

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE ZENO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth Circuit Court of Appeals affirmed Petitioner's 60 month sentence imposed upon the denial of application of the safety-valve provision of 18 U.S.C. § 3553(f), despite the fact that Petitioner's criminal history score included only a single prior 3-point offense. It affirmed Petitioner's sentence on the grounds that § 3553(f)(1) should be interpreted using a "distributive approach" to conclude that criminal defendants are "ineligible for safety valve relief under § 3553(f)(1) if they run afoul of any one of its requirements."

The question presented in this case is already before Court in *Pulsifer v. United States*, No. 22-340, 143 S. Ct. 978 (2023) (cert granted). The question presented here is:

Whether the "and" in § 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, excluding any points resulting from a 1-point offense, (B) a 3-point offense, *and* (C) a 2-point violent offense (as the Fourth, Ninth, and Eleventh Circuits hold), or whether the "and" means "or," so that a defendant satisfies the provision only if he does not have (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a 3-point offense, *or* (a 2-point violent offense (as the Fifth, Sixth, Seventh and Eighth Circuits hold)?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Petitioner's sentence can be found at *United States v. Zeno*, No. 22-30112, 2023 WL 2423158 (5th Cir. Mar. 9, 2023) (unpublished), and is set forth at App. 1.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(f) provides:

(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.

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

At Andre Zeno's sentencing in this case, he had only a single prior conviction that received criminal history points under the United States Sentencing Guidelines: a nearly twenty-year-old conviction for possession of marijuana that resulted in three criminal history points. At the sentencing hearing below, Zeno sought a sentence below the statutory minimum by seeking relief found in the newly amended safety valve statute, 18 U.S.C. § 3553(f)(1). Zeno argued that the new safety valve statute should be read in its natural, conjunctive meaning to include relief for defendants with a single prior three-point offense. The district court instead read the new safety

valve statute in a way that excluded Zeno from relief. The Fifth Circuit Court of Appeals followed suit following an intervening Circuit decision on the issue. This Court recently granted certiorari in *Pulsifer v. United States*, No. 22-340 (Feb. 27, 2023), to consider whether that interpretation of Section 3553(f)(1) is correct. The Court should accordingly hold this petition for a writ of certiorari pending its decision in *Pulsifer* and then dispose of the petition as appropriate in light of that decision.

I. Andre Zeno's arrest and plea

Andre Zeno was a 51-year-old cocaine addict who would act as a drug courier in exchange for cocaine. On May 6, 2018, Zeno was pulled over by Louisiana State Police on Interstate 10 near Baton Rouge, Louisiana. Concealed underneath the rear seat of his rental vehicle was one kilogram of cocaine. ROA.527-28. Zeno was arrested and ultimately charged in the Middle District of Louisiana with possession with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). ROA.11. A violation of § 841(b)(1)(B) carries a term of imprisonment of not less than 5 years nor more than 40 years. *Id.*

Zeno pled guilty without a plea agreement to the sole count in the indictment. ROA.161 (minutes for plea hearing). The court accepted the guilty plea and ordered a presentence investigation. ROA.379.

II. The district court declined to impose the safety valve

A Presentence Investigation Report (“PSR”) was issued by the probation officer on November 17, 2021. ROA.413-25. The report determined that Zeno’s offense level was 24 and his criminal history category II. ROA.530, ROA.536. In providing for a

criminal history category of II, the PSR determined that Zeno had a single prior conviction resulting in criminal history points:

42.	10/22/1998 (Age 31)	Possession Marijuana (Less than 50 lbs. Greater than 5 lbs.)/ 252nd Judicial District Court, Jefferson County, TX; Docket No.: 78083	06/28/2002: Pled guilty, 4A1.1(a) sentenced to 10 years imprisonment, suspended, fined \$1,500, \$250 court costs, 10 years under community supervision	3
			09/14/2006: Supervision revoked, sentenced to 3 years custody in the Institutional Division of the Texas Department of Criminal Justice (TDCJ), credit for time served	
			07/31/2008: Paroled	

ROA.533. This offense was committed nearly twenty years prior to the instant offense. *Compare* ROA.533 (prior offense committed on October 22, 1998), *with* ROA.527 (instant offense committed May 6, 2018).

With an offense level of 20 and a criminal history category of II, the PSR provided a sentencing guideline range of 57 to 71 months. ROA.545. The PSR adjusted the guideline range to 60 to 71 months because “the statutorily authorized minimum sentence of five years is greater than the minimum of the guideline range.” ROA.545.

Zeno filed a written objection to the PSR. ROA.549. Zeno objected to the PSR’s failure to apply the safety valve provision in 18 U.S.C. § 3553(f) to remove the mandatory minimum sentence of 60 months. PSR.552. Zeno set forth that he had met all five requirements of the safety valve:

1. He did not have more than 4 criminal history points. He also did not have a prior 2-point violent offense. § 3553(f)(1).
2. He did not use violence or credible threats of violence or possess a firearm or other dangerous weapon. § 3553(f)(2)
3. His offense did not result in death or serious bodily injury to any person. § 3553(f)(3)
4. He was not an organizer, leader, manager, or supervisor of others in the offense, nor was he engaged in a continuing criminal enterprise. § 3553(f)(4).
5. He truthfully provided information to the government concerning his own offense. § 3553(f)(5).

ROA.553-54. In Zeno's written objection, he acknowledged a circuit split (at that time) on the issue of whether § 3553(f)(1) should be read as a conjunctive or disjunctive list and argued that the district court should read the list in its natural, conjunctive meaning. ROA.554. The probation officer responded in writing to Zeno's objection. ROA.555. The probation officer disagreed with Zeno and made a legal argument that § 3553(f)(1) should not be read in its natural, conjunctive meaning and instead should be read in a way to exclude Zeno from relief. ROA.555-57.

Prior to the sentencing hearing, Zeno also filed a sentencing memorandum where he also argued to the district court that the safety valve applied to his case, and he should not be subject to the 60 months mandatory minimum. ROA.582-85. The government also filed a sentencing memorandum where it agreed with the probation officer's position that the safety valve should not apply to Zeno. ROA.595-98. The government acknowledged that Zeno qualified for each other provision of the safety valve. ROA.595.

Zeno was sentenced on February 24, 2022. ROA.169. At the hearing, the court heard argument from counsel regarding the safety valve application. ROA.390-94; App. 19-23. The district court overruled the objection. ROA.394; App. 23. The court stated that:

The defendant has a prior three-point offense as determined under the Sentencing Guidelines as reflected in paragraph 42 of the PSR. Because of this, the defendant does not meet the criteria for the new safety valve provision pursuant to 18 U.S.C. § 3553(f) and the court disagrees with the defendant's objection that one of subsection A, B, or C is not enough for the defendant to be barred from the safety valve provisions for the reasons given in the original opinion in the U.S. v. Garcon case and as expressed by the government in argument today.

ROA.397; App. 26.

III. Andre Zeno's arguments for a sentence below the statutory minimum

In connection with his argument in favor of the safety valve, Zeno presented several arguments supporting a sentence significantly below the 60 months mandatory minimum. In his sentencing memorandum, Zeno requested a variant sentence of 33 months imprisonment for the following mitigating reasons:

- Zeno was merely a drug courier, not a high-level trafficker, nor was he involved in selling cocaine.
- Zeno was addicted to cocaine and his addiction led to this crime as he would often receive some cocaine as payment for being a courier.
- Zeno cooperated with law enforcement and provided information on the individuals for whom he was a courier and their methods of transporting cocaine from Houston, Texas to Baton Rouge, Louisiana.
- Zeno had taken advantage of drug abuse programs while incarcerated pretrial and was maintaining his sobriety.

- Zeno had been steadily employed for the past 15 years as both a janitor and a crewman at a plant.
- Zeno had not been in trouble in over 20 years.
- The court should use a variance to provide Zeno the benefit of the two-level reduction in the defunct safety valve guideline provision U.S.S.G. § 5C1.2.

ROA.585-88. At the sentencing hearing, Zeno personally addressed the Court explaining that his present incarceration was needed to give him a wake-up call regarding his drug addiction and his actions in support of his addiction. ROA.399; App. 28. Counsel then argued to the Court that Zeno's status as a courier was mitigating and supported a lenient sentence because his guidelines and mandatory minimum were based upon the quantity of drugs found in his rental vehicle, even though those drugs did not belong to him and all he hoped was for a little bit of cocaine in exchange for driving the vehicle. ROA. 400-02; App. 29-31.

Given that the district court ruled that Zeno was not eligible under the safety valve, counsel for Zeno made the following statement to the district court:

So I just want to make the record that in my sentencing memo I did make variance arguments and I certainly don't want to forfeit those arguments. I don't want to say I'm not raising them anymore. I just want to make a record that those are additional things I would be addressing with the court if the court had discretion to go below 60 months in case that becomes an issue at some later date if there's a different ruling on the safety valve.

ROA.403; App. 32. The government argued that a guideline sentence would be appropriate in the case. ROA. 403-04; App. 32-33. The district court imposed a sentence of 60 months, the lowest sentence possible without the safety valve.

ROA.404; App. 33. The court commented on the letters of support submitted on behalf of Zeno and the fact that Zeno's employer was present in court during the sentencing hearing. ROA.404; App. 33. The court also commented that it felt Zeno was sincere in his statements to the court. ROA.404; App. 33.

The judgment was entered on March 4, 2022. ROA.170; App. 3. Zeno timely filed a notice of appeal on that same date. ROA.179.

IV. The Fifth Circuit decision

Zeno appealed to the United States Court of Appeals for the Fifth Circuit and filed his opening brief on June 27, 2022. The sole issue raised in his brief was whether the safety valve should apply to a defendant, like himself, who has only has a single prior 3-point offense. The government moved to suspend briefing in the case pending the ruling in another case at the Circuit, *United States v. Palomares*, No. 21-40247, which had already raised the same issue. *Palomares* was decided on November 2, 2022, and used a “distributive approach” to interpret § 3553(f)(1) and concluded that criminal defendants are “ineligible for safety valve relief under § 3553(f)(1) if they run afoul of any one of its requirements.” See *United States v. Palomares*, 52 F.4th 640, 647 (5th Cir. 2022). After the *Palomares* decision, Zeno’s pending case at the Fifth Circuit was summarily affirmed as foreclosed by *Palomares*. *United States v. Zeno*, No. 22-30112, 2023 WL 2423158, at *1 (5th Cir. Mar. 9, 2023) (unpublished); App. 1.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals held that a defendant is not eligible for safety-valve relief under 18 U.S.C. 3553(f)(1) if he has any single one of the criminal-history factors specified in the subparagraphs of that provision. App. 1. This Court recently granted certiorari in *Pulsifer v. United States*, No. 22-340 (Feb. 27, 2023), to consider whether that interpretation of Section 3553(f)(1) is correct. The Court should accordingly hold this petition for a writ of certiorari pending its decision in *Pulsifer* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Pulsifer v. United States*, cert. granted, No. 22-340, and then disposed of as appropriate in light of that decision.

Respectfully submitted,

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