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ADDRESSING ABUSE IN DRUG CASES: VIOLENCE AS A MITIGATING FACTOR IN SAFETY VALVE SENTENCING

Samantha Burton¹

In 1994, as a 19-year-old Black American pregnant woman, Kemba Smith was charged with intent to distribute 255 kilos of crack-cocaine.² At the start of her college experience, Smith had become romantically involved with a man named Peter Hall who was a major drug dealer. She and many other witnesses described at trial that although Hall was initially charming and attractive, he was an incredibly abusive boyfriend. Both Smith and a friend Candace R. Jeter who knew Hall, testified that Hall had slapped, beaten, and choked Smith on multiple occasions as well as had yelled at her and threatened her. Hall was known to be so enraged by the littlest of things like seeing Smith simply talk to another man that he would beat Smith so severely that it resulted in visits to the emergency room.³ Smith experienced major abuse, but she still simultaneously felt initial loyalty and love towards Hall like many victims of domestic violence. Additionally, she was afraid to leave for fear of physical harm. This led to Smith becoming marginally involved in Hall's drug conspiracies and performing small tasks for him like renting

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 - 2 Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance against U.S. Drug-Sentencing Policy*, 3 U. St. Thomas L.J. 462, 470 (2006).
 - 3 United States v. Smith, 113 F. Supp. 2d 879, 895 (E.D. Va. 1999).

different apartments. Besides performing minor jobs, she did not actually transport drugs, receive direct profits from the drug conspiracies, or act as a leader in the conspiracy. When Hall was murdered, Smith was charged as a co-conspirator in the crime and was convicted for the full quantity of drugs involved in the conspiracy.

After Smith's trial, the judge needed to determine if Smith qualified for downward departure on her sentence. Of the two main ways that a defendant can qualify for downward departure, the first option is usually difficult for low-level drug offenders to access. Termed "substantial assistance,"⁴ this option enables a reduced sentence if the defendant provides substantial and valuable information to the government. As Smith had little information to give, this option was not applicable. The second option, termed the safety valve,⁵ allows defendants downward departure if they can demonstrate that they meet five criteria including: they had little to no criminal history (4 or fewer criminal history points), did not use violence or a weapon in connection with the offense, were not an organizer or leader of the drug enterprise, provided the government with all the information they had, and the offense did not result in serious injury or death. Though Smith met most of these criteria, she was unable to qualify for the safety valve because she did not meet two of the conditions: she had possessed a firearm and had not initially cooperated with the government to the full extent.⁶ Even though the abuse Smith experienced played a major role in her involvement in the drug crime, this abuse did not mitigate her inability to meet all the safety valve criteria because the safety valve did not consider or account for the effects of abuse. She was then sentenced to 24.5 years in prison—the strict mandatory minimum.

In addition to demonstrating problems that can occur because the safety valve does not fully consider abuse as a mitigating circumstance, Smith's case also highlights the frequently problematic approach taken in sentencing court towards evidence of abuse. In Smith's case, not only did the court largely dismiss extensive evidence

4 18 U.S.C. § 3553(e).

5 18 U.S.C. § 3553(f)(1-5).

6 *See* United States v. Smith, 113 F. Supp. at 896.

of abuse that pointed to Smith’s duress, coercion, and damaged cognitive function, but the judge actually took the evidence of abuse that was presented as further evidence of Smith’s incrimination: “The court could not accept such a defense when Smith had dated Hall for such a long time and had witnessed Hall’s violent nature. In the court’s view, Smith understood and appreciated the criminality of Hall’s actions. The court did not believe that Smith committed the offenses solely out of fear.”⁷ Instead of considering the abuse Smith experienced as evidence of deep psychological fear, the court understood this abuse as evidence of her sustained experience with and knowledge of Hall’s character and violence. Smith’s abuse at the hands of Hall was used against her. In this instance, the judge’s assessment of the effects of abuse on Smith represents a misunderstanding of the real and powerful psychological effects of abuse on a defendant’s cognitive function and decision-making. Without input from psychologists and other mental health experts to speak to the extent to which this abuse would have influenced Smith, judges were not able to accurately consider how this abuse—evidence relevant to her culpability—affected Smith; subsequently, the court misinterpreted its effects in a way severely detrimental to her. Unfortunately, many other defendants, often women,⁸ find themselves in situations today similar to Smith’s because of the safety valve’s failure to adequately consider how abuse affects one’s culpability and because judges sometimes misunderstand the real psychological effects of abuse on a defendant’s decision-making.

Even though there is a gap in the way that abuse is considered during sentencing determination for drug offenses, efforts to alter the way these sentences are determined have often failed. Multiple attempts have been made to shift the role of determining safety valve qualification from judge to jury under *Alleyn v. United States* which held “that any fact that increases the mandatory minimum

7 *Id.* at 896.

8 WOMEN’S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION 4 (2002), https://vawnet.org/sites/default/files/assets/files/2017-08/AR_Incarceration.pdf (last visited Feb. 23, 2021).

is an ‘element’ [of the offense] that must be submitted to the jury.”⁹ Repeatedly, lower appellate courts have held that *Alleyne* applies only to factors that *increase* a defendant’s minimum sentence and not to factors like the safety valve which *reduce* a defendant’s mandatory minimum; as such, courts have held that safety valve qualification is entirely a matter of judicial discretion. Functioning within this set precedent of judicial discretion, this paper proposes an added qualification to the safety valve that requires judges to proactively consult with psychologists and other mental health professionals when there is evidence of abuse presented. After consulting with psychologists and other mental health professionals, the judge will then be empowered to determine if the abuse played a significant role in the defendant’s inability to meet one of the five safety valve criteria. This paper proposes that the judge be allowed to override a single criterion that a defendant would not have met otherwise due to abuse suffered, enabling the defendant to qualify for the safety valve and subsequent downward departure.

By way of organization, this paper begins by first discussing the need for sentencing reforms that specifically looks at and considers abuse. This first section discusses how abuse tends to disproportionately affect women in incarceration, how the science suggests that abuse plays a major role in cognitive function, and how the majority of sentencing reforms have not been able to sufficiently address this gap. Second, this paper explores more thoroughly the process of determining a defendant’s qualification for the safety valve in order to better understand how the safety valve’s parameters do not fully encompass the effects of abuse on a defendant. Third, this paper summarizes the cases that have foundationally confirmed safety valve determination as a matter of judicial and not jury discretion in order to understand the tight confines of precedent within which reforms must be made. Fourth, this paper presents in further detail its two-part qualification to the safety valve that functions within the set precedent and 1) requires judges to consult with mental health professionals in situations where evidence of abuse is present and 2) enables judges to allow a defendant to meet the safety valve even

if they would not initially have met one of the criteria due to abuse. Fifth, this paper considers two cases where different levels of abuse played a role in the defendant's actions in order to demonstrate the viability of this prescription across a broad range of scenarios. Sixth, this paper presents final reasons why this prescription would prove beneficial and would be particularly effective.

I. WHY FOCUS ON ABUSE?

The safety valve's failure to consider the role of abuse in a defendant's criminal offense disproportionately punishes women who are statistically more likely to be involved in criminal drug activity due to intimate partner violence. In 2017, the Center for Disease Control published their findings from a National Intimate Partner and Sexual Violence Survey that 1 in 4 women and 1 in 9 men in the U.S. experience sexual violence, physical violence, and/or stalking by an intimate partner in their lifetime.¹⁰ Although both sexes are affected, women are over twice as likely to be victims of this type of abuse. Additionally, according to a Federal Bureau of Prisons study "as many as 90 percent of women in prison have experienced trauma and that the most common type of traumatic experience for female inmates is repeated sexual violence, followed by intimate partner violence. Male inmates are less likely to have been a direct victim of violence...."¹¹ This astronomically high statistic indicates that the vast majority of women sentenced to prison have been victims of sexual violence at one point or another in their lives. The briefing report from the U. S. Commission on Civil Rights adds that another important difference between reported male and female abuse is that while "the risk of abuse for men declines after childhood, the risk of

10 CDC, THE NAT'L INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2-3 (2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> (last visited Mar. 4, 2021).

11 OFFICE OF INSPECTOR GEN., REVIEW OF THE FED. BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION 6 (2018), <https://oig.justice.gov/reports/2018/e1805.pdf> (last visited Feb. 23, 2021).

abuse for women endures throughout their juvenile and adult lives.”¹² Women experience greater amounts of sexual violence as juveniles and adults than men do before they are convicted of a crime. The impact of sexual violence on women must be taken into account when considering sentencing practices. Although sexual violence and domestic abuse is not exclusively a women’s issue, the numbers above show that it statistically affects women at higher rates than men. Gender blind approaches in policy, law, and sentencing can often lead to inadvertently ignoring major injustices that disproportionately affect women.

The U.S. Commission on Civil Rights reported that female offenders are also more likely to be convicted of nonviolent drug crimes than male offenders¹³ and that 56% of women in prison were serving time for non-violent drug crimes on a federal level in 2016.¹⁴ With so many women in prison for low-level drug offenses, it is critically important to look at the intersection between the sexual violence that these women experience and non-violent drug crimes. The Sentencing Project highlights in particular how mandatory sentencing policies for drug crimes create “the girlfriend problem,” imposing a severe burden on female offenders who are in some kind of relationship with a male drug dealer.¹⁵ This “girlfriend problem” is particularly troubling because if intimate partner violence is not taken into account in drug sentencing, the likelihood of mis-sentencing or over-sentencing increases. Mary E. Gilfus at the National Resource Center for Violence Against Women writes that “[s]ome women are introduced to drugs by abusive partners and may be forced to sell or carry drugs for them, while other impoverished women may resort

12 U.S. COMM’N ON CIVIL RIGHTS, WOMEN IN PRISON: SEEKING JUSTICE BEHIND BARS 23 (2020), <https://www.usccr.gov/pubs/2020/02-26-Women-in-Prison.pdf> (last visited Feb. 23, 2021).

13 *Id.* at 18.

14 *Id.* at 18.

15 SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN’S INCARCERATION 5 (2013), <https://sentencingproject.org/wp-content/uploads/2015/12/The-Changing-Racial-Dynamics-of-Womens-Incarceration.pdf> (last visited Feb. 23, 2021).

to selling drugs to finance a planned escape from an abuser or to find a place to sleep.”¹⁶ Women’s involvement with drugs in a large number of cases is intimately connected to their situations of previous or current sexual partner violence.

Additionally, abuse takes a toll on the victim’s cognitive capacity and mental health and has major psychological repercussions for victims. The CDC notes that sexual violence, stalking, and intimate partner violence have been linked with acute trauma, a wide range of psychological conditions, PTSD, and maladaptive coping behaviors, including increased substance abuse and use.¹⁷ Further, intimate partner violence can result in traumatic brain injury which can lead to severe physical and psychological damage. Murray B. Stein et al. found that victims of intimate partner violence with and without PTSD had “poorer performance on tasks of speeded, sustained auditory attention and working memory... and response inhibition,”¹⁸ and Janet Yuen-Ha Wong et al. concurred that “psychological stress may be further developed into autonomic, hormonal, immunological, neurological, and neuropsychological alterations relating to thoughts and feelings. These alterations may lead to poor decision-making about leaving or staying in abusive relationships, as well as memorization and concentration problems.”¹⁹ The research is clear about the effects of abuse and the serious cognitive and psychological conditions that occur in intimate partner violence. If these facts regarding the effects of abuse on cognitive function are better understood in general and on a case-by-case basis in the courtroom, judges are more

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- 16 WOMEN’S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION 4 (2002), https://vawnet.org/sites/default/files/assets/files/2017-08/AR_Incarceration.pdf (last visited Feb. 23, 2021).
- 17 CDC, THE NAT’L INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 179 (2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> (last visited Feb. 23, 2021).
- 18 Murray B. Stein et al., *Neuropsychological Function in Female Victims of Intimate Partner Violence with and without Posttraumatic Stress Disorder*, 52 *BIOLOGICAL PSYCHIATRY* 1079, 1079 (2002).
- 19 Janet Yuen-Ha Wong et al., *Bridging Intimate Partner Violence and the Human Brain: A Literature Rev.*, 15 *TRAUMA, VIOLENCE, & ABUSE* 22, 23 (2013).

likely to approach sentencing determination differently. For example, instead of regarding the limited information a defendant gives to the government as inherent evidence of the defendant's refusal to cooperate, judges may instead recognize that a defendant's experience of abuse may have affected their memory and concentration resulting in less detailed information. Further, instead of regarding a defendant's participation in a drug crime as an inherent reflection of the defendant's criminal inclinations, judges may alternatively recognize that the effects of abuse may have played a greater role in the defendant's actions than the defendant's personal criminality.

Despite the relevance of abuse in a large number of defendants' (often females') situations, the majority of sentencing reforms, though important steps, have not overtly focused on addressing this gap. In the early 2000s and into more recent years, individual state legislations made significant efforts to de-intensify drug laws.²⁰ In 2010, Congress passed the Fair Sentencing Act which reduced the sentencing disparity of crack and powder cocaine offenses from 100:1 to 18:1.²¹ And in December of 2018, Congress passed the First Step Act which made headway in lowering mandatory minimums²² and in expanding the safety valve.²³ But even though these reforms made meaningful strides toward allowing more low-level drug participants to access downward departure, the reforms often did not have as profound an effect on predominantly female defendants as they did on male defendants. For example, though the First Step Act seemed to enable more defendants to qualify for the safety valve through allowing defendants with a more extensive criminal history

20 Brian Elderbroom and Julia Durnan, *Reclassified: State Drug Law Reforms to Reduce Felony Convictions and Increase Second Chances*, URBAN INSTITUTE 3 (2018), https://www.urban.org/sites/default/files/publication/99077/reclassified_state_drug_law_reforms_to_reduce_felony_convictions_and_increase_second_chances.pdf (last visited Feb. 23, 2021).

21 Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified at 841, 844, 960).

22 First Step Act, P.L. 115-391, § 402, 132 Stat. 5221 (2018).

23 CHARLES DOYLE, FED. MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS, C.R.S. REP. NO. R41326, at 1 (2019), <https://fas.org/sgp/crs/misc/R41326.pdf> (last visited Mar. 1, 2021).

to qualify,²⁴ in practice, this modification did not affect female defendants nearly as much as male defendants because female defendants statistically tend to have a much more limited criminal history²⁵ than their male counterparts.

Recognizing both the pervasiveness and the relevance of abuse in a defendant's criminal actions requires that abuse be given more specific attention in sentencing. A judicial system that fails to consider both these scientifically relevant and often gender-specific factors that affect a defendant's culpability and likelihood to recidivate as well as the different gendered experiences of a sentence's application fails to equally apply the laws. Judge Nancy Gertner writes: "A sentencing system that fails to consider real differences between male and female offenders, differences that may correlate with the sources of their crimes and provide a basis for their rehabilitation, is an unequal one."²⁶ In essence, when lawmakers attempt to create gender-neutral laws without taking into account the laws' effects on individual groups, those laws can disproportionately punish certain groups like women, thus becoming unfair in their application. Failure to consider the role of abuse in relation to a defendant's offense can preclude women and others from fair sentencing. Sex differences in abuse simply cannot be ignored without many female and other casualties in the criminal justice system.

II. DETERMINING A DEFENDANT'S SAFETY VALVE QUALIFICATION

Understanding the full process whereby a defendant's qualification for the safety valve is determined demonstrates the lack of attention currently given to abuse in this process. After being convicted by a jury as guilty of possession and intent to distribute drugs, the judge must then determine a defendant's initial sentencing level of offense by considering the drug type, the quantity of accountable

24 P.L. 115-391, § 402, 132 Stat. 5221 (2018).

25 Nancy Gertner, *Women and Sentencing*, 57 AM. CRIM. L. REV. 1401, 1408-1409 (2020).

26 *Id.* at 1403.

drugs, and a defendant's number of past criminal points.²⁷ With that information, the judge then finds the corresponding baseline sentence on a designated matrix in the sentencing guidelines.²⁸ Following determination of a defendant's initial mandatory minimum, the judge decides whether or not a defendant qualifies for the safety-valve which then allows defendants the possibility of a significantly reduced sentence.

The safety valve provision 18 U.S.C. § 3553(f) allows judges the option to abandon mandatory minimums and impose less severe sentences for defendants who meet certain criteria. The provision is applicable when 1) the defendant has a minimal or nonexistent criminal record,²⁹ 2) the defendant did not use violence in the course of the crime,³⁰ 3) the offense did not result in death or serious injury to any person,³¹ 4) the defendant played a limited role in the crime,³² and 5) the defendant has cooperated with the government to the full extent possible.³³ Then, once a defendant has convinced the "sentencing court by a preponderance of the evidence that he [or she] satisfies each of the safety valve's five requirements,"³⁴ judges are permitted to set aside the mandatory minimums that would have applied, and determine a lower sentence.

The safety valve's factors do not proactively consider the effects of abuse on a defendant's criminality and instead focus on other factors like the defendant's criminal history, lack of violence, role in the crime, and cooperation with the government. While all of these factors point towards a lower-level role in the crime, failing to consider

27 See U.S.S.G. §4A1.1.

28 *Id.*

29 18 U.S.C. § 3553(f)(1).

30 *Id.* at (2).

31 *Id.* at (3).

32 *Id.* at (4).

33 *Id.* at (5).

34 CHARLES DOYLE, FED. MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS, C.R.S. REP. NO. R41326, 2 (2019), <https://fas.org/sgp/crs/misc/R41326.pdf> (last visited Feb. 23, 2021).

how abuse affected a defendant's actions can preclude many defendants who clearly played a diminished role in the crime from qualifying for downward departure if that abuse prevented them from meeting all five of these criteria. For example, defendants who fear retribution on themselves or loved ones for divulging information related to the drug crime often initially withhold information. Even when they eventually cooperate with the government, the damage is often already done, and it is often difficult to demonstrate qualification for this fifth criteria especially when abuse is not admitted as a mitigating factor. Without reform, the process of determining safety valve qualification is likely to continue to disproportionately punish defendants who fall victim to abuse.

III. JUDGE NOT JURY DETERMINES SAFETY VALVE QUALIFICATION

Qualifying for the safety valve places an incredibly heavy burden of proof on the defendant who must prove to the "sentencing court by a preponderance of the evidence that he [or she] satisfies each of the safety valve's five requirements."³⁵ Many defendants, victims of abuse and not, have found that proving their qualification by a preponderance of the evidence can be particularly difficult when put before a singular judge and not before a jury, especially because the safety valve excludes consideration of certain facts relevant to a defendant's culpability. As a result, many defendants have appealed decisions of safety valve disqualification. However, despite multiple attempts, courts have consistently ruled that qualification for the safety valve is a matter completely restricted to the realm of judicial discretion.

In 1996, *US v. Shrestha* clarified that the burden of proof falls heavily on the defendant to demonstrate their qualification for the safety valve rather than on the opposing party to prove their disqualification.³⁶ Then in 2005, *U.S. v. Labrada-Bustamante* (9th Cir.

35 *Id.* at 2.

36 *United States v. Shrestha*, 86 F.2d 935, 940 (9th Cir. 1996).

2005)³⁷ affirmed determination by judge not jury when the court held that the decision of safety valve application did not violate the Constitution because it did not involve fact finding. The court put forward that “mandatory minimum sentences under section 841(b) presuppose a jury’s determination of the underlying facts.”³⁸ In 2014 with *US v. King*³⁹ and then in 2016 with *US v. Leanos*,⁴⁰ defendants both appealed safety valve disqualification based on *US v. Alleyne*⁴¹ which held that “any fact that increases the mandatory minimum is an ‘element’ [of the offense] that must be submitted to the jury.”⁴² In both cases, the courts found that *Alleyne* was confined to factors that could increase a defendant’s sentence while the safety valve was concerned with factors that could reduce a defendant’s sentence. Both courts upheld safety valve determination by judge not jury.⁴³

Understanding the courts’ consistent adherence to judicial discretion over a span of nearly 20 years points towards a necessary shift in proposed legal reforms. Rather than continue to push for safety valve factors to be tried before a jury, enacting sentencing reforms situated within this clearly established realm of judicial discretion seems more plausible and effective.

IV. PRESCRIPTIVE QUALIFICATION ON THE SAFETY VALVE

Undoubtedly, defendants are relatively confined by their options for attaining downward departure. And when defendants cannot provide a substantial amount of useful information to the government (usually because they were low-level members of the drug conspiracy), they rely even more heavily on qualifying for the safety valve.

37 United States v. Labrada-Bustamante, 428 F.3d 1252, 1257 (9th Cir. 2005).

38 *Id.* at 1263.

39 United States v. King, No. 18-11468 (5th Cir. Oct. 17, 2019).

40 United States v. Leanos, 827 F.3d 1167 (8th Cir. 2016).

41 Alleyne v. United States, 570 U.S. 99 (2013).

42 *Id.* at 107.

43 See U.S. v. King and U.S. v. Leanos.

Due to the firmly established precedent that sentence determination is fully a matter of a judge's discretion and not a jury's discretion, qualification for the safety valve becomes even more difficult. When extenuating circumstances like abuse are not taken into account when considering a defendant's criminal actions, it becomes even more difficult for defendants to receive sentences that accurately reflect their criminality and punish them fairly.

Because the precedent has clearly been set denying defendants the option of presenting their argument for safety valve qualification before a jury, and because factors like abuse are not often given full consideration during sentencing determination, this paper proposes adding a qualification to the safety valve that stipulates that during the sentencing determination, if there is evidence of abuse affecting the defendant's actions, the judge must independently solicit the opinion of a relevant psychologist, psychiatrist, or mental health professional to better understand the role the abuse played in the defendant's situation. With this additional expert perspective, judges will be better informed as they determine a defendant's sentence. Then, if after a judge has solicited the opinion of a mental health professional and determined that abuse played a significant enough role in the defendant's inability to meet at most one criteria of the safety valve, this paper proposes that the judge have the option to pardon a defendant's failure to meet no more than one criterion.

Further development and research are required in order to define a clear process for actually instigating this prescription. First, it would be necessary to specifically define a method for choosing the psychiatrists and psychologists to which judges would turn. It would also be important to better define what level and extent of psychiatric examination would be required in order for judges to have adequately consulted with a mental health expert to understand the defendant's mental state.

V. CASE COMPARISON: *US v. PAZ-BARONA*
AND *US v. CASTRO*, No. 1:96-CR-10139

With this prescription in mind, this paper considers two cases in an effort to demonstrate the adaptability and broad applicability of

this qualification to a variety of different situations involving abuse. With the first case, understanding how the judge approached Santa Negrón's sentence in *US v. Castro*⁴⁴ demonstrates how consulting with a psychiatrist about the defendant's mental state can provide incredibly important information to a judge, dramatically affect a defendant's sentence, and help avoid disproportionately punishing a drug offender. The second case, *US v. Paz-Barona*⁴⁵, presents a situation where the defendant suffered short-term, albeit acutely traumatic, abuse that may or may not have affected her cognitive function and subsequent ability to meet the safety valve criteria. When considering how the prescription would have applied in this particular case, it becomes clear that consulting with a psychiatrist would have only provided advantageous information to the judges in the process of determining Paz-Barona's sentence.

A. US v. Castro, No. 1:96-CR-10139

In her article highlighting different drug sentencing disparities that female defendants often face, Judge Nancy Gertner describes her own process of assigning a sentence to the defendant Negrón in 1996 in the district court of Massachusetts. Negrón was charged with distributing between 150 and 500 grams of (crack) cocaine base—an offense that would trigger a 10-year mandatory minimum. Gertner describes how Negrón had suffered intense abuse over the course of her life and in connection with the drug offense. When she was a young child, she was abused by her stepmother.⁴⁶ She was married at age 14 to escape her home life. When her husband became abusive, she escaped illegally into Puerto Rico and tried to find work to support herself and her children. She married another man in the

44 Sentencing Order, *United States v. Castro*, No. 1:96-CR-10139 (D. Mass. 1996) (entered on Aug. 26, 1997).

45 *United States v. Paz-Barona*, 172 Fed.Appx. 278, 2006 WL 758988 (11 Cir. Mar. 27, 2006).

46 Nancy Gertner, *Women and Sentencing*, 57 AM. CRIM. L. REV. 1401, 1406 (2020).

US; when he became abusive, she left him as well.⁴⁷ After leaving her second husband, she began to look for work. A man that she had been introduced to by her recent ex-husband offered to help her; she thought he meant that he would help her find a job but instead he pressured her into drug trafficking.⁴⁸

As Judge Gertner sentenced Negron, she “refused to sentence her without evaluating her mental state.”⁴⁹ She independently consulted with a psychiatrist who examined Negron for signs of duress and coercion. The psychiatrist found that Negron’s behavior was a “learned response from previous relationships of abuse and her focused goal to provide for her children.”⁵⁰ Based off the psychiatrist’s findings that the abuse Negron had suffered substantially affected her cognitive functions and Negron’s satisfaction of the safety valve criteria, Gertner subsequently departed substantially from the mandatory minimum. Instead of assigning her a sentence of 10 years, Gertner assigned her a sentence of 2 years and 3 months.⁵¹

In this situation, Judge Gertner was clearly aware of and sensitive to situations where abuse plays a role in a defendant’s actions. However, had she stopped at simply being cognizant of abuse’s potential to affect a defendant’s criminality, it is possible that she would only have departed downwards a couple months or a couple years—a practice that is incredibly common with sentencing even though it is highly probable “that women’s sentences are in fact higher than they should be given women’s lower recidivism rates and relative culpability for their roles in their offenses.”⁵² Rather, it was only after Gertner had consulted with a psychiatrist who could authoritatively speak to the abuse’s effect on Negron that Gertner was able to determine Negron’s sentence and drastically depart downwards.

47 *Id.* at 1406.

48 *Id.* at 1406.

49 *Id.* at 1407.

50 *Id.* at 1407.

51 *Id.* at 1407.

52 Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER RACE & JUST. 73, 82 (2010).

As a result of considering this psychiatrist's assessment of the scientific effects of abuse on Negron's mental functioning, Judge Nancy Gertner reduced Negron's sentence roughly 8 whole years below the original mandatory minimum. This individual factor of abuse, one that is not currently considered by the safety valve at all, played a large enough role in Negron's situation to justify departing this far downward. Clearly, consulting with this psychiatrist was invaluable in Gertner's decision-making process, incredibly consequential for Negron's sentence, and instrumental in ensuring Negron received a punishment that reflected her actual culpability.

B. US v. Paz-Barona

While arriving from Colombia in the Miami International Airport, Paz-Barona was found to have "foreign objects in her lower intestine."⁵³ She was taken to a hospital where she expelled nine pellets of heroin accounting to 271.5 grams. After her arrest, Paz-Barona cooperated with the government and at her plea hearing, "the government and Paz-Barona's counsel both stated that they believed the safety valve provision was likely to apply."⁵⁴ However, despite indication of a lessened sentence, it was determined that she had not met the safety valve provision. Paz-Barona then released further information regarding the crime⁵⁵ including information about the individual who had intimidated her into transporting the heroin pellets. Specifically, she said that after leaving the airlines office to change their flight date due [...] to hurricanes in Florida, she was approached in the airport by an individual who shoved a "hard object"⁵⁶ in her back. He then threatened that he knew where her children lived and would kill them or her if she did not comply with his demand to transport the pellets to New York. Even with this new information, both the district and the circuit court held that

53 United States v. Paz-Barona, 172 Fed.Appx. 278, 2006 WL 758988, at 279 (11 Cir. Mar. 27, 2006).

54 *Id.* at 279.

55 *Id.* at 279-280.

56 *Id.* at 279.

Paz-Barona had not sufficiently cooperated with the government and that the discrepancy between Paz-Barona's original testimony and her later testimony made her testimonies unreliable, disqualifying her from the safety valve's fifth qualification.

In this particular case, the nature of the abuse is clearly different than the abuse suffered by Santa Negron. Whereas Negron suffered extensive and prolonged abuse, Paz-Barona's abuse seemed to occur within the limited period of time when she was at the airport when the individual accosted her. But even though the nature of Paz-Barona's abuse differed from what Negron suffered, it is still very possible that it had a major traumatic effect on her. However, in the process of determining her safety valve qualification, the judges did not actively consult with a psychiatrist or psychologist in order to assess her cognitive state. Rather, the judges explained that the inconsistency in the testimonies as well as the lack of concrete details regarding the individual who accosted her represented a failure to provide full and complete information to the government⁵⁷ and seemed to represent a last-resort effort for qualification rather than a good-faith effort to meet the safety valve criteria. While this could have been the case, it is also possible that Paz-Barona's testimony actually did represent a good-faith effort to cooperate completely with the government and that her inability to provide coherent, detailed, and consistent testimony could have been due to the effects of the abuse and fear she suffered in the airport. Multiple aspects of her situation point to mental duress playing a major role in her actions. It is likely that being accosted with a "hard object" shoved in her back as well as the fear of losing her life or her children's lives caused her significant trauma. In fact, the threat seemed poignant enough for Paz-Barona to take the incredible risk of ingesting nine pellets of heroin. This would not only be incredibly dangerous to Paz-Barona because she would be risking relatively likely discovery

57 *Id.* at 281.

due to the large number of pellets in her intestine,⁵⁸ but ingesting these pellets could also prove fatal⁵⁹ if even one of them ruptured.

In order to understand with greater certainty if the effects of the trauma and abuse that Paz-Barona experienced had actually significantly inhibited her ability to cooperate with the government, a psychologist or psychiatrist would need to assess Paz-Barona's mental state. Without fully understanding Paz-Barona's actions in the context of her abuse, the judges approached only the surface facts of the case—namely that her testimonies did not match and that her testimonies did not provide enough detailed information—and consequentially concluded that she did not meet the fifth criterion of the safety valve. Had the judges been required to consult with a psychologist or psychiatrist, they would have had additional critical information regarding Paz-Barona's cognitive state that would have allowed them to make a more definitive decision. Either the assessment would have supported the conclusion that Paz-Barona had not fully cooperated with the government because the abuse had not affected her enough to significantly impair her cognitive functioning or, the assessment would have supported the conclusion that Paz-Barona *had* in fact cooperated to her full capacity with the government because the abuse had actually significantly impaired her cognitive functioning in the aftermath of her trauma and fear. Either way, a psychiatrist's professional opinion would have augmented the judges' decision-making process. And if the judges had determined after consulting with a psychiatrist that Paz-Barona had not met the fifth safety valve criterion because of the effects of abuse and if they had then resultingly departed downwards, they would have avoided assigning a highly disproportionate mandatory minimum sentence to a defendant who did not merit harsh punishment.

58 *Id.* at 279.

59 See Pongruk Sribanditmongkol et al., *Fatal Heroin Intoxication in Body Packers in Northern Thailand during the Last Decade: Two Case Reports*, 89 JOURNAL OF THE MED. ASSOC. OF THAILAND 106-110 (2006).

C. Side-by-Side Comparison

Looking at these cases side-by-side reveals the workability of this prescription. In a case like Negron's where the abuse is extreme and prolonged, a consultation with a psychologist or psychiatrist gives the judge important additional information to understand the sheer extent to which that abuse played a role in the defendant's actions. In situations like Negron's where the abuse was extreme, having a prescription that allows judges to pardon a defendant's initial inability to meet a certain criterion because of abuse suffered ensures that defendant-survivors of violence get proportionate sentences. On the other hand, in situations like Paz-Barona's where the question of the abuse's effect on the defendant's ability to qualify for the safety valve is less clear, consulting with a psychiatrist provides the judge with additional data to more accurately answer that question. Regardless of if the psychological examination had revealed that Paz-Barona's abuse had significantly or minimally affected her cognitive functioning, that information would have strengthened the accompanying conclusion, contributing to a more just and scientifically substantiated sentencing determination.

VI. BENEFITS OF THIS PROPOSAL

A. Encourages Sentencing that Reflects Actual Criminality

Encouraging judges to consider additional mitigating circumstances, like abuse, on a defendant's ability to qualify for the safety valve allows judges to decide sentences that more accurately reflect a defendant's criminality, likelihood to recidivate, and culpability for the crime. Introducing a proposal that requires judges to consider this information that is incredibly relevant to a defendant's case and ability to qualify for the safety valve allows for the judge to account for more than the limited factors already included in the safety valve that intend to add up to a defendant meriting a reduced sentence.

B. Prevents Extreme Variations in Individual Safety Valve Determinations

Judges who do and who do not consider the effects of abuse on a defendant give those defendants sentences that vary drastically. A failure to create a standardized method for considering abuse in safety valve determination intrinsically creates a system that enacts vastly different applications of the same law. While instances of mis-sentencing due to implicit bias or misunderstanding of case facts happen in all areas of law, these variations in how the safety valve is applied in situations with abuse are more than just isolated instances.

Defendants whose judges do not consciously consider the effects of abuse on defendants' criminal actions and ability to qualify for the safety valve face a sentence substantially lengthier than their counterparts whose judges do consider the effects of abuse. Even with two relatively parallel defendants, a defendant whose judge actively considers the effects of abuse may receive a sentence reduced far below the mandatory minimum while a defendant whose judge does not choose to proactively consider the effects of abuse may be assigned the mandatory minimum sentence. Enacting this prescription and requiring judges to consider the role of abuse would at least make headway towards standardizing this process. Though there will always be judges who perhaps minimize the effects of abuse, enacting this prescription assumes that most judges' sentencing determinations will better reflect defendants' culpability when the judges are able to consider additional relevant data and evidence like the effects of abuse on defendants' actions.

C. Expands Judicial Discretion

Not only does this proposal operate within the precedent law that consistently places determination of safety valve qualification within the realm of judicial discretion and not jury discretion, but this proposal goes on to expand that judicial discretion. This qualification enables judges to have more valuable information with which to determine a defendant's sentence. It then gives judges more leniency by allowing them to pardon a defendant's initial failure to meet a singular safety

valve criterion when due to the effects of abuse. Additionally, requiring a judge to independently consult with a psychologist when there is evidence of abuse simply ensures that the judge has additionally relevant evidence and information. At the same time, requiring that judges consult with psychiatrists to assess a defendant's cognitive functioning does not restrict the judge's ability to assign a sentence that she or he deems appropriate because it does not mandate how the judge should approach that information. Then, giving the judge the ability to pardon a defendant's failure to meet a single safety criterion gives the judge even further discretion.

D. Encourages Intersectional Cooperation

Finally, implementing this proposal will contribute to more data and science-informed judicial decisions. Encouraging judges to rely more on experts in other fields when making determinations that involve intersecting problems encourages more accuracy. As Margareth Etienne suggests, legal authorities need to “team with social scientists [...] to distinguish warranted disparity from unwarranted disparity”⁶⁰ in sentencing outcomes. Just as more cooperation is needed between legal authorities and social scientists to understand the greater factors that affect distinctive populations of individuals in the criminal justice system, so also must legal authorities, including judges, better work with scientific, psychological, and psychiatric specialists in order to properly gauge a defendant's culpability and determine an appropriate sentence. Instead of asking judges to play the role of psychologist or psychiatrist as well as judge, implementing this proposal would encourage intersectional cooperation with those individuals who actually do have the authority to make judgment calls about a defendant's mental state. This would encourage the integration of even more scientifically corroborated information into the sentencing process.

60 Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER RACE & JUST. 73, 84 (2010).

CONCLUSION

The safety valve represents one of only two main options for downward departure for defendants charged with drug trafficking. As of now, the safety valve does not fully consider the role of abuse on a defendant's criminal actions and additionally on his or her ability to qualify for the safety valve. Adding a provision to the safety valve that requires judges to consult with psychologists or psychiatrists in incidents where abuse has been a factor will eliminate sentences that misunderstand and misdiagnose the role of abuse in a defendant's actions and subsequent criminality; instead, it will enable judges with additional relevant information and flexibility to determine a sentence that more accurately reflects a defendant's culpability while refusing to limit or delegate their judicial discretion. Finally, allowing judges the option to pardon a defendant's initial failure to meet a singular safety valve criterion when due to the effects of abuse will ensure that defendants like Smith, Negrón, and even Paz-Barona are able to receive downward departure when merited.