No. 19-109

In the Supreme Court of the United States

GIOVANNI MONTIJO-DOMINGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

WENDY CURTIS PALEN
Palen Law Offices, LLP
Post Office Box 156
Glendo, WY 82213
(307) 735-4022

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ETHAN H. TOWNSEND
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner

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PETITIONER'S REPLY

The government admits (Opp. 15) that a "division in the courts of appeals exists" on the discrete question of statutory interpretation presented in the petition. The government also does not deny that this case is a flawless vehicle for resolving the split. Nor could it: The district judge expressly stated on the record that she would have granted safety-valve relief were it not for Tenth Circuit precedent preventing her from doing so. See Pet. 6-7, 15-16.

The government responds in the main by arguing the merits. See Opp. 8-15. But the merits are for the Court to decide *after* granting plenary review; they are not a basis for denying the petition. As for whether review is warranted here, the government says only (Opp. 18-20) that the question presented is unimportant. But as we explained in the petition (at 14-16) and demonstrate further below (at 3-5), that is wrong: The issue is frequently outcome determinative at sentencing, and when it is, it typically makes a difference of many years of imprisonment. This Court's immediate review is therefore warranted.

A. The government concedes that the circuits are split on the question presented

The government acknowledges (Opp. 15-16) that the Ninth and Tenth Circuits "squarely resolved the question presented" in "diverg[ent]" ways in *United States* v. *Sherpa*, 110 F.3d 656 (9th Cir. 1996) and *United States* v. *De La Torre*, 599 F.3d 1198 (10th Cir. 2010). As the government further admits (Opp. 16), "[t]he court of appeals in this case relied on *Del La Torre*'s reasoning to determine that petitioner was ineligible for relief under Section 3553(f)."

1. The government disputes (Opp. 16-18) our showing (Pet. 11-14) that the Seventh Circuit sided with the Ninth Circuit and the Second Circuit sided with the Tenth Circuit, resulting in a 2-2 split.

Nothing turns on that disagreement. Either way, the Nation's sentencing laws are being administered in divergent ways in (at least) the Ninth and Tenth Circuits. Those two circuits comprise 15 States that are together home to more than a quarter of the Nation's population. The conflict is also mature and broadly acknowledged (see Pet. 9-10), which is probably why the government does not suggest that it could heal itself. Thus, even if the conflict were limited to the entrenched 1-1 split that the government concedes, it still would represent an unacceptable state of affairs warranting the Court's correction.

2. Review is all the more warranted because the split is broader than the government will admit.

In *United States* v. *Thompson*, 76 F.3d 166 (7th Cir. 1996), the defendant denied "knowledge that she was distributing cocaine" and thus "den[ied] [her] guilt" of the charged crimes. *Id*. at 170. The jury rejected that assertion. The Seventh Circuit nevertheless upheld that district court's grant of safety-valve relief because the defendant had given a "forthright" account of her version of events as she saw them. *Id*. at 171. The court noted, in particular, that circumstances sometimes "permit a finding of acceptance of responsibility" and, by extension, a truthful proffer, "notwithstanding a defendant's denial of guilt." *Id*. at 170.

The government notes (Opp. 17) that the Seventh Circuit did not expressly "identify any inconsistency between the jury's verdict and the information the defendant proffered." That is neither here nor there. The district court granted safety-valve relief—over the

government's vigorous objection—to a defendant who denied guilty knowledge, despite the jury's rejection of that position. See 76 F.3d at 170-171. That is the exact opposite of the outcome in this case.[1]

The Second Circuit recognized that *Thompson* is of a piece with *Sherpa* and rejected both cases as "wrongly decided." *United States* v. *Reynoso*, 239 F.3d 143, 149-150 (2d Cir. 2000). To be sure, there are factual distinctions between *Reynoso* and this case, as we and the government both have noted. Pet. 13-14; Opp. 18. Still, the Second Circuit's holding in *Reynoso*—a defendant's earnest belief in the truth of his proffer is insufficient for safety-valve relief (239 F.3d at 149)—cannot be squared with *Sherpa* or *Thompson*.

B. The question presented warrants the Court's attention

1. We demonstrated (Pet. 14-15) that, according to government data, the question presented is likely to arise in hundreds of cases every year. The government nevertheless asserts (Opp. 19) that resolution of the question is unlikely to affect sentencing outcomes in many cases because "the district court—despite having denied a motion for judgment of acquittal—would nonetheless [have to] find that the defendant [had] satisfied Section 3553(f)(5)'s tell-all requirement." The government implies that this is not likely to happen often. Not so.

As an initial matter, there is nothing inconsistent about a judge finding that sufficient evidence exists to

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[1] *United States* v. *Veronica Thompson*, 106 F.3d 794 (7th Cir. 1997), is not to the contrary. The defendants there asserted that they had "told the government all they knew." *Id*. at 800. The Seventh Circuit held simply that "[t]he sentencing judge was entitled to reject" their story, as had the jury. *Id*. at 801.

uphold the jury's verdict while at the same time concluding that "*he or she* would have voted differently had he or she been a juror." *Sherpa*, 110 F.3d at 661. That was the case in *Sherpa* and *Thompson*, just as it was here. It also was the case in, for example, *United States* v. *Freeman*, 139 F. Supp. 2d 1364 (S.D. Fla. 2001), aff'd, 37 F. App'x 505 (11th Cir. 2002). There, the district court credited the defendant's "assertion of innocence after a guilty verdict" and granted safety-valve relief. *Id*. at 1365. The court did so on the recognition that "the jury's verdict is not the last word on § 3553(f)(5)" and that a sentencing court "must make an independent determination" concerning the defendant's truthfulness. *Id*. at 1370.

This Court's cases also indicate that sentencing judges often reach conclusions that differ from the jury's verdict. That was the premise of the Court's decision in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), where the Court held that a sentencing judge may enhance a defendant's sentence if it finds that the defendant committed an acquitted charge. That scenario arises only when the judge concludes that the defendant committed conduct even where the jury did not reach the same conclusion.

Thus, even supposing such cases represent a minority of the hundreds of cases every year in which the government's first five conditions (Opp. 5) are satisfied, proper resolution of the question presented still will often impact sentencing outcomes.[2]

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[2] As we explained (Pet. 15 n.3), most such cases do not result in written decisions because sentences are typically imposed orally. Appeals of the discretionary elements of sentences are also unusual. The government does not dispute this.

2. The government offers no response to our observation (Pet. 15-16) that the question presented is immensely important to the defendants whom it affects, regardless how often it arises. The petition implicates the weightiest personal right of all: the right to freedom from the physical restraint incident to incarceration. The Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992). It should not start here.

The concern to avoid unjust imprisonment has special force in this context because "mandatory minimum sentencing statutes have proliferated in number and importance, [and] judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike." *Harris* v. *United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring), overruled on unrelated grounds by *Alleyne* v. *United States*, 570 U.S. 99 (2013). See also FAMM Amicus Br. 10-13. Congress enacted the safety valve for just these reasons, and the Court should be concerned to ensure that it is being properly applied.

C. The government's merits arguments are no basis for denying further review

The government devotes the bulk of its argument (Opp. 8-15) to its defense of the Tenth Circuit's decision in *De La Torre* and a "noncontradiction principle" more generally. The merits are, of course, for the next stage of the case, after the Court grants certiorari; they are not a basis for denying review. Should the Court grant the petition, we will respond to the government's

arguments in full, in our merits briefs. For now, a few brief points warrant emphasis.

First, the government cites (Opp. 8-10) its noncontradiction principle as though it is the settled law of the land. But the principle has not been recognized either by this Court or even a majority of the courts of appeals. And whether such a principle correctly applies in this context is the question presented in the petition; cataloging its application by the lower courts in other contexts is not helpful. The Eighth Circuit, for example, has twice declined to "take sides" in the split over the question presented (*United States* v. *Honea*, 660 F.3d 318, 328 (8th Cir. 2011)) despite its supposed adoption of the noncontradiction principle (Opp. 9) years earlier in *United States* v. *Campos*, 362 F.3d 1013, 1016 (8th Cir. 2004).

Second, assuming arguendo that a noncontradiction principle has merit as a general matter, the government acknowledges (Opp. 10-11) that Congress may overrule it by statute. That is just what Section 3553(f) does, by expressly assigning the task of determining a defendant's safety-valve eligibility to "the court" rather than to the jury. If Congress had wanted the judge's factfinding to be limited by the jury's findings, it would have been a simple matter of saying so. But it did not say so. The government responds by asserting (Opp. 10-11) that a noncontradiction principle has sometimes applied to sentencing decisions under the guidelines. Maybe so; but the guidelines are not drafted or adopted by Congress, so it is hard to see what relevance they have for Section 3553(f).

Third, the government brushes aside (Opp. 13) our observation (Pet. 18) that the Tenth Circuit's holding in this case contradicts Anglo-American legal tradition, which places sentencing decisions exclusively in the

hands of the judge. In the government's view (Opp. 13), mandatory minimums are a "depart[ure] from the tradition of 'discretionary' sentencing" by judges. It therefore posits that Congress could not have intended a sentencing judge's traditional discretion to apply to factfinding under Section 3553(f). That gets matters backward. As an exception to mandatory minimums, Section 3553(f) is best understood as *restoring* the judge's traditionally independent sentencing authority. That conclusion is bolstered by 18 U.S.C. 3661, which states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Finally, the government has no answer to our observation that, although Section 3553(f)(5) is not an acceptance-of-guilt provision, the Tenth Circuit's decision effectively makes it one. Pursuant to the holding in *De La Torre*, a defendant may not maintain his innocence and obtain safety-valve relief. See, *e.g.*, *United States* v. *Vazquez*, 49 F. App'x 550, 555-556 (6th Cir. 2002) (affirming denial of safety-valve relief on the ground that "a person * * * [who] maintains his opinion" concerning innocence "and goes to trial and testifies and is convicted can't get the safety valve provision"). Yet the guidelines already provide for a judge's consideration of acceptance of responsibility. The government does not deny that the acceptance provision serves a very different purpose from the safety-valve statute (*Sherpa*, 110 F.3d at 662), or that the Tenth Circuit's rule renders Section 3553(f)(5) duplicative of the guidelines provision in cases involving mandatory minimums.

Respectfully submitted.

WENDY CURTIS PALEN
Palen Law Offices, LLP
Post Office Box 156
Glendo, WY 82213
(307) 735-4022

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ETHAN H. TOWNSEND
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner