

No. \_\_\_\_\_

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IN THE  
Supreme Court of the United States

JAQUANTIOUS HUTCHISON,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit

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**APPENDIX**

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# United States Court of Appeals for the Fifth Circuit

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No. 21-51188  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit  
**FILED**  
May 8, 2023

UNITED STATES OF AMERICA,

Lyle W. Cayce  
Clerk

*Plaintiff—Appellee,*

*versus*

JAQUANTIOUS HUTCHISON,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 3:20-CR-2333-3

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Before JONES, HAYNES, and OLDHAM, *Circuit Judges.*

PER CURIAM:\*

Jaquantious Hutchison appeals his sentence following his guilty plea conviction for possession with intent to distribute five kilograms or more of cocaine. Relying on the Ninth Circuit's approach in *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), he contends that he is eligible for safety valve

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 21-51188

relief under 18 U.S.C. § 3553(f) and that his statutory minimum sentence of 120 months of imprisonment should be vacated. The Government has filed an opposed motion for summary affirmance or, in the alternative, for an extension of time to file a merits brief.

Now, Hutchison's argument is foreclosed by our recent decision in *United States v. Palomares*, 52 F.4th 640 (5th Cir. 2022), *petition for cert. filed* (U.S. Dec. 21, 2022) (No. 22-6391). Because Hutchison ran afoul of § 3553(f)(1)(A)'s requirement that he not have more than four criminal history points under the guidelines—which he does not dispute—he was ineligible for relief under § 3553(f). *See Palomares*, 52 F.4th at 647. We are not required to follow Hutchison's request that we hold this case in abeyance pending the Supreme Court's grant of certiorari on this issue. *See United States v. Pulsifer*, 39 F.4th 1018, 1021 (8th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023) (granting certiorari on this question). *See also United States v. Treft*, 447 F.3d 421, 425 (5th Cir. 2006); *United States v. Islas-Saucedo*, 903 F.3d 512, 521 (5th Cir. 2018).

In light of the foregoing, the judgment of the district court is AFFIRMED. The Government's motion for summary affirmance and alternative motion for an extension of time to file a brief are DENIED. *See United States v. Bailey*, 924 F.3d 1289, 1290 (5th Cir. 2019).

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
EL PASO DIVISION

12-3-21  
Clerk, U. S. District Court  
Western District of Texas  
By *[Signature]*  
DA 87-10

UNITED STATES OF AMERICA

v.

Case Number: EP:20-CR-02333-FM(3)  
USM Number: 16740-509

Jaquantious Hutchison;  
TN: BRANDON JAQUANTIOUS HUTCHISON

Defendant.

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

The defendant, Jaquantious Hutchison; TN: BRANDON JAQUANTIOUS HUTCHISON, was represented by Israel Parra.

On motion by the United States, the Court has dismissed Count 1 of the Indictment.

The defendant pled guilty to Count 2 of the Indictment on March 18, 2021. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

<u>Title &amp; Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. 841 Possession with Intent to Distribute Cocaine > 5 Kilograms	October 30, 2020	2

As pronounced on November 30, 2021, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Signed this 30th day of November, 2021.

*Frank Montalvo*

FRANK MONTALVO  
United States District Judge

DEFENDANT: Jaquantious Hutchison; TN: BRANDON JAQUANTIOUS HUTCHISON  
CASE NUMBER: EP:20-CR-02333-FM(3)

**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of one-hundred-twenty (120) months.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serves this sentence at F.C.I., Big Spring, Texas.

That the defendant participates in a mental health program while incarcerated.

That the defendant receives the benefits of the drug abuse treatment programs while incarcerated.

The defendant shall remain in custody pending service of sentence.

**RETURN**

I have executed this Judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

United States Marshal

By \_\_\_\_\_  
Deputy Marshal

DEFENDANT: Jaquantious Hutchison; TN: BRANDON JAQUANTIOUS HUTCHISON  
CASE NUMBER: EP:20-CR-02333-FM(3)

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special and/or additional conditions on the attached pages that have been adopted by this Court.

### **MANDATORY CONDITIONS**

1. The defendant shall not commit another federal, state or local crime during the term of supervision.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
4. The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
5. If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
6. If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
7. If this judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.
8. The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. The defendant shall notify the court of any material change in defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

DEFENDANT: Jaquantiou Hutchison; TN: BRANDON JAQUANTIUS HUTCHISON  
 CASE NUMBER: EP:20-CR-02333-FM(3)

**STANDARD CONDITIONS OF SUPERVISED RELEASE**

1. The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
3. The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
4. The defendant shall answer truthfully the questions asked by the probation officer.
5. The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.
7. The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
13. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
14. If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.
15. If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is the condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
16. If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_ Date \_\_\_\_\_

DEFENDANT: Jaquantious Hutchison; TN: BRANDON JAQUANTIOUS HUTCHISON  
CASE NUMBER: EP:20-CR-02333-FM(3)

**SPECIAL CONDITIONS OF SUPERVISED RELEASE**

- X The defendant must participate in a substance abuse treatment program and follow the rules and regulations of that program. The program may include testing and examination during and after program completion to determine if the defendant has reverted to the use of drugs. The probation officer shall supervise the participation in the program (provider, location, modality, duration, intensity, etc.). During treatment, the defendant must abstain from the use of alcohol and any and all intoxicants. The defendant must pay the costs of such treatment if financially able.
- X The defendant shall participate in a mental health treatment program and follow the rules and regulations of that program, to include taking any prescribed medication(s). The probation officer, in consultation with the treatment provider, shall supervise participation in the program (provider, location, modality, duration, intensity, etc.). The defendant must pay the costs of such treatment if financially able.

DEFENDANT: Jaquantious Hutchison; TN: BRANDON JAQUANTIOUS HUTCHISON  
CASE NUMBER: EP:20-CR-02333-FM(3)

**ADDITIONAL CONDITIONS OF SUPERVISED RELEASE**

- X If no other stable place of residence is available, the defendant shall a residential reentry center for a period of up to 180 days and shall report to said facility as directed by the probation officer. In addition to abiding by all the rules of the facility, the defendant shall not terminate his stay nor separate from the facility unless authorized by the probation officer or the director of the facility. The defendant shall report in person to the probation officer within 72 hours of completing his stay or having been terminated from further residence at said facility. The defendant's costs for subsistence are waived.
- X The defendant shall participate in a vocational services program and follow the rules and regulations of that program. Such a program may include job readiness training and skills development training. The defendant shall pay for the costs of the program if financially able.

DEFENDANT: Jaquantious Hutchison; TN: BRANDON JAQUANTIOUS HUTCHISON  
 CASE NUMBER: EP:20-CR-02333-FM(3)

**CRIMINAL MONETARY PENALTIES/ SCHEDULE**

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, Attn: Mail Log, Albert Armendariz, Sr. United States Courthouse, 525 Magoffin Avenue, Suite 105, El Paso, TX, 79901 or online by Debit (credit cards not accepted) or ACH payment (direct from Checking or Savings Account) through Pay.gov (link accessible on the landing page of the U.S. District Court's Website). **Your mail-in or online payment must include your case number in the exact format of DTXW320CR002333-003 to ensure proper application to your criminal monetary penalty.**

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
<b>TOTALS:</b>	\$100.00	\$0.00	\$0.00	\$0.00	\$0.00

**Special Assessment**

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00.

**Fine**

The fine is waived because of the defendant's inability to pay.

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 above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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.

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

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

1 IN THE UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF TEXAS

3 EL PASO DIVISION

4

5 UNITED STATES OF AMERICA No. EP-20-CR-2333-FM

6 v. El Paso, Texas

7 (3) JAQUANTIOUS HUTCHISON November 30, 2021

8 True Name: Brandon Jaquantious Hutchison

9

10 SENTENCING

11 via ZOOM

12 BEFORE THE HONORABLE FRANK MONTALVO

13 UNITED STATES DISTRICT JUDGE

14

15

16 APPEARANCES:

17 For the Government Herbert Bunton  
18 Assistant United States Attorney  
700 East San Antonio, Suite 200  
19 El Paso, Texas 79901

20 For the Defendant Israel Parra  
21 Attorney at Law  
3022 Montana Avenue  
22 El Paso, Texas 79903

23

24 Proceedings recorded by stenotype. Transcript produced by  
25 computer-aided transcription.

08:39 1 COURTRoom DEPUTY: EP-20-CR-2333, United States versus  
2 Jaquantious Hutchison.

3 MR. BUNTON: Good morning again, Your Honor. Herbert  
4 Bunton on behalf of the United States, ready.

5 THE COURT: Good morning.

6 MR. PARRA: Good morning, Your Honor. Israel Parra  
7 here on behalf of Mr. Jaquantious Brandon Hutchison.

8 THE COURT: Mr. Hutchison, good morning, sir.

9 THE DEFENDANT: Good morning, Your Honor.

10 THE COURT: Mr. Hutchison, have you had time to talk  
11 to your lawyer about today's hearing?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: And did you have time to discuss the  
14 revised presentence report with your lawyer?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Okay. I have gone over it myself as well,  
17 Mr. Bunton and Mr. Parra. And in the process of doing so, I  
18 detected an inadvertent mistake by my probation officer in the  
19 computation of the criminal history category points. So to  
20 make it easier for all of us to follow, let me go through the  
21 total number of points.

22 The first two points are from the offense listed on  
23 paragraph 38. That's two points assessed for that offense  
24 which, of course, is correctly assessed. The second two  
25 points, that is, points 3 and 4, arise from the offense listed

08:41 1 on paragraph 41. That offense included a term of probation  
2 that was set to end or is set to end on December 12, 2020. And  
3 then points 5 and 6 are from the offense found in paragraph 44,  
4 which, of course, is also correctly scored.

5 Paragraph 45 of the presentence report states the  
6 total criminal history score is 6. That is incorrect.  
7 Actually, the total criminal history score is 8, because this  
8 offense was committed while Mr. Hutchison was subject to  
9 criminal history -- to a criminal justice sentence. So the  
10 total criminal history points is 8 pursuant to  
11 Section 4A1.1(d). So the total criminal history score is 8.

12 I find that Mr. Hutchison does not qualify for safety  
13 valve. That is, he does not qualify for a sentencing below the  
14 mandatory ten-year minimum. I am aware that there are  
15 competing circuit court decisions. My probation officer  
16 correctly pointed that out in the -- in the addendum -- in the  
17 second addendum to the presentence report. I find that the  
18 reading that the Ninth Circuit gives to the pertinent section  
19 of the First Step Act would lead to an absolute result. I  
20 think that the analysis of the Eleventh Circuit is spot-on.  
21 And that's -- frankly, that's how I have read that since it  
22 went into effect in 2018.

23 Mr. Hutchison, is there anything you would like to say  
24 on your own behalf before I sentence you?

25 THE DEFENDANT: Yes, Your Honor. I do have something

08:44 1 to say. I would just like to ask for some leniency towards me,  
2 Your Honor. I know I made a bad decision to accompany my wife  
3 on the journey that she had decided to take that day. And if I  
4 could take it all back, Your Honor, I would.

5 I just had a little boy, Your Honor. And to be out of  
6 his life for ten years is the same way that it started with me,  
7 with my mother and my father being gone. I just would -- I  
8 just would like to have the same type of treatment that my  
9 co-defendants had got, Your Honor. And I understand the way  
10 that the laws work and the point differentials and the things  
11 like that. I just -- I just don't think I deserve a whole ten  
12 years, Your Honor, just from one wrong mistake that I did make,  
13 Your Honor. It wasn't an intentional mistake, but I made it.  
14 And I do have to own up to it. I do. And I am not putting the  
15 blame on anyone else but myself. And that is all I would like  
16 to say, Your Honor; that if I could take it all back, I would,  
17 Your Honor.

18 THE COURT: Mr. Hutchison, the reason why you are not  
19 getting the same treatment, to use your own words, is because  
20 of your criminal record. The law takes that into consideration  
21 in the application of the mandatory sentencing minimum. That's  
22 the reason why.

23 THE DEFENDANT: Then the 501K [sic] letter did not go  
24 through, when I had got asked to write that letter?

25 MR. PARRA: No. Judge, if I may? And I will address

08:46 1 to what he is telling you. Even assuming that the Ninth  
2 Circuit is incorrect and the Eleventh Circuit, like you  
3 indicated, is spot-on, I think that both circuits consider the  
4 First Step Act, Section 5, out of the same paragraph that we  
5 are talking about; that before the sentencing hearing, the  
6 defendant has truthfully provided to the government all  
7 information and evidence that defendant has concerning the  
8 instant offense.

9 So, in other words, there is another way to qualify  
10 for the safety valve. And in this situation, he certainly has  
11 provided all the information to them. Judge, from the very  
12 beginning at the time of his arrest, he provided information to  
13 the arresting agencies.

14 The other thing is that we made ourselves available to  
15 the U.S. Government to meet and have a conversation regarding  
16 this incident. However, they -- they declined it. Even --  
17 even -- even at that point in time, Ms. Martinez and I  
18 discussed the fact that if he could provide them with a  
19 statement. And he did provide them with a statement. It was  
20 a -- I believe it was a three- -- three-page legal -- legal  
21 writing paper that he provided to them.

22 So he has been totally honest, Judge. I mean, yeah,  
23 the -- the point valuation sure does harm him. But he has been  
24 truthful in the other way, Judge. He has provided all the  
25 information to the government. It is just that, I think, that

08:48 1 the government has just taken it on one side and said, Well,  
2 you know, that's not substantial assistance.

3                   But I bet you what, Judge, I bet you if none of the  
4 other individuals had been willing to testify against any other  
5 individual and Mr. Brandon was willing to testify against the  
6 other individual, they would qualify him for safety valve  
7 immediately. Why? Because they know that he is being  
8 truthful, and he is the only one that can provide them the  
9 information that they are requiring.

10                  THE COURT: Mr. Parra, you are confusing -- you are  
11 confusing the sections of 3553(a).

12                  MR. PARRA: Well, maybe, Judge, but I'm talking about  
13 subsection 5.

14                  THE COURT: If the government for the --

15                  MR. PARRA: Maybe I am, Judge. 3553, Section 1  
16 through 5, Judge. But anyway, it's addressed by both case laws  
17 that we handed to you, the one that I have and the one that the  
18 government has.

19                  Judge, just in closing, I don't know if there is a  
20 federal correction facility up in Big Springs, but if he can be  
21 sent there and then put in the program that you were suggesting  
22 last time. He wants to do that so he can better himself. And  
23 the only other option -- and he knows why I'm choosing this  
24 option -- I indicated to him why I was going to do it -- is  
25 that I'm going to make an oral motion to withdraw at this time

08:49 1 so that you could appoint him an appellate attorney.

2 THE COURT: For me to sentence him below the mandatory  
3 minimum, Mr. Parra, the government has to file a motion  
4 pursuant to 18 USC 3553(e). The government didn't file that.

5 MR. PARRA: No, I understand that, Judge. I do  
6 understand that.

7 THE COURT: Okay. You keep mixing that with  
8 qualifying him for safety valve. No.

9 MR. PARRA: I understand what I did, Judge.

10 THE COURT: Okay. Mr. Bunton, anything from the  
11 government?

12 MR. BUNTON: Your Honor, the government moves to  
13 dismiss count one of the -- dismiss count one and grant the  
14 additional point, I guess.

15 THE COURT: Mr. Hutchison, you are sentenced to 120  
16 months in custody, followed by five years supervised release.  
17 The fine is waived, as I find there are no resources from which  
18 to pay any fine this court may assess. And I order the  
19 mandatory special assessment of \$100.

20 During your term of supervised release, in addition to  
21 the standard and mandatory conditions of supervised release in  
22 place in the Western District of Texas, you will participate in  
23 a substance abuse treatment program and follow the rules and  
24 regulations of that program, including the testing and  
25 examination during and after the program completion, to

08:51 1 determine if you have reverted to the use of drugs. That  
2 condition is put in place due to your prior substance abuse  
3 history.

4 You will participate in a mental health treatment  
5 program and follow the rules and regulations of that program,  
6 including the taking of any medication. That condition is  
7 imposed due to your prior mental health history. You will  
8 participate in a vocational services program and follow the  
9 rules and regulations of that program, in order to help you  
10 secure stable employment. And, again, that's because of your  
11 lack of consistent employment history.

12 And you will reside at a residential reentry  
13 service -- at a residential reentry center for a term of up to  
14 180 days, because you do not have a stable residence in  
15 El Paso. Of course, if you release to a place where you have a  
16 stable residence, then that condition will be null. The  
17 subsistence fee during those 180 days is waived.

18 Mr. Hutchison, I am granting -- I am granting your  
19 lawyer to withdraw. I'm referring this matter to the  
20 magistrate for appointment of appellate counsel.

21 I find that at the time I took this plea, neither  
22 defense counsel, nor the government, was aware of the lack of  
23 precedent on point on the applicability of the safety valve.  
24 So I can see how reasonable minds could disagree on the ruling  
25 I'm making about safety valve. So I find that you should --

08:53 1 you have a right to appeal that, irrespective of what the plea  
2 agreement in your case said, because the plea agreement in your  
3 case, you waived your right to appeal; however, you could not  
4 have waived -- your lawyer could not have waived that right on  
5 your behalf. No one could have waived that right without  
6 knowing that there was an issue that had not been decided, that  
7 neither side -- that, at best, either side could take, you  
8 know, opposite positions. So, I mean, I cannot for the life of  
9 me see the government agreeing to the application of the safety  
10 valve as the Ninth Circuit has interpreted it. And, of course,  
11 that's the position that your lawyer took on your behalf.

12 So you will have a lawyer appointed to represent you  
13 on appeal. My ruling on the appealability of this sentence is  
14 simple application of contract law principles to the plea  
15 agreement. It was something that couldn't have been  
16 anticipated by either side. And, in fact, there's nothing on  
17 the record that shows that it was anticipated until the actual  
18 time in which the sentencing guidelines were computed in this  
19 case.

20 So I wish you well, Mr. Hutchison, and I will  
21 recommend the place of incarceration that your client -- I  
22 mean, that your lawyer asked for on your behalf. And I will  
23 recommend that you be given the opportunity to participate in  
24 any drug treatment and mental health program that may be  
25 available at that facility.

08:56 1 Adriana, let's refer this matter to the magistrate --  
2 to one of the magistrates for appointment of appellate counsel  
3 as soon as possible.

5 THE COURT: Thank you all very much.

6 | \* \* \* \* \*

## C E R T I F I C A T E

8 I certify that the foregoing is a correct transcript from  
9 the record of proceedings in the above-entitled matter. I  
10 further certify that the transcript fees and format comply with  
11 those prescribed by the Court and the Judicial Conference of  
12 the United States.

13      Signature: /s/Nalene Benavides      Date:    January 19, 2022  
14      Nalene Benavides, RMR, CRR