PETITION APPENDIX

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 2, 2022
Lyle W. Cayce
Clerk

No. 21-40247

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

NONAMI PALOMARES,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 20-CR-1355

Before JOLLY, WILLETT, and OLDHAM, *Circuit Judges*.

E. GRADY JOLLY, *Circuit Judge*:

The district court sentenced appellant Nonami Palomares to a 120-month "mandatory minimum" sentence for smuggling heroin. She argues the district court erred because 18 U.S.C. § 3553(f), more commonly referred to as the First Step Act's "safety valve" provision, exempts drug offenders like Palomares, with sufficiently minor criminal histories from mandatory minimum sentences.

The relevant part of the statute states that criminal defendants are eligible for relief only if:

> (1) the defendant does not have—
>
> > (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> >
> > (B) a prior 3-point offense, as determined under the sentencing guidelines; and
> >
> > (C) a prior 2-point violent offense, as determined under the sentencing guidelines[.]

18 U.S.C. § 3553(f)(1). Palomares argues that she was eligible for relief because her criminal history only ran afoul of sub-section (B)—she had a prior 3-point offense. Because the statute uses the word "and," she argues that she would only be ineligible if her criminal history satisfied sub-sections (A), (B), *and* (C). The Government disagrees, arguing that defendants who run afoul of any one of the three requirements are not entitled to relief.[1]

The First Step Act's structure is perplexing. It opens with a negative prefatory phrase coupled with an em-dash ("does not have—") followed by a conjunctive list (A, B, and C). But we conclude that the statute's uncommon structure holds the key to unlocking its meaning. We agree with the Eighth Circuit that Congress's use of an em-dash following "does not have" is best interpreted to "distribute" that phrase to each following

[1] A circuit split has emerged over this issue. *Compare United States v. Lopez*, 998 F.3d 431, 441 n.11 (9th Cir. 2021) (rejecting the "distributive" reading as "quixotic"), *with United States v. Pulsifer*, 39 F.4th 1018, 1022 (8th Cir. 2022) (concluding that the introductory phrase "does not have" found in § 3553(f)(1) "distributes" across each statutory condition in § 3553(f)(1)(A)–(C)), *and United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022) (holding that § 3553(f)(1) is to be read disjunctively). *See also United States v. Garcon*, 23 F.4th 1334 (11th Cir. 2022) (granting rehearing en banc in a case involving the interpretation of 18 U.S.C. § 3553(f)(1)).

subsection. To be eligible for safety valve relief, a defendant must show that she does not have more than 4 criminal history points, does not have a 3-point offense, *and* does not have a 2-point violent offense. Because Palomares had a previous 3-point offense, she is ineligible for safety valve relief. We AFFIRM.

I.

Nonami Palomares pleaded guilty to possession with intent to distribute one kilogram or more of a mixture or substance containing a detectable amount of heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. This offense carries a 10-year mandatory minimum sentence, with a maximum sentence of life imprisonment. 21 U.S.C. § 841(a)(1), (b)(1)(A); 18 U.S.C. § 2. The Presentence Investigation Report (PSR) calculated the advisory imprisonment range as 135 to 168 months, or if Palomares received a three-point reduction for acceptance of responsibility, 97 to 121 months. But because of the mandatory minimum, the PSR elevated its calculated guideline range to 120 to 121 months.

Palomares objected to the PSR, arguing that she was eligible for relief under the safety valve. In particular, she argued that a plain reading of § 3553(f)(1) only requires mandatory minimum sentences for defendants whose history meets all three disqualifying criteria listed in subsections (A)–(C)—not just one. And because only one of the disqualifying criteria applied to her, she argued that she was eligible for relief.

The district court overruled her objection. While the district court conceded that there was no controlling authority on this question, it agreed with the Government's position that any of the disqualifying criteria in § 3553(f)(1) would render a defendant ineligible for safety valve relief. The district court granted Palomares a three-point reduction for acceptance of responsibility, agreed with the PSR's calculation of the applicable guideline

range of 120 to 121 months' imprisonment, and sentenced Palomares to 120 months of imprisonment. Palomares timely appealed.

II.

A.

We begin, as always, with the text of the statute. *See In re DeBerry*, 945 F.3d 943, 947 (5th Cir. 2019) ("In matters of statutory interpretation, text is always the alpha."). But "we do not look at a word or a phrase in isolation. The meaning of a statutory provision 'is often clarified by the remainder of the statutory scheme . . . .'" *Ramos-Portillo v. Barr*, 919 F.3d 955, 960 (5th Cir. 2019) (quoting *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014)). "We consider the text holistically, accounting for the 'full text, language as well as punctuation, structure, and subject matter.'" *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 718 F.3d 488, 494 (5th Cir. 2013) (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)).

The ordinary meaning of "and," which § 3553(f)(1) uses to join the three subsections, is conjunctive. *See, e.g.*, Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 116–25 (2012). "Or" is disjunctive. *Conjunctive/disjunctive canon*, Black's Law Dictionary (10th ed. 2014) ("[I]n a legal instrument, *and* joins a conjunctive list to combine items, while *or* joins a disjunctive list to create alternatives."). Palomares points to this straightforward linguistic rule and insists that because Congress used the word "and," the government would need to prove that her criminal history included all the sub-sections, (A), (B), *and* (C). Or stated differently, because her criminal history only included (B), she is eligible for this sentencing relief. We cannot agree.

"Authorities agree that when used as a conjunctive, the word "and" has "a distributive (or several) sense as well as a joint sense." Bryan A.

GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 639 (3d ed. 2011). That is, the phrase "A and B" could mean "A and B, jointly or severally." *Id.*

> As applied to § 3553(f)(1), a "joint" sense of "and" would mean that a defendant is eligible for relief unless the court finds that he does not jointly have all three elements listed in (A), (B), and (C). The "distributive" sense of the word would mean that the requirement that a defendant "does not have" certain elements of criminal history is distributed across the three subsections, and a defendant is ineligible if he fails any one of the three conditions.

United States v. Pulsifer, 39 F.4th 1018, 1021 (8th Cir. 2022). To determine whether "and" is used in a "joint" sense or a "distributive" sense in § 3553(f)(1), we must look to the context of the statute itself. In different words, the words here preceding the em-dash apply to each of the conditions that follow.

Section 3553(f)(1) uses an em-dash preceding a list, with each item set off by semi-colons. To be eligible for safety valve relief the defendant must show that she:

> (1) . . . does not have—
>
> > (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> >
> > (B) a prior 3-point offense, as determined under the sentencing guidelines; and
> >
> > (C) a prior 2-point violent offense, as determined under the sentencing guidelines[.]

18 U.S.C. § 3553(f)(1)(A)–(C). This structure, utilizing a negative preceding an em-dash followed by a conjunctive list, makes it likely that the phrase "does not have" independently applies to each item in the list (*does not have* (A), *does not have* (B), and *does not have* (C)). *See Carroll v. Trump*, 498 F. Supp. 3d 422, 433 n.42 (S.D.N.Y. 2020) ("[A]n em dash . . . signif[ies] that the . . . clause" that immediately precedes the dash "applies to all . . . of the [items] that follow." (citing Act of June 25, 1948, ch. 646, 62 Stat. 982 (1948))), *rev'd in part & vacated in part*, 49 F.4th 759 (2d Cir. 2022). Read in this way, § 3553(f)(1) serves as an "eligibility checklist" for defendants who seek to avail themselves of the First Step Act's safety valve relief. *Pulsifer*, 39 F.4th at 1022. Suppose for example that you were about to enter a baseball stadium and you saw a sign that read:

> To enter the stadium, you must not have—
>
> (a) a weapon;
>
> (b) any food; and
>
> (c) any drink.

Readers would quickly understand that the phrase "must not have—" independently modifies each item in the list and thus creates a checklist of prohibited items. No baseball fan would insist that they could enter the stadium with a weapon just because they didn't have food or a drink.

i.

Such a natural reading was rejected by the *Lopez* majority. This distributive approach was described as "far-fetched and quixotic" for two reasons. *Lopez*, 998 F.3d at 441 n.11. First, it noted that no Ninth Circuit precedents had ever endorsed the distributive approach. *Id.* But neither did it cite a case rejecting it. Nor can we find one. The statute's unusual and grammatically difficult structure (a negative followed by an em-dash

introducing a list of items set off with semi-colons joined by "and") is not common. The absence of any authority cuts neither way. Second, *Lopez* rejected the distributive approach because it reasoned that, applied consistently, it "would destroy the entire safety-valve structure and allow a defendant to receive safety valve relief if he or she met the criteria in § 3553(f)(1), § 3553(f)(2), § 3553(f)(3), § 3553(f)(4), *or* § 3553(f)(5)." *Id.* (emphasis in original). But this conclusion does not follow. The distributive reading cannot affect the rest of the statute because the list in § 3553(f)(1) works differently due to its negative clause "does not have" that precedes an em-dash. By contrast, § 3553(f) contains a list of affirmative requirements. Only reading "and" to mean "or" would imperil the rest of the safety valve.

Additionally, Palomares challenges this distributive approach as being inconsistent with our holding in *Modica v. Taylor*, where we considered the FMLA's definition of "employer." 465 F.3d 174, 183–88 (5th Cir. 2006). But that case is inapposite. *Modica* was concerned with whether one sub-section in a conjunctive list modified another sub-section. *Id.* The court concluded it did. *Id.* But here we must decide how a higher-level provision applies to each of its sub-parts, not how the sub-parts modify each other. Moreover, the phrase preceding the em-dash in *Modica* did not include a negative (like "not"). Although we agree with *Modica* that the use of an em-dash "suggests that there is some relationship between the [sub-sections,]" that tells us little about what exactly that relationship is here. *Id.*

B.

The distributive meaning of "and" such that "does not have" independently applies to each item in the list (*does not have* (A), *does not have* (B), and *does not have* (C)) is the preferred interpretation because it avoids violating the canon against surplusage. The canon against surplusage is the interpretive principal that courts prefer interpretations that give independent legal effect to every word and clause in a statute. *Williams v. Taylor*, 529 U.S.

362, 404 (2000) (stating that it is "a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)) (cleaned up)); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 294 (5th Cir. 2020) (en banc) ("[T]he canon against surplusage . . . expresses courts' 'general "reluctan[ce] to treat statutory terms as surplusage."'" (quoting *Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011))).

As discussed *supra*, to be eligible for safety valve relief the defendant must show that she:

> (1) . . . does not have—
>
> > (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> >
> > (B) a prior 3-point offense, as determined under the sentencing guidelines; and
> >
> > (C) a prior 2-point violent offense, as determined under the sentencing guidelines[.]

18 U.S.C. § 3553(f)(1)(A)–(C). If we accepted Palomares's reading of § 3553(f)(1), that she would only be ineligible if her criminal history satisfied sub-sections (A), (B), *and* (C), subsection 3553(f)(1)(A) would be surplusage because every criminal defendant who has a 2-point violent offense and a 3-point offense (satisfying (B) and (C)) will have at least 5 criminal history points, satisfying (A). As a result, we could strike out (A) without changing § 3553(f)(1)'s legal effect. Put simply: $3 + 2 > 4$. Nonetheless, Palomares offers two arguments why subsection (A) is not surplusage. Neither are availing.

i.

Palomares's first argument is the argument endorsed by the Ninth Circuit in *Lopez*. *Lopez* reasoned that the surplusage problem can be avoided by supposing that a single 3-point violent offense could satisfy subsections (B) and (C) simultaneously. It cited legislative history indicating that 2-point offenses are defined as those carrying a sentence of "at least 60 days"—which would include both 2- and 3-point offenses. *Lopez*, 998 F.3d at 440 n.10. This approach is attractive because it would give Congress's choice of the word "and" its ordinary meaning, without rendering subsection (A) surplusage. But as Judge Smith noted in his concurrence in *Lopez*, this approach violates the plain wording of § 3553(f)(1)(C). *Id.* at 444–47 (Smith, J., concurring in part, dissenting in part, and concurring in the judgment). Subsection (C) incorporates the sentencing guidelines' definition of a "2-point violent offense." 18 U.S.C. § 3553(f)(1)(C) ("[T]he court shall impose a sentence . . . without regard to any statutory minimum sentence, if . . . [*inter alia*] the defendant does not have . . . a prior 2-point violent offense, *as determined under the sentencing guidelines*." (emphasis added)). And § 4A1.1 of the Sentencing Guidelines defines 2- and 3-point offenses in mutually exclusive terms. U.S.S.G. § 4A1.1(b); *see also Lopez*, 998 F.3d at 444–47 (Smith, J., concurring in part, dissenting in part, and concurring in the judgment). Courts add 3 points for sentences exceeding 13 months, 2 points for sentences between 60 days and 13 months, and 1 point for sentences less than 60 days. U.S.S.G. § 4A1.1(a)–(c). So a 3-point violent offense could not satisfy subsection (C) because by definition its sentence was more than 13 months—not between 60 days and 13 months. As Judge Smith succinctly put it: "Two points is two points. Two points is not three points." *Lopez*, 998 F.3d at 445 (Smith, J., concurring in part, dissenting in part, and concurring in the judgment).

The *Lopez* majority's first response to this argument is unpersuasive. The majority noted that the sentencing guidelines were designed to "add" criminal history points together as a part of a calculation. *Id.* at 440 n.10 (majority opinion). The majority reasoned that context compels us to count 3-point violations only once, because counting a 3-point violation as both a 3- and 2-point offense "would overstate a defendant's criminal history and cause an inflated Guidelines range." *Id.* But "[h]ere, in the safety-valve context, we are not 'adding' criminal-history points to form a Guidelines calculation." *Id.* Because Congress must have meant to target "more serious violent offenses (three-point violent offenses)" along with less serious ones (two-point offenses), the *Lopez* majority reasoned it makes little sense to rely on the Sentencing Guidelines' definitions of those terms. *Id.*

Except that is what Congress plainly did. Sensibly or not, § 3553(f)(1)(C) explicitly incorporates the Sentencing Guidelines by reference. Sub-section (C) is triggered by "a prior 2-point violent offense, *as determined under the sentencing guidelines*." *See* 18 U.S.C. § 3553(f)(1)(C) (emphasis added). While *Lopez*'s reliance on the canon against surplusage is understandable, "such interpretative canon[s are] not a license for the judiciary to rewrite language enacted by the legislature." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013) (alteration in original) (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)).

The *Lopez* majority's second response to the unambiguous text was to rely on legislative history. *Lopez*, 998 F.3d at 440 n.10 (citing COMM. ON THE JUDICIARY, 115TH CONGRESS, THE REVISED FIRST STEP ACT OF 2018 (S.3649)). But, the Supreme Court has repeatedly and emphatically rejected the use of legislative history where the text is unambiguous. *See, e.g.*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1750 (2020) ("[L]egislative history can never defeat unambiguous statutory text . . . ."). So have we. *See, e.g.*, *Franco v. Mabe Trucking Co.*, 3 F.4th 788, 795 (5th Cir.

2021) ("[N]o amount of legislative history can defeat unambiguous statutory text . . . ." (citing *Bostock*, 140 S. Ct. at 1750)). And, so did the *Lopez* majority—notably, in a part of its opinion where the legislative history undermined its interpretation. *See Lopez*, 998 F.3d at 442 ("Because § 3553(f)(1)'s 'and' is not ambiguous, we need not consult legislative history." (citing *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019)). In fact, the *Lopez* majority rejected the *exact same* piece of legislative history where it indicated that Congress meant to use "or" instead of "and." *See id.* (discussing a Senate Judiciary Committee summary of a prior version of § 3553(f)(1) saying that "[o]ffenders with prior '3 point' felony convictions . . . *or* prior '2 point' violent offenses . . . will *not* be eligible for the safety valve" (quoting COMM. ON THE JUDICIARY, 115TH CONGRESS, THE REVISED FIRST STEP ACT OF 2018 (S.3649)). The *Lopez* majority was right the second time. *Id.* (citing *Food Mktg. Inst.*, 139 S. Ct. at 2364).

ii.

That leads us to Palomares's second argument: Simply admit that subsection (A) is surplusage. That is the approach the *Lopez* majority endorsed as a fallback option, and which the concurrence defended. As both those opinions note, the canon against surplusage is not absolute. *See Lopez*, 998 F.3d at 441 (first citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); and then citing *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)); *id.* at 446 (Smith, J., concurring in part, dissenting in part, and concurring in the judgment). "[O]ur hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs." *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 137 (2007). The *Lopez* concurrence was on firm ground in concluding that it is better to admit surplusage than to rewrite the statute. *See id.* at 137 ("It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious

construction . . . ."). But here, that is unnecessary because the distributive approach gives "and" its ordinary conjunctive meaning without rendering sub-section (A) meaningless. Palomares's second argument would only be persuasive if we had no other option.

To sum up, the "distributive approach" is the most natural and indeed the most likely intent behind Congress's choice of a unique structure for § 3553(f)(1). That structure is understandably read as an eligibility checklist of conditions that the defendant cannot possess to be eligible for safety valve relief. The alternative readings are implausible because they each fail to account for the plain meaning of the statute in some way.[2]

C.

Finally, Palomares argues that the Court should apply the rule of lenity in applying § 3553(f)(1). The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Bittner*, 19 F.4th 734, 748 (5th Cir. 2021) (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion)), *cert. granted*, 142 S. Ct. 2833 (2022). But courts only apply the rule of lenity when faced with a "*grievous* ambiguity or uncertainty." *See Maracich v. Spears*, 570 U.S. 48, 76 (2013) (emphasis added) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)). And an ambiguity is only grievous if it remains after the court considers the statute's "text, structure, history, and purpose," *id.*, including all the "traditional canons of statutory construction," *Shular v. United States*, 140 S. Ct. 779, 787 (2020) (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)). Such a conclusion is not true of § 3553(f)(1). After studying the text and structure of the statute, as informed by the various canons of

[2] Because we find the Government's lead argument most persuasive, we need not consider its alternative argument that Palomares's position would give rise to absurd results.

construction, one approach stands prominently above the other interpretations. Because we need not "guess" at the statute's meaning, the rule of lenity does not apply. *See Maracich*, 570 U.S. at 76 ("[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." (quoting *Barber*, 560 U.S. at 488)).

IV.

We hold that the phrase "does not have" independently applies to each subsection in 18 U.S.C. § 3553(f)(1), rendering criminal defendants ineligible for safety valve relief if they run afoul of any one of its requirements. Because Palomares has a prior 3-point offense, we AFFIRM.

ANDREW S. OLDHAM, *Circuit Judge*, concurring in the judgment:

In my view, Nonami Palomares was ineligible for the safety valve codified in 18 U.S.C. § 3553(f). That's because she had a prior 3-point offense and hence could not satisfy § 3553(f)(1)(B).

I write separately to make two points. The first is a general point about textualism. The second is a specific point about § 3553(f)'s text.

I.

I am an ardent textualist. As I've said many times, "[i]n matters of statutory interpretation, text is always the alpha." *In re DeBerry*, 945 F.3d 943, 947 (5th Cir. 2019); *see also ibid.* (noting "it's also the omega"); *Cochran v. SEC*, 20 F.4th 194, 214 (5th Cir. 2021) (en banc) (Oldham, J., concurring) ("First, as should go without saying by now, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." (quotation omitted)); *United States v. Koutsostamatis*, 956 F.3d 301, 306 (5th Cir. 2020) ("In statutory interpretation, we have three obligations: '(1) Read the statute; (2) read the statute; (3) read the statute!'" (quoting HENRY J. FRIENDLY, BENCHMARKS 202 (1967))); *Djie v. Garland*, 39 F.4th 280, 285 (5th Cir. 2022) ("When a regulation attempts to override statutory text, the regulation loses every time—regulations can't punch holes in the rules Congress has laid down."); *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 295 (5th Cir. 2019) ("We start with the only easy part—the statutory text."); *Heinze v. Tesco Corp.*, 971 F.3d 475, 484 (5th Cir. 2020) ("Of course, when a statute's text is clear, courts should not resort to legislative history." (quotation omitted)); *United States v. Graves*, 908 F.3d 137, 141 (5th Cir. 2018) ("We start, of course, with the statutory text." (quotation omitted)); *United States ex rel. Drummond v. BestCare Lab'y Servs., LLC*, 950 F.3d 277, 281 (5th Cir. 2020) ("The statutory text is what matters . . . .").

And as a textualist, I subscribe to Justice Scalia's understanding of textualism: "In their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012); *see also ibid.* ("Textualism, in its purest form, begins and ends with what the text says and fairly implies."). I also agree with him that one of the virtues of careful adherence to text is that "most interpretive questions have a right answer." *Id.* at 6.

But I've never understood textualism to mean hyper-literalism. As my law school mentor often said, "textualists . . . are not literalists." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108 (2001); *see also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003) ("Even the strictest modern textualists properly emphasize that language is a social construct. They ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context."). Justice Scalia said the same thing. *See* SCALIA & GARNER, *supra*, at 356 ("Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text.").

Hyper-literalism is bad for two reasons. The first is perhaps the most obvious: hyper-literalism is bad textualism. A statute's "text may never be taken out of context." *Graves*, 908 F.3d at 142. That's because "words are given meaning by their context, and context includes the purpose of the text." SCALIA & GARNER, *supra*, at 56. As Justice Scalia once quipped, without context, we could not tell whether the word *draft* meant a bank note or a breeze. *See ibid.* Such nuance is lost on the hyper-literalist.

The second indictment of hyper-literalism is perhaps more subtle: it opens textualism to the very criticism that necessitated textualism in the first place. In one of the most influential law review articles ever written, Karl Llewellyn denigrated the late nineteenth century "Formal Period," in which "statutes tended to be limited or even eviscerated by wooden and literal reading, in a sort of long-drawn battle between a balky, stiff-necked, wrong-headed court and a legislature which had only words with which to drive that court." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950). That criticism—and Llewellyn's famous indictment of the canons of construction, *see id.* at 401–06—"largely persuaded two generations of academics that the canons of construction were not to be taken seriously." John F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2D 283 (2002). It's remarkable how much of modern textualism aims to overcome Llewellyn's criticisms 72 years later. *See, e.g.*, SCALIA & GARNER, *supra*, at 59–62 (devoting a chapter to the project).

While Llewellyn and his fellow legal realists were wrong about an awful lot, one of his arguments merits continued attention: wooden and hyper-literal textualism, Llewellyn argued, generates a "foolish pretense" that there's "only one single correct answer possible" in every single statutory-interpretation dispute. Llewellyn, *supra*, at 399. Again, it's true that, under careful textualist analysis, "*most* interpretive questions have a right answer." SCALIA & GARNER, *supra*, at 6 (emphasis added). But not all of them. Some textualist inquiries generate a *range* of potentially right answers, and it's the judge's job to pick the best one and explain it. We do the law a disservice when we suggest that textualist exegeses are reducible to math problems, logic puzzles, or hyper-literalist readings of the word *and*.

II.

In my view, the proper interpretation of § 3553(f)(1) does not hinge on an inferential rule of Boolean algebra called "De Morgan's Theorem." Nor does it hinge on a hyper-literalist interpretation of the conjunction "and." It hinges instead on a context-sensitive interpretation of § 3553(f) *as a whole*.

Let's start, as always, with the statutory text. Subsection (f) creates a "safety valve" by eliminating mandatory minimums for certain drug offenses:

> if the court finds at sentencing . . . that—
>
> > (1) the defendant does not have—
> >
> > > (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> >
> > > (B) a prior 3-point offense, as determined under the sentencing guidelines; and
> >
> > > (C) a prior 2-point violent offense, as determined under the sentencing guidelines;
> >
> > (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
> >
> > (3) the offense did not result in death or serious bodily injury to any person;
> >
> > (4) the defendant was not an organizer, leader, manager or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in

> a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
>
> (5) [before] the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense.

18 U.S.C. § 3553(f). Subsection (f) thus has *two different* distributive clauses and *two different* conjunctive lists.

Conjunctive List 1. The first conjunctive list provides safety-valve relief if "the court finds" that five conditions are satisfied. Those five conditions are separated into five statutory paragraphs, numbered (f)(1) through (f)(5). The five paragraphs follow an em dash, are separated by semicolons, and are written in a conjunctive list (1; 2; 3; 4; and 5). The affirmative prefatory clause in Conjunctive List 1 distributes to each of the five paragraphs. Thus, for a defendant to get relief under § 3553(f), the court needs to "find at sentencing that" (1) is met, "find at sentencing that" (2) is met, "find at sentencing that" (3) is met, "find at sentencing that" (4) is met, and "find at sentencing that" (5) is met.

Conjunctive List 2. Within paragraph (1), there is also a second nested list. This one has three items. Those three items are separated into three statutory "subparagraphs" labeled (A) through (C). The three subparagraphs also follow an em dash, are separated by semicolons, and are presented in a conjunctive list (A; B; and C).

Conjunctive List 1 and Conjunctive List 2 are structurally identical. Both are introduced by a prefatory clause followed by an em dash. Both offer a multi-item list, separated by semicolons, and conjoined with "and." The only difference between them is that Conjunctive List 1 has an *affirmative* prefatory clause ("if the court finds at sentencing . . . that") whereas

Conjunctive List 2 has a *negative* prefatory clause ("the defendant does not have"). I don't see why that difference matters. The text and structure of both Conjunctive List 1 and Conjunctive List 2 indicate that the language preceding the em dashes distributes throughout the statutory sentence. And hence subsection (f)(1) reads, in effect:

> The safety valve applies, and hence a mandatory minimum sentence does not, (1)(A) if the court finds at sentencing that the defendant does not have more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (1)(B) if the court finds at sentencing that the defendant does not have a prior 3-point offense, as determined under the sentencing guidelines; and (1)(C) if the court finds at sentencing that the defendant does not have a prior 2-point violent offense, as determined under the sentencing guidelines.[1]

The "if the court finds at sentencing" language from the umbrella clause of (f) distributes throughout, just as the "defendant does not have" language from the umbrella clause of (f)(1) distributes throughout. That double

[1] To continue the double-distributive interpretation of (f), the entirety of the subsection would read in effect: "The safety valve applies, and hence a mandatory minimum sentence does not, (1) if the court finds at sentencing that [the defendant does not have the above-quoted criminal history characteristics, which I do not repeat here]; (2) if the court finds at sentencing that the defendant did not use violence . . . in connection with the [current] offense; (3) if the court finds at sentencing that the [current] offense did not result in death or serious bodily injury to any person; (4) if the court finds at sentencing that the defendant was not an organizer, leader, manager, or supervisor of others in the [current] offense . . . and was not engaged in a continuing criminal enterprise . . . ; and (5) if the court finds at sentencing that, not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the [current] offense." Thus, it is not true that "a defendant would qualify for safety valve relief by satisfying any one of the five elements" in subsection (f). *Post*, at 27 n.15 (Willett, J., dissenting). Rather, Congress says a defendant would qualify for safety valve relief only by satisfying *all five* of the elements in subsection (f).

distribution of the prefatory clauses creates a cogent statutory sentence.[2] And none of it hinges on symbolic logic, Boolean algebra, or whether *and* means

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[2] Judge Willett suggests that I want to "distribut[e] only *part* of the so-called umbrella clause." *Post*, at 27 n.15. I'm afraid I don't understand this criticism. I want to distribute all of the text, as Congress wrote it, and to conjoin the doubly distributed text with an "and," as Congress wrote it. So the entirety of subsection (f) reads:

> (f) Limitation on Applicability of Statutory Minimums in Certain Cases.—
>
> Notwithstanding any other provision of law, . . . the court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that (1) the defendant does not have (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
>
> [Notwithstanding any other provision of law, . . . the court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that (1) the defendant does not have] (B) a prior 3-point offense, as determined under the sentencing guidelines; and
>
> [Notwithstanding any other provision of law, . . . the court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that (1) the defendant does not have] (C) a prior 2-point violent offense, as determined under the sentencing guidelines;
>
> [Notwithstanding any other provision of law, . . . the court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that] (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> [Notwithstanding any other provision of law, . . . the court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government

"and" or "or." It hinges only on the context of the statute as a whole. And a recognition that human beings—and hence members of Congress—do not speak or legislate like computers.

* * *

As this question continues to percolate through the federal courts, I am sure that the pages of the Federal Reporter and eventually the United States Reports will teem with colorful hypotheticals including and adding to those offered by my esteemed colleagues today. *See supra*, at 6 (weapons at baseball games); *post*, at 24–25 (Willett, J., dissenting) (grocery lists, drunk driving, and fire). But all these hypotheticals prove, with greatest respect, is that language is context-dependent. It's far easier, I'd submit, to approach

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has been afforded the opportunity to make a recommendation, that] (3) the offense did not result in death or serious bodily injury to any person;

[Notwithstanding any other provision of law, . . . the court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that] (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

[Notwithstanding any other provision of law, . . . the court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that] (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

the statute that Congress actually wrote and to understand it as an ordinary person would. Subsection (f) constitutes one (admittedly long) statutory sentence. And I'd read it from the beginning to the end—distributing the prefatory clauses as Congress wrote them along the way.

Perhaps I'm wrong about how best to read § 3553(f). But if I am, it only proves that ordinary English does not beget the sort of epistemic certainty that De Morgan invoked.

DON R. WILLETT, *Circuit Judge*, dissenting:

With deepest respect, I dissent.

The majority opinion holds that "and" can have either a "distributive" or a "joint" sense and that only context can resolve the inherent ambiguity. Piercing the legalese, the idea is that "and" can mean either "and" or "or." To be fair, the majority isn't alone. Courts facing clumsy drafting have sporadically reached that conclusion.[1]

The English language is never in stasis. Witness the off-definition misuse of "literally," which has literally come to mean "figuratively." But interchanging "and" and "or" is a mistake. "We give our language, and our language-dependent legal system, a body blow when we hold that it is reasonable to read 'or' for 'and'"—or "and" for "or."[2] Manufactured ambiguity poses a special threat to our language's elemental particles. How can Congress express its will if everyday words slip into linguistic black holes so dense that settled language rules break down? When judges say that certain words are inherently ambiguous, we beget a self-fulfilling prophecy. And when we use complicated semantic bracework to augment ordinary meaning, we risk creating a negative feedback loop if Congress sees the favor as an invitation rather than a one-off.

Congress said that Palomares is ineligible for safety valve relief if her criminal history runs afoul of § 3553(f)(1)(A), (B), *and* (C). While the First

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[1] *See* Majority Op. at 5 (quoting GARNER'S DICTIONARY OF LEGAL USAGE 639 (3d ed. 2011)); *see also Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 (5th Cir. 1958) ("Courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.'" (quoting *United States v. Fisk*, 70 U.S. 445, 448 (1865))).

[2] *MacDonald v. Pan Am. World Airways, Inc.*, 859 F.2d 742, 746 (9th Cir. 1988) (Kozinski, J., dissenting).

Step Act "is far from a *chef d'oeuvre* of legislative draftsmanship,"[3] we must assume that Congress meant what it said. Congress said "and." If it wished to withhold safety valve relief from defendants who failed any one of the three sub-sections, it would have (maybe *should* have) joined them together with "or." I would vacate Palomares's sentence and remand for resentencing.

I

As the majority concedes, the plain meaning of "and" is conjunctive. Dictionaries and treatises aren't needed to prove the point, but they uniformly define "and" this way.[4] The definition even lends its name to the "conjunctive/disjunctive canon" of construction.[5] That interpretive rule says what ordinary English speakers already know: When the word "and" joins a list, all the things listed are required.[6] A parent who tells you to pick up milk, eggs, and cheese will rightly be upset if you return with just milk.

"And" is still conjunctive when it follows a negative like "not" or "no." When a negative precedes a conjunctive list, "the listed things are individually permitted but cumulatively prohibited."[7] "[D]on't drink and

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[3] *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014).

[4] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 116–25 (2012); *And*, Webster's Second New International Dictionary 98 (1934) ("Expressing a general relation of connection or addition"); *see also And*, American Heritage Dictionary of the English Language 68 (5th ed., 2011) ("together with or along with"); *And*, Oxford English Dictionary 449 (2d ed. 1989) (stating that "and" introduces "a word, clause, or sentence, which is to be taken side by side with, along with, or in addition to, that which precedes it") (italics omitted)).

[5] *Conjunctive/disjunctive canon*, Black's Law Dictionary (10th ed. 2014) ("[I]n a legal instrument, and joins a conjunctive list to combine items, while or joins a disjunctive list to create alternatives."); Office of the Legislative Counsel, U.S. Senate, Senate Legislative Drafting Manual 64 (1997) (same).

[6] Scalia & Garner, *supra* note 4, at 116.

[7] *Id.* at 119.

drive" means that you can "do either one, but you can't do them both."[8] Thus a concerned parent might tell their child: "Don't drink *or* drive." Expanding the list beyond two items leaves the underlying principle unchanged. "Do not mix heat, fuel, and oxygen" instructs the reader to prevent the unity of all three ingredients unless she wants a fire.

A speaker who wishes to individually prohibit each item in a list must use "or." This common-sense rule travels more stuffily as "De Morgan's law,"[9] a logical precept which holds that (1) the negation of a conjunction is equivalent to the disjunction of the negations, and (2) the negation of a disjunction is equivalent to the conjunction of the negations.[10] I recite the precept not because this case requires it, but rather to show that "and" is conjunctive at all points along the spectrum from friendly to formal.

What this means for § 3553(f)(1) is simple. If Congress wanted "not" to independently modify each item in the list, the proper word was "or."

II

The majority agrees with me about the ordinary meaning of "and" but argues that § 3553(f)(1) has additional elements that make all the difference. That section ends its prefatory clause with an em-dash—the wonderfully versatile Swiss Army knife of punctuation marks—and it separates the subsections that follow with line breaks and semi-colons. The majority concludes that the language before the em-dash is "distributed" to independently modify each following subsection, as so:

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[8] *Id.*

[9] *See* Maria Aloni, *Disjunction,* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2016), *https://plato.stanford.edu/archives/win2016/entries/disjunction/*.

[10] *Id.*; SCALIA & GARNER, *supra* note 4, at 119–20.

(1) ~~the defendant does not have —~~

> (A) [*the defendant does not have*] more than 4 criminal history points, . . . ;
> (B) [*the defendant does not have*] a prior 3-point offense . . . ; and
> (C) [*the defendant does not have*] a prior 2-point violent offense . . . .[11]

This interpretation has some merit. For one, it has the benefit of obscurity. Style guides, dictionaries, books on grammar, and the like are silent on whether putting an em-dash after the negative phrase changes its meaning. Like the majority, I have been unable to find any case construing a statute with a similar structure.[12] It is plausible that Congress's choice to include subsections (A)–(C) on separate lines set off by semi-colons, rather than a more conventional list set off by commas, is best read as a "checklist" of items that a defendant must comply with to be eligible for safety valve relief. One of our sister circuits recently adopted this interpretation.[13]

The problem is that this approach runs afoul of the canon of consistent usage—the principle that "a given term is used to mean the same thing throughout a statute."[14] Section 3553(f), which the Government dubs the "umbrella clause," contains an introduction set off by an em-dash just like

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[11] 18 U.S.C. § 3553(f)(1).

[12] *Cf. Carroll v. Trump*, 498 F. Supp. 3d 422, 433 n.42 (S.D.N.Y. 2020) (noting that "an em dash . . . signif[ies] that the . . . clause" that immediately precedes the dash "applies to all . . . of the [items] that follow") *rev'd in part, vacated in part*, 49 F.4th 759 (2d Cir. 2022).

[13] *United States v. Pulsifer*, 39 F.4th 1018, 1022 (8th Cir. 2022).

[14] *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also* SCALIA & GARNER, *supra* note 4, at 170–73.

§ 3553(f)(1). The umbrella clause is long, but in essence it says: "The court shall not apply any mandatory minimum sentence if—". A five-part list follows, again separated by line breaks and semi-colons, and again with an "and" at the end of the list's penultimate item. If we buy the Government's argument for the "and" in § 3553(f)(1)(B), then consistency requires us to do the same for the "and" that closes § 3353(f)(4). But treating *that* "and" as an "or" would tell district courts to disregard mandatory minimums in five separate scenarios—not one scenario consisting of five elements.

As a result, the majority's "distributive" theory—applied consistently—would make it harder for defendants to meet sub-section (f)(1) but would make it far easier for them to qualify for the safety valve in general. In fact, it would effectively eliminate all mandatory minimums for drug crimes. If the majority is right that em-dashes mean everything before them independently modifies what follows, then Palomares should still win.

The majority's response to this conundrum is not convincing. The majority notes that the phrase "does not have" appears before § 3553(f)(1) but not § 3553(f). In more academic terms, § 3553(f)(1) is a negative conjunctive list while § 3553(f) is just an "ordinary" conjunctive list. But why should that matter? Why should an em-dash function one way when it is preceded the word "not," and another way when it isn't? Either an em-dash signifies that the preceding language independently modifies each sub-section that follows, or it does not. The majority does not cite a single grammarian, dictionary, or case endorsing its on-again off-again view of em-dashes. Making up new grammatical rules on the fly isn't statutory interpretation, it's statutory Calvinball.[15]

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[15] *See* BILL WATTERSON, SCIENTIFIC PROGRESS GOES BOINK 153 (1991), https://preview.tinyurl.com/mrxdnm3w ("The only permanent rule in Calvinball is that you can't play it the same way twice!"). JUDGE OLDHAM solves this problem by distributing only *part* of the so-called umbrella clause. *Ante* at 19 n.1 (Oldham, J.,

III

The majority's next argument is that a conjunctive interpretation of "and" would violate the canon against surplusage—the interpretive principal that courts prefer interpretations that give independent legal effect to every word and clause in a statute.[16] The majority reasons that reading "and" conjunctively would result in surplusage because every time subsections (B) and (C) are satisfied, so is (A). Every criminal defendant who has a 2-point violent offense and a 3-point offense (satisfying (B) and (C)) will have at least 5 criminal history points, satisfying (A). This view would allow us to strike out (A) without changing § 3553(f)(1)'s legal effect.

I agree that Palomares's first argument against surplusage—which the majority in *Lopez* adopted—is not convincing for exactly the reasons set forth in the majority's opinion.[17] But we asked the parties to brief another

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concurring). But in interpreting § 3553(f)(1), the majority distributes everything that precedes the em dash: "the defendant does not have." Consistency with this rule of distribution would require every item in JUDGE OLDHAM's list to open with the umbrella clause's full paraphrase: "The safety valve applies, and hence a mandatory minimum sentence does not . . . ." *Ante* at 19 n.1 (Oldham, J., concurring). If each item in the five-part list included the *entire* umbrella clause—*i.e.*, everything that precedes the em-dash—then a defendant would qualify for safety valve relief by satisfying any one of the five elements (just as the majority concludes that a defendant flunks § 3553(f)(1) by failing to satisfy any one of those three elements).

[16] *See Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 294 (5th Cir. 2020) (noting that the "canon against surplusage . . . expresses courts' 'general "reluctan[ce] to treat statutory terms as surplusage,"'" but cautioning that "courts should not invent new meaning[s] to avoid superfluity at all costs" (emphasis omitted) (quoting *Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011))); SCALIA & GARNER, *supra* note 4, at 176.

[17] *See also United States v. Lopez*, 998 F.3d 431, 444–47 (9th Cir. 2021) (Smith, J., concurring in part, dissenting in part, and concurring in the judgment) (making the same argument the majority does).

argument for why § 3553(f)(1)(A) can retain effect without requiring "and" to forsake its ordinary meaning.

Criminal history points are computed in a two-step process. The first step is governed by § 4A1.1 of the Sentencing Guidelines, which tells courts to add three points for prior sentences exceeding 13 months, two points for sentences between 60 days and 13 months, and one point for sentences less than 60 days.[18] The second step is governed by § 4A1.2, which tells courts to not count certain kinds of convictions. For example, § 4A1.2 tells courts to not count 3-point offenses if the defendant was released from incarceration more than fifteen years before committing the instant offense, and to not count 1- or 2-point sentences imposed more than ten years before the instant offense was committed.[19] Section 4A1.2 also instructs courts to never count certain misdemeanors like speeding, loitering, or fish and game violations.[20]

Palomares argues that the upshot of this complex system is that subsection (A) is not surplusage because some defendants will have a 2- or 3-point *conviction* that is ineligible for inclusion in the criminal history *calculation*. For example, Palomares says that a defendant who completed her sentence for a 3-point drug offense more than 15 years ago, and who committed a 2-point violent offense within the last 10 years, will satisfy § 3553(f)(1)(B) and (C)—she has a prior 3-point offense and a prior 2-point violent offense. But she will not run afoul of subsection (A), because § 4A1.2 tells courts to not count 3-point offenses that have "gone stale." This hypothetical defendant would satisfy subsections (B) and (C), but not (A).

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[18] U.S.S.G. § 4A1.1(a)–(c).

[19] U.S.S.G. § 4A1.2(e)(1)–(3).

[20] U.S.S.G. § 4A1.2(c)(1)–(2).

The Government responds that a stale conviction is a 0-point offense, not a 3-point offense. Thus, the Government argues that an offense triggering subsections (B) or (C) always counts for purposes of subsection (A). It notes that § 3553(f)(1) defines 2- and 3-point offenses by reference to § 4A1.1 *and* § 4A1.2—not just § 4A1.1. A 2- or 3-point offense that is excluded at the second step cannot be used to satisfy any of § 3553(f)(1)'s subsections. The Eighth Circuit recently agreed with similar reasoning.[21]

I think Palomares has the better argument. Most readers would not give a 2- or 3-point offense a different name just because it is excluded at the second step. They would not call it a "0-point offense." Many judges haven't either.[22] And the legislative history that the Government relies on defines 2-

[21] *Pulsifer*, 39 F.4th at 1020.

[22] *See United States v. Rivers*, No. 5:17-CR-00607-JMC-1, 2021 WL 2885956, at *3 (D.S.C. July 9, 2021) ("While Rivers has a 3-point offense . . . this is considered a 'stale conviction' . . . ."); *Lopez*, 998 F.3d at 434 (noting that an offense carrying more than 13 months' imprisonment constituted a "3-point offense," citing only § 4A1.1); *United States v. Fairbanks*, 575 F. Supp. 3d 1093, 1094 (D. Minn. 2021) (defining a "prior 3-point offense" as "a prior offense for which he received a sentence of imprisonment exceeding 13 months" and "a prior 2-point violent offense" as "a[violent] offense for which he received a sentence of imprisonment of at least 60 days but not more than 13 months"); *United States v. Brown*, No. 3:21-CR-007, 2022 WL 529227, at *3 (E.D. Tenn. Feb. 22, 2022) ("A two-point offense is a 'prior sentence of imprisonment of at least sixty days[.]' A three-point offense is a 'prior sentence of imprisonment exceeding one year and one month.'" (internal citations omitted) (quoting U.S.S.G. § 4A1.1(a), (b))); *see also United States v. Singleton*, 861 F. App'x 342, 345 (11th Cir. 2021) (per curiam); *United States v. Slone*, 370 F. Supp. 3d 736, 742 (E.D. Ky. 2019); *United States v. Howell*, No. 20-CR-30075-1, 2021 WL 2000245, at *2 (C.D. Ill. May 19, 2021); *United States v. Moses*, No. 05-CR-200, 2007 WL 42752, at *3 (E.D. Wis. Jan. 5, 2007), *aff'd on other grounds*, 513 F.3d 727 (7th Cir. 2008); *United States v. Fahm*, 13 F.3d 447, 451 (1st Cir. 1994).

and 3-point offenses in the same way.[23] A stale 3-point offense is still a 3-point offense—it just isn't counted in the criminal history point calculation.[24]

Even if subsection (A) were surplusage, that would not change my view. As Judge Smith noted in his concurrence in *Lopez*, "our hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs."[25] Our task is to follow the plain text of § 3553(f)(1). Congress joined the subsections with "and," not "or." The fact that "and" is conjunctive while "or" is disjunctive is one of the elemental aspects of the English language. While I cannot say that the conjunctive/disjunctive canon should always win out over the canon against surplusage, it is a better indication of plain meaning here for at least three reasons.

First, ignoring Congress's choice of the word "and" *also* violates the canon against surplusage.[26] If the em-dash "distributes" the prefatory clause, then subsections (A)–(C) operate independently regardless of what word appears between them. Under the majority's logic, that word could be

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[23] COMMITTEE ON THE JUDICIARY, 115TH CONG, THE FIRST STEP ACT OF 2018 (S.3649) – *AS INTRODUCED* 2 (2018), https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20First%20Step%20Act%20Summary%20-%20As%20Introduced.pdf (defining 2- and 3-point offenses solely by the length of the sentence).

[24] From the majority's silence on this issue, I infer that it agrees with the Government that stale convictions are 0-point offenses.

[25] *Lopez*, 998 F.3d at 446 (Smith, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 137 (2007)); *see also* SCALIA & GARNER, *supra* note 4, at 176 ("Put to a choice, however, a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage. So like all other canons, this one must be applied with judgment and discretion, and with careful regard to context. It cannot always be dispositive because (as with most canons) the underlying proposition is not *invariably* true."); *Latiolais*, 951 F.3d at 294.

[26] *See United States v. Shannon*, 631 F.3d 1187, 1189 (11th Cir. 2011) (noting that "disregarding the statute's use of the disjunctive" would render the statute's use of "or" surplusage).

"and," "or," or no word at all. But "the canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute.'"[27] The majority's approach fails that test because it ignores the word "and," and that means the canon against surplusage can do no work.

Second, reading "and" out of sub-section (f)(1) violates the canon of consistent usage—but not solely as discussed above. By my count, Congress used "and" to join a list of elements 8 times in this very statute.[28] "Or" joins a list of elements 3 times where Congress wanted to produce the opposite effect.[29] That does not include the countless other uses of "and" and "or" in the same statute that do not join a list of elements where, again, no party disagrees that the words appear in their ordinary sense.[30] By the majority's logic, we would have to believe that Congress meant to invoke the plain meaning of these words every time *except* in subsection (f)(1). The majority is 0-2 in complying with the canon for consistent usage.

Finally, ignoring the plain meaning of a clearly understood word like "and" is a more obvious and palpable problem than reading part of the statute as redundant. One need only look at the face of the statute to understand that "and" ordinarily means "and," not "or." In contrast, the

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[27] *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

[28] *See* 18 U.S.C. § 3553(a)(2), (a)(4), (a)(5), (a)(6), (b)(2)(A)(ii)(II), (d)(2), (f)(1), (f)(4).

[29] *See id.* § 3553(a)(4)(ii), (b)(2)(A)(ii)(III), (c)(1)

[30] *See, e.g.*, *id.* § 3553(b)(2)(A) ("In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, *or* an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) . . . ." (emphasis added)); *id.* § 3553(b) ("In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, *and* official commentary of the Sentencing Commission . . . ." (emphasis added)).

majority's surplusage argument is apparent only after a reader consults the definitions in the Sentencing Guidelines and pauses to conclude that defendants who trigger subsections (B) and (C) will also always trigger (A). Courts prefer obvious meanings to "ingen[ious]" or elaborate meanings that emerge only after careful reflection.[31] That principle favors tolerating non-obvious surplusage rather than ignoring rudimentary grammar. So it's not surprising that courts have repeatedly relied on the legislature's choice of "and" or "or," even when doing so created some statutory surplusage.[32]

IV

Because the majority accepts the Government's plain language argument, it need not consider whether Palomares's position leads to absurdities. For completeness, I will explain why the Government's argument on this point is not a feasible fallback. Absurdity arguments face a steep climb. "In statutory interpretation, an absurdity is not mere oddity. The absurdity bar is high, as it should be. The result must be preposterous, one that 'no reasonable person could intend.'"[33] The result must be so preposterous that it "shock[s] the general moral or common sense."[34]

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[31] *See Lynch v. Alworth–Stephens Co.*, 267 U.S. 364, 370 (1925) ("[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."); *Hale v. Johnson*, 845 F.3d 224, 229 (6th Cir. 2016) (same).

[32] *See Dealer's Transp. Co. v. Reese*, 138 F.2d 638, 640 (5th Cir. 1943) (adopting the disjunctive meaning of "or" even though it rendered some language surplusage); *N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 217 (2d Cir. 2021) (adopting the conjunctive meaning of "and" even though it rendered some language surplusage).

[33] *Texas Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc.*, 955 F.3d 482, 486 (5th Cir. 2020) (quoting SCALIA & GARNER, *supra* note 4, at 237).

[34] *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

The Government's absurdity argument relies on three hypothetical defendants. The first has a "lifetime of serious drug offenses" (but no 2-point violent offense). The second has multiple 3-point offenses (one of which was violent). The third has both a single 2-point violent offense and a 3-point offense. It is absurd, the Government says, that the first two should be eligible for safety valve relief while the third must face mandatory minimums.

These hypotheticals do not present any absurdities or demonstrate that Congress could not have meant what it said. The first defendant shows only that drug offenses, standing alone, do not bar a defendant from safety valve relief. Congress's evident conclusion—only violent drug offenders should receive mandatory minimum sentences—is perfectly rational.

The second defendant's situation is somewhat more troubling. This defendant can use the safety valve even though her offenses are more serious than those of the third defendant, who cannot. That hardly seems fair. But on the other hand, the rule of lenity prevents us from "giv[ing] the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant."[35] We cannot fix the unfairness that the Government posits by preventing the third defendant from using the safety valve. In other words, the absurdity canon must yield to the rule of lenity.

The authoritative case is *United States v. Wiltberger*.[36] There, Congress had passed a statute criminalizing *murder* committed "upon the high seas, or in any river, haven, basin or bay."[37] But the statute criminalized *manslaughter* only if it was committed on the "high seas."[38] Chief Justice

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[35] *Burrage v. United States*, 571 U.S. 204, 216 (2014).

[36] 18 U.S. 76 (1820).

[37] *Id.* at 98–99.

[38] *Id.* at 93.

Marshall, for the Court, conceded that it was "extremely improbable" that Congress meant to ignore shallow-water manslaughter.[39] Nevertheless, the Court was unanimous that it could not enlarge the statute to avoid this apparent absurdity.[40] "To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed . . . to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."[41]

The Government invites us to make that dangerous move here—enlarge the scope of criminal liability because, in some small class of cases, the statute's plain meaning might generate comparative lenience. The rule of lenity prevents courts from using the absurdity doctrine to that end.

And even if I agreed with the Government's absurdity argument, that would not mean the Government should prevail. After all, the strange conundrum the Government points to comes from the fact that the Sentencing Guidelines define 2- and 3-point offenses to be mutually exclusive. I agree with the majority and the Government that, according to the plain meaning of the Sentencing Guidelines, a 3-point violent offense cannot satisfy both subsections (B) and (C)—even if the *Lopez* court's argument to the contrary makes some intuitive sense.[42] But as long as we're using the absurdity doctrine to rewrite the statute, why not overlook *this* textual wrinkle rather than Congress's choice of the word "and"? Both

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[39] *Id.* at 105.

[40] *Id.*

[41] *Id.* at 96.

[42] *See Lopez*, 998 F.3d at 440 & n.10.

solutions solve the absurdity problem. When choosing between two equally plausible interpretations, "the tie must go to the defendant."[43]

The Government has one final absurdity argument, based on its concern that Palomares's interpretation would "all but eliminate" the criminal history requirement. Again, I am not persuaded. The Government presents no evidence that it would be rare for defendants to run afoul of all three of conditions in § 3553(f)(1). To the contrary, I would not be surprised to learn that a significant number of career criminals have a 2-point violent offense on their records. And even if the Government's assertion were true, the absurdity doctrine would still stand in the way. Section 3553(f)(1) is only one of five requirements that a defendant must satisfy to be eligible for safety valve relief. The other four turn on the defendant's *instant* offense.[44] Congress could have concluded that access to the safety valve should usually hinge on the instant offense's severity rather than the defendant's criminal history. "This is, at minimum, a 'rational' policy result."[45]

V

We must take Congress at its word: "and." I respectfully dissent.

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[43] *United States v. Santos*, 553 U.S. 507, 514 (2008).

[44] *See* 18 U.S.C. § 3553(f)(2)–(5) (safety valve relief is not available where the instant offense involves acting with or threatening violence, possessing a deadly weapon, inflicting serious bodily injury, acting as a leader or organizer, or keeping certain information from the government).

[45] *See Lopez*, 998 F.3d at 439.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in McAllen

UNITED STATES OF AMERICA
v.
NONAMI PALOMARES

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 7:20CR01355-001

USM NUMBER: 25987-177

Christopher George Gonzalez, AFPD
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 2 on December 2, 2020.

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2	Possession, with intent to distribute, 1 kilogram or more, that is, approximately 5.14 kilograms of heroin.	08/13/2020	2

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 1 is 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.

February 10, 2021
Date of Imposition of Judgment

Signature of Judge

MICAELA ALVAREZ
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

March 25, 2021
Date

DEFENDANT: **NONAMI PALOMARES**
CASE NUMBER: **7:20CR01355-001**

IMPRISONMENT

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

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be placed in an institution where she can receive drug abuse treatment and/or counseling and mental health treatment and/or counseling.

☒ 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 _____ 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: **NONAMI PALOMARES**
CASE NUMBER: **7:20CR01355-001**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 5 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. *(check if applicable)*
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)*

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

STANDARD CONDITIONS OF SUPERVISION

☒ See Special 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. If restitution is ordered, the defendant must make restitution as ordered by the Judge and in accordance with the applicable provisions of 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663A and/or 3664. The defendant must also pay the assessment imposed in accordance with 18 U.S.C. § 3013.
15. The defendant must notify the U.S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

DEFENDANT: **NONAMI PALOMARES**
CASE NUMBER: **7:20CR01355-001**

SPECIAL CONDITIONS OF SUPERVISION

You must participate in an outpatient substance-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program, if financially able.

You must participate in an outpatient alcohol-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program if financially able.

You may not possess any controlled substances without a valid prescription. If you do have a valid prescription, you must follow the instructions on the prescription.

You must submit to substance-abuse testing to determine if you have used a prohibited substance, and you must pay the costs of the testing if financially able. You may not attempt to obstruct or tamper with the testing methods.

You may not use or possess alcohol.

You may not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances, including synthetic marijuana or bath salts, that impair a person's physical or mental functioning, whether or not intended for human consumption, except as with the prior approval of the probation officer.

You must participate in a mental-health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the cost of the program, if financially able.

You must take all mental-health medications that are prescribed by your treating physician. You must pay the costs of the medication, if financially able.

DEFENDANT: **NONAMI PALOMARES**
CASE NUMBER: **7:20CR01355-001**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment[1]	JVTA Assessment[2]
TOTALS	$100.00	$	$	$	$

☐ See Additional Terms for Criminal Monetary Penalties.

☐ 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.

Name of Payee	Total Loss[3]	Restitution Ordered	Priority or Percentage
	$	$	

☐ See Additional Restitution Payees.

TOTALS	$	$

☐ 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:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

1 Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
2 Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
3 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: **NONAMI PALOMARES**
CASE NUMBER: **7:20CR01355-001**

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of $100.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of $_____ over a period of _____, to commence _____ after the date of this judgment; or

D ☐ Payment in equal _____ installments of $_____ over a period of _____, to commence _____ after release from imprisonment to a term of supervision; or

E ☐ 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

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
Attn: Finance
P.O. Box 5059
McAllen, TX 78502

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ 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) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

McALLEN DIVISION

UNITED STATE OF AMERICA	§ CASE NO. 7:20-CR-01355
	§ McALLEN, TEXAS
VERSUS	§ WEDNESDAY,
	§ FEBRUARY 10, 2021
NONAMI PALOMARES	§ 3:12 P.M. TO 3:44 P.M.

SENTENCING HEARING (VIA VIDEO CONFERENCE)

BEFORE THE HONORABLE MICAELA ALVAREZ
UNITED STATES DISTRICT JUDGE

APPEARANCES: SEE NEXT PAGE

COURTROOM ERO: XAVIER AVALOS

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APPEARANCES (VIA VIDEO CONFERENCE):

FOR THE PLAINTIFF, UNITED STATES OF AMERICA:	OFFICE OF THE US ATTORNEY Patricia Cook Profit, Esq. 1701 W. Business Hwy 83 Suite 600 McAllen, TX 78501 956-618-8010
FOR DEFENDANT, NONAMI PALOMARES:	FEDERAL PUBLIC DEFENDER'S OFC Christopher G. Gonzalez, Esq. 1701 W. Business Hwy 83 Suite 405 McAllen, TX 78501 956-630-2995

McALLEN, TEXAS; WEDNESDAY, FEBRUARY 10, 2021; 3:12 P.M.

THE COURT: Turning to Case Number 20-1355, Nonami Palomares.

MS. PROFIT: The Government is present and ready, Your Honor.

THE COURT: Thank you.

MR. GONZALEZ: Chris Gonzalez, Your Honor, for Ms. Palomares. She speaks English and she consents to proceed by video today.

THE COURT: Thank you.

Ms. Palomares, please raise your right hand to be sworn in.

(Defendant sworn.)

THE COURT: Thank you, Ms. Palomares. You may put your hand down.

Ms. Palomares, do you understand that you do have the right to be present in person for this hearing?

DEFENDANT PALOMARES: Yes, Your Honor.

THE COURT: And do you agree to give up that right and go forward by video?

DEFENDANT PALOMARES: Yes, Your Honor.

THE COURT: And you are before the Court for sentencing now on the charge of possession with intent to distribute.

Do you understand that?

DEFENDANT PALOMARES: Yes, Your Honor.

THE COURT: Mr. Gonzalez, did you receive and review the Presentence Investigation Report?

MR. GONZALEZ: Yes, Your Honor.

THE COURT: And did you review it with Ms. Palomares?

MR. GONZALEZ: Yes, Your Honor, I did.

THE COURT: Ms. Palomares, did you review with your attorney the Presentence Investigation Report?

DEFENDANT PALOMARES: Yes, Your Honor.

THE COURT: Let me address the objection raised here by counsel and then we'll address what we have by way of the guidelines. And that is, Mr. Gonzalez, I have looked at the objection that you raise, and then from independent research -- and I'll come back to you in just a moment, but let me turn to Ms. Profit, see if she has any response on this issue.

And that is the issue that I want to address first, Ms. Profit, is the issue as far as the First Step Act safety valve, the argument that Mr. Gonzalez makes that Ms. Palomares is not ineligible for that.

MS. PROFIT: I think that she is because of the three points, Your Honor. My understanding is that any crime that gives you three points makes you ineligible for the safety valve. And she has prior drug convictions.

THE COURT: And do you have any specific argument to

Mr. Gonzalez's argument that it is a cumulative sort of -- well, that those three categories, or I'm not what I would call them, those three sort of actors are cumulative rather than alternatives?

MS. PROFIT: No, I actually don't, Your Honor, because when I read the preparation that we have on the First Step Act, my understanding was that three levels -- any crime that came in as being three points, that that just was an automatic they could not qualify because it is indicative of a very serious crime.

THE COURT: All right. Okay.

MS. PROFIT: So -- I'm sorry.

THE COURT: No, that's fine.

THE COURT: Mr. Gonzalez, I wont ask for you for more because I did, as I indicated, read through all of yours. And again, I understand the point you make, and I know that in many cases of statutory construction that is the case. As I looked at it I did do some research just to try and see if I could find any case, I imagine you did the same thing and didn't find anything, otherwise you likely would have provided the Court with that.

And so I didn't find anything specifically addressing the issue. The only thing I did run across is some cases at the District Court level, nothing in the 5th Circuit, from the 5th Circuit of Appeals, but there were a few cases

here and there that talked -- and again, they were not specifically addressing the issue as you presented it, but there were some cases where -- here and there where there was some issue regarding the First Step Act.

And in a few of those cases, and there was a very small number, I didn't bother to write them down because they really are not dispositive here, but in the very few cases that I did run across where they were addressing some issue related to the First Step Act, several -- well, I won't say several because, again, it was a small number of cases, but some of those cases said, Well, in any event this defendant was not eligible because he had three -- a three-point conviction on his record, or they might have said, Well, you know, he wasn't eligible because he had a two-point violent offense on his record, or something along those lines.

So as I read through those I think those Courts, again, not necessarily addressing it as you presented it, but it seemed to the Court that those courts were also looking at it. Only one of those need to be present to be an exclusion. And as I look at the statute itself and the legislative history that you provided I come to the same conclusion, that we look at, you know, first, does the Defendant have more than four criminal history points. If the Defendant does, then that Defendant is not eligible for safety valve. And again, that's excluding the one-pointers, but we just sort of take

that as a given in my response.

And, okay, you know, you get past that the you look, does he have a three-point conviction. If he does, then again, not eligible. And then you look, does he have a two-point violent offense, and if he does, and again, not eligible. I don't see this as being a cumulative one.

And really the only thing that I will say convinces me -- well, not the only thing, many things convince me because I do -- I agree with Ms. Profit that when this was first coming out everything that I read on it said it'll be, you know, either no more than four points, and they will also be prohibited from -- or not eligible from this if they have a three-point offense or if they have a two-point violent felony.

Again, that was not the statute itself and I, you know, don't by any means mean to say that the statute says or rather than and. But if you look at the statute itself and you look first at the four points, then if you move down, it really would not make any sense to have it be a four-point limit excluding one-pointers and then end up with two points from the other -- I mean excuse me five points from the others because if you basically do it as a cumulative you have five points right there already so that really wouldn't make any sense. And that's just sort of a common sense approach to it. I can't say that I can point to anything else.

But the Court does believe that as the Court understands the First Step Act safety valve provisions that Ms. Palomares is not eligible because she does have the three-point prior offense. So that objection is overruled.

All right. Mr. --

MR. GONZALEZ: Thank you, Your Honor.

THE COURT: -- Mr. Gonzalez, then that objection is resolved that way so then because -- well, I guess I will still ask from the Government as to the third point on acceptance, does the Government -- well, no, let me come back then to address the issue as far as the acceptance itself. So why don't we turn to that then, Mr. Gonzalez.

MR. GONZALEZ: Your Honor, we filed a signed acceptance statement, Ms. Palomares signed it. I believe that was in mid-January. We received a petition to revoke bond recently, which I went over with Ms. Palomares. I believe in the Probation Office's response to our request that acceptance of responsibility be given I think in that response the Probation Office mentioned that that would be denied based on her conduct while on bond.

And at this point we do not dispute, Your Honor, that conduct. I've gone over that conduct, which would be unlawful possession of an illegal substance. We're not disputing that, Your Honor, and we acknowledge that perhaps acceptance of responsibility would be foreclosed by some 5th

Circuit case law that says you can accept responsibility for the offense but nevertheless you would be denied acceptance if you commit something while on bond.

We would maintain, Your Honor, that this Defendant does deserve some level of consideration due to her circumstance and we would ask the Court to grant that exception.

THE COURT: And the circumstance here would be what?

MR. GONZALEZ: Your Honor, she's facing a mandatory minimum in this case, and I think that if the Court were to deny the acceptance of responsibility, her guideline would be above the mandatory minium, and so we think it would be dispositive, but we do acknowledge, Your Honor, that our arguments may be foreclosed.

THE COURT: All right. Okay. I'll hold off hearing -- making that determination until I hear from Ms. Palomares. So, Mr. Gonzalez, is there anything else that you want to say on behalf of Ms. Palomares?

MR. GONZALEZ: Yes, Your Honor, as far an allocution for Ms. Palomares. She understands, based on the Court's ruling in regards to safety valve that the mandatory minium applied in this case and we would be respectfully requesting Your Honor consider 120 months, in the alternative a low-end guideline.

She's 40 years old, she grew up in the area, Your

Honor. Her parents are aging, they have underlying health issues that the PSR noted. She does have three children and the two youngest are under five. She's going to be giving birth soon, Your Honor, in June, and she does suffer from underlying health conditions, and she does suffer mental health issues.

And she has one prior conviction on her record, and that was almost two decades ago. But it does of course count because of this revocation sentence from 2006 that revives this quite old prior conviction, Your Honor. And Ms. Palomares understands, I've spoken with her and she understands that she likely will be spending significant time in prison, into her 40s, if not all of her 40s. And given some of the underlying health issues that are reflected in the PSR I did encourage her to explore a compassionate release motion at some point in the future post-conviction.

And the main concern right now, Your Honor, is her pregnancy. And we do not contest the basis to revoke her bond, Your Honor, but we would respectfully request that the Court consider allowing her to be released under strict conditions to give birth and then to report for service of her sentence after she's recuperated. She believes, and the doctor believes this is a high-risk pregnancy and so we would respectfully the Court's consideration in that regard.

THE COURT: And you said she's due in June?

MR. GONZALEZ: Yes, Your Honor, that's my understanding.

THE COURT: All right. Thank you, Mr. Gonzalez.

Ms. Palomares, is there anything that you wish to say? And I have a question, you don't have to answer it if you choose not to, and that's okay, but I look at the record here as far as drug use and I know that as a young teenager there was a lot of drug usage, yes, but the record here says that most of that -- you stopped when you were around 18 and then not too long ago you actually went through a program.

So I don't see any recent drug addiction issues, of active use, and so in that regard that's why I'm troubled by this cocaine use when you're so close to being sentenced, and when you're pregnant too. So if you want to address that, I will consider it, but you don't have to and if you don't, I'm not holding it against you. But is there anything you wish to say at all, Ms. Palomares?

DEFENDANT PALOMARES: Yes, Your Honor. I did it because I wanted to end my life. The father of my children was very abusive towards me and --

THE COURT: I'm sorry, the father of your children was going to what?

DEFENDANT PALOMARES: (Crying.) He was very abusive towards me (indiscernible) will you take me, he stabbed me, and the cops never did anything, and so my parole officer

(indiscernible). And the fact that I tried to commit suicide, I wanted to numb myself, make (indiscernible).

(Crying.) (Indiscernible) me out. And when my other son that I adopted, he's the one that found me, trying to cut my veins, he (indiscernible). I'm sorry that -- I was a good mom -- that it's just that they had a lot of anger towards me because of his dad (indiscernible).

My parents, my dad found out he had cancer and he doesn't want to do nothing about it, he prefers to just go die. My mom, they found out she's dying, her heart is (indiscernible). My two little girls (indiscernible) and little baby (indiscernible) a little child that's not his fault (indiscernible). And then (indiscernible) .

(Crying.) (Indiscernible) good mom. I'm really sorry that I didn't have anything (indiscernible) help me take care of these girls. (Indiscernible) to fight for my life (indiscernible). (Crying.)

THE COURT: Ms. Palomares, why don't you just take a few moments and I'll take care of -- whatever time you need, I'm just having a hard time understanding when you have your hands close to your face. Just take your time.

DEFENDANT PALOMARES: (Crying.) (Indiscernible) told me that that they do appreciate everything I did for them. (Indiscernible) keep on fighting for my life for them, that I couldn't give up, that they were going to be there for

me no matter what. (Indiscernible) see me (indiscernible) they could. (Indiscernible). With my (indiscernible) I almost died and so this pregnancy I don't think that -- I'm not going to make it.

(Crying.) I want -- I want to be with my kids in case something happens in labor, and then if everything goes right (indiscernible). But that's all I care for these days is my family. (Indiscernible). I wish I could say a lot of things, but I can't, I would be putting my kids' lives in danger.

(Pause in the proceedings.)

THE COURT: Is there anything else, Ms. Palomares?

DEFENDANT PALOMARES: Oh, no.

THE COURT: All right.

DEFENDANT PALOMARES: (Crying.) Just that I'm really (indiscernible).

THE COURT: All right. And I don't mean to make your pain worse, but just so that I understand when you took the cocaine was when you were trying to commit suicide?

DEFENDANT PALOMARES: Yes, ma'am.

THE COURT: Okay. All right. Ms. Profit, the Court is inclined to give Ms. Palomares the two points for acceptance here. Do you have any response in that regard?

MS. PROFIT: Your Honor, the Government is more than willing to give her, in fact, three points for acceptance of

responsibility. I am still amazed that someone who's pregnant and someone who was concerned about her pregnancy and had, in fact, feelings about her pregnancy still ingested cocaine. And I'm saying that because I don't want it to appear that the Government by any way, shape or form is going to say that this is reasonable conduct, because it's not. And she was receiving mental health treatments. But I understand that she has a problem, or a lot of problems.

So I certainly -- you know, I think she should be get acceptance of responsibility, I think versus her relationship with the Government she has accepted responsibility.

THE COURT: All right. Thank you.

Then the Court will grant the two points and a third point as Ms. Profit is recommending. Then, Ms. Profit, is there anything else from the Government?

MS. PROFIT: No, I don't think that the -- I guess I would be very much -- even though she is involved in a high-risk pregnancy, I would be very much concerned about releasing her back into the community, Your Honor.

THE COURT: All right.

MS. PROFIT: I just -- I would be very much opposed to releasing her back into the community. I don't think that this is an ideal circumstance, but I don't think her being in the community to deliver is an ideal circumstance either.

THE COURT: All right. Thank you.

Ms. Palomares, in the guideline range, because the Court has determined that you are not eligible for the First Step Act safety valve ends up being basically 120 to 121 months. Do you understand that?

DEFENDANT PALOMARES: Yes, Your Honor.

THE COURT: Thank you. All right. Ms. Palomares, the Court has considered everything here. Quite frankly, Ms. Palomares, I think you have so many issues in your life that are separate and apart from you ending up before the Court on this offense that I'm going to I think require a lot of effort on your part, a lot of hard work and some time sadly because you will be doing some time here.

There's obviously been family issues from some time back because I doubt that, you know, all these things that you are saying sort of were going on between you and your son or something that developed overnight. But if they're maybe starting to see a little bit, and maybe you make some changes here, because, you know, it is I think hard on a child when their parent ends up in prison, and even when that parent has otherwise been a good decent parent, you know, the child is going to suffer and the child can be five years old or the child can be 25 years old and still suffers.

And sometimes, you know, they take it out on that parent because in a lot of ways, and quite frankly in the most

principal way, you did put yourself into the situation even though I know that there are many things that go into somebody ending up in front of a court. It's not just something that, you know, is a one-factor situation. But that does obviously make things very difficult, Ms. Palomares.

But I think, Ms. Palomares, if you and your son and you family are committed to trying to improve your family relationship, it can be done even though you will be spending at least the next 10 years in prison. And I have seen many defendants who come out from serving a long sentence like that under -- they're under supervision and they, you know, seem to be able to pull their families back together. So don't give up hope in that regard, Ms. Palomares, because if you work at it, and it will take some work, you can make it happen.

In this case, again, the Court does consider everything that is before the Court. The Court, having determined that you're ineligible for the First Step Act does believe a sentence at the low end of the guideline range, which is the mandatory minimum here, is warranted. The Court will sentence you to a term of 120 months in custody. I am also imposing here a five-year term of --

(Pause in the proceedings.)

THE COURT: Has she --

MR. GONZALEZ: Your Honor, Ms. --

THE COURT: -- collapsed? Because she --

MR. GONZALEZ: -- (indiscernible) she just collapsed on the floor.

THE COURT: But is she --

MR. GONZALEZ: And we called, medical staff will be here.

THE COURT: Okay. Thank you. Does she look like she's conscious or --

MR. GONZALEZ: Yes, ma'am, she's -- Your Honor, (indiscernible).

(Pause in the proceedings.)

MR. GONZALEZ: You might put her on mute, Your Honor, that's fine.

THE COURT: Actually, no, leave her. I want to continue here.

(Pause in the proceedings -- Defendant being attended to by medical staff.)

THE COURT: Ms. Palomares, are you able to hear me?

DEFENDANT PALOMARES: Yes.

THE COURT: Are you able to respond?

MR. GONZALEZ: Is it okay (indiscernible)?

THE COURT: Do you want to take just a moment, take some deep breaths?

(Pause in the proceedings.)

THE COURT: Is she -- she's conscious though. Correct?

MR. GONZALEZ: Yes, Your Honor.

THE COURT: All right. Some deep breaths, Ms. Palomares.

DEFENDANT PALOMARES: (Indiscernible).

THE COURT: Okay.

(Pause in the proceedings.)

MR. GONZALEZ: Can you stand up?

DEFENDANT PALOMARES: Uh-huh.

MR. GONZALEZ: Yes?

DEFENDANT PALOMARES: (Indiscernible).

THE COURT: Offer her the chair, please. Offer her the chair.

(Pause in the proceedings.)

THE COURT: Ms. Palomares?

DEFENDANT PALOMARES: Yes, Your Honor.

THE COURT: Can you just take some nice deep breaths.

DEFENDANT PALOMARES: Uh-huh.

(Pause in the proceedings.)

THE COURT: Why don't we do this, let's do this, there's a little bit more that I need to finish with here, but if she's able to walk and sit outside for a little bit, if she's able to sort of gather herself, then I can finish up with her.

If you feel like you need to have her medically

evaluated, then we can conclude this at some other time. But I'm obviously, one, not there until I get, you know, a really good sense, and two, I'm not a medical personnel. So I'll leave it up to the medical staff there to make that determination. But for the time being we'll give her a little bit of time and if can finish up, we'll come back. But if not, then we'll resume.

MR. GONZALEZ: (Indiscernible), Your Honor.

THE COURT: That she does want to finish?

MR. GONZALEZ: Yes, Your Honor.

THE COURT: All right. Ms. Palomares, you feel like you can finish up?

DEFENDANT PALOMARES: Yes, Your Honor.

THE COURT: All right. And you need a few more minutes or you feel like you can finish?

DEFENDANT PALOMARES: Go ahead.

THE COURT: Okay. Could I move -- can you move her just a little bit closer though so I can see her just a little bit better?

Can you move forward just a little bit, Ms. Palomares? All right.

MR. GONZALEZ: Is that fine?

THE COURT: That's good. Thank you. Okay.

All right. So, Ms. Palomares, we always have a Record that is made, so I'm going to sort of just comment on

what I observed here, and then I'll come back to you and see where we are.

So for the Record then, as the Court was pronouncing the sentence in this case, Ms. Palomares, who is appearing by video from the La Villa Detention Center, sort of moved over towards the wall, initially just sort of leaned against the wall and then slowly slid down to the wall. The deputies there, or staff were present and immediately observed that, confirmed that she had not passed out, that she was still conscious. The Court was able to hear her sobbing somewhat and was able to hear her and confirm that she had not passed out. We've taken a few moments here. Ms. Palomares is now seated with the assistance of the staff, there is a medical staff person there who is ready to assist further if need be.

But, Ms. Palomares, then do you feel that you are able to continue? I do have a few more things that I need to address with you.

DEFENDANT PALOMARES: Yes, Your Honor.

THE COURT: All right. And if you feel like you need the medical staff there, let me know and I'll make sure that they get there. Okay?

DEFENDANT PALOMARES: Yes.

THE COURT: All right.

MR. GONZALEZ: Yeah, that's fine, Judge.

THE COURT: All right. Okay. Ms. Palomares, so I

have pronounced your term of imprisonment, I pronounced a five-year term of supervised release. While you are under supervision you are not to commit another federal, state or local crime. You are to comply with the standard conditions adopted by the Court.

Additionally you are not to possess a firearm, ammunition, destructive device or any other danger weapon. You are to cooperate in the collection of a DNA sample. You are also to participate in a mental health program. All of those conditions are set out in the appendix to the Presentence Investigation Report.

In light of the recent drug use, the Court is also going to order that you participate in an outpatient substance abuse treatment program. The Court is also recommending that if that is available to you while in the custody of the Bureau of Prisons, you participate there.

The Court finds you do not have the ability to pay a fine and will waive the fine.

All right. And regarding Mr. Gonzalez's request that the Court allow you to be released pending your term of imprisonment to begin, the Court understands that you do have a high-risk pregnancy, Ms. Palomares, and it certainly does concern the Court.

But I'm also very concerned about what you revealed to the Court about your recent suicide attempt. I am more

concerned about you being released and none of these stressors are going to be removed from your life immediately and so I'm more concerned about a second attempt and, you know, what could happen to you and to your child that you are carrying than I am concerned about you being in custody and delivering your child even through the Detention Center because you will receive the proper medical attention while you are in custody.

And hopefully they can keep you safe such that you don't make another attempt and you of course will be attended to properly for the delivery of your child, so I am not granting the request to allow you to be released pending your delivery here.

You do have the right to appeal. If you wish to appeal, you need to advise your attorney. That appeal needs to be filed within 14 days. If you cannot afford an appeal, you may file for *in forma pauperis* in which case a clerk will file your notice of appeal and the Court will appoint appellate counsel.

Is there anything else, Ms. Palomares?

MR. GONZALEZ: Your Honor, I think there was another count that the Government may want to dismiss.

THE COURT: Ms. Profit?

MS. PROFIT: Yes, there is, Your Honor, but I didn't hear anything about the $100 special assessment.

THE COURT: Oh. The Court does order that,

Ms. Palomares, you need to pay -- you're ordered to pay the $100 special assessment. Thank you.

MS. PROFIT: And the Government does move to dismiss the remaining count, Your Honor.

THE COURT: It will be dismissed.

Ms. Palomares, do you feel like you're able to get up and walk or do you another few moments there?

DEFENDANT PALOMARES: (No audible response.)

THE COURT: Will staff help Ms. Palomares to make sure she doesn't collapse again? Thank you.

Thank you, Ms. Palomares.

MR. GONZALEZ: Thank you, Your Honor. That's all I have. May I be excused?

THE COURT: You may. Thank you.

MR. GONZALEZ: Thank you.

MS. PROFIT: Your Honor, I believe that that's all I have. May I be excused?

THE COURT: As well, yes.

MS. PROFIT: Thank you, Your Honor.

(Hearing adjourned 3:44 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability produced from the electronic sound recording of the proceedings in the above-entitled matter.

/S./ MARY D. HENRY

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DATE FILED: MAY 31, 2021