

# EXHIBIT A

N.D.N.Y.  
19-cr-163  
Suddaby, C.J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24<sup>th</sup> day of November, two thousand twenty.

Present:

Guido Calabresi,  
Robert A. Katzmann,  
Richard J. Sullivan,  
*Circuit Judges.*

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United States of America,

*Appellee,*

v.

20-217

Niles O'Neil,

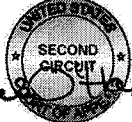
*Defendant-Appellant.*

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The Government moves for summary affirmance of the Appellant's conviction because the sole issue on appeal has been foreclosed by *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995), *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020), and *United States v. Richardson*, 958 F.3d 151 (2d Cir. 2020). Appellant opposes the motion and argues that these cases were wrongly decided. Upon due consideration, it is hereby ORDERED that the motion for summary affirmance is GRANTED and the judgment is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

  
*Catherine O'Hagan Wolfe*

# **EXHIBIT B**

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF NEW YORK  
3

4 UNITED STATES OF AMERICA, )  
5 )  
6 vs. ) CASE NO.: 8:19-CR-163  
7 NILES O'NEIL, )  
8 Defendant. )  
9

10 TRANSCRIPT OF PROCEEDINGS  
11 BEFORE THE HON. GLENN T. SUDDABY  
12 WEDNESDAY, JANUARY 8, 2020  
13 ALBANY, NEW YORK

14 FOR THE GOVERNMENT:

15 Office of the United States Attorney  
16 By: Douglas G.N. Collyer, AUSA  
17 14 Durkee Street, Room 340  
18 Plattsburgh, New York 12901

19 FOR THE DEFENDANT:

20 Office of Julie A. Garcia  
21 By: Julia A. Garcia, Esq.  
22 3873 Main Street  
23 Warrensburg, New York 12885

24 THERESA J. CASAL, RPR, CRR, CSR  
25 Federal Official Court Reporter  
445 Broadway, Room 509  
Albany, New York 12207

THERESA J. CASAL, RPR, CRR  
UNITED STATES DISTRICT COURT - NDNY

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1 (Court commenced at 10:20 AM.)

2 THE CLERK: The date is Wednesday, January 8,  
3 2020, the time is 10:20 AM. We are here in the matter of  
4 the United States of America versus Niles O'Neil, case  
5 number 19-CR-163. We are here for sentencing. May I have  
6 appearances for the record, please.

7 MR. COLLYER: Douglas Collyer for the United  
8 States. Good morning, your Honor.

9 THE COURT: Good morning.

10 MS. GARCIA: Julie Garcia on behalf of Niles  
11 O'Neil, in court and standing to my left, your Honor.

12 THE COURT: Good morning.

13 MS. GARCIA: Thank you.

14 THE COURT: It's good to see everybody. How was  
15 the Northway this morning?

16 MS. GARCIA: It was perfect.

17 MR. COLLYER: A little snowy, but it was fine.

18 THE COURT: Not bad? It was all good once I got  
19 out of Syracuse, but a different world over here.  
20 Twenty-five and snowin' like crazy over there. So it's good  
21 to see you here.

22 All right. We're here for sentencing with regard  
23 to Mr. O'Neil. Are both parties prepared to proceed?

24 MR. COLLYER: Yes, sir.

25 MS. GARCIA: Yes, your Honor.

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1 THE COURT: Okay. Very well. Counsel, have you  
2 received the presentence report which was dated August 12,  
3 2019, and an addendum which was dated September 26, 2019?  
4 The Government?

5 MR. COLLYER: Yes, sir.

6 MS. GARCIA: Yes, your Honor.

7 THE COURT: Okay. And Ms. Garcia, have you had an  
8 opportunity to share those reports with your client?

9 MS. GARCIA: Yes, your Honor.

10 THE COURT: All right. Does counsel have any  
11 objections to the facts as stated in the presentence report,  
12 for the Government?

13 MR. COLLYER: No, your Honor.

14 MS. GARCIA: No, your Honor.

15 THE COURT: Any objections to the offense level  
16 calculations in the presentence report, for the Government?

17 MR. COLLYER: No, your Honor.

18 THE COURT: Ms. Garcia?

19 MS. GARCIA: Judge, nothing other than what I --

20 THE COURT: Your submission?

21 MS. GARCIA: Submission, yeah.

22 THE COURT: Which I believe was adequately  
23 addressed in the addendum. I think Probation has  
24 appropriately responded based on your objection to the --  
25 let's see... (Pause.) the career offender status.

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1 MS. GARCIA: Correct.

2 THE COURT: All right. The offense of conviction  
3 of attempted robbery second is classified -- and actually we  
4 adjourned a couple times because we were waiting for some  
5 Circuit cases that were pending. And you're satisfied that  
6 you're ready and willing to go forward at this point?

7 MS. GARCIA: Judge, I've explained to my client  
8 that we can proceed with sentencing today and if those  
9 decisions are in his favor, we preserved his appeal rights  
10 and I believe that he would still be able to come back in  
11 with his appeal because he -- depending on what happens  
12 today, we'll probably file an appeal in this case.

13 THE COURT: Okay.

14 MS. GARCIA: So those cases have not been decided  
15 as of last week, but he wanted to proceed with sentence  
16 anyway.

17 THE COURT: Okay. Is that right, Mr. O'Neil, you  
18 would like to move forward?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: I've adjourned this at least once,  
21 maybe twice, I think, because OF the Government's request as  
22 well as defense counsel. Government want to be heard on  
23 this?

24 MR. COLLYER: Your Honor, just with respect to the  
25 Circuit cases that the Court and Ms. Garcia are referencing.

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1 One is out of the Northern District of New York and that  
2 involves -- part of the appeal is attempted robbery second  
3 being used as a crime of violence as an enhancement to  
4 career offender. I've spoken with the AUSA who is handling  
5 the appeal for the Government and she advised that, in fact,  
6 in response papers, the defendant in that case, which I  
7 believe is the *Johnson* case, has conceded the Government's  
8 position, which is that attempted robbery second is a  
9 qualifying offense and so, therefore, that is not -- no law  
10 will change from that decision and it's settled law, which  
11 would also apply to this case.

12 The other case which the name I can't remember  
13 that Ms. Garcia was referencing I believe applies  
14 specifically to attempted assault second, as to whether that  
15 qualifies as a crime of violence. So different offense than  
16 the predicate offense in this case, but also to the extent  
17 that it's analogous because it's an attempt, it's settled  
18 law, I believe, in the commentary notes, which are  
19 authoritative, that attempt to commit a qualifying offense  
20 is a qualifying offense, which it would be applicable in  
21 this case.

22 So, from the Government's perspective, there is no  
23 law that's going to change that would change the outcome of  
24 this case and it's appropriate to proceed with sentencing at  
25 this time.



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1           THE COURT: Okay. Based on what the Court has  
2 before it, I'm satisfied that the career offender status has  
3 been appropriately scored based on his predicate crimes and  
4 that Probation has appropriately and correctly determined  
5 the offense level as well as the criminal history in this  
6 particular case. So I'm adopting Probation's position that  
7 had been stated in the addendum for counsel.

8           Counsel, do you agree with the criminal history  
9 computation as set forth in the presentence report, from the  
10 Government?

11          MR. COLLYER: Yes, your Honor.

12          THE COURT: Ms. Garcia.

13          MS. GARCIA: Judge, I just rely on my submission.

14          THE COURT: Same submission, I understand.

15          MS. GARCIA: Thank you.

16          THE COURT: Absolutely. Okay. Government, go  
17 ahead.

18          MR. COLLYER: Thank you, your Honor. Your Honor,  
19 the defendant submitted a letter on his own behalf, which I  
20 thought was well written, but it left me wondering how many  
21 times he has said something similar to a previous Court.  
22 The defendant has many prior convictions, including two  
23 serious felony prior convictions, and while I don't know  
24 exactly what he said to those judges, I would not be  
25 surprised to learn that it was something similar to what he

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1 is saying to the Court here today and in his letter  
2 submission. The defendant was selling drugs in Plattsburgh  
3 as part of a larger drug trafficking organization with his  
4 roommate Corey Henry. The information we have is that in  
5 the two weeks proceeding the defendant's arrest, Corey Henry  
6 left Plattsburgh to travel to New York City to take care of  
7 some personal matters, but he was also going to use that as  
8 an opportunity to resupply the organization with drugs,  
9 which is what Corey Henry was doing when he was northbound  
10 and we arrested him.

11 The information we have is that in that two-week  
12 period where Corey Henry was gone, the defendant saw an  
13 opportunity to make his own money by selling his own drugs  
14 and sought out a supply of crack cocaine that he was going  
15 to sell on his own while Henry was gone, and what was left  
16 of that supply is what we caught the defendant with and why  
17 he is before the Court here today.

18 So the defendant is opportunistic. When he sees  
19 an opportunity to make money, he will do so without regard  
20 to whether that opportunity presents itself from the side of  
21 the line that is in conformity with the law or whether that  
22 opportunity presents itself from the side of the line that  
23 is contrary to the law. To the defendant there is no line,  
24 there is only opportunity, and that is why he has been  
25 repeatedly brought before courts. This is not a singular

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1 mistake. The defendant has multiple convictions, multiple  
2 prior felony convictions. He has multiple probation and  
3 parole violations. This is a situation where the defendant  
4 is not continuously in the wrong place at the wrong time.  
5 He is putting himself there with his own actions. And that  
6 is why his Guidelines are so high and that is why the  
7 Government is asking for a guideline sentence as it is an  
8 appropriate sentence in this case. Thank you, your Honor.

9 THE COURT: Thank you, Mr. Collyer. Miss Garcia.

10 MS. GARCIA: Yes, your Honor. I would  
11 respectfully disagree with the position of the U.S.  
12 Attorney's Office in this case clearly. Judge, I have come  
13 to know Niles O'Neil through my representation of him and I  
14 think I've pretty much outlined his horrific upbringing in  
15 my sentencing submission. Judge, there's -- I reviewed all  
16 the discovery in this case, I've reviewed it with my client,  
17 we spent hours at the jail going through everything and  
18 there was only one, I believe, controlled buy with -- that  
19 involved my client, so whatever Corey was up to, I think  
20 that he was the ring leader of this whole -- the whole  
21 organization up in Clinton County in the selling of the  
22 drugs.

23 Judge, my client understands he made a mistake.  
24 He was living in the Carolinas, he moved up to Plattsburgh  
25 when Corey called him and said come on up here. My client

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1 was able to get a job at McDonald's, he worked there for a  
2 period of time. These felonies that the Government keeps  
3 alluding to that my client was convicted of are both attempt  
4 crimes. My client, when he was in the city, living, I  
5 believe, in Kings County, took a cellphone from someone.  
6 That's what he was accused of stealing, a cellphone, that  
7 was the attempted robbery. According to my client, he was  
8 with two younger kids who were 15 years old, I think my  
9 client was 18 at that time, and because he was living with  
10 those two younger children and that family, he took the rap  
11 for taking the phone, never knowing that that would come  
12 back and bite him the way it has, because without that  
13 attempted robbery and without the attempted controlled  
14 substance -- possession of a controlled substance that he  
15 had, he would be looking at about five years instead of  
16 fifteen. Fifteen years is the low end of the Guidelines in  
17 this case when he has that Chapter 4 enhancement. And your  
18 Honor, I just can't wrap my head around it and I've had  
19 conversations with AUSA Collyer that 15 years for 40 grams  
20 of cocaine base is a lot of time, especially at a time when  
21 we're doing the First Step Act, when we're trying to  
22 initiate bail reform in New York State, when we're seeing  
23 that keeping low level drug offenders incarcerated for long  
24 periods of time is not doing anything to help anyone.

25 Judge, we've seen the war on drugs fail and I

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1 believe the reason that it has failed, one of the main  
2 reasons, is because we're treating people like Niles O'Neil  
3 worse than they need to be treated. If we want to stop the  
4 drug influx into Clinton County or Essex County or any place  
5 in the north country or New York State for that matter, we  
6 have to focus more on demand rather than supply. People  
7 like Niles O'Neil are always going to be -- not always, I  
8 think he can be rehabilitated, but people like Niles O'Neil  
9 when you dig deep and look at their story, it's not hard to  
10 imagine what their lives are like and why they choose crime  
11 over living a law-abiding life. I mean, his father had like  
12 13 or 14 other children. His father was in and out of  
13 prison. His father was a Jamaican who ended up getting  
14 deported to Jamaica, who never had any influence over my  
15 client other than to drop him off from house to house where  
16 he would be taken care of by other people.

17           This started when he was a kid. He was sexually  
18 abused in one of those homes that his father left him at.  
19 That person was never arrested or prosecuted because people  
20 like Niles and his family don't tell enforcement about  
21 things like that, they don't throw these people under the  
22 bus.

23           Judge, I tried to contact his family when I worked  
24 on this case. His mother returned one phone call to me.  
25 Based on my client's -- based on information that's been

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1 provided to me by my client, she's heavily addicted to  
2 drugs. His brother Xavier is in federal prison at this  
3 point.

4 Niles was not the main player in this whole  
5 organization in Clinton County, and I can't imagine -- to  
6 me, Judge, I think any sentence off the five-year mandatory  
7 minimum, if he wasn't a Chapter 4 enhancement -- I think  
8 five is a lot because this, this crime, if you see, there  
9 was a period between 2010 and 2011 where he did live arrest  
10 free and wasn't getting arrested. He made a mistake going  
11 to Plattsburgh and by helping his friend Corey, he did sell  
12 drugs, Judge, I think he'll admit to that, but I don't think  
13 that he deserves to be incarcerated for a 15-year term.

14 My client, Judge, would like to go to an RDAP  
15 program, if that's possible, when he is incarcerated and I  
16 believe that he would prefer being incarcerated in a federal  
17 prison that is in New York State, is that right, Niles?

18 THE DEFENDANT: Yes, ma'am.

19 MS. GARCIA: In New York State, if we could make  
20 that happen. Judge, I also wanted to bring to your  
21 attention that the Probation Office indicated they are  
22 trying to get his mental health records and I don't think  
23 the jail cooperated in getting those over. My client was  
24 able to get a letter from mental health at the jail  
25 yesterday and I would like to include it in the record if I

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1 could, it is dated January 7 and I apologize for providing  
2 it late.

3 THE COURT: Has the Government been provided with  
4 a copy?

5 MS. GARCIA: Yes, your Honor.

6 THE COURT: Okay. Then go ahead, pass it up.

7 MS. GARCIA: (Indicating.)

8 THE COURT: (Pause.) Okay. Thank you.

9 Ms. Garcia, you're done?

10 MS. GARCIA: Yes, your Honor.

11 THE COURT: Okay. Mr. Niles -- Mr. O'Neil, would  
12 you like to be heard, sir?

13 THE DEFENDANT: Yes, sir. Good morning, your  
14 Honor. I stand before you today as a man that I've done  
15 wrong.

16 THE COURT: Can we get that microphone closer to  
17 you? I'm having difficulty hearing you. Thank you.

18 THE DEFENDANT: I stand before you today as a man  
19 that has done some wrong. I'm not completely innocent. I  
20 do deserve some form of punishment. As to what extent, that  
21 is your job, sir, and I can't stress enough that I -- this  
22 isn't me, it really isn't. I understand that my record may  
23 contradict that, but that really isn't me and, you know,  
24 if -- I've never written a letter to a Judge before because  
25 I've never really been in serious trouble such as today. I

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1 just ask that if you could just give me one more chance and  
2 if you could just give me one more chance and just, I don't  
3 know, maybe give me more supervised release just so I could  
4 show that I'm really a different person. Like I want to  
5 cook, I want to open up a food truck, I have an owners and  
6 operating manual of how to own and operate a food truck and  
7 this is somethin' I really want to do and I feel -- I just  
8 feel that, you know, if I could just get one more chance  
9 just to show you that I'm different than what you see in  
10 front of you today. That's all I got to say.

11 THE COURT: Thank you. Mr. O'Neil, dreams and  
12 hopes and wishes are all good, but it comes down to what you  
13 do every day, okay. And you're right, what I have before  
14 me, as far as your prior record and what you have been  
15 doing, is not good. And I'm not passing judgment on you as  
16 to whether you're a good person, bad person or otherwise,  
17 but, certainly, you need to change some things and, you  
18 know, there's prior history where you were on probation or  
19 parole and you absconded and, you know, that weighs heavily  
20 on this Court's consideration because that means what? The  
21 Court gave you an opportunity to be out in the community and  
22 to do the right thing, to follow the rules and to get  
23 yourself back into a positive place with regard to being  
24 productive, healthy, clean, movin' forward, doin' good  
25 things in a community, and you violated that Court's trust



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1 when ya took off and ya didn't follow those rules and do  
2 what you were supposed to do. And that's -- when you stand  
3 here and say, well, I would like an opportunity for more  
4 supervised release, you've demonstrated that you don't care  
5 about that because you didn't take advantage of it. You  
6 want to say somethin'?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Go ahead.

9 THE DEFENDANT: The reason why that is is I'm --  
10 like I'm not tryin' to make an excuse about it, but my  
11 living situation, like I couldn't even explain it, this is  
12 before bein' in North Carolina, I was in New York City, I  
13 went to a shelter, a guy screwed my butt and said if I went  
14 back, I would be his. That's why I violated probation.  
15 Other than that, I didn't catch no new arrest. I've done  
16 wrong by all means, sir, but like I said, if I could just  
17 get one more chance.

18 THE COURT: Well, ya need to, you know -- there's  
19 gonna be a period of incarceration here.

20 THE DEFENDANT: I understand.

21 THE COURT: And you need to work on skills, coping  
22 skills and how you respond to different things. I am not  
23 makin' light of what you just explained to me, but there's  
24 always some reason why somebody violates the law or goes and  
25 does somethin' different, all right. There was lots of

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1 things -- I'm not sayin' ya had to go back to that shelter,  
2 but you could have gone to your Probation Officer and said,  
3 you know what, this is not tolerable, I can't live there, I  
4 am not goin' back there, I don't want to violate my  
5 probation, I don't want to leave, I want to do the right  
6 thing, but I can't live there. And you know what, they're  
7 good, decent people, they would help you, they would work  
8 with you. And you know, you unilaterally make decisions  
9 about yourself and what you're gonna do when you have  
10 responsibilities to other people, all right, that's the  
11 point here is that your record reflects you think about you  
12 and not other people and that's what the Government's been  
13 tryin' to tell me. All right. So those sort of things need  
14 to sink in and you need to understand that.

15 All right. The Court has reviewed and considered  
16 all the pertinent information, including, but not limited  
17 to, the presentence investigation report, the addendum,  
18 submissions by counsel and the Sentencing Guidelines manual,  
19 as well as the factors outlined in 18 USC, Section 3553(a).  
20 The Court adopts the factual information and guideline  
21 applications contained in the presentence investigation  
22 report. The Court finds the total offense level is 31, the  
23 criminal history category is VI and the guideline  
24 imprisonment range is 188 to 235 months. The defendant is  
25 classified as a career offender.

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1           After reviewing all of the facts of this case, the  
2 Court will impose a non-guideline sentence. In doing so,  
3 the Court notes that the guideline range, although  
4 appropriately calculated, calls for a sentence of 188 to  
5 235 months. The defendant is a career offender. However,  
6 the Court finds the guideline range generated by the career  
7 offender scoring is greater than necessary to meet the goals  
8 of sentencing outlined in 18 USC, Section 3553(a) in this  
9 particular case, including the need for the sentence to  
10 reflect the seriousness of the offense, to promote respect  
11 for the law and provide just punishment for the offense, to  
12 afford adequate deterrence to criminal conduct, and to  
13 protect the public from further crimes of this defendant.

14           The Court has considered the defendant's history  
15 and characteristics in determining the appropriate sentence  
16 to impose, including his upbringing, mental health and  
17 substance abuse history. However, based upon the  
18 defendant's criminal history, which includes an attempted  
19 robbery conviction and a conviction for attempted criminal  
20 possession of a controlled substance with intent to sell,  
21 along with multiple violations of probation and parole,  
22 resulting from his absconding from supervision for these  
23 offenses, the Court finds a substantial sentence is  
24 necessary in order to protect the public from further crimes  
25 of the defendant.

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1           Upon your plea of guilty on Count 1 of the  
2 information, it is the judgment of the Court that you are  
3 hereby committed to the custody of the Bureau of Prisons for  
4 a period of 120 months.

5           The Court recommends the defendant participate in  
6 substance abuse and mental health treatment while  
7 incarcerated with the Bureau of Prisons. The Court also  
8 strongly urges this defendant to take advantage of any  
9 skills training, job training so that when you come out, you  
10 have the skills to take care of yourself, to earn some  
11 income, all right?

12           The Court will also recommend the defendant be  
13 placed in a facility, if at all possible, here in New York  
14 State.

15           Upon your release from imprisonment, you shall be  
16 placed on supervised release for a term of four years.  
17 While on supervised release, you shall not commit another  
18 federal, state or local crime and you shall comply with the  
19 standard conditions that have been adopted by this Court, as  
20 well as the following special conditions, which the Court  
21 finds are necessary and justified in this case based upon  
22 the nature of the instant offense, as well as the history  
23 and characteristics of this defendant as outlined in detail  
24 in the presentence report and to promote the rehabilitation  
25 of this defendant:

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1           First, you shall participate in a program for  
2 substance abuse, which shall include testing for use of  
3 controlled substances, controlled substance analogues and  
4 alcohol. This may include outpatient treatment as  
5 recommended by the treatment provider based upon your risk  
6 and needs. You may also be required to participate in  
7 inpatient treatment upon the recommendation of the treatment  
8 provider and upon approval of this Court. The Probation  
9 Office shall approve the location, frequency and duration of  
10 outpatient treatment. You shall abide by the rules of any  
11 treatment program, which may include abstaining from the use  
12 of any alcohol. You shall contribute to the cost of any  
13 evaluation and/or treatment in an amount to be determined by  
14 the Probation Officer based upon your ability to pay and the  
15 availability of third-party payments.

16           Second, you shall participate in a mental health  
17 program, which may include medical, psychological or  
18 psychiatric evaluation and outpatient treatment as  
19 recommended by the treatment provider based upon your risk  
20 and needs. You may also be required to participate in  
21 inpatient treatment upon the recommendation of the treatment  
22 provider and upon approval of this Court. The Probation  
23 Officer shall approve the location, frequency and duration  
24 of outpatient treatment. You must abide by the rules of the  
25 program, which may include a medication regime. You shall

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1 contribute to the cost of any evaluation and/or treatment in  
2 an amount to be determined by the Probation Officer based  
3 upon your ability to pay and the availability of third-party  
4 payments.

5 Third, based upon your history of substance abuse  
6 and for the purposes of effective substance abuse treatment  
7 programming, you shall refrain from the use of alcohol and  
8 be subject to alcohol testing and treatment while under  
9 supervision. And that, as well as any of these special  
10 conditions, are subject to review based upon your success or  
11 failures while on supervised release, reviewed by this  
12 Court.

13 The Court finds, based upon your financial  
14 resources, that you do not have the ability to pay a fine.  
15 Therefore, no fine is imposed. You shall pay to the Clerk  
16 of the Court a special assessment of \$100, which is due and  
17 payable immediately.

18 Both parties have a right to appeal this sentence.  
19 You're advised to consult with your attorney to determine  
20 whether or not an appeal is warranted. Any appeal must be  
21 filed within 14 days of the date of the judgment being filed  
22 in this case.

23 The defendant will be remanded to the custody of  
24 the United States Marshal in accordance with the terms of  
25 this sentence.

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1           Mr. Collyer, on behalf of the Government, anything  
2 further?

3           MR. COLLYER: No, your Honor, thank you.

4           THE COURT: Okay. Miss Garcia?

5           MS. GARCIA: Nothing, your Honor.

6           THE COURT: Okay. Good luck to you, young man.

7           THE DEFENDANT: Thank you.

8                           (This matter adjourned at 10:45 AM.)

9                           - - - - -

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CERTIFICATION OF OFFICIAL REPORTER

I, THERESA J. CASAL, RPR, CRR, CSR, Official  
Realtime Court Reporter, in and for the United States  
District Court for the Northern District of New York, do  
hereby certify that pursuant to Section 753, Title 28,  
United States Code, that the foregoing is a true and correct  
transcript of the stenographically reported proceedings held  
in the above-entitled matter and that the transcript page  
format is in conformance with the regulations of the  
Judicial Conference of the United States.

Dated this 11th day of February, 2020.

/s/ THERESA J. CASAL

THERESA J. CASAL, RPR, CRR, CSR

FEDERAL OFFICIAL COURT REPORTER

**THERESA J. CASAL, RPR, CRR  
UNITED STATES DISTRICT COURT - NDNY**



# EXHIBIT C

# UNITED STATES DISTRICT COURT

Northern District of New York

UNITED STATES OF AMERICA

v.

NILES O'NEIL

## JUDGMENT IN A CRIMINAL CASE

Case Number: DNYN819CR000163-001  
USM Number: 25328-052

Julie A. Garcia, Esq.  
P.O. Box 1, 3873 Main Street  
Warrensburg, NY 12885-1346  
518-546-1040

Defendant's Attorney

### THE DEFENDANT:

- ☒ pleaded guilty to count(s) 1 of the Information on May 9, 2019.
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☐ was found guilty on count(s) of the on after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. §§ 841(a)(1), (b)(1)(B)	Possession with Intent to Distribute 28 Grams or More of Cocaine Base	04/03/2018	1


The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed in accordance with 18 U.S.C. § 3553 and the Sentencing Guidelines.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 8, 2020

Date of Imposition of Judgment

  
Hon. Glenn T. Suddaby  
Chief U.S. District Judge

January 9, 2020

Date

DEFENDANT: Niles O'Neil  
CASE NUMBER: DNYN819CR000163-001

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:  
120 months.

- ☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant participate in substance abuse and mental health treatment while incarcerated with the Bureau of Prisons and be designated to a facility in New York State, if possible.

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at ☐ a.m. ☐ p.m. on.
  - ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on.
  - ☐ as notified by the United States Marshal.
  - ☐ as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_ with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

\_\_\_\_\_  
BY DEPUTY UNITED STATES MARSHAL

DEFENDANT: Niles O'Neil  
CASE NUMBER: DNYN819CR000163-001

### **SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of:

**4 years.**

### **MANDATORY CONDITIONS**

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. § § 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(deselect if inapplicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that you pay in accordance with the Schedule of Payments sheet of this judgment.

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: Niles O'Neil  
CASE NUMBER: DNYN819CR000163-001

### STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.
14. You must provide the probation officer with access to any requested financial information.
15. You must submit your person, and any property, house, residence, vehicle, papers, effects, computer, electronic communications devices, and any data storage devices or media, to search at any time, with or without a warrant, by any federal probation officer, or any other law enforcement officer from whom the Probation Office has requested assistance, with reasonable suspicion concerning a violation of a condition of probation or supervised release or unlawful conduct by you. Any items seized may be removed to the Probation Office or to the office of their designee for a more thorough examination.

DEFENDANT: Niles O'Neil  
CASE NUMBER: DNYN819CR000163-001

### **SPECIAL CONDITIONS OF SUPERVISION**

1. You must participate in a program for substance abuse which will include testing for use of controlled substances, controlled substance analogues, and alcohol. This may include outpatient treatment as recommended by the treatment provider based upon your risk and needs. You may also be required to participate in inpatient treatment upon recommendation of the treatment provider and upon approval of the Court. The probation office will approve the location, frequency, and duration of outpatient treatment. You must abide by the rules of any treatment program which may include abstaining from the use of any alcohol. You must contribute to the cost of any evaluation and/or treatment in an amount to be determined by the probation officer based on your ability to pay and the availability of third party payments.
2. You must participate in a mental health program which may include medical, psychological, or psychiatric evaluation and outpatient treatment as recommended by the treatment provider based upon your risk and needs. You may also be required to participate in inpatient treatment upon recommendation of the treatment provider and upon approval of the Court. The probation office will approve the location, frequency, and duration of outpatient treatment. You must abide by the rules of the program which may include a medication regimen. You must contribute to the cost of any evaluation and/or treatment in an amount to be determined by the probation officer based on your ability to pay and the availability of third party payments.
3. Based upon your history of substance abuse and for the purpose of effective substance abuse treatment programming, you must refrain from the use of alcohol and be subject to alcohol testing and treatment while under supervision.

### **DEFENDANT'S ACKNOWLEDGMENT OF APPLICABLE CONDITIONS OF SUPERVISION**

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

The conditions of supervision have been read to me. I fully understand the conditions and have been provided a copy of them. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Date

\_\_\_\_\_  
U.S. Probation Officer/Designated Witness

\_\_\_\_\_  
Date

DEFENDANT: Niles O'Neil  
CASE NUMBER: DNYN819CR000163-001

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>AVAA Assessment**</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$ 100	\$ 0	\$ 0	\$ 0	\$ 0

- ☐ The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
	\$	\$	
<b>Totals</b>	\$	\$	

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

\*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

\*\*\*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Niles O'Neil  
CASE NUMBER: DNYN819CR000163-001

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ In full immediately; or
- B ☐ Lump sum payment of \$ due immediately; balance due
- ☐ not later than, or
- ☐ in accordance with ☐ D, ☐ E, ☐ F, or ☐ G below; or
- C ☐ Payment to begin immediately (may be combined with ☐ D, ☐ E, or ☐ G below); or
- D ☐ Payment in equal installments of \$ over a period of, to commence after the date of this judgment; or
- E ☐ Payment in equal installments of \$ over a period of, to commence after release from imprisonment to a term of supervision; or
- F ☐ Payment during the term of supervised release will commence within after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- G ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **Clerk, U.S. District Court, Federal Bldg., 100 S. Clinton Street, P.O. Box 7367, Syracuse, N.Y. 13261-7367**, unless otherwise directed by the court, the probation officer, or the United States attorney. If a victim cannot be located, the restitution paid to the Clerk of the Court for that victim shall be sent to the Treasury, to be retrieved when the victim is located.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
- ☐ Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.



# EXHIBIT D

# MANDATE

N.D.N.Y.  
19-cr-163  
Suddaby, C.J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24<sup>th</sup> day of November, two thousand twenty.

Present:

Guido Calabresi,  
Robert A. Katzmann,  
Richard J. Sullivan,  
*Circuit Judges.*

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United States of America,

*Appellee,*

v.

20-217

Niles O'Neil,


*Defendant-Appellant.*

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The Government moves for summary affirmance of the Appellant's conviction because the sole issue on appeal has been foreclosed by *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995), *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020), and *United States v. Richardson*, 958 F.3d 151 (2d Cir. 2020). Appellant opposes the motion and argues that these cases were wrongly decided. Upon due consideration, it is hereby ORDERED that the motion for summary affirmance is GRANTED and the judgment is AFFIRMED.

FOR THE COURT:  
Catherine O'Hagan Wolfe, Clerk of Court

Catherine O'Hagan Wolfe



A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe



MANDATE ISSUED ON 12/15/2020

# EXHIBIT E

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30<sup>th</sup> day of January, two thousand twenty.

**ORDER**

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United States of America,

Docket No. 20-217

Appellee,

v.

Niles O'Neil,

Defendant - Appellant.

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Julie A. Garcia moves to be relieved as counsel for the Appellant.

IT IS HEREBY ORDERED that the motion to be relieved is GRANTED. Andrew H. Freifeld, Law Office of Andrew Freifeld, 30 Vesey Street, 6th Floor, New York, NY 10007 is assigned as new counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. Attorney Freifeld is directed to review Local Rule 31.2 regarding procedures for setting the filing dates for the submission of briefs.

For the Court:

Catherine O'Hagan Wolfe,  
Clerk of Court

 *Catherine O'Hagan Wolfe*

# EXHIBIT F