IN THE SUPREME COURT OF THE UNITED STATES

No. 22-____

MARIO C. THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

Talmage E. Newton IV
Attorney

Newton Barth, L.L.P.
555 Washington Ave., Ste. 420
St. Louis, Missouri 63101
(314) 272-4490

Attorney for Petitioner

QUESTION PRESENTED

Section 3553(f) of Title 18, U.S. Code, is the "safety valve" which can allow a defendant to receive a sentence less than the statutory mandatory minimum in some circumstances. Section 3553(f)(1) creates a list of three disqualifying conditions: (A) having more than four points, (B) having a three-point offense, and (C) having a violent two-point offense.

The question presented is whether the 'and' in 18 U.S.C. §3553(f)(1) means 'and,' so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, *and* (C) a 2-point offense, or whether the 'and' means 'or,' so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, *or* (C) a 2-point offense.

This issue is currently before this Court in at least two petitions for writs of certiorari: *Pulsifer v. United States*, Case Number 22-340 and *Palomares v. United States,* Case Number 21-40247. Both of these petitions appear to have been fully briefed by the parties and distributed for a Court conference on February 17, 2023. The Court should hold this petition for writ of certiorari pending its determination whether to grant certiorari in *Pulsifer* and *Palomares.*

RELATED PROCEEDINGS

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

United States v. Mario C. Thomas, No. 22-1183 (October 4, 2002)

United States District Court (E.D. Mo.):

United States v. Mario C. Thomas, Cause No. 4:20-cr-00691-SRC-5 (January 19, 2022)

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Undersigned counsel, on behalf of Petitioner Mario C. Thomas, respectfully petitions for a writ or certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The judgment of the court of appeals was entered on October 4, 2022. A petition for rehearing and/or en banc hearing was filed on October 17, 2022, and was subsequently denied on November 15, 2022. A petition for certiorari is due to this Court no later than February 13, 2023. On information and belief, the opinion of the court of appeals (App., A2) has not been reported.

JURISDICTION

The jurisdiction of the appellate court was invoked under 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Petitioner requests this Court determine whether 18 U.S.C. §3553(f) should be read as an unambiguous conjunctive negative proof, so that a defendant must have all three conditions to be disqualified from "safety valve" eligibility, or whether the existence of any one condition can disqualify a defendant.

STATEMENT OF THE CASE

Petitioner was indicted by a grand jury on one count of conspiracy to distribute a mixture involving 500 grams or more of methamphetamine (in violation of 21 U.S.C. § 841(b)(1)(A)) and one count of money laundering (in violation of 18 U.S.C. §§ 1956 and 1957). The drug charge carries a statutory five-year mandatory minimum sentence.

Pursuant to a written agreement with the United States, the Petitioner pled guilty to both counts. A presentence investigation report was prepared and calculated Mr. Thomas' adjusted offense level at a 23, and his criminal history category at II, resulting in a recommended Guidelines sentencing range of 51 to 63-months. Because the drug count was governed

by a statutory mandatory minimum sentence, the bottom of the recommended Guidelines range was upwardly adjusted to 60-months. Mr. Thomas' criminal history included a prior 3-point offense. Based on that prior 3-point offense, the probation officer recommended that Mr. Thomas was ineligible for a "safety valve" reduction by way of 18 U.S.C. §3553(f)(1)(B).

Mr. Thomas filed a written objection to the presentence investigation report arguing that the new "safety valve" provision, passed in 2018, under the First Step Act, allowed for the application of the "safety valve" if the defendant did not have more than four criminal history points, a prior 3-point offense *and* a prior 2-point violent offense, as determined by the Guidelines. Thomas argued to the district court that his prior 3-point conviction alone should not disqualify him from "safety valve" eligibility.

At sentencing, the district court acknowledged the Petitioner's objection to the denial of "safety valve" eligibility. After analyzing the issue, the district court overruled Petitioner's objection and held that because of his prior 3-point conviction, Thomas did not qualify for the "safety valve". The district court then sentenced the defendant within the upwardly adjusted recommended Guidelines recommended range to a 60-month term of imprisonment. Thomas, through counsel, preserved his objection to the district court's finding regarding "safety valve" eligibility.

REASONS FOR GRANTING THE PETITION

Petitioner requests this Court determine whether 18 U.S.C. §3553(f) should be read as an unambiguous conjunctive negative proof, so that a defendant must have all three conditions to be disqualified from "safety valve" eligibility or whether the existence of any one condition can disqualify a defendant.

The "safety valve" provision in Section 18 U.S.C. §3553(f) allows a district court to sentence a defendant without regard to a mandatory minimum if the defendant meets five criteria. One of those five criteria is subsection (f)(1) which provides in pertinent part that:

> *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...*

(Emphasis added).

Petitioner had a prior 3-point offense but did not have more than four criminal history points, nor did he have a prior 2-point violent offense. It was this 3-point conviction that resulted in the district court declaring that Petitioner was ineligible for a "safety valve" reduction.

The district court and the 8th Circuit have erroneously interpreted §3553(f)(1) in a disjunctive fashion. Specifically, courts below have read §3553(f)(1) so that if a defendant has any one of the three enumerated classifications (either (A), (B), or (C)), they are disqualified from safety valve eligibility. Instead, a plain reading of §3553(f)(1) requires a conjunctive interpretation – such that a defendant is "safety valve" eligible unless they have all three of the enumerated classifications: more than 4 criminal history points AND a prior 3-point offense AND a prior 2-point violent offense. 'And' should mean 'and.'

This Court should apply basic rules of statutory interpretation, including the ordinary-meaning rule, which requires the court to give undefined words and phrases their plain and ordinary meaning. *United States v. Hackman*, 630 F.3d 1078, 1083 (8th Cir. 2011); see also *United States v. Torres*, 920 F.3d 1215, 1216 (8th Cir. 2019). Just recently in *United States v. Palomar-Santiago*, 141 S.Ct. 1615, 1620-1621 (2021), this Court addressed the use of "and" in a statutory list concluding there that in interpreting 8 U.S.C. § 1326(d), "[t]he requirements are connected by the conjunctive 'and,' meaning defendant's must meet all three." When the word 'and' joins a list of conditions, it requires not one or the other but all of the conditions to exist. To find otherwise rewrites § 3553(f)(1) to substitute the word 'or' for the word 'and,' changing the structure of the statue. The

language of §3553(f)(1) was chosen by Congress and is clear. Plainly and ordinarily, 'and' means 'and,' not 'or.'

A conjunctive interpretation of §3553(f)(1) has been supported by the United States Court of Appeals for the Ninth Circuit in *United States v. Lopez*, which held that "[a]pplying the tools of statutory construction...§ 3553(f)(1)'s 'and' is unambiguously conjunctive." 998 F.3d 431 (9th Cir. 2021)(rehearing denied January 27, 2023). The *Lopez* court arrived at this interpretation based on the "plain and unambiguous language" of §3553(f)(1), the Senate's own legislative drafting manual, §3553(f)(1)'s structure as a conjunctive negative proof, and the canon of consistent usage which results in only one plausible reading of § 3553(f)(1)'s 'and.' The *Lopez* court found the use of 'and' is conjunctive and that "[i]f Congress meant § 3553(f)(1)'s 'and' to mean 'or,' it has the authority to amend the statute accordingly." In the words of the Ninth Circuit, said another way... 'and' means 'and.'

The Eleventh Circuit in *United States v. Garcon,* considering the issue en banc, agreed with the conclusion of *Lopez* and supported a conjunctive reading finding that a defendant was not disqualified from safety valve relief due to prior convictions if he met any of the subsections, but only if he met all of the subsections. 54 F.4th 1274 (December 6, 2022).

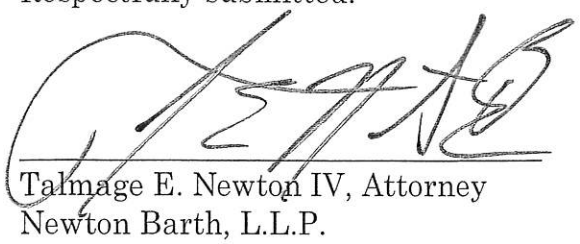
Petitioner urges this Court to follow the analysis and conclusions of the *Lopez* and *Garcon* courts (which are supported by the unambiguous language of the statue, Congress's drafting manual, and two canons of statutory

construction). The Ninth Circuit's holding in *Lopez* avoids awkwardly changing the meaning of 'and' within different subsections of § 3553(f). Moreover, the original panel decision by the Eleventh Circuit's conclusion, seemingly based solely on the cannon against surplusage, fails to pass muster under a full analysis of § 3553(f)(1). To hold otherwise would require the Court to find that 'and' actually means 'or,' which is inconsistent with the plain and ordinary meaning of the word 'and,' the consistent use of the word 'and' in the conjunctive in other portions of §3553(f), basic cannons of statutory interpretation, and the clear intent of Congress to expand "safety valve" eligibility through the First Step Act of 2018. This Court has repeatedly held that courts should defer to the language chosen by Congress, even if it leads to harsh results. *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004). If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. "It is beyond [the provenance of the courts] to rescue Congress from its drafting errors, and to provide for what [the courts] think...is the preferred result." *Id.* at 542.

CONCLUSION

The Court should hold this petition for a writ of certiorari pending its decision whether to grant the cert petitions pending in *Pulsifer*, 22-340 and *Palomares,* 21-40247. If the court does grant certiorari in either of those matters this petition should be granted.

Respectfully submitted.

By: 

Talmage E. Newton IV, Attorney
Newton Barth, L.L.P.
555 Washington Ave., Ste. 420
St. Louis, Missouri 63101
(314) 272-4490 - Telephone

Attorney for Petitioner

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