No. 19-109

In the Supreme Court of the United States

GIOVANNI MONTIJO-DOMINGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Brief of Amicus Curiae
Vermont Association of Criminal Defense Attorneys,
Connecticut Criminal Defense Attorneys Association,
New Mexico Criminal Defense Lawyers Association,
Oklahoma Defense Lawyers Association
In Support of the Petition for a Writ of Certiorari

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INTEREST OF AMICUS CURIAE VERMONT ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CONNECTICUT CRIMINAL DEFENSE ATTORNEYS ASSOCIATION, NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION AND OKLAHOMA DEFENSE LAWYERS ASSOCIATION

The Vermont Association of Criminal Defense Lawyers was established in 1991. It is the state affiliate of the National Association of Criminal Defense Lawyers. Most criminal defense practitioners within the State of Vermont and Federal District of Vermont are members of the Vermont Association of Criminal Defense Lawyers. The organization's primary roles are to promote the providing of high quality, constitutionally sound professional representation to individuals accused of criminal activity in the State and District of Vermont; to provide quality training and continuing legal education seminars, programs and materials; to send deserving member attorneys to intensive training programs outside of the State of Vermont; and to monitor and comment on pending legislature and legislative changes. A large portion of the membership of the organization, including officers, directors and many past presidents, have a significant area of their practice in the Federal Court system. The issue upon which this Amicus Curiae Brief is submitted is a matter of serious, ongoing concern to the officers and directors of the Vermont Association of Criminal Defense Lawyers, and particularly to those members who practice federal criminal defense.

The Connecticut Criminal Defense Attorneys Association ("CCDLA") is a not-for-profit organization of over three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, the CCDLA is the

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.

only statewide criminal defense lawyers' organization in Connecticut. An affiliate of the National Association of Criminal Defense Lawyers, the CCDLA works to improve the criminal justice system by ensuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally and that those rights are not diminished. CCDLA's members include members of the Criminal Justice Act Panel, Federal Defenders and members of the private federal defense bar, all of who represent federal criminal defendants for whom the availability of the safety valve is an important issue.[1]

The New Mexico Criminal Defense Lawyers Association is a voluntary membership organization whose members spend their time actively engaged in practice on behalf of the accused in the state and federal courts. The NMCDLA's mission is to advocate for fair and effective criminal justice in the courts, legislature and community. NMCDLA members have advocated at trial, on direct appeal, in post-conviction proceedings, and in civil rights actions on behalf of the actually innocent.

The NMCDLA has no parent corporation and issues no publicly traded securities.

The Oklahoma Defense Lawyers Association (OCDLA) is a private, nonprofit

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[1]Pursuant to United States Supreme Court Rule 37(2), it is certified that counsel of record received timely notice of intent to file this Amicus Curiae Brief. By written notice dated August 15, 2019, Michael B. Kimberly, Esq., counsel for the Petitioner consented to the filing of this Brief. By written notice dated August 21, 2019, counsel of record for the Respondent, the Office of the Solicitor General of the United States consented to the filing of this Brief.

public association that represents more than 500 criminal defense attorneys in the state of Oklahoma and surrounding states who are dedicated to preserving the rule of law and individual rights guaranteed by the Oklahoma and Federal Constitution, to resisting any efforts to curtail these rights, to furthering legal educational programs, and to promoting justice and the common good. As such, the OCDLA enthusiastically endorses this Amicus petition and brief dedicated to the preservation of individual due process rights related to judicial use of the "safety valve" provision/protection in regards to federal sentencing minimum guidelines for defendants who do not accept a plea bargain, but prefer to exercise their Sixth Amendment constitutional right to a fair trial.

SUMMARY OF ARGUMENT

There are numerous reasons for an accused defendant to assert his or her constitutional right to a trial by jury that do not involve a defendant taking the stand and entirely denying culpability. An accused defendant has the constitutional right to require the Government to meet its burden to prove the elements of each and every charged offense by proof beyond a reasonable doubt. It is a fundamental precept of fairness in a constitutional criminal system that no person should be punished unless their guilt is proven by the Government to a jury beyond a reasonable doubt. Defendants frequently may choose to test the strength of the Government's case without testifying untruthfully at trial.

Nothing in the federal safety valve statute or the applicable implementing advisory sentencing guideline prohibits a sentencing court from applying the safety

valve provision and departing or deviating from an otherwise applicable mandatory minimum sentence for a controlled substance conviction following a trial. The Seventh and Ninth Circuits have correctly held that the language of the statute and the implementing guideline allows application of the safety valve provision regardless of how a defendant is convicted, so long as a defendant has met all necessary statutory and implementing guideline criteria.

The issue and argument presented by the Petitioner in the instant case relative to his petition for a writ of certiorari, and the analysis and discussion set forth in Petitioner's petition, together with the analysis set forth herein, strongly supports the granting of the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

ARGUMENT

There are many reasons for an accused defendant to assert his or her constitutional right to a trial. A number of them do not involve a defendant actually taking the stand during trial and entirely denying culpability and guilt of the charged offense. Frequently, on the advice of competent counsel, but making the decision themself, a defendant may choose to exercise his or her constitutional right not to take the stand and testify at trial.

First, the Sixth Amendment provides the clearest reason why a defendant may choose to go to trial. The Government must convince a jury, beyond a reasonable doubt, of the defendant's guilt. Very often a jury trial is a question of whether the Government has the evidence it says it has, and whether a jury will

believe the Government's case. For a lower-level defendant with a minimal or nonexistant record, this protection is vitally important. The safety valve provision should not be construed to undermine these bedrock principles. A lower level defendant, with a qualifying minimal prior criminal history, cannot and should not be punished, and denied any potential for post-trial safety valve relief from either the advisory United States Sentencing Guidelines range or any otherwise applicable mandatory minimum sentence, because they have exercised their constitutional right to require the Government to meet its constitutional obligation relative to proof, before an accused person's life, liberty, or property, or a portion thereof, can be taken from them in the name of the Government. Such a denial more than arguably stands the constitutional right to a trial by jury on its ear. It also has no support in the safety valve statute, 18 U.S.C. §3553(f), implementing Guideline, U.S.S.G. §5C1.2, and commentary thereto.

Second, a defendant may choose to go to trial for other reasons, or in addition to this reason. Those include cases in which the Government arguably has overcharged the case, or charged numerous offenses in a multiple indictment, some of which the Government may not be able to prove. A defendant and counsel may quite reasonably determine that the Government has overcharged the offense, particularly regarding offenses involving possession of a controlled substance with the intent to distribute, sale or delivery of a controlled substance, or conspiracy to possess a controlled substance with intent to deliver and/or conspiracy to sell or deliver a controlled substance. This is particularly the case where, in the post

Apprendi v. New Jersey, 530 U.S. 466 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000) regimen, the Government has charged an offense or offenses involving a threshold level of controlled substances which may trigger applicability of a mandatory minimum sentence, which must be determined by a jury. See, e.g., 21 U.S.C. §§841(b)(1)(A) and (b)(1)(B).

Third, a defendant may choose to go to trial to force the Government to prove that it has credible and reliable witnesses. Frequently, a defendant, with the assistance of competent counsel, may determine that some, or even all of the Government's witnesses have substantial and significant credibility issues which must be resolved by a jury. These issues may be based upon prior criminal convictions that are available to impeach any such witness, or they may be based on witness' incentive and motive to testify, such as payment to an informant or promises of leniency made by the prosecution in exchange for cooperation. Numerous scholarly articles have been published regarding the potential inherent unreliability of paid informant testimony, or testimony of individuals who have quite literally a massive amount to gain by testifying in a manner supportive of the Government prosecution. See, e.g. J.A. Wroth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 American Criminal Law Review 737 (2016); Sandra Guerra Thompson, *Judicial Gatekeeping of Police - Generated Witness Testimony*, J. Crim L. Criminology 329 (2013). Frequently the Government and its attorneys ultimately have a significant, and sometimes sole, unreviewable say regarding the amount of and type of leniency that a cooperating witness may receive in return for

their testimony.

Fourth, an accused defendant may choose to go to trial for a variety of other factually based, good faith reasons. Those may include: a position that the Government, which frequently charges individuals with conspiracy to commit various target controlled substance offenses, has, in fact, charged an individual who may be culpable in some regard, with being a participant in an overly broad and overcharged conspiracy; or charges a defendant with playing an aggravated role in a conspiracy that is not, in fact, accurate; or that overstates the actual acts and omissions of a charged individual relative to a charged controlled substance offense or offenses conspiracy.

Fifth, a defendant may choose to exercise his or her trial rights where they have a good faith basis, in fact and law, to assert an affirmative defense. These may include an asserted insanity, and in certain circumstances, diminished capacity, defense. In certain circumstances an accused may also choose to go to trial to attempt to establish an entrapment defense; lack of sufficient knowledge of criminal/conspiratorial conduct; or in an appropriate case, a mistake of law or mistake of fact defense.

While the Government may prevail at trial, an eligible defendant should be permitted to apply for safety valve relief before sentencing by truthfully providing the Government all information he or she knows. A trial is not always a test of whether a case is to be believed. It is a test of whether the Government's case is sufficient to convict. A defendant should not be automatically banned from safety

valve relief merely because he or she exercised the one right the constitution guarantees, a trial.

While it is certainly possible, on a case by case basis, that a judge reviewing a safety valve application asserted by a post-trial defendant may determine that the defendant has not met all five safety valve criteria, based on the particular facts and circumstances of each case, it is by no means an automatic or inevitable conclusion that such a ruling must be issued, simply because an accused defendant has chosen to assert his or her constitutionally guaranteed right to a trial, and right to require the Government to meet its constitutionally mandated burdens of production and persuasion at said trial, subject to governing rules of evidence and the proof beyond a reasonable doubt standard applicable to criminal trials by jury.

Nothing in the safety valve statute, 18 U.S.C. § 3553(f), or the applicable implementing advisory federal sentencing guideline, U.S.S.G. § 5C1.2, prohibits a sentencing court from applying the safety valve provision and departing or deviating from an otherwise applicable mandatory minimum sentence for a conviction following trial. The language of the safety valve statute and guideline applies regardless of how a defendant is convicted. The plain language of the statute provides that: "the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission . . .without regard to any statutory minimum sentence, *if the court finds at sentencing*, after the Government has been afforded the opportunity to make a recommendation," that the defendant meets the five necessary criteria. 18 U.S.C. § 3553(f) (emphasis added).

That the determination is to be made prior to sentencing and by the court, not a jury, are most pertinent here. By the very nature of the federal criminal process framework, a defendant who is convicted at trial may well be able to demonstrate his or her qualification for safety valve prior to sentencing. Specifically, and as is often the challenged factor, a defendant convicted at trial may nonetheless well be able to demonstrate that 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. . . ." prior to and at sentencing. 18 U.S.C. § 3553(f)(5). The beginning of subsection (f)(5) specifically states "not later than the time of sentencing...." That places the time of compliance at least after conviction, and plainly contemplates a conviction after trial. As may often be the case, the defendant may have made such disclosure prior to trial. A defendant that goes to trial may have even participated in a safety valve proffer, and then elected, for any number of reasons, to go to trial nonetheless.

The statute is rather wide in scope and intended to be broadly applied for qualifying defendants. For example, even where the information that the defendant can provide is not useful, or is already known to the Government, it does "not preclude a determination by the court that the defendant has complied with this requirement." 18 U.S.C. § 3553(f)(5). As the determination is left to the court, the jury's verdict need not control. Neither the language of the applicable statute, the implementing federal sentencing guideline, nor its commentary, present any bar to

a defendant raising, and being granted, safety valve relief following a jury verdict. For these reasons, the Seventh and Ninth Circuits properly apply the safety valve provision to carry out its plainly intended purpose, while the Second and Tenth Circuits do not. *United States v. Reynoso*, 239 F.3d 143 (2d. Cir. 2000); *United States. v. De La Torre*, 599 F.3d 1198 (10th Cir. 2010).

The Seventh Circuit explicitly permits a defendant, convicted after trial, to qualify for safety valve relief. *See United States v. Thompson*, 76 F.3d 166 (7th Cir. 1996). In *Thompson*, the court upheld the district court's downward departure or deviation based on U.S.S.G. §5C1.2 on the basis that the defendant disclosed all information she knew, and based on how she understood it. *Id.* at 170-71 (analyzing the case under both the Government's challenge to the district court's application of the safety valve provision and acceptance of responsibility pursuant to U.S.S.G. §3E1.1(a)). Interestingly, the Second Circuit similarly concluded that to meet the requirements of subsection five, a defendant need not have been truthful and complete from the beginning, so long as such truthful and complete information is made known prior to sentencing. *See United States v. Schreiber*, 191 F.3d 103, 108–09 (2d Cir. 1999) (lies and omissions do not disqualify defendant from safety valve relief so long as defendant makes complete and truthful proffer not later than commencement of sentencing hearing.) It seems contradictory, then, to suggest that a defendant who elects to exercise his or her right to a trial becomes automatically ineligible for safety valve relief at sentencing solely because there was a trial. The Second Circuit, in *United States v. Reynoso*, a case involving a plea, further

contradicted this reasoning by declining to apply the safety valve provisions in the defendant's case where she provided false information to the Government, but also proffered an expert opinion that based on her drug addiction and history she was not able to appreciate that her statements were untrue. Nonetheless, she had provided the information as she understood it. *See* 239 F.3d 143, 143-46 (2d Cir. 2000).

In another case, including reliance on *Schreiber*, supra, the Ninth Circuit stated:

> Nothing in the statute suggests that a defendant is automatically disqualified if he or she previously lied or withheld information. Indeed, the text provides no basis for distinguishing among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline by disclosing "not later than" sentencing.

United States v. Mejia-Pimental, 477 F.3d 1100, 1105–06 (9th Cir. 2007). The Ninth Circuit highlighted the point that even defendants that maintain their innocence or opt to exercise their trial rights (often on some other theory of defense, like lack of knowledge) may be candidates for safety valve relief after a guilty verdict. *See United States v. Sherpa*, 110 F. 3d 656 (9th Cir. 1996). In so doing, the Court noted:

> "Section 3553(f) requires a determination by the judge, *not the jury*, as to the satisfaction of the five underlying criteria. This is no accident. The judge is privy to far more information than the jury and is therefore in a much different posture to assess the case and determine whether the defendant complies with § 3553(f)."

Id. at 660 (emphasis supplied).

Taking this analysis a step further, in another case, the Ninth Circuit held that even a defendant who confesses, recants that confession during his trial testimony and is convicted, may be eligible for a downward departure/deviation from an otherwise applicable mandatory minimum sentence, based on the safety valve provision. Specifically, the Ninth Circuit held that the defendant's initial confession had satisfied the fifth element that he had truthfully provide all information to the Government. *See United States v. Shrestha*, 86 F.3d 935, 937-40 (9th Cir. 1996). While the Court left open whether a defendant who provides such information only at sentencing similarly qualifies, it concluded that when such information is earlier disclosed, the defendant remains eligible. *Id.*at 940 f.n. 5.

The reality that federal criminal prosecution involves a number of moving parts, including preparation for trial, while simultaneously participating in plea negotiations and potential safety valve proffers, are exactly why the Seventh and Ninth Circuits' applications of the safety valve provision make the most sense. The Second and Tenth Circuit approaches essentially and unjustly further penalize a defendant for exercising their constitutional right to a trial. In a troubling trend observed by many, there has been a recent continuing decrease in the number of federal criminal cases taken to trial.

On a nationwide scale, across all circuits, there has been a substantial decrease in the percentage of cases that go to trial. In 1970, fifteen percent of federal cases were making it to a trial; by 2015, this number was down to just 2.9

percent. National Association of Criminal Defense Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, www.nacdl.org/trialpenaltyreport, 2018, at 5, f.n. 2. A contributing factor to this decline includes the application of the safety valve provision as currently interpreted in the Second and Tenth Circuits—at some point, it simply isn't worth the risk for a defendant to take his or her case to trial. A number of defendants who may otherwise wish to challenge the Government's case, confront the witnesses against them, or raise other valid defenses—particularly ones beyond mere innocence—are further punished for doing so. A proper reading and interpretation of 18 U.S.C. §3553(f) and the Guidelines, as exists in at least the Seventh and Ninth Circuits, is not only the fair application of the safety valve provision, it is the only constitutionally sound one.

CONCLUSION

Based upon the analysis and authorities set forth in the pending Petition for a Writ of Certiorari, and the reasons, rationale and analysis set forth herein, respectfully, this Honorable Court should grant the Petitioner's pending Petition for a Writ of Certiorari.

DATED at Montpelier, Vermont this 22nd day of August, 2019.

Respectfully submitted,

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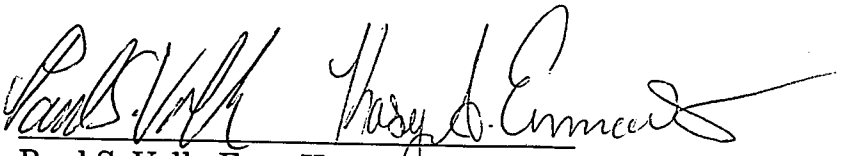

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