEA and §§ 960, 963 violations, but also as a matter of drug type and quantity, which affects the maximum penalty applicable, constituting elements of the offense.

Consequently, the Supreme Court should reverse the Fifth, Ninth, Eleventh and First Circuit decisions, and decide, as a matter of law interpretation, that first time drug offender defendants charged with MDLEA and §§ 960, 963 violations are entitled to safety valve relief.

Conclusion

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

Respectfully submitted.



MARÍA SOLEDAD RAMÍREZ-BECERRA

Counsel of Record

December 22, 2023

United States Court of Appeals For the First Circuit

No. 18-1765

UNITED STATES,

Appellee,

v.

FRANCISCO BATISTA-REYES,

Defendant - Appellant.

Before

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

JUDGMENT

Entered: June 26, 2023

Defendant-appellant Francisco Batista-Reyes 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. As an initial matter, in his reply brief, defendant attempts to join an argument raised by his co-defendant that statelessness jurisdiction under the MDLEA was lacking. Assuming the claim is not forfeited, it is nevertheless meritless. 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 next 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.").

Lastly, defendant challenges the procedural and substantive reasonableness of his sentence on various grounds, none of which have merit. First, defendant challenges the district court's consideration of a quantity of heroin for sentencing purposes. As an initial matter, there appears to be no error on this record. See United States v. Perez-Ruiz, 353 F.3d 1, 15 (1st Cir. 2003) ("Apprendi does not prohibit a sentencing court from making factual findings that increase a defendant's sentence (including findings as to drug type and quantity) as long as the sentence imposed is within the default statutory maximum."). In any event, any error in consideration of the heroin quantity would be harmless, as the heroin quantity ultimately did not alter the applicable statutory penalties or the applicable guideline-range calculation. See United States v. Harakaly, 734 F.3d 88, 94 (1st Cir. 2013) ("This court reviews . . . preserved Apprendi errors for harmless error.").

Second, the district court did not clearly err in applying the two-level enhancement under U.S.S.G § 2D1.1(b)(3)(C) (requiring a two-level increase if "the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance"), as application of the enhancement is supported by the record, see United States v. Gonzalez, 857 F.3d 61, 62 (1st Cir. 2017) ("The defendant bears the burden of disputing the PSR's factual findings, and absent an objection supported by countervailing proof, the district court usually may accept the findings in the PSR without further inquiry.").

Third, there is no unwarranted sentencing disparity, as defendant and the co-defendant to whom he points were not similarly situated (e.g., the relevant co-defendant pleaded guilty via agreement and thereby garnered certain benefits). See 18 U.S.C. § 3553(a)(6) (requiring sentencing judges to "consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); United States v. Martin, 520 F.3d 87, 94 (1st Cir. 2008) (explaining that § 3553(a)(6) "aims primarily at the minimization of disparities among defendants nationally, not at disparities among co-defendants in a conspiracy") (internal citation omitted); United States v. Marceau, 554 F.3d 24, 33-34 (1st Cir. 2009) (concerns may arise where "two identically situated defendants" receive different sentences from the same judge) (citation and quotation omitted). Finally, there is no basis to believe the district court overlooked any sentencing factor. See United States v. Clogston, 662 F.3d 588, 593 (1st Cir. 2011) ("That the sentencing court chose not to attach to certain of the mitigating factors the significance that the appellant thinks they deserved does not make the sentence unreasonable.").

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

By the Court:

Maria R. Hamilton, Clerk

App. 2a

cc:

Maria Soledad Ramirez-Becerra
Francisco Batista-Reyes
Julia Meconiates
Desiree Laborde-Sanfiorenzo
Mariana E. Bauzá-Almonte
Antonio Perez-Alonso

App. 3a

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 value") 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

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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).¹ 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

¹ 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. § 960.² 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-

² 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.");³ 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

³ 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.⁴ 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

⁴ 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).⁵ 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.)

⁵ 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 1990.⁶ 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.

⁶ 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).⁷ 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.").⁸

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

⁷ 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.).

⁸ 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.”⁹ 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

⁹ 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

Ap. 23 a

United States Court of Appeals For the First Circuit

No. 18-1765

UNITED STATES,

Appellee,

v.

FRANCISCO BATISTA-REYES,

Defendant - Appellant.

Before

Barron, Chief Judge,
Howard, Lynch, Kayatta,
Montecalvo and Rikelman, Circuit Judges.

ORDER OF COURT

Entered: October 10, 2023

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Maria Soledad Ramirez-Becerra
Francisco Batista-Reyes
Julia Meconiates
Desiree Laborde-Sanfiorenzo
Mariana E. Bauzá-Almonte
Antonio L. Perez-Alonso