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**DON'T BREAK THE SAFETY VALVE'S HEART:
HOW THE SEVENTH CIRCUIT SUPERIMPOSES
SUBSTANTIAL ASSISTANCE ON THE MANDATORY
MINIMUM SAFETY VALVE'S COMPLETE
TRUTHFUL DISCLOSURE REQUIREMENT**

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INTRODUCTION

In January 2014, the Seventh Circuit upheld a circuit split regarding the mandatory minimum safety valve provision, which provides low-level defendants who meet five criteria the chance to receive a sentence below the mandatory minimum.¹ Specifically, the split concerns the safety valve's truthful disclosure requirement, which requires defendants provide all the information they have to

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¹ *United States v. Acevedo-Fitz*, 739 F.3d 967 (7th Cir. 2014); *United States v. Adu*, 82 F.3d 119, 121 (6th Cir. 1996).

prosecutors² – also called “the heart of the provision.”³ The circuits disagree as to whether a defendant when they invoke the provision but then lie or omit information to prosecutors before telling the truth is eligible for the safety valve.⁴ The Seventh Circuit holds that when a defendant invokes the safety valve and lies to prosecutors, even if he eventually tells the truth, he cannot receive safety valve relief.⁵ The other circuits hold that defendants may lie at a proffer before providing complete disclosure and still retain safety valve eligibility.⁶ These circuits permit eligibility within a range: some provide safety valve relief when a defendant provides prosecutors with a single lie;⁷ at least one has gone so far as to state a defendant will not automatically lose eligibility even after committing perjury at trial.⁸ The Second Circuit best summarizes the reasoning of the circuits that allow safety valve relief despite previous lies: the [safety valve’s] text provides no basis for distinguishing among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline.”⁹

In Part I, I discuss the mandatory minimums and safety valve. In Part II, I analyze the Circuit split about the safety valve provision.

² There is a second circuit split regarding whether the information must be both objectively and subjectively truthful, but that is outside the scope of this article. *See* *United States v. Thompson*, 76 F.3d 166, 170-71 (7th Cir. 1996); *United States v. Sherpa*, 110 F.3d 656, 659-63 (9th Cir. 1996); *United States v. Reynoso*, 239 F.3d 143, 144, 150 (2d Cir. 2000); *Sentencing, Telling the Truth and the Safety Valve: Three Circuits Differ* 17 No. 10 CRIM. PRAC. REP. 4 (May 14, 2003).

³ *United States v. Feliz*, 453 F.3d 33, 35 (1st Cir. 2006).

⁴ *United States v. Mejia-Pimental*, 477 F.3d 1100, 1105 (9th Cir. 2007); *United States v. Madrigal*, 327 F.3d 738, 743-44 (8th Cir. 2003); *United States v. Edwards*, 65 F.3d 430, 433 (5th Cir. 1995); *United States v. Schreiber*, 191 F.3d 103, 108-09 (2d Cir. 1999).

⁵ *Acevedo-Fitz*, 739 F.3d at 971.

⁶ *United States v. Padilla-Colon*, 578 F.3d 23, 31-2 (1st Cir. 2009); *Mejia-Pimental*, 477 F.3d at 1108; *Schreiber*, 191 F.3d 103; *Madrigal*, 327 F.3d 738 at 745; *United States v. Rodriguez*, 676 F.3d 183, 190-91 (D.C. Cir. 2012).

⁷ *United States v. DeLaTorre*, 599 3d 1198, 1206 (10th Cir. 2010).

⁸ *United States v. Jeffers*, 329 F.3d 94, 98 (2d Cir. 2003).

⁹ *Schreiber*, 191 F.3d at 106.

In Part III, I critique mandatory minimums and the way judicial interpretation, particularly by the Seventh Circuit, superimposes substantial assistance – the requirement that defendants have useful information that assists prosecutors - on the safety valve. In Part IV, I argue courts should not superimpose substantial assistance on the safety valve and instead utilize the plain language reading.

MANDATORY MINIMUMS AND THE SAFETY VALVE

Sentencing in the federal system is a complex interaction between mandatory minimums and the sentencing guidelines.¹⁰ For some crimes, including drug crimes, judges are statutorily required to impose a mandatory minimum sentence.¹¹ For drug crimes, mandatory minimum sentences are based on the type and amount of drug a defendant possessed.¹² Before the Mandatory Minimum Sentencing Reform Act, adopted in 1994, defendants could only receive a lesser sentence if they substantially assisted prosecutors.¹³ Applying a “grim calculus [in which] drug kingpins may suffer little while subordinates serve long sentences,”¹⁴ high-level criminal defendants could

¹⁰ Celesta A. Albonetti, *The Effects of the “Safety Valve” Amendment on Length of Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender’s Ethnicity*, 87 IOWA L. REV. 401, 404 (2001-2002).

¹¹ United States v. Quirante, 486 F.3d 1273, 1275 (11th Cir. 2007); Philip Oliss, Note, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1851 (Summer 1995).

¹² United States v. Vasquez, 09-CR-259 (JG), 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010); Alison Siegler & Erica K. Zunkel, *Written Statement of the Federal Criminal Justice Clinic at the University of Chicago Law School Submitted to the Senate Committee on the Judiciary Hearing on “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”*, 1, U. OF CHIG. L. SCH. (Sept. 18, 2013) available at

<http://www.law.uchicago.edu/files/clinicblog/Federal%20Criminal%20Justice%20Clinic%20Written%20Statement%20for%20September%202018%202013%20Hearing%20on%20Federal%20Mandatory%20Minimums.pdf>.

¹³ United States v. Arrington, 73 F.3d 144, 147 (7th Cir. 1996); 18 U.S.C. § 3553(e) (West Supp. 1988).

¹⁴ United States v. Milo, 506 F.3d 71, 77 (1st Cir. 2007).

substantially assist prosecutors to receive a lesser sentence because they had more knowledge of the criminal extent of their activities, whereas low-level criminal defendants were ineligible for shorter or less severe sentences because they had no such information and could not substantially assist prosecutors with their investigations.

The result further goes against the purpose stated in the sentencing section of the United States Code, “[t]he court shall impose a sentence sufficient, but not greater than necessary.”¹⁵ The Code states “[t]he court, in determining the particular sentence to be imposed, shall consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant;” as well as “the need for the sentence imposed – . . . to provide just punishment,” “afford adequate deterrence,” and “protect the public from further crimes of the defendant.”¹⁶ Thus judges, scholars, the American Bar Association, the Judicial Conference, and the Sentencing Commission called for change because mandatory minimums “undermine federal sentencing reform goals of uniformity and proportionality.”¹⁷ Indeed “disparity is inevitable” under mandatory minimums.¹⁸ A report summarizes Congress’s concerns: “for the very offenders who most warrant proportionally lower sentences – offenders that by guideline

¹⁵ 18 U.S.C. § 3553(a) (West).

¹⁶ *Id.*

¹⁷ Albonetti, *supra* note 10, at 427; U.S. SENT’G GUIDELINES MANUAL § 5C1.2 (1995); 18 U.S.C. § 3553 (West); Trial Motion, Memorandum and Affidavit, United States v. Dondon Fletcher, 2009 WL 2730304 (D.Conn.) (citing United States Sentencing Commission, *Cocaine and Federal Sentencing Policy*, Executive Summary, pp. v-viii (May 2002)); *Hearing on Mandatory Minimum Sentences* before the Subcomm. on Crime, Terrorism and Homeland Sec., (2009) (Testimony of the Hon. J. Julie E. Carnes, Chair of the Criminal Law Committee on behalf of the Judicial Conference) 8, *available at* http://judiciary.house.gov/_files/hearings/pdf/Carnes090714.pdf; *Hearing on Mandatory Minimum Sentences* before the Subcomm. on Crime, Terrorism and Homeland Sec., (2009) (Statement of Julie Stewart, President, Families against Mandatory Minimums) 6, *available at* http://judiciary.house.gov/_files/hearings/pdf/Stewart090714.pdf.

¹⁸ Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 112 (1993).

definitions are the least culpable – mandatory minimums generally operate to block the sentence from reflecting mitigating factors.”¹⁹

These concerns about deleterious and harsh sentences led Congress to pass a provision, which gives low-level, nonviolent drug offenders the chance to receive a sentence below the mandatory minimum.²⁰ This exemption, referred to as the safety valve, applies to federal drug offenses including possession, conspiracy and importation.²¹ To be eligible for the safety valve, defendants must prove, by a preponderance of the evidence, that they meet five enumerated criteria:

- (1) the defendant does not have more than 1 criminal history point . . . ;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . ;
- (3) the offense did not result in death or serious bodily injury;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . and was not engaged in a continuing criminal enterprise . . . ; 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

¹⁹ Mandatory Minimum Sentencing Reform Act of 1994, H.R. REP. NO. 103-460, 103rd Cong., 2d Sess., 1994 WL 107571 (1994).

²⁰ S. REP. NO. 225, 98th Cong., 1st Sess. 40 (1983); *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 18, at 24; U.S. SENT’G COMM’N, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, (1991); Charles Doyle, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, 1, 5, available at <http://www.hsdl.org/?view&did=746019>.

²¹ 18 U.S.C. § 3553(f); *United States v. Brehm*, 442 F.3d 1291, 1299 (11th Cir. 2006); Jeffrey J. Shebesta, *The “Safety Valve” Provision: Should the Government Get an Automatic Shut-Off Valve?*, 2002 U. ILL. L. REV. 529, 536 (2002).

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.²²

Although meeting all five criteria may be difficult, the safety valve can “provide[] an important escape from mandatory minimum sentencing.”²³ If a defendant meets the requirements, he is eligible for a reduced sentence, so a judge waives the mandatory minimum and imposes a “strictly regulated reduction[]” under the Federal Sentencing Guidelines.²⁴ While theoretically the safety valve provides an escape hatch for lower level offenders, from its enactment there has been much debate over whether it in fact “protect[s] low-level drug offenders from inflated sentences.”²⁵

The Federal Sentencing Guidelines assign offenses “an initial base sentencing level” based on the amount of drugs the defendant possessed.²⁶ The offense constitutes a certain number of points, and the judge adds points for aggravating factors and subtracts points for mitigating factors.²⁷ Finally, the judge adjusts the sentence within the

²² 18 U.S.C. § 3553(f)(5) (West 1995).

²³ Francesca Bowman, *Make the Safety Valve Retroactive*, 12 FED. SENT’G REP. 120, 120 (1999-2000).

²⁴ *United States v. Adu*, 82 F.3d 119, 121 (6th Cir. 1996).

²⁵ Natasha Bronn, “*Unlucky Enough to Be Innocent*”: *Burden-Shifting and the Fate of the Modern Drug Mule Under the 18 U.S.C. § 3553(f) Statutory Safety Valve*, 46 COLUM. J.L. & SOC. PROBS. 469, 483 (2012-2013).

²⁶ Brian T. Yeh, *Federal Cocaine Sentencing Disparity: Sentencing Guidelines, Jurisprudence, and Legislation*, available at <http://congressionalresearch.com/RL33318/document.php?study=Sentencing+Levels+for+Crack+and+Powder+Cocaine+Kimbrough+v.+United+Sates+and+the+Impact+of+United+States+v.+Booker>.

²⁷ U.S. SENTENCING GUIDELINES MANUAL § 3A-D (2002); Molly N. Van Etten, *The Difference Between Truth and Truthfulness: Objective Versus Subjective Standards in Applying Rule 5C1.2*, 56 VAND. L. REV. 1265, 1271 (May 2003); Yeh, *supra* note 27.

mandatory range based on the offender's criminal history.²⁸ The Sentencing Guidelines discount potentially mitigating – and generally relevant – issues such as the offender's “family and community ties, education, and employment,”²⁹ and only permit judges to consider factors such as the defendant's cooperation for possible sentence reduction.³⁰ In contrast, the safety valve permits judges to consider further mitigating factors, and can have a major impact on sentences.³¹ Under the safety valve, the government provides input as to whether the defendant met his burden, but judges may independently decide whether the defendant shared all the information he had available.³² If the judge determines the defendant met all five requirements – even if the information they provided was not useful – the judge must impose the safety valve.³³

Frequently, there is no dispute about the first four requirements: 1) criminal history; 2) use of violence; 3) “death or serious bodily injury;” and 4) offender level.³⁴ However the fifth element requires a defendant “[n]ot later than the time of the sentencing hearing . . . truthfully provide to the Government all information and evidence the defendant has concerning the offense or offenses.”³⁵ This element is subject to several interpretations, and is

²⁸ U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2002); *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra* note 21, at 19.

²⁹ Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1498 (2000).

³⁰ U.S. SENTENCING GUIDELINES MANUAL § 3A-D (2002); Van Etten, *supra* note 28, at 1272.

³¹ H.R. REP. NO. 103-460, at 5 (1994); Bowman, *supra* note 24, at 120; Albonetti, *supra* note 10, at 407.

³² *United States v. Oye*, 397 F. App'x 697, 699 (2d Cir. 2010); *United States v. Valenzuela-Sanchez*, 245 F. App'x 678, 680 (9th Cir. 2007); Oliss, *supra* note 11, at 1885.

³³ *United States v. Quirante*, 486 F.3d 1273, 1275 (11th Cir. 2007); *United States v. Alvarado-Rivera*, 412 F.3d 942, 949 (8th Cir. 2005).

³⁴ 18 U.S.C. § 3553(f)(5).

³⁵ *Id.*; *United States v. Steward*, 93 F.3d 189 (5th Cir. 1996).

thus the most heavily litigated.³⁶ Courts interpret the fifth element as requiring a defendant to provide information about other crimes that are “part of the same course of conduct or of a common scheme or plan,” which includes “uncharged related conduct.”³⁷ Courts sometimes refer to this as the “‘tell all you can tell’ requirement.”³⁸ The truthfulness requirement, particularly regarding prior inconsistent statements, is the subject of an ongoing circuit split.³⁹

THE CIRCUIT SPLIT REGARDING THE SAFETY VALVE

In the Seventh Circuit, defendants are not eligible for the safety valve if they lie to prosecutors after invoking the safety valve – even if they come clean before their sentencing date.⁴⁰ Several other circuits hold defendants may meet the complete and truthful disclosure requirement even if they lie to prosecutors so long as they ultimately tell the truth, although courts may properly consider any prior lies or inconsistent statements when determining whether the eventual disclosure was complete and truthful.⁴¹ The best way for a defendant to receive safety valve relief is to provide a proffer to the government, either through a debriefing or in writing, and be prepared to prove his

³⁶ *United States v. Brownlee*, 204 F.3d 1302, 1305 (11th Cir. 2000); *United States v. Marin*, 144 F.3d 1085, 1086 (7th Cir. 1998); *United States v. Shrestha*, 86 F.3d 935, 940 (9th Cir. 1996); *United States v. Ceballos*, 605 F.3d 468, 472 (8th Cir. 2010); *United States v. Altamirano-Quintero*, 511 F.3d 1087, 1096 (10th Cir. 2007); *United States v. Salgado*, 250 F.3d 438, 459 (6th Cir. 2001); *United States v. Cruz*, 156 F.3d 366, 372 (2d Cir. 1998); *United States v. Sabir*, 117 F.3d 750, 753 (3d Cir. 1997).

³⁷ *United States v. Miller*, 151 F.3d 957, 958 (9th Cir. 1998); *Ceballos*, 605 F.3d at 472; *Altamirano-Quintero*, 511 F.3d at 1096; *United States v. Montes*, 381 F.3d 631, 635-36 (7th Cir. 2004); *Salgado*, 250 F.3d at 459; *Cruz*, 156 F.3d at 372.

³⁸ *Shrestha*, 86 F.3d at 939 (quoting *United States v. Acosta-Olivas*, 71 F.3d 375, 378-79 (10th Cir. 1995)).

³⁹ *United States v. Ramunno*, 133 F.3d 476 (7th Cir. 1998); *Brownlee*, 204 F.3d at 1302.

⁴⁰ *United States v. Acevedo-Fitz*, 739 F.3d 967, 969 (7th Cir. 2014).

⁴¹ *United States v. Padilla-Colon*, 578 F.3d 23, 31-2 (1st Cir. 2009); *United States v. Mejia-Pimental*, 477 F.3d 1100, 1108 (9th Cir. 2007); *United States v. Jeffers*, 329 F.3d 94, 99-100 (2d Cir. 2003).

statement is complete and truthful.⁴² These safety valve debriefings occur under a variety of circumstances, “from an intense grilling to a perfunctory conversation undertaken primarily to satisfy the formal requirements of the safety valve.”⁴³ The Circuits also disagree as to when the complete truthful disclosure must occur. Many courts require defendants provide disclosure before their sentencing hearing; others do not require complete disclosure until the actual sentencing, or even the second sentencing hearing.⁴⁴ This distinction plays no role in the Seventh Circuit because defendants lose any hope of safety valve relief if they are not completely forthcoming at their first debriefing.⁴⁵ Yet in other circuits, the distinction can make a large difference.

A. The Seventh Circuit’s View: Prior Inconsistent Statements Bar a Defendant from Safety Valve Eligibility

The Seventh Circuit was the first to interpret truthful disclosure as requiring a defendant make a “good faith effort to cooperate” with authorities from the moment he invokes the safety valve.⁴⁶ Some policy reasons behind this good faith interpretation include efficiency and the benefits of an easy-to-apply bright-line rule, as one omission or lie automatically forecloses safety valve relief.⁴⁷ Another argument underlying the good faith interpretation is that the government should not have to conduct multiple investigations, nor repeatedly share its

⁴² *United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999); *United States v. Montanez*, 82 F.3d 520, 523 (1st Cir. 1996).

⁴³ Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1073 (2001); e.g. *Flanagan*, 80 F.3d at 146; *United States v. Ramirez*, 94 F.3d 1095, 1101 (7th Cir. 1996).

⁴⁴ *Brownlee*, 204 F.3d at 1305; *United States v. Shrestha*, 86 F.3d 935, 940 (9th Cir. 1996); *Mejia-Pimental*, 477 F.3d at 1105; *United States v. Madrigal*, 327 F.3d 738, 743-44 (8th Cir. 2003); *United States v. Edwards*, 65 F.3d 430, 433 (5th Cir. 1995); *Schreiber*, 191 F.3d 103 at 108-09.

⁴⁵ *United States v. Marin*, 144 F.3d 1085, 1095 (7th Cir. 1998).

⁴⁶ *United States v. Arrington*, 73 F.3d 144, 148 (7th Cir. 1996).

⁴⁷ *United States v. Acevedo-Fitz*, 739 F.3d 967 (7th Cir. 2014); *Davis v. United States*, 131 S. Ct. 2419, 2424 (2011); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006).

information with a defendant simply to get the complete truth.⁴⁸ Further, the government has the right to expect defendants tell the truth and not try to game the system.⁴⁹ Consistently, the Seventh Circuit holds “lying is inconsistent with a good-faith effort to cooperate, and thus a sentencing judge may refuse the safety valve to a defendant who was caught lying during safety[]valve debriefings.”⁵⁰ Thus, it stands to reason a judge may refuse safety valve relief for a defendant who later tells the complete truth because the safety valve was intended to protect only those defendants who fully disclose all information they possess during their first debriefing.⁵¹ The Seventh Circuit expressed concern about giving a defendant multiple opportunities “to change his version of events and attempt to make a more complete disclosure until the version comports with the government’s evidence.”⁵² For similar reasons, the court further held that a letter purporting to be a complete truthful statement that denies culpability where the evidence proves otherwise does not make a defendant eligible for the safety valve.⁵³ It reasoned “[c]ontinu[ing] to cling to a false version of events and dispute [one’s] culpability . . . is a sufficient basis for refusing to invoke the safety valve.”⁵⁴ In an early case, *United States v. Marin*, the Seventh Circuit emphasized a “defendant is not entitled to deliberately mislead the government and wait until the middle of the sentencing hearing to . . . provide a truthful disclosure.”⁵⁵

⁴⁸ *Marin*, 144 F.3d at 1093-94.

⁴⁹ *Marin*, at 1093-94; Shebesta, *supra* note 22, at 548.

⁵⁰ *United States v. Acevedo-Fitz*, 739 F.3d 967, 970 (7th Cir. 2014); *Montes*, 381 F.3d at 637; *Ramunno*, 133 F.3d at 482.

⁵¹ *Marin*, 144 F.3d at 1086, 1092; *United States v. Nunez*, 627 F.3d 274, 282-833 (7th Cir. 2010).

⁵² *Marin*, 144 F.3d at 1091.

⁵³ *United States v. Corson*, 579 F.3d 804, 814 (7th Cir. 2009).

⁵⁴ *Id.*

⁵⁵ *Marin*, 144 F.3d at 1091.

1. The Seventh Circuit Reaffirmed its Safety Valve Approach in *United States v. Acevedo-Fitz*

In January 2014, the Seventh Circuit reaffirmed its approach to the safety valve.⁵⁶ In *United States v. Acevedo-Fitz*, it explicitly rejected the “plain language” interpretation used by other circuits.⁵⁷ The opinion Judge Flaum authored stated:

None of these decisions persuades us to retreat from our common-sense understanding that a defendant who intentionally lies while seeking to benefit from the safety valve is not acting in good faith and is not within the class of offenders whom Congress intended to protect from potentially harsh statutory minimum penalties. The point of § 3553(f)(5) is that a defendant who *waits until the last minute* to seek the safety valve will not be penalized for his tardiness, but tardiness is very different from trying repeatedly to deceive the government until time has run out.⁵⁸

In *Acevedo-Fitz*, the Seventh Circuit precluded safety valve eligibility for a defendant who initially lied before providing the truth.⁵⁹ Prosecutors charged Acevedo-Fitz with conspiracy, heroin distribution, and three counts of using a communication facility in committing a felony drug crime.⁶⁰ Acevedo-Fitz pleaded guilty to the conspiracy charges, and admitted to selling heroin on several occasions.⁶¹ The government dropped the other charges.⁶² Acevedo-Fitz lied during two safety valve briefings, both before and after his guilty plea; he only admitted the truth after the government confronted his lies using recorded conversations.⁶³ Acevedo-Fitz continued to deny remembering the events, but told investigators he might

⁵⁶ *United States v. Acevedo-Fitz*, 739 F.3d 967 (7th Cir. 2014).

⁵⁷ *Id.* at 971.

⁵⁸ *Id.*

⁵⁹ *Id.* at 969.

⁶⁰ *Id.*

⁶¹ *Id.* at 968.

⁶² *Id.*

⁶³ *Id.* at 969.

remember more if he could hear the recordings.⁶⁴ The government argued Acevedo-Fitz was ineligible for the safety valve because he failed to provide “all [the] information” he had.⁶⁵ Acevedo-Fitz contended the safety valve applied because before his sentencing hearing he sent the government a letter where he admitted to all heroin sales, identified his customers and supplier, and described the location of each transaction.⁶⁶ The government countered Acevedo-Fitz lied, did not cooperate during his safety valve debriefings, denied documented offenses, and his letter contained insufficient detail.⁶⁷ Acevedo-Fitz argued he provided some truthful statements during the debriefings and the missing details were unimportant.⁶⁸ Nonetheless, the district court found his “debriefings ‘absolutely would not come anywhere close to being in the ball park of qualifying’ him for the safety valve, particularly since he denied events which were demonstrably true.”⁶⁹ The district court reasoned, while the letter technically met statutory requirements because Acevedo-Fitz tendered it prior to sentencing, it was “too little too late, with emphasis on the too little,” noting that the defendant only provided the “bare minimum” of information.⁷⁰ Acevedo-Fitz’s sentencing range, had he been eligible for the safety valve, would have been between 87 and 108 months: the court sentenced him to 120.⁷¹

The Seventh Circuit affirmed the sentence and reasoned “Acevedo-Fitz apparently contends, he was free to lie to the government so long as, if found out, he retracted his lies and made a full, truthful disclosure before the sentencing hearing.”⁷² The Seventh Circuit held that because Acevedo-Fitz’s debriefing statements were “demonstrably false in light of the recorded telephone conversations,” and contradicted his guilty plea as well as statements he made during

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 970.

⁷⁰ *Id.* at 969.

⁷¹ *Id.*

⁷² *Id.* at 970.

his plea colloquy, he intentionally deceived investigators and thus “forfeited his eligibility for the safety valve by lying, i.e., trying to secure a sentencing benefit through bad faith.”⁷³ The opinion highlighted that even in circuits that do not consider prior lies bad faith, courts may consider those lies in determining if the defendant eventually told the truth.⁷⁴ The Seventh Circuit further reasoned “[t]he point of [the safety valve] is that a defendant who *waits until the last minute* to seek the safety valve will not be penalized for his tardiness, but tardiness is very different from trying repeatedly to deceive the government until time has run out.”⁷⁵ The Seventh Circuit held that due to Acevedo-Fitz’s “lack of cooperation” and “resistance to admitting irrefutable offense conduct” he could not prove his letter was complete and truthful by “a bare assertion.”⁷⁶

B. Other Circuits Hold that a Defendant May be Eligible for the Safety Valve Even After Lying to Prosecutors

The majority of circuits utilize a plain-language reading of the safety valve, granting relief even to defendants who initially lied to prosecutors, so long as they provided complete truthful disclosure.⁷⁷ However, the circuits disagree as to the timing of the truthful disclosure. Some circuits hold complete disclosure prior to the sentencing hearing – even in the judge’s chambers on the day of the sentencing hearing – qualifies a defendant for the safety valve.⁷⁸ Other courts grant relief to defendants who repeatedly withheld information,

⁷³ *Id.* at 971.

⁷⁴ *Id.* at 970.

⁷⁵ *Id.* at 971.

⁷⁶ *Id.* at 972.

⁷⁷ *United States v. Schreiber*, 191 F.3d 103, 108-09 (2d Cir. 1999); *United States v. DeLaTorre*, 599 3d 1198, 1206 (10th Cir. 2010); *United States v. Brownlee*, 204 F.3d 1302, 1305 (11th Cir. 2000); *United States v. Tournier*, 171 F.3d 645, 647 (8th Cir. 1999).

⁷⁸ *DeLaTorre*, 599 3d at 1206; *United States v. Jeffers*, 329 F.3d 94, 98-100 (2d Cir. 2003); *Brownlee*, 204 F.3d at 1305; *United States v. Gaviria*, 116 F.3d 1498, 1521-22 (D.C. Cir. 1997); *Schreiber*, 191 F.3d 103 at 107; *Deltoro–Aguilera v. United States*, 625 F.3d 434, 437 (8th Cir. 2010).

or committed perjury at trial, so long as, before their sentencing hearing, the defendants provide complete disclosure.⁷⁹

1. In Many Circuits, While Prior Lies and Inconsistent Statements do Not Preclude Safety Valve Relief, Those Statements May be Considered as Evidence Regarding Truthful Disclosure

Several circuits hold that, while lies or omissions do not automatically foreclose safety valve relief, a defendant's lies are relevant to determining if the final statement is complete and truthful.⁸⁰ Because lies are relevant, the court may "consider any lies the defendant may have told when evaluating the defendant's truthfulness."⁸¹ The Second Circuit pointed out that a defendant who lies or changes his story "risks irrevocably undermining his or her credibility" leading to doubts his disclosure is truthful and complete.⁸² Defendants risk exposure of their lies at the sentencing hearing, which would preclude safety valve relief.⁸³ It further reasoned that the government could refuse to meet with a defendant caught in a lie, because lying damages the defendant's credibility.⁸⁴ The First Circuit warns defendants that avoiding a debriefing is dangerous because the defendant must prove he provided truthful disclosure, and it is unlikely a defendant is unable to provide information unknown to the government.⁸⁵ The First Circuit has implied that, following an inadequate attempt at truthful disclosure a defendant might meet the complete and truthful disclosure requirement by requesting an additional chance.⁸⁶ Even in circuits where prior lies and inconsistent statements are considered, a defendant who told several different stories may remain eligible, as sentencing courts may "credit the last

⁷⁹ *Jeffers*, 329 F.3d at 98-100.

⁸⁰ *Brownlee*, 204 F.3d at 1305; *Schreiber*, 191 F.3d at 107; *Deltoro-Aguilera*, 625 F.3d at 437; *United States v. Aidoo*, 670 F.3d 600, 610 (4th Cir. 2012) *cert. denied*, 133 S. Ct. 627 (2012).

⁸¹ *Brownlee*, 204 F.3d at 1305; *Aidoo*, 670 F.3d at 610.

⁸² *Schreiber*, 191 F.3d 103 at 107.

⁸³ *Id.*

⁸⁴ *Id.* at 108.

⁸⁵ *United States v. Montanez*, 82 F.3d 520, 523 (1st Cir. 1996).

⁸⁶ *Id.* at 524.

version of events as truthful and grant safety valve relief on such basis.”⁸⁷

2. In Some Circuits Even Repeated Lies Do Not Preclude Safety Valve Relief, so long as a Defendant Provides Complete Truthful Disclosure by His Sentencing

Some circuits hold even repeated lies do not preclude safety valve relief.⁸⁸ In these circuits, “the safety valve is available so long as the government receives the information no later than the time of the sentencing hearing, even if a defendant’s last-minute move to cooperate is a complete about-face.”⁸⁹ The Eighth Circuit holds early, consistent cooperation is “not a precondition for safety valve relief.”⁹⁰ In *United States v. Deltoro–Aguilera*, the Eighth Circuit upheld safety valve relief for a defendant who lied in three interviews, but provided complete disclosure at a fourth interview before she was sentenced.⁹¹ Similarly, in *United States v. Tournier*, the Eighth Circuit specifically rejected the contention safety valve relief “must be denied to those whose tardy or grudging cooperation burdens the government with a need for additional investigation.”⁹² The Eighth Circuit further found accepting responsibility and substantially assisting the government are not “precondition[s] to safety valve relief, which is even available to defendants who put the government to the expense and burden of a trial.”⁹³

Similarly, in *United States v. Mejia-Pimental*, the Ninth Circuit overturned a safety valve denial because the district court “construed good faith too broadly.”⁹⁴ Mejia-Pimental had three sentencing hearings; he eventually offered to share what he knew, but the government refused because he lied and his information would be

⁸⁷ *United States v. Gomez-Perez*, 452 F.3d 739, 741-42 (8th Cir. 2006).

⁸⁸ *Deltoro–Aguilera v. United States*, 625 F.3d 434, 437 (8th Cir. 2010); *United States v. Mejia-Pimental*, 477 F.3d 1100, 1101-02 (9th Cir. 2007).

⁸⁹ *Deltoro–Aguilera*, 625 F.3d at 437.

⁹⁰ *United States v. Tournier*, 171 F.3d 645, 647 (8th Cir. 1999).

⁹¹ *Deltoro–Aguilera*, 625 F.3d at 437.

⁹² *Tournier*, 171 F.3d at 647.

⁹³ *Id.*

⁹⁴ *United States v. Mejia-Pimental*, 477 F.3d 1100, 1101-02 (9th Cir. 2007).

useless.⁹⁵ Mejia-Pimental wrote a letter providing everything he knew, including the involvement of others.⁹⁶ The Ninth Circuit reasoned “good faith” requires nothing more than truthful complete disclosure by the sentencing, because “[a]nything else would unjustifiably impose on a defendant an additional burden above and beyond the plain meaning of the [safety valve’s] text.”⁹⁷ The court further reasoned “the good faith inquiry focuses on the defendant’s cooperation in fully disclosing his knowledge of the charged offense conduct, not on identifying a defendant’s pre-sentencing delays in providing this information.”⁹⁸ The court concluded a defendant satisfies the truthfulness requirement “regardless of his timing or motivations.”⁹⁹ In so deciding, the Ninth Circuit expressly rejected the idea that good faith requires a defendant provide the disclosure without delay or “attempts to impede law enforcement investigation” because the Sentencing Guidelines already require judges impose lengthier sentences for obstruction.¹⁰⁰

3. Some Circuits Hold that Even Defendants who Confess, then Recant, or Commit Perjury at Trial, then Provide Complete Truthful Disclosure may still be Eligible for Safety Valve Relief
In *United States v. Schreiber*, the Second Circuit held, assuming “complete and truthful” disclosure, the defendant complied with the safety valve by submitting a letter and affidavit prior to his sentencing.¹⁰¹ The court reasoned:

[t]he plain words of the statute provide only one deadline for compliance . . . Nothing in the statute suggests that a defendant is automatically disqualified if he or she previously lied or withheld information. Indeed, the text provides no basis for distinguishing

⁹⁵ *Id.* at 1103.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1104-05.

⁹⁸ *Id.* at 1106.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1107 (citing U.S.S.G. §§ 3C1.1, 3E1.1, 5K1.1.).

¹⁰¹ *United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999).

among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline by disclosing “not later than” sentencing.¹⁰²

The Second Circuit held that withholding information – or indeed even committing perjury at trial – does not automatically make a defendant ineligible for the safety valve as long as, by the time of his sentencing, he truthfully provides all the information he has.¹⁰³ Where a defendant meets all five safety valve requirements, the court cannot deny safety valve relief.¹⁰⁴ In *Schreiber*, the Second Circuit expressly disagreed with the Seventh Circuit’s reasoning in *Marin*: that the government’s interest in the truth during interviews “provides any basis for placing additional requirements on defendants who seek to comply with the safety valve.”¹⁰⁵ Instead, the Second Circuit held, “the government’s right to a [safety valve] disclosure does not accrue until [sentencing],” emphasizing the government can penalize “defendants who lie or withhold information during proffer sessions” under other statutes.¹⁰⁶

Other courts provide safety valve relief even to defendants who confess then recant because the “recantation does not diminish the information” provided by the defendant.¹⁰⁷ The Ninth Circuit reasoned “[t]he safety valve statute is not concerned with sparing the government the trouble of preparing for and proceeding with trial,” or “providing the government a means to reward a defendant for supplying useful information.”¹⁰⁸ Rather, “the safety valve was designed to allow the sentencing court to disregard the statutory minimum in sentencing first-time nonviolent drug offenders who

¹⁰² *Id.* at 106.

¹⁰³ *United States v. Jeffers*, 329 F.3d 94, 98-100 (2d Cir. 2003).

¹⁰⁴ *Id.* at 100.

¹⁰⁵ *Schreiber*, 191 F.3d at 108 (citing *United States v. Marin*, 144 F.3d 1085, 1093 (7th Cir. 1998)).

¹⁰⁶ *Id.*; see U.S.S.G. § 3C1.1 (obstruction of justice).

¹⁰⁷ *United States v. Shrestha*, 86 F.3d 935, 940 (9th Cir. 1996).

¹⁰⁸ *Id.*

played a minor role in the offense.”¹⁰⁹ Following similar reasoning, the D.C. Circuit remanded a case for resentencing consistent with the safety valve.¹¹⁰ The defendant in *United States v. Rodriguez* originally lied about a cocaine transaction in part because he feared for his family.¹¹¹ The D.C. Circuit held, because Rodriguez eventually “‘came clean about all aspects of the transaction,’ he met all five elements.”¹¹²

The Tenth Circuit holds a defendant who provides complete truthful disclosure in the Judge’s chambers just before his sentencing hearing is not barred from safety valve relief merely because of his “‘last ditch effort’ before sentencing.”¹¹³ The Eighth Circuit goes one step further, reasoning that, while typically full and complete disclosure should happen before sentencing “to prevent the defendant from misleading the government or manipulating the sentence,” complete disclosure sufficient to meet the fifth element for safety valve relief may be possible even after the sentencing hearing begins.¹¹⁴ In *United States v. Madrigal*, the Eighth Circuit clarified a statement it made in an earlier decision: “a defendant who cynically waits to see what the government can prove at sentencing before telling all is unlikely to warrant safety valve relief.”¹¹⁵ In *Madrigal*, it highlighted “‘unlikely’ would seem not to preclude all possibilities of receiving the safety valve after making a proffer after the start of a sentencing hearing.”¹¹⁶ The majority of circuits hold the plain language of the safety valve requires complete truthful disclosure before sentencing, but previous lies or omissions do not automatically preclude safety valve relief.

¹⁰⁹ *Id.* (quoting *United States v. Arrington*, 73 F.3d 144, 147 (7th Cir. 1996)).

¹¹⁰ *United States v. Rodriguez*, 676 F.3d 183, 193 (D.C. Cir. 2012).

¹¹¹ *Id.* at 188-89.

¹¹² *Id.* at 190-91.

¹¹³ *United States v. Gama-Bastidas*, 142 F.3d 1233, 1242-43 (10th Cir. 1998).

¹¹⁴ *United States v. Madrigal*, 327 F.3d 738, 745 (8th Cir. 2003).

¹¹⁵ *Id.* at 746 (quoting *United States v. Morones*, 181 F.3d 888, 891 n.2 (8th Cir. 1999)).

¹¹⁶ *Id.*

III. A CRITIQUE OF MANDATORY MINIMUMS: HOW THE SAFETY VALVE FAILS TO CORRECT UNJUST MANDATORY MINIMUM SENTENCES THE WAY CONGRESS INTENDED

Congress blamed “uncertain and inadequate penalties” for the growing drug problem, so it enacted mandatory minimums.¹¹⁷ However, mandatory minimums are untenable, and, as Chief Justice Rehnquist pointed out, lead to several unintended and undesirable consequences.¹¹⁸ First, mandatory minimums “upset federalism” because they turn many state drug offenses into federal crimes.¹¹⁹ Second, both mandatory minimums and the Sentencing Guidelines are unfair and fail to work as Congress intended.¹²⁰ Third, the current sentencing system “expressly forbids judges from considering personal characteristics like the defendant’s age and family responsibilities.”¹²¹ However, “[j]ustice in sentencing requires an individualized assessment of the offender and the offense . . . [which] cannot be made by a distant bureaucracy pursuant to abstract rules that disregard important context.”¹²²

Mandatory minimums “squander scarce resources” because defendants receive sentences far greater than are reasonable.¹²³ This is due, in part, because mandatory minimums “typically identify just one aggravating factor, and then pin the prescribed enhanced sentence

¹¹⁷ Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 199 (1993); H.R. REP. NO. 1030, 98th Cong., 2d Sess. 38-40 (1984), reprinted in 1984 U.S.C.C.A.N. 3221-23.

¹¹⁸ *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony) *supra* note 18, at 2 (William H. Rehnquist, Luncheon Address, U.S. SENT’G COMM’N, *Drugs and Violence in America: Proceedings of the Inaugural Symposium on Crime and Punishment in the United States*, 283, 286 (1993).

¹¹⁹ *Hearing on Mandatory Minimum Sentences*, (Stewart Statement), *supra* note 18, at 5.

¹²⁰ Erik Luna, *Mandatory Minimum Sentences Usurp Judicial Power*, Executive Summary, 4, available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa458.pdf>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 18, at 2.

totally on that one factor” disregarding all mitigating factors.¹²⁴ Mandatory sentences also are frequently unpredictable, and their “inflexibility and deliberate inattention to context” ultimately produces unfair and unjust results – results the Seventh Circuit alluded to in *Acevedo-Fitz*.¹²⁵ Because mandatory minimums are unjust, they corrode “our judicial system [which] must enjoy the respect of the public. The robotic imposition of sentences that are viewed as unfair or irrational greatly undermines that respect.”¹²⁶ Moreover, “mandatory minimums are automatic, indiscriminate, and blunt provisions that deny trial courts the ability to calibrate punishment to correspond to a defendant’s actual criminal conduct and circumstances.”¹²⁷ The safety valve fails to address these issues because the vast majority of defendants are not eligible; the safety valve fails to remedy unjust sentences under the mandatory minimum, and the safety valve fails to solve the problems inherent with substantial assistance.

A. The Vast Majority of Defendants Are Not Eligible for the Safety Valve

The safety valve provides relief for defendants convicted of five specific offenses involving certain controlled substances: 1) drug trafficking; 2) possession; 3) smuggling; 4) attempt or conspiracy to violate controlled substance provisions; or 5) attempt or conspiracy to violate the controlled substance import/export provisions.¹²⁸ To be eligible for the safety valve, defendants must provide complete truthful

¹²⁴ *Id.* at 5-6.

¹²⁵ Schulhofer, *supra* note 118, at 208, 211; *United States v. Acevedo-Fitz*, 739 F.3d 967, 971 (7th Cir. 2014); *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra* note 21 at 13-15.

¹²⁶ *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 18, at 2; *United States v. Newhouse*, 919 F. Supp. 2d 955, 974-75 (N.D. Iowa 2013).

¹²⁷ *Com. v. Carela-Tolentino*, 48 A.3d 1221, 1227 (2012).

¹²⁸ 18 U.S.C. § 3553(f); *United States v. Brehm*, 442 F.3d 1291, 1299 (11th Cir. 2006).

disclosure to prosecutors.¹²⁹ But the required form of this disclosure is unclear.¹³⁰ Most frequently, prosecutors interview the defendant, or the defendant provides a proffer.¹³¹ However, simply because a defendant proffers a statement and invites prosecutors to request additional information does not guarantee the defendant will qualify.¹³² While judges independently determine if a defendant provided complete truthful disclosure,¹³³ judges must rely on the prosecutor's input about that disclosure because the defendant discloses his information to the prosecutor, and the prosecutor has all the information regarding the transaction.¹³⁴ This means prosecutors' "near-total control" over safety valve eligibility makes it "virtually impossible for an offender to obtain safety valve relief without the prosecutor's support, because he would have to convince the judge – over the prosecutor's opposition – that he has been truthful and complete."¹³⁵ Because prosecutors frequently want as much information as possible, they likely will ignore the fifth element's express statement that the information need not be useful or novel.¹³⁶ Some prosecutors even charge defendants with crimes not covered by

¹²⁹ *United States v. Jimenez-Martinez*, 83 F.3d 488, 495-96 (1st Cir. 1996); *United States v. Contreras*, 136 F.3d 1245, 1246 (9th Cir. 1998); *United States v. Cervantes*, 519 F.3d 1254, 1257 (10th Cir. 2008).

¹³⁰ *United States v. De La Torre*, 599 F.3d 1198, 1206-07 (10th Cir. 2010).

¹³¹ *United States v. Mejia-Pimental*, 477 F.3d 1100, 1105 (9th Cir. 2007); *United States v. Madrigal*, 327 F.3d 738, 743-44 (8th Cir. 2003); *United States v. Edwards*, 65 F.3d 430, 433 (5th Cir. 1995); *United States v. Schreiber*, 191 F.3d 103, 108-09 (2d Cir. 1999); *United States v. Marin*, 144 F.3d 1085, 1093 (7th Cir. 1998).

¹³² *U.S. v. Milkintas*, 470 F.3d 1339, 1345 (11th Cir. 2006); *United States v. O'Dell*, 247 F.3d 655, 675 (6th Cir. 2001); *United States v. Ortiz*, 136 F.3d 882, 884 (2d Cir. 1997); *United States v. Flanagan*, 80 F.3d 143, 146-47 (5th Cir. 1996); *United States v. Ivester*, 75 F.3d 182, 185-86 (4th Cir. 1996).

¹³³ *United States v. Stewart*, 391 F. App'x 490, 494 (6th Cir. 2010); *United States v. Espinosa*, 172 F.3d 795, 796 (11th Cir. 1999).

¹³⁴ *United States v. Alvarado-Rivera*, 412 F.3d 942, 949-50 (8th Cir. 2005) (Bright, J., Dissenting); Bronn, *supra* note 26, at 498.

¹³⁵ *Siegler & Zunkel*, *supra* note 12, at 3-4; *United States v. Vasquez*, 09-CR-259 (JG), 2010 WL 1257359, at *5 (E.D.N.Y. Mar. 30, 2010); *United States v. Gales*, 560 F. Supp. 2d 27, 29 (D.D.C. 2008).

¹³⁶ 18 U.S.C. § 3553(f)(5).

the safety valve to ensure the defendant is ineligible.¹³⁷ If a defendant is ineligible for the safety valve he can only receive a sentence less than the mandatory minimum by providing substantial assistance.¹³⁸ These issues mean the safety valve fails to address “federal prosecutors’ charging discretion.”¹³⁹ This may explain why judges, activists and legal scholars want judges to determine eligibility.¹⁴⁰

Most drug offenders receive mandatory minimum sentences largely because the safety valve’s scope is limited.¹⁴¹ Many judges and scholars feel Congress should expand the safety valve, particularly since more than two-hundred thousand people are serving mandatory minimum “one-size-fits-all” sentences.¹⁴² Twenty-eight former United States Attorneys turned judges feel the continuing sentencing disparity even with the safety valve “cannot be justified and results in sentences that are unjust and do not serve society’s interest.”¹⁴³ Former prosecutors, judges and legal commentators join groups like the American Bar Association and the non-partisan Federal Judicial Center in calling to repeal mandatory minimums, or at the very least to limit their use to “the most extraordinary circumstances.”¹⁴⁴ One judge

¹³⁷ Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *Cardozo L. Rev.* 1, 54 (September 2010).

¹³⁸ 18 U.S.C. § § 3553(f), (e); Siegler & Zunkel, *supra* note 12, at 2.

¹³⁹ Oliss, *supra* note 11, at 1890; *see United States v. Vasquez*, 09-CR-259 (JG), 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010).

¹⁴⁰ *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 16, at 8.

¹⁴¹ Siegler & Zunkel, *supra* note 12, at 12; Luna & Cassell, *supra* note 137, at 54.

¹⁴² *Hearing on Mandatory Minimum Sentences*, (Stewart Statement) *supra* note 18, at 6; Doyle, *supra* note 21, at 7.

¹⁴³ U.S. SENT’G COMM’N, *Report to the Congress: Cocaine and Federal Sentencing Policy*, 2 (May 2002) available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf (*Statement by Certain United States Circuit Court of Appeals and District Court Judges who Previously Served as United States Attorneys, regarding the penalties for powder and crack cocaine* (April 16, 2002)).

¹⁴⁴ *Hearing on Mandatory Minimum Sentences*, (Stewart Statement), *supra* note 18, at 5; *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 18, at 22.

summarized the continuing sentencing issues, stating “any reasonable person who exposes himself or herself to this system of sentencing, whether judge or politician, would come to the conclusion that such sentencing must be abandoned in favor of a system based on principles of fairness and proportionality.”¹⁴⁵

B. The Safety Valve Fails to Fix Sentencing Disparities Inherent in Mandatory Minimums and Further Fails to Fix the Issues Caused by Substantial Assistance

The safety valve fails to address the mandatory minimum’s sentencing disparities, including “inverted sentences,” which occur when a low-level defendant receives a similar sentence to a higher-level offender when that higher-level offender has more information to provide; “misplaced equality,” which happens when statutes result in sentences that are neither proportional nor commensurable under the circumstances; and “cliffs,” which happen when similarly situated defendants receive vastly different sentences.¹⁴⁶ The safety valve also fails to fix the issues inherent with substantial assistance, often called the cooperation paradox.¹⁴⁷

Inverted sentences occur because a defendant who committed a more serious crime can disclose more information.¹⁴⁸ The Seventh Circuit addressed this issue in *United States v. Brigham*, stating “[t]he more serious the defendant’s crimes, the lower the sentence—because

¹⁴⁵ *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 18, at 31 (quoting Senior Judge Vincent L. Broderick, Southern District of New York, speaking for the Judicial Conference Committee on Criminal Law in testimony about mandatory minimum sentences before the House Judiciary Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, July 28, 1993).

¹⁴⁶ *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992); *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra* note 21; Oliss, *supra* note 11, at 1888; Albonetti, *supra* note 10, at 408.

¹⁴⁷ *Brigham*, 977 F.2d at 317-18 (low-level driver sentenced to 120 months, kingpin to 84. “Mandatory minimum penalties, combined with a power to grant exemptions, create a prospect of inverted sentences”); *United States v. Evans*, 970 F.2d 663, 676-78 & n.19 (10th Cir. 1992) (low level defendants sentenced between 210 months and life, organizers sentenced to probation or supervised release).

¹⁴⁸ *Id.* at 318; Doyle, *supra* note 21, at 3-4.

the greater his wrongs, the more information and assistance he has to offer to a prosecutor.”¹⁴⁹ Further, mandatory minimums “distort traditional roles by transferring judicial discretion to legislatures as well as prosecutors.”¹⁵⁰ When judges lack sentencing discretion and prosecutors have “undue and unreviewable influence,” sentences are disproportionate.¹⁵¹ Indeed, judges must often impose mandatory minimums that “seem[] greatly disproportionate to the crime and terribly cruel to the human being.”¹⁵² As one judge summarized: “The absence of fit between the crude method of punishment and the particular set of circumstances before me was conspicuous; when I imposed sentence . . . everyone present, including the prosecutor, could feel the injustice.”¹⁵³

Mandatory minimums intentionally create disproportionate sentences because they “resemble a search for severity,” focusing on a single factor so “a severe penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator.”¹⁵⁴ This means many offenders receive excessive sentences.¹⁵⁵ Such misplaced equality is “inconsistent with the sentencing reform objectives of proportionality and uniformity.”¹⁵⁶ While proponents of mandatory minimums claim long sentences deter crime, in actuality this deterrence is exceedingly low, leading to the incarceration of large numbers of easily replaced low-level drug dealers without benefitting society.¹⁵⁷ In many instances, mandatory

¹⁴⁹ *Brigham*, 977 F.2d at 318.

¹⁵⁰ *Hearing on Mandatory Minimum Sentences*, (Stewart Statement), *supra* note 18, at 5.

¹⁵¹ *Id.*; *Brigham*, 977 F.2d, at 317-18; *Evans*, 970 F.2d at 676-78.

¹⁵² *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 18, at 8.

¹⁵³ *United States v. Vasquez*, 09-CR-259 (JG), 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010).

¹⁵⁴ *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 18, at 2, 6-7.

¹⁵⁵ *Id.* at 2; *Brigham*, 977 F.2d, at 317-18; *Evans*, 970 F.2d, at 676-78 & n.19.

¹⁵⁶ 18 U.S.C. § 3553(a)(2); *United States v. Booker*, 543 U.S. 220, 224 (2005).

¹⁵⁷ *United States v. Newhouse*, 919 F. Supp. 2d 955, 974-75 (N.D. Iowa 2013) (easily replaced); *Report to the Congress: Cocaine and Federal Sentencing Policy*,

minimum sentences undermine “accurate outcomes” and may “increase the possibility of wrongful convictions.”¹⁵⁸ This explains why most judges feel they “should be allowed to use the generally permissible sentencing factors.”¹⁵⁹

Under mandatory minimums, judges frequently must impose conflicting sentences for two defendants convicted of possessing the same amount of drugs.¹⁶⁰ This cliff effect occurs because mandatory minimums are linked to the quantity of drugs, so small differences – such as 499 grams versus 500 grams – lead to vastly disparate sentences.¹⁶¹ The safety valve may make the cliff effect worse because defendants who are quite different in many respects often receive the exact same sentence.¹⁶² Therefore, the safety valve “increase[s] cliffs by establishing another mandatory bright-line rule that punishes very similar offenders with very different degrees of severity.”¹⁶³ Reducing disparities – such as cliffs – is a “prime directive” of the Sentencing Commission, which recently found the safety valve contributes to “widening sentencing gap[s].”¹⁶⁴

supra note 144, at viii (letter from Judge John S. Martin, Jr. et al., p. 1) (benefitting society).

¹⁵⁸ Luna & Cassell, *supra* note 138, at 67.

¹⁵⁹ Doyle, *supra* note 21, at 4; United States v. Vasquez, 09-CR-259 (JG), 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010).

¹⁶⁰ United States v. Rawlings, 821 F.2d 1543 (11th Cir. 1987); United States v. Raynor, 939 F.2d 191 (4th Cir. 1991).

¹⁶¹ *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra* note 21; Oliss, *supra* note 11, at 188; 5 Albonetti, *supra* note 10, at 409; Froyd, *supra* note 30, at 1499; *USSC on Mandatory Minimums: Testimony of Judge William W. Wilkins, Jr., Chairman*, 6 FED. SENT’G REP. 67, 67 (1993).

¹⁶² *USSC on Mandatory Minimums*, (Wilkins Testimony), *supra* note 162, at 67; *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra* note 21; Froyd, *supra* note 30, at 1499.

¹⁶³ Oliss, *supra* note 11, at 1889-90; *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra* note 21; United States v. Blewett, 12-5226, 2013 WL 6231727 (6th Cir. Dec. 3, 2013) *cert. denied*, 13-8947, 2014 WL 859676 (U.S. Mar. 31, 2014).

¹⁶⁴ Aaron Rappaport, *The State of Severity*, 12 FED. SENT’G REP. 3, 3 (July/August 1999) (prime directive); *Report to the Congress: Cocaine and Federal Sentencing Policy*, *supra* note 144, at 58 (gaps).

The safety valve fails to mitigate harsh drug sentences and, when an offender fails to qualify, mandatory minimums lead to longer sentences.¹⁶⁵ Just twenty-three percent of drug offenders were eligible for the safety valve in 2012.¹⁶⁶ Just six percent of those sentenced under the mandatory minimum were high-level offenders.¹⁶⁷ Seventy-one percent of low-level offenders were ineligible for the safety valve, and received mandatory minimum sentences.¹⁶⁸ Presuming high-level offenders have a similar conviction rate to low-level offenders, the safety valve fails to provide shorter sentences for less culpable defendants.¹⁶⁹ Mandatory minimums result in longer sentences for the most vulnerable and significantly longer sentences for minorities.¹⁷⁰ Racial sentencing disparity and even its perception “fosters disrespect for and lack of confidence in the criminal justice system.”¹⁷¹ Without confidence and respect, our jury system will be less effective because if individuals do not respect our laws they may be less likely to follow them.¹⁷²

¹⁶⁵ Bowman & Heise, *supra* note 44, at 1071; Siegler & Zunkel, *supra* note 12, at 11; CONGRESSIONAL RESEARCH SERVICE, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues and Options 1*, Summary & 15 tbl. 1 (Jan. 22, 2013), available at <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

¹⁶⁶ U.S. SENT’G COMM’N, *2012 Sourcebook of Federal Sentencing Statistics*, tbl. 44 (2013) available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table44.pdf; Siegler & Zunkel, *supra* note 12, at 3-4.

¹⁶⁷ *Id.* at 170, tbl. 40; Siegler & Zunkel, *supra* note 12, at 3-4.

¹⁶⁸ *2012 Sourcebook*, *supra* note 167, tbl. 40, 44; Siegler & Zunkel, *supra* note 12, at 3-4.

¹⁶⁹ *United States v. Brigham*, 977 F.2d 317, 317-18 (7th Cir. 1992); *United States v. Evans*, 970 F.2d 663, 676-78 & n.19 (10th Cir. 1992).

¹⁷⁰ *United States v. Williams*, 788 F. Supp. 2d 847, 882 (N.D. Iowa 2011); *Hearing on Mandatory Minimum Sentences*, *supra* note 18, at 5 (Stewart Statement); Attorney General Eric Holder’s Remarks to American Bar Association (Aug. 12, 2013) available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

¹⁷¹ *Report to the Congress: Cocaine and Federal Sentencing Policy*, *supra* note 144, at viii.

¹⁷² *Williams*, 788 F. Supp. 2d at 882; *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 18, at 2.

The safety valve also does nothing to alleviate the disparity between almost identical defendants who receive drastically different sentences.¹⁷³ Because an ineligible offender may have “mitigating circumstances that substantially differentiate him or her from other offenders dealing in the same quantity of drugs,” but cannot receive a lesser sentence, the safety valve does not solve “excessive uniformity.”¹⁷⁴ This goes against fairness, because “[a] just legal system seeks not only to treat different cases differently but also to treat like cases alike. Fairness requires sentencing uniformity as well as efforts to recognize relevant sentencing differences.”¹⁷⁵ In enacting the safety valve, Congress “focused upon the unfair way in which federal sentencing failed to treat similar offenders similarly,”¹⁷⁶ and intended the safety valve to reduce the inequity and disparity caused by mandatory minimums by restricting them to “kingpins and managers.”¹⁷⁷ However, the safety valve only applies to a small group of low-level defendants, does not apply to many others, and frequently fails entirely to assist mid-level offenders who are neither kingpins nor managers.¹⁷⁸ Moreover, “[l]ow-level, non-violent drug addicts are not drug kingpins engaged in repeated and ‘extremely lucrative’ drug trafficking as envisioned by Congress. On the contrary, they [are] low-level cogs in the drug trade, who are readily replaced.”¹⁷⁹

The safety valve also fails to solve the problems of the cooperation paradox, which increases the inequity of mandatory

¹⁷³ *United States v. Vasquez*, 09-CR-259 (JG), 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010); Oliss, *supra* note 11, at 1890.

¹⁷⁴ Oliss, *supra* note 11, at 1890; *Pepper v. United States*, 131 S. Ct. 1229, 1252 (2011) (Breyer, J., concurring in part and concurring in the judgment); *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra* note 21.

¹⁷⁵ *Pepper*, 131 S. Ct. at 1252 (Breyer, J., concurring).

¹⁷⁶ *Id.*

¹⁷⁷ *Vasquez*, 2010 WL 1257359.

¹⁷⁸ *United States v. Diaz*, 11-CR-00821-2 JG, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013); Adriano Hrvatin, Comment, *Unconstitutional Exploitation of Delegated Authority: How to Deter Prosecutors from Using Substantial Assistance to Defeat the Intent of Federal Sentencing Laws*, 32 GOLDEN GATE U.L. REV. 117, 157 (2002).

¹⁷⁹ *United States v. Newhouse*, 919 F. Supp. 2d 955, 974-75 (N.D. Iowa 2013).

minimum sentences under substantial assistance.¹⁸⁰ Before the enactment of the safety valve, sentencing concessions were available only to those defendants who “provide[d] the most information at the earliest possible point in an investigation,” and generally required a defendant to testify against others or assist investigators.¹⁸¹ The substantial assistance exception provided powerful incentives for defendants to cooperate, but it also created a cooperation paradox, permitting sentence reductions only for those defendants with significant knowledge or responsibility,¹⁸² or for those defendants who win “the race to be the first to ‘spill the beans.’”¹⁸³ This cooperation paradox, which results in “meting out the harshest penalties to those least culpable,” the Seventh Circuit recognizes “is troubling, because it accords with no one’s theory of appropriate punishments.”¹⁸⁴ Because Congress modeled the safety valve’s truthful disclosure requirement after the substantial assistance provision, the safety valve shares many of these same problems.¹⁸⁵ However, this modeling makes little sense, because the safety valve is based on the offender’s culpability while substantial assistance is based on the defendant’s ability and desire to assist prosecutors.¹⁸⁶ Substantial assistance relates neither to the offender’s culpability nor to the traditional factors that determine if a defendant is a threat to society.¹⁸⁷ In contrast, the safety valve’s first four elements reflect the traditional safety factors - 1) criminal history;

¹⁸⁰ *United States v. Brigham*, 977 F.2d 317, 317-18 (7th Cir. 1992); *United States v. Evans*, 970 F.2d 663, 676-78 & n.19 (10th Cir. 1992); Schulhofer, *supra* note 118, at 211.

¹⁸¹ Schulhofer, *supra* note 118, at 211; *United States v. Petrus*, 588 F.3d 347, 358-59 (6th Cir. 2009); *United States v. Flanagan*, 80 F.3d 143, 145, n.1 (5th Cir. 1996); *Brigham*, 977 F.2d at 317-18.

¹⁸² Schulhofer, *supra* note 118, at 212; *Brigham*, 977 F.2d 317; *Evans*, 970 F.2d 663.

¹⁸³ *Petrus*, 588 F.3d at 358-59.

¹⁸⁴ *Brigham*, 977 F.2d at 318.

¹⁸⁵ Froyd, *supra* note 30, at 1499; Albonetti, *supra* note 10, at 410.

¹⁸⁶ Froyd, *supra* note 30, at 1499; Albonetti, *supra* note 10, at 410.

¹⁸⁷ 18 U.S.C. § § 3553(e), (f); *Brigham*, 977 F.2d at 317-18.

2) use of violence; 3) “death or serious bodily injury;” and 4) offender level.¹⁸⁸

While Congress designed the safety valve to reduce disparate sentences, it “is not a cure-all. It does not completely loosen the heavy-handed approach of mandatory minimums for many, if not most, drug defendants.”¹⁸⁹ In actuality, under the safety valve many similar offenders continue to receive vastly different sentences.¹⁹⁰ As one judge lamented, the safety valve, while “commendable in spirit, amount[s] to gnats around the ankles of the elephant . . . safety valve relief from a mandatory minimum does no more than relegate the defendant to a Guidelines range that matches, and even exceeds, the mandatory minimum.”¹⁹¹ Thus, the safety valve fails to remedy disparities and ensure only high-level offenders receive mandatory minimum sentences.¹⁹² This “offend[s] a bedrock principle of justice” because the sentences are “greater than necessary to comply” with the purposes of punishment.¹⁹³ Moreover, the safety valve “often lead[s] to absurd results,”¹⁹⁴ and Washington lawmakers sentencing crimes rather than individuals is “utterly un-American.”¹⁹⁵

¹⁸⁸ 18 U.S.C. § 3553(f).

¹⁸⁹ Jon M. Sands, Note, *How Does the Safety Valve Work? Sentencing Issues Under 18 U.S.C. § 3553{F} AND U.S.S.G. § 5C1.2*, Champion Column Grid & Bear It 39, 42 (Dec. 1996); Ronald Weich, *The Battle Against Mandatory Minimums: a Report from the Front Lines*, 9 FED. SENT’G REP. 94 (1996); Hrvatin, *supra* note 179, at 157.

¹⁹⁰ Oliss, *supra* note 11, at 1890; *United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999).

¹⁹¹ *United States v. Diaz*, 11-CR-00821-2 JG, 2013 WL 322243, at *7 (E.D.N.Y. Jan. 28, 2013).

¹⁹² *United States v. Ortiz*, 136 F.3d 882, 883 (2d Cir. 1997); *United States v. Marin*, 144 F.3d 1085, 1091 (7th Cir. 1998); *United States v. Contreras*, 136 F.3d 1245, 1246 (9th Cir. 1998).

¹⁹³ *Hearing on Mandatory Minimum Sentences*, (Stewart Statement), *supra* note 18, at 5.

¹⁹⁴ Siegler & Zunkel, *supra* note 12, at 3; *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), *supra* note 18, at 2.

¹⁹⁵ *Hearing on Mandatory Minimum Sentences*, (Stewart Statement), *supra* note 18, at 1.

IV. COURTS SHOULD UTILIZE THE PLAIN LANGUAGE INTERPRETATION, NOT SUPERIMPOSE SUBSTANTIAL ASSISTANCE REQUIREMENTS ON THE SAFETY VALVE, AND PERMIT RELIEF FOR DEFENDANTS WHO ORIGINALLY LIE TO ALIGN WITH CONGRESSIONAL INTENT

The safety valve “grant[s] relief to defendants whose knowledge may be of little or no use to the government,” and who cannot meet the substantial assistance requirements.¹⁹⁶ However, the judicial good faith interpretation of the safety valve superimposes substantial assistance requirements on the fifth element, which results in unintended consequences that fail to comport with Congress’ intent.¹⁹⁷ Courts should use the plain language of statutes unless the result is either “so gross as to shock . . . common sense” or “is ‘demonstrably at odds’ with legislative intent.”¹⁹⁸ The Second Circuit explains how this applies to the safety valve: “the text provides no basis for distinguishing among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline.”¹⁹⁹ One advantage of conditioning safety valve relief on complete truthful disclosure is that because the defendant is hoping for a reduced sentence, it makes sense to require he prove he has disclosed all the information he has.²⁰⁰ The plain language reading of the safety valve provides a greater incentive for defendants to tell the truth by permitting them to decide to tell the truth until their sentencing.²⁰¹

¹⁹⁶ *United States v. Shrestha*, 86 F.3d 935, 938-39 (9th Cir. 1996).

¹⁹⁷ *United States v. Matos*, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO.103-460 (1994).

¹⁹⁸ *United States v. Schreiber*, 191 F.3d 103, 106 (2d Cir. 1999) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) and *United States v. Reyes*, 116 F.3d 67, 71 (2d Cir. 1997)).

¹⁹⁹ *Id.*

²⁰⁰ *Shebesta*, *supra* note 22, at 544.

²⁰¹ *Schreiber*, 191 F.3d 103; *United States v. Tournier*, 171 F.3d 648 (8th Cir. 1999); *United States v. Shrestha*, 86 F.3d 935, 935 (9th Cir. 1996); *Krecht v. United States*, 846 F. Supp. 2d 1268, 1286 (S.D. Fla. 2012) (quoting *United States v. Figueroa*, 199 F.3d 1281, 1283 (11th Cir. 2000)); *Shebesta*, *supra* note 22, at 554.

A. Conditioning Safety Valve Relief on Complete Truthful Disclosure from the Moment a Defendant Invokes the Safety Valve and Failing to Require any Proof from the Prosecutor a Defendant Lied Frustrates Congress' Purpose Because This Judicial Interpretation Superimposes Substantial Assistance on the Safety Valve's Fifth Element

Courts – including the Seventh Circuit – treat the safety valve the same way they treat substantial assistance.²⁰² But this is improper because the two statutes work in separate and distinct ways.²⁰³ Substantial assistance is not a “precondition to safety valve relief” and the truthful disclosure element “need not rise to the level of substantial assistance.”²⁰⁴ While substantial assistance requires a defendant’s information help the prosecutor, the fifth element of the safety valve expressly provides the information need not be “relevant or useful.”²⁰⁵ Thus the safety valve “focus[es] . . . on the defendant’s providing information, rather than on the Government’s need for information.”²⁰⁶ Further, prosecutors can “penalize[e] defendants who lie or withhold information during proffer sessions” under an independent and unrelated statute.²⁰⁷

The statutes’ titles further illustrate their differences. Substantial assistance is entitled “Limited Authority to impose a sentence below a statutory minimum.”²⁰⁸ Thus, substantial assistance is a departure from the mandatory minimum, leaving the mandatory minimum as “a reference point for a specific, carefully circumscribed

²⁰² *Shrestha*, 86 F.3d at 939 (quoting *United States v. Arrington*, 73 F.3d 144, 149 (7th Cir. 1996)).

²⁰³ *United States v. Winebarger*, 664 F.3d 388, 393-94 (3d Cir. 2011); *United States v. Ahlers*, 305 F.3d 54, 59 (1st Cir. 2002); *United States v. Fountain*, 223 F.3d 927, 928 (8th Cir. 2000); *United States v. A.B.*, 529 F.3d 1275, 1284 (10th Cir. 2008).

²⁰⁴ *Tournier*, 171 F.3d at 647 (precondition); *United States v. Montanez*, 82 F.3d 520, 522 (1st Cir. 1996) (substantial assistance).

²⁰⁵ *Krecht*, 846 F. Supp. 2d at 1286; 18 U.S.C. § § 3553(f)(5), (e).

²⁰⁶ *United States v. Flanagan*, 80 F.3d 143, 146 (5th Cir. 1996).

²⁰⁷ *United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999) (citing U.S.S.G. § 3C1.1 (obstruction of justice)).

²⁰⁸ 18 U.S.C. § 3553(e).

type of departure” but the mandatory minimum still applies.²⁰⁹ In contrast, the safety valve’s title “Limitation on the applicability of statutory minimums in certain cases” makes it an excusal from “the mandatory minimum [which] is to be *disregarded* once certain conditions are met.”²¹⁰ This demonstrates how Congress “intended to authorize sentencing judges to ignore the limitations imposed by statutory minimum sentences and treat a ‘mandatory minimum’ case like any other.”²¹¹ Had Congress intended the safety valve to operate the same way as substantial assistance, it would likely never have enacted the safety valve. Congress enacted the safety valve to rectify many injustices under the mandatory minimum sentencing scheme; injustices that substantial assistance did not address.²¹² Congress intended the safety valve to provide leniency for low-level defendants who provide what information they have regardless of whether it is new or useful, so disclosure need “not amount to ‘substantial assistance.’”²¹³ Indeed, “[t]he sharp divergence between these regimes leads inexorably to the conclusion that Congress had different plans in mind for the operation and effect of the two provisions.”²¹⁴

Providing separate requirements for the safety valve and substantial assistance also aligns with the reasons behind the safety valve – to provide an opportunity for lower level offenders to escape sentencing under harsh mandatory minimums.²¹⁵ Most safety valve litigation regards the fifth factor, and focuses on the amount of information the defendant provided, when he provided it, and how

²⁰⁹ *United States v. Ahlers*, 305 F.3d 54, 59 (1st Cir. 2002); *United States v. Fountain*, 223 F.3d 927, 928 (8th Cir. 2000).

²¹⁰ *Ahlers*, 305 F.3d at 59; 18 U.S.C. § 3553(f); *United States v. Poyato*, 454 F.3d 1295, 1299 (11th Cir. 2006); *United States v. Holguin*, 436 F.3d 111, 117 (2d Cir. 2006); *United States v. Morrisette*, 429 F.3d 318, 324-25 (1st Cir. 2005).

²¹¹ *Ahlers*, 305 F.3d at 59.

²¹² *United States v. Shrestha*, 86 F.3d 935, 938 (9th Cir. 1996); Mandatory Minimum Sentencing Reform Act of 1994, H.R. REP. NO. 103-460, 103rd Cong., 2d Sess. (1994); S. REP. NO. 225, 98th Cong., 1st Sess. 40 (1983).

²¹³ *United States v. Montanez*, 82 F.3d 520, 522 (1st Cir. 1996).

²¹⁴ *Ahlers*, 305 F.3d at 59.

²¹⁵ *United States v. Matos*, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO. 103-460, at 5 (1994); Hrvatin, *supra* note 179, at 215.

much information he must provide about other conspirators and conduct outside the actual charges.²¹⁶ This is due in part because the determination of whether a defendant completely and truthfully provided all information at his disposal “rests largely on a necessarily imprecise and largely unverifiable assessment by the prosecutor.”²¹⁷ This leaves prosecutors with “considerable de facto discretion either to smooth the path to a safety valve adjustment or to block it.”²¹⁸

Despite the safety valve’s explicit statement that the defendant’s information need not be useful, judges “apply the [fifth] element in the same manner that they apply the substantial assistance provision: by looking to approval from the government. Instead of utilizing the government’s word as a mere recommendation, judges have permitted it to become dispositive of the credibility determination.”²¹⁹ This means even with the safety valve, cooperation is the only meaningful way defendants can reduce their sentences.²²⁰ Thus, judicial interpretation implying a good faith substantial assistance requirement into the fifth element extends the same sentencing problems Congress enacted the safety valve to remedy.²²¹ A plain language reading of the safety valve would permit the safety valve to work the way Congress intended and not re-introduce a substantial assistance requirement.

²¹⁶ *United States v. Feliz*, 453 F.3d 33, 35 (1st Cir. 2006); *United States v. Cruz*, 106 F.3d 1553, 1557 (11th Cir. 1997); *United States v. Vazquez*, 460 F. App’x 442, 444 (5th Cir. 2012); *United States v. Schreiber*, 191 F.3d 103, 104 (2d Cir. 1999); *United States v. Rodriguez-Colon*, 296 F. App’x 767, 768 (11th Cir. 2008).

²¹⁷ *Bowman & Heise*, *supra* note 44, at 1072, 1073.

²¹⁸ *Id.* at 1073; *United States v. Vasquez*, 09-CR-259 (JG), 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010); *United States v. Gales*, 560 F. Supp. 2d 27, 28 (D.D.C. 2008).

²¹⁹ *Bronn*, *supra* note 26, at 484; *Vasquez*, 2010 WL 1257359; *United States v. Ajugwo*, 82 F.3d 925, 929 (9th Cir. 1996); *Hearing on Mandatory Minimum Sentences*, *supra* note 18, at 5 (Stewart Statement).

²²⁰ *United States v. Montes*, 602 F.3d 381, 390 (5th Cir. 2010) (quoting *United States v. Krumnow*, 476 F.3d 294, 295-98 (5th Cir. 2007); *United States v. Christensen*, 582 F.3d 860, 862 (8th Cir. 2009); *United States v. Johnson*, 580 F.3d 666, 673 (7th Cir. 2009).

²²¹ *United States v. Matos*, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO. 103-460, at 5 (1994); *United States v. Montanez*, 82 F.3d 520, 522 (1st Cir. 1996).

1. Placing the Burden of Proof on Defendants Without any Prosecutorial Showing Regarding Truthful Disclosure Reinstates Substantial Assistance on the Safety Valve

Neither the safety valve nor its legislative history discusses the burden of proof, but the Seventh Circuit interpreted the safety valve as requiring defendants prove they met all five elements.²²² The court assumed the safety valve was a departure from mandatory minimums, so it allocated the burden of proof the same way it did other departures, like substantial assistance.²²³ Other circuits followed.²²⁴ But the Seventh Circuit misread the safety valve provision: it is not a departure but rather an excusal from mandatory minimums.²²⁵ So the burden of proof for the safety valve need not be allocated the same way it is for departures.²²⁶ Requiring the defendant to prove their eligibility without any affirmative showing from the government regarding the statement's truthfulness means the government need only make a blanket statement to preclude eligibility.²²⁷ Accepting the government's claims about truthful disclosure without further investigation "transforms the . . . safety valve into the . . . substantial assistance provision," particularly "because fear of a negative recommendation by the government puts immense pressure on the defendant to disclose as much information as possible . . . for fear that

²²² *United States v. Ramirez*, 94 F.3d 1095, 1097-99 (7th Cir. 1996).

²²³ *Ramirez*, 94 F.3d at 1097-99; Bronn, *supra* note 24, at 501-02.

²²⁴ *United States v. Montanez*, 105 F.3d 36 (1st Cir. 1997); *United States v. Verners*, 103 F.3d 108, 110 (10th Cir. 1996) (citing *Ramirez*, 94 F.3d at 1100-1102); *United States v. Ajugwo*, 82 F.3d 925, 929 (9th Cir. 1996); *United States v. Honea*, 660 F.3d 318, 328 (8th Cir. 2011); Bronn, *supra* note 26, at 485.

²²⁵ *Ramirez*, 94 F.3d at 1100; Bronn, *supra* note 26, at 501-02.

²²⁶ *Ramirez*, 94 F.3d at 1100; Bronn, *supra* note 26, at 501-02.

²²⁷ *Honea*, 660 F.3d at 328; *Verners*, 103 F.3d at 110; *Ajugwo*, 82 F.3d at 929; *United States v. Miller*, 179 F.3d 961, 967-68 (5th Cir. 1999) (quoting *United States v. Miranda-Santiago*, 96 F.3d 517, 529 -30 (1st Cir. 1996); *United States v. Gales*, 560 F. Supp. 2d 27, 28 (D.D.C. 2008).

the government will be unsatisfied and claim that the defendant is lying.”²²⁸

Judges have no reliable way to determine whether a defendant provided all information they had and a defendant is frequently unable to prove his information was truthful, particularly when prosecutors disagree.²²⁹ Certainly, as the Seventh Circuit acknowledges, low-level drug dealers frequently have little information because criminal enterprises purposely restrict low-level dealers’ knowledge of the overall operation, so they have no information to provide.²³⁰ Criminal enterprises may intentionally provide false information to low-level dealers to send prosecutors astray.²³¹ The Seventh Circuit described this precise problem: “[d]rones of the organization—the runners, mules, drivers, and lookouts – . . . lack the contacts and trust necessary to set up big deals, and they know little information of value. Whatever tales they have to tell, their bosses will have related.”²³² It is also likely prosecutors will frequently feel they have not received enough information, particularly because they almost certainly have more information than does any low-level defendant. As the safety valve expressly states, “the fact that the defendant has ‘no relevant or useful’ information to provide will not prevent a finding that the defendant has fulfilled the fifth requirement only requires defendants be completely forthcoming.”²³³ However, because judges must make credibility determinations based solely on the defendant’s proffer and

²²⁸ Bronn, *supra* note 26, at 496-97; *e.g.* Miller, 179 F.3d at 967-68; Gales, 560 F. Supp. 2d at 28.

²²⁹ Virginia G. Villa, *Retooling Mandatory Minimum Sentencing: Fixing the Federal “Statutory Safety Valve” to Act As an Effective Mechanism for Clemency in Appropriate Cases*, 21 HAMLINE L. REV. 109, 124(1997); Gales, 560 F. Supp. 2d at 29; United States v. Shrestha, 86 F.3d 935, 938 (9th Cir. 1996); United States v. Milo, 506 F.3d 71, 77 (1st Cir. 2007); United States v. Arrington, 73 F.3d 144, 147-48 (7th Cir. 1996).

²³⁰ United States v. Brigham, 977 F.2d 317 (7th Cir. 1992); Deborah Young, *Rethinking the Commission’s Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENT. REP. 2, 64 (1990).

²³¹ Young, *supra* note 231, at 63-64.

²³² Brigham, 977 F.2d at 317.

²³³ 18 U.S.C. § 3553(f)(5); Shrestha, 86 F.3d at 938.

the government's bare assertion about the proffer's truthfulness without any further showing, there is little opportunity to find the truth.²³⁴ By permitting prosecutors to control the eligibility determination, many "otherwise eligible and truthful defendants" will be ineligible.²³⁵ This goes against Congressional intent, as demonstrated by the fact that Congress enacted the safety valve, and did not include a government motion requirement.²³⁶ It also frustrates judges because, "by merely asserting doubt about an offender's truthfulness, a prosecutor can place the offender in the position of having to prove a negative. It is difficult to imagine how a defendant can prove that he does not know a supplier's name."²³⁷ This judicial dissatisfaction with requiring a defendant prove all five elements with no evidence provided by the prosecution that he has not told the truth has been a contentious issue since the safety valve's enactment.²³⁸

One common objection to shifting the burden to the government is that it would encourage low-level offenders to lie; however, this is inapposite.²³⁹ Since defendants only qualify for the safety valve if they provide truthful disclosure, many will not lie for fear of losing their chance at relief.²⁴⁰ This is particularly true since most courts consider lies or omissions when they determine whether the defendant eventually provided complete truthful disclosure.²⁴¹ Another objection is prosecutors may have to reveal information about continuing drug investigations.²⁴² However, the government has all the

²³⁴ *Gales*, 560 F. Supp. 2d at 29; Bronn, *supra* note 26, at 488.

²³⁵ Bronn, *supra* note 26, at 485-86.

²³⁶ 18 U.S.C. § § 3553(e), (f); *United States v. Stewart*, 391 F. App'x 490, 494 (6th Cir. 2010); *United States v. Espinosa*, 172 F.3d 795, 796 (11th Cir. 1999).

²³⁷ *Gales*, 560 F. Supp. 2d at 28.

²³⁸ Bronn, *supra* note 26, at 488; *United States v. Diaz*, 11-CR-00821-2 JG, 2013 WL 322243, at *7 (E.D.N.Y. Jan. 28, 2013).

²³⁹ *United States v. Marin*, 144 F.3d 1085, 1091 (7th Cir. 1998).

²⁴⁰ *United States v. Schreiber*, 191 F.3d 103, 107 (2d Cir. 1999).

²⁴¹ *United States v. Brownlee*, 204 F.3d 1302, 1305 (11th Cir. 2000); *Schreiber*, 191 F.3d 103 at 107; *Deltoro-Aguilera v. United States*, 625 F.3d 434, 437 (8th Cir. 2010).

²⁴² Bronn, *supra* note 26, at 504-05.

requisite information to prove whether the defendant is truthful,²⁴³ and prosecutors could reveal this proof *in camera* so as not to threaten any on-going investigations. More importantly, this concern is irrelevant to the reasons Congress passed the safety valve.²⁴⁴ Requiring the government prove a defendant was untruthful would preserve Congress's intent, because "[i]f the government had to weigh the cost of challenging the defendant's disclosure with potential difficulties in their ongoing investigations . . . [it would] only challenge a defendant's safety[]valve credibility in instances when the government has valid evidence that the defendant was untruthful."²⁴⁵

Most circuits, including the Seventh, place the burden of proving safety valve eligibility on the defendant,²⁴⁶ but two circuits require the government prove the defendant failed to meet the fifth element. The Fifth and Ninth Circuits shift the burden of proof to the government with regard to truthful disclosure, which helps ensure the safety valve comports with Congress's intent.²⁴⁷ Congress intentionally distinguished the two provisions in several ways – one important method was to give the judge the ultimate eligibility decision.²⁴⁸ Another is that the safety valve is concerned solely with truthful disclosure, and not whether the defendant can provide new or useful information.²⁴⁹ By relying solely on a prosecutor's statements, "the courts have evaded their responsibility of determining eligibility."²⁵⁰ If courts insisted the government demonstrate untruthfulness, it would better serve the safety valve's purpose of providing an opportunity for a lesser sentence for defendants who

²⁴³ *Id.*

²⁴⁴ *United States v. Matos*, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO. 103-460, at 5 (1994).

²⁴⁵ Bronn, *supra* note 26, at 505.

²⁴⁶ *United States v. Acevedo-Fitz*, 739 F.3d 967, 969-70 (7th Cir. 2014); *Matos*, 328 F.3d at 38; Bronn, *supra* note 26, at 488.

²⁴⁷ *United States v. Shrestha*, 86 F.3d 935, 940 (9th Cir. 1996); *United States v. Miller*, 179 F.3d 961, 961 (5th Cir. 1999).

²⁴⁸ 18 U.S.C. § § 3553(e), (f); *Shrestha*, 86 F.3d at 940.

²⁴⁹ 18 U.S.C. § § 3553(e), (f); *Shrestha*, 86 F.3d at 940.

²⁵⁰ Bronn, *supra* note 26, at 498.

provide complete truthful disclosure.²⁵¹ Because the safety valve is not tied to the defendant's ability to assist the government, and because most low-level defendants cannot assist the government because they lack knowledge,²⁵² the concerns underlying substantial assistance do not apply to the safety valve.²⁵³ Courts should construe ambiguous statutes in favor of defendants, so the burden of proof should shift to the government when the fifth factor may make a defendant ineligible for the safety valve.²⁵⁴ Requiring the government prove a defendant failed to meet the fifth factor "honors the safety valve's mandate that the offender's disclosure need not be new or useful."²⁵⁵ It would also ensure judges make the final determination, and prevent prosecutors from "mak[ing] adverse eligibility recommendations if they are simply unsatisfied with the defendant's disclosure."²⁵⁶

2. Judicial Interpretation Requiring Defendants to Provide Truthful Disclosure from the Time They Invoke Safety Valve Relief Goes Against Congressional Intent by Requiring Substantial Assistance for Safety Valve Relief

Many courts that grant safety valve relief to defendants who lie before telling the truth hold defendants must provide complete disclosure before the sentencing hearing occurs.²⁵⁷ The sentencing hearing deadline improves efficiency by creating a bright-line rule that

²⁵¹ *Id.* at 500; *Shrestha*, 86 F.3d at 940; *Miller*, 179 F.3d at 961; *United States v. Miranda-Santiago*, 96 F.3d 517, 519 (1st Cir. 1996).

²⁵² *United States v. Rodriguez*, 60 F.3d 193, 196 (5th Cir. 1995); *United States v. Brigham*, 977 F.2d 317 (7th Cir. 1992).

²⁵³ 18 U.S.C. § 3553(f); *Van Etten*, *supra* note 28, at 1297.

²⁵⁴ *United States v. Santos*, 553 U.S. 507, 514 (2008); *Chapman v. United States*, 500 U.S. 453, 463 (1991).

²⁵⁵ *Bronn*, *supra* note 26, at 507.

²⁵⁶ *Id.*

²⁵⁷ *United States v. Mejia-Pimental*, 477 F.3d 1100, 1105 (9th Cir. 2007); *United States v. Madrigal*, 327 F.3d 738, 743-44 (8th Cir. 2003); *United States v. Edwards*, 65 F.3d 430, 433 (5th Cir. 1995); *United States v. Schreiber*, 191 F.3d 103, 108-09 (2d Cir. 1999).

is easy to apply, reduces time in court, keeps the government from having to argue against its use after that time, and permits the government to question the defendant more extensively about his statement.²⁵⁸ However, this bright-line rule shares a major problem with all bright-line rules because “it sweeps so broadly that it creates harsh results that were probably not intended.”²⁵⁹

Regarding the disclosure’s timing, Congress did not intend the safety valve to “spare the government the trouble of preparing for and proceeding with trial,” or “provid[e] the government a means to reward a defendant for supplying useful information.”²⁶⁰ Substantial assistance addresses these considerations, and defendants who obstruct investigations receive longer sentences.²⁶¹ Moreover, the safety valve’s “plain words . . . provide only one deadline for compliance . . . Nothing in the statute suggests that a defendant is automatically disqualified if he or she previously lied or withheld information.”²⁶² Nor does it “distinguish[] among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline by disclosing ‘not later than’ sentencing.”²⁶³ Even defendants who provide “tardy or grudging cooperation,”²⁶⁴ are eligible for safety valve relief because defendants satisfy the truthfulness requirement, “regardless of [their] timing or motivation,” rendering any “pre-sentencing delays” irrelevant.²⁶⁵

A major justification for imprisonment is to protect society.²⁶⁶ However, this concern is addressed by the safety valve’s first four

²⁵⁸ *Davis v. United States*, 131 S. Ct. 2419, 2424 (2011); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006).

²⁵⁹ *Texas Farmers Ins. Co. v. Deville*, 988 S.W.2d 331, 336-37 (Tex. App. 1999); *United States v. Stotts*, 925 F.2d 83, 89 (4th Cir. 1991); *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141, 146 (3d Cir. 2003).

²⁶⁰ *United States v. Shrestha*, 86 F.3d 935, 940 (9th Cir. 1996).

²⁶¹ 18 U.S.C. § 3553(e); *Mejia-Pimental*, 477 F.3d at 1107.

²⁶² *Schreiber*, 191 F.3d at 106.

²⁶³ *Id.*

²⁶⁴ *United States v. Tournier*, 171 F.3d 645, 647 (8th Cir. 1999).

²⁶⁵ *Mejia-Pimental*, 477 F.3d at 1106.

²⁶⁶ 18 U.S.C. § 3553(a); Bronn, *supra* note 26, at 505-06.

requirements – criminal history, use of violence, whether the act resulted in “death or serious bodily injury,” and the offender’s involvement.²⁶⁷ Further, a defendant’s truthfulness does not align with their culpability or the threat they pose to society.²⁶⁸ Thus, courts should work to ensure the safety valve applies to low-level offenders, rather than using the fifth element as a proxy for substantial assistance and unfettered prosecutorial discretion.²⁶⁹ As one court aptly stated:

The government is not free to play cat and mouse with defendants, leading safety valve debriefings down blind alleys and then blaming the defendants for failing to disclose material facts. Nor can the government squeeze all the juice from the orange and then deprive a truthful and cooperative defendant of his end of the bargain by juxtaposing trivial inconsistencies or exaggerating inconsequential omissions.²⁷⁰

Disqualification based on one lie defeats the safety valve’s purpose – to reduce the severity of sentences imposed on low-level defendants.²⁷¹

Because insisting upon complete disclosure from the time a defendant invokes safety valve relief re-imposes the substantial assistance requirement, the Seventh Circuit’s good faith interpretation essentially reinstates mandatory minimums for a majority of offenders, excluding too many defendants and creating unfair results because the safety valve’s text does not impose any such requirement.²⁷² The plain language interpretation is persuasive, as Congress did not intend

²⁶⁷ 18 U.S.C. § 3553(f); Bronn, *supra* note 26, at 505-06.

²⁶⁸ 18 U.S.C. § 3553(f); *United States v. Rodriguez*, 60 F.3d 193, 196 (5th Cir. 1995); *United States v. Shrestha*, 86 F.3d 935, 938 (9th Cir. 1996); *United States v. Brigham*, 977 F.2d 317, 317-18 (7th Cir. 1992).

²⁶⁹ *United States v. Matos*, 328 F.3d 34, 42 (1st Cir. 2003); *United States v. Vasquez*, 09-CR-259 (JG), 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010); *United States v. Gales*, 560 F. Supp. 2d 27, 29 (D.D.C. 2008).

²⁷⁰ *Matos*, 328 F.3d at 42.

²⁷¹ *United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999); H.R. REP. NO.103-460, at 2 (1994); Shebesta, *supra* note 22, at 553-54.

²⁷² *United States v. Ramunno*, 133 F.3d 476 (7th Cir. 1998); *United States v. Wrenn*, 66 F.3d 1 (1st Cir. 1995).

delays in truthful disclosure to preclude safety valve relief, but rather intended to rectify harsh mandatory minimum sentences.²⁷³ Moreover, Congress' purpose for passing the safety valve is separate from – and unrelated to – substantial assistance.²⁷⁴ Because Congress intended the safety valve to benefit defendants, and the rule of lenity requires courts construe ambiguous criminal statutes in favor of defendants due to the severity and moral implications of a criminal conviction, courts should construe the safety valve in the defendant's favor when the fifth factor may make a defendant ineligible for the safety valve.²⁷⁵

CONCLUSION

For all these reasons, the judicially imposed requirement that defendants provide complete truthful disclosure from the moment they invoke the safety valve defeats the safety valve's purpose: to spare less culpable offenders from mandatory minimum sentences.²⁷⁶ Utilizing the plain-language interpretation of the safety valve would result in a greater number of defendants being eligible, and would help mitigate inverted sentences, misplaced equality, and cliffs.²⁷⁷ Providing an incentive to defendants to disclose information to the government serves a utilitarian function.²⁷⁸ It makes sense to require the defendant provide complete truthful disclosure as it is the defendant who hopes for a reduced sentence and the government may receive useful information.²⁷⁹ The plain language interpretation of the safety valve

²⁷³ *United States v. Mejia-Pimental*, 477 F.3d 1100, 1107 (9th Cir. 2007).

²⁷⁴ 18 U.S.C. § 3553(f); *Matos*, 328 F.3d at 36; H.R. REP. NO. 103-460, at 5 (1994).

²⁷⁵ *United States v. Santos*, 553 U.S. 507, 514 (2008).

²⁷⁶ 18 U.S.C. § 3553(f); *United States v. Shrestha*, 86 F.3d 935, 938 (9th Cir. 1996); *United States v. Acosta-Olivas*, 71 F.3d 375, 378 (10th Cir. 1995); *United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999); *Matos*, 328 F.3d at 36; H.R. REP. NO. 103-460, at 5.

²⁷⁷ *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992); *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra* note 21; Oliss, *supra* note 11, at 1888; Albonetti, *supra* note 10, at 408.

²⁷⁸ Shebesta, *supra* note 22, at 544.

²⁷⁹ *Id.*

provides greater incentive for defendants to provide complete truthful information to prosecutors because a defendant who is disqualified after one lie has no reason to share any more information.²⁸⁰ Furthermore, immediately disqualifying a defendant due to a prior lie or omission means more defendants receive disparate and harsh sentences.²⁸¹ Congress enacted the safety valve because, “for the very offenders who most warrant proportionally lower sentences—offenders that by guideline definitions are the least culpable—mandatory minimums generally operate to block the sentence from reflecting mitigating factors.”²⁸² So the “least culpable offenders may receive the same sentences as their relatively more culpable counterparts.”²⁸³ The current sentencing system “is perceptibly unfair: mandatory statutory sentences [are] applied consistently only to those who are the least culpable, and to whom, perhaps, the statutes should not apply at all.”²⁸⁴ A plain language reading of the safety valve, as utilized in most circuits, comports with Congress’ intent while providing just sentences for low-level defendants.

²⁸⁰ 18 U.S.C. § § 3553(f); Shebesta, *supra* note 22, at 554.

²⁸¹ *Matos*, 328 F.3d at 36; *Brigham*, 977 F.2d at 317-18; *United States v. Evans*, 970 F.2d 663, 676-78 & n.19 (10th Cir. 1992); H.R. REP. NO. 103-460, at 5 (1994); Shebesta, *supra* note 22, at 554.

²⁸² *United States v. Thompson*, 76 F.3d 166, 171 (7th Cir. 1996) (quoting H.R. REP. NO. 103-460, at 5 (1994)).

²⁸³ *Views from the Sentencing Commission*, 12 REP. FED. SENT. R. 347 (JUNE 1, 2000); see H.R. REP. NO. 103-460, at 5 (1994); *United States v. Thompson*, 76 F.3d 166, 171 (7th Cir. 1996); *Acosta-Olivas*, 71 F.3d at 378; *United States v. Tournier*, 171 F.3d 645, 647 (8th Cir. 1999); *Matos*, 328 F.3d at 36.

²⁸⁴ *Villa*, *supra* note 230, at 121.