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I. INTRODUCTION

Since the passage of the Maritime Drug Law Enforcement Act (MDLEA) in 1986, drug traffickers intercepted on the high seas have been prosecuted in United States district courts.[2] Many cases prosecuted under the MDLEA in United States district courts have nearly identical facts: the United States Coast Guard apprehends a foreign national on a suspicious vessel on the high seas carrying large quantities of drugs.[3] Until recently, circuit courts have been consistent in upholding a district court's denial of "safety valve"[4] relief to defendants charged under the MDLEA.[5] However, a recent decision by the Court of Appeals for the District of Columbia Circuit has created a circuit split regarding the applicability of "safety valve" relief to defendants charged under the MDLEA.[6] Furthermore, a petition for *certiorari* was submitted requesting that the Court resolve the newly-created circuit split.[7]

This Note will compare a recent decision from the Eleventh Circuit dealing with the applicability of the "safety valve" provision, *United States v. Alexander*, to the D.C. Circuit's decision in *United States v. Mosquera-Murillo*. Additionally, this Note will assert that the petition for *cert.* should

1. J.D. Candidate, 2020, University of Maine School of Law.

2. Lieutenant Commander Aaron J. Casavant, *In Defense of the U.S. Maritime Drug Law Enforcement Act: A Justification for the Law's Extraterritorial Reach*, 8 HARV. NAT'L SEC. J. 191, 195 (2017).

3. *See generally*, United States v. Pertuz-Pertuz, 679 F.3d 1327, 1328 (11th Cir. 2012); United States v. Gamboa-Cardenas. 508 F.3d 491, 494 (9th Cir. 2007).

4. 18 U.S.C. § 3553(f)(2012) ("Safety valve" relief provides a limitation on the application of statutory minimum sentences. This provision will be discussed in depth in the section entitled "X").

5. *See* United States v. Gamboa-Cardenas, 508 F.3d at 494.

6. *See* United States v. Mosquera-Murillo, 902 F.3d 285, 287 (C.A.D.C. 2018).

7. Castillo v. United States, No. 18-374, 2018 WL 4564803, **2-3 (11th Cir. 2018), *petition for cert. filed*, (U.S. Sept. 21, 2018).

be granted and that the Supreme Court should affirm the D.C. Circuit's *Mosquera-Murillo* decision.

II. BACKGROUND

Under the Define and Punish Clause of the United States Constitution, Congress has the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[8] Since the 1970s, Congress has used this power to promote the interdiction of vessels on the high seas attempting to smuggle narcotics into the United States.[9] In particular, United States counterdrug operations focus on three geographic areas: (1) Source Zone (supplier countries in South America); (2) Transit Zone (a 7 million square mile area between source countries in South America and Arrival Zone in North America); and (3) Arrival Zone (area where narcotics arrive in United States and Canada).[10] For the transportation of narcotics from the Source Zone to the Arrival Zone, criminal organizations have long "recognize[d] the oceans as critical routes, given the anonymity a ship enjoys over large, ungoverned stretches of space, the relative complexities in jurisdiction, and the limited capacity of most countries' coastal law enforcement."[11] The use of the Transit Zone by criminal organizations for the transportation of narcotics into the United States is substantial.[12] For example, in the fiscal year of 2017, the Coast Guard "removed 223.8 metric tons of cocaine from the Transit Zone . . . ."[13]

In order to combat the smuggling of narcotics through the Transit Zone and expand the scope of interdiction efforts, Congress passed the MDLEA, codified as 46 U.S.C. §§ 70501-70508.[14] The MDLEA provides, in relevant part, that an individual is prohibited from "manufactur[ing] or distribut[ing], or possess[ing] with intent to manufacture or distribute, a controlled substance"[15] while the individual is "on board a covered

8. U.S. CONST. art. 1, § 8, cl. 10.

9. Mary B. Neumayr, *Maritime Drug Law Enforcement Act: An Analysis*, 11 HASTINGS INT'L & COMP. L. REV. 487, 488 (1988) (citing 21 U.S.C. § 955(a) (1980)).

10. Casavant, *supra* note 2, at 197-98.

11. Brian Wilson, *Submersibles and Transnational Criminal Organizations*, 17 OCEAN & COASTAL L.J. 35, 39 (2011).

12. Department of Homeland Security, Office of the Inspector General, *Review of U.S. Coast Guard's Fiscal Year 2017 Drug Control Performance Summary Report*, 2-3 (2018).

13. *Id.* at 3.

14. *See* Neumayr, *supra* note 9, at488-92; 46 U.S.C. §§ 70501-70508 (2018).

15. 46 U.S.C.A. § 70503(a)(1) (2016).

vessel."[16] A "covered vessel" is defined as "a vessel of the United States or a vessel subject to the jurisdiction of the United States"[17] or "any other vessel if the individual is a citizen of the United States or a resident alien of the United States."[18] The language "a vessel subject to the jurisdiction of the United States" affords United States law enforcement, namely the Coast Guard,[19] the ability to police "stateless vessels."[20] This provision has been controversial; with some commentators arguing that this language creates an overbroad grant of authority for United States law enforcement and others contend that it is necessary to effectively stem the tide of narcotics into the United States.[21]

A. Safety-valve Relief

In 1990, Congress ordered the United States Sentencing Commission to study the impact of mandatory minimums on the sentencing guidelines.[22] Ultimately, the House Judiciary Committee "characterized the resulting report as concluding that 'by limiting the effect of mitigating factors, mandatory minimums did in some cases lead to instances in which offenders who markedly differed in seriousness nonetheless received similarly severe sentences.'" [23] In the wake of this finding, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994.[24]

Primarily concerned with the sentencing of nonviolent drug offenders, the Violent Crime Control and Law Enforcement Act applies to particular offenses charged under the Controlled Substances Act[25] and the Controlled Substances Import and Export Act (CSIEA).[26] The CSIEA is the statute at issue in cases charged under the MDLEA.[27] 18 U.S.C. § 3553(f) provides, in relevant part, that "the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing

16. *Id*.
17. § 70503(e)(1)
18. § 70503(e)(2)
19. Department of Homeland Security, *supra* note 12, at 2.
20. 46 U.S.C.A. § 70502(c)(1) (2018).
21. *See generally* Casavant, *supra* note 2; Elaina Aquila, *Courts Have Gone Overboard in Applying the Maritime Drug Law Enforcement Act*, 86 Fordham L. Rev. 2965 (2018).
22. Hutchison et. al, Authors' Comments, Limitation on Applicability of Statutory Minimum Sentences in Certain Cases, Fed. Sent. L. & Prac. § 5C1.2 (2009 ed.).
23. *Id.* at 3.
24. *Id.* at 10.
25. 21 U.S.C.A. §§ 841, 844, 846 (2018).
26. 18 U.S.C. § 3553(f) (2018); the Controlled Substances and Import and Export Act is codified as 21 U.S.C. §§ 960, 963 (2018).
27. *See* United States v. Mosquera-Murillo, 902 F.3d 285, 292-93 (C.A.D.C. 2018).

Commission . . . without regard to any statutory minimum sentence," if five factors are present.[28] The factors are as follows:

> (1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.[29]

There are two ways the "safety valve" provision may potentially benefit a defendant who satisfies the enumerated factors.[30] "First, a defendant can receive a guideline sentence of less than the mandatory minimum."[31] Additionally, "the sentencing court, without regard to [a] . . . defendant's guideline range, can depart to a sentence below the mandatory minimum if there is a basis for the departure and the extent to the departure is reasonable."[32] The two cases in this Note, *United States v. Mosquera-Murillo* and *United States v. Alexander,* deal with defendants asserting a denial of the first benefit.[33]

28. 18 U.S.C. § 3553(f); *id.* at 292.
29. § 3553(f).
30. Hutchison, *supra* note 22.
31. *Id.*
32. *Id.*
33. United States v. Mosquera-Murillo, 902 F.3d 285, 288 (C.A.D.C. 2018); United States v. Alexander, 713 F. App'x 919, 921 (11th Cir. 2017).

B. Alexander Factual Background

United States Coast Guard cutter[34] Richard Dixon intercepted a suspicious vessel that was traveling in international waters approximately seventy nautical miles[35] south of the Dominican Republic.[36] The suspicious vessel did not identify its nationality.[37] When a chase boat was launched from the *Richard Dixon*, the suspicious vessel attempted to flee and one of the occupants of the vessel "fell or jumped overboard during the pursuit."[38] This individual was later identified as Desmond Alexander.[39] Once the Coast Guard secured the vessel and apprehended Alexander, the bales of marijuana were brought to Miami where the Drug Enforcement Administration (DEA) weighed them and determined that the amountonboard was approximately 1,251 kilograms.[40] Alexander was charged and convicted under the MDLEA and sentenced to the mandatory minimum of 120 months imprisonment.[41]

On appeal at the Eleventh Circuit, Alexander challenged his conviction on four grounds.[42] First, Alexander contended that the "government failed to prove beyond a reasonable doubt that the offense involved 1,000 kilograms or more of marijuana."[43] Second, Alexander alleged that "the government's use of his post-arrest, pre-*Miranda* silence, violated his Fifth Amendment rights to due process and against self-incrimination."[44] Third, Alexander argued that the MDLEA was unconstitutional as applied to him.[45] Finally, Alexander argued that "his sentence should be vacated because . . . denying safety-valve relief to

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34. Department of Homeland Security, United States Coast Guard, *The Cutters, Boats, and Aircraft of the U.S. Coast Guard* 130, https://www.uscg.mil/Portals/0/documents/CG_Cutters-Boats-Aircraft_2015-2016_edition.pdf?ver=2018-06-14-092150-230 [https://perma.cc/TL2X-95QT] (A "cutter" is "a Coast Guard vessel 65 feet in length or greater, with accommodations for a crew to live aboard").

35. United States Department of Commerce, National Oceanographic and Atmospheric Administration, *What is the difference between a nautical mile and a knot?*, (June 15, 2018), https://oceanservice.noaa.gov/facts/nauticalmile_knot.html [https://perma.cc/N8HC-UFCM] (stating that a nautical mile is equal to approximately 1.15 land-measured miles).

36. *Alexander*, 713 F. App'x. at 921.

37. *Id.*

38. *Id.*

39. *Id.* at 922.

40. *Id.*

41. *Id.* at 922.

42. *Id.* at 923.

43. *Id.*

44. *Id.* at 926.

45. *Id.*

defendants convicted under the MDLEA violates equal protection."[46] The Eleventh Circuit upheld Alexander's conviction and sentence.[47]

In denying the defendant safety-valve relief, the Eleventh Circuit turned to its 2012 decision in *United States v. Pertuz-Pertuz*.[48] Specifically, the Court noted that *Pertuz-Pertuz*, "explained that, by its terms, the safety valve applies only to convictions under the five listed statutes – 21 U.S.C. §§ 841, 844, 846, 960, and 963."[49] The Court concluded that "the express selection of five statutes reflects an intent to exclude others"[50] and 46 U.S.C. § 70503 does not qualify for safety-valve relief.[51] Alexander's Equal Protection challenge was rooted in the presumption that "geography alone is not a good enough reason to exclude MDLEA defendants from the safety valve."[52] The Court, however, found this argument unpersuasive and sided with the government that Alexander failed to show plain error.[53]

C. Mosquera-Murillo Factual Background

The facts of *Mosquera-Murillo* are remarkably similar. In the *Mosquera-Murillo* case, a United States Coast Guard cutter spotted a fast moving, suspicious vessel approximately seventy nautical miles off the coast of Panama.[54] When the cutter approached the suspicious vessel, "the *Mistby* fled, and its crew began to dump cargo overboard."[55] The Coast Guard was able to overtake the *Mistby*, board it, and determined that it was a vessel of Colombian nationality.[56] With permission from the

46. *Id.* at 927.
47. *Id.* at 928.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 927, n. 4. (The Eleventh Circuit reviewed the constitutionality of the MDLEA for plain error rather than *de novo* because Alexander "did not raise this specific issue before the district court." Furthermore, the Eleventh Circuit was not persuaded by Alexander's argument that *de novo* review should apply because the district court failed to provide an opportunity, after the sentence was imposed, to object to the Court's "findings of fact and conclusions of law," in violation of United States v. Jones, 899 F.2d 1097, 1103 (11th Cir. 1990)).
54. United States v. Mosquera-Murillo, 902 F.3d 285, 287 (C.A.D.C. 2018).
55. *Id.*
56. *Id.*

Colombian Navy,[57] the Coast Guard arrested the *Mistby*'s crew and searched the vessel, eventually uncovering large quantities of cocaine.[58] Mosquera-Murillo pled guilty to violating the MDLEA and was sentenced to 120 months imprisonment.[59]

On appeal, the *Mosquera-Murillo* defendants challenged their conviction and sentence on two grounds.[60] First, defendants argued that the district court lacked subject matter jurisdiction over the cases.[61] Second, the defendants argued that the offense charged under the MDLEA was eligible for safety-valve relief.[62] However, unlike in *Alexander*, Mosquera-Murillo challenged the application of the safety-valve on statutory grounds – claiming that a conviction under the MDLEA constitutes "'an offense under' § 960 within the meaning of the safety-valve provision."[63] This challenge necessitated statutory interpretation.[64]

To begin, the D.C. Circuit examined the source of the penalties for offenses under the MDLEA, which is 21 U.S.C. § 960.[65] The Court explained that "[o]ffenses are defined by the provisions that supply their elements."[66] For offenses under the MDLEA, the conduct elements of the offenses are defined in 46 U.S.C. § 70503. In Mosquera-Murillo's case, the D.C. Circuit interpreted the elements as "(i) conspiring, (ii) to intentionally or knowingly, (iii) distribute or possess with intent to distribute, (iv) a controlled substance, (v) while on board a vessel."[67] Yet, the offense elements "of drug-type and drug-quantity . . . which bear on the degree of culpability and determine the statutory sentencing range" are enumerated in 21 U.S.C. § 960.[68] Thus, since violations of the MDLEA necessarily draw certain offense elements from 21 U.S.C. § 960 – one of the crimes explicitly enumerated as qualifying for safety-valve relief – "the defendants' crime is 'an offense under' *both* the MDLEA *and* § 960."[69]

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57. *Id.* (citing Agreement to Suppress Illicit Traffic by Sea, Colom.-U.S., art. 2, Feb. 20, 1997, T.I.A.S. No. 12,835.) (The United States and Colombia "have agreed by treaty to 'cooperate in combating illicit traffic by sea.'").
58. *Id.*
59. *Id.* at 288.
60. *Id.* at 289.
61. *Id.*
62. *Id.*
63. *Id.* at 292; *Cf.* United States v. Alexander, 713 F. App'x. 919, 926 (11th Cir. 2017).
64. *Id.*
65. *Id.*
66. *Id.* at 293 (citing Patterson v. New York, 432 U.S. 197, 210 (1977)).
67. *Id.*
68. *Id.*
69. *Id.* (emphasis in original).

In support of its determination that violations of the MDLEA also constitute "offenses under" § 960, the Court turned to *Apprendi v. New Jersey*.[70] Specifically, the Court in *Mosquera-Murillo* noted that "any fact that increases the prescribed statutory maximum penalty to which a defendant is exposed amounts to an offense element that must be submitted to the jury, and proved beyond a reasonable doubt."[71] In cases charged under the MDLEA, the drug-type and drug-quantity elements supplied by § 960 impact the maximum sentence and thus qualify as "offense elements" under the rule set forth by the United States Supreme Court in *Apprendi*.[72]

The Government, in response, asserted that since there are no MDLEA offenses under § 960(a), convictions under the MDLEA do not qualify as "offenses" under § 960 "within the meaning of the safety-valve provision."[73] The Government contended that only offenses enumerated in § 960(a), and "not other offenses defined in part by drug-type and drug-quantity elements set out in § 960(b)," constitute offenses entitled to safety-valve relief.[74] The Court found the government's argument unpersuasive.[75]

In response to the government's contentions, the Court determined that rather than laying out elements of criminal offense, § 960(a) "merely lists certain offenses established elsewhere in the code," in order to "identify a set of offenses for which § 960(b) supplies the drug-type and drug-quantity elements, and, accordingly, the range of potential penalties."[76] Therefore, the D.C. Circuit concluded:

> [i]f both the offenses listed in § 960(a) and the relevant offenses under the MDLEA as (i) established outside of § 960, and (ii) make use of the drug-type and drug-quantity elements and associated penalties set forth in § 960(b), then there is no reason to conclude . . . that the former qualify as "offenses under" § 960 for purpose of safety-valve eligibility whereas the latter do not.[77]

The D.C. Circuit, however, did not stop its analysis with statutory interpretation of § 960(a) and the MDLEA.[78] Rather, the Court looked to

70. *Id.*
71. *Id.* (internal quotation and citation omitted).
72. *Id.*
73. *Id.* at 294.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 295.
78. *Id.*

the legislative history of both the MDLEA and 21 U.S.C. § 955, its counterpart for offenses committed "via the customs waters of the United States."[79] The Court also noted the "century-long pattern of identical penalties for drug offenses committed in domestic waters and on the high seas"[80] and concluded that Congress did not intend to break "its 100-year pattern of penalty parity" by allowing offenders of § 955 to qualify for safety-valve relief, but not offenders of the MDLEA.[81]

D. Petition for Cert.

In light of the recent circuit split created by the D.C. Circuit Court of Appeals' decision in *United States v. Mosquera-Murillo*, a petition for *writ of certiorari* was submitted to the United States Supreme Court in the case of *United States v. Castillo*.[82] This Note argues that the petition for *cert.* should be granted to resolve the circuit split.

Although granting a petition for a *writ of certiorari* to resolve an issue related to sentencing guidelines was rare last term,[83] the Court should nevertheless grant the petition on this matter. Rule 10 of the Supreme Court Rules explains that "[a] petition for a writ of certiorari will be granted only for compelling reasons."[84] While granting a petition is "not a matter of right," but one of discretion, the issues presented by the current circuit split fit squarely within the "character of the reasons the Court considers."[85] Specifically, the circuit split is "on the same important matter."[86] When addressing the application of the safety-valve provision to offenses charged under the MDLEA, the Eleventh Circuit in *Alexander* relied on its earlier precedent to conclude that because the MDLEA is not listed as an "offense under § 960," defendants are not entitled to safety-valve relief.[87] Therefore, the Eleventh Circuit's interpretation of "offense under § 960," is in direct conflict with the D.C. Circuit's interpretation in *Mosquera-Murillo*.[88]

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79. *Id.*
80. *Id.*
81. *Id.*
82. United States v. Castillo, 899 F.3d 1208 (11th Cir. 2018).
83. *The Supreme Court 2016 Term, The Statistics*, 131 HARV. L. REV. 403, 415 (2017) (finding that of the nine federal criminal cases granted *cert*., only one was related to "Sentencing Guidelines.").
84. U.S. Sup. Ct. R. 10.
85. *Id.*
86. *Id.*
87. United States v. Alexander, 713 F. App'x 919, 928 (11th Cir. 2017).
88. United States v. Mosquera-Murillo, 902 F.3d 285, 292 (C.A.D.C. 2018).

In addition to the circuit split being "on the same important matter," the split will not be resolved without Supreme Court review.[89] This split presents a compelling reason for the Court to grant *certiorari* in this instance given the importance of the issue: disparate sentencing for defendants based on the Circuit in which they are tried.[90] Based on these characteristics, this Note urges the Supreme Court to grant the petition for *writ of certiorari.*

III. RESOLUTION OF THE CIRCUIT SPLIT

Current jurisprudence has left a circuit split of three-to-one with the Fifth, Ninth, and Eleventh Circuits holding that defendants charged under the MDLEA are not entitled to safety-valve relief[91] and with the D.C. Circuit holding that defendants are eligible.[92] Although the split is three-to-one in favor of denying safety-valve relief to otherwise eligible defendants charged under the MDLEA, the D.C. Circuit's approach to determining whether or not the MDLEA constitutes an "offense under § 960" is the correct approach. In concluding that otherwise eligible defendants charged under the MDLEA are eligible for safety-valve relief, the D.C. Circuit brought the MDLEA in line with other acts that provide uniform sentencing for "drug crimes committed in domestic waters and drug crimes committed on the high seas," such as 21 U.S.C. § 955.[93]

The text of 18 U.S.C. § 3553(f) explicitly states that the section applies to three sections of the Controlled Substances Act (21 U.S.C.[94] §§ 841, 844, 846) and to two sections of the Controlled Substances Import and Export Act (21 U.S.C. §§ 960 and 963).[95] Furthermore, the text of 21 U.S.C. § 960(a) enumerates six "unlawful acts," none of which include the

89. *See* Petition for Writ of Certiorari, *Castillo*, 2018 WL 4564803 (U.S.) (No. 18-374) at 15; *see also* Deborah Beim and Kelly Rader, *Evolution of Conflict in the Federal Circuit Courts*, YALE UNIVERSITY 2-3 (Mar. 19, 2015), https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/EvolutionofConflict.pdf [https://perma.cc/EF8J-PUNR] ("Unless a circuit repudiates its past decision to come in line with other circuits, only the Supreme Court can bring uniformity to a body of law when circuits split.").

90. Petition for Writ of Certiorari, *Castillo*, 2018 WL 4564803 (U.S.) (No. 18-374) at 14.

91. *See* United States v. Anchundia-Espinoza, 897 F.3d 629 (5th Cir. 2018); Gamboa-Cardenas, 508 F.3d at 494; *Alexander*, 713 F. App'x at 928.

92. *Mosquera-Murillo*, 902 F.3d at 295.

93. *Id.*

94. 18 U.S.C. § 3553(f)(2012).

95. *Id.*

provisions of the MDLEA.[96] But, as the D.C. Circuit pointed out, the penalties for the MDLEA are supplied in § 960(b).[97] Additionally, the relevant portion of the MDLEA refers to different sentencing provisions for "second or subsequent offense[s]."[98] Because "second or subsequent offense[s]" are punished harshly,[99] and expressly provided for in separate parts of the United States Code, it is clear that first time offenses under the MDLEA are "offenses under" 21 U.S.C. § 960 for purposes of sentencing. The defendants in *Alexander* and *Mosquera-Murillo* were first-time offenders who would have been otherwise eligible for safety-valve relief.[100]

The next step, then, is determining whether or not the MDLEA can be considered an "offense under § 960" if § 960 only provides the sentencing for the MDLEA.[101] This is the critical point of divergence between the circuits. In *United States v. Pertuz-Pertuz*, the case that provided the precedent upon which *Alexander* was decided, the Eleventh Circuit produced a five-page opinion that was limited to the plain-language of 18 U.S.C. § 3553(f).[102] Specifically, the Eleventh Circuit relied on *United States v. Steele* to conclude "that when Congress uses clear and unambiguous language, 'that is as far as we go to ascertain its intent.'"[103] Furthermore, the Eleventh Circuit concluded that "[t]he selection of these five statutes reflects an intent to exclude others."[104] This conclusion is where the Eleventh and Ninth Circuits have erred. Although the language of § 960(a) is unambiguous, whether or not an offense can

96. § 960 (listing §§ 825, 952, 957, 955, and 959 as acts which prohibit the specific offenses which the "safety valve" provisions applies to).

97. *Mosquera-Murillo*, 902 F.3d at 295; 46 U.S.C. § 70506(a) (2018) ("A person violating paragraph (1) of section 70503(a) of this title shall be punished as provided in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960).").

98. § 70506(a) ("However, if the offense is a second or subsequent offense as provided in section 1012(b) of that Act (21 U.S.C. 962(b)), the person shall be punished as provided in section 1012 of that Act (21 U.S.C. 962).").

99. *Id.*; 21 U.S.C. § 962(a) (1994) (providing that "Any person convicted of any offense under this subchapter is, if the offense is a second or subsequent offense, punishable by a term of imprisonment twice that otherwise authorized . . . .").

100. *Alexander*, 713 F.App'x. at 922, 928; *Mosquera-Murillo*, 902 F.3d at 289, 292.

101. *See generally*, *Mosquera-Murillo*, 902 F.3d at 294.

102. United States v. Pertuz-Pertuz, 679 F.3d 1327, 1328 (11th Cir. 2012).

103. *Id.* (quoting United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc)).

104. *Id.* (quoting United States v. Anderson, 200 F.3d 1344, 1348 (11th Cir. 2000) (internal quotation omitted).

qualify as "an offense under" § 960 when the penalty for that offense is enumerated in § 960(b) is ambiguous.

The D.C. Circuit's approach to resolving the issue of whether or not the MDLEA constitutes an "offense under § 960" addresses head on the ambiguity present in the case of first-time MDLEA offenses.[105] By recognizing the ambiguity created by the interaction of the MDLEA and 18 U.S.C. § 3553(f) as well as 21 U.S.C. § 960, the D.C. Circuit was able to take the critical first step to resolving the issue correctly. Once the ambiguity of the relationship between the aforementioned statutes is recognized, courts can look to the legislative intent and statutory interpretation as opposed to stopping their analysis at the plain-language of the statute.

Regarding the legislative intent, the D.C. Circuit noted that "[w]hen Congress criminalized opium possession on the high seas in 1914, it set the maximum penalty at two years, which at the time was the maximum penalty for importing opium into the United States."[106] Moreover, when Congress amended the sentences for the two offenses in 1922 and 1951, it maintained the sentencing parity.[107] Although Congress ultimately repealed these statutes when the drug code was "overhauled" in 1970,[108] this is compelling evidence of Congressional intent to punish drug offenses committed on the high seas and in domestic waters as equivalent for sentencing purposes. Notably, an analysis of the historical and legislative history of the sentencing statutes is noticeably absent from the Eleventh Circuit's opinions in *Alexander* and *Pertuz-Pertuz*.[109] In light of the complicated interaction of the MDLEA and the related sentencing statutes, the Eleventh Circuit erred by not addressing this history in its analyses. Accordingly, the Supreme Court should consider the legislative history and Congressional intent when determining whether first-time offenses qualify for safety-valve relief. This will likely lead to the same conclusion that the D.C. Circuit reached: first-time offenders of the MDLEA are eligible for safety-valve relief.

In addition to addressing the legislative intent and history behind the drug enforcement statutes, the D.C. Circuit acknowledged the complex interaction between the MDLEA and the statutes that provide its penalties. Of importance to the analysis of whether the MDLEA constitutes "an

105. *Mosquera-Murillo*, 902 F.3d at 294-95.
106. *Id.* at 295.
107. *Id.*
108. *Id.*
109. United States v. Alexander, 713 F. App'x. 919 (11th Cir. 2017), *see generally Pertuz-Pertuz*, 679 F.3d.

offense under § 960" is whether § 960 supplies some of the elements that comprise the MDLEA. This was correctly addressed by the D.C. Circuit but not by the Eleventh.[110] "Offenses are defined by the provisions that supply their elements."[111] In the case of the MDLEA, the elements of penalties are drawn directly from 21 U.S.C. § 960.[112] Based on the principle identified in *Patterson*, the MDLEA qualifies as "an offense under § 960" because it supplies the penalty elements for the MDLEA.[113] Although the Eleventh Circuit observed that "section 3553(f), refers to an 'offense under' section 960 – not to an 'offense penalized under' section 960 and not to a 'sentence under 960,'"[114] this observation is not persuasive for the purposes of defining "an offense under § 960." Because the MDLEA is not complete without the sentencing elements, which are provided by § 960(b), a defendant cannot violate the MDLEA without violating § 960.[115] A violation of MDLEA constitutes a violation of § 960(b) and thus the MDLEA constitutes "an offense under § 960."

Looking at the plain language of 18 U.S.C. § 3553(f), it does not state "an offense under § 960(a)." Instead, it merely states "960."[116] Therefore, if the MDLEA can constitute an offense under § 960 because § 960(b) supplies the penalties for the MDLEA, violations of the MDLEA constitute violations of § 960. This observation was the crucial difference between the interpretations of the D.C. and Eleventh Circuits.[117]

More importantly, however, § 960(b) "supplies the offense elements of drug-type and drug-quantity . . . which bear on the degree of culpability and determine the statutory sentencing range."[118] Thus, the Eleventh Circuit's insinuation that the MDLEA is merely "an offense penalized under § 960"[119] is inaccurate. The drug-type and drug-quantity do not just bear on the "statutory sentencing range," these are elements that make a defendant's conduct illegal. The defendants in *Mosquera-Murillo* and *Alexander* violated § 960(b) as well as the MDLEA; therefore, the violations constituted offenses under § 960.

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110. *Mosquera-Murillo*, 902 F.3d at 293; *Alexander*, 713 F. App'x.

111. *Mosquera-Murillo*, 902 F.3d at 293 (citing Patterson v. New York, 432 U.S. 197, 210 (1977)).

112. *Id.; see also* § 70503(a)(1).

113. *Mosquera-Murillo*, 902 F.3d at 293.

114. *Pertuz-Pertuz*, 679 F.3d at 1329.

115. *See Mosquera-Murillo*, 902 F.3d at 293.

116. 18 U.S.C. § 3553(f)(2012).

117. *Mosquera-Murillo*, 902 F.3d at 293; *see also Alexander*, 713 F.App'x. 919 (11th Cir. 2017).

118. *Mosquera-Murillo*, 902 F.3d at 293.

119. *Pertuz-Pertuz*, 679 F.3d at 1329.

IV. THE FIRST STEP ACT

Recent legislation passed the House of Representatives may have implications on the "safety valve" provision.[120] The legislation, known as the FIRST STEP Act,[121] includes a number of changes that impact the length of sentences.[122] The Act, as amended by the Senate, includes reforms that would allow judges to "have greater freedom to use so-called safety valves to sidestep mandatory minimums in some cases."[123] Although the Act has substantial backing in both the Senate and the White House,[124] the impact of the changes cannot be assessed until the legislation has become finalized and signed into law. However, at the very least, the Congressional support for broadening the reach of "safety-valves" to sidestep mandatory minimums in the cases of nonviolent drug offenders may be viewed as support for the interpretation of the legislative intent taken by the D.C. Circuit in *Mosquera-Murillo*. Viewed in this light, the D.C. Circuit's decision in *Mosquera-Murillo* arguably brings current jurisprudence on the "safety-valve" provision of 18 U.S.C. § 3553(f) squarely in line with what Congress intended.

V. CONCLUSION

The current circuit split results in disparate sentencing for defendants based on geography. Denying "safety-valve" relief to defendants sentenced under the MDLEA creates a sentencing scheme that departs from Congress' century-long practice of sentencing parity for defendants apprehended on the high seas and those who conducted their illicit activities in domestic waters. Although there is a need for harsh penalties for international drug traffickers, the language of the MDLEA does not support denying safety-valve relief for those who violate it. The policy concerns for imposing harsher sentences on international as opposed to domestic drug traffickers is a debate that is beyond the scope of this case note; however, regardless of the policy rationale, denying safety-valve relief to otherwise eligible defendants is not supported by either the text of the statute or the legislative intent.

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120. Nicholas Fandos & Maggie Haberman, *Trump Embraces a Path to Revise U.S. Sentencing and Prison Laws*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/us/politics/prison-sentencing-trump.html?module=inline [https://perma.cc/8LKV-YQT6].

121. FIRST STEP Act, HR. 5682, 115th Cong. (2018).

122. Fandos & Haberman, *supra* note 120.

123. *Id.*

124. *Id.*

Based on these factors, the Supreme Court should grant the petition for *certiorari* and resolve the circuit split to ensure uniformity in federal sentencing. Furthermore, the Supreme Court should look to the D.C. Circuit Court of Appeals' interpretation and hold that otherwise eligible defendants are entitled to safety-valve relief as the statute is currently written. The Supreme Court should recognize that 21 U.S.C. § 960 not only supplies the penalties for first-time offenders of MDLEA but also the drug-type and quantity which impact the statutory sentencing scheme. These facts support the D.C. Circuit's position that the MDLEA is "an offense under § 960" and renders applicable defendants eligible for safety-valve relief pursuant to 18 U.S.C. § 3553(f).

In conclusion, the Supreme Court should overturn the precedent set by the Fifth, Ninth, and Eleventh Circuits and hold that defendants charged under the MDLEA are entitled to safety-valve relief as a matter of law.