

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH RAUBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in order for a defendant to satisfy the prerequisite for "safety-valve" sentencing relief in 18 U.S.C. 3553(f)(1), a court must find that the defendant does not have more than 4 criminal history points (excluding any criminal history points resulting from a 1-point offense); does not have a prior 3-point offense; and does not have a prior 2-point violent offense.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Neb.):

United States v. Rauber, No. 20-cr-189 (June 30, 2021)

United States Court of Appeals (8th Cir.):

United States v. Rauber, No. 21-2550 (Aug. 15, 2022)

IN THE SUPREME COURT OF THE UNITED STATES

No. 22-6076

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-3A) is not published in the Federal Reporter but is available at 2022 WL 3348982.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2022. The petition for a writ of certiorari was filed on November 9, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Nebraska, petitioner was convicted of conspiring to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 1A, 4A. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 5A-6A. The court of appeals affirmed. Id. at 1A-3A.

1. Under 18 U.S.C. 3553(f), defendants convicted of specified drug offenses "may obtain 'safety valve' relief" if they satisfy certain requirements. Dorsey v. United States, 567 U.S. 260, 285 (2012) (appendix B to the opinion of the Court). Such relief allows a district court to impose a sentence below the otherwise-applicable statutory minimum. 18 U.S.C. 3553(f).

Before 2018, safety-valve relief was available only if the court first found that "the defendant d[id] not have more than 1 criminal history point, as determined under the sentencing guidelines." 18 U.S.C. 3553(f)(1) (2012). The statute set forth other eligibility requirements, all relating to the offense of conviction, in four additional paragraphs. 18 U.S.C. 3553(f)(2)-(5) (2012).

Section 402 of the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, 132 Stat. 5221, replaced the existing criminal-history requirement with a new Section 3553(f)(1). As amended, Section 3553(f) now provides:

Notwithstanding any other provision of law, in the case of an offense under [21 U.S.C. 841, 846, or other federal drug laws], the court shall impose a sentence * * * 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 * * * .

18 U.S.C. 3553(f).

2. In 2020, petitioner twice sold methamphetamine to a purchaser who was cooperating with the government. Plea Agreement 2-3. While conducting surveillance before the second sale, investigators saw a white minivan arrive at petitioner's location

to supply him with methamphetamine. Id. at 3. A subsequent search of the minivan uncovered 949 grams of methamphetamine, and a subsequent search of petitioner's residence uncovered 84 grams of methamphetamine. Ibid.

A federal grand jury in the District of Nebraska indicted petitioner on one count of conspiring to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1), 841(b)(1), and 846; and two counts of distributing 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). Indictment 1-2. Pursuant to a plea agreement, petitioner pleaded guilty to the conspiracy count, and the government agreed to dismiss the other two counts. Plea Agreement 1; D. Ct. Doc. 98 (Jan. 28, 2021). Because of the drug quantity involved, petitioner faced a statutory-minimum term of imprisonment of 10 years. 21 U.S.C. 841(b)(1)(A).

3. At sentencing, the district court found that petitioner had more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as well as a prior 3-point offense. See Pet. App. 2A, 16A. The court therefore determined that petitioner was ineligible for safety-valve relief. Id. at 19A-21A. The court rejected petitioner's contention that he satisfied the safety-valve precondition in Section 3553(f)(1) solely because he did not have a prior 2-point violent offense. Id. at 19A. The court explained that Section 3553(f)(1) "contains

a negative list, none of which can exist if the safety valve relief is to be granted.” Id. at 20A.

After considering the sentencing factors set forth in 18 U.S.C. 3553(a), the district court sentenced petitioner to 180 months of imprisonment -- 60 months above the statutory-minimum sentence. Pet. App. 36A-37A. The court explained that even if petitioner “qualifie[d] for safety valve,” it “believe[d] he d[id] not deserve a sentence of 120 months or below anyway.” Id. at 37A; see ibid. (stating that a sentence below the statutory minimum was “not warranted no matter whether or not [the safety valve] applies or not”).

4. The court of appeals affirmed. Pet. App. 1A-3A. Relying on its prior decision in United States v. Pulsifer, 39 F.4th 1018 (8th Cir. 2022), petition for cert. pending, No. 22-340 (filed Oct. 7, 2022), the court explained that Section 3553(f)(1) “uses ‘and’ as a conjunctive, but in the distributive rather than joint sense of the word,” such that “the subsection ‘is satisfied only when the defendant (A) does not have more than four criminal history points, (B) does not have a prior three-point offense, and (C) does not have a prior two-point violent offense.’” Pet. App. 3A (quoting Pulsifer, 39 F.4th at 1022).

DISCUSSION

Petitioner contends (Pet. 16-19) that a defendant is eligible for safety-valve relief under 18 U.S.C. 3553(f)(1) so long as he does not have every single one of the criminal-history factors

specified in the subparagraphs of that provision. The question presented by petitioner is the same as the question presented in the petition for a writ of certiorari in Pulsifer v. United States, No. 22-340 (filed Oct. 7, 2022). The government has filed a response to the petition in Pulsifer in which it takes the position that the question warrants this Court's review in that case. See Gov't Cert. Resp. Br. at 7-13, Pulsifer, supra (No. 22-340). For the reasons stated in that response, the best course is for the Court to grant certiorari in Pulsifer and hold the petition in this case pending the Court's decision on the merits. See id. at 12-13.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's consideration of the petition for a writ of certiorari in Pulsifer v. United States, No. 22-340 (filed Oct. 7, 2022), and then disposed of as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

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