"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

"And what we students of history always learn is that the human being is a very complicated contraption and that they are not good or bad but are good and bad and the good comes out of the bad and the bad out of the good, and the devil take the hindmost."
– Robert Penn Warren, *All the King's Men*

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Congress enacted 18 U.S.C. § 3553(f) as a statutory safety-valve provision to prevent low-level narcotics offenders from receiving the harshest sentences under the federal mandatory minimum narcotics sentencing regime. Unfortunately, the majority of federal circuits allocate the burden of proof of the statute to the defendant, thereby rendering the safety valve ineffective for many narcotics offenders. This Note analyzes the history of the statute, as well as the majority and minority judicial practices in allocating the burden of proof under the statute, and argues that the government should shoulder the burden of proof in safety-valve eligibility hearings in order to effectuate the intent of Congress.

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I. INTRODUCTION

Alma Garcia is a hard-working woman who fled civil war in her home country of El Salvador to make a life for herself and her children in the United States.[1] Alma worked in America for many years as a cashier, waitress, cook, and translator. But at $6.50 an hour, a strong work ethic was not enough to support her children. Desperate to provide for her family, she accepted an offer to earn money by allowing two men to drop cocaine off at her home.[2] In 2001, Alma asked the men to stop using her home for their illicit purposes, and she moved away from the area shortly thereafter. However, a few years later, the men found Alma again, and convinced her to let them use her home once more to store methamphetamine. Out of fear, she allowed them to store the drugs at her home five times in the course of eight months.[3] In 2006, the Drug Enforcement Administration (DEA) began investigating the two men for drug conspiracy and, although she was no longer involved in trafficking, Alma contacted an agent and confessed to her role in the crime.[4]

Alma was eventually charged with and pled guilty to her role in the drug conspiracy, and although she was a minimal participant and had been forced to store the drugs out of desperation, she was still held responsible for the entire quantity of drugs that the men dealt throughout the decade-long course of their felony.[5] Because of harsh mandatory minimum drug laws in the United States, Alma qualified for a ten-year sentence — she was certain that her children would be adults by the time she completed her time in prison.[6]

1. *Faces of FAMM: Federal Prisoners: Alma Garcia*, Families Against Mandatory Minimums (Feb. 10, 2011, 4:12 PM), http://www.famm.org/ProfilesofInjustice/FederalProfiles/AlmaGarcia.aspx (accessed by searching for FAMM.org in the Internet Archive index).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

During her sentencing hearing, the judge acknowledged that Alma had no prior criminal history and had willingly contacted the DEA, and expressed deep regret that he had to sentence Alma to any time in prison at all.[7] However, luckily for Alma, he was able to sentence her to significantly fewer years than the ten that the guidelines would have normally dictated, due to the passage of the 18 U.S.C. § 3553(f) safety-valve provision. This provision allows judges to sentence qualifying low-level drug offenders to less than the mandatory minimum.[8] Alma is currently serving a sentence of five years and ten months in federal prison, less than half the amount of time she would have been slated to serve absent the safety valve's application.[9]

Despite the five years that she will serve in prison for her minimal involvement in a drug conspiracy, Alma Garcia is a success story among low-level drug offenders and so-called "drug mules." Alma's relatively good fortune would not have been possible without 18 U.S.C. § 3553(f), which Congress passed in 1994 in response to concerns that mandatory minimum laws were forcing low-level offenders to serve disproportionally long sentences.[10]

Prior to the passage of the statutory safety valve, the only way for drug offenders to avoid receiving a mandatory minimum sentence was through the 18 U.S.C. § 3553(e) "substantial assistance" provision.[11] However, in order to qualify for a substantial-assistance sentencing departure, an offender must provide the government with information that is both new and useful to the government about the drug conspiracy in which the offender was nominally involved. At that point, the prosecutor must decide whether to make a motion for the departure, based in part on how satisfied he or she is with the extent of the offender's disclosure.[12] While drug-conspiracy organizers often possess significant amounts of valuable information to offer to the government

7. *Id.*

8. 18 U.S.C. § 3553(f) (2006).

9. *Id.*

10. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 16–17 (1991) [hereinafter SPECIAL REPORT], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm.

11. 18 U.S.C. § 3553(e) (2006). Mandatory minimum sentences are typically set at approximately five years, even when very small quantities of drugs are involved.

12. *Id.*

and thereby qualify for the substantial-assistance departure, drug mules frequently lack any detailed information about the conspiracy whatsoever. When they are lucky enough to possess useful information, in most cases that information has already been passed to the government by conspirators higher in the pecking order.[13] Thus, before the passage of the safety valve, it was often the low-level offenders who were serving the harshest sentences, while the more significant players served reduced time because of what they could offer the government.[14]

In 1994, Congress created the statutory safety valve as part of the Violent Crime Control and Law Enforcement Act. The statute created five requirements that defendants must meet to qualify for a reduced sentence.[15] The first four requirements are that the offender must not be a leader of the drug conspiracy, must not have used violence or a firearm in the conspiracy, and must have a criminal history designation that falls below a specified criminal history number.[16] The fifth factor states that a defendant is eligible for a sentence reduction if:

> Not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful 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 not complied with this requirement.[17]

This fifth element works to distinguish the safety-valve provision from the substantial-assistance departure by clarifying that the information the low-level drug offender discloses need not be new or useful to the government. Therefore, even if the defendant

13. Molly Van Etten, *The Difference Between Truth and Truthfulness: Objective Versus Subjective Standards in Applying Rule 5C1.2*, 56 VAND. L. REV. 1265, 1275 (2003).

14. Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1483 (2000).

15. 18 U.S.C. § 3553(f) (2006).

16. 18 U.S.C. § 3553(f).

17. 18 U.S.C. § 3553(f)(5).

only offers information that the government already has, or even if the defendant has no information at all, he or she will not automatically be disqualified from safety-valve eligibility.

Despite Congress's intentions in drafting this fifth factor as a way to mitigate sentences for low-level offenders, there has been substantial litigation over the safety valve's application and effectiveness. A large amount of the litigation has centered on how the burden of proof is to be allocated during the eligibility hearing, a question with no answer in either the statutory text or legislative history.[18] All circuits agree that the initial burden of proof to demonstrate safety-valve eligibility is on the defendant. However, they differ as to where the burden should fall if the government challenges the truthfulness of the defendant's fifth-factor disclosure.

The majority of circuits require that the burden of proof always remain with the defendant, which means that the government need not make any affirmative showing to challenge the defendant's credibility.[19] However, the Fifth and Ninth Circuits have held that, while the burden to prove safety-valve eligibility initially rests with the offender, the burden of proof shifts to the government to prove that the defendant is safety-valve ineligible if the government challenges the truthfulness of the fifth-factor disclosure. This Note argues that the allocation of the burden of proof by the Fifth and Ninth Circuits is the optimal way to effectuate Congress's goals in the passage of the statutory safety valve, which include distinguishing the statutory safety valve from the substantial assistance provision.

Part II of this Note provides a brief history of mandatory-minimum drug laws in the United States and the creation of the statutory safety valve.

Part III discusses the circuit split in interpretation of the allocation of the burden of proof during safety-valve hearings. Part IV explains why leaving the burden of proof with the defendant risks transforming the safety valve into the old substantial-assistance provision and stripping judges of the responsibility of

18. 18 U.S.C. § 3553(f); United States v. Ajugwo, 82 F.3d 925, 929 (9th Cir. 1996) (noting there is "no legislative comment . . . addressing the burden of proof" during the eligibility hearing).

19. United States v. Honea, 660 F.3d 318, 328 (8th Cir 2011) (defendant bears burden of proving he qualifies for relief); United States v. Verners, 103 F.3d 108, 110 (10th Cir. 1996); *Ajugwo*, 82 F.3d at 929.

determining safety-valve eligibility. Finally, Part V argues that all federal circuits should follow the interpretations of the Fifth and Ninth Circuits, and allocate the burden of proof to the government should it challenge the credibility of the defendant's fifth-factor disclosure.

II. THE DEVELOPMENT OF THE 18 U.S.C. § 3553(F) SAFETY VALVE

The use of mandatory minimums for narcotics sentencing and the creation of the safety valve both have long and complicated histories. In fact, the 1994 safety-valve provision has its genesis in a set of reforms from ten years prior.[20] In 1984, Congress passed the Sentencing Reform Act (SRA) as part of the Comprehensive Crime Control Act.[21] The SRA created the Federal Sentencing Guidelines, and was intended as sweeping reform to reduce the prevalence of crime in the United States.[22] The SRA changed sentencing in the United States from a discretionary regime in which judges could adjust sentences upward or downward based upon the status of the offense and characteristics of the offender, to "an essentially mandatory system of federal sentencing."[23] Among Congress's stated reasons for the passage of the SRA was a desire to create more uniformity in sentencing between similarly situated offenders,[24] to deter crime by increasing the certainty of receiving a given sentence,[25] and to enhance proportionality in sentencing.[26] Another stated Congressional

20. Froyd, *supra* note 14, at 1475.

21. *Id.* at 1472; Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586 (2006) & 28 U.S.C. §§ 991–998 (2006)); Pub. L. No. 98-473, 98 Stat. 1837, 1976 (codified as amended in scattered sections of Title 18 and 28 of the United States Code).

22. Van Etten, *supra* note 13, at 1270; S. REP. NO. 98-225, at 1 (1983).

23. Van Etten, *supra* note 13 at 1270; H.R. REP. NO. 103-460, at 3 (1994); Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 192 (1994) (noting that avoiding unwarranted sentencing disparity was "[t]he principal evil Congress sought to remedy").

24. Van Etten, *supra* note 13, at 1270; S. REP. NO. 98-225, at 52.

25. S. REP. NO. 98-225, at 56.

26. Van Etten, *supra* note 13, at 1270; 28 U.S.C. § 991(b) (2006). The statute states that:

b) the purposes of the United States Sentencing Commission are to –

purpose was to achieve "truth in sentencing," which would ensure that offenders served the sentences that they were given, rather than being released on parole after serving only a portion of their terms.[27]

When it passed the Sentencing Reform Act, Congress also created additional mandatory minimums for certain types of offenses, such as narcotics and firearms offenses.[28] These mandatory minimums were meant to ensure stringency for particularly serious crimes. According to these mandatory minimums, a judge must sentence the defendant to at least a certain number of years in prison; the judge has discretion to go higher than the set sentence, but no discretion to go below.[29] For crimes with no specific mandatory minimums, judges must sentence in accordance with ranges set out in the Guidelines, though they retain broad discretion to sentence individual defendants within that range.[30]

Congress passed particularly harsh mandatory minimums for drug-related offenses in response to public outcry against drug use and increased political focus on the "war on drugs."[31] The minimums were further stiffened over the next several years to their current levels, beginning with the Anti-Drug Abuse Act of 1986,[32] which directly tied sentences to the amount of drugs involved in the crime. The Act was apparently predicated upon the belief that the quantity of drugs involved "reflects both the harm to society as well as the offender's culpability,"[33] and created

> 1) establish sentencing policies and practices for the Federal criminal justice system that – A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(s) of title 18, United States Code; B) provide certainty and fairness in meeting the purposes of sentencing, avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

Id.

27. S. REP. NO. 98-225, at 56.
28. Van Etten, *supra* note 13, at 1271; SPECIAL REPORT, *supra* note 10, at 16.
29. Van Etten, *supra* note 13, at 1271; SPECIAL REPORT, *supra* note 10, at 16.
30. Van Etten, *supra* note 13, at 1271; SPECIAL REPORT, *supra* note 10, at 16.
31. Froyd, *supra* note 14, at 1483; SPECIAL REPORT, *supra* note 10, at 16–17.
32. Pub. L. No. 99-570, 100 Stat. 3207 (1986).
33. Froyd, *supra* note 14, at 1486; U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 4 (1997), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/19970429_RtC_Cocaine_Sentencing_Policy.PDF.

harsh mandatory minimum for drug-trafficking crimes.[34] Under the current version of the Act, upper-level dealers receive a ten-year mandatory minimum "for a first time offense and a 20-year sentence for a subsequent conviction of the same offense."[35] Mid-level dealers are given a minimum penalty of five years for a first offense and ten years for any subsequent conviction.[36]

Two years later, in 1988, inner-city drug violence was at an all-time high, and Congress responded by increasing the length of mandatory minimum sentences and decreasing the amount of drugs required to trigger them.[37] The Omnibus Anti-Drug Abuse Act of 1988[38] amended 21 U.S.C. § 844 to create a five-year mandatory minimum sentence for simple possession of more than five grams of crack cocaine.[39] The Act also increased the ten-year mandatory minimum under 21 U.S.C. § 848(a) to a mandatory twenty-year sentence for offenders engaged in a continuing drug enterprise.[40] The Act's focus on drug enterprises began to blur the lines between upper-level organizers, mid-level dealers, and low-level dealers by applying mandatory minimums to all players involved and determining sentences based upon quantities of drugs trafficked rather than rank in a trafficking organization.[41]

With the passage of the Comprehensive Crime Prevention Act, Congress again cited several reasons why it believed that mandatory minimums were necessary for the proper sentencing of drug offenders. Retribution and the concern that judges would sentence too leniently under indiscriminate regimes were viewed as the backbone of the legislation,[42] but Congress also cited disparities between sentences, encouragement of cooperation with prosecutors, deterrence, incapacitation, and inducement of pleas as additional purposes for drug mandatory minimums.[43] The new

34. H.R. REP. NO. 99-845, 10–11.
35. Froyd, *supra* note 14, at 1487.
36. Froyd, *supra* note 14, at 1487 (citing, William W. Wilkins Jr. et. al., *Competing Sentencing Policies in a "War on Drugs" Era,* 28 WAKE FOREST L. REV. 305, 305 (1993)).
37. *Id.*
38. Pub. L. No. 100-690, 102 Stat. 4181 (1988).
39. 21 U.S.C. § 844 (2006).
40. 21 U.S.C. § 848(a).
41. *Id.*
42. *Id.*
43. Steven J. Schulhofer; *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 201 (1993) ("The federal code now contains more than 100 separate mandatory minimum sentence provisions, located in sixty different statutes . . . from 1984 through 1990, almost 60,000 cases were sentenced under mandatory minimum provisions. However, just

regime minimized judicial discretion in an attempt to standardize sentences among similarly situated offenders; tying sentences more directly to the offense itself, rather than to the habits and beliefs of a particular judge.[44] The statute also included the 18 U.S.C. 3553(e) "substantial assistance" provision,[45] which, at that time, was the only mechanism through which a judge could avoid application of a mandatory minimum.[46] The substantial-assistance provision stated that, if a defendant provided information to the government regarding the drug conspiracy and other offenders involved, the prosecutor would have discretion to submit a motion to the court for a substantial-assistance downward departure.[47] The desire to avoid the harsh mandatory minimum sentences encouraged offenders to cooperate with prosecutors in order to receive their recommendations.

A. THE UNINTENDED CONSEQUENCES OF MANDATORY-MINIMUM SENTENCING LAWS

Despite the exacting intentions that lay behind the passage of mandatory-minimum sentencing laws, their application in practice has lead to many unanticipated consequences. One of the most troubling results has been what some have termed the "cliff effect."[48] While the minimums strove to ensure similar sentences for similarly situated offenders, in actuality miniscule differences between offenders in criminal history or in quantity of drugs carried can lead to drastically different sentences, and in some cases might even double an offender's sentence.[49] For example, a defendant who sells 500 grams of cocaine would likely receive a five-year mandatory minimum prison sentence, whereas a similar offender who sold 495 grams of cocaine would likely receive a sentence of only two and a half years.[50]

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four of these statutes (covering possession, manufacture, importation, and distribution of controlled substances, as well as the enhancement for carrying a gun during another offense) accounted for ninety-four percent of those cases.").

44. *Id.*

45. 18 U.S.C. 3553(e) (2006)

46. *Id.*

47. UNITED STATES SENTENCING GUIDELINES MANUAL § 5K1.1 (2011).

48. Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1859 (1995).

49. *Id.*

50. *Id.*

Mandatory minimums have also created a phenomenon that some scholars have referred to as "misplaced equality."[51] "Misplaced equality" results when a single factor is used to distinguish between offenders for the purposes of sentencing.[52] In the context of drug conspiracies, the use of a single element — such as drug quantity — to determine a sentence can often lead to offenders at very different levels of importance in a criminal organization receiving the same sentence.[53] When mandatory minimum sentences for drug trafficking are determined by the quantity of drugs involved, the sentences of upper-level organizers and "mules" with very different roles in drug-distribution conspiracies are determined by the sole aspect they have in common – the amount of drugs in circulation.[54] Thus, mandatory minimums are especially harsh on low-level offenders, who exercise little control and derive little benefit from the distribution network's operations, and yet receive the same sentences as the upper-level organizers who exercise almost absolute control and receive the majority of the drug-related profit.[55]

Another related externality of the mandatory-minimum laws is the "cooperation paradox" it creates.[56] As noted above, under the substantial-assistance provision, judges may depart from mandatory minimum sentences only if the government motions for a reduced sentence on the basis of intelligence received from the defendant.[57] However, because "substantial assistance" means information that is both new and beneficial to the government, typically only the upper-level offenders of the drug organizations can provide such information, and the low-level offenders, with little information, are left to serve their full sentences.[58]

Professor Steven Schulhofer notes that, while sentence reductions for cooperation with the government are common across types of crimes other than just narcotics offenses, they are par-

51. *Id.* at 1860.
52. *Id.*; Froyd, *supra* note 14, at 1492.
53. Oliss, *supra* note 48, at 1860.
54. 21 U.S.C. § 841(b) (2006).
55. Froyd, *supra* note 14, at 1493; Oliss, *supra* note 48, at 1858.
56. Schulhofer, *supra* note 43, at 211.
57. *Id.* at 212; 18 U.S.C. 3553(e)(2006).
58. Froyd, *supra* note 14, at 1494; Oliss, *supra* note 48, at 185–56; 18 U.S.C. § 3553(e).

ticularly problematic in the narcotics context because their focus on quantity of drugs leaves low-level offenders exposed to the same sentences as the highest members in the organization.[59] He illustrates this problem by describing the outcome when "sentence concessions that tend to increase with knowledge and responsibility of the offender"[60] are used: "The 'big fish' and the 'minnows' wind up in the same sentencing boat . . . . The big fish gets the big breaks, while the minnows are left to face severe and sometimes draconian penalties."[61] Under the substantial-assistance departure, the drug mule who does not have enough information to assist the government is thus treated identically to the defendant who refuses to cooperate with the government at all.[62]

The "cooperation paradox" is compounded by drug ring organizers' deliberate attempts to exploit it. Research into drug operations has demonstrated that, when hiring mules and couriers for their ventures, upper-level organizers often intentionally hire persons who have no information about the distributor in order to protect their organizations should the mules be apprehended.[63] This practice helps to explain why in 1990, more than 90% of first-time drug offenders tried in federal courts were sent to prison, with an average prison sentence of five years.[64]

B. RESPONSES TO MANDATORY-MINIMUM SENTENCING LAWS

The cliff effect, misplaced equality, and cooperation paradox did not go unnoticed by judges and scholars. By 1995, over 100 federal senior judges had refused to preside over the trials of low-level drug offenders prosecuted under mandatory-minimum sentencing laws.[65] One such judge described the collective judicial

59. Schulhofer, *supra* note 43, at 212.

60. *Id.* at 213.

61. *Id.*

62. Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENT'G REP. 63–64 (1990).

63. *Id.* at 64 ("Such defendants are often young. Some have held non-skilled jobs and only turn to being couriers when the employment ended. Many are women, some with children, chosen in part because they are less likely to be stopped for matching a drug courier profile. These couriers are often unaware of the quantity or value of the drugs they are carrying, or even the type, such as crack rather than cocaine powder.").

64. *Id.*

65. Oliss, *supra* note 45, at 1864 (noting that semi-retired judges have a greater ability to recuse themselves from certain cases.).

discomfort in the following manner: "I simply cannot sentence another impoverished person whose destruction has no discernable effect on the drug trade."[66]

A number of other federal judges have also commented on the injustice of mandatory minimums. In 1992, Judge Frank Easterbrook of the Seventh Circuit decried the use of drug quantity as the determining factor for culpability, and the resulting cooperation paradox, in *United States v. Brigham*.[67] He lamented the plight of drug mules who are sold out by upper-level offenders and are of little value to the government: "They lack the contacts and trust necessary to set up big deals, and they have little information of value. Whatever tales they have to tell, their bosses will have related. Defendants unlucky enough to be innocent have no information at all . . . ."[68] Although the Seventh Circuit upheld the use of the mandatory minimum for the low-level offender in that particular case, Judge Easterbrook urged that "meting out the harshest penalties to those least culpable is troubling, because it accords with no one's theory of appropriate punishment."[69]

Judge Easterbrook was not alone is in his belief in the unfairness of mandatory minimums for drug offenders; the American Bar Association has been officially opposed to mandatory minimum sentences for drug offenders since 1974, and the Judicial Conference of the United States has adopted resolutions opposing these sentences as well.[70]

C. ENACTMENT OF THE STATUTORY SAFETY VALVE

Fortunately, these failings of the mandatory drug minimums did not go unnoticed by Congress, and eventually legislative action was taken in an attempt to make the laws fairer to low-level

66. *Id.* at 1863 (quoting Eric Schlosser, *Marijuana and the Law*, ATLANTIC MONTHLY, Sept. 1994, at 94).

67. United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992).

68. *Id.* at 317.

69. *Id.* at 318.

70. Myrna S. Raeder, *Rethinking Sentencing and Correctional Policy for Nonviolent Drug Offenders*, 14 CRIM. JUST. 1, 53–56 (1999). *See also* Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547, 562 (2001). ("If I were writing the guidelines, I would probably reverse the relative importance of roles in trade versus sheer quantities of drugs, but the guidelines at least take the defendant's role in the offense into account.").

offenders.[71] Under the leadership of Senators Edward Kennedy and Strom Thurmond, Congress directed the Sentencing Commission to undertake a study on the effects of mandatory minimums on sentencing and the sentencing guidelines.[72] The report, published in 1991, compared the mandatory minimum sentences unfavorably with the sentencing guidelines, and concluded that the goals articulated by Congress in the passage of the mandatory minimums could best be met by the sentencing guidelines alone, without the use of supplemental mandatory-minimum statutes.[73]

The findings in the report and momentum in Congress eventually led to the 1994 passage of Section 80001, the "safety valve" section of the Violent Crime Control and Law Enforcement Act of 1994.[74] The safety valve created an exemption to the mandatory-minimum drug sentences for a specific class of non-violent, first-time, low-level drug offenders.[75] Under the statute, if an offender qualifies for the safety valve, the judge is required to waive the mandatory minimum and instead impose a reduced sentence based upon recognized mitigating factors in the Federal Sentencing Guidelines.[76]

In order to qualify for safety-valve relief, the Federal Sentencing Commission created five requirements that a defendant must meet in order to establish a prima facie showing of eligibility:

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71. *See* Lynch, *supra* note 70 at 548, commenting that:

> "These mandatory minimum sentences are perhaps a good example of the law of unintended consequences. There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders . . . mandatory minimums have also led to an inordinate increase in the federal prison population and will require huge expenditures to build new prison space . . . they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the sentencing guidelines were intended to accomplish.") This does not support the proposition that more legislative action was taken.

Id. *See also,* Lynch, *supra*, at 566 (citing Joe Davidson, *Clinton's Tough Prison Watch*, CHRISTIAN SCI. MONITOR, Mar. 27, 2001, at 11); Stuart Taylor Jr., *Good Pardons, Bad Laws, and Bush's Unique Opportunity*, NAT'L J., Feb. 17, 2001 (All noting the widespread positive response toward President Clinton's pardons of a number of low-level drug offenders sentenced pursuant to the harsh mandatory minimums).

72. Oliss, *supra* note 48; SPECIAL REPORT, *supra* note 10, at 6–7 nn. 14–19.

73. Oliss, *supra* note 48, at 1879.

74. 18 U.S.C. § 3553 (2006).

75. Froyd, *supra* note 14, at 1496; UNITED STATES SENTENCING GUIDELINES MANUAL § C1.2 (2011).

76. Froyd, *supra* note 14, at 1497–98 (citing Oliss, *supra* note 48, at 1884–85); H.R. REP. NO. 103-460, at 5 (1994).

> 1. The defendant does not have more than one criminal history point, as determined under the sentencing guidelines;
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> 2. The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> 3. The offense did not result in death or serious bodily injury to any person;
>
> 4. The defendant was not an organizer, leader or manager or supervisor of others in the offense as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act, and
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> 5. Not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful 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 not complied with this requirement.[77]

The safety valve differs from the substantial-assistance provision in a number of important ways, most significantly in that it does not require a motion from the government to be applied, as it is an excusal rather than a departure from the mandatory minimums.[78] The provision is thus written to allow judges to sentence eligible offenders as though they had not qualified for the

77. 18 U.S.C. § 3553(f).
78. Froyd, *supra* note 14, at 1497.

mandatory minimum sentence, and without relying on the government's good will.[79]

D. THE POTENTIAL BENEFITS OF THE SAFETY VALVE

When it passed the statutory safety valve, Congress sent a message that that the mandatory-minimum drug sentences needed to be reformed. However, since its enactment, there has been significant debate over the success of the safety valve in protecting low-level drug offenders from inflated sentences. While some believe that the safety valve has been entirely ineffective, some studies have shown that the safety valve has reduced the overall length of sentences for low-level offenders and has also lead to less disparity in sentencing across racial groups.[80] A 2002 study that examined 8,123 offenders found that the safety valve significantly decreased the average length of imprisonment.[81] The safety valve has important effects in the shadow of sentencing as well: the same study found that the effect of guilty pleas and other guidelines departures on the length of actual imprisonment critically depended upon whether the defendant had qualified for the safety-valve provision.[82] Finally, the study also suggested that the safety valve may reduce racial disparity in sentencing — in comparison to Caucasian offenders, African-American and Hispanic offenders received significantly longer sentences only when the offenders did not quality for the safety valve, and among those within the safety-valve group, "the effect of ethnicity is statistically insignificant."[83] The safety valve has also decreased the average length of imprisonment for female drug offenders: under the safety valve, consistent with the typical gendered roles in drug conspiracies, women receive significantly shorter sentences than men.[84]

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79. *Id.*; Van Etten, *supra* note 13, at 1278 (noting that relief is "no longer based on a prosecutorial motion").

80. Celesta A. Albonetti, *Legal Issues and Sociological Consequences of the Federal Sentencing Guidelines: 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, 403 (2002).

81. *Id.*

82. *Id.*

83. *Id.* at 426.

84. *Id.* at 416.

The statutory safety valve thus does make significant strides towards preventing low-level drug mules and couriers from receiving the longer sentences meant for upper-level offenders. However, its effectiveness has been seriously compromised by judicial interpretations of the fifth factor. That factor (also referred to as the "tell-all provision") states that a defendant is eligible for the safety valve if:

> Not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful 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 not complied with this requirement.[85]

Practice has shown that, many judges, rather than making an assessment of the defendant's fifth-factor fulfillment based solely upon their own findings, apply the element in the same manner that they apply the substantial assistance provision: by looking to approval from the government.[86] Instead of utilizing the government's word as a mere recommendation, judges have permitted it to become dispositive of the credibility determination.[87] This practice has created the same problem that existed under the substantial-assistance regime, which Congress attempted to solve with the passage of the safety valve.[88] Professor Virginia Villa has explained that, if prosecutors are still determining eligibility, "[m]inor offenders may not be able to meet the fifth element due

85. 18 U.S.C. § 3553(f) (2006).

86. Virginia 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).

87. *See id.* at 120 ("For instance, for fiscal year 1996, there were 34, 894 defendants whose sentences were analyzed. Of these, a total of 11,557 received sentences pursuant to downward departures. Of these departures, 7,556 were pursuant to substantial assistance motions. Of these substantial assistance departures, 4,872 were drug trafficking cases. The next highest category of offense which received substantial assistance motions was in the area of fraud, with 882 departures.").

88. *Id.* at 124.

to fear of reprisal from more culpable offenders, or simply because they do not have the communication ability to satisfy the prosecution."[89] Thus, allowing the government to control when a defendant is eligible for the safety valve may not effectuate Congress's goal of alleviating the burden on low-level offenders. Further, experience has shown that the difficulties inherent in truthfulness determinations under the fifth factor stem from judicial misunderstandings about where Congress intended to allocate the burden of proof of safety-valve eligibility.

E. WHERE SHOULD THE BURDEN FALL?

Though there is nothing in the statute or in the official legislative history allocating the burden of proof under the safety valve, a majority of courts place the initial burden of proof on the defendant to prove by a preponderance of evidence that he is eligible for the safety-valve reduction.[90] For the first four elements of the provision, this burden is typically unproblematic as the defendant need only prove objective facts, such as a lack of violence in the crime's perpetration or criminal-history level. However, under the fifth factor, the defendant is sometimes left in a position in which he must prove a negative — that he does not know more than he has told the government. Thus, defendants can find themselves ineligible for the safety valve simply because they are unable to overcome a court's adverse credibility determination.[91] One commentator aptly describes this difficult scenario:

> At the sentencing hearing, the defendant will attempt to prove that she has given all of the information she knows by presenting evidence of her minimal involvement in the criminal activity. If the government has contrasting information from the other members of the conspiracy, it will attempt to discredit the defendant's claim that she lacks such knowledge. It will be difficult for the defendant to overcome

89. *Id.*

90. *See, e.g.,* United States v. Honea, 660 F.3d 318, 328 (8th Cir. 2011) (citing United States v. Aguilera, 625 F.3d 482, 488 (8th Cir. 2010)); United States v Ajugwo, 82 F.3d 925, 929 (9th Cir. 1996); United States v. Verners, 103 F.3d 108, 110 (10th Cir. 1996).

91. Villa, *supra* note 86, at 124.

> these attempts by the government, however, because the defendant typically has little or no information regarding the other criminal actors in the conspiracy, especially if she acted only as a "mule," or courier of drugs. In this situation, the judge has little "objective" basis on which to determine the defendant's truthfulness. Because of the defendant's minimal role in the criminal activity and the heavy burden of demonstrating truthfulness, the defendant's fate will hinge on the judge's general impression of the defendant's credibility.[92]

The burden is thus left on the defendant to prove eligibility, and many courts interpret the statute to mean that the burden remains with the defendant even after the government has suggested that they are withholding information. Left with the task or proving a negative, the defendant can often only assert that he is telling the truth and know no more, and are then left to the mercy of the judge's credibility determination, with no showing required from the government.[93]

III. THE BURDEN-SHIFTING DEBATE

Imposing the burden of proving a negative on a low-level offender can prevent otherwise eligible and truthful defendants from receiving safety-valve relief. A recent case from the United States District Court for the District of Columbia illustrates this problem well.[94] In 2008, a routine prosecution of a low-level offender named Vinson Gales ignited debate once again over where the burden of proof should fall when applying the statutory safety valve. Judge James Robertson sentenced Gales under the mandatory minimum of no less than five years in federal prison, despite his auxiliary role in a drug conspiracy, and despite the fact that the judge noted that there was no dispute that the defendant had satisfied the first four elements of the safety valve. Judge Robertson lamented that the burden requirements of the fifth

92. Van Etten, *supra* note 13, at 1299.
93. *Id.*
94. United States v. Gales, 560 F. Supp. 2d 27 (D.D.C. 2008).

factor obliged him to deny Gales the safety-valve reduction.[95] In sentencing Gales, Judge Robertson noted that the safety valve typically works well: "the otherwise-qualified offender engages in debriefing, the government is satisfied — often with a debriefing that is perfunctory — and the safety valve is duly applied."[96] However, he observed that when the government is unsatisfied with the information it receives, the burden allocation in the provision fails to work in a manner that is just to defendants. "But if, as in this case, the prosecutor believes that the defendant is withholding information or misstating facts, the duty of deciding whether the defendant has been truthful shifts to the judge, and burden of proof shifts to the defendant."[97]

In this particular case, while Gales had met the first four factors, "the government maintained that Gales had failed as to the fifth element, because he had not truthfully given the name of his narcotics supplier — that the story he had given in debriefing was a sham."[98] As is typical of many low-level drug defendants,[99] Gales again attempted to offer proof to the judge by stating that he knew only the first name of the drug-dealer but did not know where he lived or his phone number.[100] The judge, left to make a credibility determination based solely upon this equivocal information and the government's assertion that Gales must know more, "concluded that Gales had simply decided to accept a longer sentence . . . rather than try to explain (to fellow inmates, to his community, to himself) that telling the police what he knew about his crime was not the same as 'snitching.'"[101] Despite his credibility determination against Gales, and exasperated as to how he was to make a finding of truthfulness with so little information, Judge Robertson expressed dismay with the manner in which the government can so easily cast doubt upon a defendant's safety-valve eligibility:

95. *Id.* at 28.
96. *Id.*
97. *Id.*
98. *Id.*
99. *See* Young, *supra* note 62 (observing that "[f]or self-protection, drug suppliers and distributors intentionally hire individuals who have no ongoing connection with the supplier or distributor").
100. *Gales*, 560 F. Supp. 2d at 28.
101. *Id.*

> My refusal of the safety valve was driven by Circuit precedent whose allocation of the burden of proof means that, 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 unless he testifies to his own lack of knowledge.[102]

Judge Robertson's indignation is well-founded, as the language of the statute itself states that 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.[103] However, if a judge must make a credibility determination based solely upon the defendant's proffer and the government's assertion that it is truthful or not without having to show anything further, then there is little opportunity for the truth to be revealed if the burden remains on the defendant should the government challenge the defendant's eligibility. In line with this reasoning, Judge Robertson concluded that the burden of proof must be reexamined. "[I]n my view, the controlling precedents need to be re-examined. A story told by an otherwise safety-valve eligible defendant — any story — should be enough to shift to the prosecution the burden of proving its falsity."[104]

Though his forthrightness was novel, Judge Robertson's dissatisfaction with keeping the burden upon the defendant to prove that he has met all of the safety-valve eligibility requirements is a concern that has been discussed for over a decade in courts across the country. The majority of circuits maintain that the burden remains on the defendant to prove eligibility for the safety valve; however, a minority of circuits have begun to shift the burden to the government if the government claims the defendant to be ineligible for the safety valve for failure to fulfill the fifth "tell all" factor. Part III.A will first conclude Gales's sentencing story in order to situate the majority practice before presenting the practice of a majority of circuits that keep the burden with the defendant. Part III.B will explain the practice of a minority

102. *Id.*
103. UNITED STATES SENTENCING GUIDELINES MANUAL § 5C1.2 (2011).
104. *Gales*, 560 F. Supp. 2d at 29.

of circuits that shift the burden to the government to challenge a defendant's credibility under the fifth factor of the safety valve.

A. THE MAJORITY PRACTICE: THE DEFENDANT'S HEAVY BURDEN

Following Judge Robertson's conflicted decision to sentence Gales pursuant to the safety-valve provision, the case was appealed to the D.C. Circuit.[105] Despite Judge Robertson's reservations about Gales's ability to prove that he had satisfied the fifth factor if the burden of truthfulness remained with him, the D.C. Circuit affirmed his five-year mandatory-minimum sentence for possession of five grams of cocaine.[106] However, the court did address Gales's contention that, although the initial burden to prove safety-valve eligibility is incontestably on the defendant, once the government doubted the truthfulness and completeness of his fifth-factor disclosure, the burden of proof should have then shifted to the government to prove that he had lied.[107] Like the majority of circuit courts in the country, the D.C. Circuit resolved that the burden always remains with the defendant in the safety-valve context, and was satisfied by the government's bare assertion of Gales's dishonesty: "Although Gales is correct that the government did not offer any hard evidence of its own contradicting Gales's account, the government did argue to the district court that Gales's inability to identify more concretely his supplier was simply not credible."[108] The court further highlighted that although the government provided no evidence in support of this apparent lack of credibility, the government had no statutory obligation to do so, and therefore the court was well within its powers to deny safety-valve eligibility with no further showing.[109]

The court acknowledged a First Circuit decision, *United States v. Miranda-Santiago*,[110] which declared that the burden should shift to the government, but concluded that "[t]he First Circuit's holding, while not binding upon us, seems sensible but inapplica-

105. United States v. Gales, 603 F.3d 49 (D.C. Cir. 2010).
106. *Id.*
107. *Id.* at 54.
108. *Id.*
109. *Id.*
110. 105 F.3d 36 (1st Cir. 1997).

ble."[111] The D.C. Circuit's holding, while progressive for its concession that a change in the burden of proof to the government would be "sensible," unfortunately continued to perpetuate the precedent set by several circuits that the burden of proof for safety-valve eligibility remains with the defendant at all times, even following a prosecutor's assertion of untruthfulness in the defendant's fifth-factor disclosure. This holding, while detrimental to the ability of many low-level drug offenders to qualify for safety-valve eligibility despite Congress's intentions, continues to be emulated by the majority of the federal courts,[112] and has a long history in circuits across the country.

B. A HISTORY OF THE PLACEMENT OF THE BURDEN OF PROOF

Soon after the passage of the safety-valve statute in 1994, litigation arose over its proper application at sentencing hearings. Since the statute does not explicitly state where the burden of proof should fall, courts were left to interpret this important aspect of the statute for themselves.[113]

One of the earliest circuits to address the burden of proof issue was the Seventh Circuit in the 1996 case of *United States v. Ramirez*,[114] in which the defendant, a drug mule who had transported a package of cocaine, appealed the lower court's rejection of his safety-valve eligibility for his purported inability to satisfy the fifth factor.[115] The Seventh Circuit analyzed the burden placement in the safety valve based upon where it fell in other sentencing statutes, and determined that it must always stay with the defendant, in line with other "sentencing departures."[116]

111. *Id.*

112. *See* United States v. Honea, 660 F.3d 318, 328 (8th Cir 2011) ("The defendant bears the burden of proving 'that he qualifies for this relief, and we review for clear error the district court's findings about the completeness and truthfulness of a defendant's provision of information.'" (internal citation omitted)).

113. United States v. Ajugwo, 82 F.3d 925, 929 (9th Cir. 1996) ("Although there is no legislative comment or circuit authority addressing the burden of proof under 5C1.2, we have placed the burden on the defendant to prove by a preponderance of the evidence" the presence of a mitigating factor.).

114. 94 F.3d 1095 (7th Cir. 1996).

115. *Id.* at 1097–99.

116. *Id.* at 1101.

Within months, the First and Tenth Circuits relied on *Ramirez* to reach a similar result.[117]

Despite the holding in *Ramirez*, a minority of circuits have taken the position that, once the defendant establishes his eligibility for the safety valve, the government has the burden to challenge the defendant's credibility. In an attempt to give effect to Congress's desire to avoid overly harsh sentences for low-level offenders, the Ninth Circuit has held that, although the burden begins on the defendant, if the government challenges the defendant's credibility in relation to the fifth factor, the burden then shifts to the government to prove that the defendant was untruthful. In *United States v. Shrestha*, the court addressed the case of a Sherpa from a small Nepalese village who had been hired to transport a suitcase from Bangkok to Los Angeles for $1500.[118] At trial, Shrestha was found guilty of possession of heroin with intent to distribute, and, though eligible for a ten-year mandatory minimum sentence, the court found that Shrestha had met his burden of persuasion on all elements of the safety valve, and thus sentenced him to a more lenient seventy-eight months in prison, which the government appealed.[119] The government argued that Shrestha was ineligible for the safety-valve reduction because he had claimed at trial that he had no knowledge that he was carrying drugs, though he had appeared knowledgeable during his arrest.[120] The Ninth Circuit addressed the government's concern that Shrestha had not provided enough information by reaffirming Congress's intent in the passage of the act:

> The safety valve statute is not concerned with sparing the government the trouble of preparing for and proceeding with trial . . . or with providing the government a means to reward a defendant for supplying useful information, as is [the substantial-assistance provision]. Rather, the safety

117. United States v. Montanez, 105 F.3d 36 (1st Cir. 1997); United States v. Verners, 103 F.3d 108, 110 (10th, Cir. 1996) (citing United States v. Ramirez, 94 F.3d 1095, 1100–1102 (7th Cir. 1996)) ("[W]e now follow the reasoning set out by other circuits and hold that the defendant has the burden of proving, by a preponderance of the evidence, the applicability of" § 5C1.2).

118. 86 F.3d 935, 935 (9th Cir. 1996).

119. *Id.* at 937–938.

120. *Id.* at 939.

> valve was designed to allow the sentencing court to disregard the statutory minimum when sentencing first-time nonviolent drug offenders who played a minor role in the offense and who "have made a good-faith effort to cooperate with the government."[121]

Most importantly to the fate of Shrestha and other low-level drug mules like him, the court declared that the burden of proof must shift to the government to prove untruthfulness if it challenges the credibly of the defendant's fifth-factor disclosure:[122]

> The initial burden is incontestably on the defendant to demonstrate by a preponderance of the evidence that he is eligible for the reduction. Once he has made the showing, however, it falls to the Government to show that the information he has supplied is untrue or incomplete. Apart from contending that Shrestha's denial of guilty knowledge at trial rendered him untruthful, which we have deemed irrelevant, the Government did not do so.[123]

Following the decision of the Ninth Circuit, and despite its earlier holdings to the contrary,[124] the First Circuit has also declared that the government bears a burden when contesting the credibly of a defendant's safety-valve disclosures. In the 1996 case of *United States v. Miranda-Santiago*, the court overturned a lower court's denial of safety-valve eligibility to a young woman who had been a low-level participant in a drug operation run by her boyfriend.[125] At trial, the defendant attempted to qualify for the safety valve by offering the government what information she had about the offense.[126] The government recommended against safety-valve eligibility because the defendant allegedly "failed to honestly disclose her own participation in the conspiracy," a failure which could be "gleaned from the Presentence Report in this case." [127] However, in actuality, the report had designated her as

121. *Id.* at 938 (citing United States v. Arrington, 73 F.3d 144, 147 (7th Cir. 1996)).
122. *Id.* at 940.
123. *Id.*
124. *United States v. Miranda-Santiago,* 96 F.3d 517, 519 (1st Cir. 1996).
125. Id.
126. *Id.* at 526.
127. *Id.*

a "minor participant," and described her role as "passive."[128] But despite the government's unfounded claims, the sentencing judge still denied the defendant safety-valve eligibility, simply concluding that the fifth factor had not been met.[129]

The First Circuit admonished the trial court's rejection of the defendant's safety-valve eligibility based upon such vague and unsubstantiated objections by the government.[130] Like the Ninth Circuit, the court also stated the government must carry the burden of showing lack of credibility if Congress's purpose in enacting the statute is to be honored: "The government cannot assure success simply by saying, 'We don't believe the defendant,' and doing nothing more. If it could, it would effectively eliminate the self-conscious difference between the safety valve provision . . . and the substantial assistance provision."[131] The court thus concluded that "[t]he district court's bare conclusion that [the defendant] did not 'cooperate fully,' absent either specific factual findings or easily recognizable support in the record, cannot be enough to thwart her effort to avoid imposition of a mandatory minimum sentence."[132]

The First Circuit's suggestion in *Miranda-Santiago* that the government bears the burden of proof if it attempts to refute a defendant's safety-valve eligibility has influenced other circuits. The Fifth Circuit in particular has been increasingly resolute in its assertion that the safety-valve statute must be interpreted to require a burden-shift to the government if it is to remain distinct from the substantial-assistance provision.

In the 1999 case of *United States v. Miller*,[133] the Fifth Circuit overturned a lower court's denial of safety-valve eligibility to a low-level drug offender who had distributed cocaine near the Mexican border.[134] Although Miller attempted to fulfill his initial burden under the fifth safety-valve factor by offering the government information related to the drug conspiracy, the government nevertheless made a recommendation for ineligibility because it believed that the defendant was untruthful when he stated "that

128. *Id.* at 529.
129. *Id.* at 528.
130. *Id.* at 529.
131. *Id.* at 532.
132. *Id.* at 529–30.
133. 179 F.3d 961, 961 (5th Cir. 1999).
134. *Id.* at 962.

he had just learned how to dry cocaine for the first time preceding his arrest for the offense of conviction."[135] The trial court agreed with the government, and sentenced Miller pursuant to the mandatory minimum.[136] Before overturning the sentence on appeal, the Fifth Circuit criticized the speculative nature of the government's claim that Miller was lying. The court was dismayed that the only justification offered by the government was that "because Miller was no stranger to the cocaine business, he surely lied . . . that he had only just learned how to dry cocaine, returning it to powder form," and went on to cite the First Circuit to explain why the government cannot defeat safety-valve eligibility with mere speculation.[137]

The court highlighted two standards in particular: "Where a defendant in her submissions credibly demonstrates that she has provided the government with all the information she reasonably was expected to possess, in order to defeat her claim, the government must at least come forward with some sound reason to suggest otherwise," and that bare conclusions "absent either specific factual findings or easily recognizable support in the record, cannot be enough to thwart her effort to avoid imposition of a mandatory minimum sentence."[138] The court's rejection of the use of "mere speculation" by the government to refute the truthfulness of a defendant's disclosures is particularly well attuned to the Congressional intent in the passage of the safety valve, as it recognizes the realities of the information available to low-level offenders.

A similar rejection of vague allegations by the government occurred in the *Miranda-Santiago* case, in which the government concluded that the defendant must know more about the drug operation than she claimed simply because she "shared living quarters with other co-defendants."[139] The court summarily rejected this speculation, stating that "if mere conjecture based on personal relationships could bar application of section 3553(f)(5) in all cases where minor participants knew others more involved, the safety valve would be beyond their grasp."[140] The court took a

135. *Id.* at 963.
136. *Id.*
137. *Id.* at 967–68 (quoting *Miranda-Santiago*, 96 F.3d at 529–30).
138. *Id.* at 968 (citing *Miranda-Santiago*, 96 F.3d at 529).
139. *Miranda-Santiago*, 96 F.3d at 529.
140. *Id.*

practical and realistic approach to the use of the safety valve based upon the common sense observation that, in the realm of narcotics operations, a low-level offender will rarely know the same information or possess the same skills as upper-level offenders.[141]

The Fifth Circuit has remained consistent in its placement of the burden of proof on the government if it challenges a defendant's fifth-factor credibility. In a 2010 decision, *United States v. Powell*, the Fifth Circuit was confronted with an extreme governmental attempt to challenge a safety-valve reduction with no information to refute the defendant's credibility.[142] The defendant, a low-level marijuana dealer, was denied safety-valve eligibility simply because the prosecutor had not had enough time to verify the defendant's disclosure due to scheduling errors on the part of the government.[143] The sentencing judge accepted this argument, stating that "the Government's entitled to check [the information] out," because "it is a requirement of this Judge that it be verified, to some degree. How can it be truthful if it's not verified?"[144] He then sentenced Powell to the statutory minimum of five years in prison.[145]

The Fifth Circuit swiftly rejected this denial of safety-valve eligibility based upon such speculative and unreasoned comments by the government, noting the injustice of requiring an offender to serve additional years in prison because of a prosecutor's scheduling the prosecutor had made a timing error. The court looked to *Miller* for its justification, again repeating: "If the government opposes the safety valve, however, on the grounds that a defendant has not satisfied the fifth criterion — i.e., has not truthfully provided all the information he has concerning the offense or course of conduct that gave rise to the crime of conviction — it must offer more than 'mere speculation,'" and once the defendant "credibly demonstrates that she has provided the gov-

141. Young, *supra* note 62 at 64–78. (describing the profile and knowledge of most low level drug offenders: "Such defendant's are often young. Some have held non-skilled jobs and only turned to being couriers when their employment ended. Many are women, some with children, chosen in part because they are less likely to be stopped for matching a drug courier profile. These couriers are often unaware of the quantity or value of the drugs they are carrying, or even the type, such as crack rather than cocaine powder.").

142. 387 F. App'x. 491 (5th Cir. 2010).

143. *Id.* at 494.

144. *Id.*

145. *Id.*

ernment with all the information he reasonably was expected to possess," the government must "at least come forward with some sound reason to suggest otherwise."[146]

The issue of allocating the burden of proof in safety-valve hearings continues to divide the federal circuits. While still in the minority, the allocation used by the Fifth and Ninth Circuits, and to a lesser extent the First Circuit, is truest to Congressional intent and is the key to effectuating Congress's purpose in the passage of 18 U.S.C. § 3553(f).

IV. HOW TO FIX THE 18 U.S.C. § 3553(F) SAFETY VALVE

In interpreting the application of the statutory safety valve, all federal courts have placed the initial burden of proving eligibility on the defendant. Typically, the defendant can meet this burden, and the safety valve will be applied to the deserving low-level offenders and drug mules. But the safety valve ceases to work as intended when the government is unhappy with the defendant's fifth-factor disclosure, and is not required by the court to make an affirmative showing of untruthfulness. It is under these circumstances that the improper allocation of the burden of proof undermines the effectiveness of the safety valve as a tool to ensure sentencing fairness for low-level offenders. Thus, while the statutory safety valve is effective in theory and sometimes in practice, in order to preserve its intent, the circuits must standardize the allocation of the burden of proof when determining eligibility under the statute. Using the allocation adopted by the Fifth and Ninth Circuits will achieve greater sentencing fairness and also correct a misunderstanding of a number of circuits that the safety valve is not a departure from the Federal Sentencing Guidelines, but is rather an excusal from them, and thus susceptible to different rules for the application of the burden of proof.

When the burden of proof remains on the defendant regardless of the government's recommendation, the defendant is thus essentially left at the mercy of the government to refrain from declaring him untruthful during the sentencing hearing, for if the government does so, the defendant will be required to meet the

146. *Id.* (citing United States v. Miller, 179 F.3d 961 (5th Cir. 1999); United States v. Edwards, 65 F.3d 430, 433 (5th Cir. 1995)).

burden of proving a negative beyond a reasonable doubt, a feat that is nearly impossible to accomplish in practice. This effectively transforms the 18 U.S.C. § 3553(f) safety valve into the 18 U.S.C. § 3553(e) substantial assistance provision, because fear of a negative recommendation by the government puts immense pressure on the defendant to disclose as much information as possible to the government for fear that the government will be unsatisfied and claim that the defendant is lying.

A. THE ROLE OF JUDGES IN THE STATUTORY SAFETY VALVE

Congress deliberately distinguished the safety valve from the substantial-assistance provision by placing the former provision's eligibility determination squarely with the judge, as opposed to with the prosecutor.[147] One commentator notes that "[c]ongressional adoption of 18 U.S.C. section 3553(e) [the substantial-assistance provision] effectively stripped judges of the power to decide whether a sentence should be reduced because of a defendant's cooperation with the prosecution and gave that power to the prosecution."[148] Thus, when drafting the safety-valve provision, Congress made a calculated decision to take this discretion away from the prosecutor and place the eligibility determination in the hands of the judge. This distinction exists in part because, unlike the substantial-assistance provision, which is predicated upon a defendant's ability to aid the government in its investigations, the safety-valve provision is not concerned with the government's satisfaction with the defendant's disclosure: rather, it is only concerned with the defendant's truthfulness.[149]

147. 18 U.S.C. § 3553(e) (2006) ("Upon motion of the Government [based on substantial assistance], the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence").

148. Oliss, *supra* note 48, at 1864.

149. 18 U.S.C. § 3553(f); *see also* United States v. Shrestha, 86 F.3d 935, 940 (9th Cir. 1996), ("The safety valve statute is not concerned with sparing the government the trouble of prepping for and proceeding with trial, as is [the substantial assistance provision], or . . . with providing the government a means to reward a defendant for supplying useful information"); Van Etten, *supra* note 13, at 1297 ("Fear that defendants would intentionally mislead the government by offering false information was a major rationale underlying Congress's decision to vest the power to bring motions for departures based on substantial assistance in the executive branch. However, the same rationale should not apply to defendants who typically have no new or useful information to provide. The language of the safety valve specifically avoids emphasis upon benefit to the government."); United States v. Shrestha, 86 F.3d 935, 940 (9th Cir. 1996), ("The safety valve statute is not concerned

Despite Congress's deliberate intention to vest this determination in the court, and despite the common understanding across all circuits that the judge will make the eligibility determination in safety-valve hearings, many courts continue to apply the safety valve by placing the burden of proof on the defendant, which vests discretion in the prosecutor in the same manner seen in the substantial assistance provision.

Through her work studying the application of the safety-valve provision in federal court, scholar Virginia Villa explains that because judges are more familiar with applying the substantial-assistance provision — due to its longer history and judges' familiarity with prosecutors signaling the defendant's truthfulness — they have interpreted safety-valve burdens consistently with substantial-assistance burdens.[150] However, by placing the burden of proof on the defendant and keeping it there even after the government has challenged the defendant's truthfulness, the courts have evaded their responsibility of determining eligibility and have instead given this responsibility to the prosecutors.

The sentencing of Vinson Gales plainly demonstrates the manner in which placing the burden of proof on the defendant in a safety-valve hearing allows judges to pass the responsibility of determining safety-valve eligibility to prosecutors. During Gales's sentencing hearing, the government stated that it believed that Gales was being untruthful in his fifth-factor disclosure because he stated that he did not know the full name of his supplier.[151] The government presented no evidence to show why it believed Gales was untruthful, and the burden remained or Gale's to prove his credibility, which he could not do. The judge, perplexed as to how he could determine the defendant's credibility, effectively allowed the government to make the determination.[152] The judged stated at the hearing:

> What I'm being asked to do is to decide whether your belief that your client was telling the truth or [the prosecutor's] belief that your client was not telling the truth is the better

with sparing the government the trouble of prepping for and proceeding with trial, as is [the substantial assistance provision], or . . . with providing the government a means to reward a defendant for supplying useful information").

150. Villa, *supra* note 86, at 124.

151. United States v. Gales, 560 F. Supp. 2d 27, 28 (D.C. Cir. 2008).

152. *Id.*

> argument. The only way I can resolve this, I suppose, is to put your client under oath and ask the same questions to him. I really don't want to go that route . . . . I'm not a drug detective. I'm not really qualified to put Mr. Gales through the paces of asking . . . what am I supposed to do, judge credibility by looking into his eyes or something like that? It's a puzzle as to exactly how this credibility thing is to be decided.[153]

Nevertheless, the judge did make a credibility determination, and ruled that Gales had been untruthful in his disclosure, "I don't see any way for me to draw a conclusion other than that the defendant has not truthfully provided to the government all the information and evidence he has concerning the offense or offenses that were part of the same court or conduct, and accordingly, I think it would be unlawful of me to invoke the safety-valve provisions of the sentencing guidelines."[154] Thus, though not statutorily charged with determining Gales's safety-valve ineligibility, by simply stating that it believed that the defendant was untruthful, the government usurped that authority from the court. Indeed, the judge advised Gales to give the government "the answer they want," because, "this is the way the safety valve works."[155]

Under the current one-sided burden in most circuits, judges are left to make tough credibility determinations based on very little information: only the defendant's statements about their involvement, and a bare assertion by the government that the defendant is lying. The judge, unable to determine in one short hearing and through simple testimony if the defendant is in fact telling all he or she knows, will likely vest blind faith in the government's claim that the defendant is untruthful, and will assume that it must possess some intelligence that led it to conclude that the defendant was untruthful. If, however, the burden of proof shifts to the government in the event that it challenges the defendant's fifth-factor credibility, then the government would have to present evidence and explain in detail the reasons for its belief that the defendant is lying.

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153. Brief for Appellant at 6, *Gales*, 560 F. Supp. 2d 27 (No. 08-3040), 2008 WL 6697433.

154. *Id.*

155. *Id.* at 8.

Requiring the government to prove that the defendant was untruthful in his or her disclosure will preserve the safety-valve provision as a tool to help low-level drug offenders by ensuring that any challenges to their eligibility stem from actual untruthfulness on their part, rather than simple government speculation or the government's dissatisfaction with the information it received.

B. WHERE THE SAFETY VALVE WENT WRONG

Fixing the safety valve requires understanding where it was broken. Why was the burden placed with the defendant in the first place? It was not placed there by dictate of the statute, for the statute and the legislative history are silent as to where the burden of proof should be situated.[156] The courts are to blame. Unfortunately, in an attempt to conceptualize the safety-valve provision in line with the substantial assistance provision and other sentencing regimes with which they were familiar, a number of courts incorrectly placed the burden of proof with the defendant. Recognizing that there is no statutory or precedential reason to maintain the burden of proof with the defendant in safety-valve hearings helps to clarify that the burden of proof can and should be shifted to the government.

In 1996, the Seventh Circuit, in one of the earliest federal cases to interpret the burden allocation of the safety-valve provision, mistakenly allocated the burden of proof to the defendant in an attempt to place the burden as it had been placed in other sentencing regimes.[157] In ruling on safety-valve eligibility in the case of *United States v. Ramirez*, the Seventh Circuit explained its determination that the burden should always stay with the defendant during the eligibility hearing in terms of a misplaced understanding of the safety valve as a sentencing "departure."[158] The court explained:

156. *See* United States v. Ajugwo, 82 F.3d 925, 929 (9th Cir. 1996) ("Although there is no legislative comment or circuit authority addressing the burden of proof under 5C1.2, we have placed the burden on the defendant.").

157. United States v. Ramirez, 94 F.3d 1095, 1100 (7th Cir. 1996).

158. *Id.*

> The approach we take to the burden under [the safety valve] also comports with the usual allocation of responsibility in departure cases. In general, the party seeking the departure from a presumptive guidelines sentence has the burden of proving that he meets the criteria for adjustment. When the departure is upward, the government has the burden; when it is downward, the defendant has the burden. It logically follows, under this analysis that a defendant moving for [a safety-valve] reduction would be responsible to prove his entitlement to it."[159]

The initial decision to place the burden of proof with the defendant to determine safety-valve eligibility was then not made as a policy decision by Congress, but rather as an interpretation by the courts. Though its logic was adopted by a number of other circuits, the Seventh Circuit's determination that the defendant must always carry the burden of proof under the safety valve in order to emulate the allocation used in other downward departures, does not hold.

The Seventh Circuit's reasoning was based upon the assumption that the safety-valve provision is a departure from the mandatory minimum, and thus, the allocation of the burden of proof should be akin to other departures. The safety-valve provision, however, is not in fact a departure from the mandatory minimums, but rather, it is an excusal from them. As an excusal rather than a departure, there is no basis that the burden of proof for the safety valve must, or even should be allocated in the same manner that it is for departures.

The language of the provision itself, particularly when compared directly with the 18 U.S.C. § 3553(e) substantial-assistance departure, demonstrates that the safety valve was not meant to be understood as a departure, and is, in fact, an excusal from the narcotic mandatory minimums. The titles of the two provisions distinctly flag their differences. For example, the title of 18 U.S.C. § 3553(e) ("Limited Authority to impose a sentence below a statutory minimum"[160]) indicates that the substantial-assistance provision is still tied to the statutory minimum — in other words, the mandatory minimum still applies to the sentence, but the

159. *Id.* at 1101.
160. 18 U.S.C. § 3553(e) (2006).

judge has authority to depart from it. In contradistinction, the 18 U.S.C. § 3553(f) heading ("Limitation on the applicability of statutory minimums in certain cases"[161]) indicates that, when a defendant is safety-valve eligible, the mandatory minimum is then inapplicable to the sentence and is no longer tied to it. Therefore, the safety valve is not a departure below the mandatory minimum, but is in fact an excusal from it — when an offender is safety-valve eligible, the mandatory minimum is no longer applicable to his or her sentence at all.

The statute's text provides further evidence of the correct allocation of burdens. The statute states that, if a candidate is found to have fulfilled the five safety-valve factors, the court "shall impose a sentence pursuant to the guidelines promulgated by the United States Sentencing Commission . . . without regard to any statutory minimum sentence."[162] Like the heading, here again the language indicates that if, the defendant is found to be safety-valve eligible, then the mandatory-minimums no longer apply and can be disregarded. This can be contrasted with the language of the 18 U.S.C. § 3553(e) substantial-assistance provision which states that, if the government makes a motion for the downward departure to the court, the court then has "the authority to impose a sentence below a level established by statute as a minimum sentence . . . ."[163] In that case, the sentence is simply a departure from the mandatory minimum that is still applicable to the sentence, and which works as a baseline that a judge can still sentence below. Thus, while the substantial-assistance provision is indeed a departure from the mandatory minimums, the safety-valve provision is not a departure below the mandatory minimum, but rather an excusal from the mandatory minimums. Therefore, the initial logic of the Seventh Circuit that the burden of proof for the safety valve must be allocated like a departure does not hold.

C. THE RULE OF LENITY

Additionally, based upon the statutory-interpretation canon of the rule of lenity, there is a strong argument that the safety valve

161. 18 U.S.C. § 3553(f).
162. 18 U.S.C. § 2553(f) (2006).
163. 18 U.S.C. § 2553(e).

should be construed to shift the burden of proof to the government if it challenges the defendant's credibility in his or her fifth-factor disclosure. The rule of lenity requires that, in certain circumstances, statutes "be interpreted in favor of defendants."[164] The Supreme Court has held that the rule of lenity applies where the legislature has failed to give full notice of the scope of a statute's punishment, and when the statute leaves "a grievous ambiguity or uncertainty in the language and structure of the [statute], such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute."[165] In such a case, the court is required to interpret the statute in favor of the defendant and "impose the lesser of two penalties."[166]

While typically applied to penal statutes, the rule of lenity has also been applied to sentencing by a number of circuits. For example, in the case of *United States v. Simpson*, the Second Circuit held that applying the rule of lenity to sentencing was well aligned with the purposes of the rule:

> "The purposes underlying the rule of lenity [are] to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts . . . . Application of the rule of lenity to the Guidelines promotes these goals."[167]

Application of the rule of lenity to determining the allocation of burdens of proof in the safety valve is similarly within the scope of the rule. Indeed, the purposes of the safety valve include maintaining a balance between "prosecutors and courts" and

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

165. Chapman v. United States, 500 U.S. 453, 463 (1991).

166. United States v. Jolibois, 294 F.3d 1110, 1113 (9th Cir. 2002).

167. 319 F.3d 81, 81 (2d Cir. 2003) (quoting United States v. Kozminski, 487 U.S. 931, 952 (1988)). *See also* United States v. Gonzalez-Mendez, 150 F.3d 1058, 1061 (9th Cir. 1998) (applying the rule of lenity to the Guidelines); United States v. Lazaro-Guadarrama, 71 F.3d 1419, 1421 (8th Cir. 1995) (applying the rule of lenity to the Guidelines and finding that the "[t]he rule of lenity states that a court cannot interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended") (internal quotation marks and citation omitted); United States v. Cutler, 36 F.3d 406, 408 (4th Cir. 1994) (holding that the rule of lenity may be applied to the Guidelines).

"minimiz[ing] the risk of selective and arbitrary enforcement" in the sentencing of low-level drug offenders. Furthermore, the lack of any mention of burden allocation in the statute itself likely satisfies the Supreme Court's "ambiguity" requirement for utilization of the rule of lenity.[168] When applied to burden of proof for the statutory safety valve, the rule of lenity counsels in favor of shifting the burden of proof to the government if it challenges the defendant's credibility in his fifth-factor disclosure. Shifting the burden of proof in such a way would fulfill the rule of lenity's mandate that ambiguous statutes be construed in favor of the defendant or in a manner that will result in the lesser penalty.[169]

D. POTENTIAL OBJECTIONS TO THE BURDEN-SHIFTING APPROACH

Some may argue that shifting the burden of proof to the government in safety-valve hearings when the government challenges the credibility of the defendant's disclosure will undermine the integrity of the safety-valve statute. This concern, however, is without merit. The most common objection to shifting the burden of proof to the government is that doing so would encourage low-level offenders to lie in their fifth-factor disclosures, because they would no longer carry the burden to prove truthfulness. The First Circuit voiced this concern in the 2009 case of *United States v. Padilla-Colon*, and explained that, if the burden were to shift to the government, "the district courts would be bound to accept even the most arrant nonsense from a defendant's mouth so long as the government could not directly contradict it by independent proof, in effect, turning the burden of persuasion inside out."[170]

This concern however, would likely not come to fruition if the burden of proof were shifted as the structure of the safety-valve provision itself encourages truthfulness. Indeed, the defendant qualifies for the safety valve only if his or her disclosure is in fact truthful; many defendants would not be willing to risk losing the potential sentencing leniency by lying in their disclosure to the government. Furthermore, a defendant's knowledge that the

168. *Chapman*, 500 U.S. at 463.
169. *Id.* at 453.
170. United States v. Padilla-Colon, 578 F.3d 23, 23 (1st Cir. 2009).

burden shifts to the government to affirmatively prove untruthfulness probably would not itself encourage untruthfulness — it is still unlikely that the defendant would risk being untruthful in his disclosure to the government for fear that the government possessed enough evidence (perhaps through interviewing other people involved in the drug conspiracy) to easily fulfill such a burden at the safety-valve hearing. Indeed, in his memorandum in *United States v. Gales,* Judge Robertson addressed this concern, stating, "There can be little worry that such a rule will encourage fabrication; the Sentencing Guidelines discourage lying."[171]

Even so, concern still may exist that, should the government have to fulfill a burden of proof to show a defendant's untruthfulness, it would be forced to reveal intelligence from ongoing drug conspiracy investigations. While this is certainly a valid concern — indeed, the prosecutions of low-level offenders at the federal level are often done in conjunction with larger ongoing narcotics investigations — determining how much information should be revealed to challenge a defendant's credibility is an evaluation that the government is capable of undertaking. Furthermore, that the government may be forced to reveal aspects of its investigation if it decides to challenge a defendant's safety-valve credibility does not discredit Congress's intent to help low-level offenders. If the government had to weigh the cost of challenging the defendant's disclosure with potential difficulties in their ongoing investigations, this would likely have the benefit of forcing the government to only challenge a defendant's safety-valve credibility in instances when the government has valid evidence that the defendant was untruthful. This will preserve Congress's intent of using the safety valve as tool to prevent deserving low-level offenders from being sentenced to mandatory minimums.

Finally, although it is for Congress to decide, it is important to examine the relation of the fifth-factor truthfulness disclosure to the overall purposes of the safety valve. A habitual justification for imprisonment is that the defendant poses a threat to society and thus must be put away to reduce that threat. But as Virginia Villa has highlighted, while the first four factors of the safety valve do relate to a defendant's threat to society (as they concern

171. United States v. Gales, 560 F. Supp. 2d 27, 28 (D.C. Cir. 2008).

use of violence, prior criminal history, and the extent of his or her role in a drug operation), the fifth disclosure requirement "creates barriers [to the safety valve] unrelated to a threat assessment," and, "defeat[s] the purposes of clemency decisions."[172] In his memo in *Gales*, Judge Robertson also questioned the importance of the truthfulness and disclosure requirement to the safety valve, stating:

> And what exactly is the point or the public benefit of requiring a defendant to identify his supplier when the government asserts, as the basis for its claim that the defendant has been untruthful, that it already knows the identity of the supplier. If the point is nothing more than to vindicate the safety valve's requirement of truthfulness, notwithstanding the clear direction from the statute that the fact the defendant has no useful information shall not preclude its application, then in my view, the controlling circuit precedent needs to be re-examined.[173]

Thus, there is reason to suggest that the truthfulness of the defendant has little to do with their culpability as a drug dealer, or their threat to society in general. Therefore, when determining where the burden of proof should fall in safety-valve hearings, effectuating Congress's desire to ensure that low-level offenders are not sentenced to the harshest mandatory minimums should take precedence over any apprehension that shifting the burden of proof on the government would undermine a defendant's truthfulness.

In conclusion, it is unlikely that shifting the burden of proof to the government in the event that it challenges the credibility of the defendant's fifth-factor disclosure would weaken the effectiveness of the safety valve. Even with such a burden shift, the defendant will still likely be truthful in his or her disclosures for fear that the government could easily meet its burden of proof. Additionally, forcing the government to weigh the validity of its credibility challenge against concerns about undermining other ongoing investigations may in fact further the goals of the safety valve.

172. Villa, *supra* note 86, at 124.
173. *Gales*, 560 F. Supp. 2d at 28.

V. CONCLUSION

The Fifth and Ninth Circuits' shift of the burden of proof to the government during safety-valve hearings when the government challenge the credibility of the defendant's fifth-factor disclosure safeguards the intent of Congress in the passage of 18 U.S.C. § 3553(f). Allocating the burden of proof in such a way preserves the effectiveness of the safety valve as a tool to protect low-level drug offenders and drug mules from disproportionately high mandatory minimums by ensuring that they will not be placed in the impossible situation of having to prove a negative. Furthermore, shifting the burden of proof to the government helps to distinguish the safety-valve provision from the substantial-assistance provision, and honors the safety valve's mandate that the offender's disclosure need not be new or useful. Finally, shifting the burden ensures that prosecutors cannot make adverse eligibility recommendations if they are simply unsatisfied with the defendant's disclosure and that ultimate responsibility for determining eligibility is left with the judge.

In order to fully effectuate Congress's goal of protecting low-level drug offenders from harsh mandatory minimums, it is vitally important that courts allocate the burden of proof in the most just manner possible. If applied correctly, the safety-valve provision can reduce sentencing disparities across race and gender lines. The stories of both Vinson Gales — who will likely be in prison longer than the head of the drug organization with which he was involved — and Alma Garcia — who, owing to proper use of the safety valve will be reunited with her children five years earlier than expected — should serve as both a warning and a beacon of hope for federal narcotics sentencing. Only when all circuits adopt the allocation of the burden of proof used by the Fifth and Ninth Circuits will justice for low-level drug offenders best be served.