No. 19-109

# In the Supreme Court of the United States

GIOVANNI MONTIJO-DOMINGUEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

NOEL J. FRANCISCO
*Solicitor General*
*Counsel of Record*
BRIAN A. BENCZKOWSKI
*Assistant Attorney General*
SCOTT A.C. MEISLER
*Attorney*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Under 18 U.S.C. 3553(f)(5), district courts are authorized to sentence certain drug offenders to a term of imprisonment below the otherwise-applicable statutory minimum if, among other things, "not later than the time of the sentencing hearing" the offender "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." 18 U.S.C. 3553(f)(5).

The question presented is whether a sentencing court may find that a defendant has satisfied this truthful-disclosure requirement based on statements by the defendant that contradict the jury's finding beyond a reasonable doubt that the defendant knowingly participated in a drug conspiracy.

**ADDITIONAL RELATED PROCEEDINGS**

United States District Court (D. N.M.):

*United States* v. *Montijo-Dominguez*, No. 14-cr-3758 (Dec. 29, 2017)

*United States* v. *Mendoza-Alarcon*, No. 14-cr-3758 (Feb. 16, 2018)

United States Court of Appeals (10th Cir.):

*United States* v. *Montijo-Dominguez*, No. 18-2008 (Apr. 25, 2019)

*United States* v. *Mendoza-Alarcon*, No. 18-2036 (Apr. 25, 2019)

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Constitution, statutes, rules, and guideline:

Statutes, rules, and guideline—Continued: Page



Miscellaneous:

# In the Supreme Court of the United States

No. 19-109

GIOVANNI MONTIJO-DOMINGUEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINION BELOW

The order and judgment of the court of appeals (Pet. App. 1a-14a) is not published in the Federal Reporter but is reprinted at 771 Fed. Appx. 870.

## JURISDICTION

The judgment of the court of appeals was entered on April 25, 2019. The petition for a writ of certiorari was filed on July 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of conspiring to possess with the intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 841(b)(1)(A) and 846. Judgment 1. The district court sentenced petitioner to 120 months of impris-

onment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-14a.

1. On October 7, 2014, petitioner and co-defendant Luis Mendoza-Alarcon were arrested after they attempted to buy six kilograms of cocaine from undercover agents of the Homeland Security Investigations unit (HSI) of the Department of Homeland Security. Gov't C.A. Br. 1; Presentence Investigation Report (PSR) ¶¶ 13-21. In the days preceding the arrest, the undercover agents had spoken by phone with Mendoza-Alarcon —whom they knew as "Leche" or "Lichi"—and agreed to sell him the cocaine at the price of $25,000 per kilogram, for a total of $150,000. Gov't C.A. Br. 2; PSR ¶ 14. Based on Mendoza-Alarcon's familiarity with coded language commonly used in the drug trade, the agent who first spoke with Mendoza-Alarcon understood him to be an experienced drug trafficker. Gov't C.A. Br. 2; C.A. ROA 902-906.

At the planned time, Mendoza-Alarcon and petitioner arrived for the drug deal at a Walmart parking lot in Albuquerque, New Mexico. PSR ¶¶ 14, 15. Mendoza-Alarcon was the passenger in a Chevy Tahoe driven by petitioner. PSR ¶ 15. Upon arriving, petitioner drove the vehicle through the parking lot in a pattern that agents identified as a counter-surveillance measure designed to detect the presence of law enforcement. Pet. App. 3a; Gov't C.A. Br. 2. Petitioner and Mendoza-Alarcon engaged in approximately 12 minutes of negotiation with the agents over where they would make the exchange, where the drugs were, and where to check (or "try * * * out") the cocaine, and potential future dealings with the drug suppliers. Gov't C.A. Br. 2-3; PSR

¶ 15. Petitioner then handed the agents $150,000 in cash shrink-wrapped in plastic. Pet App. 4a; PSR ¶ 16.

After petitioner handed over the money, Mendoza-Alarcon entered a second car that contained the cocaine and indicated that the transaction was complete. Pet. App. 4a; PSR ¶ 16. At that point, a separate group of agents in marked police vehicles, with lights flashing and sirens on, approached to arrest petitioner and Mendoza-Alarcon. PSR ¶ 17. Petitioner—who had been sitting with one of the undercover agents—made a statement of surprise and fled on foot. *Ibid.*; Gov't C.A. Br. 3-4. Agents eventually arrested petitioner after he had jumped a chain-link fence lined with barbed wire and continued to run when the agents identified themselves as police and shouted "stop." Gov't C.A. Br. 4; C.A. ROA 1226.

2. A federal grand jury returned an indictment charging petitioner and Mendoza-Alarcon with conspiring to possess with the intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 841(b)(1)(A) and 846. Superseding Indictment 1-3.[1] In a pretrial debriefing with the government, petitioner denied any knowledge that the transaction in the Walmart parking lot was going to involve exchanging cash for cocaine. D. Ct. Doc. 239-1, at 1-3 (Oct. 31, 2017). He asserted that he understood himself to be helping a friend (Mendoza-Alarcon) who was the victim of extortion—specifically, that a drug-cartel member named Lazaro had threatened harm to Mendoza-Alarcon's daughter unless Mendoza-

[1] Petitioner was also charged with illegal reentry after being removed from the United States, in violation of 8 U.S.C. 1326. Superseding Indictment 3. The district court severed that charge for purposes of trial, and petitioner ultimately pleaded guilty to it. Pet. 5 n.1; Pet. App. 25a.

Alarcon gathered up his savings and drove to meet with unknown people. *Id.* at 2. Petitioner told the government that he did not hear or participate in Mendoza-Alarcon's negotiations with the undercover agents in the parking lot and that he never saw the police as they approached to make the arrests. *Id.* at 2-3.

At petitioner's joint trial with Mendoza-Alarcon, the government presented testimony from the HSI agents who participated in the undercover operation, as well as recordings of the agents' calls with Mendoza-Alarcon and video recordings of the transaction in the Walmart parking lot. Gov't C.A. Br. 2-4. At the close of the government's case, the district court denied petitioner's motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29. C.A. ROA 1250-1254. Petitioner and Mendoza-Alarcon then testified in their own defense. *Id.* at 1695-1712, 1726-1855 (petitioner); *id.* at 1255-1294, 1301-1485, 1517-1582 (Mendoza-Alarcon). As relevant here, petitioner largely repeated the account he had given in his pretrial debriefing. He admitted to realizing at some point during the transaction that Mendoza-Alarcon had not told him everything about the transaction in which he was participating, *id.* at 1778, 1845, but denied ever knowing or realizing that the transaction was a drug deal involving distribution-level quantities of cocaine, *id.* at 1778.

Based on the testimony about threats of harm to Mendoza-Alarcon's daughter, the district court instructed the jury on the affirmative defense of duress or coercion. D. Ct. Doc. 195, at 10 (June 1, 2017). The court also instructed the jury that, to find petitioner guilty of participating in the drug conspiracy, the jury had to find that petitioner knew the essential nature of the conspiracy and "knowingly and voluntarily involved

[himself] in the conspiracy." *Id.* at 6. After the jury found petitioner and Mendoza-Alarcon guilty, the court denied petitioner's post-trial motion for judgment of acquittal under Rule 29 or, in the alternative, for a new trial under Rule 33. D. Ct. Doc. 215, at 1-6 (July 13, 2017). The court found sufficient evidence to support petitioner's conspiracy conviction and, in particular, that the jury rationally inferred petitioner's knowledge from the circumstantial evidence that had been introduced. *Id.* at 2-4.

3. The presentence report prepared by the Probation Office determined that petitioner was subject to a statutory-minimum sentence of 120 months of imprisonment based on the jury's verdict and that petitioner was not eligible for a sentence below the minimum under the safety-value statute, 18 U.S.C. 3553(f). See PSR ¶ 80; PSR Addendum 3. Under Section 3553(f) and the corresponding sentencing guideline, district courts are authorized to sentence defendants convicted under certain drug statutes "without regard to any statutory minimum sentence, if the court finds at sentencing"—and after hearing a recommendation from the government—that five criteria have been met. 18 U.S.C. 3553(f); see Sentencing Guidelines § 5C1.2 (2016). Those criteria include that, "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)(5).[2]

---

[2] At the time of petitioner's offense, the other four criteria were:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or

Petitioner objected to the presentence report, arguing that he had provided all the information he had and that the jury's verdict did not preclude a finding that he had testified truthfully for purposes of Section 3553(f)(5). Pet. App. 6a. The government responded that petitioner was not entitled to safety-valve relief because a finding that petitioner had been truthful would be inconsistent with the jury's determination beyond a reasonable doubt that petitioner knowingly participated in the drug conspiracy. D. Ct. Doc. 238, at 1-19 (Oct. 31, 2017).

The district court rejected petitioner's safety-valve argument and sentenced him to the statutory-minimum term of 120 months of imprisonment. Pet. App. 15a-27a. The court observed that it had "analyzed everything as best [as it] could to see whether or not [petitioner] was eligible for the safety valve." *Id.* at 18a. The court stated that it "had no choice but to conclude that he is not eligible," because if it "concluded that [petitioner] had fully and completely and truthfully debriefed, [it] would essentially find contrary to the jury verdict." *Ibid.*; *id.* at 22a ("[T]o find that he truthfully debriefed would require me to reach a finding that is contrary to the jury verdict."). In making that observation, the court reviewed the facts presented at trial and reiterated its previous determination that "those facts * * *

---

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; and (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.

18 U.S.C. 3553(f)(1)-(4) (2012).

justify the jury's verdict." *Id.* at 20a. The court found that the verdict "could not [be] reconcile[d]" with relief under "the safety valve." *Id.* at 18a.

4. The court of appeals affirmed in an unpublished order. Pet. App. 1a-14a.

As relevant here, the court of appeals first rejected petitioner's contention "that the jury could plausibly have credited his testimony as truthful despite its guilty verdict." Pet. App. 12a; see *id.* at 12a-13a. The court agreed with the district court that "the jury necessarily must have found that [petitioner] knowingly participated in a conspiracy with" Mendoza-Alarcon and thus necessarily "found his testimony to be untruthful." *Id.* at 13a.

The court of appeals also determined that the district court had committed no legal error in declining to grant safety-valve relief based on a finding that would contradict the jury's verdict. Pet. App. 13a-14a. The court of appeals acknowledged petitioner's reliance on *United States* v. *Sherpa*, 110 F.3d 656 (9th Cir. 1996), "which allowed a district court to apply safety-valve relief notwithstanding a jury's finding that a defendant testified untruthfully," Pet. App. 13a. But the court noted that its "case law diverges from that of the Ninth Circuit" and that it had previously stated that "[n]o reasonable defendant could claim safety-valve eligibility based on trial testimony that necessarily contradicts the conviction itself." *Id.* at 14a (quoting *United States* v. *De La Torre*, 599 F.3d 1198, 1206 (10th Cir.), cert. denied, 562 U.S. 898 (2010)) (brackets in original). The court explained that because petitioner had "denied his involvement in a conspiracy both on the witness stand" and in debriefings with the government, "the district court could not have granted him safety-valve relief without directly

undermining the jury's verdict that he knowingly conspired with" Mendoza-Alarcon. *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 1-2, 8-20) that the court of appeals erred in determining that he was not entitled to safety-valve relief under 18 U.S.C. 3553(f) and that this Court's review is necessary to resolve a circuit conflict on "whether a district court may grant safety-valve relief under [Section] 3553(f) from a mandatory minimum sentence when the factual findings necessary to support such relief are inconsistent with the jury's verdict," Pet. 8. Those contentions lack merit. The court of appeals correctly determined that the district court could not grant petitioner safety-valve relief based on statements by petitioner that contradicted the jury's finding beyond a reasonable doubt that petitioner knowingly participated in a drug-distribution conspiracy. And although a narrow division of authority exists on the question presented, that question has arisen infrequently in the 25 years since the safety-valve statute was passed and is outcome determinative in an exceedingly small set of drug prosecutions. Further review of the court of appeals' unpublished decision is therefore unwarranted.

1. a. The court of appeals correctly determined that petitioner was not eligible for safety-valve relief when a finding that he made the truthful disclosures required under Section 3553(f)(5) would necessarily contradict the jury verdict. Pet. App. 13a-14a. That determination follows directly from the "non-contradiction principle," which "prohibits a sentencing court from finding a fact that is inconsistent with any of the findings that are necessarily implicit in the jury's guilty verdict." *United States* v. *Slaton*, 801 F.3d 1308, 1319 (11th Cir. 2015) (collecting cases from the First, Fourth, Sixth, Seventh,

and Eighth Circuits). Under that principle, the jury's "verdict controls unless the evidence is insufficient or some procedural error occurred; it is both unnecessary and inappropriate for the judge to reexamine, and resolve in the defendant's favor, a factual issue that the jury has resolved in the prosecutor's favor beyond a reasonable doubt." *United States* v. *Rivera*, 411 F.3d 864, 866 (7th Cir.), cert. denied, 546 U.S. 966 (2005). The principle respects the jury's role as a factfinder of constitutional stature, see U.S. Const. Amend. VI, and is consonant with the distinct standards of proof that govern at the guilt and sentencing phases of federal criminal prosecutions, see *United States* v. *Campos*, 362 F.3d 1013, 1016 (8th Cir. 2004) ("It is axiomatic that a fact proved beyond a reasonable doubt cannot simultaneously be disproved by a preponderance of the evidence.").[3]

The courts of appeals have applied the noncontradiction principle for decades in reviewing multiple aspects of federal sentencing. The contexts in which they have done so include findings that district judges make in determining a defendant's range under the Sentencing Guidelines, see, *e.g.*, *Slaton*, 801 F.3d at 1318-1319

---

[3] In light of these differing standards of proof, the noncontradiction principle is fully consistent with this Court's precedents establishing that sentencing judges may increase a defendant's sentence, within statutory limits, based on facts that a jury declined to find beyond a reasonable doubt in "return[ing] a general verdict of not guilty," *United States* v. *Watts*, 519 U.S. 148, 155 (1997) (per curiam). As the Eleventh Circuit has explained, while "a court's finding that a fact has been proven by a preponderance of the evidence is consistent with a jury's finding that the same fact has *not* been proven beyond a reasonable doubt," "if the jury verdict establishes [that the fact] was proven beyond a reasonable doubt," "a court must find that [it] was proven by a preponderance of the evidence." *Slaton*, 801 F.3d at 1319 n.7 (emphasis added).

(amount of loss); *Campos*, 362 F.3d at 1015-1016 (drug quantity); *United States* v. *Weston*, 960 F.2d 212, 218 (1st Cir. 1992) (offense-level enhancement); and whether to sentence outside of the sentencing range established by the formerly mandatory, and now-advisory, Sentencing Guidelines, see, *e.g.*, *United States* v. *Jackson*, 862 F.3d 365, 395 (3d Cir. 2017) (downward variance); *United States* v. *Curry*, 461 F.3d 452, 460-461 (4th Cir. 2006) (same); *United States* v. *Costales*, 5 F.3d 480, 487-488 (11th Cir. 1993) (downward departure for minimal role). Applied here, the principle yields a straightforward conclusion—namely, that because the jury necessarily found that petitioner knowingly participated in a drug conspiracy when it returned a guilty verdict, Pet. App. 12a-13a, a finding that petitioner "truthfully provided" information when he denied such knowledge during his debriefing and trial testimony, 18 U.S.C. 3553(f)(5), would impermissibly contradict the verdict. Pet. App. 14a, 18a.

Nothing in 18 U.S.C. 3553(f) suggests that Congress intended to authorize district courts to violate the noncontradiction principle in authorizing a "limited" set of offenders, H.R. Rep. No. 460, 103d Cong., 2d Sess. 5-6 (1994), to obtain safety-valve relief. To the contrary, Congress tied a defendant's eligibility for such relief directly to the Sentencing Guidelines, see 18 U.S.C. 3553(f)(1) and (4), and provided that a finding of safety-valve eligibility would result in a sentence below the statutory minimum but within the guidelines range, 18 U.S.C. 3553(f). When Congress enacted Section 3553(f) in 1994, see Pub. L. No. 103–322, Tit. VIII, § 80001(a), 108 Stat. 1985, courts were applying the noncontradiction principle in reviewing district courts' factual findings supporting the application of the then-

mandatory guidelines. See, *e.g.*, *Costales*, 5 F.3d at 484-488; *Weston*, 960 F.2d at 218. Yet Congress provided no basis for concluding that it disapproved of that application of the general principle to such determinations. See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

Moreover, departing from the noncontradiction principle for purposes of Section 3553(f)(5) would lead to anomalies that Congress could not have intended. As the Seventh Circuit has explained, it would lead to the "illogical" conclusion that "defendants could use the very story which led to their conviction as a means of obtaining a reduced sentence." *United States* v. *Thompson*, 106 F.3d 794, 801 (1997) (*Veronica Thompson*). And it would mean that, while findings the jury necessarily made in determining guilt beyond a reasonable doubt could have preclusive effect in a separate civil suit against the defendant, those same findings would not bind the district judge at the defendant's own sentencing hearing. See 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4474, at 437 (2d ed. 2002) ("A civil plaintiff now is allowed to rest issue preclusion on the defendant's criminal conviction."); cf. *Allen* v. *McCurry*, 449 U.S. 90, 95 n.6 (1980). The court of appeals correctly declined to endorse an interpretation of Section 3553(f) that would lead to such outcomes.

b. Petitioner contends (Pet. 16-17) that a district court may contradict a jury's findings in this context because Section 3553(f) assigns the task of determining a defendant's safety-valve eligibility to "the court," not the jury. But that assignment is not particularized to the truthfulness criterion, and a defendant's safety-

valve eligibility turns on aspects of a defendant's background and the circumstances of the offense that a jury will not necessarily have resolved—and may even be barred from considering—when rendering a guilty verdict. Compare, *e.g.*, 18 U.S.C. 3553(f)(1) (requiring consideration of a defendant's criminal history), with Fed. R. Evid. 404(b)(1) (generally barring the introduction of evidence of a defendant's past crimes). It was therefore sensible for Congress to provide that district courts would resolve those issues at sentencing, especially where they involve determinations that courts are already called upon to make in calculating the guidelines range. See 18 U.S.C. 3553(a)(4) (requiring courts to calculate and consider the guidelines range). Nothing in Congress's decision to assign the various safety-valve determinations to the courts as a general matter suggests that, when the jury *has* spoken to the relevant facts through its verdict, courts remain free to contradict those findings at sentencing.

Petitioner's assertion (Pet. 17) that "Congress had good reason to authorize a district judge to make findings of fact at sentencing independent of the jury's verdict" is misconceived. The "good reason" that petitioner offers—that a sentencing "'judge is privy to far more information than the jury and is therefore in a much different posture to assess the case,'" *ibid.* (quoting *United States* v. *Sherpa*, 110 F.3d 656, 660 (9th Cir. 1996))—is not limited to Section 3553(f)(5), but would apply equally both to the other safety-valve criteria and to most other sentencing determinations. It would render the widely applied noncontradiction principle largely a nullity, see *Slaton*, 801 F.3d at 1319; *United* States v. *Bertling*, 611 F.3d 477, 481-482 (8th Cir. 2010), particularly if it

applied even in cases, like this one, in which the information available to the court on the relevant point is *not* meaningfully different in any respect than the evidence that the jury considered.

Petitioner relatedly contends that the court of appeals' decision "is at odds with 'the long-standing tradition that sentencing is the province of the judge, not the jury.'" Pet. 18 (quoting *Sherpa*, 110 F.3d at 661). But the safety-valve statute itself is a narrow exception to statutory-minimum sentences that depart from the tradition of "discretionary" sentencing (Pet. 18) that petitioner invokes. See *Harris* v. *United States*, 536 U.S. 545, 560-561 (2002) (plurality opinion), overruled by *Alleyne* v. *United States*, 570 U.S. 99 (2013). That statutory context makes it unlikely that Congress would confer on courts unfettered discretion in determining eligibility for relief—and even less likely that Congress intended for courts to contradict the jury findings that are often necessary to trigger a statutory-minimum sentence in the first place. See *Alleyne* v. *United States*, 570 U.S. 99 (2013).

Contrary to petitioner's suggestion (Pet. 18-20), the court of appeals' construction of Section 3553(f) also does not contravene Congress's "purpose" of affording relief to "lower-level [drug] offenders" who did not or could not provide substantial assistance to the government. Pet. 19. The very cases on which petitioner relies belie his assertion (*ibid.*) that "a defendant who exercises his constitutional right to a jury trial will effectively never be eligible for safety-valve relief." Defendants who exercise their right to a jury trial and are found guilty can still satisfy Section 3553(f)(5)'s tell-all requirement, as long as the account that they provide to

the government (before or after trial) does not "necessarily contradict[] the conviction." *United States* v. *De La Torre*, 599 F.3d 1198, 1206 (10th Cir.), cert. denied, 562 U.S. 898 (2010); see *United States* v. *Honea*, 660 F.3d 318, 328-330 (8th Cir. 2011) (affirming the district court's finding of safety-valve eligibility where the court of appeals identified "no contradiction between Honea's safety-valve statement and the jury's verdict finding Honea guilty"). That result is consistent both with the noncontradiction principle and with this Court's recognition, in an analogous context, that a jury's guilty verdict does not invariably entail a finding that a testifying defendant was untruthful. See *United States* v. *Dunnigan*, 507 U.S. 87, 95 (1993) (explaining that, because "an accused may give inaccurate testimony due to confusion, mistake, or faulty memory," "not every accused who testifies at trial and is convicted will incur" a guidelines enhancement for perjury).[4]

Nor is anything "bizarre" (Pet. 20) about treating a defendant who asserts his innocence and delivers trial testimony that is rejected by a factfinder of constitutional stature differently from an offender who accepts imposition of punishment from the outset and provides testimony credited by the only factfinder (the judge) to hear it. Cf. *United States* v. *Susi*, 674 F.3d 278, 288

---

[4] *Dunnigan* also refutes the suggestion of amici that the court of appeals' construction of Section 3553(f) "unconstitutionally burden[s] defendants' right to testify at trial." FAMM Amicus Br. 6. If the risk of a sentence enhancement for perjury does not impermissibly interfere with the right to testify, see *Dunnigan*, 507 U.S. at 96-98, then neither does the possibility that trial testimony may limit defendants' ability to obtain relief from an otherwise applicable statutory-minimum sentence.

(4th Cir. 2012) (reaffirming that the need to avoid unwarranted sentencing disparities under 18 U.S.C. 3553(a)(6) "does not require courts to sentence similarly individuals who go to trial and those who plead guilty," because "[t]hey are not similarly situated for sentencing purposes"). The "nonsensical" rule (Pet. 20) would instead be one that allows district courts to sustain the jury's guilty verdict—including the jury findings that trigger a statutory-minimum sentence—yet treat the defendant's denial of the conduct found by the jury as truthful for purposes of sentencing. See *Veronica Thompson*, 106 F.3d at 800-801.

2. Petitioner contends (Pet. 8-16) that this Court's review is warranted to resolve a circuit conflict about "whether a district court may grant safety-valve relief under [Section] 3553(f) from a mandatory minimum sentence when the factual findings necessary to support such relief are inconsistent with the jury's verdict." Pet. 8. Although a narrow division in the courts of appeals exists on that question, petitioner overstates both the extent of the disagreement and the frequency with which the question presented arises and is determinative of an offender's eligibility for the safety valve. The Court's review is therefore unwarranted at this time.

a. Contrary to petitioner's assertion (Pet. 8), since the enactment of Section 3553(f) in 1994, only two courts of appeals—the Ninth and the Tenth Circuits—have squarely resolved the question presented.

In *De La Torre*, the Tenth Circuit principally determined that district courts are "not *categorically* precluded from considering a defendant's trial testimony in determining whether he" has truthfully provided the government information under Section 3553(f)(5). 599 F.3d at 1207 (emphasis added). The court recognized that

"[n]o reasonable defendant could claim safety-valve eligibility based on trial testimony that necessarily contradicts the conviction itself." *Id.* at 1206. But it stated that, because it was "conceivable that a fact-finder could believe De La Torre's [trial] testimony without necessarily contradicting" the jury's verdict, De La Torre was entitled to an opportunity to prove on remand that he had "'truthfully and fully disclosed everything he knew,'" through that testimony or otherwise. *Id.* at 1206-1207 (citation omitted). The court of appeals in this case relied on *Del La Torre*'s reasoning to determine that petitioner was ineligible for relief under Section 3553(f), observing that the district court could not have granted such relief "without directly undermining the jury's verdict that [petitioner] knowingly conspired with" co-defendant Mendoza-Alarcon. Pet. App. 14a.

As the court of appeals acknowledged (Pet. App. 14a), the approach it followed here "diverges from" the Ninth Circuit's decision in *United States* v. *Sherpa*, *supra*. In *Sherpa*, the district court awarded safety-valve relief to a defendant who was charged with federal drug offenses for bringing a suitcase containing three kilograms of heroin into the United States, denied at trial that he knew what was in the suitcase, and was found guilty by the jury. 110 F.3d at 658-659. The Ninth Circuit upheld the application of the safety valve on appeal, stating that "the safety valve requires a separate judicial determination of compliance [with Section 3553(f)(5),] which need not be consistent with a jury's findings." *Id.* at 662.

Contrary to petitioner's contention (Pet. 11-12), however, the Seventh Circuit's decision in *United States* v. *Thompson*, 76 F.3d 166 (1996) (*Shirley Thompson*), does not demonstrate that court's agreement with the Ninth Circuit's approach in *Sherpa*. The district court in

*Shirley Thompson* granted safety-valve relief to a defendant who, both before and after being convicted at trial, provided the government with "all information and evidence she had concerning the offense." *Id.* at 171. In affirming the sentence, the Seventh Circuit relied on expert testimony concerning the defendant's diminished capacity that was offered at sentencing to conclude that the defendant was "forthright within the range of her ability." *Ibid.* But the court did not identify any inconsistency between the jury's verdict and the information the defendant proffered, and thus had no occasion to address the effect of any such inconsistency on eligibility for safety-valve relief. *Ibid.*[5]

The Seventh Circuit's subsequent decisions strongly suggest that, if faced with such a contradiction, it would adopt the same approach as the Tenth Circuit did here. In *Veronica Thompson*, *supra*, the Seventh Circuit affirmed the denial of safety-valve relief to defendants who at trial denied their involvement in a drug conspiracy and later "told the same story" to the judge in seeking relief. 106 F.3d at 801. The court explained that the sentencing judge "was entitled to reject the claim of non-involvement" in the wake of the jury's verdict, and that "[i]t would be illogical if defendants could use the very story which led to their conviction as a means of obtaining a reduced sentence." *Ibid.* And more generally, the Seventh Circuit has applied the noncontradiction principle in multiple sentencing contexts, recognizing that "it is both unnecessary and inappropriate for the judge to reexamine, and resolve in the defendant's

---

[5] Contrary to petitioner's suggestion (Pet. 11), the opinion in *Shirley Thompson* did not indicate that the defendant testified at trial at all, much less that "[s]he testified that she was unaware that" a bag she handled had "contained cocaine."

favor, a factual issue that the jury has resolved in the prosecutor's favor beyond a reasonable doubt." *Rivera*, 411 F.3d at 866; see *United States* v. *Fuller*, 532 F.3d 656, 664 (7th Cir. 2008).

Finally, *United States* v. *Reynoso*, 239 F.3d 143 (2d Cir. 2000), did not implicate any question concerning the effect of a jury verdict on a defendant's safety-valve eligibility, because it did not involve a jury trial at all. Rather, the defendant in *Reynoso* pleaded guilty and then sought safety-valve relief despite making a factual proffer to the government that was not supported by the objective facts. *Id.* at 145. The sole question on appeal was "whether a defendant who provided *objectively* false information to the Government nevertheless satisfies the requirement set forth in [Section] 3553(f)(5) if he or she *subjectively* believed the information" to be true. *Id.* at 144. As petitioner acknowledges (Pet. 13-14), in answering that question, the Second Circuit expressed disagreement with the decisions in *Sherpa* and *Shirley Thompson* only "to the extent" that they were "arguably on point." *Reynoso*, 239 F.3d at 149; see *id.* at 149-150. But the Second Circuit also made clear that it did *not* believe those decisions were germane to the question before it. *Id.* at 150; see Pet. 13 (recognizing that the Second Circuit "[f]or the most part * * * distinguished the [other] cases on their facts").

b. The narrow disagreement over the question presented does not warrant the Court's review at this time, because the question arises infrequently and is rarely determinative of a defendant's safety-valve eligibility.

Contrary to petitioner's contention (Pet. 14-15), the answer to the question presented is dispositive of a defendant's eligibility for safety-valve relief in an exceed-

ingly narrow set of federal drug prosecutions. Specifically, that answer is outcome determinative only in the small percentage of cases where a defendant (1) is subject to a statutory-minimum sentence under particular drug statutes; (2) pleads not guilty and elects a jury trial, cf. Pet. 15 (noting that only two percent of federal defendants go to trial); (3) is convicted; (4) satisfies the first four criteria for safety-valve criteria eligibility in Section 3553(f)(1)-(4); and (5) offers statements at trial or in debriefings with the government that necessarily contradict the jury's verdict; and, finally, (6) the district court—despite having denied a motion for judgment of acquittal—would nonetheless find that the defendant has satisfied Section 3553(f)(5)'s tell-all requirement. This last circumstance alone confirms the infrequency with which the question presented will matter. As one district court to make such a finding recognized (in 2001), "it will be extremely rare for a judge to credit [a defendant's] assertion of innocence after a guilty verdict." *United States* v. *Freeman*, 139 F. Supp. 2d 1364, 1365 (S.D. Fla. 2001), aff'd, 37 Fed. Appx. 505 (11th Cir. 2002) (Tbl.).

Indeed, in the 25 years since Congress enacted the safety-valve statute, only two courts of appeals—the Ninth and Tenth Circuits—have squarely resolved whether a district court may find that a defendant's disclosures satisfy Section 3553(f)(5) when that finding would contradict the jury's verdict. See pp. 15-18, *supra*. Although petitioner cites several decisions that involved similar fact patterns, the courts in those cases had no occasion to resolve the question presented, either because they found no conflict between the verdict and the defendant's disclosures, see *Honea*, 660 F.3d at 329-330, or because they concluded that the sentencing

court was permitted—even if not obligated—to reject a safety-valve claim, see *United States* v. *Moreno-Gonzalez*, 662 F.3d 369, 375 (5th Cir. 2011); *United States* v. *Aguilera*, 625 F.3d 482, 488 (8th Cir. 2010); *Veronica Thompson*, 106 F.3d at 800-801. Petitioner identifies no decisions at all raising the question (or variations of it) in the First, Third, Fourth, Sixth, and D.C. Circuits. Petitioner suggests in a footnote (Pet. 15 n.3) that the issue is not often discussed in reported opinions "because courts typically impose sentences orally." But he provides no reason to believe that oral sentence imposition is more common in the context of this sentencing issue than in the context of a host of other federal sentencing issues that reach and result in opinions by appellate courts—including this Court.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
*Solicitor General*
BRIAN A. BENCZKOWSKI
*Assistant Attorney General*
SCOTT A.C. MEISLER
*Attorney*

NOVEMBER 2019