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).
prosecutors—also called “the heart of the provision.” 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. 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. The other circuits hold that defendants may lie at a proffer before providing complete disclosure and still retain safety valve eligibility. These circuits permit eligibility within a range: some provide safety valve relief when a defendant provides prosecutors with a single lie; at least one has gone so far as to state a defendant will not automatically lose eligibility even after committing perjury at trial. 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.

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

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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 CRM. 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).


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

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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.” 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.” 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.” Indeed “disparity is inevitable” under mandatory minimums. 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.
definitions are the least culpable – mandatory minimums generally operate to block the sentence from reflecting mitigating factors.”

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. This exemption, referred to as the safety valve, applies to federal drug offenses including possession, conspiracy and importation. 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

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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.\textsuperscript{22}

Although meeting all five criteria may be difficult, the safety valve can “provide[] an important escape from mandatory minimum sentencing.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{25}

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


\textsuperscript{24} United States v. Adu, 82 F.3d 119, 121 (6th Cir. 1996).


\textsuperscript{27} U.S. SENTENCING GUIDELINES MANUAL § 3A-D (2002); Molly N. Van Etten, \textit{The Difference Between Truth and Truthfulness: Objective Versus Subjective Standards in Applying Rule 5C1.2}, 56 \textit{Vand. L. Rev.} 1265, 1271 (May 2003); Yeh, \textit{supra} note 27.
mandatory range based on the offender’s criminal history.\textsuperscript{28} The Sentencing Guidelines discount potentially mitigating – and generally relevant – issues such as the offender’s “family and community ties, education, and employment,”\textsuperscript{29} and only permit judges to consider factors such as the defendant’s cooperation for possible sentence reduction.\textsuperscript{30} In contrast, the safety valve permits judges to consider further mitigating factors, and can have a major impact on sentences.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{35} This element is subject to several interpretations, and is

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{29} Jane L. Froyd, Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines, 94 NW. U. L. REV. 1471, 1498 (2000).
\item \textsuperscript{30} U.S. SENTENCING GUIDELINES MANUAL § 3A-D (2002); Van Etten, supra note 28, at 1272.
\item \textsuperscript{31} H.R. REP. No. 103-460, at 5 (1994); Bowman, supra note 24, at 120; Albonetti, supra note 10, at 407.
\item \textsuperscript{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.
\item \textsuperscript{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).
\item \textsuperscript{34} 18 U.S.C. § 3553(f)(5).
\item \textsuperscript{35} Id.; United States v. Steward, 93 F.3d 189 (5th Cir. 1996).
\end{itemize}
thus the most heavily litigated.\textsuperscript{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.”\textsuperscript{37} Courts sometimes refer to this as the “‘tell all you can tell’ requirement.”\textsuperscript{38} The truthfulness requirement, particularly regarding prior inconsistent statements, is the subject of an ongoing circuit split.\textsuperscript{39}

\textbf{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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.

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

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

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

\textsuperscript{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.\footnote{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.”\footnote{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.\footnote{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.\footnote{45} Yet in other circuits, the distinction can make a large difference.

\textbf{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.\footnote{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.\footnote{47} Another argument underlying the good faith interpretation is that the government should not have to conduct multiple investigations, nor repeatedly share its

\footnote{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).
\footnote{43} Frank O. Bowman, III & Michael Heise, \textit{Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences}, 86 \textit{IOWA L. REV.} 1043, 1073 (2001); \textit{e.g.} Flanagan, 80 F.3d at 146; United States v. Ramirez, 94 F.3d 1095, 1101 (7th Cir. 1996).
\footnote{44} Brownlee, 204 F.3d at 1305; United States v. Shrestha, 86 F.3d 935, 940 (9th Cir. 1996); \textit{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.
\footnote{45} United States v. Marin, 144 F.3d 1085, 1095 (7th Cir. 1998).
\footnote{46} United States v. Arrington, 73 F.3d 144, 148 (7th Cir. 1996).
\footnote{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. In *United States v. Acevedo-Fitz*, it explicitly rejected the “plain language” interpretation used by other circuits. 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.

In *Acevedo-Fitz*, the Seventh Circuit precluded safety valve eligibility for a defendant who initially lied before providing the truth. Prosecutors charged Acevedo-Fitz with conspiracy, heroin distribution, and three counts of using a communication facility in committing a felony drug crime. Acevedo-Fitz pleaded guilty to the conspiracy charges, and admitted to selling heroin on several occasions. The government dropped the other charges. 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. Acevedo-Fitz continued to deny remembering the events, but told investigators he might

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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. The government argued Acevedo-Fitz was ineligible for the safety valve because he failed to provide “all [the] information” he had. 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. The government countered Acevedo-Fitz lied, did not cooperate during his safety valve debriefings, denied documented offenses, and his letter contained insufficient detail. Acevedo-Fitz argued he provided some truthful statements during the debriefings and the missing details were unimportant. 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.” 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. 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.

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.” 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

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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.” 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. 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.” 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.”

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. 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. Other courts grant relief to defendants who repeatedly withheld information.

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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."

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. 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.”

The Eighth Circuit holds early, consistent cooperation is “not a precondition for safety valve relief.” 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. 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.”

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.”

Similarly, in United States v. Mejia-Pimental, the Ninth Circuit overturned a safety valve denial because the district court “construed good faith too broadly.” 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.\textsuperscript{95} Mejia-Pimental wrote a letter providing everything he knew, including the involvement of others.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{98} The court concluded a defendant satisfies the truthfulness requirement “regardless of his timing or motivations.”\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{101} The court reasoned:

\begin{quote}
[t]he plain words of the statute provide only one deadline for compliance \ldots 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
\end{quote}

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\textsuperscript{95} \textit{Id.} at 1103.
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.} at 1104-05.
\textsuperscript{98} \textit{Id.} at 1106.
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.} at 1107 (citing U.S.S.G. §§ 3C1.1, 3E1.1, 5K1.1.).
\textsuperscript{101} \textit{United States v. Schreiber}, 191 F.3d 103, 108 (2d Cir. 1999).
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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. 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. Where a defendant meets all five safety valve requirements, the court cannot deny safety valve relief. 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.” 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.

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. 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.” 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.
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.”

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

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. 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.

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.” 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.” 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.

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109 Id. (quoting United States v. Arrington, 73 F.3d 144, 147 (7th Cir. 1996)).
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. However, mandatory minimums are untenable, and, as Chief Justice Rehnquist pointed out, lead to several unintended and undesirable consequences. First, mandatory minimums “upset federalism” because they turn many state drug offenses into federal crimes. Second, both mandatory minimums and the Sentencing Guidelines are unfair and fail to work as Congress intended. Third, the current sentencing system “expressly forbids judges from considering personal characteristics like the defendant’s age and family responsibilities.” 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.”

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

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

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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.
128 18 U.S.C. § 3553(f); United States v. Brehm, 442 F.3d 1291, 1299 (11th Cir. 2006).
Disclosure to prosecutors. But the required form of this disclosure is unclear. Most frequently, prosecutors interview the defendant, or the defendant provides a proffer. However, simply because a defendant proffers a statement and invites prosecutors to request additional information does not guarantee the defendant will qualify. While judges independently determine if a defendant provided complete truthful disclosure, 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. 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.” 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. Some prosecutors even charge defendants with crimes not covered by

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

Most drug offenders receive mandatory minimum sentences largely because the safety valve’s scope is limited. 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. 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.” 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.” 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.
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.
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.”

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. The safety valve also fails to fix the issues inherent with substantial assistance, often called the cooperation paradox.

Inverted sentences occur because a defendant who committed a more serious crime can disclose more information. 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


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.” Further, mandatory minimums “distort traditional roles by transferring judicial discretion to legislatures as well as prosecutors.” When judges lack sentencing discretion and prosecutors have “undue and unreviewable influence,” sentences are disproportionate. Indeed, judges must often impose mandatory minimums that “seem[] greatly disproportionate to the crime and terribly cruel to the human being.” 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.”

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.” This means many offenders receive excessive sentences. Such misplaced equality is “inconsistent with the sentencing reform objectives of proportionality and uniformity.”

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. In many instances, mandatory

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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.
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.
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.” This explains why most judges feel they “should be allowed to use the generally permissible sentencing factors.”

Under mandatory minimums, judges frequently must impose conflicting sentences for two defendants convicted of possessing the same amount of drugs. 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. The safety valve may make the cliff effect worse because defendants who are quite different in many respects often receive the exact same sentence. 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.” 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].”

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.
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.
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. Just twenty-three percent of drug offenders were eligible for the safety valve in 2012. Just six percent of those sentenced under the mandatory minimum were high-level offenders. Seventy-one percent of low-level offenders were ineligible for the safety valve, and received mandatory minimum sentences. 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. Mandatory minimums result in longer sentences for the most vulnerable and significantly longer sentences for minorities. Racial sentencing disparity and even its perception “fosters disrespect for and lack of confidence in the criminal justice system.” 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.

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.
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.\footnote{United States v. Vasquez, 09-CR-259 (JG), 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010); Oliss, supra note 11, at 1890.} 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.”\footnote{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.} 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.”\footnote{Pepper, 131 S. Ct. at 1252 (Breyer, J., concurring).} In enacting the safety valve, Congress “focused upon the unfair way in which federal sentencing failed to treat similar offenders similarly,”\footnote{Id.} and intended the safety valve to reduce the inequity and disparity caused by mandatory minimums by restricting them to “kingpins and managers.”\footnote{Vasquez, 2010 WL 1257359.} 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.\footnote{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).} 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.”\footnote{United States v. Newhouse, 919 F. Supp. 2d 955, 974-75 (N.D. Iowa 2013).}

The safety valve also fails to solve the problems of the cooperation paradox, which increases the inequity of mandatory
minimum sentences under substantial assistance. 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. 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, or for those defendants who win “the race to be the first to ‘spill the beans.’” 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.” Because Congress modeled the safety valve’s truthful disclosure requirement after the substantial assistance provision, the safety valve shares many of these same problems. 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. Substantial assistance relates neither to the offender’s culpability nor to the traditional factors that determine if a defendant is a threat to society. 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.\textsuperscript{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.”\textsuperscript{189} In actuality, under the safety valve many similar offenders continue to receive vastly different sentences.\textsuperscript{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.”\textsuperscript{191} Thus, the safety valve fails to remedy disparities and ensure only high-level offenders receive mandatory minimum sentences.\textsuperscript{192} This “offend[s] a be- drock principle of justice” because the sentences are “greater than necessary to comply” with the purposes of punishment.\textsuperscript{193} Moreover, the safety valve “often lead[s] to absurd results,”\textsuperscript{194} and Washington lawmakers sentencing crimes rather than individuals is “utterly un-American.”\textsuperscript{195}

\textsuperscript{188} 18 U.S.C. § 3553(f).
\textsuperscript{190} Oliss, supra note 11, at 1890; United States v. Schreiber, 191 F.3d 103, 108 (2d Cir. 1999).
\textsuperscript{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).
\textsuperscript{193} Hearing on Mandatory Minimum Sentences, (Stewart Statement), supra note 18, at 5.
\textsuperscript{194} Siegler & Zunkel, supra note 12, at 3; Hearing on Mandatory Minimum Sentences, (Carnes Testimony), supra note 18, at 2.
\textsuperscript{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. 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. 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.” 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.” 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. 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.

197 United States v. Matos, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO.103-460 (1994).
199 Id.
200 Shebesta, supra note 22, at 544.
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. But this is improper because the two statutes work in separate and distinct ways. Substantial assistance is not a “precondition to safety valve relief” and the truthful disclosure element “need not rise to the level of substantial assistance.” 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.” Thus the safety valve “focus[es] . . . on the defendant’s providing information, rather than on the Government’s need for information.” Further, prosecutors can “penalize[e] defendants who lie or withhold information during proffer sessions” under an independent and unrelated statute.

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

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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).
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. 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.” 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.” 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 to rectify many injustices under the mandatory minimum sentencing scheme; injustices that substantial assistance did not address. 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.’” 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.”

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. Most safety valve litigation regards the fifth factor, and focuses on the amount of information the defendant provided, when he provided it, and how

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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.
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.\textsuperscript{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.”\textsuperscript{217} This leaves prosecutors with “considerable de facto discretion either to smooth the path to a safety valve adjustment or to block it.”\textsuperscript{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.”\textsuperscript{219} This means even with the safety valve, cooperation is the only meaningful way defendants can reduce their sentences.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{217} Bowman & Heise, supra note 4, at 1072, 1073.


\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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. 1999); 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.”

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. 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. Criminal enterprises may intentionally provide false information to low-level dealers to send prosecutors astray. 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.” 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.” However, because judges must make credibility determinations based solely on the defendant’s proffer and

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


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.\textsuperscript{234} By permitting prosecutors to control the eligibility determination, many “otherwise eligible and truthful defendants” will be ineligible.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{240} This is particularly true since most courts consider lies or omissions when they determine whether the defendant eventually provided complete truthful disclosure.\textsuperscript{241} Another objection is prosecutors may have to reveal information about continuing drug investigations.\textsuperscript{242} However, the government has all the

\textsuperscript{234} Gales, 560 F. Supp. 2d at 29; Bronn, supra note 26, at 488.
\textsuperscript{235} Bronn, supra note 26, at 485-86.
\textsuperscript{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).
\textsuperscript{237} Gales, 560 F. Supp. 2d at 28.
\textsuperscript{239} United States v. Marin, 144 F.3d 1085, 1091 (7th Cir. 1998).
\textsuperscript{240} United States v. Schreiber, 191 F.3d 103, 107 (2d Cir. 1999).
\textsuperscript{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).
\textsuperscript{242} Bronn, supra note 26, at 504-05.
requisite information to prove whether the defendant is truthful,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{245}

Most circuits, including the Seventh, place the burden of proving safety valve eligibility on the defendant,\textsuperscript{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.\textsuperscript{247} Congress intentionally distinguished the two provisions in several ways – one important method was to give the judge the ultimate eligibility decision.\textsuperscript{248} Another is that the safety valve is concerned solely with truthful disclosure, and not whether the defendant can provide new or useful information.\textsuperscript{249} By relying solely on a prosecutor’s statements, “the courts have evaded their responsibility of determining eligibility.”\textsuperscript{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

\textsuperscript{243} Id.
\textsuperscript{244} United States v. Matos, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO. 103-460, at 5 (1994).
\textsuperscript{245} Bronn, supra note 26, at 505.
\textsuperscript{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.
\textsuperscript{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).
\textsuperscript{248} 18 U.S.C. § § 3553(e), (f); Shrestha, 86 F.3d at 940.
\textsuperscript{249} 18 U.S.C. § § 3553(e), (f); Shrestha, 86 F.3d at 940.
\textsuperscript{250} Bronn, supra note 26, at 498.
provide complete truthful disclosure.\textsuperscript{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,\textsuperscript{252} the concerns underlying substantial assistance do not apply to the safety valve.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{257} The sentencing hearing deadline improves efficiency by creating a bright-line rule that

\textsuperscript{251} Id. at 500; \textit{Shrestha}, 86 F.3d at 940; \textit{Miller}, 179 F.3d at 961; United States v. Miranda-Santiago, 96 F.3d 517, 519 (1st Cir. 1996).
\textsuperscript{252} United States v. Rodriguez, 60 F.3d 193, 196 (5th Cir. 1995); United States v. Brigham, 977 F.2d 317 (7th Cir. 1992).
\textsuperscript{253} 18 U.S.C. § 3553(f); \textit{Van Etten}, supra note 28, at 1297.
\textsuperscript{255} Bronn, \textit{supra} note 26, at 507.
\textsuperscript{256} \textit{Id}.
\textsuperscript{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. 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.”

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.” Substantial assistance addresses these considerations, and defendants who obstruct investigations receive longer sentences. 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.” 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.” Even defendants who provide “tardy or grudging cooperation,” are eligible for safety valve relief because defendants satisfy the truthfulness requirement, “regardless of [their] timing or motivation,” rendering any “pre-sentencing delays” irrelevant.

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

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260 United States v. Shrestha, 86 F.3d 935, 940 (9th Cir. 1996).
261 18 U.S.C. § 3553(d); 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.\textsuperscript{267} Further, a defendant’s truthfulness does not align with their culpability or the threat they pose to society.\textsuperscript{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.\textsuperscript{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.\textsuperscript{270}

Disqualification based on one lie defeats the safety valve’s purpose – to reduce the severity of sentences imposed on low-level defendants.\textsuperscript{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.\textsuperscript{272} The plain language interpretation is persuasive, as Congress did not intend

\begin{footnotesize}
\textsuperscript{267} 18 U.S.C. § 3553(f); Bronn, \textit{supra} note 26, at 505-06.
\textsuperscript{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).
\textsuperscript{270} Matos, 328 F.3d at 42.
\textsuperscript{272} United States v. Ramunno, 133 F.3d 476 (7th Cir. 1998); United States v. Wrenn, 66 F.3d 1 (1st Cir. 1995).
\end{footnotesize}
delays in truthful disclosure to preclude safety valve relief, but rather intended to rectify harsh mandatory minimum sentences.\textsuperscript{273} Moreover, Congress’ purpose for passing the safety valve is separate from – and unrelated to – substantial assistance.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{277} Providing an incentive to defendants to disclose information to the government serves a utilitarian function.\textsuperscript{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.\textsuperscript{279} The plain language interpretation of the safety valve

\textsuperscript{273} United States v. Mejia-Pimental, 477 F.3d 1100, 1107 (9th Cir. 2007).
\textsuperscript{274} 18 U.S.C. § 3553(f); Matos, 328 F.3d at 36; H.R. REP. NO. 103-460, at 5 (1994).
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{278} Shebesta, supra note 22, at 544.
\textsuperscript{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.\footnote{18 U.S.C. § § 3553(f); Shebesta, supra note 22, at 554.} Furthermore, immediately disqualifying a defendant due to a prior lie or omission means more defendants receive disparate and harsh sentences.\footnote{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.} 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.”\footnote{United States v. Thompson, 76 F.3d 166, 171 (7th Cir. 1996) (quoting H.R. REP. NO. 103-460, at 5 (1994)).} So the “least culpable offenders may receive the same sentences as their relatively more culpable counterparts.”\footnote{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.} 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.”\footnote{Villa, supra note 230, at 121.} 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.