NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

HOUSHENG XIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The safety-valve statute, 18 U.S.C. § 3553(f), provides relief from the severe statutory minimum penalties for drug offenses. One requirement to qualify for the safety valve is that the defendant provide full and complete information about his conduct. See 18 U.S.C. § 3553(f)(5). The question presented by this case is the following:

> Do the findings embodied in a jury's verdict constrain a sentencing judge's ability to find that a defendant has provided full and truthful information about his conduct, and satisfied 18 U.S.C. § 3553(f)(5), even where the defendant did not testify at trial, but has later provided his account in claiming entitlement to the safety valve of § 3553(f)?

STATEMENT OF RELATED CASES

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United States v. Xian, No. 19-cr-00084-RPM (D. Colo.)
Judgment entered January 26, 2022

United States v. Xian, No. 22-1080 (10th Cir.)
Judgment entered March 12, 2024

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PRAYER

Petitioner, Huosheng Xian, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on March 12, 2024.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Xian, 2024 WL 1070654 (10th Cir. March 12, 2024), is found in the Appendix at A1. The Tenth Circuit's order denying rehearing is found in the Appendix at A3. The district court's oral order denying safety-valve eligibility is found in the Appendix at A4.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). The Tenth Circuit denied rehearing on July 30, 2024. Ninety days from July 30, 2024 is October 28, 2024, so this petition is timely.

STATUTORY PROVISION INVOLVED

This petition implicates 18 U.S.C.§ 3553(f), which allows a sentence outside of an otherwise applicable statutory minimum sentence in certain cases. Section 3553(f) provides as follows:

> **(f) Limitation on applicability of statutory minimum 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 mandatory 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 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.

18 U.S.C. § 3553(f).

STATEMENT OF THE CASE

Mr. Xian, who was born in Vietnam, lived from a very young age in China. He came to this country from China in late 2016 with his wife, Youlian Zhong, and their children. In the summer of 2018, the family was living at a house on Glencoe Street in Thornton, Colorado. Police executed a search warrant at the house early one morning and found more than 1,500 marijuana plants growing in the basement.

Mr. Xian and his wife were charged in a three-count indictment in the United States District Court for the District of Colorado. They were accused of (1) conspiring to manufacture, or to possess with intent to distribute, more than one thousand marijuana plants, (2) the substantive offenses that were the objects of the conspiracy, and (3) using and maintaining a house for the purpose of manufacturing and distributing marijuana.

The couple was tried to a jury. Neither Mr. Xian nor Ms. Zhong testified at the trial. A jury convicted them of all three offenses.

Two of the convictions carried a mandatory minimum term of imprisonment of ten years. Mr. Xian and Ms. Zhong sought the benefit of

the "safety valve" of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2(a)(5), which allows for a sentence below the statutory minimum.

To be eligible for the safety valve, Mr. Xian and his wife had to meet five statutory criteria. 18 U.S.C. § 3553(f)(1)-(5). The government agreed they met each of the first four. But it claimed their written proffer letter and associated addendum did not satisfy the fifth one. That last criterion -- whose application is at issue here -- requires that a defendant "truthfully provide[] to the Government all information and evidence [he or she] has concerning the offense or offenses that were part of the same course of conduct." 18 U.S.C. § 3553(f)(5).

On the only disputed eligibility requirement for the safety valve, the district court considered the couple's position to be inconsistent with the jury verdict. The mental state the couple admitted, the court reasoned, was less than that *mens rea* of intent necessarily found by the jury in its verdict. United States v. Zhong, 95 F.4th 1296, 1300 (10th Cir. 2024). Although noting this inconsistency, the district court did not rely on it as a reason to deny safety-valve eligibility. Id. Instead, the district court invoked other supposed defects in the proffer. Id. at 1299-1300.

Mr. Xian appealed to the United States Court of Appeals for the Tenth Circuit. He challenged only the district court's determination that he was ineligible for the safety valve. He explained at length why the reasons given by the district court could not support that result. Some of the reasons the district court gave applied only to Ms. Zhong, some were legally irrelevant to safety-valve eligibility, and some were clearly erroneous.

The particulars of those challenges do not matter here, for the Tenth Circuit did not consider any of them, and it is only that refusal that is at issue in this petition. The Tenth Circuit, in an unpublished decision, held Mr. Xian to be categorically barred from qualifying for the safety valve because his proffer did not admit the mental state found by the jury in convicting him. A2. In doing so, the Tenth Circuit applied its precedential decision in the case of Mr. Xian's wife, Youlian Zhong, which it issued the same day.

In Zhong, the Tenth Circuit held that "a defendant who is convicted of having a certain state of mind must provide information about that state of mind to the Government in order to qualify for safety-valve eligibility

under § 3553(f)." Zhong, 95 F.4th at 1301. The court of appeals reasoned that the proffer letter and addendum did not show that Ms. Zhong had the intent needed to commit the crimes for which the jury convicted. Id. at 1302, 1303. It continued that Ms. Zhong "cannot have disproved by a preponderance of the evidence what the jury found beyond a reasonable doubt." Id. at 1303. In short, the Tenth Circuit held in Zhong, "where the jury convicts a defendant of a crime involving mens rea," a defendant cannot satisfy her disclosure obligation for the safety valve unless she "provide[s] the Government with information sufficient to prove such mens rea." Id. at 1304.

Mr. Xian had argued that the jury did not reject his account in the proffer letter and addendum as he did not testify at trial. That is, the jury did not pass on the obviously broader set of facts -- including those as to his state of mind -- that were before the sentencing court. What the jury decided should thus not be conclusive on issues (like his *mens rea*) that bore on eligibility for the safety valve. The panel in his case, bound by Zhong, did not address this point.

Mr. Xian sought rehearing by the full Tenth Circuit. In his request for *en banc* review, he explained that the decision in Zhong conflicted with the decision of both the Ninth Circuit in United States v. Sherpa, 110 F.3d 656 (9th 1996), and the Seventh Circuit in United States v. Thompson, 76 F.3d 166 (7th Cir. 1996). The Tenth Circuit denied rehearing. A3.

REASONS FOR GRANTING THE WRIT

This Court should grant review to decide an important question, which has divided the courts of appeals, about the ability of a sentencing judge to make findings under the safety-valve statute, which allows for sentencing below a statutory, mandatory minimum term.

This case raises a consequential question about the safety-valve statute, which provides relief from the stiff mandatory minimum sentences of the federal drug statutes. E.g., 21 U.S.C. § 841(b)(1)(A) (minimum sentence of ten years for certain first offenders). The question has split the circuits. It is one that may arise in a significant number of cases each year. And it is one that -- if answered wrongly, as by the Tenth Circuit in this case -- may cause defendants to spend many more years in prison than they otherwise would have. Given the split among the courts of appeals, and the liberty interests at stake, this Court should grant certiorari.

A. The circuits are divided on whether the requirement that a defendant provide full and truthful information about the offense can be met where what the defendant says is inconsistent with the jury's verdict.

To be eligible for the benefits of the safety valve of 18 U.S.C. § 3553(f), a defendant must tell all he knows about the offense of conviction. Two

circuits do not require that what the defendant says be consistent with the jury's verdict. They permit a sentencing judge to find there has been such disclosure even if the jury's verdict embodies a rejection of some of what the defendant has said. United States v. Sherpa, 110 F.3d 656 (9th Cir. 1996); United States v. Thompson, 76 F.3d 166, 168 (7th Cir. 1996).

On the other hand, two circuits (including the Tenth Circuit, as reflected in this case), give preclusive effect to the jury verdict. That is, they require what the defendant says to be consistent with what the jury found by its verdict. A2; United States v. Zhong, 95 F.4th 1296, 1300 (10th Cir. 2024); United States v. Reynoso, 239 F.3d 143 (2d Cir. 2000). They do so even though thee sentencing judge will have access to information that may be far broader than what was before the jury. Indeed, the sentencing judge in this case had Mr. Xian's account; the jury did not.

Other circuits have acknowledged the split. United States v. Moreno-Gonzalez, 662 F.3d 369, 375 (5th Cir. 2011); United States v. Honea, 660 F.3d 318, 328 (8th Cir. 2011). With the split both well-entrenched and of long-standing, this Court's intervention is needed to resolve it. Only this court

can ensure that the significant benefits of the safety valve do not depend in this regard (as they do now) on the happenstance of geography.

1. The Seventh and Ninth Circuits do not consider a jury verdict to constrain a defendant's ability to make the required § 3553(f) showing.

Section 3553(f), the criterion of the safety valve at issue here, requires the defendant to make a full and truthful disclosure of the offense. The most forceful articulation of the position that the jury's verdict does not constrain a defendant's ability to make that showing, and the rationale for it, comes in the Ninth Circuit's decision in United States v. Sherpa, 110 F.3d 656 (9th Cir. 1996).

In Sherpa, the defendant testified at trial and denied he was aware that there was heroin in a suitcase he brought to this country, and that formed the basis for the charges against him. Id. at 658, 659. By convicting him of the charges, "'the jury found to the contrary.'" Id. at 659 (quoting district court). The district court nevertheless found that Mr. Sherpa, who had told the same story throughout the proceedings, was eligible for the safety valve. Id.

The Ninth Circuit affirmed. It rejected the government's contention that the jury's verdict foreclosed a finding that Mr. Sherpa had been truthful in denying his knowledge of the heroin. Id. The court noted that § 3553(f) "requires a determination by the judge, *not the jury*, as to the satisfaction of the [statutory] criteria." Id. at 660 (emphasis in original). And it stressed that "[t]he judge is privy to far more information than the jury and is therefore in a much different posture to assess the case and to determine whether the defendant complies with § 3553(f)." Id. This was so even where the jury heard the same account that was the basis for safety-valve eligibility. Id. at 659. The Ninth Circuit therefore held "that the safety valve requires a separate judicial determination which need not be consistent with a jury's findings." Id. at 662.

The Seventh Circuit also allows the sentencing judge to reach a different result than the jury did, and does not give controlling effect to the jury's findings. In United States v. Thompson, 76 F.3d 166, 168 (7th Cir. 1996), the defendant was convicted of conspiring to distribute cocaine and of knowingly distributing cocaine. She testified at trial that she was unaware that a bag she handed to an undercover officer contained cocaine,

but the jury convicted and so rejected her contention. Id. The sentencing judge nevertheless found her eligible for the safety valve based on evidence of her mental abilities not presented to the jury. Id. at 171.

On the government's appeal, the Seventh Circuit affirmed the district court's grant of safety-valve relief. Id. The Seventh Circuit held that "the district, in its factfinding role" did not err in finding Ms. Thompson to be "forthright within the range of her abilities." Id. So, even though what Ms. Thompson had said clashed with the jury verdict of guilty of the charged drug offenses, it could be full-and-truthful disclosure under § 3553(f)(5).

2. The Second and Tenth Circuits take the contrary position that a defendant's § 3353(f) showing cannot be inconsistent with the jury's findings.

The Second and Tenth Circuits do not share the view of the Seventh and Ninth Circuits. Instead, they have concluded that a jury's verdict constrains the ability of the sentencing judge to make § 3553(f) findings.

The Second Circuit took this position in United States v. Reynoso, 239 F.3d 143 (2d Cir. 2000). Ms. Reynoso, who was mentally impaired, pleaded guilty to drug charges. Id. at 145. She argued she satisfied § 3553(f)(5)

because she subjectively believed what she told prosecutors was true, even though that was not in fact the case, an argument the court of appeals ultimately rejected. Id. at 149.

In arriving at this conclusion, the Second Circuit addressed Sherpa and Thompson, which Ms. Reynoso claimed supported her argument. In doing so, the Second Circuit wrote that "to the extent that Sherpa and Thompson are arguably on point," those cases were "wrongly decided and [it] decline[d] to follow them." Id. at 149-50.

There is also the Tenth Circuit, the jurisdiction from which this case arises. The Tenth Circuit's first decision relevant to the question presented here was United States v. De La Torre, 599 F.3d 1198 (10th Cir. 2010). Mr. De La Torre based his § 3553(f) showing on his trial testimony. The court noted that "a defendant's trial testimony most often includes a denial of the essential factual elements of guilt and directly conflicts with the jury's finding of guilt. Id. at 1206. And this, the court continued, would almost always preclude a favorable § 3553(f) finding. Id. As the Tenth Circuit put it, "[n]o reasonable defendant could claim safety-valve eligibility based on trial testimony that necessarily contradicts the conviction itself." Id. The

rule did not apply to Mr. De La Torre, and his case was remanded for resentencing, only because a "novel circumstance" about the nature of his offense made it "conceivable that a factfinder could believe [the defendant's] testimony without necessarily contradicting the conviction." Id.

In De La Torre, the contention was that trial testimony the jury heard satisfied the requirement of § 3553(f). The Tenth Circuit later applied that case to deny a defendant's claim that his trial testimony and proffer (in both of which he denied involvement in a drug conspiracy) made out the § 3553(f) showing. United States v. Montijo-Dominguez, 771 F. App'x 870 (10th Cir. 2019). In doing so, the court described its holding in De La Torre as being that no reasonable defendant could claim that trial testimony the jury had rejected could make out safety-valve eligibility. Id. at 877. It then declared this was contrary to the [Ninth Circuit's] holding in Sherpa." Id.

Here, in the case of Mr. Xian's wife and codefendant, the Tenth Circuit applied this reasoning where the defendant did not testify at trial. In Ms. Zhong's case, the Tenth Circuit concluded that the proffer and associated addendum did not show an intent to engage in criminal

conduct, while to convict the jury had to find Ms. Zhong acted with such intent. Zhong, 95 F.4th at 1302. The court held this foreclosed safety-valve relief. It explained that "[b]ecause Zhong was convicted of crimes of intent, and because she did not provide information sufficient to show her intent, she did not provide 'all information' within the meaning of § 3553(f)(5). Id. Relying on the precedential decision in Zhong, the Tenth Circuit held in Mr. Xian's appeal that, for the same reason, he was foreclosed from satisfying § 3553(f). A2

Of course, the jury did not hear the account Mr. Xian gave in the proffer letter and addendum. Still, the Tenth Circuit's rule means there could be no finding by the sentencing judge -- who did have the benefit of Mr. Xian's account -- that Mr. Xian was providing all he knew when he denied having the *men rea* that the jury found.

B. The question presented potentially applies to a large number of defendants each year and, in each such case, the incorrect conclusion of the Second and Tenth Circuits may result in the defendant serving much longer in prison.

The question presented has not only divided the circuits, but is also an important one. The question may arise in a significant number of cases

each year. And when it does, the answer that obtains in the Second and Tenth Circuits may result in the affected defendant being wrongly denied safety-valve eligibility, and serving far longer in prison than he or she otherwise would.

As to the frequency with which the question presented may arise, in 2022, there were just shy of 12,600 defendants charged in federal court with drug offenses that carry a mandatory minimum sentence. U.S. Sentencing Comm'n, 2022 Annual Report and Sourcebook of Federal Sentencing Statistics, 127 (2023) (Table D-13). Five thousand forty-six of those defendants were sentenced with the benefit of the safety valve. Id. Data suggests that about 2% of federal criminal defendants go to trial and that 83% of those who do are convicted. John Gramlich, Only 2% of federal criminal defendants go to trial, and most who do are found guilty, Pew Research Ctr. (2019). If every defendant who faces a mandatory minimum sentence and goes to trial (roughly 12,600 people) seeks safety-valve relief, and assuming that those who go to trial maintain their innocence, the question presented will arise in over 200 cases a year.

As for how consequential the question is for each defendant in those cases, the guideline range without the statutory mandatory minimum is typically much lower than that minimum term. Consider this case as an example. The required statutory minimum term of imprisonment here was ten years, or 120 months. Mr. Xian's advisory guideline range without that minimum was 63 to 78 months.

That is, the 63-month bottom of the range was just over *half* of the lowest possible sentence the district court was obligated to impose on Mr. Xian with the mandatory minimum. Even the 78-month top of the range, was *less than two-thirds* of the 120 months that was the lowest term of imprisonment the district court had to impose with the mandatory minimum.

The government itself thought that, were it not for the ten-year term that the statute required, a sentence of five years (that is, 60 months) was appropriate. The district judge also considered the statutory, mandatory minimum to be far from a just and appropriate sentence. He proclaimed the mandatory minimum of ten years to be "heavy handed as hell," and "brutal."

C. This case is an excellent vehicle to decide the important question presented here.

This case is an ideal vehicle for this Court to decide whether the Seventh and Ninth Circuits have the better of the entrenched circuit split (as Mr. Xian contends), or whether the Second and Tenth Circuits do. The Tenth Circuit expressly relied on its authority that the jury findings bars a sentencing judge from reaching a different result.

This case also embodies the most extreme application of the rule of the Second and Tenth Circuits, and one that it also not uncommon. It occurs in the situation where the defendant (like Mr. Xian) does not testify at trial and continues to maintain his innocence at sentencing. In almost all such cases, the account the non-testifying defendant offers in support of eligibility for the safety valve will be inconsistent with the verdict (often, as here, on the element of *mens rea*). The rule applied in the Second and Tenth Circuits will, in this not-unusual situation, categorically bar the district court from crediting the defendant's account and from finding that he is eligible for the significant benefits of the safety valve.

Of course, the district court did not rely on the inconsistency between Mr. Xian's proffer and the jury verdict. Rather, the district court found that

Mr. Xian's account did not for other reasons satisfy his obligation to make truthful disclosure of all he knew about the offenses. But the question presented in this petition does not just matter in the general case, but also matters greatly to Mr. Xian.

The Tenth Circuit noted that Mr. Xian had raised numerous bases for reversal of the district court's finding that he was not eligible for the safety valve. A2. But given that the rule of Zhong foreclosed relief, id., the Tenth Circuit determined that it "need not reach Xian's claims of error," id. Were it not for the Tenth Circuit's resolution of the question presented in this petition, Mr. Xian would have obtained appellate review of his contentions that the district court had erred in its finding that he did not satisfy § 3553(f), and that he was therefore entitled to be sentenced with the benefit of the safety valve and without regard to the statutory minimum term.

CONCLUSION

This Court should grant Mr. Xian a writ of certiorari.

Respectfully submitted,

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