# APPENDIX

APPENDIX A

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File Name: 22a0271p.06

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

AARON M. HAYNES,

*Defendant-Appellant.*

No. 22-5132

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville.
No. 3:19-cr-00207-4—Thomas A. Varlan, District Judge.

Argued: October 20, 2022

Decided and Filed: December 19, 2022

Before: BATCHELDER, GRIFFIN, and KETHLEDGE, Circuit Judges.

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## COUNSEL

**ARGUED:** Rachel L. Wolf, Knoxville, Tennessee, for Appellant. Francesco Valentini, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Rachel L. Wolf, Knoxville, Tennessee, for Appellant. Francesco Valentini, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Brent Nelson Jones, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

KETHLEDGE, J., delivered the opinion of the court in which BATCHELDER, J., joined. GRIFFIN, J. (pp. 8–16), delivered a separate dissenting opinion.

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**OPINION**

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KETHLEDGE, Circuit Judge. Aaron Haynes argues that the district court misinterpreted 18 U.S.C. § 3553(f)(1) when it denied him "safety valve" relief from his mandatory-minimum sentence. We agree with the district court's interpretation of the statute and affirm.

I.

In 2018, Aaron Haynes began dealing drugs as part of a larger drug-trafficking conspiracy near Knoxville, Tennessee. About a year later a federal grand jury indicted him on drug charges. In April 2020, Haynes pled guilty to conspiring to possess with intent to distribute 40 grams or more of fentanyl and 100 grams or more of heroin, in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(B).

The quantity of drugs to which Haynes pled made him subject to a mandatory-minimum sentence of five years. *See* 21 U.S.C. § 841(b)(1)(B). At sentencing, however, Haynes argued that he was eligible for so-called "safety-valve" relief under 18 U.S.C. § 3553(f). That provision allows a district court to impose a sentence below an otherwise-applicable mandatory minimum if the defendant meets certain requirements. *See* 18 U.S.C. § 3553(f)(1)-(5). The district court held that Haynes had not met those requirements—specifically, the one enumerated in § 3553(f)(1)(B)—because he had a prior conviction for which he was assigned three points under the Sentencing Guidelines.

At sentencing, the government separately moved to afford Haynes a different kind of relief from the mandatory-minimum sentence, based on his "substantial assistance" in prosecuting other members of the conspiracy. 18 U.S.C. § 3553(e). The court granted that motion and sentenced Haynes to 32 months' imprisonment. In doing so, however, the court expressly considered Haynes's ineligibility for safety-valve relief under § 3553(f) as a factor favoring a longer sentence. This appeal followed.

II.

We review the court's interpretation of 18 U.S.C. § 3553(f)(1) de novo. *See United States v. Miller*, 734 F.3d 530, 539 (6th Cir. 2013).

Section 3553(f)(1) provides in relevant part:

> (f) the court shall impose a sentence . . . without regard to any statutory minimum sentence, 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[.][1]

[1]Section 3553(f) reads in its entirety as follows:

> (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 . . . 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) 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.
>
> Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

The question presented is whether—as the government argues and the district court held—this provision requires the defendant to show that he has *none* of the criminal history described in subsections (A)-(C); or whether instead—as Haynes argues—the defendant must show only that he lacks the criminal history described in *any one* of those subsections. The answer to that question, everyone agrees, depends on the meaning of the word "and" as used in § 3553(f)(1)(B).

It turns out that "and" has more meanings than one might suppose. By way of background, grammatical rules are an archetype of rules of conduct with which we often comply without conscious awareness of doing so. Small children comply with any number of grammatical rules without awareness even of their existence; and adults comply with rules concerning the pluperfect and subjunctive tenses, for example, without consciously knowing what those rules are. We likewise *understand* language according to these same grammatical rules, again often without awareness of their existence. Thus, a particular grammatical rule might strike us as impossibly esoteric, and yet shape our understanding of language every day. The task of determining the ordinary meaning of a word or phrase, therefore, is sometimes one of excavating—and taking conscious account of—rules as to which our compliance is often unconscious.

For all but seasoned grammarians, such is the case here. Everyone agrees that, as used in § 3553(f)(1), the word "and" is conjunctive rather than disjunctive. The relevant grammatical rule is that, "[w]hen used as a conjunctive, the word 'and' has 'a distributive (or several) sense as well as a joint sense.'" *United States v. Pulsifer*, 39 F.4th 1018, 1021 (8th Cir. 2022) (quoting *Garner's Dictionary of Legal Usage* 639 (3d ed. 2011)). The specific question here is which sense of "and"—distributive or joint—is used in § 3553(f)(1)(B).

Judge Rogers has provided an excellent illustration of the distributive and joint senses of "and." Suppose a host asks two guests what they like to drink. One guest answers "bourbon and water"; the other, "beer and wine." For both answers the distributive and joint senses of the word "and" are grammatically sound. But the guest who likes "bourbon and water" will probably be disappointed if the host hands her a glass of water alone. That is because her answer very likely uses "and" in the joint sense, meaning she likes bourbon and water *together*. Yet the

latter guest will likely be revolted if the host hands him a glass of Budweiser and Bordeaux combined; for his answer very likely uses "and" in the distributive (or several) sense, meaning "I like beer and I like wine." *See OfficeMax, Inc. v. United States*, 428 F.3d 583, 600 (6th Cir. 2005) (Rogers, J., dissenting); *see also, e.g.*, R. Huddleston & G. Pullum, The Cambridge Grammar of the English Language, ch. 15, § 1.3, pp. 1280-82 (2002). No rule of construction tells the host which meaning each guest intends; yet virtually no one would say that either answer is ambiguous. That is simply because of the *content* of each answer: for the bourbon-and-water answer, as a matter of common sense or experience, the joint sense of "and" is more plausible than the distributive; and for the beer-and-wine answer, the opposite is true.

Here, the situation is similar. As a grammatical matter, § 3553(f)(1) could require, as Haynes argues, that the "defendant does not have" "more than 4 criminal history points" and "a prior 3-point offense" and "a prior 2-point violent offense" *together* in his criminal record—which would be the joint sense of the word "and." Thus, on that reading, a defendant is eligible for safety-valve relief if his record lacks *any* of those things. Or, as the government argues, § 3553(f)(1) could use the word "and" in the distributive sense, so that "and" serves as a shorthand for repeating (or "distributing") the prefatory clause before each of the subsections that follows. Thus, on that reading, a defendant is eligible for safety-valve relief only if the defendant does not have "more than 4 criminal history points" *and* the defendant does not have "a prior 3-point offense" *and* the defendant does not have "a prior 2-point violent offense[.]"

Both meanings are grammatically sound. Moreover—with one important exception, discussed below—no rule of construction strongly favors one meaning over the other. Consider, for example, the presumption that "identical words used in different parts of the same act are intended to have the same meaning." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 319 (2014) (cleaned up). That rule is useless here because (as Judge Rogers's example illustrates) one can toggle between the joint and distributive senses of "and" in close proximity to each other. In this respect, the word "and" is simply different from the more specialized words to which that presumption is typically applied.

The reality is that—as with Judge Rogers's example—the respective content of each proposed meaning of § 3553(f)(1) shows that one sense of the word "and" is more plausible than

the other. In making that judgment, of course, we must be careful not to conflate plausibility with our own sense of good policy. The interpretive question, rather, is how the words of § 3553(f)(1) would be understood by an ordinary reader. And—whatever the underlying policy reflected in each interpretation—an ordinary reader would favor a logically coherent interpretation over a seemingly arbitrary one.

Here, the government's interpretation of § 3553(f)(1) is logically coherent. Again by way of background, when § 3553(f)(1) was first enacted in 1994, it provided that any defendant with "more than one criminal history point" was ineligible for safety-valve relief. *See* 18 U.S.C. § 3553(f)(1) (1994). Congress amended § 3553(f)(1) in the First Step Act of 2018 to read as it does now. Under the government's interpretation—for a defendant to obtain relief from an otherwise mandatory-minimum sentence—the defendant must not have any of three disqualifying conditions in his criminal record: first, "more than 4 criminal history points," itself a fourfold increase over the prior cap; second, a prior offense serious enough to add three points to his criminal record; and third, a prior 2-point "violent offense[.]" Each of those conditions on its face is quite plausibly an independent ground to deny a defendant the extraordinary relief afforded by the safety valve—which means this reading is logically coherent.

The same is not true of Haynes's interpretation, which would require that all these conditions be present for a defendant to be ineligible for safety-valve relief. Consider, for example, a defendant with 25 criminal history points, generated in part by six convictions for assault with a deadly weapon and six convictions for domestic assault. (Both can be two-point violent offenses. *See, e.g.*, *United States v. Delgado-Hernandez*, 646 F.3d 562, 564 (8th Cir. 2011).) Under Haynes's interpretation, this defendant would qualify for safety-valve relief because of the fortuity that his criminal record lacks "a prior 3-point offense[.]" 18 U.S.C. § 3553(f)(1)(B). Or consider an incorrigible recidivist with, say, 24 criminal-history points, comprising a half-dozen convictions for robbery and two convictions for possession of explosives with intent to terrorize. (Both are often three-point offenses. *See, e.g.*, *United States v. Henderson*, 209 F.3d 614, 616 (6th Cir. 2000); *United States v. Priest*, 447 F. App'x 682, 684 (6th Cir. 2011).) This defendant too would be eligible for safety-valve relief, for want of a prior *two*-point violent offense. Results like these appear arbitrary enough to be implausible—which

makes Haynes's interpretation akin to an interpretation of beer-and-wine in the joint sense rather than the distributive one. Haynes does offer a thoughtful response: namely that the district court serves as a gatekeeper in cases where § 3553(f)(1) generates results as bizarre as these. But an ordinary reader would expect that § 3553(f)(1) itself would serve as a gatekeeper—and not an arbitrary one. That indeed is the whole point of the provision. The government's reading of § 3553(f)(1) is therefore better than Haynes's reading.

That conclusion is confirmed by a rule of statutory construction, namely the "cardinal principle" that courts "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). We agree with the Eighth Circuit that, of the interpretations on offer here, "[o]nly the distributive interpretation avoids surplusage." *Pulsifer*, 39 F.4th at 1022. A defendant with "a prior 2-point violent offense" and "a prior 3-point offense" by definition would have "more than 4 criminal history points"—meaning that, under Haynes's interpretation, § 3553(f)(1)(A) would lack any practical effect. Haynes responds that a defendant might have a prior 2-point violent offense or 3-point offense that is too old to count toward his criminal-history points. *See* U.S.S.G. § 4A1.2(e) (providing that certain prior sentences imposed more than ten or fifteen years before the current offense do not count toward the defendant's criminal history). But § 3553(f)(1) refers only to "prior 3-point" and "prior 2-point violent" offenses "as determined under the sentencing guidelines"—which means *all* the Guidelines, including § 4A1.2(e). And a prior offense that counts for zero points under that guideline is not a "3-point" or "2-point" offense "as determined under the sentencing guidelines[.]" 18 U.S.C. § 3553(f)(1)(B), (C). The district court was correct to find Haynes ineligible for safety-valve relief.

* * *

The district court's judgment is affirmed.

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**DISSENT**

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GRIFFIN, Circuit Judge, dissenting.

Today's case presents a basic issue of statutory interpretation: does "and" mean "and"? This issue arises in the context of 18 U.S.C. § 3553(f)'s "safety valve" provision, which provides that a defendant is ineligible for relief from a mandatory-minimum sentence if he has "more than 4 criminal history points," "a prior 3-point offense, . . . *and*," "a prior 2-point violent offense." § 3553(f)(1)(A)–(C) (emphasis added). The majority's conclusion, though couched in other terms, is that "and" means "or" in this context. Because I conclude that "and" should indeed mean "and," I respectfully dissent.

I.

As amended by the First Step Act of 2018, § 3553(f) provides that a district court "shall impose a sentence . . . without regard to any statutory minimum sentence, if the court finds" that the defendant meets five requirements:

> (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) 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.

18 U.S.C. § 3553(f) (emphasis added).

The requirements in subsection (f)(1) are the basis of the dispute before us. It is undisputed that defendant Aaron Haynes has a 3-point felony conviction on his record, but neither a 2-point offense nor more than 4 criminal history points. Thus, whether the list in subsection (f)(1) is conjunctive or disjunctive, distributive or joint, is dispositive—Haynes prevails if the list is conjunctive, but he loses if it is disjunctive (or distributive).

Fortunately, we are not the first court to consider this issue, nor (hopefully) will we be the last—whether one is eligible for safety-value relief is now largely a function of geography. I agree with the Eleventh Circuit's en banc opinion in *United States v. Garcon*, — F.4th —, 2022 WL 17479829 (11th Cir. 2022) (en banc), with the conclusion reached by the Ninth Circuit in *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), and with other dissenting colleagues in the Fifth and Seventh Circuits, namely Judge Willett in *United States v. Palomares*, 52 F.4th 640, 652–59 (5th Cir. 2022), and Judge Wood in *United States v. Pace*, 48 F.4th 741, 759–68 (7th Cir. 2022). Their interpretation—that § 3553(f)(1)'s "and" is truly conjunctive—harmonizes most canons of statutory interpretation and gives effect to the language Congress used.

In discerning the ordinary meaning of "and," we have recognized that it generally requires a conjunctive reading. "[D]ictionary definitions, legal usage guides and case law compel us to start from the premise that 'and' usually does not mean 'or'"; rather it "presumptively should be read in its 'ordinary' conjunctive sense unless the 'context' in which the term is used or 'other provisions of the statute' dictate a contrary interpretation." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 588–89 (6th Cir. 2005) (citations omitted). This indicates that the "and" here presumptively joins the three requirements together. But how? *Reading Law* provides the answer: "Under the conjunctive/disjunctive canon, *and* combines items while *or*

creates alternatives." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, 116 (Thompson/West 2012). Here, the statute is not a normal list (i.e., you must have A, B, and/or C) or even a basic prohibition (i.e., you must not do A, B, and/or C), but rather a negative proof (i.e., you must *have not* A, B, and/or C). *See id*. at 116–21. When a negative proof employs the word "and," it is conjunctive; thus, "you must prove that you did not do *all three*." *Id*. at 120 (emphasis added). This is contrasted with the disjunctive negative proof where the defendant "must have done none" of the prohibitions. *Id*. Therefore, the ordinary meaning of "and" is that it requires the defendant to have done "all three" of the requirements in § 3553(f)(1) to be excluded from consideration.

"Context confirms this reading." *Garcon*, — F.4th at —, 2022 WL 17479829, at *3. Applying the ordinary reading of "and" in this context draws support from the canon of consistent usage. "Similar language contained within the same section of a statute must be accorded a consistent meaning." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998). Subsection (f) has two lists of criteria joined together by "and." One is the list in subsection (f)(1) that is the focus of our dispute; the other is in the broader list in subsection (f) itself. The canon of consistent usage explains that the two "ands," in the same section, nonetheless, should be accorded a consistent meaning. *See id*.; *see also Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (rejecting a particular interpretation of statute because "we cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings *in the same section* of the statute" (emphasis added)). Here, no one disputes that the broader list in subsection (f) is a conjunctive one—a defendant must satisfy each one of these criteria to be eligible for safety valve relief. Thus, it makes logical sense that the "and" in subsection (f)(1) be interpreted in the same conjunctive manner as "and" in subsection (f)—doing otherwise creates discord within the same section.

The thrust of the government's response to these arguments is that requiring "and" to truly mean "and" would result in § 3553(f)(1)(A) being surplusage. "[O]ne of the most basic interpretive canons," the presumption against surplusage means that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citations

omitted). This argument is intuitive: three plus two is five, which is always more than four. And the Supreme Court has recognized that we are "often compelled to construe '*or*' as meaning '*and*,' and again '*and*' as meaning '*or*.'" *United States v. Fisk*, 70 U.S. 445, 447 (1865). It has also formed the basis for most decisions on this issue in the government's favor. *See, e.g.*, *Palomares*, 52 F.4th at 644–47; *Pace*, 48 F.4th at 754; *United States v. Pulsifer*, 39 F.4th 1018, 1021–22 (8th Cir. 2022).

Determining whether subpart (A) has meaning, and what that meaning is, requires first determining exactly what subparts (B) and (C) require. Subpart (B) requires a defendant not to have "a prior 3-point offense, as determined under the sentencing guidelines" and subpart (C) similarly requires him or her not to have "a prior 2-point violent offense, as determined under the sentencing guidelines." These two sections, per their own terms, focus on a prior "*offense*." This is different from subsection (A), which focuses on "criminal history *points*." Because these terms are materially different, "the presumption is that the different term denotes a different idea." *Southwest Airlines Co. v. Saxon*, 142 S.Ct. 1783, 1789 (2022) (quoting *Reading Law*, 170).

Next, both (B) and (C) incorporate the Guidelines, which provide the following calculations:

> (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
>
> (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
>
> (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.
>
> (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
>
> (e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

U.S.S.G. § 4A1.1. However, not all offenses that a defendant has ever committed will be used to assess criminal history points. Section 4A1.2 lays out certain exclusions or limitations on assessing points. For example, subsection (c) explains that "all felony offenses are counted," but others for misdemeanor and petty crimes are not. U.S.S.G. § 4A1.2(c). There are time limitations too. Felonies (i.e., crimes with a sentence of a year and a month) are counted if the defendant committed the offense, or served any part of a resulting sentence, within 15 years of the instant offense. U.S.S.G. § 4A1.2(e)(1). Other sentences have a 10-year limit, and "[a]ny prior sentence not within the time periods specified above is not counted." U.S.S.G. § 4A1.2(e)(2)–(3). The same section also exempts sentences imposed by certain courts—for example, sentences resulting from a juvenile "diversionary disposition," a "summary court martial," a "foreign conviction[]," a "tribal court conviction[]," and an "expunged conviction[]" are not counted. U.S.S.G. § 4A1.2(f)–(j).

Considering the Guidelines reveals that interpretations of subparts (B) and (C) exist that would give effect to all § 3553(f)'s provisions, such that "no part will be inoperative or superfluous, void or insignificant." *Corley*, 556 U.S. at 314. Subparts (B) and (C) focus on criminal *offenses*, while subpart (A) focuses on criminal history *points*. All three direct the reader to determine this "under the sentencing guidelines." Under § 4A1.1, points are assessed for offenses which carry certain sentence lengths, but under § 4A1.2, some of these points do not count towards a defendant's criminal history points. Thus, a defendant may have committed a 2- or 3-point *offense* without that offense being used to calculate criminal history *points*. Judge Wood cogently outlined several examples of when this could occur:

> • A defendant who finished serving a sentence for a two-point violent offense 11 years ago, thus satisfying subpart (C), and who has a more recent three-point nonviolent offense (satisfying (B)), would not satisfy (A). His "criminal history points . . . as determined under the sentencing guidelines" would be three, because the guidelines instruct that two-point or lower sentences older than 10 years should not be included in the criminal history points calculation. See *Id.* §§ 4A1.2(e)(2), (3).
>
> • Similarly, a defendant who finished serving a sentence for a three-point offense 21 years ago (satisfying (B)) and a two-point violent offense last year (satisfying (C)), would not satisfy (A). His "criminal history points . . . as determined under the sentencing guidelines" would be two, because the

> guidelines instruct that no sentence older than 15 years should be included in the calculation. See *Id.* §§ 4A1.2 (e)(1), (3).
>
> • To the same effect, a defendant who committed a three-point offense (satisfying (B)), and a two-point violent offense adjudicated by a tribal court (satisfying (C)), would not satisfy (A). His "criminal history points . . . as determined under the sentencing guidelines" would be three because the guidelines instruct that points resulting from tribal court convictions be excluded. See *Id.* § 4A1.2(i).

*Pace*, 48 F.4th at 763–64 (Wood, J., dissenting). And, as the Eleventh Circuit explained, a single *offense* could result in multiple sentences for separate crimes, but the Guidelines treat those offenses as a single sentence for scoring *points*. *See Garcon*, — F.4th at —, 2022 WL 17479829, at *6. As these examples demonstrate, circumstances exist where a defendant's record contains a particular *offense* that would normally carry with it a point assessment, but that offense is not counted as part of the defendant's criminal *points*. So a defendant may have on his or her record a 2-point *offense* and a 3-point *offense* but still have less than 4 criminal history *points*. In this interpretation, subpart (A) is not surplusage.

This interpretation harmonizes all three canons and, thus, should carry the day. First, it gives effect to the plain meaning of the words chosen by Congress. "And" means "and" in its normal conjunctive sense, and both "points" in subpart (A) and "offense" in subparts (B) and (C) are given their separate meanings. Second, it allows "and" to have a consistent usage throughout subsection (f)—the lists in subsection (f)(1)(A) and (f)(1) are both conjunctive. And third, it avoids surplusage because subparts (A), (B), and (C) still have independent functions. Subpart (A) ensures that a defendant does not have too many criminal history points, while subparts (B) and (C) ensure that a defendant has not committed both felony and non-felony offenses. Together, this excludes defendants from safety-valve consideration if they have committed too many types of offenses. And, as Judge Willett reasoned, a counter-interpretation runs afoul of these canons in other ways, such as by failing to read "and" out of § 3553(f)(1) entirely or failing to give consistent effect to other times Congress used "and" and "or" in § 3553. *See Palomares*, 52 F.4th at 656–58 (Willett, J., dissenting). Consequently, this interpretation is preferrable as it provides the most logically coherent interpretation of the statute and the canons we use to interpret it.

II.

The majority disagrees. It concludes that the list is conjunctive, yet also distributive. To reach this conclusion, the majority relies on context to conclude that the only "logically coherent" interpretation of the statute is the one advanced by the government—the defendant must not have each individual prohibition. But the majority's interpretation relies on a host of interpretive problems to reach its conclusion.

For one, the majority ignores the plain language of the statute, concluding instead that "and" is conjunctive but also distributive by relying on the "content" of the lists at issue. But the ordinary meaning of the word "and" is that it usually *joins* elements together. *See And*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/and (last accessed December 1, 2022) (defining "and" as "used to join sentence elements of the same grammatical rank or function"). The majority explains this normal meaning away, stating that "and" can have "a distributive (or several) sense as well as a joint sense" based purely on the "content" of the list at issue. *See Pulsifer*, 39 F.4th at 1021 (quoting *Garner's Dictionary of Legal Usage* 639 (3d ed. 2011)). True, "and" may sometimes have a distributive sense, but that is not its normal, usual meaning, largely because a conjunctive-yet-distributive sense of "and" transforms it into "or." *See Garcon*, — F.4th at —, 2022 WL 17479829, at *4 ("Essentially, the government['s argument] invites us to read 'and' to mean 'or.'"). And "[w]e give our language, and our language-dependent legal system, a body blow when we hold that it is reasonable to read '*or*' for '*and*.'" *Garner's Dictionary of Legal Usage* 56 (citation omitted). While § 3553(f) is not a masterpiece of draftsmanship, Congress used the words that it did, and we must apply those terms as written.

According to the majority opinion, the purported "content" indicating a distributive sense of "and" is that Haynes's interpretation is not "logically coherent" because it would allow "incorrigible recidivist[s]" to be eligible for safety valve relief. But there is nothing incoherent, arbitrary, or absurd in excluding only those defendants who have both a 2- and 3-point offense from safety-valve relief. As described in *Lopez*, the statute exempts defendants from consideration if they have too many types of recent offenses. *See* 998 F.3d at 439. "Congress could have made a policy decision that the safety valve should focus more on the defendant's

instant offense rather than the defendant's prior criminal history." *Id*. The majority's description to the contrary ignores § 3553(f) as a whole, for other provisions of the statute exclude violent offenders from safety-valve consideration. *See* § 3553(f)(2)–(3). Further, the entire subsection, not just § 3553(f)(1), is the "gatekeeper" for safety-valve relief, meaning that this interpretation is far from "arbitrary." The statute says what it says, and its "content" supports Haynes's interpretation. Because of this, the majority's acceptance of the government's interpretation is no more than doing what it says it is not: "conflat[ing] plausibility with our own sense of good policy." *Cf. Lopez*, 998 F.3d at 440 ("The government's request . . . is simply a request for a swap of policy preferences.").

Finally, even if § 3553(f)(1)(A) *were* surplusage, that should not change our conclusion. Despite the majority's notation to the contrary, rules of construction *do* strongly favor one reading over another. As described above, "and" should mean "and" given the canons of ordinary meaning and consistent usage—they support reading "and" as conjunctive given that subsection (f) is a conjunctive list. Plus, surplusage is far from being forbidden: "[r]edundancies across statutes are not unusual events in drafting," *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (citations omitted), and, as such, "a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage," *Reading Law*, 174. *See also Lopez*, 998 F.3d at 445–46 (Smith, J., concurring) (concluding that § 3553(f)(1)(A) is surplusage yet that subsection (f)(1) is still conjunctive). Therefore, ample logic exists that supports Haynes's interpretation of the statue, even if subsection (f)(1)(A) were surplusage. Thus, the purported "logical consistency" in the government's argument is no more than a fallacy as "[t]he anti-surplusage canon gives us no license to skirt unambiguous text." *Garcon*, — F.4th at —, 2022 WL 17479829, at *12 (Newsom, J., concurring).

III.

In summary, "[t]here is nothing irrational, absurd, superfluous, or otherwise faulty about applying section 3553(f)(1) straightforwardly, allowing the word 'and' to mean 'and,' and observing the distinctions drawn in the Sentencing Guidelines between offenses and the number of criminal history points that are countable." *Pace*, 48 F.4th at 768 (Wood, J., dissenting). "If [Congress] 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.'" *Palomares*, 52 F.4th at 652–53 (Willett, J., dissenting). In other words, "'[a]nd' means 'and.'" *Garcon*, — F.4th at —, 2022 WL 17479829, at *2. Thus, I respectfully dissent.

# UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE KNOXVILLE DIVISION

UNITED STATES OF AMERICA

v.

AARON M. HAYNES

USM#54867-074

**JUDGMENT IN A CRIMINAL CASE**

Case Number: **3:19-CR-00207-TAV-JEM(4)**

**Rachel L Wolf**
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s): 1 of the Indictment
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☐ was found guilty on count(s) after a plea of not guilty.

**ACCORDINGLY**, the court has adjudicated that the defendant is guilty of the following offense(s):

| **Title & Section and Nature of Offense** | **Date Violation Concluded** | **Count** |
|---|---|---|
| 21 U.S.C. §§ 846, 841(a)(1) and 21 U.S.C. § 841(b)(1)(B) (Lesser Included Offense) Conspiracy to Distribute and Possess with Intent to Distribute 40 Grams or More of Fentanyl, and 100 Grams or More of Heroin. | 04/23/2019 | 1 |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. § 3553.

☐ The defendant has been found not guilty on count(s).
☐ All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall 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 shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

**February 7, 2022**
Date of Imposition of Judgment

s/ Thomas A. Varlan
Signature of Judicial Officer

**Thomas A Varlan, United States District Judge**
Name & Title of Judicial Officer

**February 7, 2022**
Date

# IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 32 months.

☒ The court makes the following recommendations to the Bureau of Prisons: that the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons' Institution Residential Drug Abuse Treatment Program. It is further recommended that the defendant be designated to Lexington

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on .

☒ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

# RETURN

I have executed this judgment as follows:

Defendant delivered on
to ,
at ,
with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

# SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **four (4) years**.

# MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentencing 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 which 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

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.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the mandatory, standard, and any special conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

# SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as you are released from the program by the probation officer.

2. You must submit your person, property, house, residence, vehicle, papers, [computers (as defined in Title 18 U.S.C. § 1030(e)(1), other electronic communications or data storage devices or media,] or office, to a search conducted by a United States probation officer or designee. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

# CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

| | Assessment | Restitution | Fine | AVAA Assessment* | JVTA Assessment ** |
|---|---|---|---|---|---|
| **TOTALS** | $100.00 | $.00 | $.00 | $.00 | $.00 |

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* 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.

☐ 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 under the Schedule of Payments sheet of this judgment 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:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** 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.

# 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 *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

**D** ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

**E** ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* 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:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **U.S. District Court, 800 Market Street, Suite 130, Howard H. Baker, Jr. United States Courthouse, Knoxville, TN, 37902**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

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

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
☐ 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 EASTERN DISTRICT OF TENNESSEE

AT KNOXVILLE, TENNESSEE

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Government,<br><br>vs.<br><br>AARON M. HAYNES,<br><br>Defendant. | Case No. 3:19-CR-207 |

**SENTENCING HEARING**
**BEFORE THE HONORABLE THOMAS A. VARLAN**

**February 7, 2022**
**3:02 p.m.**

APPEARANCES:

ON BEHALF OF THE GOVERNMENT:

BRENT NELSON JONES, ESQ.
U.S. Department of Justice
Office of U.S. Attorney
800 Market Street, Suite 211
Knoxville, TN 37902

ON BEHALF OF THE DEFENDANT:

RACHEL L. WOLF, ESQ.
Law Office of Rachel Wolf
706 Walnut Street, Suite 401
Knoxville, TN 37902

REPORTED BY:

Kara L. Nagorny, RMR, CRR
P.O. Box 1121
Knoxville, TN 37901
(865) 264-9628

(Proceedings commenced at 3:02 p.m.)

THE COURTROOM DEPUTY: All rise. This honorable court is again in session, the Honorable Thomas A. Varlan, United States District Judge presiding. Please come to order and be seated.

THE COURT: Thank you. Good afternoon. Let's call up the next case.

THE COURTROOM DEPUTY: Criminal action 3:19-CR-207, United States of America versus Aaron Haynes. Mr. Brent Jones is here on behalf of the government. Is the government ready to proceed?

MR. JONES: Yes, Your Honor.

THE COURTROOM DEPUTY: Ms. Rachel Wolf is here on behalf of the defendant. Is the defendant ready to proceed?

MS. WOLF: Yes, Your Honor.

THE COURT: All right. Thank you. We're here for imposition of judgment and sentence in this case. We'll begin with you, Mr. Haynes. To confirm, you continue to be represented this afternoon by Ms. Wolf; is that correct?

THE DEFENDANT: Yes, Judge.

THE COURT: Mr. Haynes, on April 5, 2021, you pled guilty to the lesser included offense as to Count 1 of the indictment in this case charging you with conspiracy to distribute and possess with intent to distribute 40 grams or more of fentanyl and 100 grams or more of heroin in violation of

21 United States Code §§ 846 and 841. Do you understand the offense requires a sentence of a term of imprisonment of at least five years up to 40 years, supervised release of at least four years up to life, a fine of up to 5 million dollars, forfeiture, and a $100 assessment?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Haynes, have you received and had the opportunity to read and discuss the presentence report in this case with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Ms. Wolf, have you received the presentence report and reviewed it with the defendant?

MS. WOLF: Yes, Your Honor.

THE COURT: And I believe the only objection the defendant lodged is to I guess the safety valve eligibility or lack thereof calculation?

MS. WOLF: Yes, Your Honor.

THE COURT: Other than that, are there any objections?

MS. WOLF: No, Your Honor.

THE COURT: All right. Thank you. We'll put that aside for just a moment. Mr. Jones, have you received the presentence report?

MR. JONES: Yes, Your Honor.

THE COURT: And does the government have any objections?

MR. JONES: No objections, Your Honor.

THE COURT: All right. So the only objection before the Court is the defendant's argument that the presentence report should have applied the safety valve set forth in § 3553(f). Basically are we to adopt a conjunctive reading as the Ninth Circuit apparently suggests or a disjunctive reading as the Tenth Circuit suggests and I believe as this Court is partly aware applied in an earlier case. So I guess with all that in mind, is there anything further you want to argue or point out to --

MS. WOLF: I'm just going to hold on to my objection, Your Honor.

THE COURT: Mr. Jones, anything further?

MR. JONES: Same here, Your Honor. It's my understanding that the *U.S. versus Garcon* case has been as Ms. Wolf, as Ms. Wolf filed in one of her attachments to her sentencing memorandum, obviously that case was vacated for an en banc decision. And so our position, I think the Department of Justice's position as well as our position here today is we take, even though that case was vacated or that decision was vacated, we believe the judgment in that case was sound as that it should be read disjunctively because that makes the most sense when looking at the context of the statute. So thank you, Your Honor.

THE COURT: Thank you. And I'm not going to go

through all the legal analysis other than to say I've certainly reviewed the parties' arguments and reviewed the two appellate cases, neither of which is from the Sixth Circuit, but also the various district court cases that apparently have, a limited number of district court cases that have addressed this issue.

So in short summation, as we noted, the Eleventh Circuit in *United States versus Garcon*, G-A-R-C-O-N, held that based on the text and structure of § 3553(f)(1)(B) quote "and," close quote, within there should be read in the disjunctive and otherwise certain sections, particularly subsection (A), it would be seen as superfluous.

Three days after that initial decision, the Nineth Circuit held that the quote "and," close quote, in 3553(f)(1) is, according to the Nineth Circuit quote, "unambiguously conjunctive," close quote. And following that reading, if the Court followed that reading, the defendant would have safety valve eligibility in this case.

At the time of this Court's earlier decision on this issue in *United States V. Dixon*, 3:19-CR-213-5, the Court was aware at least of three other district court opinions that had addressed this issue, and each read the provision disjunctively as the Tenth Circuit did in *Garcon*. The Court is aware as the parties have discussed that the Eleventh Circuit granted, has granted en banc review of *Garcon*, and therefore, that panel decision was vacated as of January 21, 2022.

However, considering the reasoning of the initial panel in that case, also reviewing the Nineth Circuit opinion but also looking at district court opinions both before and after the granting of en banc review in *Garcon*, it does appear that the greater weight of authority suggests a disjunctive reading of the statute, and the Court has reviewed all those district judge opinions. They're not all in court, but the limited ones the Court has reviewed does appear to fall within the initial reading of *Garcon* as well as following this Court's reasoning in the *Dixon* case.

So after consideration, the Court ultimately believes looking at the various statutory canons that are discussed, the legislative history, and what appears to be the near consensus other than the Nineth circuit on this issue, the Court's prior application of the statute as disjunctive in *Dixon* and recognizing the lack of Sixth Circuit jurisprudence from an appellate standpoint in this case, I'm going to find, again, that 3553(f)(1) should be read disjunctive. And therefore, the defendant is not eligible for safety valve relief as is reflected in the presentence report, and therefore, the Court will overrule that objection from the defendant.

MS. WOLF: Your Honor, can I get a ruling on if he, if Your Honor was following the Nineth Circuit whether or not he would be eligible?

THE COURT: You want a -- is that an advisory ruling?

You know, the Nineth Circuit, there's -- I think in that one, there was, was there one concurrence in the Nineth Circuit and there's various aspects to that? No. I'm sorry. That was in the *Garcon* case.

MR. JONES: *Garcon* case.

THE COURT: Judge Branch concurred. I think --

MS. WOLF: Just more for his I guess appeal purposes. I had just put in my motion that it's my understanding that if, you know, it was read in that way, he would have satisfied the safety valve, but if it was read disjunctively, then he would not.

THE COURT: Would the government agree with a conjunctive reading would result in safety valve eligibility? I recall now looking in my notes there was a concurrence and dissent in part, concurrence in the Nineth Circuit opinion as well from Judge Smith. So he read it a little bit differently from the majority, so.

MR. JONES: I believe so, Your Honor.

MS. WOLF: I don't think -- I think we can all agree he wasn't a leader, he didn't threaten violence, and I think it was the points were the sole issue.

MR. JONES: I do believe in Mr. Haynes's case that he only has a three-point -- the three-point offense is what makes him not eligible for safety valve.

THE COURT: And if we read the statute or the "and"

word conjunctively, he more than likely would be eligible.

MR. JONES: More than likely would be.

THE COURT: I think the parties would agree.

MR. JONES: Yes, Your Honor.

MS. WOLF: Thank you, Your Honor.

THE COURT: Let me make sure I asked you, Mr. Jones. Does the, has the government reviewed, received the presentence report, and does the government have any objections?

MR. JONES: Yes, Your Honor. You asked. No objection.

THE COURT: All right. Does the government have a motion for third level of acceptance of responsibility pursuant to Sentencing Guideline § 3E1.1(b)?

MR. JONES: Yes, Your Honor. So moved.

THE COURT: All right. Without objection, that motion will be granted. So we have before it what would now be the restricted guideline range of 60 months. The government has a motion for downward departure and a recommendation I believe for 42 months. Mr. Jones, anything further you'd like to add in regard to the government's motion and/ or sentencing in this case?

MR. JONES: Yes, Your Honor. I would just, I would just say, obviously Mr. Haynes, he was indicted in a later indictment, not in the original indictment with Mr., with Mr. Knox or the superseding indictment in that case in

3:19-CR-65, but he was involved in the Knox conspiracy.

Mr. Haynes was on the lower end of the culpability level in this case. Obviously he is still facing 60 months because of his criminal history, but even though he was on the lower end of the culpability level, Mr. Haynes did, from the moment he first spoke with me and started working with Mr., Ms. Wolf and spoke with me, he was forthcoming and honest about all information that he could provide in this case. He did have information against both Mr. Knox and Mr. Crawford as well as others, but I think when he spoke with the government, some of those defendants had already pled; but Mr. Knox and Mr. Crawford were still facing trial, and so this, his, he was willing to testify. The United States was considering calling Mr. Haynes as a witness in that case, in either of those cases against those defendants if they decided to move forward to trial and which they did until very recently.

And so it's my understanding that Mr. Haynes has been on pretrial release. Well, he has been on pretrial release, but he's been complying with his conditions of release and that that is a testament to Mr. Haynes's character. We -- based on, you know, the assistance he did provide, it was timely in that he was still willing to provide testimony against two defendants, at least two defendants in this case, and so based on that, we recommended the, we think a 30 percent departure is appropriate in this case, and that's all we have at this time, Your Honor.

THE COURT: Thank you. Ms. Wolf, I believe -- did you have some witnesses that you wanted to present to the Court?

MS. WOLF: I did, Your Honor.

THE COURT: Or just statements?

MS. WOLF: His employer and his older brother.

THE COURT: All right. Then why don't we -- I think they can just come up to the podium, and we probably need to swear them in since they're offering testimony, but if you'll just introduce them, Ms. Wolf.

MS. WOLF: This is Jack Haynes, the defendant's oldest brother.

THE COURTROOM DEPUTY: Raise your right hand?

(The witness was thereupon duly sworn.)

JACK HAYNES,

having been first duly sworn, was examined and testified as follows:

THE COURTROOM DEPUTY: Would you state your name?

MR. JACK HAYNES, JR.: Jack Franklin Haynes, Junior.

THE COURT: Go ahead, Mr. Haynes.

MR. JACK HAYNES, JR.: Your Honor, I wanted to come today --

THE COURT: I didn't mean to interrupt. I was just going to entertain a statement unless you wanted to ask questions.

MS. WOLF: That's exactly how -- I told him I might

put him on the stand, and I would just ask if he had anything to say to you, so this is easier.

THE COURT: Go ahead, Mr. Haynes.

MR. JACK HAYNES, JR.: I just wanted to come in and offer some words of encouragement and support for my younger brother Aaron. He understands and has spoken to me several, several times in the last three years on his regret of his past life that took a lot away from him, more -- he's lost more due to his addictions than anyone here for sure, including children that he no longer has contact with and things like that.

I just want to let the Court know that he's a completely changed man from that life that he was living. He's supporting my step-father and was helping support my step-father and mother until her passing last September, and the whole time he's been taking care of the household and caretaking for my step-father who has several medical conditions that in fact even limit him from even being here today in support.

I just ask the Court's mercy. He's much needed at home. He has all the support of me and my wife and family that we can provide for his needs, and I know he's, he's so sorry and wishes he could change things, but that's not possible. That's kind of all I have to say, Your Honor.

THE COURT: All right. Well, I appreciate your making that statement. Thank you, Mr. Haynes.

MS. WOLF: And Mr. Clark. Your Honor, this is the

defendant's employer, Elmer Clark.

THE COURTROOM DEPUTY: Raise your right hand?

(The witness was thereupon duly sworn.)

ELMER CLARK,

having been first duly sworn, was examined and testified as follows:

THE COURTROOM DEPUTY: If you'll state your name, please?

MR. CLARK, JR.: Elmer Clyde Clark, Jr.

THE COURT: Go ahead, Mr. Clark.

MR. CLARK, JR.: Aaron has worked for me, our company for approximately three years. He's become a good team player, very loyal, very dependable, and we really need him, you know. It would be a big loss if we lose him.

THE COURT: What's the nature of the company?

MR. CLARK, JR.: We -- construction company. He's a great employee, and that's all I have.

THE COURT: Okay. Well, thank you for that. Ms. Wolf, anything further you'd like to --

MS. WOLF: He's going to allocute, but then I just have arguments, Your Honor.

THE COURT: We'll go ahead. We'll go ahead and hear the allocution first. That's fine.

MS. WOLF: You want to do it now you said?

THE COURT: Yeah. You can go ahead. We'll hear from

you, and that way we'll have all the testimony before us and the allocution. Mr. Haynes, anything you'd like to say on your behalf before sentence is imposed?

THE DEFENDANT: Bear with me.

THE COURT: That's fine. No. Just actually since we have -- why don't you stay seated.

MS. WOLF: Can he take his mask off, Your Honor?

THE COURT: Yes.

THE DEFENDANT: Sorry. It just got me all choked up.

THE COURT: Take your time.

THE DEFENDANT: (Inaudible). I heard words of encouragement. I don't even want this. I heard words of encouragement. You know, people can depend on me now, you know, and that makes me feel so good. And it's more of those people I worry about than myself with what I'm going through now, and you know, I messed up. I made some bad decisions. I got addicted to opiates and buying and selling and trading to support my addiction to opiates, and you know, I made that decision, but the one decision I don't regret is getting clean. I got clean and I decided to get clean months, months, months before these charges ever came to light. I went to work, helped my mother and step-dad at home 'cause their financial needs were -- they didn't even enjoy enough from the government to pay the bills, and so I buckled down on that; but I've started mending relationships with my son and mother, father, siblings, you

know, as soon as I got clean, and I'm still working on, you know, mending some things.

And I've lost a lot of myself, you know, before through the addiction, you know, whether it be physical or cognitive and just other things; but you know, and I know I can't get that part of me back, the person I was before, but I look forward to the person that I'm going to become now past the addiction. And I just -- alls I can do is ask for your mercy and consideration when it comes to my future, and I thank you for your time and your consideration.

THE COURT: All right. Thank you for that, Mr. Haynes. The Court appreciates the allocution. Ms. Wolf, do you want to supplement the allocution and testimony with any argument or --

MS. WOLF: Just a little short argument, Your Honor.

THE COURT: You can go ahead. Either way.

MS. WOLF: Your Honor, my original sentencing memo had a sentencing guideline of 19. That was taking into consideration the safety valve which has been disclosed by your earlier ruling, but I'm still going to be arguing for a sentencing guideline of 19 which would place him at 27 to 33 months. I'm basing that -- in my original memo, I had asked for three points, but in reviewing, in the period between filing my sentencing memo and now, I went through some of my earlier emails with the general and more of my personal notes with

Aaron, and some things occurred to me.

One of the issues I first had, and this case is so old that I was having a hard time recollecting what the discovery even was, and I had an email that said I've gone through the entire discovery that you've given me which is quite substantial. I've gone through 17 different plea agreements of co-defendants from this case and the connected other case, and there is not a single mention of Aaron Haynes in there. Are we sure that you gave me the right discovery? And it turns out, most of his case against him like other cases was co-defendant testimony or other stuff that wasn't in there; but names that kept popping up continuously, one of them was Tina Berry, and she was in a million of these co-defendant's cases in their plea agreements. And I read her plea agreement, and it included a minor role reduction, and I looked at some of the other ones that had a minor role reduction. I think one was Tiffans, and his stated that he had come from -- it said nothing about him being a drug user, but that he had come from Detroit to, specifically to Knoxville to sell drugs.

And so I am asking Your Honor to take into consideration his substantial assistance that some of the benefits that other co-defendants who are similarly situated to him who were, you know, like Tina Berry I think allowing people to use her house to sell drugs out of and selling some drugs out of it to support her habits as well as this other gentleman who

apparently came here just to sell drugs who got the benefit of a minor role reduction that Mr. Haynes did not and to take those two points and have that go towards his substantial assistance. So essence I am asking for five-point reduction based on substantial assistance to get to my guideline range of 19.

There's other things I put in my motion about, you know, his overstated criminal history, his importance to his family, all of that. I'm not going to go into great detail on that because I think that's obvious from the support that he has here today, that this would be a very great hardship to a number of people if he goes into custody; but I am asking for a, you know, a variance even from the calculated guideline range that I put of 27 to 33 months. With the safety valve issue ruled not in our favor, that does cause some hardship, but I still am going to ask for it. Thank you, Your Honor.

THE COURT: All right. Thank you. Mr. Jones, do you want to respond to I guess that additional request by the defendant?

MR. JONES: Your Honor, I would just leave it to Your Honor's discretion. I will say, I -- you know, from the prosecutor's standpoint in this case for both cases, I have tried to be reasonable, you know, with both Mr. Haynes, Ms. Berry, and all the other defendants in this case. We do recognize that this defendant has been fully cooperative the entire time. A lot of the evidence that we had against

defendant was cooperator testimony, and you know, we've conveyed that to Ms. Wolf. We do appreciate that Mr. Haynes seems to be on the straight and narrow now, and so whatever, whatever confinement, if this Court gives confinement in whatever manner of punishment this Court gives, we ask Your Honor to take all of that into consideration.

We appreciate his employer for being here and the words from his family certainly. Opiate addiction is a tough time. I've just been -- I'm dealing with this, these types of cases now for three-and-a-half years, but you know, I see a lot of these sentencings like this; but we miss, we wish Mr. Haynes the best, but we would leave it to your discretion, Your Honor, based on the circumstances of this case.

THE COURT: So just to make sure I'm clear, so without the safety valve eligibility, the defendant's guideline term is 60 months. The government, using that as a starting point, is requesting approximately a 30 percent reduction to 42 months, and Ms. Wolf, you're asking the Court to go I guess beyond that even assuming 60 months is our starting point to --

MS. WOLF: I think a five-point reduction. Let's see what that would make it.

THE COURT: I guess a five-level reduction would be 27 to 33 months --

MS. WOLF: Yes.

THE COURT: -- if I follow the sentencing table. So

you're asking the Court to look within that range whereas the 42 months is roughly within a three-level, falls within a three-level reduction, so let me ask the probation officer a quick question.

Let me take a short break 'cause one of the cases mentioned, I just want to go back and look at that, so we'll take just about a 10-minute recess.

THE COURTROOM DEPUTY: All rise. This honorable court stands in recess.

(Recess taken.)

THE COURTROOM DEPUTY: This honorable court is again in session.

THE COURT: All right. Thank you, everyone. The Court is prepared to proceed forward with sentencing at this point. Specifically and in a manner intended to comply with the Sixth Circuit's jurisprudence since the *Booker* case rendered the sentencing guidelines advisory and *Gall v. United States's* requirement that the Court make an individual assessment based on the facts presented and adequately explain the chosen sentence, the Court will explain its reasons for the sentence to be imposed in this case.

The Court has discussed the advisory guideline calculation already, and as is reflected in the presentence report based upon the Court's ruling on the defendant's objection, the defendant is subject to a guideline term of

imprisonment of 60 months, the mandatory minimum in this case.

With respect to the § 3553 factors, the nature and circumstances of the offense, the defendant has pled guilty to the lesser included offense of conspiracy to distribute and possess with intent to distribute 40 grams or more of fentanyl and 100 grams or more of heroin. His offense conduct and that of others involved in this conspiracy are set out beginning at paragraph 11 of the presentence report.

As noted therein, briefly summarized, the defendant was identified by multiple individuals as a distributor of heroin and fentanyl for the drug-trafficking organization led by Damion Knox in the summer of 2018. The defendant began receiving varying quantities of heroin and fentanyl on a daily to weekly basis from multiple larger distributors within the drug-trafficking organization, and it's noted at one point, 2018, the defendant was receiving 3 to 5 grams multiple times per day both for personal use and for distribution. And again, the defendant agrees while participating in the conspiracy he conspired to possess with intent to distribute at least 40 grams but less than 160 grams of a mixture and substance containing a detectable amount of fentanyl and 100 grams but less than 400 grams of a mixture and substance containing a detectable amount of heroin.

With respect to the history and characteristics of the defendant, as reflected in the presentence report as well as in

the defendant's sentencing memorandum, the defendant reports that he was primarily cared for by his mother. However, his mother remarried and considers his step-father as his father. He's described in his sentencing memorandum and in the evidence before the Court as a hard worker. States he dropped out of high school to support himself financially, had a motorcycle accident in 1994, became addicted to opiate pain medication that he was prescribed. Had another motorcycle accident in 2002 in which he suffered a broken back and was again prescribed opiates, and that his drug addiction resurfaced and that he began undertaking various criminal activities including shoplifting and forging prescriptions to support his habits and did receive convictions based on those offenses.

The defendant notes after his mother's diagnosis with cancer, he quote, "turned his life around," quote close, and moved in with his parents, obtained a construction job to help his parents pay bills and made repairs and landscaping for his parent's home. And that since 2019, he has maintained employment, continues sobriety, and complied with the law, and after his mother's passing in 2020 began caring for his step-father who has numerous health conditions. And it is noted in late 2019 he was indicted in the instant case as he submits despite that his participation had long been completed.

The defendant's criminal history has been discussed. It does include adult criminal convictions in addition for

shoplifting and theft, also at the age of 17 assault and battery; age 33, attempting to obtain controlled substance by fraud; and at age 38, theft, resulting in four criminal history points and a criminal history category of III.

The defendant's currently I believe 50 years of age; is that correct?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: He does have multiple children. The Court has described his physical condition arising particularly from motorcycle accidents. Reports no history of or treatment for mental or emotional health issues and does have a significant substance abuse history as has been discussed and outlined in the presentence report. Some limited treatment in the past. Attended high school until the 11th grade, obtained a GED diploma in 1996.

With this background in mind, the Court does consider the need for the sentence imposed to reflect various factors including the seriousness of the offense. The government has discussed and the Court certainly recognizes the defendant is not a leader or manager of this conspiracy. Nonetheless, as is reflected in the offense conduct provisions of the presentence report, he did play a role in this conspiracy, specifically resulting in the illegal accumulation of and distribution of dangerous drugs in this community, in this instance fentanyl and marijuana.

The Court considers the need to promote respect for the law and provide just judgment. Again, considering the level and scope of defendant's offense conduct, considering his criminal history, the aspects of that criminal history and I believe what he would submit is the underlying reasons for that criminal history, the Court also certainly does consider also the defendant's acceptance of responsibility, expressions of remorsefulness, and cooperation in this case.

For many of the same reasons, the Court considers the need for deterrence, both specific and general, as well as to protect the public from further crimes of the defendant. Although in that regard, the Court certainly does note the defendant's continued behavior and compliance with the terms of his pretrial release up to and including today's sentencing.

The Court also considers the need to provide the defendant with training, education, and medical treatment, again, recognizing the defendant's work ethic and employment history; and the Court would primarily focus in that regard on medical treatment, i.e. substance abuse treatment. And in discussing and recommending such treatment, the Court is not intending to and is not imposing or lengthening the defendant's prison sentence to enable him to complete a treatment program or otherwise promote rehabilitation.

Turning now to the government's sealed motion for downward departure brought pursuant to both §5K1.1 of the

guidelines and 18 United States Code § 3553(e), §5K1.1 instructs the Court to consider several factors in determining an appropriate reduction, including, but not limited, to the Court's evaluation of the significance and usefulness of the defendant's assistance taking into consideration the government's evaluation of the assistance rendered.

Similarly, 18 U.S.C. § 3553(e) provides that upon motion of the government, the Court may depart below a minimum mandatory sentence set by statute to reflect a defendant's substantial assistance. Having considered these factors as well as all the evidence before the Court, the Court does find the defendant's assistance was timely, significant, and useful to the government and that the information he provided was also truthful, complete, and reliable. His cooperation as outlined in detail in the government's motion certainly helped influence other defendants to plead guilty, recognizing the defendant provided significant details of the conspiracy to the government and that he stood ready to testify as necessary if any of the defendants in this case had gone to trial.

Accordingly, given this description of the defendant's substantial assistance, the Court will grant the government's motion for downward departure and will take the defendant's cooperation and assistance into consideration in fashioning a sentence sufficient but not greater than necessary to comply with the purposes of 18 U.S.C. § 3553.

The defendant for the reasons discussed requests additional consideration for among other things I guess not only his substantial assistance but also points to the I guess minor role adjustment for the defendant Berry and other facts as set forth, primarily in the § 3553 factors. The Court recognizes its discretion to depart or in this instance request to vary as it deems appropriate. However, the Court believes given not only the mandatory minimum, but given the totality of the record before the Court that it's appropriate to deny the defendant's request for a variance but to consider the facts brought forward by the defendant within both the context of the Court's § 3553 analysis and as relates to defendant's cooperation within the context of the government's own motion. And the Court recognizes within that § 3553 analysis the defendant's somewhat limited role in this conspiracy, vis-a-vis other defendants, but also notes that he was indicted on the lesser included offense which does in part take into consideration the defendant's lesser participation if you will.

So the Court is going to look at sentencing within the context of the mandatory minimum in light of the Court's determination of the defendant's ineligibility for safety valve eligibility, the government's motion, and the § 3553 factors, and the Court is going to in that regard move beyond the defendant's recommended 42 months. I don't believe I can get to a 50 percent reduction from the mandatory minimum, but I want to

get close to that with a sentence of 32 months. For all the reasons discussed, the Court finds this sentence to be sufficient but not greater than necessary to comply with the purposes of 18 United States Code § 3553.

Furthermore, the Court is going to impose a term of supervised release of four years with all the standard conditions as well as the special conditions of supervision in paragraph 69 of the presentence report, namely, testing or treatment for drugs or alcohol and submission to searches upon reasonable suspicion of the violation of the conditions of supervision, the Court finding these special conditions to be reasonably related to the several sentencing factors discussed by the Court to involve no greater deprivation of liberty than reasonably necessary for those several sentencing purposes and to be consistent with pertinent policy statements issued by the sentencing commission.

Accordingly, and pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court as to the lesser included offense of Count 1 in the indictment that the defendant is hereby committed to the custody of the Bureau of Prisons for a term of imprisonment of 32 months. The Court will recommend you receive 500 hours' substance abuse treatment from the Bureau of Prisons Institution Residential Drug Abuse Treatment Program.

Upon release from imprisonment, you shall be placed on supervised release for a term of four years. While on

supervised release, you shall not commit another federal, state, or local crime. You must not unlawfully possess and must refrain from use of controlled substances. You must comply with the standard conditions adopted by this court in Local Rule 83.10. In particular, you must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon. You shall cooperate in the collection of DNA as directed by the probation officer. In addition, you shall comply with the special conditions of supervised release as discussed and adopted by the Court.

Title 18 U.S.C. §§ 3565(b) and 3583(g) require mandatory revocation of supervised release for possession of a controlled substance, ammunition or firearm, or for refusal to comply with drug testing.

Pursuant to Title 18 U.S.C. § 3013, you shall pay a special assessment fee in the amount of $100 which shall be due immediately. The Court finds you do not have the ability to pay a fine and will waive the fine in this case.

The plea agreement is accepted.

Pursuant to Rule 32 of the Federal Rules of Criminal Procedure, the Court advises you may have the right to appeal the sentence imposed in this case. A notice of appeal must be filed within 14 days of entry of judgment. If you request and so desire, the clerk of court can prepare and file the notice of appeal for you.

The Court also has before it the defendant's request to self-surrender in this case. You still have that request, Ms. Wolf?

MS. WOLF: Yes, Your Honor.

THE COURT: All right. Does the government have a position in that regard?

MR. JONES: No objection to self-surrender, Your Honor. The defendant has been compliant with all conditions at this point.

THE COURT: In light of, with the request before it, in light of the government's lack of opposition to that request, and the Court notes the district courts may permit a defendant to self-surrender and that such a decision to self-surrender is discretionary under the applicable law, the Court will allow defendant to self-surrender noting that he has fully complied with his pretrial conditions for well over a year. In that regard, he has demonstrated a commitment to follow the law with respect to those conditions, and the Court further notes as the defendant submitted that he did voluntarily cease his criminal activity before he was indicted in this case, and therefore, has in that regard also demonstrated at least going forward from that point forward an ability to comply with the law. So the Court will grant, again without opposition to the government, the defendant's motion for self-surrender.

So with all that in mind, Mr. Jones, does the

government have any objection to the sentence just pronounced that has not previously been raised?

MR. JONES: No, Your Honor.

THE COURT: Ms. Wolf, does the defendant have any objection to the sentence just pronounced that has not previously been raised?

MS. WOLF: Other than the safety valve issue, Your Honor. Thank you.

THE COURT: The Court does note also that I think the defendant served maybe a little over a month, approximately one month already toward his sentence. Is that --

MS. WOLF: That is correct. I think it was -- was it just over or --

THE COURT: It think it might have been a month and two days.

MS. WOLF: Yes, Your Honor.

THE COURT: He was detained on January or arrested on January 21, 2020, and ordered detained and was released on bond following a detention hearing on February 24, 2020. So it might take those dates. I'm reading that he was released on that same date, but so that would give you credit, at least a month's and a few days credit toward the sentence.

The Court understands that any term of imprisonment is a significant one. Certainly the term of imprisonment here is significantly lower than a lot of the defendants in this

conspiracy case, but that's due in part to your lesser included role as we discussed and also your cooperation and certainly as your attorney may have already discussed with you and probably will, you have the opportunity for good behavior credits and other credits.

So the Court encourages you to take advantage of programs that would be offered to you not only during a relatively short period of incarceration but also during a period of supervised release as well as offered to you by the probation office.

So with that in mind, unless there's anything further, I thank everyone for being here this afternoon, and good luck to you going forward in the future, Mr. Haynes, and we'll stand adjourned.

MS. WOLF: Your Honor, I forgot to ask for Lexington as the designation.

THE COURT: We'll include that. Thank you. Thank you, everyone.

THE COURTROOM DEPUTY: All rise. This honorable court should stand adjourned.

(Proceedings concluded at 3:52 p.m.)

C E R T I F I C A T E

STATE OF TENNESSEE )

COUNTY OF KNOX )

I, Kara L. Nagorny, RPR, RMR, CRR, do hereby certify that I reported in stenographic machine shorthand the above proceedings; that the foregoing pages were transcribed under my personal supervision and with computer-aided transcription software and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel of any of the parties nor an employee or relative of any attorney or counsel connected with the action nor financially interested in the action.

Transcript completed and dated this 2nd day of April, 2022.

Kara L. Nagorny

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