

No. 22-6391

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IN THE SUPREME COURT OF THE UNITED STATES

NONAMI PALOMARES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in order for a defendant to satisfy the prerequisite for "safety-valve" sentencing relief in 18 U.S.C. 3553(f)(1), a court must find that the defendant does not have more than 4 criminal history points (excluding any criminal history points resulting from a 1-point offense); does not have a prior 3-point offense; and does not have a prior 2-point violent offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 52 F.4th 640.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2022. The petition for a writ of certiorari was filed on December 21, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of

possessing one kilogram or more of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Pet. App. 37a. The district court sentenced petitioner to 120 months of imprisonment, to be followed by five years of supervised release. Id. at 38a-39a. The court of appeals affirmed. Id. at 1a-36a.

1. Under 18 U.S.C. 3553(f), defendants convicted of specified drug offenses “may obtain ‘safety valve’ relief” if they satisfy certain requirements. Dorsey v. United States, 567 U.S. 260, 285 (2012) (appendix B to the opinion of the Court). Such relief allows a district court to impose a sentence below the otherwise-applicable statutory minimum. 18 U.S.C. 3553(f).

Before 2018, safety-valve relief was available only if the court first found that “the defendant d[id] not have more than 1 criminal history point, as determined under the sentencing guidelines.” 18 U.S.C. 3553(f)(1) (2012). The statute set forth other eligibility requirements, all relating to the offense of conviction, in four additional paragraphs. 18 U.S.C. 3553(f)(2)-(5) (2012).

Section 402 of the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, 132 Stat. 5221, replaced the existing criminal-history requirement with a new Section 3553(f)(1). As amended, Section 3553(f) now provides:

Notwithstanding any other provision of law, in the case of an offense under [21 U.S.C. 841, 846, or other federal drug laws], the court shall impose a sentence \* \* \* 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 \* \* \* .

18 U.S.C. 3553(f).

2. In August 2020, petitioner traveled from Mexico to a border-patrol checkpoint near Falfurrias, Texas, where a drug-sniffing dog alerted to petitioner's suitcase. C.A. ROA 124. A search of the suitcase uncovered six bundles of heroin hidden within various items. Id. at 125. Petitioner stated that an

unidentified person in Mexico had forced her to transport the drugs. Ibid. Petitioner was arrested. Ibid.

A federal grand jury in the Southern District of Texas indicted petitioner on one count of conspiring to possess one kilogram or more of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846; and one count of possessing one kilogram or more of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A). Indictment 1-2. Pursuant to a plea agreement, petitioner pleaded guilty to the possession count, and the government agreed to dismiss the conspiracy count. Plea Agreement 1; D. Ct. Doc. 40, at 19-21 (May 31, 2021). Because of the drug quantity involved, petitioner faced a statutory-minimum term of imprisonment of 10 years. 21 U.S.C. 841(b)(1)(A).

At sentencing, the district court found that petitioner had a prior 3-point offense. Pet. App. 46a, 50a. The court then explained that, for a defendant to be ineligible for such relief, “[o]nly one” of the criminal-history factors specified in the subparagraphs of Section 3553(f)(1) “need[s] to be present.” Id. at 48a. And the court accordingly determined that petitioner was ineligible for safety-valve relief. Id. at 50a. The court sentenced petitioner to 120 months of imprisonment. Id. at 58a.

3. The court of appeals affirmed. Pet. App. 1a-36a. The court recognized that Section 3553(f)(1) uses “‘and’” as a “conjunctive,” but in the “‘distributive’” sense of the word, id.

at 4a (citation omitted), such that “the phrase ‘does not have’ independently applies” to each subparagraph of the provision, id. at 13a. The court accordingly explained that, “[t]o be eligible for safety valve relief, a defendant must show that she does not have more than 4 criminal history points, does not have a 3-point offense, and does not have a 2-point violent offense.” Id. at 3a; see id. at 17a-21a (Oldham, J., concurring in the judgment).

Judge Willett dissented. Pet. App. 23a-36a. In his view, Congress would have used the word “or,” not “and,” if it had wanted Section 3553(f)(1)’s prefatory phrase “to independently modify” each subparagraph. Id. at 25a.

#### DISCUSSION

Petitioner contends (Pet. 16-21) that a defendant is eligible for safety-valve relief under 18 U.S.C. 3553(f)(1) so long as he does not have every single one of the criminal-history factors specified in the subparagraphs of that provision. The question presented by petitioner is the same as the question presented in the petition for a writ of certiorari in Pulsifer v. United States, No. 22-340 (filed Oct. 7, 2022). The government has filed a response to the petition in Pulsifer in which it takes the position that the question warrants this Court’s review in that case. See Gov’t Cert. Resp. Br. at 7-13, Pulsifer, supra (No. 22-340). For the reasons stated in that response, the best course is for the Court to grant certiorari in Pulsifer and hold the petition in

this case pending the Court's decision on the merits. See id. at 12-13.

Petitioner states that the district court in Pulsifer granted the defendant there an 18-month reduction below the statutory minimum "so as to reflect [the] defendant's substantial assistance" under 18 U.S.C. 3553(e). See Pet. 26-27. But the court in Pulsifer would have had authority to impose an even lower sentence "without regard to [the] statutory minimum," 18 U.S.C. 3553(f), if the defendant had satisfied the requirements for safety-valve relief under Section 3553(f), and the safety-valve question was therefore squarely presented, considered, and decided in that case. The petition for a writ of certiorari in Pulsifer thus presents a suitable vehicle for resolving the question presented. See Gov't Cert. Resp. Br. at 12, Pulsifer, supra (No. 22-340). And that petition was filed more than two months before the petition here. See, e.g., Pugin v. Garland, No. 22-23 (Jan. 13, 2023) (granting the earlier-filed certiorari petition in Pugin rather than the later-filed certiorari petition in Silva v. Garland, No. 22-369, raising a similar issue).



## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's consideration of the petition for a writ of certiorari in Pulsifer v. United States, No. 22-340 (filed Oct. 7, 2022), and then disposed of as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

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