No. 19-109

IN THE
Supreme Court of the United States

GIOVANNI MONTIJO-DOMINGUEZ,
Petitioner,
v.
UNITED STATES OF AMERICA.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF OF FAMM AND THE SENTENCING PROJECT AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

FAMM (Families Against Mandatory Minimums) is a national, nonprofit, nonpartisan organization of more than 75,000 members. Founded in 1991, FAMM strives to promote fair, rational, and proportionate sentencing policies, and it challenges inflexible and excessive penalties required by mandatory sentencing laws. FAMM pursues a broad mission of creating a more fair and effective justice system that respects American values of individual accountability and dignity while keeping communities safe. By mobilizing prisoners and their families who have been adversely affected by unjust sentencing polices, FAMM gives a voice to incarcerated individuals, their families, and their communities. From its founding, FAMM has worked to increase judicial discretion and was instrumental in the effort to pass and enact the federal safety valve, 18 U.S.C. § 3553(f), with the passage of the Violent Crime Control and Law Enforcement Act in 1994. *See* Pub. L. No. 103-322, 108 Stat, 1796. FAMM's advocacy efforts in Congress to enhance safety-valve relief were rewarded most recently with the passage of the First Step Act of 2018, Pub. L. No.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* also represent that the parties have consented to the filing of this brief, and the parties were notified 10 days prior to the filing of the brief of *amici*'s intention to file.

115-391, 132 Stat. 5194, which included an expansion of the safety valve.

The Sentencing Project is a national nonprofit organization established in 1986 to engage in public policy research and education on criminal justice reform. The Sentencing Project is dedicated to promoting rational and effective public policy on issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies, especially mandatory sentencing laws. The Sentencing Project has published widely cited scholarship on the effects of federal mandatory-minimum penalties.

Amici advance their respective missions by filing amicus briefs in important cases. Amici submit this brief because this case in particular illustrates the heavy toll extracted by mandatory sentencing laws and the arbitrary results of different courts' interpretation of relevant exceptions to mandatory-minimum penalties. Contrary to the statutory text and legislative history, the court of appeals has constrained the district court's ability to find facts at sentencing that would allow individuals to obtain relief from the damaging and failed system of mandatory minimum laws.

SUMMARY OF ARGUMENT

This case is about whether defendants who have testified in their own defense, but are ultimately convicted, must be deprived of the opportunity for a reduced sentence under the federal safety-valve provision, 18 U.S.C. § 3553(f), if they maintain at

sentencing that their trial testimony was truthful. Constrained by Tenth Circuit precedent, the district court sentenced petitioner Giovanni Montijo-Dominguez to a mandatory minimum of 10 years imprisonment under 21 U.S.C. § 841(b)(1)(A)(ii). The district judge believed petitioner's testimony at trial that he provided ransom money to his friend—whose daughter was threatened with kidnapping by a drug cartel—without knowledge that the money would be used in a drug transaction. The jury, nonetheless, convicted petitioner of knowing participation in a drug conspiracy. Even though the district judge found petitioner's trial testimony credible, the judge felt bound by the Tenth Circuit's interpretation of the safety-valve provision, which categorically denies any possibility of safety-valve relief to convicted defendants who stood by their trial testimony that they lacked a culpable *mens rea*.

Under the Tenth Circuit's rule, a district judge's belief in a defendant's candor and her factual findings at sentencing are subservient to the implicit factual findings in the jury's verdict, with all the room for ambiguity that framework entails. The Tenth Circuit's statutory interpretation is wrong, and the statute's text, constitutional principles, and policy research demonstrate why. Congress did not intend that criminal defendants be punished for testifying in their own defense. The practical impact of the Tenth Circuit's rule will be a chilling effect on a defendant's constitutionally protected right to testify in his own defense. Because the circuits are split on this issue, significant sentencing disparities arise based on the geographical location of the conviction, furthering the injustice.

Amici urge this Court to resolve this circuit split and undo the harm caused by the Tenth Circuit's misinterpretation of the safety-valve provision. The petition for a writ of certiorari should be granted.

ARGUMENT

THE SAFETY-VALVE PROVISION SHOULD SERVE TO REDUCE EXCESSIVE AND UNJUST SENTENCES, NOT BE A VEHICLE FOR IMPOSING THEM.

A. Congress Intended the Safety-Valve Provision to Make Sentencing More Just, Not as a Vehicle for Enhancing the Punishment for Individuals Who Testify in Their Own Defense.

Congress's intent is evident in the statutory text: the applicability of safety-valve relief is a question for the sentencing court to decide. 18 U.S.C. § 3553(f). The safety valve's language focuses exclusively on the judge's role at sentencing, stating that "the court shall impose a sentence . . . without regard to any statutory minimum sentence, if the *court* finds at sentencing" that the defendant satisfies five elements. *Ibid.* (emphasis added). The safety valve establishes the factors a defendant must satisfy, provides the government an "opportunity to make a recommendation," and, critically, grants the judge the ultimate decision-making power on whether the defendant is entitled to relief at sentencing. *Ibid.*

Congress's focus on the judge's fact-finding role at sentencing, rather than on the jury verdict, is consistent with judges' historical role in fashioning a just sentence. "[B]oth before and since the American

colonies became a nation," sentencing judges have exercised "wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *See Williams v. New York*, 337 U.S. 241, 246 (1949). The purpose of that discretion was, and is, to "craft individualized sentences, taking into account the facts of the crime and the history of the defendant." *Beckles v. United States*, 137 S. Ct. 886, 893 (2017).

Indeed, "[f]or most crimes, Congress set forth a range of sentences, and sentencing courts had 'almost unfettered discretion' to select the actual length of a defendant's sentence 'within the customarily wide range' Congress had enacted." *Beckles*, 137 S. Ct. at 893 (quoting *Mistretta v. United States*, 488 U.S. 361, 364 (1989)); *see also Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (judicial "discretion was bound [only] by the range of sentencing options prescribed by the legislature"). When the safety valve's criteria are met, the sentencing judge is afforded significant discretion to determine an appropriate sentence.

Congress enacted the safety valve to restore judicial discretion because it believed that mandatory minimums had unduly constrained the judge's role to consider more lenient sentences in the case of first-time, minor participants in a drug offense. *See* Pet. 18-20. As one House Report stated: "Ironically, due to the current operation of mandatory minimums, mitigating factors that are recognized in the guidelines and generally are considered in drug cases do not apply to the least culpable offenders except in rare instances." H.R. Rep. No. 460, 103d Cong., 2d Sess. (1994). The Ninth Circuit similarly explained in

United States v. Sherpa, "Section 3553(f) requires a determination by the judge, *not the jury*," in light of "the long-standing tradition that sentencing is the province of the judge, not the jury," considering that the judge frequently is privy to evidence and information not presented to a jury and because "there is no need for a defendant to relate . . . back [his own knowledge] at sentencing," when knowledge is "judicially established by a guilty verdict." 110 F.3d 656, 660-62 (9th Cir. 1996).

But, contrary to Congress's intent, the Tenth Circuit's faulty interpretation of Section 3553(f) legally forecloses even the least culpable defendants from benefitting from the safety valve if they maintain their innocence post-conviction.

B. The Tenth Circuit's Approach Turns the Safety Valve into an Unconstitutional Punishment.

The Tenth Circuit's rule has the troubling effects of unconstitutionally burdening defendants' right to testify at trial.

Defendants have a "fundamental constitutional" right to testify in their own defense. *Rock v. Arkansas*, 483 U.S. 44, 51-53 & n.10 (1987). The accused's right to testify at trial is guaranteed by the Fifth and Sixth Amendments, and it applies to state-level prosecutions under the Fourteenth Amendment. *Id.* "[T]he most important witness for the defense in many criminal cases is the defendant himself." *Id.* at 52. This Court in *Rock* found that the "necessary ingredients" of due process include the "right to be heard and to offer testimony." *Id.* at 51. Indeed, long before *Rock*, this Court held that the "opportunity to

be heard" is as basic as a defendant's fundamental "right to his day in court." *In re Oliver*, 333 U.S. 257, 273 (1948).

This Court has evaluated state-level evidentiary rules that infringe on a defendant's right to testify, and it has found very little space for such rules to coexist with the U.S. Constitution. *See Rock*, 483 U.S. at 52-53. Any restriction on the right to testify "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 55-56. For example, the *Rock* Court found that a state rule prohibiting testimony about post-hypnosis recollections at trial unduly infringed on the right to testify in one's own defense. *Id.* at 62; *see also Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (collecting cases). An enhanced risk of punishment serves as such a restriction.

The Tenth Circuit's decision in *United States v. De La Torre*, 599 F.3d 1198 (10th Cir. 2010)—which furnished the basis for the outcome in this case—clearly chills a defendant's right to testify at trial and, thus, unconstitutionally infringes upon that constitutional right. In *De La Torre*, the Tenth Circuit held that "[n]o reasonable defendant could claim safety-valve eligibility based on trial testimony that necessarily contradicts the conviction itself." *Id.* at 1206. In other words, in *De La Torre*, the court of appeals held that even if a trial judge determines that a convicted defendant testified fully and truthfully in his own defense, that defendant is not entitled to safety-valve relief.

Such a rule creates a serious dilemma for any defendant who desires to exercise his right to testify at trial. Specifically, before trial, a defendant would need to weigh the consequences of a jury's rejection of his testimony regarding his *mens rea*. If the jury discredits that testimony, the defendant will need to choose between forfeiting his safety-valve eligibility and renouncing his trial testimony. A defendant who maintains he lacked knowledge of the offense will thereby face a much harsher sentence if he testifies and is convicted than if he did not testify at all. Under the Tenth Circuit's rule, the penalty for testifying in such a case may be the difference between a sentence with a mandatory minimum and one without, which usually equates to many additional years in prison. Just as in *Rock*, penalizing a defendant's right to testify is constitutional only if justified by a sufficient countervailing legitimate, proportionate purpose for the rule. None exists here. The Tenth Circuit's misreading of the safety valve unconstitutionally chills petitioner's right to testify and violates this Court's decision in *Rock*. 483 U.S. at 51-53.

After a conviction, a defendant is put to a Hobson's choice: she can either (i) make post-trial statements that conform with the jury's verdict but are contrary to her prior sworn testimony in the hopes of receiving a reduction under the safety valve, which may hinder or foreclose an appeal from the conviction, or (ii) continue to assert that her trial testimony was truthful and lose any hope of safety-valve relief. No evidence suggests that Congress intended such a result when it enacted Section 3553(f).

The punishment involved is severe. The average sentence is more than twice as long when a mandatory minimum is imposed than the average sentence when a defendant receives relief from the minimum sentence.[2] Of those drug defendants subject to a mandatory minimum at sentencing, the average sentence was 126 months.[3] Defendants who obtained relief because of the safety-valve provision or because they provided the government with substantial assistance received an average sentence of 57 months imprisonment.[4] Here, the district court stated it would have imposed a sentence that was "considerably less" than the 10-year mandatory minimum imposed. Pet. App. 18a.

These issues, moreover, impact a significant number of cases. Convictions for drug offenses expose defendants to particularly harsh mandatory minimums: 58.4% of drug-related convictions carried a mandatory-minimum sentence if the court granted no relief.[5] District courts presently grant safety-valve relief in about one-third of cases where a mandatory minimum sentence would otherwise apply.[6]

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[2] U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Federal Drug Offenses* 6 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf.

[3] *Ibid.*

[4] *Ibid.*

[5] U.S. Sentencing Comm'n, *Quick Facts: Drug Trafficking* (FY 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Drug_Trafficking_FY18.pdf

[6] *Ibid.*

C. The Safety Valve Is an Important Tool in Reducing Excessive and Unproductive Incarceration in the Federal Prison System.

In addition to providing relief to individuals convicted of lower-level drug offenses that do not warrant lengthy incarceration, the safety valve serves as an important check on the scale of the burgeoning federal prison population. From 1980 to 2013, the federal prison population increased by approximately 800%.[7] A significant portion of this increase was due to the rise in the number of individuals incarcerated for drug offenses.[8] The prison population has declined in recent years, primarily due to retroactive sentencing guideline changes instituted by the U.S. Sentencing Commission.[9] But severe overcrowding and understaffing continue to plague day-to-day prison operations.[10] Today, more than 45% of inmates in

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[7] *See* Julie Samuels et al., Urban Inst., *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* (2013) ("The federal prison population has escalated from under 25,000 inmates in 1980 to over 219,000" in 2013), https://www.urban.org/sites/default/files/publication/24086/412932-Stemming-the-Tide-Strategies-to-Reduce-the-Growth-and-Cut-the-Cost-of-the-Federal-Prison-System.PDF.

[8] Charles Colson Task Force on Fed. Corrs., Urban Inst., *Drivers of Growth in the Federal Prison Population* (2015), https://www.urban.org/sites/default/files/publication/43681/2000141-Drivers-of-Growth-in-the-Federal-Prison-Population.pdf.

[9] Nazgol Ghandnoosh, Sentencing Project, *Federal Prisons at a Crossroads* (2017), https://www.sentencingproject.org/publications/federal-prisons-crossroads/.

[10] *Ibid.*; *see, e.g.*, Michelle Mark, *Just 18 Workers Were Guarding 750 Jail Inmates on the Night Jeffrey Epstein Died by Suicide*, Bus. Insider (2019), https://www.businessinsider.com/jeffrey-epstein-jail-guards-chronic-staff-issues-2019-8.

federal prison are incarcerated for a drug-offense conviction.[11]

The safety-valve plays a key role in mitigating the prison population crisis without impacting public safety.[12] Excessive prison terms are counterproductive for public safety goals due to the criminological findings that individuals "age out" of the high crime years.[13] Young males in the age group of 15 to 19 years display an increased risk of involvement in criminal activity, but this risk declines markedly by their early 20s and continues to do so as individuals mature and take on adult roles.[14] Thus, long-term sentences produce diminishing returns for public safety with each additional year of incarceration, while still incurring the substantial financial costs of imprisonment.[15]

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[11] Fed. Bureau of Prisons, *Offense: Statistics Based on Prior Month's Data as of Aug. 17, 2019*, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

[12] Aside from the vast number of incarcerated individuals, the dramatic racial and ethnic disparities in the federal prison system must be noted. Two-thirds of defendants in drug-offense cases are people of color (48% Hispanic, 25% black, and 2.9% other races). *See Quick Facts: Drug Trafficking*, *supra* note 5.

[13] Rolf Loeber & David P. Farrington, *Age-Crime Curve*, *in* Encyclopedia of Criminology and Criminal Justice 12-18 (Gerben Bruinsma & David Weisburd eds., 2014), https://link.springer.com/referenceworkentry/10.1007%2F978-1-4614-5690-2_474.

[14] *Ibid.*

[15] Pew Charitable Trs., *More Imprisonment Does Not Reduce State Drug Problems: Data Show No Relationship Between Prison Terms and Drug Misuse* (2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems.

Reduced terms of incarceration have also been shown to have no ill effects on rates of recidivism.[16] The U.S. Sentencing Commission's research found that individuals who had received reduced prison terms for drug offenses following a 2007 guidelines reform displayed recidivism rates that were no greater than comparable persons serving longer prison terms.[17]

Moreover, research shows that sentence length has a limited deterrent effect on criminal activity for various reasons, including that most people do not expect to be apprehended for a crime, most people are not familiar with relevant legal penalties, and many who commit crimes do so with their judgment compromised by substance abuse or mental health problems.[18] A 2014 National Research Council report explains that the best available data suggest "the

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[16] U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[17] *Ibid.*; *cf.* Pew Charitable Trs., *Prison Time Served and Recidivism* (2013), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2013/10/08/prison-time-served-and-recidivism ("An analysis of data from three states—Florida, Maryland, and Michigan—found little or no evidence that longer prison terms for many nonviolent offenders produced either incapacitation or deterrence effects.").

[18] Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 Oxford J. of Legal Stud. 173, 181 (2004); Jennifer Bronson et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Drug Use, Dependence and Abuse Among State Prisoners and Jail Inmates, 2007-2009* (2017), https://www.bjs.gov/content/pub/pdf/dudaspji0709.pdf.

successive iterations of the war on drugs . . . are unlikely to have markedly or clearly reduced drug crime over the past three decades."[19] Thus, for all practical purposes, mandatory minimums and the denial of safety-valve relief do very little, if anything, to enhance the marginal deterrence of committing crimes.

[19] Jeremy Travis et al., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 153-54 (2014), http://johnjay.jjay.cuny.edu/nrc/nas_report_on_incarceration.pdf.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the Tenth Circuit's decision.

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