NUMBER: _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO MONTERO
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A defendant is entitled to the safety-valve sentencing provision of 18 U.S.C. §3553(f) unless he violates all three subsections of the statute: (1) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (2) a prior 3-point offense, as determined under the sentencing guidelines; *and* (3) a prior 2-point violent offense, as determined under the sentencing guidelines. (emphasis added).

The question before this Court is whether the trial judge must find Montero violated *all* conditions to be eligible for sentence reduction or whether the violation of less than allsubsections prevents safety-valve consideration.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

United States of America, through the Solicitor General of the United States.

Antonio Montero, an individual and the defendant.

CORPORATE DISCLOSURE

The **United States of America** is a body politic and the federal government. The Solicitor General of the United States is the representative of the United States in matters before this Court.

RELATED PROCEEDINGS

United States v. Antonio Montero, 21-30767 (5th Cir. 3/8/23), Opinion set forth in Appendix 1-5.

United States v. Antonio Montero, 2:18-246 (WD, La., criminal judgment entered 1/27/20).

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PETITION FOR WRIT OF CERTIORARI

Antonio Montero petitions for a writ of certiorari to have this Court reverse the United States Court of Appeals for the Fifth Circuit on grounds the court improperly interpreted the "safety-valve" provision of 18 U.S.C. §3553(f). The court misapplied the conjunctive "and" – which indicates a defendant must violate all excluding elements – as "or" to conclude because Montero violated two conditions he was ineligible for safety-valve relief. Based upon sound, consistent, interpretive canons of statutory construction that connote the use of "and" as conjunctive, a judge is required to find a defendant has violated *all* conditions in order to be ineligible for sentence reduction.

OPINIONS BELOW

The opinion of the Fifth Circuit is not published, but is available at 2023 WL 2400746. It is also set forth at Appendix A. As for the issue herein, the court found Montero's argument foreclosed under *United States v. Palomares*, 52 F.4th 640 (5th Cir. 2022), pending when Montero appealed. In *Palomares*, the Fifth Circuit held that "criminal defendants [are] ineligible for safety-valve relief if they run afoul of *any one* of [the §3553(f)(1)] requirements." *Id.* at 647 (emphasis provided).[1]

JURISDICTION

The Fifth Circuit issued an opinion on March 8, 2023, affirming as modified the trial court judgment denying Montero reduction under the safety-valve provision of 18

[1] See Palomares v. United States, 22-6391(same issue)(certiorari petition pending).

U.S.C. §3553(f). Appx. 5.[2] Because the appellate court decision is final, this Court has jurisdiction under 28 U.S.C. §1254(1) to review the decision. This application is timely filed under 28 U.S.C. §2101(d), as outlined in United States Supreme Court Rule 13.2. A pauper application is also attached.

STATUTORY PROVISIONS

Section 3553(f) of Title 18, U.S. Code, provides:

> 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;

[2] The court modified the judgment to strike a provision authorizing credit for time served. Appx. 5. This ruling is not before the Court in this application.

(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.

STATEMENT OF THE CASE

Montero was one of seven individuals indicted for various counts related to two conspiracies to distribute and possess with intent to distribute methamphetamine and cocaine. Specifically, Montero was indicted for:

(1) conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine, count (1);

(2) possession with intent to distribute controlled substances, count (10);

(3) conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, count (12); and

(4) possession with intent to distribute 500 grams or more of cocaine, count (13).

Montero ultimately pleaded guilty to count (1), in violation of 21 U.S.C. §846.

In exchange, the government dismissed the remaining three counts: (10), (12), and (13).

Montero and the government stipulated to this factual basis:

> Beginning on or about June 6, 2017, and continuing through July 31, 2018, Montero supplied Julio Elizagarate with methamphetamine. Additionally, beginning on or about an unknown date but continuing through June 20, 2017, Montero supplied Angie Perez with meth-amphetamine. Elizagarate and Perez in turn sold the methamphetamine to other methamphetamine distributors in the Lake Charles, Louisiana area.
>
> On June 7, 2017, law enforcement utilized a confidential informant to purchase ten ounces of methamphetamine from Gary S. Byrd. Perez coordinated the June 7, 2017 meth-amphetamine transaction by introducing Byrd to Montero, and Byrd purchased 10 ounces of meth-amphetamine from Montero with money provided by the confidential informant.
>
> Between June 28, 2017, and April 23, 2018, law enforcement utilized various confidential informants to make multiple purchases of methamphetamine from Elizagarate. Montero supplied Elizagarate with the methamphetamine that [she] Elizagarate sold to the confidential informants.
>
> Beginning on or about May 31, 2018, and continuing through July 31, 2018, Montero and Elizagarate acquired cocaine from Michael Miers in order to redistribute the cocaine for profit. Elizagarate and Montero paid cash for the cocaine or, on occasion, they traded other controlled substances, such as methamphetamine, for the cocaine that Miers supplied.
>
> The parties agree and stipulate that the amount of methamphetamine attributed to Montero by virtue of his own conduct or the conduct of other conspirators reasonably foreseeable to him on Count 1 is at least 500 grams of methamphetamine but less than 1.5 kilograms of methamphetamine.

The probation department prepared a pre-sentence report. The department calculated a subtotal criminal history score of three based upon a 2007 Louisiana state court conviction for possession of cocaine with intent to distribute. The department

added two criminal history points since the current offense was committed while Montero remained under the state criminal justice sentence (the offense of conviction occurred from June 7, 2017, through July 31, 2018, while Montero was on state parole until June 9, 2022).

The probation department determined the total history score of five resulted in a criminal history category of III under U.S.S.G. Chapter 5, Part A. The probation department also calculated a total offense level of 27, based upon the adjusted offense level, minus two points for acceptance of responsibility and minus one point for assistance by timely agreeing to a guilty plea. The combination resulted in a Guideline imprisonment range of 87 months to 108 months. Nonetheless, the probation department noted the conviction under 21 U.S.C. 846 requires a statutory minimum term of imprisonment of ten years. 21 U.S.C. §841(b)(1)(A).

At the sentencing hearing, the trial court adopted the factual findings of the probation department and sentenced Montero to the statutory minimum 120 months imprisonment. The trial court did not consider whether it had authority to sentence Montero below the statutory mandatory minimum or whether the safety-valve provision of 18 U.S.C. § 3553(f) provided the court authority for a lesser sentence. The court imposed five years supervised release with conditions.

On appeal, Montero filed a merits brief that challenged denial of the safety-valve relief. Montero also found an apparent error by the trial court in ordering 'credit for time served.' Finally, Montero contended the district court's failure to advise him of the possible immigration consequences he faced if convicted of an aggravated felony

presented a *res novo* issue in the circuit. However, the record is not sufficient to show whether Montero would not have entered the guilty plea had he been warned of any potential adverse consequences.

ARGUMENT

Denial of the safety-valve provision requires the Court find a defendant violated all provisions, not just any provision.

Under the 'safety-valve' provision of 18 U.S.C. §3553(f), a district court has the discretion to sentence a criminal defendant below the mandatory minimum for certain drug offenses. A defendant who meets the criteria in §3553(f)(1) through §3553(f)(5) is eligible for such a reduction. As amended by the First Step Act,[3] §3553(f)(1) focuses only on a criminal defendant's prior criminal history as determined by the United States Sentencing Guidelines. This subsection requires a defendant prove he "does not have –"

> (A) more than 4 criminal history points, excluding any criminal history points relating 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[.][4]

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[3] See First Step Act of 2018, Pub. L. No. 115-391, §402, 132 Stat. 5194, 5221.

[4] In sum, the remainder of the statute requires the defendant show (1) he did not use violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (2) the offense did not result in death or serious bodily injury to any person; (3) 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 (4) the defendant has truthfully provided to the Government all

The pre-sentence report shows that Montero has a single 3-point conviction for possession of cocaine with intent to distribute. He has more than 4 criminal history points only because this incident occurred while he was on parole for the state conviction. U.S.S.G. §4A1.1(d).

But Montero never committed a 2-point violent offense. Therefore, under the list of negatives in the conjunctive language of the statute, Montero should be eligible for a sentence below the statutory minimum.[5] In other words, because the sentencing court cannot find that Montero has violated all three subsections, he is eligible for the safety-valve consideration.

Montero's position is based upon sound, consistent, interpretive canons of statutory construction that connote the use of "and" as conjunctive, requiring that a judge find the defendant has violated **all** conditions in order to be ineligible for the sentence reduction. *See United States v. Lopez*, 998 F.3d 431, 436 (9th Cir. 2021):

> For the past fifty years, dictionaries and statutory-construction treatises have instructed that when the term "and" joins a list condition, it requires not one or the other, but *all* of the conditions. *See e.g. Merriam-Webster's Collegiate Dictionary*, 46 (11th ed. 2020)(defining "and" to "indicate connection or addition"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 116-120 (2012)(stating that "and" combines a list of conditions in a statute); *New Oxford American Dictionary*, 449 (3rd ed. 2010)(stating that "and" is "used to connect words of the same part of speech, clauses, or sentences that are to be taken *jointly*")(emphasis added); *Oxford English Dictionary* 449 (2d

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information and evidence the defendant has concerning the offense. 18 U.S.C. §3553(f)(2)-(f)(5).

These remaining provisions are not at issue in this case.

[5] Whether 18 U.S.C. §3553(f)(1) is conjunctive or disjunctive is an issue pending before this Court. See United States v. Palomares, 22-6391.

> ed. 1989)(stating that "and" introduces "a word, clause, or sentence, which is to be taken side by side with, along with, or in addition to, that which precedes it")(italics omitted); *Webster's Third New International Dictionary* 80 (1967)(defining "and" to mean "along with or together with" or "as well as").

The *Lopez* court also found the United States Senate drafting manual instructs that the term 'and' should be used to join a list of conditions – such as §3553(f)(1)(A), (B), and (C) – when a conjunctive interpretation is intended:

> In a list of criteria that specifies a class of things – (1) use "or" between the next-to-last criterion and the last criterion to indicate that a thing is included in the class if it meets 1 or more of the criteria; and (2) use "and" to indicate that a thing is included in the class only if it meets all of the criteria.

Lopez, 998 F.3d at 436, citing Office of the Legislative Counsel, *Senate Legislative Drafting Manual* 64 (1997).

One more recent case supports Montero's position. In *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022)(en banc), the court also held that the word "and" retains a conjunctive sense within the statute: "So a defendant runs afoul of the provision and loses eligibility for relief only if all three conditions in subsections [18 U.S.C. §3553(f)(1)] (A) through (C) are satisfied." *Garcon*, 54 F.4th at 1278.

Congress followed the 'and' and 'or' rule throughout the entire statute. The three conditions in (f)(1) are joined by 'and,' indicating Congress intended the three conditions to be conjunctive. The remainder of the statute uses 'or' to express disjunction or alternative conditions. *See* 18 U.S.C. §3553(f)(2)("the defendant did not use violence ***or*** credible threats of violence ***or*** possess a firearm ***or*** other dangerous weapon"; 18 U.S.C. §3553(f)(3) ("the offense did not result in death ***or*** serious bodily

injury to any person"); 18 U.S.C. §3553(f)(4) ("the defendant was not an organizer, leader, manager, ***or*** supervisor")(emphasis added).

A conjunctive interpretation of 18 U.S.C. §3553(f)(1) is consistent with at least one other federal statute and a decision of this Court interpreting that statute. Under 8 U.S.C. §1326(d), an immigrant may collaterally attack an administrative order of removal in a criminal case, but only under limited circumstances. The statute, which codified the holding of *United States v. Mendoza-Lopez*, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987), provides defendants charged with unlawful entry 'may not' challenge their underlying orders 'unless' they 'demonstrat[e] that —

> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the [removal] proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; **and**
>
> (3) the entry of the order was fundamentally unfair.

The requirements are connected by the conjunctive 'and,' meaning defendants must meet all three requirements. *United States v. Palomar-Santiago*, 141 S.Ct. 1615, 1620-1621; 209 L.Ed.3d 703 (2021); *United States v. Flores-Perez*, 1 F.4th 454 (6th Cir. 2021)(Because the requirements of 8 U.S.C. §1326(d) are conjunctive, Flores-Perez's failure to satisfy any one of them defeats his collateral challenge); *United States v. Chaves-Leiva*, 782 Fed.Appx. 142 (3rd Cir. 2019), citing *United States v. Torres*, 383 F.3d 92 (3rd Cir. 2004)(Because the three requirements of §1326(d) are conjunctive, each must be satisfied to pursue a collateral challenge to a removal order); *Accord.*

United States v. Parrales-Guzman, 922 F.3d 706 (5th Cir. 2019) (emphasizing the word 'and' to hold that '[i]f the alien fails to satisfy any one of these prongs, then the court need not consider the other prongs.').[6]

Additionally, at least three other recognized interpretative tools of statutory construction demonstrate that 'and' is conjunctive, which requires invocation of the safety-valve relief unless a defendant has violated all three provisions:

1. Ordinary meaning canon. The most fundamental semantic rule of interpretation, Scalia & Garner at 29, the ordinary-meaning rule requires that words are given their ordinary, plain meaning unless defined otherwise. *In re McCarthy*, 554 B.R. 388, fn. 4 (Bankr.W.D.Tex. July 22, 2016). And unless the context dictates otherwise, the word *'and*' is presumed to be used in the ordinary sense, conjunctively. *See United States v. Palomar-Santiago*, 141 S.Ct. 1615, 1620-1621, 209 L.Ed.2d 703 (2021)(where "requirements are connected by the conjunctive '*and*,'" "defendants must meet all three").

2. Conjunctive/disjunctive canon. According to Scalia & Garner at 116, under the conjunctive/disjunctive canon, '*and'* combines items while *or* creates alternatives. For example, "[t]o be eligible, you must prove that you have not A, B, *and* C." *See* Scalia &

[6] When a noun phrase precedes a series of parallel clauses, the language is structured as a sydenton in which all of the conjuncts (i.e., the parallel clauses) must be satisfied for the test to be met. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 116; Sadowski v. State, 2021 WL 3117585 (Ct. Apps. Mich. 2021)(not reported)(Thus, as a matter of straightforward grammar, Subdivision (c) requires an exonerated individual to prove each of the following: (i) new evidence shows that the individual did not commit the crime or participate as an accomplice or accessory; (ii) new evidence results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon; and (iii) new evidence results in dismissal of the charges or a finding of not guilty after retrial). (Emphasis added).

Garner at 120. The conjunctive negative proof follows the "basic prohibition" (illustrated by the statement" "You must not do A, B, *and* C") in which "the listed things are individually permitted but *cumulatively* prohibited." Scalia & Garner at 119. This is distinguishable from the *disjunctive* negative proof: "[t]o be eligible, you must prove that you have not A, B, or C." Id. at 120. It is with the *disjunctive* list that "none of the listed things is allow." Id. at 119. "Since you may not do any of the prohibited things, you necessarily must not do them all." Scalia & Garner at 119.

3. The canon of consistent usage. A basic canon of statutory construction is that identical terms within an Act bear the same meaning. *Lexon Ins. Co. v. Fed. Deposit Ins. Corp.*, 7 F.4th 315, 324 (5th Cir. 2021) (quoting *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992)) *See* Scalia & Garner, supra, at 170–73 (discussing presumption of consistent usage). The safety-valve text uses '*and*' to join multiple lists. Congress's use of '*and*' in 18 U.S.C. §3553(f)(1)(B) suggests the items listed in 18 U.S.C. §§(f)(1)(A), (B), and (C), are prohibited as a package or group. And, therefore, because Montero has not violated the package of prohibited conduct, he is eligible for safety-valve relief. The government's argument that the '*and*' is distributive and would lead to surplusage language is not convincing upon the plain interpretation as established by jurisprudence, legal experts (including former Justice Scalia) and the Congressional Legislative Manual. This Court need not delve into the legislative intent since this provision is clear. Congress wrote what it intended, using the conjunctive word '*and*.' No further interpretation is necessary.

Palomares argues to this Court that - at the time of his application - a 4-2 circuit split exists on this issue. To the point, Palomares argues the Fifth Circuit decision "strains against the plain meaning of the word "and" and conjunctive/disjunctive canon of construction in favor of an inconsistent application of the em-dashes in §3553(f) that has no support in the case law or other authorities, all for the purpose of avoid surplusage." *Palomares*, 22-6391, p. 16.

This Court has noted the ambiguity between the circuits and has granted certiorari in this case. *Pulsifer v. United States*, 22-340, the Eight Circuit iteration of this issue. In a merits brief, *Pulsifer* makes the basic statutory interpretation argument that "and" means "and."

> "And" ordinarily joins things together. So when "and" connects requirements in a list, *every* requirement must be met, not one *or* another. *Pulsifer*, 22-340, p. 16.

Simply, *Pulsifer* contends that "Section 3553(f)(1)'s plain meaning is unambiguous: "and" means "and," so a defendant satisfies §3553(f)(1), and this is eligible for safety-valve relief, so long as he "does not have – (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense ... ; (B) a prior 3-point offense ... ; *and* (C) a prior 2-point violent offense," 18 U.S.C. §3553(f)(1) (emphasis added) – all three." *Pulsifer*, supra at 17. *See also*, *United States v. Jones*, 60 F.4th 230 (4th Cir. 2023).

Given the Court has granted certiorari on this issue, Montero joins the *Pulsifer* application and adopts the argument in *Palomares*.

CONCLUSION

"Only the written word is the law." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737, 207 L.Ed.2d 218 (2020). "[P]eople are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." Id. at 1749. These principles require the Court to enforce the statute as written. Congress wrote the statute using the conjunctive word 'and,' which requires the satisfaction of all elements of §3553(f)(1) to deny Montero the safety-valve benefit. Failure to apply the safety-valve to Montero's sentence is a plain error that affects the fairness, integrity, or public reputation of judicial proceedings since the defendant was sentenced to a statutory minimum sentence of 120 months rather than a guideline range of 87 - 108 months.

Montero has a single three-point conviction for possession of cocaine with intent to distribute. He has more than 4 total criminal history points only because this incident occurred while he was on parole for the state conviction. USSG §4A1.1(d). But Montero never committed a two-point violent offense.

Therefore, under the list of negatives in the conjunctive language of the statute, Montero is eligible for a sentence below the statutory minimum. In other words, because the sentencing court cannot find that Montero has violated all three subsections, it must consider the safety-valve provision in its sentence determination.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2023, I provided a copy of this Writ of Certiorari by electronic mail to:

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