CASE NO. 21-7352

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

LARONE F. ELIJAH,

Plaintiff - Appellant,

v.

RICHARD S. DUNBAR, Warden,

Defendants - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT BEAUFORT

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Warden concedes that Elijah appropriately presented his objections to the magistrate judge's report and recommendation, and that the district court should have reached the merits of Elijah's argument that the First Step Act entitles him to additional good conduct time ("GCT") credits. The Warden argues that the appropriate remedy is a remand, but his own citations demonstrate that the district court has already rejected Elijah's argument in other cases. In all likelihood a remand would simply delay this Court's consideration of the issues, and risk mooting Elijah's separate request that this Court consider reopening his § 2255 proceedings to address the point that his revocation sentence exceeded the statutory maximum by a full year. Reaching the merits of Elijah's case rather than merely remanding it would better serve the interests of justice.

As amended by the First Step Act, 18 U.S.C. § 3624(b)(1) provides that "a prisoner who is serving a term of imprisonment . . . may receive credit *toward the service of the prisoner's sentence*, of up to 54 days for each year of the prisoner's sentence imposed by the court." (emphasis added). The Act expressly makes its more generous GCT calculation retroactive to all offenses committed after November 1, 1987. First Step Act § 102(b)(3), 132 Stat. at 5213. Elijah therefore is entitled to a retroactive recalculation of the GCT credits earned during his initial term of imprisonment, and he is entitled to apply those new retroactive credits "toward the

service of" his entire "sentence"—which includes his new term of imprisonment imposed after revocation of supervised release. This Court has long recognized that "any additional term of imprisonment imposed for violating the terms of supervised release [is] part of the original sentence." *United States v. Evans*, 159 F.3d 908, 913 (4th Cir. 1998); *see also, e.g., United States v. Venable*, 943 F.3d 187, 194 (4th Cir. 2019). The Warden argues that Elijah is no longer serving his original "term of imprisonment." That is irrelevant. The Act provides that GCT credits are *earned* during a "term of imprisonment," but *applied* toward the service of a prisoner's "sentence." The plain language of the First Step Act and this Court's "unitary sentence" jurisprudence make clear that Elijah is entitled to these credits. The Warden, and the (mostly unpublished) authority on which he relies, just wants to read § 3624(b)(1) as if it said that inmates earn GCT credits during a term of imprisonment and receive credit "toward the service of that term of imprisonment." That is not the statute Congress wrote.

Elijah also was sentenced to a full year in excess of the statutory maximum revocation sentence. The Warden argues that Elijah litigated and lost this issue in his prior § 2255 proceeding. The record of that case suggests, however, that the issue may well have been overlooked. There, as in this proceeding, the district court does not appear to have understood that Elijah presented a statutory issue distinct from his constitutional argument based on *United States v. Haymond*, 139 S. Ct. 2369

(2019), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has the power to reopen that proceeding and grant the certificate of appealability that it previously denied, and should consider doing so in order to correct a miscarriage of justice.

ARGUMENT

I. THIS COURT SHOULD REACH THE MERITS OF ELIJAH'S ARGUMENT THAT THE FIRST STEP ACT ENTITLES HIM TO ADDITIONAL GOOD CONDUCT TIME CREDITS

Elijah appreciates the Warden's concession that the district court erred in not addressing his First Step Act argument on the merits. Appellee's Br. at 9-11. The district court's misunderstanding suggests that the district courts would benefit from guidance about the proper implementation of the specific objections requirement in circumstances like these. This Court explained in *United States v. Midgette* that litigants must specifically identify those aspects of the magistrate judge's report and recommendation that they specifically disagree with, rather than objecting generally. 478 F.3d 616, 621-22 (4th Cir. 2007). But this Court's decisions do not address whether a specific objection can reargue points that were presented to the magistrate and rejected. At least one district court in this circuit has held, in a published opinion, that "a mere restatement of the arguments" presented to the magistrate is inappropriate. *See Nichols v. Colvin*, 100 F. Supp. 3d 487, 497 (E.D. Va. 2015). Clarification of the rule from this Court would aid the district courts in their review

of magistrate judges' reports and recommendations. *See* Appellant's Br. at 14-16, 20-21; *Thomas v. Arn*, 474 U.S. 140, 154 (1985).

The Warden argues that the appropriate remedy is a remand, pointing to *Cruz v. Marshall,* 673 F. App'x 296, 299 (4th Cir. 2016) (unpublished). In *Cruz,* however, the prisoner had introduced relevant new *factual* information in the time between the magistrate judge's report and recommendation and the district court's decision. *Id.* at 298-99. This Court held that when a litigant introduces new facts or new arguments the district court "must do more than simply agree with the magistrate" and must provide "a specific rationale that permits meaningful appellate review." *Id.* at 299. In Elijah's case, no new facts were alleged; the issue is a pure question of law. This Court frequently reaches pure questions of law that were not addressed below. *See United States v. Faulls,* 821 F.3d 502, 212 n.4 (4th Cir. 2016) ("Although we generally do not consider issues not passed upon below, the question before us is purely one of law, and we perceive no injustice or unfair surprise in doing so here." (citing *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.")). The Warden notes that Elijah did present a new *legal* argument to the district court that had not been presented to the magistrate, by contending that *Haymond* had abrogated *United States v. Ward*, 770 F.3d 1090 (4th Cir. 2014),

which held that *Apprendi* does not apply to revocation proceedings. JA 132-133. But this Court has already rejected that argument, so there is no need for the district court to consider it. *See United States v. Coston*, 964 F.3d 289, 294-95 (4th Cir. 2020).

Mr. Elijah respectfully submits that in these circumstances it would better serve the interests of justice and judicial efficiency for this Court to reach the merits of his GCT arguments now. First, the magistrate judge's report and recommendation explains that the district courts in this circuit (including the District of South Carolina) have consistently rejected Elijah's argument and the understanding of this Court's "unitary sentencing" cases underlying that argument. The Warden's eleven-case string cite in his responsive brief confirms this point. Appellee's Br. at 13-14. It seems quite likely, therefore, that a remand would serve little purpose but to delay this Court's consideration of this important and recurring issue.

Second, Mr. Elijah cares deeply about his request that this Court consider reopening his § 2255 proceedings to address the point that his revocation sentence exceeded the statutory maximum. The district court cannot consider that claim, and the delay associated with a remand could make it impossible for Elijah to receive full relief. Elijah's understanding is that if he prevailed on that issue he would be entitled to release very soon. Significant further delay could result in him over-serving his lawful sentence, or even mooting the issue altogether.

II. THE WARDEN'S INTERPRETATION OF THE FIRST STEP ACT IS INCONSISTENT WITH THE STATUTE AND THIS COURT'S UNITARY SENTENCING FRAMEWORK

On the merits, the Warden concedes that the First Step Act applies to increase the GCT credits Elijah can earn on his present 144 month term of imprisonment.[1] Citing the Seventh Circuit's unpublished decision in *White v. Sproul*, No. 21-2202, 2022 WL 728967 (7th Cir. Mar. 10, 2022), the Warden argues that Elijah can no longer benefit from additional GCT credits earned during his original term of imprisonment because he no longer "is serving" that term. Appellee's Br. at 17.

The Warden and the *White* decision misread the statute. As modified by the First Step Act, 18 U.S.C. § 3624(b)(1) provides that "a prisoner who is serving a term of imprisonment . . . may receive credit toward the service of the prisoner's sentence, of up to 54 days for each year of the prisoner's sentence imposed by the court." Under that language GCT credits are *earned* by a prisoner "who is serving a term of imprisonment," but the prisoner "may receive *credit*" for those earned GCT credits "toward the service of the prisoner's sentence." A "term of imprisonment" and a "sentence" are critically different concepts, and a "sentence" may (as here)

[1] That term consists of his 36 month revocation term and a 108 month term associated with his new sentence for his conduct in June 2015. Elijah's opening brief explained (at 29-32) that those terms are consolidated for all administrative purposes by statute and BOP policy. The Warden has no response, apparently conceding that if Elijah would be entitled to apply additional GCT credits to his revocation term then he can still benefit from that application on his new, consolidated, term. *See* Appellee's Br. at 23-24.

include multiple terms of imprisonment. Congress deliberately chose to make the new, more generous GCT credit calculation retroactive. First Step Act § 102(b)(3), 132 Stat. at 5213. So, by retroactive operation of the First Step Act, Elijah earned an additional 7 days of GCT credit per year while "serving" his previous term of imprisonment and has never received those credits. The statutory question now is not whether he still "is serving" that same "term of imprisonment," but whether he still "may receive credit toward the service of" that same "sentence."

Because a defendant's revocation term and the original term of imprisonment form one unitary sentence, a defendant serving a revocation term is still serving his original sentence and therefore still "may receive credit toward the service of" that sentence. The Warden tellingly has almost no response to the extensive case law cited in Elijah's opening brief, including the Supreme Court's decision in *Johnson v. United States*, 529 U.S. 694 (2000), and this Court's decisions in *Venable* and *United States v. Ketter*, 908 F.3d 61 (4th Cir. 2018), all of which make clear that original and revocation terms of imprisonment have to be treated "as components of one unified sentence." *Ketter*, 908 F.3d at 65. The Warden asserts that Elijah has offered "nothing to show that Congress extended the [unitary sentencing] framework beyond its constitutional roots" (Appellee's Br. at 21), but Elijah's opening brief explained at length that this Court has already applied "the [unitary sentence] framework set out in *Johnson* and *Ketter*" to conclude that because an inmate's

"revocation sentence is part of the penalty for his initial offense, he is still serving his sentence for a 'covered offense' for purposes of the First Step Act." *Venable*, 943 F.3d at 194. *Venable* explained that an inmate serving a revocation sentence should be treated "as if he were still serving the original custodial sentence" for purposes of the First Step Act's sentence-adjustment provisions. *Id.* This Court thought that conclusion "flows directly from the plain language of the relevant statutes and the unitary theory of sentencing." *Id.* at 193. And that statutory holding all but dictates the answer here. The Warden argues that Elijah's argument rests entirely on "unitary sentencing" theory rather than on "the Act." Appellee's Br. at 23. But the two cannot be separated. The meaning of "sentence" in § 3624(b)(1) is informed by the overarching principle that original and revocation sentences are parts of the same sentence, here just as in *Venable.*

The Warden argues that if Congress had wanted prisoners serving revocation terms to benefit from a recalculation of GCT credits from their original terms, it would have said that a defendant who "is serving or has served" a term of imprisonment may receive "credit toward the service of any term [sic] imprisonment he is serving or is later ordered to serve." Appellee's Br. at 19. But Congress found a much more elegant drafting solution, by providing that inmates may receive credit toward their "sentence." If Congress had wanted credits earned during a term of

imprisonment to be credited only against that term of imprisonment, it could easily have said so.

The Warden argues that because supervised release is also part of the "sentence," an interpretation fully consistent with unitary sentencing principles would allow defendants to earn GCT credits during their time out on supervised release. Appellee's Br. at 20. Not so. The statute plainly says that only a "prisoner" who "is serving a term of imprisonment" may earn GCT credits. Notice also that only a "prisoner" who "is serving a term of imprisonment" may *apply* credits toward his "sentence," which guarantees that defendants who are out on supervised release are not entitled to apply credits unless they are later re-incarcerated. Elijah *is* currently "serving a term of imprisonment," but a defendant out on supervised release is not. Close attention to the statute's language solves the interpretive puzzles that the Warden posits.

Rather than looking to principles of statutory interpretation, the courts that have rejected claims like Elijah's have centered their rationales largely around policy. The Warden's chief concern is that Elijah's reading of the statute would permit defendants "to bank time for future offenses." Appellee's Br. at 19. It is true that Congress's deliberate decision to make this part of the First Step Act retroactive means that, for a limited time, defendants who are out on supervised release may have a small "bank" of GCT credit that would be applied to a revocation term if they

received one. The total credit will rarely be more than a few weeks; only defendants previously incarcerated for twenty-six years would have even six months of retroactive GCT credit. This state of affairs will be short-lived. Going forward, all credits will be applied and exhausted before the prisoner's release on supervision. And this temporary state of affairs is hardly unprecedented. This Court noted in *United States v. Jackson* that when a defendant has over-served his original term of imprisonment because a portion of that sentence is vacated after being served, the defendant generally is entitled to a credit for that excess prison time against any subsequent revocation term imposed "under the same sentence." 952 F.3d 492, 498 (4th Cir. 2020). That credit may be much more substantial than the GCT credits at issue here. It seems very unlikely that a few weeks of "banked" GCT credit will motivate recidivism among the limited group of prisoners currently out on supervised release. More importantly, if Congress had been concerned it could easily have made the GCT amendments prospective only.

As the opening brief explained, the cases supporting the Warden's position mostly just follow the Second Circuit's influential *non sequitur* in *United States v. McNeil* that a revocation sentence "is partly based on new conduct, is wholly derived from a different source, … has different objectives altogether[, and] is therefore a different beast." 415 F.3d 273, 277 (2d Cir. 2005). The Warden attempts to bolster *McNeil* by pointing out that the Second Circuit acknowledged the Supreme Court's

holding in *Johnson* that supervised release is "part of the penalty for the initial offense" for *Ex Post Facto* Clause purposes. Appellee's Br. at 22. Almost eighteen years later, however, it is clear in this circuit that the unitary treatment of initial and revocation sentences goes far beyond the constitutional holding of *Johnson*—indeed it confirms, specifically, that a defendant serving a revocation term "is still serving his sentence for a 'covered offense' for purposes of the First Step Act." *Venable*, 943 F.3d at 194. The Second Circuit's observation that supervised release is imposed for new conduct and serves new purposes provides no reason to ignore this Court's careful analysis of the actual language of the First Step Act in *Venable*.

The Warden argues that this Court "appears to agree" with the parade of unpublished district court decisions following *McNeil*, citing *Andrews v. Dobbs*, 848 F. App'x 568, 569 (4th Cir. 2021) (unpublished), *cert. denied*, 142 S. Ct. 1221 (2022). Appellee's Br. at 14. The Warden says that *Andrews* "expressly relied on" *Kidd v. Fikes*, No. 20-cv-287 (SRN/TNL), 2020 WL 7210025 (D. Minn. Aug. 17, 2020). Appellee's Br. at 15. But the *Andrews* panel relied on *Kidd* for a completely different proposition: that time served on supervised release cannot be credited against a prison sentence imposed for new criminal conduct. *Andrews*, 848 F. App'x at 569. Regardless, the *Andrews* decision is unpublished and not precedential.

III. THIS COURT SHOULD CONSIDER GRANTING A CERTIFICATE OF APPEALABILITY TO REVIEW THE DENIAL OF ELIJAH'S PRIOR § 2255 PETITION IN THE INTERESTS OF JUSTICE

Elijah's three-year revocation sentence exceeded the statutory maximum by a full year. This Court should consider granting the certificate of appealability that it denied in his § 2255 proceeding in 2021, in order to correct a miscarriage of justice.

A. The Highly Unusual Circumstances of Elijah's Case Merit the Extraordinary Remedy of Reopening Elijah's Previous § 2255 Proceeding

Elijah understands that this Court issued a mandate in his attempted § 2255 appeal. *See* No. 20-7352, Dkt. No. 28. But that mandate references the Court's opinion resolving four consolidated appeals, and that opinion says the Court affirmed in No. 20-7352 only in part. *See United States v. Under Seal*, 856 F. App'x 476, 477 (4th Cir. 2021). As to the aspects of No. 20-7352 challenging the denial of Elijah's § 2255 motion, this Court denied a certificate of appealability and dismissed the appeal. *Id.* Elijah's opening brief argued that the mandate would need to be recalled only "[t]o the extent this Court did issue a mandate" because it is unclear whether this Court's mandate embraced, or could embrace, issues that were never formally appealed because the Court declined to grant any certificate of appealability that would have covered them. *See* Appellant's Br. at 41. The question may simply be whether to grant the certificate of appealability that has, thus far, been withheld.

But even if granting that certificate of appealability would require the Court to recall its mandate, the Warden concedes that this Court has the power to do so—subject, of course, to the Supreme Court's clarification that this Court could only consider issues that were actually presented in the prior proceeding. *See Calderon v. Thompson,* 523 U.S. 538 (1998). Elijah does not deny that this would be an extraordinary remedy. Appellant's Br. at 40-42. But the basic premises of his request are that he was sentenced to a year of confinement not authorized by law, and that he presented that claim to the district court and to this Court with sufficient clarity, but the claim was overlooked. The Warden challenges those premises, and this Court may or may not agree with them. But if it does, there would be a strong case for extraordinary measures to prevent a serious miscarriage of justice.

The Warden briefly contends that Elijah failed to argue the substantive predicate for a certificate of appealability: a debatable constitutional claim. *See* 28 U.S.C. § 2253(c)(2) (requiring an applicant to make a "substantial showing of the denial of a constitutional right"). But Elijah's opening brief argued at length that he was sentenced to a year in excess of the statutory maximum under the plain language of 18 U.S.C. § 3583(e)(3). Appellant's Br. at 33-38. A sentence exceeding the statutory maximum is a clear violation of due process, and Elijah's vigorous argument that the plain language of the statute forbids this sentence inherently embraces the point that the issue is at least debatable.

B. Elijah Previously Presented The Argument That His Statutory Maximum Revocation Sentence Was Two Years, But That Argument May Have Been Overlooked

The Warden argues that Elijah has already litigated and lost his argument that his maximum revocation sentence was two years, several times. But a close reading of the filings and orders does not support that conclusion. It appears, instead, that Elijah fairly presented his statutory maximum argument (at least with the clarity required for a *pro se* litigant) but that the courts overlooked that argument because it was embedded within Elijah's distinct constitutional argument based on the Supreme Court's decision in *Haymond.*

The Warden contends that Elijah first presented a challenge to his statutory maximum sentence in a motion to recall the mandate in his direct appeal. Appellee's Br. at 25. In that motion, Elijah never argued his sentence *exceeded* the statutory maximum. He stated that "I was sentenced to the statutory maximum in a supervised release revocation hearing for 36 months, at that hearing, I advised my attorney to appeal the maximum sentence the district court imposed." *Elijah*, No. 15-4712, Dkt. No. 33 at 1.

The Warden next contends that Elijah presented his argument about the statutory maximum "fairly clearly" in his § 2255 filings. Appellee's Br. at 26. As in this case, however, Elijah's dominant argument was that Justice Gorsuch's plurality opinion in *Haymond* applies the Fifth and Sixth Amendments to revocation

sentences, abrogates this Court's decision in *Ward*, and requires jury factfinding under the *Apprendi* rule. *See* Mem. ISO Mot. To Vacate Under 28 U.S.C. § 2255, No. 4:15-cr-70-D-1 (E.D.N.C. Apr. 22, 2020), ECF No. 138 ("§ 2255 Mem.") at 23-24. He argued that "the Fair Sentencing Act of 2010 applies after *Haymond*'s ruling giving us 5th and 6th Amendment rights," that "[m]y supervised release violation of 36 months is in violation of *Apprendi*," and that "when the supervised release sentence is imposed in violation of *Apprendi*, a 'full resentencing is required.'" *Id*. But Elijah also argued in two places that "the statutory penalty for supervised release was lowered from 5 years to 3 years [sic] due to the Fair Sentencing Act of 2010" and that "[m]y statutory maximum for the supervised release is now 24 months." *Id.* at 23-24. Those arguments raise a pure statutory question, calling for interpretation of the Fair Sentencing Act and 18 U.S.C. § 3583(e)(3), and have nothing at all to do with *Haymond* or *Apprendi.* Elijah also argued that counsel was ineffective for failing to file an appeal arguing that because of "the Fair Sentencing Act of 2010" "the new maximum was 24 months under 21 U.S.C. 841(a)(1), (b)(1)(c)." *Id.* at 27.

The district court's order denying Elijah's § 2255 motion referenced and rejected his arguments based on *Haymond* and *Apprendi*. *See Elijah v. United States,* No. 7:07-CR-10-D, 2020 WL 5028767, at *2 (August 25, 2020) (describing Elijah's argument as "(3) *United States v. Haymond,* 139 S. Ct. 2369 (2019), applies to his supervised release revocation sentence of August 17, 2015."). The district court held

that he had procedurally defaulted his *Haymond*-based claim by failing to raise it on direct appeal—a holding that is hard to understand given that Elijah's direct appeal happened in 2016 and *Haymond* was not decided until 2019. *Id.* But the district court's order did not address Elijah's distinct argument that his "statutory maximum for the supervised release is now 24 months" because of the Fair Sentencing Act. The order displays no evidence that the court understood that point at all.

Undersigned appointed counsel does not have access to the sealed filings before this Court. The Warden argues a kind of Catch-22: that Elijah either presented his argument about the statutory maximum to this Court (in which case it was considered and rejected) or failed to do so (in which case he does not deserve extraordinary relief here). Appellee's Br. at 27. But the briefing and decision in the district court strongly suggest a third possibility: that Elijah fairly presented the statutory maximum issue, but it just got lost amidst his argument about the implications of *Haymond*. This Court would have recognized in 2021 that it had, in *Coston*, already rejected any argument that the fractured opinions in *Haymond* undermined *Ward* and applied the *Apprendi* rule to revocation proceedings. But this Court's bare statement that it had "independently reviewed the record" and "conclude[d] that Appellant has not made the requisite showing for a certificate of appealability" provide no way to assess whether this Court, like the district court, may have missed Elijah's distinct statutory argument. Elijah fairly identified that

issue in the district court, even if he did not develop it as extensively as the *Haymond* point. He may have done so on appeal as well. This Court aspires to interpret *pro se* filings to "raise the strongest arguments that [the filings] suggest." *Wall v. Rasnick,* 42 F.4th 214, 217 (4th Cir. 2022).

Finally, the Warden cites to Elijah's Rule 60(b) motion to the sentencing court and states that he "argued the court had failed to rule on his excessive-sentence claim." Appellee's Br. at 27. Again, however, that motion primarily pressed the *Haymond* and *Apprendi* arguments, stating that Elijah was sentenced in violation of both because "S/R hearings are 'criminal prosecution' that provide defendants with 5th & 6th Amendment rights in *Haymond*." *Elijah,* No. 4:15-cr-0070-D, ECF No. 176 at 6-7. Elijah again included a statement that "the violation of supervised release exceeds the statutory maximum after passage of the Fair Sentencing Act 2010." *Id.* at 6. But nothing in the district court's opinion denying that motion as both procedurally defaulted and "meritless" indicates that the court understood Elijah's statutory point. *Elijah,* No. 4:15-cr-0070-D, ECF No. 179 at 1.

Contrary to the Warden's contention, therefore, it is not obvious that "both the sentencing court and this Court" have considered and rejected Elijah's argument about the statutory maximum sentence. Appellee's Br. at 28.

C. Elijah's Statutory Argument Is Meritorious (And At Least Debatable)

Elijah's opening brief explained that 18 U.S.C. § 3583(e)(3) caps the statutory maximum sentence for revocation of supervised release at two years "if the offense that resulted in the term of supervised release … is a Class C or D felony." By the time Elijah was sentenced to a revocation term, the offense that resulted in his term of supervised release had been reclassified as a Class C felony. Elijah was therefore correct to point out that his maximum sentence was two years. At a bare minimum, that point is debatable among jurists of reason.

The Warden relies on a series of unpublished decisions and the Third Circuit's opinion in *United States v. Turlington*, 696 F.3d 425 (3d Cir. 2012), to argue that § 3583(e)(3) should be understood to "look[] backwards in time" to "how the original offense was classified at the original sentencing," both because of the "principle of unitary sentencing" and "because the Fair Sentencing Act does not apply retroactively to defendants sentenced before its effective date." Appellee's Br. at 30. Elijah already explained why *Turlington* is unpersuasive, and why the holding of *McNeill v. United States*, 563 U.S. 816 (2011), rests on ACCA-specific considerations that do not translate to § 3583(e)(3). *See* Opening Br. at 35-38. The Warden's defense of those decisions is no more persuasive.

"Unitary sentencing" just means that there is only one sentence: that all of the punishments imposed under the rubric of the original sentence make up a single

statutory and constitutional whole. Unitary sentencing principles tell us (as in *Venable*) that a defendant serving a revocation term is still serving his sentence for the offense of conviction. They shed no light on how long that revocation term can be, and certainly do not justify any strong presumption that one must look to prior law to determine whether the offense of conviction "is" a Class B felony. Recognizing that "is" means "is" (not "was") does not require the Court to deny that the revocation sentence and the original sentence are two parts of a unified whole. The Warden argues that "the text of § 3583(e)(3) looks to what crime the defendant originally committed," but that characterization is imprecise—or incomplete. The statute looks to whether that crime "is a Class C or D felony." That is a present-tense inquiry, not a retrospective one.

The Warden's point that "neither the First Step Act nor the Fair Sentencing Act retroactively changes how an offense was originally classified," and his reliance on *United States v. Payne*, 54 F. 4th 748 (4th Cir. 2022), misunderstand how retroactivity and prospectivity operate in this context. Elijah's argument requires no retroactive application of either statute—indeed it does not require application of the First Step Act at all. When Elijah violated the terms of his supervised release and was sentenced to a revocation term, the Fair Sentencing Act had already been effective for several years. The question is whether, at that sentencing event, the Fair

Sentencing Act's reclassification of federal drug offenses should have been applied *prospectively.*

The right answer flows directly from the Supreme Court's holding in *Dorsey v. United States,* 567 U.S. 260 (2012). There, the Court held that sentencing under the Fair Sentencing Act should proceed under the law *as it exists at the time of sentencing*, not as it existed when the offense was committed. The Court noted that "in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." 567 U.S. at 280. And it explained that looking backward to the law in effect when the crime was committed would defeat the specific ameliorative purposes of the Fair Sentencing Act. *Id.* at 276-79.

This Court reached a similar conclusion in *United States v. Hope*, holding that the 2018 Farm Bill's reclassification of hemp meant that a 2013 conviction for distribution of marijuana under South Carolina law was no longer a "serious drug offense" for purposes of present sentencing under the ACCA—even though that crime had qualified as a serious drug offense when committed. 28 F.4th 487, 505 (4th Cir. 2022). This Court agreed with the Ninth Circuit that it would be "illogical" to look backward to the federal law in place at the time the state crime was committed, because doing so "would prevent amendments to federal criminal law from affecting federal sentencing and would hamper Congress' ability to revise

federal criminal law." *Id.* (quoting *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021)). And this Court distinguished the Supreme Court's decision in *McNeil* on the ground that subsequent changes in *state* law do not affect the federal ACCA implications of a past state conviction, but subsequent ameliorative changes in *federal* law should be applied as of the time of the relevant sentencing event.

In *Payne*, the defendant asked the court to modify his pre-FSA felony drug sentence and declare him a misdemeanant rather than a felon. This Court held that his request to modify his already-served sentence was moot, and that retroactively lowering his sentence to less than a year would not somehow nullify his going-forward status as a felon—since "[t]he classification of his § 844 offense as a felony was based on that offense's statutory maximum sentence, not the actual sentence that Payne received." 54 F.4th 748, 751-52 (4th Cir. 2022). The *Payne* panel also held that the retroactive provisions of the First Step Act did not "extinguish Payne's liability for a felony offense," because they merely authorized district courts to "impose a reduced sentence *as if* sections 2 and 3 of the Fair Sentencing Act … were in effect at the time the covered offense." *Id*. at 754 (quoting First Step Act, Pub. L. No. 115-391, § 404) (emphasis added). Because the Fair Sentencing Act does not *in fact* apply retroactively, a court's authority to revise the length of a sentence *as if* that statute applied retroactively does not alter a defendant's status as a felon. But that logic breaks down when, as here, a court is called upon to apply the Fair

Sentencing Act *prospectively*. Elijah's point is that the district court failed to apply the Fair Sentencing Act's reclassification regime when imposing a revocation sentence entered *after* that statute's effective date.

The Warden contends that Elijah's reading of § 3583(e)(3) "presents *ex post facto* issues." Appellee's Br. at 33. But the Warden does not actually invoke the canon of constitutional avoidance, for good reasons. Certainly it would violate the *Ex Post Facto* Clause if Congress increased maximum revocation sentences for some class of offenders, and made that change retroactive to previously committed offenses. But that hypothetical is not presented here, so there is no grave and doubtful constitutional issue to avoid. If it did happen, the right application of the canon of constitutional doubt would be to read the particular law increasing those sentences as not applying retroactively if at all possible—not to read § 3583(e)(3) in a way that effectively defeats the *prospective* application of an important remedial statute meant to *reduce* penalties for thousands of real-world defendants and eliminate disparities that Congress has recognized were racially discriminatory.

And even when it does apply the canon does not support atextual constructions like the one urged by the Warden, just the resolution of genuine ambiguity (which is not present here). *United States v. Simms,* 914 F.3d 229, 251 (4th Cir. 2019) (en banc) (this Court is "obligated to construe [a] statute to avoid [constitutional] problems" only when "such a reading is 'fairly possible . . . after the application of

ordinary textual analysis.'") (internal citations omitted). The more relevant interpretive principle here is lenity. *See, e.g., Yi v. Federal Bureau of Prisons,* 412 F.3d 526, 535 (4th Cir. 2005) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant" and this rule extends "to answer questions about the severity of sentencing.").

The "significant notice problem" the Warden describes next, Appellee's Br. at 33-34, is entirely solved by the *Ex Post Facto* Clause, which prohibits any retroactive increase in punishments. *See, e.g., United States v. Wilson,* 210 F.3d 230, 233 (4th Cir. 2000). The only "uncertainty" facing defendants is the possibility that Congress might *reduce* the penalties associated with their conduct after commission of the crime—which, of course, the Fair Sentencing Act partially does. This is not a due process fair notice problem.

The Warden is correct that situations may arise where two defendants who committed the same crime on the same day later end up with different maximum revocation sentences because one violated the terms of their supervision before the Fair Sentencing Act and one of them after. But two defendants distributing the same quantity of drugs immediately before and after that statute faced even worse disparities; that unfairness is just a feature of the reality that the Fair Sentencing Act applied only prospectively. It is hardly surprising that the statute similarly would

have different consequences for defendants found to have violated the terms of supervision before and after its enactment.

The plain text reading of § 3583(e)(3) is the right one. At a minimum, the point is debatable. If the Court concludes that Mr. Elijah presented this issue in his § 2255 proceedings but that it was overlooked, the Court should consider taking whatever steps are necessary to reopen those proceedings and grant a certificate of appealability.

CONCLUSION

This Court should reverse the opinion of the District Court and remand for further proceedings. It should also consider reopening Elijah's prior § 2255 case to grant a certificate of appealability.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,898 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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