No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

NOLAN WASHINGTON — PETITIONER

VS.

UNITED STATES — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court erred when it (1) felt constrained to impose the mandatory minimum sentence, 120 months of imprisonment; (2) did not apply the "Safety Valve," 18 U.S.C. § 3553(f); and (3) did not impose a presumptively reasonable sentence within the guideline range of imprisonment calculated by Nolan Washington's Presentence Investigation Report ("PSR"). The District Court should have read the "and" in the "Safety Valve," specifically 18 U.S.C. § 3553(f)(1), in the conjunctive and should have calculated Mr. Washington's guideline range of imprisonment as determined by his PSR, 87-108 months of imprisonment.

The United States Fifth Circuit Court of Appeals found "[w]e do not resolve whether Washington properly preserved this issue because he cannot show that the district court erred, plainly or otherwise, by refusing to apply § 3553(f)'s safety-valve provision to depart below the statutory minimum in light of *United States v. Palomares*, 52 F.4th 640 (5th Cir. 2022), *petition for cert. filed* (Dec. 21, 2022) (No. 22-6391), which was decided while this appeal was pending. *See United States v. Rodriguez*, 602 F.3d 346, 361 (5th Cir. 2010). Using a 'distributive approach' to interpret § 3553(f)(1), the majority panel concluded that criminal defendants are 'ineligible for safety valve relief under § 3553(f)(1) if they run afoul of *any one* of its requirements.' *Palomares*, 52 F.4th at 647 (emphasis added). Thus, because Washington ran afoul of § 3553(f)(1)(B)'s requirement that he not have a prior three-point offense under the guidelines—which he does not dispute—he was ineligible for relief under § 3553(f). *See id." United States v.*

Washington, 2023 U.S. App. LEXIS 4657, at p. 2 (5th Cir. Feb. 23, 2022) (*per curiam*) (unpublished).

Did the Fifth Circuit err when it read the "and" in § 3553(f)(1) in the disjunctive and/or when it concluded that criminal defendants are 'ineligible for safety valve relief under § 3553(f)(1) if they run afoul of *any one* of its requirements.' *Palomares*, 52 F.4th at 647 (emphasis added).

This issue involves, at least, a 4-2 circuit split. *See* Br. for United States at 7, 10–11, *United States v. Pulsifer,* 39 F.4th 1018 (8th Cir. 2022), *cert. granted*, 2023 U.S. LEXIS 980 (Feb. 27, 2023) (No. 22-340). Currently pending before this Court on similar issues interpreting § 3553(f)(1) are *Pulsifer* and *Palomares.* This Court appears poised to resolve this issue.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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RELATED CASES

1. *United States v. Washington*, 19-cr-394-9 (W.D. La. June 9, 2021)

2. *United States v. Washington*, 2023 U.S. App. LEXIS 4657 (5th Cir. Feb. 23, 2022) (*per curiam*) (unpublished)

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IN THE

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OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals appears at Appendix B to the petition and is reported at *United States v. Washington*, 2023 U.S. App. LEXIS 4657 (5th Cir. Feb. 23, 2022) (*per curiam*) (unpublished).

The sentencing transcript from the United States District Court for the Western District of Louisiana in *United States v. Washington*, 19-cr-394-9 (W.D. La. June 3, 2021) appears at Appendix A and is unpublished.

JURISDICTION

The United States Court of Appeals decided the case on February 23, 2023. No petition for rehearing was filed timely in the case. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(f)

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.

STATEMENT OF THE CASE

According to the factual basis submitted during the change of plea hearing:

> Beginning on or about March 1, 2019, and continuing until on or about December 31, 2019, the exact dates being uncertain, in the Western District of Louisiana and elsewhere, the defendant, Demetrius Deangelo Hall, a.k.a. "D", "Dee", "D-Town" ("Hall"), conspired with Steve Mireles, Aaron McKinney, Michael Francis, Bland Mouncil, David Williams, Raymond Jeffers, John Wilson, Nolan Washington ("Washington"), and other persons, to distribute and to possess with the intent to distribute over 50 grams of methamphetamine, a Schedule II controlled substance. During the investigation, DEA agents obtained a T-III intercept on Hall's cell phone. Agents identified telephone number ***-***-0003 as being utilized by Washington.
>
> On September 17, 2019, DEA Task Force conducted a controlled purchase from Hall utilizing a confidential source ("CS"). The CS called Hall and requested 2 ounces of methamphetamine. Hall agreed to sale the CS 2 ounces of methamphetamine and stated he was waiting on his supply. DEA agents intercepted calls between Washington and Hall. During the calls, Hall asked Washington for "two of them." Washington replied, "yeah."
>
> DEA agents then intercepted a call from Hall in which he informed Washington that he was heading to Washington's residence. Hall then called the CS and advised CS to get the money and meet him at the location in Shreveport, Louisiana. Hall told the CS he was going to grab the "stuff."
>
> Surveillance agents observed Hall leave his residence and travel to Washington's residence. After Hall was seen departing Washington's residence, DEA agents intercepted a call in which Hall advised the CS he would be at the meeting location in five minutes. Hall then met with the CS and sold the CS two ounces of methamphetamine for $600.00. A laboratory from the Southeast Laboratory in Miami, Florida analyzed the narcotics and determined the drugs to be 38.6 grams of methamphetamine actual (pure).

> On September 11, 2019, September 12, 2019, September 13, 2019, September 14, 2019, September 16, 2019, October 6, 2019, and November 3, 2019, calls were intercepted during the T-III intercept of Hall's cell phone in which Hall and Washington discussed Washington providing drugs to Hall. During these calls, Hall and Washington spoke about amounts, prices, and transportation of the drugs.
>
> The parties hereby agree that the total drug quantity reasonably foreseeable to HALL [sic] was at least 50 grams of methamphetamine (pure), a more accurate amount to be determined at sentencing.

ROA. 169-71.

On February 26, 2020, Mr. Washington was indicted in a 9-count superceding indictment. The Government charged that, beginning on or about March 1, 2019, and continuing until on or about December 31, 2019, in the Western District of Louisiana and elsewhere, Mr. Hall, Mr. Mireles, Mr. McKinney, Mr. Francis, Mr. Mouncil, Mr. Williams, Mr. Jeffers, Mr. Wilson, Mr. Washington, and other persons, conspired to distribute and to possess with the intent to distribute over 50 grams of methamphetamine, a Schedule II controlled substance. ROA. 2, 10-17.

On August 18, 2020, Mr. Washington pled guilty to Count 1 of the superseding indictment. ROA. 6, 67-103, 161-77.

The PSI, determined that Mr. Washington's total offense level was 27 and that his criminal history category was III. ROA. 109-10, 184-87, 191, 204-07, 211. Mr. Washington's guideline sentencing range was 87 to 108 months of imprisonment, with a mandatory minimum sentence of 120 months of imprisonment. ROA. 109-10, 191, 211.

On June 3, 2021, the District Court sentenced Mr. Washington to 120 months of imprisonment. ROA. 7-8, 54-55, 104-19. On June 16, 2021, Mr. Washington filed a timely notice of appeal. ROA. 17, 367-68. On February 23, 2023, the United States Fifth Circuit Court of Appeals affirmed Mr. Washington's conviction and sentence. This timely petition follows.

REASONS FOR GRANTING THE PETITION

The First Step Act allows defendants with more than one criminal history point to be eligible for relief under the "Safety Valve," set forth in 18 U.S.C. § 3553(f). Specifically, 3553(f), in relevant portion, now provides that "[n]otwithstanding 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), . . . 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[.]" 18 U.S.C. § 3553(f).

In *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 5/21/21), the Ninth Circuit Court of Appeals recognized that "[a]s a matter of first impression, we must interpret the 'and' joining subsections (A), (B), and (C) under § 3553(f)(1). If § 3553(f)(1)'s 'and' carries its ordinary conjunctive meaning, a criminal defendant must have (A) more than four criminal-history points, (B) a prior three-point offense, and (C) a prior two-point violent offense, cumulatively, before he or she is barred from safety-valve relief under § 3553(f)(1). But if we rewrite § 3553(f)(1)'s

'and' into an 'or,' as the government urges, a defendant must meet the criteria in only subsection (A), (B), or (C) before he or she is barred from safety-valve relief under § 3553(f)(1). Applying the tools of statutory construction, we hold that § 3553(f)(1)'s 'and' is unambiguously conjunctive. Put another way, we hold that 'and' means 'and.'" Therefore, even though Mr. Lopez had a three-point offense in his criminal history, the Ninth Circuit affirmed the district court when it sentenced Mr. Lopez below his mandatory minimum sentence. *Lopez*, 998 F.3d at 433-34, 443.

Mr. Washington had 4 criminal history points. R. 185-87, 205-07. 3 criminal history points were added for a possession of Schedule IV CDS. ROA. 186, 206. However, Mr. Washington did not have any criminal history points added for a crime of violence, much less any 2-point crimes of violence. ROA. 185-87, 205-07.

In *Lopez*, the Ninth Circuit, in finding that § 3553(f)(1)'s "and" was conjunctive, started with the "[w]ell-established rules of statutory construction" and gave "and" its "ordinary, contemporary, common meaning." 998 F.3d 435-36 (internal citation and quotation marks omitted) (noting that the Government conceded "that the plain and ordinary meaning of § 3553(f)(1)'s "and" is conjunctive[,]" citing "Merriam-Webster's Collegiate Dictionary 46 (11th ed. 2020) . . . ; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116–20 (2012) . . . ; *New Oxford American Dictionary* 57 (3rd ed. 2010). . . *Oxford English Dictionary* 449 (2d ed. 1989) . . . *Webster's Third New International Dictionary* 80 (1967)[,]" and Office of the Legislative Counsel, Senate Legislative Drafting Manual 64 (1997). *Lopez*, 998 F.3d at 436

The *Lopez* court buttressed this conclusion by recognizing that § 3553(f)(1)'s "and" was a "conjunctive negative proof." 998 F.3d at 436. The *Lopez* court explained how this fact limited a court's ability to interpret § 3553(f)(1)'s "and" as a disjunctive. 998 F.3d at 436-47 (citing Scalia & Garner, at 119–20).

Finally, the Lopez court noted that its conclusion was required by "the canon of consistent usage[.]" 998 F. 3d at 437. After addressing the Government's arguments for reading "and" in the disjunctive, 998 F.3d 437-43, the Ninth Circuit found that "Section 3553(f)(1)'s plain and unambiguous language, the Senate's own legislative drafting manual, § 3553(f)(1)'s structure as a conjunctive negative proof, and the canon of consistent usage result in only one plausible reading of § 3553(f)(1)'s 'and' here: 'And' is conjunctive. If Congress meant § 3553(f)(1)'s 'and' to mean 'or,' it has the authority to amend the statute accordingly. We do not." *Lopez*, 998 F.3d at 444.

Mr. Washington should have been granted the benefit of the "Safety Valve" because he had no 2-point offense for a crime of violence, although he had four criminal history points and a 3-point offense. For these reasons, under 18 U.S.C. § 3553(f)(1), Mr. Washington was entitled to relief under the Safety Valve.

Because the District Court felt constrained by the mandatory minimum, it erred in imposing the mandatory minimum sentence, 120 months of imprisonment, and in not considering the imposition of a presumptively reasonable sentence within the guideline range of imprisonment calculated by Nolan Washington's PSR, 87-108 months of imprisonment.

Accordingly, Mr. Washington respectfully submits that the District Court erred. Therefore, Mr. Washington respectfully submits that this Court should vacate his sentence and remand this matter to the District Court to impose a sentence after applying the "Safety Valve."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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