No. 22-____

IN THE

Supreme Court of the United States

ROGER E. PACE,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Courts interpret statutes by applying Congress's plain language. In the First Step Act, Congress modified the federal sentencing statute to say that a defendant qualifies for safety-valve relief from a mandatory-minimum sentence if he "does not have" three different qualifiers. Congress enumerated those qualifiers using the conjunctive "and." Is a defendant who "does not have" all three qualifiers safety-valve-eligible?

More specifically, the question presented is whether the "and" in 18 U.S.C. § 3553(f)(1) means "and," so that a defendant is safety-valve-eligible so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, *and* (C) a 2-point violent offense (as the Fourth, Ninth, and Eleventh Circuits hold), or whether the "and" means "or," so that a defendant is only safety-valve-eligible if he has none of: (A) more than 4 criminal history points, (B) a 3-point offense, *or* (C) a 2-point violent offense (as the Fifth, Sixth, Seventh, and Eighth Circuits hold).

RELATED PROCEEDINGS

United States Court of Appeals (7th Cir.):

United States v. Pace, No. 21-2151 (Sept. 9, 2022)

United States District Court (C.D. Ill.):

United States v. Pace, No. 3:19-cr-30051-SEM-TSH (June 17, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Roger Pace respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a–56a) is reported at 48 F.4th 741. The court of appeals' order denying Mr. Pace's petition for rehearing *en banc* (Pet. App. 110a) is unofficially reported at 2022 WL 17254332. The district court's amended judgment (Pet. App. 57a–69a) and the sentencing transcript (Pet. App. 70a–109a) are unpublished.

JURISDICTION

The court of appeals entered its judgment on September 9, 2022 and denied Mr. Pace's petition for rehearing *en banc* on November 28, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3553(f) of Title 18, U.S. Code, provides:

> LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28

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;

(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.

STATEMENT OF THE CASE

A. Introduction

This case presents an acknowledged, entrenched, and growing circuit conflict concerning the proper interpretation of the "safety-valve" provision of the federal sentencing statute, 18 U.S.C. § 3553(f). Seven courts of appeals have now addressed the issue, splitting 4–3. There have been several divided decisions, including this one, where Judge Diane Wood dissented from the majority opinion. The same issue is pending in additional circuits as well.

This circuit conflict arises from changes that Congress made to the safety-valve provision in the First Step Act of 2018. It has developed so quickly because it concerns a sentencing issue that dramatically affects defendants' sentences and arises in thousands of cases each year. Specifically, it determines whether non-violent, non-recidivist drug offenders can obtain relief from mandatory-minimum sentences. Mr. Pace's case provides a compelling vehicle for this Court to resolve the issue and thereby

to put an end to the current geographic disparity in sentencing.

B. Statutory Background

The federal sentencing statute's "safety-valve" provision, 18 U.S.C. § 3553(f), permits a court to sentence qualifying non-violent drug offenders below the otherwise-applicable mandatory-minimum sentence.

Defendants qualify if they were convicted of violating 21 U.S.C. § 841(a)(1) and can meet the criteria in 18 U.S.C. § 3553(f)(1) through (5). For example, the defendant must not have "use[d] violence or credible threats of violence," or a firearm, "in connection with the offense," *id.* § 3553(f)(2), and the offense must not have resulted in death or serious bodily injury, *id.* § 3553(f)(3). The defendant also must have "truthfully provided to the Government all information and evidence" he has about the offense or related offenses. *Id.* § 3553(f)(5).

This case concerns the criteria in § 3553(f)(1), which focuses on the defendant's criminal history. Under the pre-First Step Act sentencing regime, to be safety-valve eligible, a defendant had to show that he did "not have more than 1 criminal history point." 18 U.S.C. § 3553(f)(1) (2017). That was the only criterion in (f)(1), and the safety valve was limited to a small number of defendants specifically because of § 3553(f)(1). Along with several changes to limit the application of mandatory-minimum drug sentences, Congress expanded safety-valve eligibility in the First Step Act of 2018. Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221. As amended, a defendant satisfies § 3553(f)(1) as long as he "does not

have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense … ; (B) a prior 3-point offense … ; *and* (C) a prior 2-point violent offense." 18 U.S.C. § 3553(f)(1)(A)–(C) (emphasis added). The question presented is whether the term "and" is conjunctive, as the plain meaning would suggest, or disjunctive. In other words, does § 3553(f)(1) preclude safety-valve eligibility only if a defendant's criminal history runs afoul of all three conditions in subsections (A), (B), *and* (C), or does § 3553(f)(1) preclude safety-valve eligibility if a defendant's criminal history runs afoul of any one of the criteria in subsections (A), (B), *or* (C)?

C. Factual and Procedural History

1. Mr. Pace pleaded guilty to one count of possession with intent to distribute fifty grams or more of a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). Pet. App. 58a. This offense subjected Mr. Pace to a mandatory minimum sentence of five years, 21 U.S.C. § 841(b)(1)(B), unless the safety valve applied.

The safety-valve inquiry turned on § 3553(f)(1) alone. The district court found that Mr. Pace satisfied the other criteria in § 3553(f)(2)–(5). Pet. App. 82a–83a.

In arguing that he satisfied § 3553(f)(1) as well, Mr. Pace contended that § 3553(f)(1) precludes safety-valve eligibility only if a defendant's criminal history runs afoul of all three conditions in subsections (A) through (C). *See id.* at 78a–80a. Because Mr. Pace did not have a prior 2-point violent offense,

as § 3553(f)(1)(C) required, he asserted he was safety-valve-eligible. *Id.* at 8a.

The district court rejected Mr. Pace's argument, holding that a defendant "need only have four criminal history [points] *or* a prior three-point offense *or* a prior two-point violent offense" to become ineligible for the safety valve. *Id.* at 81a–82a (emphasis added). The court sentenced Mr. Pace to the statutory-minimum sentence of five years. *Id.* at 105a.

2. a. In a divided decision, the Seventh Circuit affirmed the district court's judgment. While recognizing that "the word 'and' is commonly utilized conjunctively," the majority focused on "the context of the word" within § 3553(f)(1) to nonetheless adopt a disjunctive interpretation. *Id.* at 23a. The majority asserted that "[i]f disqualification results only when a defendant meets each of the subsections, subsection (A) is superfluous." *Id.* The majority also opined that "the use of the em-dash following subsection one of § 3553(f) … to connect the subsections demonstrates that the lead-in 'does not have' modifies each subsection requirement." *Id.* Finally, the majority held that a conjunctive reading would produce absurd results, as it could result in safety-valve eligibility for certain offenders with more serious past offenses than other ineligible offenders. *Id.* at 25a. Based on these considerations, the panel found that a defendant who meets any one of subsections (A), (B), "or" (C) does not qualify for safety-valve relief. *Id.* at 27a.

b. Judge Kirsch concurred to advance a distributive interpretation of the "and" in § 3553(f)(1). Judge Kirsch found that § 3553(f)(1)'s "text

distributes the introductory phrase 'does not have' across each statutory condition." *Id.* at 34a (quoting *United States v. Pulsifer*, 39 F.4th 1018, 1022 (8th Cir. 2022)).

c. Judge Wood dissented, finding that any interpretation in which "and" means "or" in § 3553(f)(1) "strain[s]" against normal English. *Id.* at 39a. Rather, she concluded that "and" must be construed in accordance with its everyday conjunctive meaning. *Id.*

Judge Wood found the government's absurdity argument unpersuasive. *Id.* at 49a–50. She explained that, given the "significant support among federal judges and the general public for reforms to the safety-valve exception," Congress amended the statute "in a way designed to make it available to more defendants." *Id.* at 43a. The result is that the statute "achieves a coherent policy objective—that is, categorically to exclude violent recidivists with recent criminal history from safety-valve eligibility." *Id.* at 46a–47a.

Judge Wood rejected the majority's surplusage holding as well. She noted "[s]ubpart (A) [of § 3553(f)(1)] speaks of criminal history *points*, while subparts (B) and (C) are phrased in terms of *offenses* that are assigned a certain number of criminal history points by the Sentencing Guidelines." *Id.* at 44a. Under the Sentencing Guidelines, a prior offense does not always generate criminal history points, such as when the sentence for the offense was imposed sufficiently long ago. *Id.* at 44a–46a. Thus, Judge Wood opined, "it is not accurate to assume that any defendant who satisfies (B) and (C) would

automatically have more than four criminal history points." *Id.* at 46a.

Finally, Judge Wood rebutted the majority's reliance on the em-dash. She pointed out that the Senate's drafting manual generally instructs drafters to use an em-dash for formatting lists. *See id.* at 50a–51a. Thus, "the em-dash has no meaning, distributive or otherwise." *Id.* at 51a. Instead, "[w]hat does matter is the conjunction at the end of the list." *Id.*

REASONS FOR GRANTING THE PETITION

I. The Circuits Have Divided Over the Meaning of § 3553(f)(1).

An acknowledged and well-developed circuit split has emerged on the question presented. In the Fourth, Ninth, and Eleventh Circuits, "and" means "and." A defendant must have (A) more than 4 criminal history points, (B) a 3-point offense, *and* (C) a 2-point violent offense before § 3553(f)(1) disqualifies him from safety-valve relief. *See United States v. Jones*, No. 21-4605, 2023 WL 2125134 (4th Cir. Feb. 21, 2023); *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (*en banc*); *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), *reh'g en banc denied*, 58 F.4th 1108 (9th Cir. 2023).

In contrast, in the Fifth, Sixth, Seventh, and Eighth Circuits, "and" means "or." Defendants can satisfy § 3553(f)(1) and prove their eligibility for safety-valve relief only if they show that they do not have (A) more than 4 criminal history points, (B) a 3-point offense, *or* (C) a 2-point violent offense—*i.e.*, that they have none of the above. *See United States v. Haynes*, 55 F.4th 1075 (6th Cir. 2022); *United*

States v. Palomares, 52 F.4th 640 (5th Cir. 2022); *United States v. Pace*, 48 F.4th 741 (7th Cir. 2022); *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022).

Only this Court can resolve the disagreement.

A. The Fourth, Ninth, and Eleventh Circuits Construe "and" to Mean "and," Not "or."

1. The Ninth Circuit was the first court of appeals to decide the question presented in this case.[1] In *Lopez*, the Ninth Circuit adopted a conjunctive reading of § 3553(f)(1), concluding that if the defendant does not have (A) more than 4 criminal history points, (B) a prior 3-point offense, *and* (C) a prior 2-point violent offense, the defendant is eligible for safety-valve relief. *Lopez*, 998 F.3d at 433.

The court began its analysis with the statute's text, recognizing that "the plain and ordinary meaning of § 3553(f)(1)'s 'and' is conjunctive." *Id.* at 436. The Ninth Circuit also consulted the last 50 years' worth of dictionaries and statutory-construction treatises. The court found that, without fail, "when the term 'and' joins a list of conditions it requires not one or the other, but *all* of the conditions." *Id.* The Ninth Circuit also relied upon the Senate's own legislative-drafting manual. *Id.* The manual "instructs

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[1] The Eleventh Circuit issued an opinion on the same issue just days before the Ninth Circuit's decision, but the opinion was subsequently vacated upon the grant of rehearing *en banc*. *See United States v. Garcon*, 997 F.3d 1301 (11th Cir. 2021), *reh'g en banc granted, opinion vacated*, 23 F.4th 1334 (11th Cir. 2022).

that the term 'and' should be used to join a list of conditions … when a conjunctive interpretation is intended." *Id*. Further, relying on Scalia and Garner's *Reading Law*, the Ninth Circuit held "that § 3553(f)(1)'s structure as a conjunctive negative proof supports a conjunctive interpretation." *Id.* Finally, the Ninth Circuit held that the canon of consistent usage supported a conjunctive reading as well, as the court had previously interpreted the "and" located at the end of § 3553(f)(4) conjunctively. *Id.* at 437.

The Ninth Circuit rejected the government's absurdity, surplusage, and legislative-history arguments. *Id.* at 438–43. With respect to surplusage, the Ninth Circuit held that a defendant might have a 3-point violent offense, thus satisfying both § 3553(f)(1)(B) and (C), but not (A)'s condition of more than 4 points total. *Id.* at 440. And even if reading "and" to mean "and" created surplusage, the Ninth Circuit noted that "[t]he canon against surplusage does not supersede a statute's plain meaning and structure" or license "inconsistently interpret[ing] the same word in the same sentence." *Id.* at 441.

Finally, the Ninth Circuit held in the alternative that even if the term "and" were ambiguous, the rule of lenity would apply. *Id.* at 443. The court explained that it would never expect any defendant to "ignore the plain meaning of 'and,' ignore the Senate's legislative drafting manual, ignore § 3553(f)(1)'s structure, ignore our prior case law interpreting 'and' in § 3553(f)(4), and then, somehow, predict that a federal court would rewrite § 3553(f)(1)'s 'and' into an 'or.'" *Id.*

2. The Eleventh Circuit, sitting *en banc*, reached the same conclusion as the Ninth Circuit. *Garcon*, 54 F.4th 1274. The Eleventh Circuit's majority opinion largely followed the reasoning of the Ninth Circuit in *Lopez*, relying on the ordinary meaning of "and," the accepted meaning of a conjunctive negative proof, consistent usage canons, and the Senate's legislative-drafting manual. *Id.* at 1277–80. Like the Ninth Circuit, the Eleventh Circuit also rejected the government's arguments based on negative prefatory phrases, surplusage, absurdity, and legislative history. *Id.* at 1280–85.

However, the Eleventh Circuit's reasoning as to why a conjunctive interpretation does not produce surplusage differed slightly from the Ninth Circuit's. In line with Judge Wood's dissent in *Pace*, the Eleventh Circuit recognized that § 3553(f)(1) "distinguishes between points associated with an 'offense'—points that may or may not count towards the criminal history score—and the final tally of 'criminal history points.'" *Id.* at 1282. As a result, there are circumstances in which "a defendant could have 'a prior 2-point violent offense' and 'a prior 3-point offense ... under the sentencing guidelines' but fewer than five 'criminal history points.'" *Id.* at 1281. For example, "[u]nder the sentencing guidelines, a two-point offense adds no points to the defendant's criminal-history score if the sentence was imposed more than 10 years before the defendant commenced the present offense." *Id.* Thus, a conjunctive reading does not render § 3553(f)(1)(A) superfluous. *Id.*

In the end, the Eleventh Circuit declined to adopt the "novel reading" proposed by the government, because that reading "appears to have been

crafted by the government specifically for this statute to achieve its preferred outcome." *Id.* at 1280. Instead, the court held that a defendant has to fail all three criteria in § 3553(f)(1) to be disqualified from safety-valve relief. *Id.* at 1279–80.

In accord with the Ninth Circuit, the Eleventh Circuit also held that even if there were any ambiguity in the text, the court would be required to apply the rule of lenity. Therefore, the Eleventh Circuit held that under either a clear or ambiguous reading of the statute, the defendant was entitled to safety-valve relief because he did not fail all three criteria in § 3553(f)(1). *Id.* at 1285.

One of the dissenting judges in the Eleventh Circuit expressly noted that "[t]he Court's decision deepens a circuit split that is sure to attract the attention of the Supreme Court." *Id.* at 1308 (Brasher, J., dissenting). Notably, the debate in the Eleventh Circuit's 11-judge *en banc* proceeding resulted in six separate opinions.

3. Just last week, the Fourth Circuit also adopted the conjunctive reading of "and" as used in § 3553(f)(1), further deepening the noted circuit split. *Jones*, 2023 WL 2125134, at *1. The court found that "§ 3553(f)(1)'s plain language is unambiguous," and that "a defendant is ineligible for safety-valve relief only if she has all three criminal history characteristics." *Id.* at *2–3.

As in *Lopez* and *Garcon*, the Fourth Circuit found unpersuasive the government's arguments based on surplusage, absurdity, legislative history, and the safety valve's use of an em-dash. *Id.* at *4–8. With respect to the question of surplusage, the

Fourth Circuit explicitly adopted the reasoning of the Eleventh Circuit in *Garcon*, concluding no surplusage results from a conjunctive interpretation. *Id.* at *5–6. The court also held that a conjunctive interpretation does not produce absurd results, and that if Congress had intended a different outcome, "it would have used 'or' instead of relying on an ill-defined em-dash to alter the meaning of 'and.'" *Id.* at *5–7. In sum, the Fourth Circuit held that "the Government's argument is nothing more than an exaggerated way of saying 'and' means 'or,' an interpretation we must reject." *Id.* at *2.

4. Dissents in the Fifth, Sixth, and Seventh Circuits also strongly resemble the reasoning of the Fourth, Ninth, and Eleventh Circuits' opinions. For example, Judge Willett, the dissenter in the Fifth Circuit, criticized the majority's "[m]anufactured ambiguity" as a threat to the elemental use of English itself. *Palomares*, 52 F.4th at 652 (Willet, J., dissenting). He found that the majority's use of "complicated semantic bracework to augment [the] ordinary meaning" of "and" could not overcome Congress's plain drafting. *Id*. Accordingly, he concluded that a defendant has to fail all of the disqualifying criteria—not just one—in order to be ineligible for safety-valve relief. *Id.* at 652–53.

Likewise, as discussed above, in her dissent in the Seventh Circuit, Judge Wood found it "painfully obvious that Congress did not use the word 'or' to connect" the criteria in § 3553(f)(1). Pet. App. 39a. Judge Wood agreed with the Ninth Circuit's view that "[i]n everyday English, the word 'and' is a conjunction that signifies that all items in a list are included." *Id*.

Sixth Circuit Judge Griffin, in his dissent in *Haynes*, expressly agreed with the *en banc* Eleventh Circuit in *Garcon*, the Ninth Circuit in *Lopez*, and his "dissenting colleagues in the Fifth and Seventh Circuits," finding that their conjunctive interpretation "harmonizes most canons of statutory interpretation and gives effect to the language Congress used." *Haynes,* 55 F.4th at 1081 (Griffin, J., dissenting). Judge Griffin recognized that 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.'" *Id.* at 1085; *cf. Lopez*, 998 F.3d at 440 ("The government's request … is simply a request for a swap of policy preferences.").

B. The Fifth, Sixth, Seventh, and Eighth Circuits Construe "and" to Mean "or."

1. The Eighth Circuit was the first court of appeals to reject the Ninth Circuit's ordinary-meaning interpretation. The Eighth Circuit thought the word "and" in § 3553(f)(1) had to be interpreted "severally," not "jointly." *Pulsifer*, 39 F.4th at 1021. In the court's view, § 3553(f)(1)(A) through (C) should be read distributively, such that a defendant must show that he does not have (A) more than 4 criminal history points, (B) a 3-point offense, *or* (C) a 2-point violent offense. *Id.* at 1021–22.

According to the court, reading "and" jointly—such that a defendant must have (A), (B), *and* (C) before he is ineligible for relief—would make (A) superfluous. *Id.* at 1021. The court reasoned that a defendant with a 3-point offense under (B) and a 2-point violent offense under (C) would always have

more than 4 points under (A). *Id.* Reading the statute distributively, in contrast, would give (A) independent force by disqualifying a defendant who does not meet (B) or (C). *Id.* at 1021–22.

The court of appeals rejected the defendant's argument that the presumption of consistent usage supported reading "and" conjunctively because the word "and" connects § 3553(f)(1) through (5). *Id.* at 1022. The court thought that presumption lacked force given the differences between the affirmative list in § 3553(f)(1) through (5) and the negative list in § 3553(f)(1)(A) through (C) and the need "to avoid surplusage." *Id.* And because it thought that "the traditional tools of interpretation reveal the meaning of the provision," the court rejected the defendant's reliance on the rule of lenity as well. *Id.* at 1023.

2. The Seventh Circuit framed the competing interpretations of § 3553(f)(1) slightly differently than the Eighth Circuit. Rather than focus on the distributive approach, the Seventh Circuit discussed the "conjunctive" versus "disjunctive" interpretations of the statute. Pet. App. 19a n.18. However, as discussed above, the Seventh Circuit ultimately agreed with the outcome the Eighth Circuit reached—that "a defendant who meets any one of subsections (A), (B), or (C) does not qualify for safety-valve relief." *Id.* at 27a.

3. Subsequently, in *Palomares*, the Fifth Circuit largely followed the Eighth Circuit's distributive approach and reasoning. The Fifth Circuit expressly rejected the reasoning of the Ninth Circuit and held that "the statute's uncommon structure holds the

key to unlocking its meaning." *Palomares*, 52 F.4th at 642. With respect to § 3553(f)(1), the Fifth Circuit concluded that the opening "prefatory phrase coupled with an em-dash" acts to distribute the opening phrase to the list that follows, making the word "and" in the list of criteria effectively an "or." *Id.* Thus, in the Fifth Circuit's view, to be eligible for safety-valve relief under the statute, a defendant must not fail any of § 3553(f)(1)'s listed criteria. *Id.* at 647. The Fifth Circuit also found that there was no "grievous" ambiguity and thus declined to apply the rule of lenity. *Id.*

4. Finally, in *Haynes*, the Sixth Circuit adopted a distributive reading of the statute as well. The court considered the relevant question to be "which sense of 'and'—distributive or joint—is used in § 3553(f)(1)(B)." *Haynes*, 55 F.4th at 1078. The court stated that "[b]oth meanings are grammatically sound." *Id.* at 1079. But it concluded the government's interpretation that "the defendant must not have any of three disqualifying conditions" was the "logically [more] coherent" one because each of the conditions listed in § 3553(f)(1) "on its face is quite plausibly an independent ground to deny a defendant the extraordinary relief afforded by the safety valve." *Id.* The Sixth Circuit also agreed with the Eighth Circuit that, "[o]nly the distributive interpretation avoids surplusage." *Id.* at 1080 (quoting *Pulsifer*, 39 F.4th at 1022).

* * *

This deep and entrenched circuit split is the product of numerous appellate opinions that have exhaustively analyzed the issue and reached

conflicting conclusions. This split will persist, and only worsen, unless resolved by this Court, as the Fourth Circuit's recent opinion in *Jones* demonstrates. Further, other courts have explicitly declined to address the issue until this Court's intervention. *See United States v. Holroyd*, No. 20-3083 (D.C. Cir.) (Jan. 23, 2023 order holding case in abeyance).

Nor will the United States Sentencing Commission's recent proposed amendments to the Sentencing Guidelines solve the issue. *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180 (Feb. 2, 2023). While the amendments will bring the Guidelines up to date with the current version of the safety-valve statute, they will not resolve the existing circuit split regarding the proper interpretation of § 3553(f)(1).

Thus, the Court should resolve the issue now.

II. This Case Presents an Important Question of Federal Law and an Ideal Vehicle for Resolving It.

1. The correct interpretation of the First Step Act's "safety-valve" provision presents an important question of federal law.

This Court's resolution of the question will determine the eligibility of nonviolent drug offenders for safety-valve relief, a vital part of the bipartisan First Step Act. The Act's sentencing provisions were specifically designed to "address[] overly harsh and expensive mandatory minimums for certain nonviolent offenders" by "expanding the existing Federal safety valve to include more low-level, nonviolent

offenders." 164 Cong. Rec. S7648, S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley); *see also* 164 Cong. Rec. S7745, S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar) (stating the Act "allows judges to sentence below the mandatory minimum for low-level, nonviolent drug offenders who work with the government"). But several circuits have dramatically curtailed the scope of that relief.

Further, how courts interpret the safety-valve provision will affect the sentencing of thousands of offenders. That this issue has so quickly given rise to numerous, and conflicting, court of appeals decisions is not surprising. In fiscal year 2021 alone, the United States Sentencing Commission reports that 11,534 of the 17,192 federal offenders who received penalties for drug offenses were convicted of offenses carrying mandatory-minimum penalties. *See* U.S. Sent'g Comm'n, *2021 Sourcebook of Federal Sentencing Statistics*, Table D13, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/TableD13.pdf (last visited Feb. 26, 2023). Of those 11,534 offenders who were subject to mandatory minimums, 5,215 or approximately 45% obtained relief through the safety valve. *See id.*

But as it stands now, "whether one is eligible for safety-value relief is … largely a function of geography." *Haynes*, 55 F.4th at 1081 (Griffin, J., dissenting). For instance, as the Ninth Circuit recognized, the disjunctive interpretation of § 3553(f)(1) means that "a criminal defendant convicted of selling a small amount of marijuana (such as a marijuana cigarette), who received a sentence that exceeded

thirteen months of imprisonment, could not receive safety-valve relief." *Lopez*, 998 F.3d at 439. Thus, in Mississippi, under the Fifth Circuit's interpretation, a district court would be required to sentence this hypothetical defendant to the statutory minimum—even if the Sentencing Guidelines indicated a much shorter sentence was appropriate. While just across the border, in Alabama, under the Eleventh Circuit's interpretation, the exact same defendant would be eligible for the relief that the safety-valve provision was meant to provide.

2. This case is an ideal vehicle for addressing the severe disparity in sentencing that now exists across different circuits. Mr. Pace raised his eligibility for relief from the statutory minimum under 18 U.S.C. § 3553(f) before his sentencing, and the district court acknowledged on the record that he had satisfied the criteria in § 3553(f)(2)–(5). Pet. App. 78a–80a, 82a–83a. The only issue in dispute with respect to Mr. Pace's eligibility was the proper interpretation of the word "and" in § 3553(f)(1). The district court rejected Mr. Pace's arguments, however, and sentenced him to the statutory minimum five years of imprisonment. *Id.* at 105a.[2]

On appeal, the Seventh Circuit squarely addressed the issue in a published opinion, with both

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[2] Because the district court deemed Mr. Pace ineligible for safety-valve relief, it also sentenced Mr. Pace to the mandatory minimum four years of supervised release under 21 U.S.C. § 841(b)(1)(B). Pet. App. 89a, 106a. Thus, while Mr. Pace's projected release date is July 8, 2023 according to the Bureau of Prisons website, this case will not be rendered moot even if the case is heard next Term and not decided until the end of the Term in 2024.

concurring and dissenting opinions that examined all sides of the matter. *Id.* at 1a–56a. The issue is thus cleanly presented for resolution.

III. The Seventh Circuit's Decision Is Wrong.

In the decision below, the Seventh Circuit "strain[ed] against th[e] normal English understanding of 'and.'" Pet. App. 39a. Rather than give the term its accepted meaning, the Seventh Circuit contorted the word "and" as used in 18 U.S.C. § 3553(f)(1) to actually mean "or."

In a thorough and well-reasoned dissent below, Judge Wood explained why that interpretation is unsound and should not stand. Interpreting § 3553(f)(1), Judge Wood found that "and" should be construed conjunctively in accordance with its everyday English meaning. *Id.* As Judge Wood identified, it is "painfully obvious" that Congress chose not to use the disjunctive "or" in § 3553(f)(1). *Id.* Further, rejecting the majority's "contortions," she held "[t]here is nothing irrational, absurd, superfluous, or otherwise faulty about applying section 3553(f)(1) straightforwardly, allowing the word 'and' to mean 'and.'" *Id.* at 40a, 56a. Thus, she rightfully concluded that a defendant is ineligible for safety-valve relief "only if the defendant meets all three criteria of subpart (1)." *Id.* at 39a. The majority's contrary opinion should be reversed.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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February 27, 2023

APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 21-2151

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ROGER E. PACE, *Defendant-Appellant.*

Appeal from the United States District Court
for the Central District of Illinois.
No. 3:19-cr-30051 — Sue E. Myerscough, *Judge.*

ARGUED DECEMBER 6, 2021 — DECIDED SEPTEMBER 9, 2022

Before RIPPLE, WOOD, and KIRSCH, *Circuit Judges.*

RIPPLE, *Circuit Judge.* During a search of Roger Pace's vehicle, a police officer discovered methamphetamine. Mr. Pace was subsequently charged with possession with intent to distribute 50 grams or more of a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B).

Mr. Pace filed a motion to suppress the drugs and other evidence found during the search of his SUV.

The magistrate judge conducted an evidentiary hearing and then recommended that the district court deny the motion. After considering Mr. Pace's objections to the magistrate judge's report, the district court overruled those objections, adopted the report, and denied the motion to suppress.

Mr. Pace subsequently pleaded guilty but reserved his right to appeal the ruling on his suppression motion. At his sentencing hearing, Mr. Pace asserted that he was eligible for relief from the five-year statutory minimum sentence pursuant to the "safety valve" provision of 18 U.S.C. § 3553(f). The district court determined, however, that Mr. Pace did not qualify for the safety valve and sentenced him to 60 months' imprisonment.

Mr. Pace now asks us to review both the district court's denial of his motion to suppress and its ruling that he did not qualify for the safety valve. We hold that the district court correctly determined that the search of Mr. Pace's vehicle was based on reasonable suspicion and that he did not qualify for the safety valve. Accordingly, we affirm the judgment of the district court.

I

BACKGROUND

A.

On April 5, 2019, at around 10:30 p.m., Officer Ryan Crowder observed a white SUV in the parking lot of a local business. An individual was sitting inside the SUV. That night, Officer Crowder was the only police officer on duty in the small town of Pleasant Hill, Illinois. He testified that he pulled into the

parking lot to investigate the SUV because it was nighttime, the business was closed, and he had never seen that particular SUV in Pleasant Hill. As soon as Officer Crowder pulled his car alongside the SUV, Mr. Pace exited his vehicle and started speaking with him. Mr. Pace explained that he was in town visiting his friend, Jennifer Johns, but was lost and needed directions to Carolina Street where Johns lived.

Officer Crowder knew of Johns and of her past methamphetamine use. Indeed, Johns previously had provided information to Officer Crowder about methamphetamine use in Pleasant Hill, and this information had led to the arrest of a person for possession of the drug. A member of the Western Central Illinois Task Force also had informed him that a confidential source reported that Johns and her mother were using and moving methamphetamine. Finally, Officer Crowder had received complaints from Johns's neighbors about frequent traffic at her home, which was consistent with drug trafficking. Officer Crowder testified that Mr. Pace's mention of Johns's name and of his planned late-night visit to her residence therefore raised a red flag.

After providing Mr. Pace with directions to Johns's home, Officer Crowder backed up his police car, activated his emergency lights, and parked directly behind Mr. Pace's SUV. At this point, less

than one minute had elapsed from the time that Officer Crowder had initially stopped.[1] While Officer Crowder moved his squad car, Mr. Pace stood in front of his SUV and talked on his phone. The exit to the parking lot was in front of Mr. Pace's car; nothing obstructed his ability to drive away.

Officer Crowder then approached Mr. Pace again and asked for his driver's license. Shining his flashlight inside the SUV, he did not see any weapons or contraband but did see multiple musical instrument cases. Mr. Pace walked to the back of his SUV and attempted to get one of the instruments out to play for Officer Crowder but was asked to leave it in the vehicle. Mr. Pace's behavior struck Officer Crowder as very odd and overly friendly, yet nervous at the same time. Officer Crowder attempted to radio Mr. Pace's driver's license into dispatch to confirm its validity and to ascertain whether Mr. Pace had any warrants. Discovering that his portable radio was not working, Officer Crowder returned to his squad car with Mr. Pace's license and waited for dispatch to respond. He also called an officer from another agency to determine whether he could assist, but the officer was busy.

Dispatch confirmed that Mr. Pace's license was clear and that he had no outstanding warrants. It further indicated, however, that he had a history of drug possession including methamphetamine, narcotic instruments, and drug paraphernalia. Officer

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[1] The dashcam video recording from Officer Crowder's squad car was admitted in the evidentiary hearing as Government's Exhibit 2. R.19-2.

Crowder also checked a website that provides a person's criminal history from several jurisdictions. According to the site, Mr. Pace was on probation for possession of methamphetamine.[2] After exiting his squad car, Officer Crowder inquired whether Mr. Pace had any weapons. Mr. Pace denied that he did and consented to a search of his person. Officer Crowder then asked if Mr. Pace would consent to a search of his SUV, but Mr. Pace declined.

At that point, Officer Crowder informed Mr. Pace that he was going to conduct a free air sniff of his SUV with his canine partner. Officer Crowder then explained to Mr. Pace that he was not under arrest, but that he was going to place him in restraints during the sniff for officer safety. He handcuffed Mr. Pace's hands in front of his body. Both Officer Crowder and Mr. Pace walked back to the SUV, and Mr. Pace retrieved an item from the front of the vehicle. Officer Crowder then placed him in front of his squad car. Officer Crowder retrieved his K-9 from the squad car. After the dog alerted to the presence of drugs in the SUV, Officer Crowder searched the SUV and found both methamphetamine and cannabis. Officer Crowder then arrested Mr. Pace and placed him inside the squad car.

B.

Following his indictment for possession with intent to distribute methamphetamine, Mr. Pace filed a motion to suppress, asserting that all evidence obtained from the seizure, search, and arrest should be

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[2] The website is www.judici.com, which explicitly states that it is not to be relied upon for accuracy.

suppressed. The magistrate judge conducted a hearing on the motion and determined that the initial interaction between Mr. Pace and Officer Crowder was consensual. The judge also concluded that Officer Crowder's use of his emergency lights did not constitute a seizure for purposes of the Fourth Amendment, but, in any event, Officer Crowder had reasonable articulable suspicion at that point in time to conduct a limited investigative stop to check Mr. Pace's license. The magistrate judge also concluded that once Officer Crowder learned of Mr. Pace's criminal history, he had sufficient information to conduct a free air sniff of Mr. Pace's SUV. Finally, the magistrate judge rejected the argument that an arrest occurred when the officer handcuffed Mr. Pace. An arrest occurred only after the completion of the search of the vehicle and the discovery of the drugs.

Mr. Pace filed several objections to the magistrate judge's report. He objected to the magistrate judge's determination that his encounter with Officer Crowder was consensual, that Officer Crowder's testimony was credible, that the activation of the squad car's emergency lights did not constitute a seizure, that Officer Crowder had reasonable suspicion when he activated the emergency lights, and that he was not placed under arrest when he was handcuffed. He contended that the facts demonstrated Officer Crowder "relied on nothing more than the name 'Jennifer Johns' to detain Mr.

Pace, and that [was] not sufficient to establish reasonable suspicion."[3]

These arguments did not persuade the district court. In a written opinion, the court overruled Mr. Pace's objections and adopted the magistrate judge's report and recommendation. The court held that Mr. Pace's initial encounter with Officer Crowder was consensual, that Officer Crowder had reasonable suspicion to conduct a limited investigatory stop to check Mr. Pace's license,[4] and that, based on the totality of the circumstances, the squad car's emergency lights were activated appropriately as part of an investigatory stop.[5] Finally, the district court held that Officer Crowder had not placed Mr. Pace under arrest by handcuffing him during the search of the SUV. Having made these determinations, the district court denied the motion to suppress.

Mr. Pace then pleaded guilty but reserved his right to appeal the district court's ruling on the suppression motion. The probation office prepared a Presentence Report and did not deem him eligible for safety-valve relief under 18 U.S.C. § 3553(f).[6] Mr.

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[3] R.31 at 12.

[4] R.37 at 17.

[5] "Officer Crowder had reasonable suspicion to conduct an investigatory stop—when Officer Crowder activated his emergency lights and when he took Defendant's license back to the police vehicle." *Id.* at 21.

[6] The safety valve requires federal courts to impose a sentence "without regard to any statutory minimum sentence" if the defendant satisfies the five requirements set forth in § 3553(f)(1)–(5).

Pace maintained that he was eligible for the safety valve, was not subject to a mandatory minimum sentence, and was entitled to a two-level reduction in his offense level.[7] Under Mr. Pace's interpretation of § 3553(f)(1), he was eligible for safety-valve relief because he did not have a prior 2-point violent offense, as required under § 3553(f)(1)(C). Noting a division between the circuits on the issue, Mr. Pace also contended that the rules of lenity and fair warning should apply.

At the sentencing hearing, the district court rejected Mr. Pace's interpretation of safety valve eligibility found in § 3553(f)(1). The district court had previously addressed and rejected arguments identical to Mr. Pace's in *United States v. Howell*, No. 20-CR-30075-1, 2021 WL 2000245 (C.D. Ill. May 19, 2021). Relying on that opinion, the district court concluded that Mr. Pace's proposed interpretation gave rise to absurd results. The court therefore sentenced Mr. Pace to the statutory minimum sentence of 60 months. Mr. Pace filed a timely notice of appeal.

II

DISCUSSION

A.

In examining a district court's denial of a motion to suppress, we review its findings of historical fact for clear error and its conclusions of law de novo. *See*

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[7] A defendant who qualifies for the safety valve also receives a two-level guideline reduction. See U.S.S.G. § 2D1.1(b)(18) ("If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of § 5C1.2 … decrease by 2 levels.").

United States v. Ruiz, 785 F.3d 1134, 1140–41 (7th Cir. 2015); *United States v. Eymann*, 962 F.3d 273, 281 (7th Cir. 2020).

1.

Mr. Pace first submits that his initial encounter with Officer Crowder was not consensual. Mr. Pace contends that after Officer Crowder learned of his "completely innocent explanation" for his presence in the parking lot—being lost and looking for a friend's home—he nevertheless detained him on nothing more than a hunch. In response, the Government, noting that Mr. Pace voluntarily exited his vehicle and commenced a conversation with the officer, submits that his interaction with Officer Crowder was a consensual encounter.

A seizure occurs when "taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quotation omitted). "Whether a police-citizen encounter is consensual is a question of fact, and we therefore review it for clear error." *United States v. Whitaker*, 546 F.3d 902, 906 (7th Cir. 2008). The Supreme Court has stated clearly that there is no constitutionally cognizable seizure "simply because a police officer approaches an individual and asks a few questions." *Bostick*, 501 U.S. at 434. Indeed, we have noted expressly that in a consensual encounter "the degree of suspicion [that is] required is zero." *United States v. Serna-Barreto*, 842 F.2d 965, 966 (7th Cir. 1988).

In determining whether an encounter is consensual, we have provided a nonexclusive, non-exhaustive list of factors for the district courts to consider:

- where the interaction took place, including whether it was in public;
- how many police officers were present;
- the extent to which the police presence was threatening;
- whether the officers made any show of weapons or physical force;
- the officers' language and tone;
- whether the police suggested the defendant was suspected of crime; and
- whether officers told the defendant he was free to leave.

United States v. Holly, 940 F.3d 995, 1000 (7th Cir. 2019).

Here, the record supports the district court's determination that the initial encounter was, viewed objectively, consensual. It also reveals that the district court employed the appropriate methodology in assessing the facts contained in the record. The court considered the factors listed in *Holly*. It noted that the encounter took place outside; Officer Crowder did not force Mr. Pace to stop as his vehicle was already parked; only one officer was present; there was no threatening presence or show of authority; and Mr. Pace moved about freely during their initial interaction. Furthermore, when he first stopped, Officer Crowder inquired whether Mr. Pace needed help, and he did not act in a manner that would have

communicated to Mr. Pace that he could not leave.[8] Reaching a decision compatible with our case law,[9] the district court considered the applicable factors, all of which pointed to the conclusion that the encounter was consensual. The district court, therefore, did not clearly err.

2.

Mr. Pace next contends that the information that became known to Officer Crowder following the initial encounter did not establish reasonable suspicion to prolong the encounter. In his view, Officer Crowder's initial exchange with Mr. Pace left him with only "hunches" that Johns and her mother were involved with methamphetamine.[10] Consequently, Officer Crowder lacked reasonable suspicion to activate his emergency lights, to reposition his squad car behind the SUV, to check the status of Mr. Pace's driver's license, or to determine his criminal background, if any. In the Government's view, Officer Crowder had reasonable suspicion as a result of his initial conversation with Mr. Pace. It submits that

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[8] R.19-2.

[9] *See, e.g., United States v. Lickers*, 928 F.3d 609, 616 (7th Cir. 2019) (finding it was reasonable for the officers to ask whether the defendant needed help and noting that the Fourth Amendment is not triggered when "officers merely approach an individual in a public place and ask a few questions." (quotation omitted)).

[10] In the evidentiary hearing, Officer Crowder testified that there were no active warrants for Johns's arrest, no active search warrants for her home, and that he had received no tips that either she or her mother would receive methamphetamine that evening. R.25 at 57–58.

the officer was therefore on solid ground when he took each of these actions.

It is well established that a police officer can stop and detain briefly a person for investigative purposes when the officer has a reasonable suspicion, supported by articulable facts, that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). "Reasonable suspicion exists only when an officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Eymann*, 962 F.3d at 282 (quotation omitted). Thus, "[w]hile reasonable suspicion requires something less than what is necessary to show probable cause, it requires more than a mere 'hunch.'" *United States v. Ienco*, 182 F.3d 517, 523 (7th Cir. 1999). Information lawfully obtained during an initial consensual encounter "may provide the officer with reasonable suspicion of criminal conduct that will justify prolonging the stop to permit a reasonable investigation." *United States v. Figueroa-Espana*, 511 F.3d 696, 702 (7th Cir. 2007).

Our examination of the record convinces us that the information that Officer Crowder learned during the initial encounter justified his conclusion that additional investigation was warranted. Given his reasonable suspicion that Mr. Pace's intended late-night visit to individuals suspected of dealing in methamphetamine could involve illegal drug activity, placing his vehicle behind Mr. Pace's SUV, activating the squad car's lights, and then asking for Mr. Pace's driver's license were reasonable steps for the

officer to take.[11] Specific, articulable facts, when viewed objectively, justified a brief investigation to confirm or dispel the suspicion that Mr. Pace's visit was drug-related and not social.[12]

We cannot accept the view that the information then known to Officer Crowder was too vague to justify his course of proceeding. The Government appropriately emphasizes that: (1) within the last year, Officer Crowder had observed Johns to be high on what he believed to be methamphetamine; (2) two months prior, Johns had given Officer Crowder information on methamphetamine use in Pleasant Hill, which had led to an arrest; (3) Officer Crowder received information from a task force officer that Johns and her mother were involved in methamphetamine use; and (4) Johns's neighbors had com-

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[11] Contrary to Mr. Pace's assertion, this case is not like *United States v. Segoviano*, 30 F.4th 613 (7th Cir. 2022). In *Segoviano*, we determined that there were absolutely no facts tying the defendant to the crime at issue, nor was there "particularized suspicion" that he was engaged in wrongdoing. Here, Mr. Pace was from out-of-town, in a parking lot late at night, and he provided information to Officer Crowder that directly tied him to a known methamphetamine user. While Officer Crowder was already suspicious that Johns was dealing narcotics from her home, it was Mr. Pace's explanation of his presence in Pleasant Hill that supplied the particularized suspicion that he might be involved in dealing methamphetamine.

[12] *See Hayes v. Florida*, 470 U.S. 811, 816 (1985) ("[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information.").

plained to Officer Crowder about the amount of traffic at her home that was consistent with drug trafficking.[13] This information about Johns, in combination with Mr. Pace's explanation of why he was in Pleasant Hill so late in the evening, supplied the reasonable suspicion that justified Officer Crowder's decision to detain Mr. Pace for further investigation.[14] This prolongation of the encounter constituted an investigatory stop.[15]

3.

Finally, Mr. Pace submits that even if Officer Crowder had reasonable suspicion to detain him, he did not have probable cause to arrest him. In Mr. Pace's view, Officer Crowder arrested him by placing him in handcuffs prior to the K-9 search of the exterior of the SUV.

Following Mr. Pace's denial of consent to search the SUV, Officer Crowder then told Mr. Pace that he was going to conduct a free air sniff of the SUV with

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[13] Appellee's Br. 21–22.

[14] *See United States v. Yang*, 39 F.4th 893, 901 (7th Cir. 2022) (recognizing that while alternative inferences from what the officer observed could have been drawn, the other potentially innocuous causes did not negate reasonable suspicion).

[15] *See Florida v. Royer*, 460 U.S. 491, 501 (1983) (noting that when a defendant's ticket and driver's license were retained without any indication from officers that he was free to depart, the defendant was effectively seized for purposes of the Fourth Amendment); *United States v. Ahmad*, 21 F.4th 475, 481 (7th Cir. 2021) (holding that whether retention of a driver's license constitutes a seizure depends upon "*how long* and *under what circumstances* the suspect's identification documents were retained").

his canine partner. At the evidentiary hearing, Officer Crowder explained that Mr. Pace had been compliant through all his interactions with him, but he still believed that use of handcuffs was necessary for his own safety. Officer Crowder testified, "I explained to him that at this point that he was not under arrest, that I was going to place him in restraints for my officer safety at that point."[16] Mr. Pace's hands were cuffed in front of his body, he was not placed in the squad car, and he was still able to walk about freely.

Mr. Pace now maintains that Officer Crowder arrested him when the officer put him in handcuffs. As Mr. Pace sees it, the record is devoid of any evidence that the handcuffing accomplished any purpose other than to escalate the encounter into an arrest, an escalation which Officer Crowder had planned from the outset. The Government takes a different view. It counters that because Officer Crowder was the only officer on the scene, he was justified in handcuffing Mr. Pace, while he retrieved his canine partner from the squad car and conducted a search of the SUV.

"Subtle, and perhaps tenuous, distinctions exist between a *Terry* stop, a *Terry* stop rapidly evolving into an arrest and a *de facto* arrest." *United States v. Tilmon*, 19 F.3d 1221, 1224 (7th Cir. 1994). "We have been unwilling to hold that the handcuffing of a suspect without probable cause to arrest is unlawful per se." *United States v. Smith*, 3 F.3d 1088, 1094 (7th Cir. 1993). Instead, we have recognized the "'rare'

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[16] R.25 at 42:16–19.

case wherein common sense and ordinary human experience convince us that an officer believed reasonably that an investigative stop could be effectuated safely only through the use of handcuffs." *Id.* (quoting *United States v. Boden*, 854 F.2d 983, 993 (7th Cir. 1988)). In short, we have "recognized a limited set of circumstances in which handcuffs are appropriate without converting a Terry stop into a full arrest. Chief among them is officer safety and the possibility of the presence of a weapon." *Howell v. Smith*, 853 F.3d 892, 898 (7th Cir. 2017).

Although Officer Crowder admitted that he did not feel threatened by Mr. Pace at any point during their interaction, he certainly was entitled to take into consideration that he was the only officer on duty and that back-up officers were over a twenty-minute drive away. In making the decision to use handcuffs, Officer Crowder also could take into account that Mr. Pace was from out-of-town, that it was late at night, that Mr. Pace had stated that he was in town to visit the home of a suspected methamphetamine dealer, that Mr. Pace had a criminal history of possessing methamphetamine, and that he had denied consent for the search of his vehicle. Notably, Officer Crowder explicitly told Mr. Pace that he was not under arrest.

The district court did not err in denying Mr. Pace's motion to suppress. Instead, it properly determined that Mr. Pace's initial encounter with Officer Crowder was consensual. From the ensuing conversation, he gained reasonable suspicion that justified detaining Mr. Pace for further investigation. Mr. Pace was not placed under arrest until after the

search of his SUV and the discovery of methamphetamine. At that point, there certainly was probable cause to arrest Mr. Pace. The district court correctly denied Mr. Pace's motion to suppress.

B.

We now turn to the sentencing phase of the district court proceedings. Here, Mr. Pace contends that the district court erred in not affording him the benefit of the "safety valve" provision in 18 U.S.C. § 3553(f)(1).

"We review the district court's interpretation of the safety-valve provision under the statute and the sentencing guidelines de novo." *United States v. Collins*, 924 F.3d 436, 441 (7th Cir. 2019). The defendant bears the burden of establishing eligibility for the safety-valve exemption from a mandatory minimum sentence. *See United States v. Draheim*, 958 F.3d 651, 658 (7th Cir. 2020).

1.

The safety valve provision "create[s] more flexibility in sentencing by permitting courts to sentence below the minimum sentences fixed by statute." *United States v. Syms*, 846 F.3d 230, 235 (7th Cir. 2017). The provision is designed to benefit "first-time, non-violent drug offenders who were not organizers of criminal activity and who have made a good-faith effort to cooperate with the government." *Id.* (quoting *United States v. Arrington*, 73 F.3d 144, 147 (7th Cir. 1996)).

In order to qualify for the benefit of the safety valve provision, a defendant must satisfy certain requirements set out in the statute. Specifically, the

safety valve requires defendants to satisfy five elements found in 18 U.S.C. § 3553(f), one of which pertains to a defendant's criminal history. In the First Step Act of 2018, Congress replaced the criminal-history element of § 3553(f)(1), which originally had only required a defendant to not have more than one criminal history point, with the current list of three criminal-history conditions now found at § 3553(f)(1)(A)–(C). The relevant portion of the statute now states:

> (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 … .

§ 3553(f)(1) (emphasis added).

Mr. Pace submits that he is eligible for the safety valve because he does not meet the criterion of subsection (C): he does not have a prior two-point violent offense. Mr. Pace asserts that the word 'and' in § 3553(f)(1) "must be read in its natural, conjunctive meaning, which only disqualifies defendants who

fail each of § 3553(f)(1)(A), (B), 'and' (C)."[17] The district court disagreed and determined that satisfying even one of the subsections listed in § 3553(f)(1) resulted in safety-valve ineligibility.

Mr. Pace continues to assert that a defendant is only disqualified from the application of the safety valve if he fails to satisfy each of § 3553(f)(1)'s subsections (A), (B), and (C). In response, the Government contends that when read as a whole, the text, context, and purpose of § 3553(f) only allow one interpretation: that a defendant is disqualified from the safety valve if he has (A) more than four criminal history points, *or* (B) a prior three-point offense, or (C) a prior two-point violent offense. Thus, the Government asserts that Mr. Pace is not eligible for the safety valve because he meets the criteria of subsections (A) and (B).

2.

We have not yet had the occasion to address whether § 3553(f)(1) requires a defendant to meet all three subsections or just one of the subsections to be eligible for the safety valve. Three other circuits have addressed this question but have reached differing conclusions.[18] The Eleventh Circuit held that

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[17] Appellant's Br. 36.

[18] These two conclusions have been represented helpfully as the "conjunctive" argument and the "disjunctive" argument. Here, Mr. Pace is asserting the conjunctive argument by claiming that a defendant is only ineligible for safety-valve relief if he meets the criteria of all three subsections. The disjunctive argument asserts that the use of "and" should be read as "or," thus meeting any one of the subsections makes a defendant in-

a defendant who meets any one of the three subsections is disqualified from safety-valve eligibility. *See United States v. Garcon*, 997 F.3d 1301, 1306 (11th Cir. 2021) (adopting the disjunctive approach). Notably, the Eleventh Circuit's decision was recently vacated as the court decided to take up the issue en banc.[19] More recently, the Eighth Circuit held that "[a] defendant qualifies under § 3553(f)(1) if he 'does not have—'the criminal history points specified in (A), the prior offense listed in (B), and the prior offense listed in (C)." *United States v. Pulsifer*, 39 F.4th 1018, 1021 (8th Cir. 2022). In contrast, the Ninth Circuit held that only a defendant who meets the criteria of all three subsections is disqualified. *See United States v. Lopez*, 998 F.3d 431, 437 (9th Cir. 2021) (adopting the conjunctive approach).

Here, the district court determined at the sentencing hearing that Mr. Pace was not eligible for the safety valve because he satisfied at least one of the subsections of § 3553(f)(1). The district court recognized the disagreement among the circuits on the issue but stated that the Ninth Circuit's reasoning in *Lopez* had not convinced it that its previous decision on the same issue in *Howell*, 2021 WL 2000245 was incorrect. In *Howell*, the district court provided several reasons for rejecting the defendant's safety-valve argument: (1) the conjunctive interpretation

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eligible for safety-valve relief. This court also recognizes a similar question is before the Fifth Circuit, but no decision has been issued yet in *United States v. Palomares*, No. 21-40247 (5th Cir. argued Feb. 1, 2022).

[19] *United States v. Garcon*, 23 F.4th 1334 (11th Cir. 2022) (mem.).

rendered part of § 3553(f)(1) superfluous and gave rise to absurd results; (2) the legislative history of the First Step Act's Safety Valve expansion supported a disjunctive interpretation; and (3) the rule of lenity did not apply.

The primary arguments addressed by the parties on appeal are based on the statutory text of § 3553(f), the legislative history of the statute, the canons of construction when interpreting the statute, and the rule of lenity. We will address each.

Mr. Pace's chief argument relies on the plain language of § 3553(f)(1). He stresses the conjunctive use of the word "and" as it is commonly understood. He stresses, as did the defendants in *Howell*, "that if the list elements were meant to be individually prohibited, Congress would have used the word 'or' instead of 'and,' as 'or' normally functions disjunctively." *Howell*, 2021 WL 2000245, at *2. Mr. Pace also points to the use of "and" in the other sections of § 3553(f) and notes that "and" is used conjunctively between § 3553(f)(4) and (5).[20] Mr. Pace also relies on our holding in *United States v. Draheim*, 958 F.3d 651, 658 (7th Cir. 2020), where we determined that the "and" within § 3553(f)(4) is conjunctive. Thus, in two other places in the same statute, argues Mr. Pace, the word "and" is used conjunctively.

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[20] The use of the conjunctive between subsections (4) and (5) means that a defendant is eligible for the safety valve if he can establish that he satisfies each of subsections (1), (2), (3), (4), and (5).

The Government maintains that the provision should be read disjunctively. It stresses that the context in which language is used matters and that the meaning of a word cannot be determined in isolation. *See Yates v. United States*, 574 U.S. 528, 537 (2015). The Government submits that the word "and" can mean "joint and several," and § 3553(f)'s text suggests that usage in this context. The Government also contends that the statute's use of the em-dash to connect the lead-in ("does not have") in § 3553(f)(1) to the subsection list (A)–(C) suggests that the lead-in modifies each subsection. Finally, the Government asserts that § 3553(f)(1) is the only provision of § 3553(f) that sets out a list of elements framed in the negative, which makes it structurally different from § 3553(f)(4), thus requiring different treatment.

3.

"As with all issues of statutory interpretation, the appropriate place to begin our analysis is with the text itself, which is the most reliable indicator of congressional intent." *Bass v. Stolper, Koritzinsky, Brewster & NMeider, S.C.*, 111 F.3d 1322, 1324–25 (7th Cir. 1997) (citation omitted). We also read a statute "as a whole" rather than "as a series of unrelated and isolated provisions." *Arreola-Castillo v. United States*, 889 F.3d 378, 386 (7th Cir. 2018) (first quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); and then quoting *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006)).

Here, the two suggested interpretations of § 3553(f)(1) are not equally plausible. The conjunctive argument creates more problems than solutions and

renders a portion of the statute superfluous. Although Mr. Pace is correct that the word "and" is commonly utilized conjunctively and is used in that way in other parts of § 3553(f), the context of the word "and" in § 3553(f)(1) supports the view that it should be read disjunctively. If disqualification results only when a defendant meets each of the subsections, subsection (A) is superfluous. If a defendant meets subsection (B) requiring a three-point offense, and subsection (C) requiring a two-point violent offense, then he would automatically have more than the four criminal history points required by subsection (A). This interpretation of the statute therefore cannot be squared with the canon against surplusage.[21] By contrast, the "disjunctive" interpretation gives independent meaning to all three subsections; it does not render subparagraph (A) meaningless.

The placement of the word "and" also supports a disjunctive reading. The use of the em-dash following subsection one of § 3553(f) (see below) to connect the subsections demonstrates that the lead-in "does not have" modifies each subsection requirement:

(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

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[21] *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("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." (citation omitted)).

> guidelines; and (C) a prior 2-point violent offense, as determined under the sentencing guidelines … .

Thus, the em-dash serves to modify each requirement: *does not have* more than 4 criminal history points, *does not have* a prior 3-point offense, and *does not have* a prior 2-point violent offense. This reading of the statute gives proper meaning to the word "and" while also treating the subsections as a checklist of requirements a defendant must not have in order to be eligible for the safety valve. Our colleagues in the Eighth Circuit recently employed an approach that, although employing different nomenclature, is conceptually quite compatible with our emphasis on the em-dash. In *Pulsifer*, 39 F.4th at 1021, that court emphasized that "and" should be read conjunctively and distributed across the subsections. It found a "strong textual basis [for preferring] a distributive reading of 'and' in § 3553(f)." *Id.* It noted: "The practical effect of reading 'and' in its distributive sense is that § 3553(f)(1) serves as an eligibility checklist for offenders who seek to avail themselves of the limitation on statutory minimums. The text distributes the introductory phrase 'does not have' across each statutory condition." *Id.* at 1022. In short, the most important textual basis for this "distributive" reading is Congress's use of the em-dash.

In response to the em-dash argument, Mr. Pace invites our attention to the em-dash at the end of the introductory paragraph for the entire subsection (f) of the statute. Attributing the same interpretation to this em-dash as we have to the introductory phrase of section (f)(1) would destroy the entire

safety valve structure in § 3553(f) and would allow a person to be eligible for the safety valve if he satisfied just one of the provisions rather than all five of the provisions of section (f). But again, context matters. Section (f) as a whole is framed in the positive; subsection (f)(1) is framed in the negative. As a defendant need not meet each of the requirements of subsections (A), (B), *and* (C) to satisfy § 3553(f)(1), he must meet the requirements of (f)(1), (f)(2), (f)(3), (f)(4), *and* (f)(5) to fulfill the requirements of § 3553(f).

Moreover, Mr. Pace's interpretation of the statute produces absurd results. A defendant who had multiple three-point violent offenses under subsection (B) would still be safety-valve eligible so long as he did not have a prior two-point violent offense under subsection (C). This interpretation would afford leniency to defendants with more serious offenses (those serious enough to receive three criminal history points) while denying safety-valve eligibility to the defendants with less serious offenses that received only two points.

Mr. Pace attempts to avoid the absurdity argument by suggesting that Congress intended to expand the safety valve in 2018 to give district courts more discretion in avoiding situations where drug offenders may receive an unduly harsh sentence because of a mandatory minimum. But the Government notes that the legislative history from the Senate Judiciary Committee as well as guidance from the Sentencing Commission support its disjunctive argument. The Senate Judiciary Committee stated that the Act expanded safety-valve relief "to include offenders with up to four criminal history points,"

but that offenders "with prior '3-point' felony convictions … or prior '2-point' violent felony offenses … will not be eligible." S. Comm. on the Judiciary, 115th Cong., *The First Step Act of 2018 (S.3649)*—as introduced, at 2 (2018). As for the Sentencing Commission, it has previously stated that "a defendant with any '2-point violent offense' is ineligible for the safety valve." United States Sent'g Comm'n, *First Step Act*, at 6 (Feb. 2019).

Finally, Mr. Pace asserts that if this court finds there to be two equally plausible interpretations of "and" in § 3553(f)(1) then it is bound by the rule of lenity. The rule of lenity "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994). Only 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[,]" then the rule of lenity applies. *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)).

Here, there are not equally plausible interpretations such that the rule of lenity comes into play. As the Government points out, "[t]he mere possibility of articulating a narrower construction … does not by itself make the rule of lenity applicable." *Smith v. United States*, 508 U.S. 223, 239 (1993). The words of the statute, the canons of statutory construction, the legislative history surrounding the statute, and the purpose of the statute all support the disjunctive interpretation.

Section 3553(f) addresses when a defendant is eligible for relief from a statutory minimum sentence. Section 3553(f)(1) contains a list of certain prior offenses that a defendant must *not* have to qualify for the safety valve. A defendant satisfies § 3553(f)(1), and thus may be eligible for safety-valve relief, only if he does not have (A), he does not have (B), *and* he does not have (C). Said another way, a defendant who meets any one of subsections (A), (B), or (C) does not qualify for safety-valve relief.

CONCLUSION

The district court properly denied Mr. Pace's motion to suppress. Officer Crowder had reasonable articulable suspicion to detain him and search his vehicle under the Fourth Amendment. Additionally, the district court properly found that Mr. Pace did not qualify for safety-valve relief. Therefore, the judgment of the district court is affirmed.

AFFIRMED

KIRSCH, *Circuit Judge*, concurring. I join the opinion but write separately to explain my understanding of 18 U.S.C. § 3553(f)'s safety valve. Section 3553(f)(1) is conjunctive, not disjunctive. The statute conjoins three separate conditions that the defendant must show he does not satisfy:

> [T]he 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[.]

18 U.S.C. § 3553(f) (emphases added). A conjunctive reading of "and" does not require us—as the dissent sees it—to read "and" as cumulative, joining the conditions together as if they had been bracketed. Rather, a conjunctive "and" can have a distributive or joint (cumulative) sense. Garner's Dictionary of Legal Usage 639 (3d ed. 2011); see *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 71 (2014) (how "and" works in 8 U.S.C. § 1153(h)(3) "depends, like many questions of usage, on the context"). Applied to § 3553(f)(1), the distributive "and" requires the defendant to show that he does not have (A), does not have (B), and does not have (C), not the combination of [(A) joined with (B) joined with (C)].

It is our job to decide from plain meaning and context whether "and" is distributive or joint. See *OfficeMax, Inc. v. United States*, 428 F.3d 583, 600 (6th Cir. 2005) (Rogers, J., dissenting) ("Whether to interpret the preceding words as distributed over the conjoined elements or not depends on the context of the sentence, and what we externally know about the conjoined elements."). Here, the context is a checklist of conditions. In a list like this, the plain meaning is that the defendant must satisfy all three negative requirements individually, not cumulatively. Plain readers naturally distribute the "does not have" in § 3553(f)(1). The three conditions do not jump out as joint (combining (A), (B), and (C)). That's why the Ninth Circuit had to provide readers the word "cumulatively": "This structure requires a defendant to prove that he or she does not meet the criteria in subsections (A), (B), and (C), *cumulatively*." *United States v. Lopez*, 998 F.3d 431, 436 (9th Cir. 2021).

I recognize that in this statute and others like it, a distributive reading makes "and" interchangeable with a disjunctive "or." But Congress writes statutes like that all the time, and for those statutes "courts have generally said ['and' and 'or'] are interchangeable and that one may be substituted for the other."*

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* The dissent somehow reads this sentence as "lead[ing] us down a dangerous path … of construing statutes to conform to what we judges think Congress 'really' meant, rather than to follow the words that Congress actually used." *Post* at 48. But this concurrence lays no such path. Consulting Congress's use of language in other statutes is an ordinary tool of statutory interpretation. See *Buckeye Check Cashing, Inc. v. Cardegna*,

Conjunctive and Disjunctive Words, 1A Sutherland Statutory Construction § 21:14 (7th ed.); see *Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 n.1 (5th Cir. 1958) ("The words 'and' and 'or' when used in a statute are convertible, as the sense may require."). Here's one example:

> (b) Exemptions.—This chapter does not apply to—
>
> (1) a contract of the Federal Government or the District of Columbia for the construction, alteration, or repair, including painting and decorating, of public buildings or public works;
>
> (2) any work required to be done in accordance with chapter 65 of this title;
>
> (3) a contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;
>
> (4) a contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934 (47 U.S.C. 151 et seq.);
>
> (5) a contract for public utility services, including electric light and power, water, steam, and gas;
>
> (6) an employment contract providing for direct services to a Federal agency by an individual; *and*

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546 U.S. 440, 448 n.3 (2006) (looking "elsewhere in the United States Code" to aid statutory interpretation).

(7) a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.

41 U.S.C. § 6702(b) (emphasis added). Had Congress used "or" instead of "and," this distributive list would mean exactly the same thing. It certainly cannot be that the only contract exempted by 41 U.S.C. § 6702(b) is an employment contract of the federal government or D.C. with USPS providing for direct services to a federal agency by an individual for the carriage of freight or personnel, for the furnishing of telecommunication services, and for public utility services. There's no contract in America that satisfies all those conditions. Yet the dissent's bracketing approach would exempt only such a super-contract. But everyone intuitively knows that Chapter 67 of Title 41 ("this chapter") "does not apply" to any contract that satisfies any of the six enumerated criteria. The statutory reader distributes the "does not apply."

There are numerous other examples in the federal code. Take 18 U.S.C. § 845(a), which lists seven exceptions to federal crimes about explosive materials. If the dissent's cumulative "and" were forced into the statutory list, § 845(a) would create a single exception with seven requirements: only the regulated transportation of military small-arms explosives that are used in medicines, antique devices, and tribal fireworks displays would be exempted. See also 26 U.S.C. § 9831(a) (chapter would be inapplicable only to governmental group health plans with fewer than two participants); 41 U.S.C. § 8302(a)(2) (section would be inapplicable only to articles, materials, or supplies for use outside the

United States, procured by a reciprocal defense procurement memorandum of understanding that is also somehow a contract with an award value that is not more than the micro-purchase threshold under 41 U.S.C. § 1902). And sometimes Congress uses "or" instead of "and" to mean the same thing. See, e.g., 7 U.S.C. § 138a(e) ("or" could be changed to "and" with no semantic shift); 46 U.S.C. § 3202(d) (same).

The dissent concedes that, in these examples, "whether the list ends with 'and,' 'or,' or nothing makes no difference." Post at 48. Still, it finds them inapposite, reasoning that, unlike § 3553(f)(1), "[t]here is nothing cumulative about the items" on these "simple list[s]" expressed in these other statutes because "they do not work together to establish criteria." Post at 49. But this circular reasoning assumes its conclusion: that the list in § 3553(f)(1) is cumulative. Instead of these examples, the dissent favors two of its own, one from 41 U.S.C. § 6702(a) and another about a teenager seeking a driver's license. Yet Congress would need to rewrite § 3553(f)(1) before these could aid our interpretation. Take the dissent's driver's license example. The dissent frames eligibility as requiring three "must haves": the person "must have attained a specified age (say, 16 years), … must be able to pass the vision test, *and* … must be able to pass the road test." Post at 49. But the safety valve eligibility requires a defendant "not have" three things. A better framing for the dissent's example would be: "Under Illinois law, anyone is eligible to drive who does not have—(A) an age below 16 years old; (B) inadequate vision (as assessed by the required vision test); and (C) inadequate road safety skills (as assessed by the required

road test).” It‘s clear that a person’s eligibility to drive turns on them not being under 16 years old, not having inadequate vision, and not lacking adequate road safety skills. The reader naturally distributes the phrase “does not have” to each of the three lettered conditions. No one would suggest that this law would authorize a 12 year old with perfect vision and road-safety skills to drive.

The government has provided a common-sense approach that I include here in full:

> In other contexts, statements with the form “You must not A and B” have a different meaning—a meaning that still uses the word “and” in the conjunctive, but that distributes the prefatory phrase “you must not” individually to each item that follows. Take the advice: “To be healthy, you must not drink and smoke.” This directive also shares the form “You must not A and B.” But a reasonable listener would understand it, in context, to mean that he must refrain not merely from drinking and smoking in combination, but also from engaging in either activity in isolation. The listener would reasonably distribute the prefatory phrase “you must not” to each item individually, even though the phrase is not repeated. Or, to illustrate the same point with parentheses, the listener would interpret the statement as: NOT (A) AND NOT (B).
>
> Sometimes, a distributive reading offers the only natural interpretation of a statement. Imagine a public announcement states, “Under Florida law, every citizen is eligible to vote this November,

> but this rule does not extend to—(A) minors under the age of 18; (B) individuals who fail to register with the Secretary of State by the statutory deadline; and (C) convicted felons still serving their sentences." It is evident that a person's eligibility to vote hinges on not being a minor, not being an unregistered person, and not being a convicted felon. The reader should distribute the phrase "does not extend to" to each of the three lettered subparagraphs.
>
> No one would suggest that this announcement authorizes an unregistered 35-year-old prison inmate (much less every 6-year-old with an unblemished rap sheet) to vote.

En Banc Brief for the United States in Support of Government Appeal at 19–20, *United States v. Garcon*, 2022 WL 831883 (11th Cir. March 14, 2022) (No. 19-14650-U).

The Eighth Circuit has gotten § 3553(f)(1) right. See *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022). Finding § 3553(f)(1) obviously conjunctive because of the "and," the court held that § 3553(f)(1)'s "text distributes the introductory phrase 'does not have' across each statutory condition" and "serves as an eligibility checklist for offenders who seek to avail themselves of the limitation on statutory minimums." *Id.* at 1022. Meanwhile, the Eleventh Circuit had changed "and" to "or," meaning defendants are ineligible for the safety valve if they satisfy statutory condition (A) or (B) or (C). See *United States v. Garcon*, 997 F.3d 1301, 1305 (11th Cir. 2021), reh'g en banc granted, opinion vacated, 23 F.4th 1334

(11th Cir. 2022). This ineligibility checklist is the opposite framing—though the same result—of the Eighth Circuit's eligibility checklist.

One last observation. The dissent notes that Congress could have made this whole thing easier by using "or" in the first place. But even "or" is not rock solid: Pace would argue that he was eligible for the safety valve because he didn't satisfy one of the three conditions. His theory would be that "or" means he has to prove only that he does not have one of A or B or C. As I see it, Congress could have drafted this statute using no connecting word at all, e.g.:

> [T]he court shall impose a sentence … without regard to any statutory minimum sentence, if the court finds at sentencing … (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;
> >
> > (C) a prior 2-point violent offense, as determined under the sentencing guidelines.

I bring this up to note that regular readers do not even process the word "and" or "or" in a checklist like this or an exemption list like 18 U.S.C. § 845(a). Regardless of which word is used before the final item in the list or whether any word is used at all, we simply read each item as separately covered by the negative prefatory phrase.

Reading § 3553(f)(1) as a conjunctive "and" distributing "does not have" across all three statutory conditions, I agree with the result: A defendant is eligible for the safety valve only if, under the Guidelines, the defendant does not have more than four criminal history points, does not have a prior three-point offense, and does not have a prior two-point violent offense. That's the plain reading in a statutory checklist context. Pace is therefore ineligible. The district court should be affirmed both on the denial of the motion to suppress and the application of the safety valve, so I join the opinion.

WOOD, *Circuit Judge*, dissenting in part. This case requires us to don the hat of an expert grammarian employed by a legislative drafting office in order to determine whether Roger Pace was eligible for relief from the five-year mandatory minimum sentence that applied to his drug crime. My colleagues ably set out the facts and procedural history of the case, which presents two questions: whether the district court correctly denied Pace's motion to suppress, and whether it properly read the so-called safety-valve statute, 18 U.S.C. § 3553(f), for sentencing purposes. I agree with their disposition of the suppression motion, and so I join Part II.A. of the opinion. Regrettably, however, I am not persuaded that their reading of section 3553(f) is correct. For the reasons I explain here, I believe that the district court had the authority to impose a sentence less than the five-year statutory minimum, see 21 U.S.C. § 841(b)(1)(B)(viii), and so I would remand to allow the district court to exercise that discretion.

Like the majority, I begin with the language of the safety-valve statute:

> (f) Limitation on applicability of statutory minimums in certain cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), … the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 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;

(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.

18 U.S.C. § 3553(f) (emphasis added).

The critical part for Pace's case is subsection 1, which sets out three criteria that disqualify a defendant from safety-valve eligibility. Those items—subparts (A), (B), and (C)—are linked by the word "and." In everyday English, the word "and" is a conjunction that signifies that all items in a list are included; we contrast it with the conjunction "or," which has a disjunctive meaning—any one item on the list will suffice. It is painfully obvious that Congress did not use the word "or" to connect the three subparts of section 3553(f)(1). A defendant is disqualified, therefore, only if the defendant meets all three criteria of subpart (1) (as w ell a s t he requirements in subparts (2) through (5) of section 3553(f)). Whether wisely or foolishly, Congress used the word "and," and as judges it is our duty to apply the law as it is written.

My colleagues strain against that normal English understanding of "and." They offer several reasons for their conclusion that, in this part of this statute, the word "and" actually means "or." They fear that the conjunctive reading (i.e. the one that requires a defendant to meet all three of the criteria) would render part of the statute superfluous; that it would lead to absurd results; and they insist that the "distributive reading" must reflect what Congress "really" intended (i.e., a disjunctive list in which the

final connector must be read as an "or" even though it says "and.")

I see no need for these contortions. First, as long ago as 1978, the Supreme Court held that the courts must follow statutory language, even if they think that the results would be absurd or wildly out of proportion to the goals that Congress has articulated. It did so in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978), in which it had to decide whether the Tennessee Valley Authority (TVA) would be in violation of the Endangered Species Act if the agency completed and then operated a dam that would lead to the extinction of a small fish known as the snail darter. Despite the millions of dollars that had been sunk into the dam project—dollars appropriated by Congress, no less—the Court found no applicable exception to the Act's requirements. "To sustain that position," Chief Justice Burger wrote, would "force[] [the Court] to ignore the ordinary meaning of plain language." *Id.* Later in the same opinion, he said that the Court was being "urged to view the Endangered Species Act 'reasonably,' and hence shape a remedy 'that accords with some modicum of common sense and the public weal.' But is that our function? … Congress has spoken in the plainest of words … ." *Id.* at 194.

The same is true here. Importantly, there is no need to turn, as the concurrence implicitly does, to the arcane grammatical concept of the "conjunctive negative proof" in order to read this statute. That is necessary only if one needs to disambiguate something, but no such task lies before us—the plain language suffices. I cannot agree that the word "and" is

so esoteric that judges are unable to give it its normal meaning. If I order ham and eggs for breakfast, then I assume that the plate will contain some ham and some eggs, not just one or the other. If I tell the wait staff that I do not want mustard and pickles on my Impossible burger, the server knows not to bring a burger with just mustard, or a burger with just pickles. My request, in brief, is conjunctive.

For what it's worth, my view is entirely consistent with the discussion of the "negative proof" offered by Scalia and Garner in their book *Reading Law: The Interpretation of Legal Texts* (2012). At page 120, they begin their discussion of the negative proof with a table showing the conjunctive and disjunctive variants:

Conjunctive	Disjunctive
To be eligible, you must prove that you have not A, B, and C.	To be eligible, you must prove that you have not A, B, or C.

All they have to say about the conjunctive proof, which our statute exemplifies, is this: "With the conjunctive negative proof, you must prove that you did not do all three." Scalia & Garner, *supra*, at 120. One might wonder whether they mean all three simultaneously, or all three at any time, but the next sentence on the disjunctive proof answers the question. "With the disjunctive proof, … [i]f you prove that you did not do one of the three things, are you eligible?" They answer that question "no"—the person must have done none of these things. *Id.* There would be no difference between the conjunctive and disjunctive versions of this proof if the person also had to prove that he had done neither A, nor B, nor C. The

only way in which the conjunctive proof does any work is if all three things must exist together—that is, the example should be understood this way: "To be eligible, you must prove that you have not [A, B, and C]."

As applied to our case, this means that unless the defendant meets all three criteria set forth in subsections 3553(f)(1)(A) through (C), the defendant is eligible to move on and attempt to satisfy the remainder of the statutory requirements. If the record shows, for instance, that the defendant has six criminal history points but has never committed a three-point offense and has never committed a two-point violent offense, then safety-valve relief is still available. The same would be true if the defendant has four criminal history points (satisfying (A)), and a prior three-point offense (satisfying (B)), but no two-point violent offense.

This is a straightforward reading of the statute. It also has the virtue of consistency with Congress's purpose in enacting the safety-valve provision. Recall that the original version of 18 U.S.C. § 3553(f) was available only to defendants who did not have more than one criminal history point. As our colleagues in the Ninth Circuit recognized, "[t]he low threshold of more than one criminal history point resulted in many drug offenders receiving mandatory-minimum sentences in instances that some in Congress believed were unnecessary and harsh." *United States v. Lopez*, 998 F.3d 431, 435 (9th Cir. 2021). Concern over this regime increased with the passage of time. In 2009, Congress directed the U.S. Sentencing Commission to research federal mandatory-minimum sentencing provisions. Cong. Research Serv.,

R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions* 1 (July 5, 2022). In response to significant support among federal judges and the general public for reforms to the safety-valve exception, the Commission recommended that Congress expand its scope. *Id.* Congress followed that recommendation in the First Step Act of 2018, which amended section 3553(f) in a way designed to make it available to more defendants.

We do no violence to the statute when we read it in a manner that is consistent with this congressional purpose. The straightforward reading (*i.e.*, "and" means "and," not "or") does not raise any of the problems about which the majority is concerned—certainly not in a significant enough way to justify overriding the language that Congress chose. I note as well that there is no need to reach conjunctive negative proofs and other such esoterica if we follow the plain language of the statute. The words mean what they mean, whether or not we like the outcome.

Surplusage. The majority begins with its concern about surplusage, and so I will start there, too. It posits that the conjunctive reading ("and" means "and") and the disjunctive reading ("and" means "or") "are not equally plausible" and it is the latter reading that is preferable because "[t]he conjunctive argument creates more problems than solutions and renders a portion of the statute superfluous." *Ante* at 21. It goes on to posit that "[i]f a defendant meets subsection (B) requiring a three-point offense, and subsection (C) requiring a two-point violent offense, then he would automatically have more than the four criminal history points required by subsection

(A). This interpretation of the statute therefore cannot be squared with the canon against surplusage." *Id.*

But, even putting to one side that the statute is doing real work any time the two-point offense is not for a crime of violence, and any time the defendant does not have a three-point offense, the surplusage problem the majority fears goes away when we look at the statute more closely.

Subpart (A) speaks of criminal history *points*, while subparts (B) and (C) are phrased in terms of *offenses* that are assigned a certain number of criminal history points by the Sentencing Guidelines. See generally U.S.S.G., Chapter 4, Criminal History and Criminal Livelihood. The focus in subpart (A) on criminal history points as determined by the Sentencing Guidelines has consequences. Criminal history points are based on past sentences, but not all past sentences generate points. So, for example, under U.S.S.G. § 4A1.2(e), the Guidelines count only a "prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense … ." There are other similar limitations, and defendants receive a reduced number of points for certain juvenile offenses. *Id.* § 4A1.2(d).

In contrast, subparts (B) and (C) of the safety valve focus directly on offenses, using a short-hand that generically correlates offense severity with criminal history points. Nothing suggests that an offense would not satisfy (B) or (C) because it was committed 20 years ago, for example. Those subsections

look to past offenses, not the number of criminal history points ultimately assigned.

With this distinction in mind, it is not hard to imagine situations in which the conjunctive reading does not render subpart (A) superfluous. Here are a few examples:

- 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).

These are only a few of the examples one can imagine. Many others could arise under plausible readings of the exclusions found in sections 4A1.2(c) through (k) of the Guidelines.

At a minimum, this shows that it is not accurate to assume that any defendant who satisfies (B) and (C) would *automatically* have more than four criminal history points. This becomes clear when one accounts for the distinction between offenses and points, and also appreciates that Congress used that distinction with precision in the safety-valve statute.

One cannot rescue the claim of surplusage by treating offenses that the guidelines do not include in the criminal history-score calculation as zero-point offenses that do not satisfy either (B) or (C). Doing so would be inconsistent with the structure of Chapter 4. It *first* assigns points to offenses based on the length of the sentence, U.S.S.G. § 4A1.1. Only after that does it specify which sentences should be counted and which should be excluded. *Id.* § 4A1.2(c). It makes no sense to say that a three-point offense suddenly ceases to be a three-point offense just because a different provision of the Guidelines requires it to be excluded for some reason.

Congress had good reason to write the safety-valve statute this way. It achieves a coherent policy objective—that is, categorically to exclude violent recidivists with recent criminal history from safety-

valve eligibility. It does so with careful attention to the structure of Chapter 4. And there is nothing incongruous about the policy goal. Congress sensibly could have thought that in cases that meet the other criteria of section 3553(f), when the defendant is not a violent recidivist, judges should have the leeway to go below a statutory minimum. Such a view would be consistent with other parts of the First Step Act, which limits mandatory minimums in several ways. See, *e.g., Deal v. United States*, 508 U.S. 129, 131 (1993) (construing the pre-First Step Act version of 18 U.S.C. § 924(c)(1) to require the stacking of mandatory minimums for second or subsequent offenses charged in the same case); *United States v. Davis*, 139 S. Ct. 2319, 2324 n.1 (2019) (recognizing that Deal was abrogated by the First Step Act, which stipulates that only a second section 924(c)(1) violation committed after a prior conviction under that statute becomes final will trigger the mandatory minimum).

I recognize that the reading of section 3553(f)(1) that I propose is not the same as the one adopted by the Ninth Circuit in *Lopez*, *supra*, 998 F.3d 431, even though I come to the same ultimate result. We begin, however, at the same point: the word "and" in the statute must carry its ordinary conjunctive meaning. *Id.* at 436. And, as I explain below, we agree that section 3553(f)(1) is "a conjunctive negative proof," *id.*, pursuant to which the defendant must prove that he or she "did not have" any one of the items listed in (A), (B), and (C) to be eligible.

The Ninth Circuit's answer to the superfluity concern, however, was different from mine. It noted (and I agree) that each of the subparts of section

3553(f)(1) has a different purpose. *Id.* at 439. Next, it addressed the government's argument that anyone who satisfies subpart (B) (three-point offense) as well as subpart (C) (two-point violent offense) will automatically have more than four criminal history points and thus (A) would not be doing any work. I have already provided my answer to this argument (*i.e.*, not all offenses result in points). The Ninth Circuit gave a different one. It noted that the canon against surplusage is "just a rule of thumb," *id.* at 441, which "does not supersede a statute's plain meaning and structure." *Id.* And it pointed out that "a defendant who has only one three-point violent offense under the Sentencing Guidelines … would have (B) a 'prior 3-point offense' and (C) a 'prior 2-point violent offense' but would have only three criminal-history points, *not* (A) 'more than 4 criminal history points.'" *Id.* at 440.

I have no reason to disagree with the Ninth Circuit's conclusion that a three-point violent offense might simultaneously qualify as a three-point offense for purposes of subpart (B) and a two-point violent offense for purposes of subpart (C), and that it would leave the defendant below the threshold specified in subpart (A). But this is not the best answer to the claim of surplusage. It seems more likely that Congress included subpart (A) in the First Step Act's revision of the safety-valve statute because it did not want eligibility to be stripped from defendants on the basis of convictions that are decades old. Requiring at least four criminal history points achieves that end.

Absurd results. The majority is also concerned that the conjunctive reading of section 3553(f)(1) inevitably leads to absurd results. It argues that:

> … Mr. Pace's interpretation of the statute produces absurd results. A defendant who had multiple three-point violent offenses under subsection (B) would still be safety-valve eligible so long as he did not have a prior two-point violent offense under subsection (C). This interpretation would afford leniency to defendants with more serious offenses (those serious enough to receive three criminal history points) while denying safety-valve eligibility to the defendants with less serious offenses that received only two points.

Ante at 23–24. With respect, I am not troubled by this aspect of the statutory scheme.

In my view, there is nothing absurd about treating violent offenders who served shorter sentences differently from nonviolent offenders who served longer ones. Many laws do just that. The Armed Career Criminal Act, for instance, treats felons with a history of "violent felonies" more harshly than defendants without a history of violence (setting aside those with a history of controlled-substance offenses), even when the nonviolent defendants have served longer sentences. And, as the Ninth Circuit observed, it makes the most sense to read the third criterion as imposing a two-point floor on the offense, not a two-point floor *and* ceiling. The rest of the safety-valve statute puts special weight on violent crime, stripping defendants of eligibility if the offense of conviction resulted in "death or serious

bodily injury," 18 U.S.C. § 3553(f)(3), or if the defendant used "violence or credible threats of violence" or a firearm "in connection with the offense." *Id.* § 2. Given the extremely harsh sentences that for years have been imposed for nonviolent drug crimes—a history the First Step Act aimed to correct or at least ameliorate—it is no surprise that the Act shifted the focus of sentencing judges away from the *length* of past sentences and toward the underlying *substance* of the past crimes.

The Use of an Em-Dash. The majority turns to the use of an "em-dash" at the top of the list that appears in section 3553(f)(1) to support its interpretation. This, it argues, supplies a textual basis for the "distributive" reading that the concurrence advocates. The use of the em-dash could be seen as a signal that Congress "distributed" the introductory phrase "does not have" across each statutory condition. *Id.* And indeed, this is the way that the Eighth Circuit reads the statute. See *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022).

But that argument falls apart upon closer examination. It does not reflect the way that the Senate drafts statutes, as one can see by reference to the Senate's Legislative Drafting Manual. Section 321 of the Manual provides the following instructions for the formatting of "Items in a Series" (and note that the Manual illustrates its own principles):

(a) LISTS.—

(1) FOLLOWING A DASH.—If a list is preceded by a dash—

(A) the item is subdivided and its margin is indented;

(B) the first word in each item in the list is lower case (unless a proper noun);

(C) each item (other than the last item) ends with a semicolon; and

(D) the conjunction "and" or "or" appears at the end of the next-to-last item only.

Section 3553(f)(1) follows these rules to a "T". Moreover, as subsection (D) of the Senate's rule makes clear, its drafting practices recognize the standard meaning of the word "and."

Given the style rules—rules that are scrupulously enforced by the Senate's Legislative Counsel—the only responsible thing to do is to recognize that the em-dash has no meaning, distributive or otherwise. What does matter is the conjunction at the end of the list. That conjunction (in our statute, "and") is what dictates whether all of the items must be present, or whether the list is in the disjunctive.

The Distributive Reading. This is the place where the concurring opinion has put its money, despite its admission that "in this statute and others like it, a distributive reading makes 'and' interchangeable with a disjunctive 'or.'" *Ante* at 27. It brushes off this concern, however, with the comment that Congress "writes statutes like that all the time." *Id.* This, in my view, overstates matters considerably and leads us down a dangerous path—one that the Supreme Court has repudiated—of construing statutes to conform to what we judges think Congress "really"

meant, rather than to follow the words that Congress actually used. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022) ("The Court may not replace the actual text with speculation as to Congress' intent.' Rather, the Court 'will presume more modestly' that 'the legislature says what it means and means what it says.'") (internal citations omitted); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) ("Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."); see also Scalia & Garner, *supra*, at 57 (arguing that to permit the alleged purpose of a statute to override its clear text "is to provide the judge's answer rather than the text's answer to the question").

Worse, the concurrence has disregarded the distinction between a simple list of examples and a list of criteria. The statutes that the concurrence cites all take this form: "This chapter shall not apply to [a list of terms A, B, and C]." In that setting, whether the list ends with "and," "or," or nothing makes no difference. Thus, looking at 41 U.S.C. § 6702(b), one of the examples cited in the concurrence, we find this introductory language: "This chapter does not apply to [any of the seven different things listed]." *Ante* at 27–28. Interestingly, the previous subsection of the very same statute provides an example of criteria that must be met, and it uses the word "and" cumulatively:

> This chapter applies to any contract or bid specification for a contract whether negotiated or advertised that—(1) is made by the Federal Government or the District of Columbia; (2) involves an

> amount exceeding $2,500; and (3) has as its principal purpose the furnishing of services in the United States through the use of service employees.

41 U.S.C. § 6702(a). No one would say that it is enough that the contract was made by the federal government, or that it is enough that it involves an amount exceeding $2,500, or that it has the required principal purpose. All three criteria must be met, which is why Congress used the word "and."

The same is true of the other examples cited in the concurring opinion. The statute setting out exceptions to federal crimes about explosive materials, 18 U.S.C. § 845(a), sets out a simple list. There is nothing cumulative about the items on that list, and importantly, they do not work together to establish criteria that must be met before the exception will apply. The same is true of the Tax Code's list of exceptions for certain health plans, 26 U.S.C. § 9831(a), and the Buy-America rules found in 41 U.S.C. § 8302(a)(2). In contrast, think of the rules that govern one's ability to obtain a driver's license: the person must have attained a specified age (say, 16 years), *and* the person must be able to pass the vision test, *and* the person must be able to pass the road test. These are criteria, not a list of examples, and one alone will not suffice. A 17-year-old who has uncorrectable 20/300 vision may not drive, period.

The "Conjunctive Negative Proof." Another argument that may have some superficial appeal, but that breaks down on closer examination, rests on the idea of the "conjunctive negative proof." I have already addressed this, but a few additional words are

in order. To reiterate, let's say that section 3553(f)(1) has a structure that *Reading Law* calls the "conjunctive negative proof." See Scalia & Garner, *supra*, at 120. That structure lends support to Pace's reading, not the government's, as the Ninth Circuit has explained. See *Lopez*, 998 F.3d at 437.

A negative proof, according to Scalia and Garner, is a statutory structure that takes this form: "To be eligible, you must prove that you have not A, B, ____ C." Scalia & Garner, *supra*, at 120. A *conjunctive* negative proof is one that fills the blank before item C with "and"; a *disjunctive* negative proof is one that fills it with "or." *Reading Law* devotes several paragraphs to the *disjunctive* structure, which is common in both law and daily usage. Scalia and Garner's takeaway about that structure's meaning is best illustrated by the example they give: a citizenship applicant required by statute to prove that she has not previously "(1) been convicted of murder; (2) been convicted of manslaughter; *or* (3) been convicted of embezzlement" must prove that she "has done none" of those things before she can naturalize. *Id.* Put another way, if she has been convicted of any one of the three listed offenses, she loses her eligibility to naturalize.

Reading Law has much less to say about the rarer conjunctive form of the negative proof—the form that concerns us here. In fact, it gives us just one sentence to go on: "With the conjunctive negative proof, you must prove that you did not do all three." *Id.* As I observed earlier, that maxim leaves open the question whether all three conditions must exist at once (*i.e.*, do they count only if all three are present,

and one alone does not suffice) or whether the language must be read some other way. To set the record straight: a conjunctive negative proof renders the subject ineligible for the benefit in question if and only if she flunks all of the proof's requirements.

Start with an intuitive example: "To be acquitted of Operating while Intoxicated, you must prove that you did not drink and drive." All would agree that drinking and driving are both fine on their own—it's the *combination* of the two that precludes acquittal. Similar two-condition examples abound in common parlance:

- "To be acquitted of theft by fraud, you must prove that you did not dine and dash."
- "To be acquitted of distracted driving, you must prove that you did not text and drive."

English speakers will have no trouble interpreting these examples in a manner consistent with my view of the safety valve, and Scalia and Garner would classify each as a two-condition conjunctive negative proof. Intuitions may be less clear when we turn directly to section 3553(f)(1) because conjunctive negative proofs that, like the statute, have more than two conditions occur more rarely. (This is no doubt because the verbs tending to accompany such constructions—"mix," "combine," "blend," "fuse," and so on—suggest the conjunctive meaning themselves). Still, one can think of coherent examples where the structure alone conveys the conjunctive meaning. To name one, a doctor lecturing about a lethal three-

way drug interaction might say: "To disqualify accidental poisoning as the cause of death, you must establish that the patient did not take drug X, drug Y, and drug Z." Each of those drugs might be fine if taken alone, but if all three are taken together there might be a toxic interaction.

The rarity of examples involving multiple conjunctive conditions does not change the key point, which is that the conjunctive negative proof is—as the name suggests—conjunctive. Whatever the number of terms, the structure has the same logical upshot: the conditions that may preclude eligibility do so only when they exist jointly.

* * * *

Congress is the master of the statutes it passes, and it is not for us to assess their wisdom. There 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. I therefore respectfully dissent from Part II.B. of the majority's opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	**AMENDED JUDGMENT IN A CRIIMINAL CASE**
v.	)	
ROGER PACE	)	Case Number: 10-30051-001
	)	USM Number: 22864-026
	)	**Date of Original Judgment: 6/15/2021**
	)	Johanes Christian Maliza Defendant's Attorney

Reason for Amendment:

□ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

□ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☒ Correction of Sentence by Sentencing Court (Fed. R. Crim P. 35(a))

□ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

□ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

□ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

□ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

□ Direct Motion to District Court Pursuant □ 28 U.S.C. § 2255 or □ 18 U.S.C. § 3559(c)(7)

□ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☒ pleaded guilty to count(s) 1____________________

□ 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

21 USC §§ 841(a)(1) and (b)(1)(B)

Nature of Offense

Possession with Intent to Distribute Methamphetamine

Offense Ended	**Count**
4/5/2019	1

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) ____________________
□ is □ are dismissed on the motion of the United States.

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

6/16/2021
Date of Imposition of Judgment

s/ Sue E. Myerscough
Signature of Judge

SUE E. MYERSCOUGH U.S. District Judge
Name of Judge Title of Judge

6/17/21
Date

FILED

JUN 17 2021

CLERK OF THE COURT
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

IMPRISONMENT

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

*60 months, to run concurrently with any sentence imposed in Jersey County, Illinois, Circuit Court, Case No. 2018-CF-265.

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

1. That the defendant serve his sentence at FCI Terre Haute, IN.
2. That the defendant serve his sentence in a facility that will allow him to participate in the Residential Drug Abuse Program (RDAP).
3. That any subsistence fee assessed by a residential re-entry center be waived.

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

□ The defendant shall surrender to the Unites 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

4 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

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)*

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

The defendant must comply with the following conditions:

1. The defendant shall not knowingly leave the federal judicial district in which he is approved to reside without the permission of the Court.

2. The defendant shall report to the probation office in the district to which he is released within 72 hours

of release from custody. He shall report to the probation officer in a reasonable manner and frequency as directed by the Court or probation officer.

3. The defendant shall follow the instructions of the probation officer as they relate to his conditions of supervision. He shall answer truthfully the questions of the probation officer as they relate to his conditions of supervision, subject to his right against self-incrimination.

4. The defendant shall permit a probation officer to visit him at home between the-hours of 6:00 a.m. and 11:00 p.m., at his place of employment while he is working, or at the locations of his court-ordered treatment providers. Visits may be conducted at any time if the probation officer has reasonable suspicion to believe that the defendant is in violation of a condition of supervised release or if he or a third party has reported that he is unable to comply with a directive of the probation officer because of illness or emergency. He shall permit confiscation of any contraband observed in plain view of the probation officer.

5. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer. This condition does not prevent him from invoking his Fifth Amendment right against self-incrimination.

6. The defendant shall notify the probation officer at least ten days prior to, or as soon as he knows about, any change in residence or any time he leaves a job or accepts a job or any time he changes from one position to another at his workplace.

7. The defendant shall not knowingly be present at places where he knows controlled substances are illegally sold, used, distributed, or administered.

8. The defendant shall not knowingly meet, communicate, or otherwise interact with any person whom he knows to be a convicted felon or to be engaged in, or planning to engage in, criminal activity, unless granted permission to do so by the Court.

ADDITIONAL SUPERVISED RELEASE TERMS

9. The defendant shall not knowingly possess a firearm, ammunition, destructive device as defined in 18 U.S.C. § 921(a)(4), or any object that he intends to use as a dangerous weapon as defined in 18 U.S.C. § 930(g)(2).

10. The defendant shall make a meaningful attempt to secure lawful and regular employment, defined as a monthly average of at least 30 hours per week, unless excused by the Court for schooling, training, or other acceptable reason, such as child care, elder care, disability, age, or serious health condition.

11. The defendant shall not purchase, possess, use, distribute; or administer any controlled substance or psychoactive substance that impairs physical or mental functioning, including street, synthetic, or designer drugs, or any paraphernalia related to any controlled substance or psychoactive substance, except as prescribed by a physician. He shall, at the direction of the U.S. Probation Office, participate in a program for substance abuse treatment including not more than six tests per month to determine

whether he has used controlled or psychoactive substances. He shall abide by the rules of the treatment provider. He shall pay for these services to the extent he is financially able to pay. The U.S. Probation Office shall determine his ability to pay and any schedule for payment, subject to the Court's review upon request. He shall not be deemed financially able to pay if, at the time he begins receiving substance abuse treatment, he would qualify for Court-appointed counsel under the Criminal Justice Act.

12. The defendant shall refrain from any use of alcohol. He shall, at the direction of the U.S. Probation Office, participate in a program for alcohol treatment, including testing, to determine if he has used alcohol. The defendant shall abide by the rules of the treatment provider. He shall pay for these services, to the extent he is financially able to pay. The U.S. Probation Office shall determine the defendant's ability to pay and any schedule for payment, subject to the Court's review upon request. The defendant shall not be deemed financially able to pay if, at the time the defendant begins receiving alcohol treatment, he would qualify for court-appointed counsel under the Criminal Justice Act.

CRIMINAL MONETARY PENALTIES

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

	Assessment	**Fine**	**Restitution**
TOTALS	$100.00	$	$

□ The determination of restitution is deferred until __________. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

□ The defendant shall 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***	**Restitution Ordered**	**Priority or Percentage**
TOTALS		$0.00	$0.00

□ 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 □ fine □ restitution.

  □ the interest requirement for □ fine □ restitution is modified as follows:

* 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 shall be 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 supervise 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 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 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

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

□ The defendant shall pay the-cost of prosecution.

- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

United States of America,	)	
Plaintiff,	)	Case No. 19-30051
	)	
vs.	)	
	)	
Roger E. Pace,	)	June 11, 2021
Defendant.	)	11:41 p.m.

SENTENCING HEARING

BEFORE: THE HONORABLE SUE E. MYERSCOUGH
United States District Judge

Court Reporter:

LISA KNIGHT COSIMINI, RMR-CRR
U.S. District Court
201 South Vine
Urbana, Illinois 61802

Proceeding recorded by mechanical stenography; transcript produced by computer.

A P P E A R A N C E S:

For the Plaintiff:

MATTHEW Z. WEIR, ESQUIRE
Assistant U.S. States

318 South Sixth Street
Springfield, IL 62701-1806
217-492-4450
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For the Defendant:

JOHANES C. MALIZA, ESQUIRE
Assistant Federal Defender
600 East Adams, 2nd Floor
Springfield, IL 62701
217-492-5070
johanes_maliza@fd.org

U.S. Probation Officer:

LINNEA R. GUSTAFSON

(In virtual courtroom, 1:41 p.m.)

THE COURT: This is 19-30051, *U.S. v. Roger Pace*.

We are present today for sentencing. The government's represented by Assistant United States Attorney Matthew Weir.

The defendant's represented by Federal Public Defender Johanes Maliza.

Also present is Linnea Gustafson of Probation.

All are present by video.

Mr. Pace, you're appearing today by video conference from the Pike County Jail.

Let me describe the arrangements we've made for this proceeding. You're at the Pike County Jail with a video link to my courtroom. Your lawyer, the prosecuting attorney, and other participants are appearing by video conference. You should be able to see me, my courtroom deputy, the lawyers, the probation officer, and the court reporter.

Can you see all of us?

DEFENDANT PACE: Yes, I can.

THE COURT: Can you hear all right?

DEFENDANT PACE: Most of you. The one down in the lower, lower right, I can't hear her.

THE COURT: Are you referring to Ms. Gustafson? She's not speaking.

DEFENDANT PACE: Well, when she did speak earlier, I couldn't hear.

THE COURT: That was the court reporter who was speaking?

DEFENDANT PACE: I, I assume. Yes.

THE COURT: Okay. If you have any trouble with this video connection or you can't see or hear something, interrupt, speak up, wave your hand. Let us know. We'll stop the proceeding. If you want something repeated, let us know.

The court reporter will prepare a transcript, but no recording will be preserved.

You have the right to be physically present here in my courtroom at your sentencing hearing, but you can waive that right. Before I ask whether you intend to waive that right, you should know the following.

Today is June 11, 2021. We're experiencing a worldwide pandemic caused by COVID-19. The President of the United States and the Governor of Illinois have each declared a state of emergency. Congress has passed an emergency statute that permits defendants in criminal cases to appear in court by video or telephone for certain types of proceedings under certain circumstances.

Our normal procedure before the emergency caused by the pandemic was to have all defendants physically present in the courtroom for sentencing hearings.

We're trying as best we can to protect the health and safety of our court employees, the lawyers, defendants, security personnel, and everyone else who's involved in the court system, including the jail where you're staying.

At the same time, we're trying to permit the basic functions of the Court to go forward without unnecessary delays.

So the physical appearance of defendants in the courthouse and their transportation to and from the courthouse are likely to increase the health risks for all involved, including defendants, counsel, and security personnel.

So to try to minimize the health risk, among other things, we're giving defendants who prefer to appear in court by video the option to do so.

At this point, it's voluntary. You don't have to appear by video. If you choose to appear by video, I will ask you to waive your right to be physically present.

You should know that you have the right to a public trial and the right to have certain types of proceedings, such as your sentencing hearing, conducted in open court in public view.

Again, our normal procedure before the emergency caused by the pandemic was to have all these proceedings in open court in public view.

In light of the emergency caused by the pandemic and as announced on our website, we are permitting members of the public to have access to this video conference, both by audio and video.

Do we have any members of the public on the conference, Ms. Meadows?

COURTROOM DEPUTY: No, Your Honor.

THE COURT: Mr. Pace, you understand you have the right to be physically present in open court for your sentencing?

DEFENDANT PACE: Yes. My counselor explained all this to me earlier. It's been a while back. I signed papers to, to proceed this way. So, yeah, I've waived that right.

THE COURT: So you understand you have the right to consult with your lawyer during this sentencing?

DEFENDANT PACE: Yes.

THE COURT: And you understand if you want to speak with him, let us know; and we'll make arrangements for the two of you to discuss the -- anything you wish to talk to him about confidentially.

DEFENDANT PACE: Thank you.

THE COURT: I need you to say yes if you --

DEFENDANT PACE: Yes.

THE COURT: -- understand. Okay, thank you.

You have the right to see and hear everything that happens in court during your sentencing. Do you understand that?

DEFENDANT PACE: Yes, I do.

THE COURT: Do you understand your family members and other supporters have the right to attend this proceeding?

DEFENDANT PACE: Yes.

THE COURT: You understand you have the right to speak to me as the judge before I pronounce your sentence?

DEFENDANT PACE: Yes.

THE COURT: You understand if you waive your right to be physically present and if you decide to speak to me before I sentence you, you'll have to do so by video?

DEFENDANT PACE: Yes. I understand that.

THE COURT: Have you consulted with Mr. Maliza concerning you waiving your right to appear in person?

DEFENDANT PACE: I have. Yes.

THE COURT: Do you agree to waive your right to appear in person for your sentencing and, instead, appear by video?

DEFENDANT PACE: Yes.

THE COURT: Do you also agree that to the extent your right to public access to this proceeding is in any way impaired, you waive that right?

DEFENDANT PACE: Yes.

THE COURT: Is there any reason I should not accept the waiver?

DEFENDANT PACE: No.

THE COURT: Counsel, any reason? Mr. Weir, do you --

MR. MALIZA: No, Your Honor.

MR. WEIR: No, Your Honor.

THE COURT: I find Mr. Pace has knowingly and voluntarily waived his right to appear physically and has knowingly and voluntarily agreed to proceed by video conference.

I further find that the measures taken to provide public access to this proceeding are reasonable under the circumstances and that, to the extent Mr. Pace's right to public access to this proceeding is in any way impaired, Mr. Pace has knowingly and voluntarily waived that right. I accept the waiver and will now proceed to sentencing.

Mr. Pace has pled guilty to the indictment. The indictment charged Mr. Pace with on or about April 5 of 2019 knowingly and intentionally possessing with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of 21 USC 841(a)(1) and (b)(1)(B).

The indictment also includes special findings that state the following factors are relevant to determining a sentence for Mr. Pace pursuant to 21 USC Section 851. Mr. Pace was convicted of the offense of unlawful possession of a controlled substance with intent to deliver in the Circuit Court of Jersey County, Illinois, Case Number 2003-CF-273, a serious drug felony offense; and, as a result, Mr. Pace faced a possible sentence of ten years or more of imprisonment. Mr. Pace served a term of imprisonment of more than 12 months, and Mr. Pace was released from imprisonment within 15 years of the

commencement of the offense alleged in the one-count indictment.

On February 3, 2021, Mr. Pace appeared before Magistrate Schanzle-Haskins and pled guilty to the indictment without a written plea agreement.

On February 23, 2021, I accepted Mr. Pace's plea of guilty and adjudged him guilty of the offense charged in the indictment.

I've reviewed the revised presentence investigation report, Probation's sentencing recommendation, Mr. Pace's memorandum regarding safety-valve eligibility, the government's sentencing commentary, Mr. Pace's sentencing commentary and memorandum, character letters in support of Mr. Pace, and the mitigation report.

Mr. Pace, have you received a copy of the revised presentence report and discussed it with Mr. Maliza?

DEFENDANT PACE: I have. Yes.

THE COURT: Are you satisfied with his representation?

DEFENDANT PACE: Yes, I am.

THE COURT: Mr. Maliza, I understand Mr. Pace has an objection to the presentence report and argues he's statutorily eligible for the safety valve under 18 USC Section 3553(f).

MR. MALIZA: Yes, Your Honor. I won't belabor the point. I know the Court has read plenty of briefing and did issue an opinion in *United States v. Howell*.

I would add only that the Court issued that opinion without the similar opinion from the Ninth Circuit, without the benefit of the Ninth Circuit Court's insight in *United States v. Lopez*.

So I would reiterate that I think the fact that two circuit courts have come out differently on this question demonstrates that there is grievous risk of ambiguity -- in fact, just in my opinion, objective ambiguity -- as to whether "and" means "and" or "and" means "or." So I would say that even if the Court disagrees with me that "and" means "and," I would say that the rule of lenity certainly applies.

Relatedly, Your Honor -- we might get to it after this -- there is the objection of whether or not he's eligible for the two-level deduction under Guideline Section 5C1.2. In the PSR, the Probation Office contends that because the statute was changed but the guidelines weren't updated, it doesn't fit Mr. Pace anymore.

I would argue, Your Honor, that the guidelines still refer directly to 18 USC 3553(f). And, you know, they talk about being safety-valve eligible. I argue Mr. Pace is safety-valve eligible.

I would also note that the guidelines are full of language that, frankly, predates *Booker*; and they speak in, in "shall sentence" and "mandatory" language, demonstrating that the Commission doesn't go through line by line changing every little word in the guidelines to adjust to changing statutes and case law.

So I would say that "safety-valve eligible" means "safety-valve eligible." I believe he's

safety-valve eligible under the statute and, therefore, is entitled to the safety-valve eligibility under the guidelines, Your Honor.

Again, I could go more into detail if you really want me to. But I did append the, I believe it was the *Wells* pleadings; but, essentially, we're asking the Court to adopt the *Lopez* decision, which held that it's not ambiguous. Or we're asking the Court to adopt the position that it is ambiguous, given that two circuit courts have come up with it.

THE COURT: So I noted in *Howell*, I believe, you moved to withdraw, and there was a substitution of counsel?

MR. MALIZA: Yes, Your Honor.

THE COURT: Was that with the defendant's agreement?

MR. MALIZA: Absolutely, Your Honor. Yes.

THE COURT: That was never stated in any of the documents, and I just had to make sure Mr. Howell agreed to that.

MR. MALIZA: Sorry, Your Honor. I could file something following up on that; but, yes, he's --

THE COURT: Yes.

MR. MALIZA: -- well aware of that.

THE COURT: And who are these people? I mean, I know something about the defense lawyers, but I -- how are they involved?

MR. MALIZA: Mr. O'Neil was a former high-ranking official at the Department of Justice, and they are -- well, to be honest, they're interested in the case and interested in the issue because they believe it could be a Supreme Court certiorari-worthy case. They see that there's a circuit split. They have an active Supreme Court practice, and they're hoping to represent Mr. Howell in that forum and build the record as they can. That's my understanding.

THE COURT: Okay.

So I'm overruling Mr. Pace's objection. Mr. Pace argues that defendants are only disqualified from the safety valve if they fail all three of the requirements under 3553(f)(1) such that a defendant must have more than four criminal history points, a prior three-point offense, and a prior two-point violent offense under the Sentencing Guidelines before they become ineligible for the safety valve.

The government and Probation have taken the position that the defendant need only have four criminal history or a prior three-point offense or a prior two-point violent offense.

I recently ruled on this in *Howell*, as you said, in 20-CR-30075 -- 2021 WL 2000245, Central District of Illinois, May 19 of 2021 -- which the government has included in the record as an exhibit to its sentencing commentaries.

Since I ruled in *Howell*, as you indicated, *United States v. Lopez* came out, 19-50305, 2021 WL 2024540, Ninth Circuit, May 21, 2021, agreeing with Defendant's position.

I recognize the circuit split on the issue. The reasoning of *Lopez* has not convinced me that my earlier decision was incorrect. Accordingly, for the reasons stated in *Howell*, I find Mr. Pace is not eligible for the safety valve.

Are there any other objections, Mr. Maliza?

MR. MALIZA: No, Your Honor.

A couple notes on the PSR. I earlier submitted, via electronic mail to the Court and to Mr. Weir about a half hour before the hearing, Mr. Pace's medication list from Pike County Jail. I would ask that that medication list be appended to his presentence report, Your Honor.

THE COURT: Any objection, Mr. Weir?

MR. WEIR: No, Your Honor.

MR. MALIZA: And --

THE COURT: Any objections to anything else, Mr. Weir?

MR. WEIR: The government has no objections.

THE COURT: Okay.

MR. MALIZA: Your Honor, one last question. Could the Court make a finding, just to sharpen the record, that the only thing preventing Mr. Pace from being safety-valve eligible is the Court's ruling on 3553(f)(1)?

And, specifically, I'm asking the Court to find that he does meet the other requirements.

And I can inform the Court that, a couple weeks ago, I did send a letter to Mr. Weir in satisfaction of 3553(f)(5).

THE COURT: Mr. Weir, any objection?

MR. WEIR: Your Honor, I think that it's deeply beyond necessary since the Court has found he does not qualify. However, I have no objection to the Court making such findings if it chooses to.

THE COURT: All right. I will make that finding.

Mr. Pace, do you have any other objections to the revised presentence report?

DEFENDANT PACE: No. No, Your Honor.

THE COURT: All right. I adopt the factual findings of the revised presentence report as my own.

On June 8 of 2021, I filed conditions of supervised release and justifications for those conditions.

I note that there is a misspelling of Mr. Pace's first name, Roger. It's spelled R-o-d-g-e-r. By interlineation, I am striking the extra "d" -- it is R-o-g-e-r -- and initialing each one of those changes and will file that, those amended conditions of supervised release as amended by interlineation.

Mr. Pace, did you have enough time to go over those conditions of supervised release with Mr. Maliza?

DEFENDANT PACE: Yes, Your Honor. I did.

THE COURT: I want you to know: If you fail to object, it may result in a waiver of any objection to the conditions on appeal.

Do you understand that?

DEFENDANT PACE: Yes. I understand.

THE COURT: Do you -- Mr. Maliza?

MR. MALIZA: Your Honor, we have two objections to the, to the conditions. The first is number 8, which requires him to avoid consorting with anybody with a felony conviction.

Mr. Pace is very concerned about that because a lot of people in his family have felony convictions, and the reason it's worrying is that his number one job when he gets out will be recovery from substance abuse. And our position is that family is central to recovering from substance abuse in family support; so cutting him off from family members, I worry, will be very detrimental to 3553(a)(2)(D), which is what promotes rehabilitation through a sentence, Your Honor. So he is very concerned about that, so he does object to that.

THE COURT: Did you file that objection in writing, Mr. Maliza?

MR. MALIZA: No, Your Honor. I had, I had always thought that the process was: You send us the pre-conditions; and if we have objections, you want us to mention them, and that the initials were to confirm receipt of the conditions.

THE COURT: What is Probation's position on association with a felon, Ms. Gustafson?

PROBATION OFFICER GUSTAFSON: Your Honor, our position would be that the Court can determine whether or not the defendant can have contact with a known felon.

THE COURT: So, in other words, you're indicating that you would like paragraph 8 to be in effect; and that if Mr. Pace wants to associate with a felon, he's to ask the Court whether he may associate with that felon?

PROBATION OFFICER GUSTAFSON: That's correct.

THE COURT: All right. I'm going to overrule the objection and keep paragraph 8.

And I will tell you, Mr. Pace: I very seldom deny leave to associate with family members who are felons; however, I do note that in your case I believe you have a brother who's incarcerated for murder of a cousin.

DEFENDANT PACE: Yes, I do.

THE COURT: What happened in that circumstance?

DEFENDANT PACE: All the details, I, I wouldn't know. I wasn't there -- I wasn't there through all of the trial. His, his counsel had asked us to come in when it was, when we was going to testify and not to be there on the other days. Why? I do not know, but -- so I, I -- I don't know all of the particulars on the case.

THE COURT: Well, how was your cousin murdered?

DEFENDANT PACE: Blunt trauma to the head.

THE COURT: Well, at this time, I'm clearly not going to allow your association with that felon family member. If circumstances change, ask your probation officer to bring it to me, and I will consider it at that time.

Do you have any other objections?

MR. MALIZA: Your Honor, the other one was just paragraph 10, or condition number 10, about getting a job.

As noted in the mitigation report, at the time he was arrested, Mr. Pace was in the process of applying for Social Security disability. If he does get Social Security disability approved, he would like that condition to be struck. Or he'd like that condition to at least be suspended pending resolution of his application for Social Security disability in light of this.

THE COURT: Ms. Gustafson, your position?

PROBATION OFFICER GUSTAFSON: Your Honor, the conditions specifically state that "unless excused by the Court" for employment training or disability, or other reason. So, therefore, I don't think the condition needs to be changed because disability would be excused by the Court.

THE COURT: So I'm overruling the objection. Paragraph 10 will remain.

Mr. Pace, that means if you are actively seeking your disability, you need to notify your probation officer, and I will excuse that requirement. All right?

DEFENDANT PACE: Yes. I understand that.

Your Honor, on paragraph 8, you've noted my brother. My son is a convicted felon. My wife is a convicted felon, and my ex-wife are convicted felons.

THE COURT: I'm aware of that, Mr. Pace, and we'll address that when you are released. Tell your probation officer if you're going to be wanting contact with those people; and, depending on the circumstances, I most likely will allow it.

DEFENDANT PACE: Thank you, Your Honor. I understand.

THE COURT: Mr. Maliza.

MR. MALIZA: Your Honor, this is probably more for Mr. Pace's benefit; but perhaps at the time of his release, he could request an eve-of-release hearing so that -- let's say BOP releases him and his plan is to go to stay with his son, for instance. Maybe that would be an appropriate time for him to ask for that hearing --

THE COURT: Yes. It would be.

MR. MALIZA: -- specifically.

THE COURT: So, Mr. Pace, do you have any other objections to the proposed conditions?

DEFENDANT PACE: No. I do not.

THE COURT: Mr. Maliza, did you have enough time to go over the conditions with Mr. Pace?

MR. MALIZA: I did, Your Honor.

THE COURT: Mr. Weir, any objection to the conditions?

MR. WEIR: No, Your Honor.

THE COURT: Do the parties waive an oral reading of the discretionary conditions of supervised release and justifications for the conditions?

Mr. Weir?

MR. WEIR: Yes, Your Honor.

THE COURT: Mr. Maliza?

MR. MALIZA: Yes, Your Honor.

THE COURT: Mr. Pace?

DEFENDANT PACE: Yes, Your Honor.

THE COURT: So calculations, based on the revised presentence report, Mr. Pace's base offense level is 24. Because he's a career offender under the Sentencing Guidelines, his offense level is enhanced to 34. A two-level reduction for acceptance of responsibility lowers the offense to 32.

Is the government moving for an additional one-level deduction for acceptance of responsibility?

MR. WEIR: Yes, Your Honor.

THE COURT: That gives us a total offense level of 31.

Mr. Pace's prior criminal convictions result in eight criminal history points. Mr. Pace committed the instant offense while under a criminal justice sentence for possession of methamphetamine in Jersey County, Illinois, Circuit Court Case Number 2018-CF-265, so two points are added. Ten criminal history points establish a criminal history category of V. However, due to the designation as a career offender, Mr. Pace's criminal history category is VI.

With that, the guideline range under the sentencing guidelines is 188 to 235 months.

The applicable statutory minimum term of imprisonment is five years, and the maximum term is 40 years.

Because the applicable guideline range is in Zone D of the Sentencing Table, the minimum term is to be satisfied by a term of imprisonment.

Under 21 USC Section 841(b)(1)(B), the Court must impose a term of supervised release of at least four years. The guideline range for supervised release is four years.

You are not statutorily eligible for probation, and you're not eligible for probation under the guidelines.

Pursuant to 21 USC Section 841(b)(1)(B), the statutory maximum fine is $5 million. The fine range under the sentencing guidelines is $30,000 to $5 million.

A $100 special assessment must be imposed.

Those are my findings. Any objections?

MR. WEIR: No, Your Honor.

MR. MALIZA: No, Your Honor.

THE COURT: Any evidence today, besides the medication list?

MR. WEIR: None from the government, Your Honor.

THE COURT: All right.

(Discussion off the record between the Court and the courtroom deputy.)

THE COURT: Argument, Mr. Weir.

MR. WEIR: Thank you, Your Honor. May it please the Court, --

THE COURT: Yes.

MR. WEIR: -- Mr. Maliza.

Your Honor, the government is recommending a low end of the guideline sentence of 188 months -- that's based on the defendant's career offender status -- to be followed by a term of supervised release of four years, which, in this case, is the minimum term of supervised release under the statute.

Your Honor, this is an interesting case. The background of Mr. Pace is interesting in that until he was 37, according to the PSR, he had no criminal history at all.

However, since then, in 1999 when he was first convicted of a felony offense, he has consistently been in and out of trouble and been to prison on multiple occasions going back to 1999. Your Honor, Mr. Pace was convicted of three separate felonies in 1999 to include -- I'm sorry, two felonies, Your Honor. He had another felony or misdemeanor aggravated battery to an assault and then possession with intent to distribute more than 50 but less than 200 grams of methamphetamine.

He had a bond violation charged. He also had another manufacture and delivery charge dismissed.

He was then revoked on parole in those felony cases and returned to the Illinois Department of Corrections. That was in 2004 that he was revoked, Your Honor. In 2004, he received four felony charges, this time for possession with intent to deliver methamphetamine again. He was returned to the Illinois Department of Corrections. That charge included a firearms charge as well. And then he was also charged with possession of methamphetamine, Your Honor, a concurrent sentence, Your Honor, to the Illinois Department of Corrections.

Then upon his release on that case, he was charged and convicted of battery where he punched a woman that he was a member of the household with.

And then he had a DUI in 2010, Your Honor.

And then he had a conviction of unlawful possession of methamphetamine in 2018, for which he was on probation at the time that these charges were filed.

There was also a pending case in Pike County for possession of methamphetamine with intent to deliver, but I believe that was based on these – the charges in this case.

So, Mr. Pace, for the first 37 years of his life, had no legal issues and then has consistently been involved in the manufacture and distribution of methamphetamine and some violent crimes, such as the assault and the battery; and some of these crimes have involved firearms, Your Honor.

And in the last 20 years, he's been in and out of prison fairly consistently.

And, Judge, while that does coincide with drug use, these crimes are not indicative of someone who is simply using drugs. He has consistently been convicted of distributing drugs, and that is the foundation for his being sentenced as a career criminal or career offender in this case, Your Honor.

Based on his history of drug use and violence and his involvement of firearms in the past, the government is asking for the low end of the guidelines, Your Honor, and is certainly recommending to the Court a sentence above the mandatory minimum in this case, as Mr. Pace has previously served terms in the Illinois Department of Corrections of ten years and five years.

And a sentence in this case of 60 months, which is the mandatory minimum, absolutely not only fails to address the serious nature of these crimes, but would also not serve the purpose of a progression, if you will, of penalties for a career offender in that they would not -- a five-year term would not be any greater than the past sentences that he has received for similar crimes.

So based on the totality of the circumstances and the factors the Court must consider, the government respectfully recommends a 188-month sentence to the Bureau of Prisons, followed by a four-year term of supervised release, a $100 mandatory sup-- mandatory special assessment. The government is not seeking any fines or restitution based on Mr. Pace's inability to pay.

Thank you, Your Honor.

THE COURT: I'm sorry. Did I misspeak? Is there a mandatory minimum of five years here?

MR. MALIZA: [Nodding head up and down.]

MR. WEIR: Yes, Your Honor.

THE COURT: So Mr. Maliza's asking for less than the mandatory minimum?

MR. WEIR: I believe so, based on his argument that Mr. Pace is safety-valve eligible.

MR. MALIZA: It is, Your Honor. That's my position.

THE COURT: All right.

Mr. Maliza.

MR. MALIZA: Thank you, Your Honor. May it please the Court and Mr. Weir.

Just to clarify that last point, Your Honor, if the Court's holding is that 60 months is the lowest possible, we obviously want that; but we do so without waiving our argument that we believe he's eligible for less.

But, Your Honor, I actually think that less is appropriate in this case. The government is asking Mr. Pace to spend 15 years and 8 months in prison at age 59, which -- you know, he's not a healthy man, as we have seen from his medication list. I certainly fear they're asking for death in prison, and I don't think that's appropriate for Mr. Pace.

Mr. Weir highlighted 1999 at age 37, which feels awfully recent to me, given my own age. I'm 39. And I think about, *Wow, what if today my wife and I, who have been together for 15 years* -- and at that point, I believe Mr. Pace and his wife had been together for 20 years -- *What if our marriage started falling apart? What if drugs had taken over?* As noted -- I think it was page 8 of the mitigation report -- that's the year they separated. That's the year that their addictions -- they were both addicted -- really came to a head and started taking over their lives. Goodness, I hope I wouldn't fall into the dire straits Mr. Pace is in; but, Your Honor, his life started falling apart then, and it's never fallen back into place.

That, that should not discount the period of 2010 to 2017 when he was sober and doing well; but what happened in 2017, his mother died. And, again, referring back to the mitigation report, Mr. Pace said his mother was the most wonderful woman in the world. He was very close to her.

Back to the marriage part, though, the -- it's not just like a short-term relationship. They were childhood sweethearts, Your Honor. So when his first marriage died -- he was so young, Your Honor, when I believe they got married -- I think in Missouri, unless I'm wrong --

THE COURT: That's correct.

MR. MALIZA: Huh?

THE COURT: That's correct.

MR. MALIZA: Yeah.

They were so young. And I can imagine someone feeling absolutely adrift. So, like, I have nothing but sympathy for Mr. Pace and his addiction.

As we said in our, in our -- in this case, he was using drugs for a long time, and he was using drugs for a long time to fund his relatively intense drug addiction. It's not okay, and he doesn't argue that it's okay. But we are saying that hammering him with a sentence that's death in prison, or close to, I think is unduly harsh.

The number 188 months, or 15 years and 8 months is outside the normal range of a number. It's not 15 and a half years. It's not 16. It's 15 years and 8 months. And it's a very precise number,

which is obviously under the guidelines; and Mr. Weir sites that as the basis for that recommendation.

But as I highlighted in my memorandum, technicalities and tiny slivers are the basis of this recommendation. With all due respect, if this very man with this very record turned up in Arizona or California right now, he would be looking at much lower guidelines. Not because they're silly judges, and this Court has it right or this Court has it wrong. And they're, you know, they're the ones that are correct. But just on the luck of geography. It's not because the Sentencing Commission has said something. That's, I think, a really important thing.

The government defaults to the guidelines because that's the Sentencing Commission's pronouncement. I think we can all agree that the Sentencing Commission has not, has not said what the safety valve and the First Step Act means. We know they haven't said it because they haven't even had a quorum since the safety value in the First Step Act was enacted. So the 15 years and 8 months cannot be tied to the Sentencing Commission's pronouncement. It can't be tied to Congress because we don't actually know -- I mean, like I said, it's -- some judges think it's one thing. Some judges think another thing. You know, it's all educated guesses, all educated rulings; but it's judicial decisions. It's not Congress.

So what Congress did say is: Avoid unwarranted disparities.

And Mr. Pace, who doesn't have a gun connected to this case or anything, I think, should

not be sentenced more harshly than somebody in his position in another state. Or another circuit, I suppose.

But the other, the other part of the technicality that has nothing to do with the safety-valve issue, Your Honor, is the fact that when I mentioned it, the difference between 15 years and 14.8 years on that look-back, it kind of detracts from people's respect for the law, which is 3553(a)(2)(A), right?

If I try to imagine where I was 15 years ago this month, I can place myself in a particular state. I can't necessarily say what city I was in in that state.

And if you say: Where were you 14.8 years ago? I'd then say: Okay, two months earlier? Again, I can place myself in a particular state. I can't necessarily place myself in a city in that state, and I certainly don't know a thing I did on that day. All I know is in a general time period, there's no real difference.

And, yet, that real difference, that ten weeks, which I defy anybody to make into a big deal from 15 years ago, that ten weeks cost Mr. Pace -- even without the safety-valve issue, it cost Mr. Pace something like ten years on the government's recommendation.

And my position, Your Honor, is that that, again, is not tethered to any particular wisdom from the Sentencing Commission saying, *Oh, you know what? Fifteen years is particularly different from 14.8.*

If -- as I said in the beginning, I get that 15 years is a number, and it makes a great deal of difference from three years ago; but 14.8 just doesn't.

So this sentencing recommendation from the government is being driven by technicalities. Right or wrong, it's being driven by technicalities, and I think that Mr. Pace is much more than that.

He is a person who is dealing with addiction. He's dealing with depression. One of the things that we see so often is that people lose dear family members and they have a backslide into real negative habits.

As we noted in our mitigation report, Mr. Pace, you know, he might not have been getting in trouble for it. He actually thought of himself as a functioning addict, but he was in substance abuse for decades, and he had it under control for seven years. And he can pinpoint the date he fell off the cliff, and that's when his mom died.

And in crafting a sentence, I would ask the Court to consider whether that sort of culpability is the same as one might have, for instance, for a person who comes in after multiple violent felony convictions. Someone who's a career offender for violence should not be the same as somebody who's a career offender who's a drug-only defendant.

And I cited the Sentencing Commission's 2016 report to the Court in previous cases, noting that many judges kind of recognize how harsh the drug-only career offender guidelines are and how

many judges across the country have taken to sentencing people at or near their otherwise applicable guidelines.

I think a good analog -- oh, wait, Your Honor, one other thing before I get to analogs.

Mr. Pace, for all of his troubles, he has been a good worker; and it is a shame that he did feel the need to apply for Social Security and that he doesn't feel up to working because he has had a history of working. He's done well, but he has never gotten his drug use under control.

So under 3553(a)(2), the sentencing goals, you know, a punishment of five years, as the Court has ruled as a minimum, I think would be sufficient but not greater than necessary to punish and say, *Hey, look, stop using drugs. You need to get this under control*. It would also demonstrate to the community that one could lose five years even if they're just about 60 years old; that the Court will treat people as, you know, ongoing, ongoing criminals and is not going to just give them a light slap on the wrist.

For (B) and (C), deterrence and protection of the community, Your Honor, deterrence works very differently when somebody's trying to overcome an addiction. That addiction, kind of, is what's driving their criminal behavior, not a defective personality.

Similarly, protection of the community. Whatever dangerous activity Mr. Pace has engaged in is related to his addiction and his need to keep funding his addiction through drug distribution. So

that gets us to (D), 3553(a)(2)(D), which is rehabilitation. And under *Tapia*, 3582(a) is not a, not to be done with a prison sentence.

So I would argue the mandatory minimum, without waiving our objection that it shouldn't apply in the first place, that the mandatory minimum would be the appropriate sentence in this case.

And last, Your Honor, I would point to a recent decision this Court had, which is *United States v. Jason Hoyt*. Mr. Hoyt got five years. They were similar profiles in many ways: career offender -- nonviolent, career offenders dealing with raging drug addictions and who had dealt with significant personal traumas that caused those addictions to continue. And I think Mr. Pace is similar to Mr. Hoyt at least in those ways, so I would urge the Court to impose a similar sentence.

And unless the Court has any questions, I have nothing further, Your Honor.

THE COURT: Mr. Pace, now is your opportunity to be heard. Do you have anything you wish to say at this time?

DEFENDANT PACE: Yes, Your Honor.

I would like to start by saying I accept full and sole responsibility for my actions. I have no excuses for being an addict. I grew up in a loving and stable family. My parents were married for 62 years before my mother passed away. We were taught respect, manners, in a non-abusive environment. Still, I'm a common addict.

I'd like to apologize to my family for the distress, the hardships, humiliation, and anything else I put them through.

I'd also like to apologize to this Court due to my actions causing these proceedings and any other inconveniences.

I have spent a lot of time self-reflecting, and I realize that it doesn't matter who you sell drugs to. Even if you don't sell to kids, they're still affected. You can justify it by saying: *If I don't sell to this person, they'll go down the street and get it from somebody else*. That's not always so because the harder it is for them to find the drugs the more apt they're not going to chase the drugs.

As far as the kids are concerned, when a person sells to somebody and they have kids, the child does without food, clothes, Christmas gifts -- whatever. So they do suffer. So no matter what, kids are affected.

This I understand: To be a better me upon my release, I have to sever all ties with any and all people who would potentially lead back to drug use.

I'd also want to actively participate in some type of rehabilitation program upon my release.

Again, I'd like to apologize to my family, and I'd also like to thank my family for all their love and support through everything.

And, again, I apologize to the Court.

(Sealed sidebar, 2:30p.m.)

THE COURT: I note that pursuant to *U.S. v. Booker*, the guidelines are advisory, not mandatory. In determining an appropriate sentence, I've considered the factors set out in 18 United States Code, Section 3553(a), particularly the nature and circumstances of the offense and the history and characteristics of Mr. Pace in reaching a sentence.

Mr. Pace, on April 5 of 2019, law enforcement found 74.1 grams of methamphetamine and 297.4 grams of cannabis in your vehicle.

(Discussion off the record between the Court and the courtroom deputy.)

THE COURT: You committed this crime while under a criminal justice sentence for unlawful possession of methamphetamine in Jersey County Circuit Court Case Number 2018-CF-265.

You've contributed to the drug epidemic that's devastating the Central Illinois area.

I do note: You had a stable childhood and reported being raised by two loving parents, free from abuse.

Your family views you as kind and giving, who has been plagued by addiction. The Presentence Investigation Report and the mitigation report also supports this view.

I also note: Your older brother introduced you to drugs at a young age and started you on the path towards addiction. From around 18 on, you used methamphetamine on a daily basis from 1980 to 2003; marijuana weekly until roughly 37; and you had no criminal history until you were 37.

You also used cocaine on occasion when you were younger. You also have drunk alcohol excessively from 19 to 38.

You reported you had stopped using methamphetamine and other illicit substances from 2003 to 2017, and you refrained from alcohol from 2010 to 2017.

Your criminal record correlates with your drug addiction. The criminal history begins in '99 with an Illinois assault conviction, then unlawful manufacture with intent to deliver involving methamphetamine.

In 2003, only a few months after release from your first sentence, you committed two more drug crimes involving methamphetamine and cocaine.

While serving time for these offenses, you reported participating in substance abuse treatment while incarcerated in IDOC, and that seems to have worked for a period of time.

You then have a misdemeanor battery conviction in 2007, a DUI conviction in 2009, and driving on a suspended license conviction in 2010.

Then you were able to refrain from drug use for over 14 years, so this shows me that you do have the strength and ability to overcome your addiction. I also find it very positive that you want to participate in the residential drug abuse program offered by BOP.

I note you have an associate's degree and a certificate in construction occupations and held a steady job from your release from IDOC in

2006 until 2018. As with your criminal history, your job history also correlates with your drug addiction. When you're not using drugs, you appear to be a contributing member of society.

I note you began using methamphetamine after your mother passed. Your criminal activity began at that time as well.

You were convicted of unlawful possession of methamphetamine on November 2018 and then this offense in April 2019.

I note you and your wife married in 2016, and you report a continuing relationship with her. Your future plans include building rocking chairs for your wife and yourself, playing guitar with your wife, fishing, and staying to yourself. You also want to build a log cabin and care for your father on his property.

You do regret your actions.

I also note that you're 59 years old, which lessens the recidivism concerns.

And I note you barely quality as a career offender because one of your qualifying crimes was almost outside of the 15-year look-back.

Your convictions relate to drug addiction, even though you were selling. That would not classify you as a violent offender, despite your two misdemeanor battery convictions. So I do find your career offender designation overstates your criminal history.

You have the opportunity to be a contributing member of society again for you and your

loved ones, and I hope this sentence sets you on the right path to forgo criminal activity and overcome your drug addiction again.

Taking all of the relevant factors into consideration, I find the following sentence is sufficient but not greater than necessary to comply with the sentencing purposes in 18 United States Code, Section 3553(a)(2).

Pursuant to the Sentencing Reform Act of 1984, Defendant Roger E. Pace is hereby committed to the custody of the Bureau of Prisons for a period of 60 months to run concurrently with sentences imposed in Pike County Illinois Circuit Court Case Number 2019-CF-67.

This case adequately reflects the seriousness of the offense, promotes respect for the law, provides just punishment, protects the public from further crimes of Mr. Pace, and hopefully affords adequate deterrence.

Is there a request as to where Mr. Pace serves his sentence?

MR. MALIZA: Mr. Pace, do you have a particular place?

DEFENDANT PACE: Terre Haute has, has programs that interest me.

THE COURT: I will recommend Terre Haute. I recommend that you participate in the Residential Drug Abuse Program. I also recommend any subsistence fee be waived for a residential reentry center.

Following your release from custody, you shall serve a four-year term of supervised release. I believe this term is sufficient but not greater than necessary to help you transition back into society and deter you from committing crimes in the future.

While on supervised release, you shall not commit another federal, state, or local crime.

You shall not unlawfully use or possess a controlled substance.

You shall submit to one drug test within 15 days of release from imprisonment and at least two drug tests thereafter as directed by Probation.

Pursuant to 34 USC Section 40702, you shall cooperate in the collection of DNA as directed by Probation or the Bureau of Prisons.

I'm imposing all of the discretionary conditions filed by the Court for the justifications stated therein.

One of those requires you, within 72 hours of release from custody from the Bureau of Prisons, to report in person to Probation in the district where you're released.

I find you have no ability to pay a fine, so none is imposed. A $100 special assessment is due immediately.

I also order you to give your copies of the initial Presentence Investigation Report and the revised Presentence Investigation Report to a Pike

County Jail employee at the conclusion of this hearing so they can be returned to our Probation Office.

Mr. Maliza, have I addressed all matters in mitigation?

MR. MALIZA: Yes, you have, Your Honor.

Just to be clear, I'm not waiving our prior objections; but otherwise, yes.

THE COURT: Anything other than appellate rights?

MR. MALIZA: No, Your Honor.

THE COURT: Mr. Pace, do you have any questions about the sentence I just imposed?

DEFENDANT PACE: No, Your Honor, I don't.

The $100 assessment fee, I, I -- obviously, I'm indigent at the present time.

MR. MALIZA: Mr. Pace, do you want to just call me and we can talk about that?

DEFENDANT PACE: Okay.

MR. MALIZA: We'll just talk about that. She can't do anything about that.

DEFENDANT PACE: Okay.

THE COURT: You'll be given time to make that payment, Mr. Pace.

DEFENDANT PACE: Okay, thank you.

THE COURT: Mr. Pace, you have the right to appeal the sentence I imposed. Pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A), your Notice of Appeal must be filed within 14 days of the entry of judgment or within 14 days of the filing of a Notice of Appeal by the government.

If you're indigent or without money, an attorney would be appointed to handle your appeal without charge, and a transcript of the court hearings in this matter would be prepared and given to you without charge for your appeal.

Mr. Pace, good luck. It may take several weeks for the marshal to transport you. You most likely will be transported to Oklahoma City before assigned to the Bureau of Prisons where you'll be assigned, which I hope is Terre Haute.

So at this time, you're remanded to the custody of the marshals.

Good luck, Mr. Pace.

DEFENDANT PACE: Thank you, Your Honor.

THE COURT: Court is adjourned in this matter.

(Hearing concludes, 2:40 p.m.)

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REPORTER'S CERTIFICATE

I, LISA KNIGHT COSIMINI, RMR-CRR, hereby certify that the foregoing is a correct

transcript from the record of proceedings in the above-entitled matter.

Dated this 14th day of July, 2021.

s/ Lisa Knight Cosimini
Lisa Knight Cosimini, RMR-CRR
Illinois License # 084-002998

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 28, 2022

Before

KENNETH F. RIPPLE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 21-2151

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* ROGER E. PACE, *Defendant-Appellant.*	Appeal from the United States District Court for the Central District of Illinois. No. 3:19-cr-30051 Sue E. Myerscough, *Judge.*

ORDER

On consideration of the petition for rehearing and rehearing en banc filed by Defendant-Appellant on October 6, 2022, a majority of judges on the original panel voted to deny rehearing. Judge Diane P. Wood voted to grant panel rehearing. A judge in regular active service requested a vote on the petition for rehearing en banc. A majority of judges in regular active service voted to deny the petition.

Accordingly, the petition for rehearing and rehearing en banc is **DENIED**.