NO: 22-851

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

UNITED STATES OF AMERICA,

Petitioner,
v.

JULIAN GARCON,

Respondent.

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

MEMORANDUM FOR RESPONDENT JULIAN GARCON

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QUESTION PRESENTED

Title 18 U.S.C. § 3553(f)(1), as amended by the First Step Act of 2018, provides that a district court must impose sentence without regard to any statutory minimum if, among other criteria, the district court finds at sentencing 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.

18 U.S.C. § 3553(f)(1) (emphasis added).

The question presented is: Whether the *en banc* Eleventh Circuit properly interpreted the word "and" in 18 U.S.C. § 3553(f)(1)(B), to have its ordinary, conjunctive meaning.

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OPINION BELOW

The opinion of the court of appeals is reported at *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (en banc).

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2022. The United States' petition for a writ of certiorari was filed on March 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

DISCUSSION

Title 18 U.S.C. § 3553(f)(1), as amended by the First Step Act of 2018, provides that a district court must impose sentence without regard to any statutory minimum if, among other criteria, the district court finds at sentencing that:

> The defendant does not have—
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> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
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18 U.S.C. § 3553(f)(1) (emphasis added).

In *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (en banc), the en banc Eleventh Circuit held that a defendant must have all three disqualifying criteria listed in 18 U.S.C. § 3553(f)(1), before he becomes ineligible for safety-valve relief. In an opinion authored by Chief Judge William Pryor, the *en banc* majority held that "a defendant runs afoul of the provision and loses eligibility for relief only if all three conditions in subsections (A) through (C) are satisfied." *Id.* at 1278. "That is, to lose eligibility for relief, a defendant must have 'more than 4 criminal history points, excluding any . . . 1-point offense,' together with 'a prior 3-point offense,' together with 'a prior 2-point violent offense.'" *Id.* (citation omitted). Therefore, "[b]ecause Garcon has a prior 3-point offense but does not have 4 criminal history points

(excluding any 1-point offense) or a prior 2-point violent offense, he is eligible for safety-valve relief." *Id*.

The Eleventh Circuit rejected the government's contention that a defendant who has "a prior 3-point offense," under 18 U.S.C. § 3553(f)(1)(B), and a "prior 2-point violent offense," under § 3553(f)(1)(C), will always have more "more than 4 criminal history points," as required by § 3553(f)(1)(A). *Garcon*, 54 F.4th at 1281. "To the contrary," the court recognized "at least two circumstances" in which a defendant could satisfy the requirements of §§ 3553(f)(1)(B) and (C), but still have no more than 4 criminal history points under § 3553(f)(1)(A). Specifically, a defendant could have either a prior two- or three-point offense that does not contribute to his criminal history score, because it is too old to qualify under the criminal history score computation rules in Guidelines. *See Garcon*, 54 F.4th at 1281-82. "The second circumstance in which a defendant could have two- and three-point offenses but fewer than five criminal history points occurs when the two- and three-point offenses are treated as a single sentence" under U.S.S.G. § 4A1.2(a)(2). *Garcon*, 54 F.4th at 1282.

The court recognized that this interpretation requires reading the "prior 3-point offense" and "prior 2-point violent offense" in § 3553(f)(1)(B) and (f)(1)(C), to "include offenses that do not contribute to the total criminal history score." *Id*. "[B]ut," the court found, "this reading is a function of the statutory text." *Id*. As the court explained, "[t]he guidelines are not framed around 'offenses'; they instead instruct courts to add points to the defendant's criminal-history score for his 'prior sentence[s] of imprisonment." *Id*. (citing U.S.S.G. § 4A.1.1). "So the meaning of 'a

prior ... offense' must come from section 3553(f), not from the guidelines." *Id.* Section 3553(f)(1)(A) "distinguishes between points associated with an 'offense'—points that may or may not count toward the criminal history score—and the final tally of 'criminal history points.'" *Id. See also* 18 U.S.C. § 3553(f)(1)(A) ("more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines"). The statute itself "distinguishes between 'havi[ing] ... criminal history points' and 'hav[ing] ... offense[s].'" *Id.* The text thus forecloses the government's argument that offenses should be considered under § 3553(f)(2) and (f)(3) only if they contribute to the defendant's final criminal history score. *See id.*

This interpretation of the statutory text was subsequently adopted by the Fourth Circuit in *United States v. Jones*, 60 F.4th 230, 238 (4th Cir. 2023), and has been endorsed by dissenting judges in the Fifth, Sixth, and Seventh Circuits. *See United States v. Palomares,* 52 F.4th 640, 655-656 (5th Cir. 2022) (Willet, J., dissenting); *United States v. Pace*, 48 F.4th 741, 763-64 (7th Cir. 2022) (Wood, J., dissenting); *United States v. Haynes*, 55 F.4th 1075, 1082-84 (6th Cir. 2022) (Griffin, J., dissenting). It is the only faithful reading of the text, and should be adopted by this Court as well.

2. The question presented is before the Court in *Pulsifer*

The United States correctly notes that the Court has recently granted certiorari to review a similar question regarding the proper interpretation of 18 U.S.C. § 3553(f)(1), in *Pulsifer v. United States*, *cert. granted*, No. 22-340 (U.S. Feb.

27, 2023). Therefore, Mr. Garcon concedes that it is appropriate for the Court to hold this case pending the outcome in *Pulisfer*. Mr. Garcon respectfully urges the Court to adopt the interpretation of § 3553(f)(1) applied by the Eleventh Circuit in *Garcon*, and argued by the petitioner in *Pulsifer*, as well as in the Brief of National Association of Federal Defenders as Amicus Curiae in Support of Petitioner, in that case.

CONCLUSION

Mr. Garcon concedes that it is appropriate to hold the United States' petition pending a decision in *Pulsifer*. Mr. Garcon respectfully urges the Court to adopt the interpretation of § 3553(f)(1) applied by the en banc Eleventh Circuit in *Garcon*, and argued by the petitioner in *Pulsifer*.

Respectfully submitted,

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