No. ____

October Term, 2021

IN THE
Supreme Court of the United States

GREGORY LERI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
BERNARDO LOPEZ
Assistant Federal Public Defender
Attorney for Petitioner Leri
One E. Broward Blvd, Ste. 1100
Ft. Lauderdale, FL 33301
Tel.: (954) 356-7436
Bernardo_Lopez@fd.org

DECEMBER 9, 2021

QUESTIONS PRESENTED FOR REVIEW

On December 21, 2018, Congress enacted the First Step Act of 2018 (P.L. 115-391). In Section 402 of the First Step Act, Congress amended subsection (f)(1) of the statute commonly known as the "safety valve," mandating that "the court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds . . . that—(1) the defendant does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; ***and*** (C) a prior 2-point violent offense, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1) (emphasis added). This petition presents two inter-related questions with regard to the amendments to the Safety Valve statute made by section 402 of the First Step Act.

Questions Presented:

1. **Whether the criteria of 18 U.S.C. § 3553(f)(1), as amended, are to be read in the conjunctive requiring the district court to impose a sentence pursuant to the Sentencing Guidelines, without regard to any statutory minimum sentence, *unless* the defendant meets *all three criteria*: "(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, . . .[and] (B) a prior 3-point offense . . . and (C) a prior 2-point violent offense"?**

    a. **Assuming the criteria are read in the conjunctive and that the Safety Valve applies unless the defendant meets all three criteria, does the amended definition of safety valve under § 3553(f)(1) apply equally to , which apply a two-level downward adjustment to defendants convicted of a drug trafficking offense who meet the Safety Valve criteria?**

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

***United States v. Leri,* 19-cr-60265-WPD (S.D. Fla. 2020)**

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Mr. Gregory Leri, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 20-12380 in that court on April 27, 2021, *United States v. Gregory Leri ,* which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on April 27, 2021. A timely-filed petition for rehearing *en banc* was denied by the Court of Appeals on July 13, 2021. This Court's order of March 19, 2020 extended the deadline for filing of petition for a writ of certiorari to 150 days. Mr. Leri's petition is due by December 10, 2021. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following statutory provisions:

18 U.S.C. § 3553(f)(1):

> Limitation on applicability of statutory minimums in certain cases.-- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506

of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

U.S.S.G. § 5C1.2:

the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) . . .

U.S.S.G. §2D1.1(b)(18):

If the defendant meets the criteria set forth in subdivision (1)–(5) of subsection (a) of § 5C1.2 (Limitations on Applicability of Statutory Minimum Sentences in Certain Cases) decrease by **2** levels.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

Mr. Gregory Leri entered a plea of guilty to one count of conspiring to possess with intent to distribute fentanyl and one count of conspiring to possess with intent to distribute oxycodone. The district court sentenced Mr. Leri to a 78-month term of imprisonment. (DE 102).

STATEMENT OF FACTS

Mr. Gregory Leri is a fifty-six year old native of South Florida. Presentence Report (PSR) ¶ 96. Mr. Leri dropped out of high school before graduating, but he eventually earned his GED diploma. PSR ¶118. Mr. Leri has vocation skills as a machinist and worked in that field until 2004. PSR ¶¶ 120, 122.

In 1988, Mr. Leri's life changed when he severely injured his neck in an automobile accident. PSR ¶ 105. He later underwent a single-disk fuse surgery to repair his neck. *Id*. Mr. Leri began to self-medicate his pain by using and becoming addicted to powder cocaine. PSR ¶ 115. In 2004, Mr. Leri again injured his neck in a workplace accident. PSR ¶ 105. This time, Mr. Leri had to undergo multi-disk fusion surgery to repair his neck. *Id*. Mr. Leri was never able to work again and he started getting social security disability. PSR ¶¶ 121, 122. In addition, Mr. Leri's addiction to illicit drugs increased as he became addicted to crack cocaine and he also became addicted to prescription drugs that he took for the pain from his accident and surgeries. PSR ¶ 105.

In 2016, Mr. Leri went to the emergency room with severe neck pain and later underwent triple-disk fusion surgery. PSR ¶ 105. Mr. Leri was also diagnosed with cancer on his tongue. PSR ¶ 106. He received chemotherapy and radiation treatment for his cancer. In order to manage the pain from his neck and the nausea from his cancer treatment, Mr. Leri was prescribed fentanyl and oxycodone. In addition, Mr. Leri continued to abuse illicit drugs such as cocaine.

All of that led to the instant offense. Essentially, Mr. Leri illegally sold the fentanyl and oxycodone that he was legally prescribed and used those proceeds to satiate his addiction to illicit drugs like cocaine. In fact, while Mr. Leri was out pre-trial on bond in the instant case, he succumbed to his addiction and his bond was revoked for using cocaine. That also cost him acceptance of responsibility and resulted in a higher sentence.

A grand jury charged Mr. Leri and others in a multi-count indictment charging various offenses stemming from the illegal sale, and possession with intent to distribute fentanyl and oxycodone. (DE 10). Mr. Leri and the government subsequently entered into a written plea agreement in which Mr. Leri agreed to enter a plea of guilty to one count of conspiracy to possess with intent to distribute fentanyl (count one), and one count of conspiracy to possess with intent to distribute oxycodone (count two). (DE 53:¶ 1). The government agreed to dismiss all the other counts against Mr. Leri. *Id*. The parties also agreed that for sentencing purposes, the fentanyl amount in count one was 1,080 grams and that the oxycodone amount in count two was sixty 30 mg pills. *Id*. at ¶ 2.

Prior to sentencing, the probation office prepared a presentence report (PSR). The report noted that Mr. Leri had tested positive for cocaine while out on bond. The violation resulted on a revocation of bond and also in a loss of the three-level reduction for acceptance of responsibility. PSR ¶ 44. The probation office calculated the base offense level at 30 based on the agreed amount of drugs involved, and because there were no adjustments, the final offense level was also 30. PSR ¶¶ 49-57. U.S.S.G. § 2D1.1(18) provides a two-level reduction under the safety-valve provision, but Mr. Leri was not given the two-level reduction because he had a 2006 conviction for possession of cocaine that was scored a three-point prior conviction. PSR ¶ 81. The probation office calculated Mr. Leri's criminal history as a category III. An offense level of 30 and criminal history of III results in an advisory sentencing range of 121 to 151 months.

Prior to sentencing, counsel for Mr. Leri filed a sentencing memorandum that included a downward variance from the otherwise applicable sentencing range. (DE 80). Counsel for Mr. Leri noted that Mr. Leri was addicted to illicit drugs and pain killers. He also noted that Mr. Leri's addiction unfortunately began as a result of an accident. In 1988, Mr. Leri's life changed when he severely injured his neck in an automobile accident. He later underwent a single-disk fuse surgery to repair his neck. Doctors prescribed morphine and oxycodone for the pain, but the medication did not help Mr. Leri with the pain. As a result, Mr. Leri began to self-medicate his pain by using and becoming addicted to powder cocaine. In 2004, Mr. Leri again injured his neck in a workplace accident. This time, Mr. Leri had to undergo multi-

disk fusion surgery to repair his neck. Mr. Leri was never able to work again and he started getting social security disability when he was found to be 100% disabled. In addition, Mr. Leri's addiction to illicit drugs increased as he became addicted to crack cocaine and he also became addicted to prescription drugs that he took for the pain from his accident and surgeries.

In 2016, Mr. Leri went to the emergency room with severe neck pain and later underwent triple-disk fusion surgery. Mr. Leri was also diagnosed with cancer on his tongue. He received chemotherapy and radiation treatment for his cancer. In order to manage the pain from his neck and the nausea from his cancer treatment, Mr. Leri was prescribed fentanyl and oxycodone. In addition, Mr. Leri continued to abuse illicit drugs such as cocaine. Counsel for Mr. Leri requested a sentence that did not include any imprisonment.

As result of continued drug use while on bond, Mr. Leri's bond was revoked and he was imprisoned. During the pendency of his criminal case, Mr. Leri believed that the cancer in his tongue had returned even though it had been in remission. He became depressed and contemplated suicide. He wrote several letters to the district court complaining about his condition and lack of treatment.

Based on those letters, the government sought a sentencing enhancement for obstruction of justice. The government reasoned that Mr. Leri's letters in which he articulated to the court a fear that his cancer had returned and which were fueled by depression were intentional lies intended to obstruct justice.

At sentencing, the district court determined the advisory sentencing range was 121 to 151 months. If Mr. Leri's addiction had not cost him the three-level acceptance-of-responsibility, his sentencing range would have been 87 to 108 months. At the hearing, the district court denied the government's request for a sentencing enhancement. The Court noted that Mr. Leri's mistaken belief that his cancer had returned was not a proper basis for a sentencing enhancement for obstruction of justice. The district court granted Mr. Leri's request for a downward variance in part since it did not provide the non-prison sentence requested by Mr. Leri. The district court varied downward to a sentence of 87-months' imprisonment, the bottom of the sentencing range that would have applied if Mr. Leri had received the three-level adjustment for acceptance of responsibility.

On appeal, Mr. Leri argued that the district court erred when it failed to grant a two-level reductions for safety valve as mandated by U.S.S.G. § 2D1.1(b)(18) since he met the criteria for safety valve under 18 U.S.C. § 3553(f)(1). The Eleventh Circuit rejected the argument and affirmed Mr. Leri's sentence. *United States v. Leri*, No 20-12380 (11th Cir. April 27, 2021). Mr. Leri filed a petition for rehearing *en banc* which was denied on July 13, 2021.

REASONS FOR GRANTING THE WRIT

I. There is a circuit split on whether 18 U.S.C. § 3553(f)(1) requires the district court to impose a sentence pursuant to the Sentencing Guidelines, without regard to any statutory minimum sentence, *unless* the defendant meets *all three criteria*: "(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, . . .[and] (B) a prior 3-point offense . . . and (C) a prior 2-point violent offense." In *United States v. Garcon*, 997 F.3d 1301 (11th Cir. 2021), the Eleventh Circuit held that the presence of any one of the criteria is sufficient to disqualify a defendant from getting safety valve relief. In contrast, the Ninth Circuit held in *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), that a sentencing court must provide safety valve relief to a federal criminal defendant unless all three criteria are present. This Court must determine which of the two conflicting interpretations of section 3553(f)(1) is correct especially since the difference in interpretations can make a substantial difference in a federal defendant's sentence.

The "safety valve" statute requires a district court to impose a sentence based on the Sentencing Guidelines calculations without any limitations from statutory mandatory minimums unless certain criteria are met. 18 U.S.C. § 3553(f). On

December 21, 2018, Congress enacted the First Step Act of 2018 (P.L. 115-391). Under Section 402 of the First Step Act, Congress amended subsection (f)(1) of the statute commonly known as the "safety valve," as follows:

> Limitation on applicability of statutory minimums in certain cases.-- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—
>
> (1) the defendant does not have—
>
> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
>
> (B) a prior 3-point offense, as determined under the sentencing guidelines; and
>
> (C) a prior 2-point violent offense, 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. Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

18 U.S.C. § 3553(f).

The plain language of § 3553(f), as amended by the First Step Act, mandates that "the court **shall** impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds . . . that (1) the defendant does not have (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; **and** (C) a prior 2-point violent offense, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1) (emphasis added). The plain reading of that unambiguous language is that a prior 3-point offense, by itself, is insufficient to kick in the limitations on the safety valve provision. Absent the limitation, the court is required to apply the safety valve provision.

"And" As Conjunctive

One Circuit Court of Appeals, the Ninth Circuit, held that the "and" in the newly-amended language of section 3553(f)(1) must be read in the conjunctive so that a criminal defendant must meet all three criteria cumulatively before the defendant can be barred from safety-valve relief. *United States v. Lopez*, 998 F.3d 431, 443-44 (9th Cir. 2021). In reaching that conclusion, the Ninth Circuit first began with the

plain language of the amended statutory text noting that "the plain and ordinary meaning of § 3553(f)(1)'s 'and' is conjunctive." *Id*. at 436. The Court then looked to the Senate's legislative drafting manual which notes that in drafting legislation, the Senate intends "and' to be conjunctive. Citing the work of Justice Scalia, the Court noted that the structure of language in question was a conjunctive negative proof, and as such the "and" was required to be read as a conjunctive. *Id.* Finally, the Court noted that the cannon of consistent usage also required a conclusion that the "and" be read as conjunctive since the Court had previously read other uses of "and" within section 3553(f) to be read as conjunctive. The Court then concluded:

> In sum, § 3553(f)(1)'s plain meaning, the Senate's own legislative drafting manual, § 3553(f)(1)'s structure as a conjunctive negative proof, and the canon of consistent usage lead to only one plausible reading of "and" here. Section 3553(f)(1)'s "and" is conjunctive. Thus, a defendant must meet the criteria in subsections (A) (more than four criminal-history points), (B) (a prior three-point offense), and (C) (a prior two-point violent offense) to be barred from safety-valve relief by § 3553(f)(1). This means one of (A), (B), or (C) is not enough. A defendant must have all three before § 3553(f)(1) bars him or her from safety-valve relief.

Id. at 437. Because the defendant in *Lopez* did not satisfy all three requirements of § 3553(f)(1),(A), (B), and (C), he was not barred from receiving safety-valve relief.

"And" As Disjunctive

In direct contrast to the Ninth Circuit, the Eleventh Circuit came to the exact opposite conclusion holding that "based on the text and structure of § 3553(f)(1), the 'and' is disjunctive." *United States v. Garcon*, 997 F.3d 1301,1303 (11th Cir. 2021). The Eleventh Circuit thus concluded that any one of the three requirements in § 3553(f)(1),(A), (B), or (C), is sufficient to bar a defendant from safety-valve relief. *Id*.

at 1306. Because the defendant in Garcon satisfied at least one of the three requirements of § 3553(f)(1), a prior three-point offense under (B), he was barred from receiving safety-valve relief.

As with the Ninth Circuit, the Eleventh Circuit began "with the text itself." *Id*. at 1304. But although the Eleventh Circuit acknowledged that "the word 'and' is presumed to have its ordinary, conjunctive meaning," the Eleventh Circuit did not read the text using that ordinary meaning but rather skipped ahead to look at the context for a differing meaning. *Id*. at 1305. It then concluded that, in context, giving the "and" its ordinary conjunctive meaning rendered subsection (A) superfluous. *Id*. It then held that such a reading violated the cannon of statutory interpretation against surplusage:

> Reading the "and" in § 3553(f)(1) disjunctively avoids rendering subsection (A) superfluous and gives every part of § 3553(f)(1) meaning. For this reason, we find that the context of § 3553(f)(1) demonstrates that the "and" is disjunctive.

Id. Aside from its conclusion based on the rule against surplusage, the Eleventh Circuit's majority opinion gave no other reason for holding that the "and" in § 3553(f)(1) must be read as a disjunctive.

This Court must resolve the inter-circuit conflict that exists. Congress amended the definition of safety-valve in federal sentencing to increase the number of federal defendants that are eligible for safety-valve relief. The amendment to § 3553(f)(1) gave district courts greater discretion in sentencing federal defendants. But whether the "and" in § 3553(f)(1) is read conjunctively or disjunctively will have

a substantial impact on the number of federal defendants who will be eligible for safety-valve relief.

Sentencing Guidelines

The amendments to § 3553(f)(1) also affect sentences under the Sentencing Guidelines. The Sentencing Guidelines expressly adopt the statutory definition of safety valve noting that "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5)." U.S.S.G. § 5C1.2. The section then restates verbatim what was in 18 U.S.C. § 3553(f)(1)-(5). *Id*.at § 5C1.2(a)(1)-(5). The drug trafficking guidelines incorporate that definition and mandate that a court is to decrease a drug trafficking defendant's offense by two offense levels "if the defendant meets the criteria set forth in subdivision (1) –(5) of subsection (a) of § 5C1.2. U.S.S.G. §2D1.1(b)(18). The clear intent of the Sentencing Commission in having U.S.S.G. § 5C1.2 precisely track the language of 18 U.S.C. § 3553(f)(1)-(5) and then to tie that verbatim language to govern reductions under U.S.S.G. §2D1.1(b)(18) was to have the term "safety valve" be exactly the same in of 18 U.S.C. § 3553(f)(1)-(5), U.S.S.G. § 5C1.2, and U.S.S.G. §2D1.1(b)(17).

Since early 2019, the Sentencing Commission has lacked a quorum required by statute to promulgate amendments to the Sentencing Guidelines. *See* Letter of Charles R. Breyer, Acting Chair of U.S. Sentencing Commission (September 15, 2021), available at https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/Cover_Letter.pdf (last visited December 6, 2021). "Thus, the 2018

edition of the *Guidelines Manual*, which incorporated amendments effective November 1, 2018, was the last version of the *Guidelines Manual* released." *Id*. The Sentencing Commission reprinted the 2018 manual with a new cover but no substantive changes for 2021. *Id*. Again, Section 402 of the First Step Act, which amended 18 U.S.C. § 3553(f)(1), went into effect on December 21, 2018, almost two months after the 2018 edition of the *Guidelines Manual* went into effect. The problem with that is that the Sentencing Commission has not been able to incorporate the changes to § 3553(f)(1) into the *Guidelines Manual* due to its lack of quorum.

The history of 18 U.S.C. § 3553(f), U.S.S.G. § 5C1.2, and U.S.S.G. §2D1.1 demonstrate that the three provisions have always been linked together. In September 1994, Congress amended 18 U.S.C. § 3553(f) to create a safety-valve provision that allowed district courts to sentence certain federal defendants below the otherwise-applicable statutory minimum sentence. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(a), 108 Stat. 1796, 1985-86 (1994). Almost immediately, the Sentencing Commission passed an emergency amendment to the Sentencing Guidelines creating U.S.S.G. § 5C1.2 "to reflect the addition of 18 U.S.C. § 3553(f) by section 80001 of the Violent Crime Control and Law Enforcement Act of 1994." *See* U.S.S.G., Appendix C, Amendment 509, Reason for Amendment (Amendment Effective September 23, 1994). The amendment also amended the commentary to U.S.S.G. § 2D1.1. *See id*. Section 5C1.2 was made a permanent amendment to the *Guidelines Manual* on November 1, 1995. *See* U.S.S.G., Appendix C, Amendment 515, Reason for Amendment (Amendment

Effective November 1, 1995). That amendment also amended Section 2D1.1(b) of the *Guidelines Manual* to mandate a two-level reduction for a drug trafficking offense "[i]f the defendant meets the criteria set forth in subdivisions (1)-(5) of § 5C1.2." *See id*. For more than two decades, the three provisions remained unchanged and inextricably intertwined. For all of that time, any federal drug trafficking defendant that met the criteria of 18 U.S.C. § 3553(f)(1)-(5), by definition also met the criteria of U.S.S.G. § 5C1.2, and was required to get a two-level reduction under U.S.S.G. §2D1.1(b).

The First Step Act amended § 3553(f)(1) to make it easier for a federal defendant to meet the safety valve criteria. Nothing in the First Step Act or the amended language of § 3553(f)(1) suggests that Congress had any intention to disrupt a basic truth that existed since the creation of the safety valve provision in 1995 – namely, that the criteria for meeting safety-valve relief in § 3553(f), § 5C1.2, and § 2D1.1 has always been exactly the same. Because the Guidelines Manual expressly authorizes district courts to apply the safety valve "if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5)," the amended criteria of § 3553(f)(1) should also apply to an application of safety valve relief under § 2D1.1(b)(17). As such, the district court erred when it failed to reduce Mr. Leri's offense level by two levels as mandated by § 2D1.1(b)(18).

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/ Bernardo Lopez*
Bernardo Lopez
Assistant Federal Public Defender
Counsel For Petitioner Hernandez

Fort Lauderdale, Florida
December 9, 2021