IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7352

LARONE F. ELIJAH,

Appellant,

v.

RICHARD S. DUNBAR, WARDEN,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

The Warden agrees with Elijah that the district court had jurisdiction over Elijah's habeas corpus petition under 28 U.S.C. § 2241, that this Court has jurisdiction over the judgment denying that petition under 28 U.S.C. § 1291, and that no certificate of appealability is required to review the district-court judgment being appealed.

As to Elijah's request that the Court revisit its decision to deny Elijah a certificate of appealability in another appeal (*see United States v. Under Seal*, 856 F. App'x 476 (4th Cir. 2021) (unpublished)), appellate jurisdiction is lacking. The Court's jurisdiction over that appeal ended when the mandate issued over a year ago. *See United States v. Under Seal*, No. 20-7352, Dkt. No. 28 (4th Cir. Oct. 12, 2021); *In re Williams*, 156 F. App'x 551, 551 (4th Cir. 2005) (unpublished). The Warden acknowledges, however, that the Court has the power to recall a mandate in extraordinary circumstances. *See Davis v. Kia Motors Am.*, 408 F. App'x 731, 732 n.* (4th Cir. 2011) (unpublished).

STATEMENT OF THE ISSUES

I. Should this case be remanded so the district court can address Elijah's objection, perform *de novo* review of the R&R, and develop a record to enable appellate review?

II. Did the district court properly hold the First Step Act does not afford Elijah additional good-conduct credits from his completed prison sentence that he can carry forward to shorten his current imprisonment?

III. Should this Court reopen an appeal Elijah previously lost so he can assert an argument this Court and others have rejected?

STATEMENT OF THE CASE

A. Elijah's Offenses and Prison Terms

This appeal involves the prison terms Elijah has been ordered to serve for committing drug possession offenses.

First, in 2007, he was convicted in the Eastern District of North Carolina of possession with intent to distribute more than five grams of cocaine base ("crack cocaine"), and quantities of cocaine, heroin, and methylenedioxymethamphetamine ("MDMA"), in violation of 21 U.S.C. § 841(a)(1). JA 73. He was sentenced to 108 months in prison, followed by 5 years of supervised release. JA 74-75. While he was in prison, the BOP awarded him good-conduct time credits. JA 37. He was released in May 2014 and began supervised release that month. JA 82.

Just over a year into supervision, Elijah was arrested after being found in possession of cocaine, heroin, and 3,4-methlylenedioxy-N-ethylcathinone (MDEC,

bk-MDEA). *See* JA 47, 50. That new criminal conduct resulted in the sentencing court revoking Elijah's supervised release and sentencing him to 36 additional months in prison in August 2015. JA 50.

Elijah's conduct in North Carolina also led to him being charged with possession with intent to distribute those controlled substances, in violation of 21 U.S.C. § 841(a)(1). JA 47. In March 2017, the sentencing court imposed a below-Guidelines sentence of 108 months in prison and 3 years of supervised release. JA 45–46. The court ordered that the sentence be served consecutively to Elijah's revocation sentence. JA 45.

B. Elijah's Prior Challenges to His Revocation Sentence

Elijah has challenged his 36-month revocation sentence several times. First, he tried directly appealing the revocation judgment. Appointed appellate counsel filed an *Anders* brief; Elijah did not submit a *pro se* response. The appeal was ultimately dismissed as untimely. Elijah then moved to recall the mandate, asserting that his sentence exceeded the statutory maximum and that he wanted to challenge it on unspecified grounds. The Court denied his motion. *See United States v. Elijah*, No. 15-4712, Dkt. Nos. 33, 34 (4th Cir.).

Next, Elijah filed a motion in the sentencing court attacking his revocation sentence under 28 U.S.C. § 2255. *See Elijah v. United States*, Nos. 7:07-CR-10-D & 4:15-cr-00070-D, 2020 WL 5028767, at *1 (E.D.N.C. Aug. 25, 2020). In his

§ 2255 motion, Elijah argued (among other things) that his revocation sentence exceeded the statutory maximum. *United States v. Elijah*, 4:15-cr-00070-D, ECF No. 138, at 23 (E.D.N.C. Apr. 22, 2020). The sentencing court rejected that claim as procedurally defaulted. *Elijah*, 2020 WL 5028767, at *2. After rejecting his other claims, the court denied his motion. *Id.* at *5.

Elijah also sought a sentence reduction under Section 404 of the First Step Act and compassionate release. *See id.* at *1. The sentencing court denied both requests. As to the Section 404 motion, the court found him ineligible for a reduction; Elijah had already finished serving his revocation sentence, and his sentence in the 2015 case was not for a "covered offense." *Id.* at *6. The court went on to hold that Section 404 relief and compassionate release were unwarranted under the 18 U.S.C. § 3553(a) factors because Elijah is a "violent recidivist" who "performed terribly on supervision." *Id.*

Elijah appealed. This Court affirmed the denial of his Section 404 and compassionate-release motions. *United States v. Under Seal*, 856 F. App'x 476, 477 (4th Cir. 2021) (unpublished). As for Elijah's § 2255 motion, the Court declined to issue a certificate of appealability and dismissed the appeal. *Id.*

Elijah then returned to the sentencing court, arguing its order denying his § 2255 motion should be vacated under Rule 60(b) because it failed to address his excessive-sentence claim. *Elijah*, 4:15-cr-00070-D, ECF No. 167, at 6–7 (E.D.N.C.

Aug. 31, 2021). The sentencing court denied his motion. *Elijah*, 4:15-cr-00070-D, ECF No. 179. (E.D.N.C. Sept. 27, 2021). Elijah appealed that decision but then voluntarily withdrew his appeal. *See United States v. Elijah*, No. 21-7502 (4th Cir. filed Oct. 12, 2021).

C. Elijah's § 2241 Petition

Shortly after the sentencing court denied his motions, Elijah petitioned for habeas corpus in the District of South Carolina, where he is confined. JA 7-13. He asserted three claims. He first argued the time he spent on supervised release in his 2007 case was "official detention" that the BOP had to credit against his current term of incarceration. JA 11.

Second, he asserted the claim he presses on appeal here: the First Step Act entitles him to retroactive additional good-conduct time credits from the prison term he completed in 2014 that he can use to shorten his current stay in prison. JA 11. He based his claim on the Supreme Court's statement in *United States v. Haymond*, 139 S. Ct. 2369 (2019), that initial imprisonment, supervised release, and revocation imprisonment are parts of a unitary sentence. *Id.* According to Elijah, that meant credits from one prison term are creditable against another. *Id.*

Finally, Elijah asserted 18 U.S.C. § 3585(e)(3) is unconstitutional. JA 12.

The Warden moved for summary judgment. JA 61-68. After briefing, a magistrate judge issued a report and recommendation ("R&R") concluding Elijah's

claims all lacked merit. JA 119-129. Relevant here, the R&R reasoned that although different terms of imprisonment imposed in a particular case may be viewed as part of the same sentence, they are still separate for the purposes of awarding good-conduct credits. And because Elijah completed his original prison term in the 2007 case before the First Step Act became effective, he could not get additional credits on that term after the fact in order to shorten his time in prison on revocation. JA 127-128. The R&R noted other courts have reached the same conclusion and cited several representative decisions. *Id.*

Elijah objected to the R&R's conclusions on each of his claims. JA 134-135. The district court found Elijah's objections insufficient to trigger *de novo* review. JA 136-137. After reviewing the record, the court adopted the R&R, granted summary judgment, and dismissed the case. JA 137.

D. Proceedings on Appeal

Elijah timely appealed. JA 138. After he filed an informal brief, Dkt. No. 10, this Court appointed Elijah counsel and directed briefing on whether the BOP miscalculated his release date "by failing to give credit for prior time served and good conduct time under First Step Act § 102(b)[](1)(a)," Dkt. No. 12. Through counsel, Elijah has filed a brief addressing good-conduct credits, as well as two other issues: whether the district court properly found Elijah's R&R objections

insufficient, and whether this Court should reopen *Under Seal* for further consideration of Elijah's excessive-sentence claim in his § 2255 motion.

SUMMARY OF ARGUMENT

Elijah first contends the district court should have found his R&R objections sufficient and then reviewed his claims *de novo*. The Warden agrees that the district court should have reviewed Elijah's First Step Act claim *de novo* and then provided a more detailed analysis to enable appellate review of its decision. The district court's order should be vacated and remanded for that purpose.

If the Court reaches the merits of Elijah's First Step Act claim, it should affirm. When Elijah served his original prison term, he was eligible to earn up to 47 days per year of good-conduct credits against that term. Years after his release, the First Step Act increased the annual number of days of credit the BOP can award a prisoner against a prison term he is serving. The district court properly held the Act does not give Elijah additional days of credits from his original, completed prison term to offset against his revocation term.

Courts have roundly rejected other prisoners' similar attempts to mine their completed prison terms for credits against revocation terms; indeed, this Court has found no merit in a claim just Elijah's. To the extent this theory warrants further analysis, it should be rejected again. It is incompatible with the text of § 3624(b)(1), which states a prisoner may receive good-conduct credits on "a term of

imprisonment" that he "is serving." At no relevant point in time has Elijah been serving the prison term for which he now wants more credit. Moreover, the First Step Act provides no basis for holding that Congress desired to give supervised-release violators advance reductions on punishments for breaching district courts' trust.

Finally, Elijah attempts to use this appeal to reopen the § 2255 appeal he lost in 2021. Giving Elijah the relief he seeks would be doubly extraordinary: the Court would have to not only recall its mandate in that appeal but then reverse its denial of a certificate of appealability. The Court should do neither. Elijah has already litigated the claim he wants the Court to revisit; his arguments here are in essence a second petition for rehearing in his § 2255 appeal. Moreover, the claim he wants to raise rests on a reading of § 3583(e)(3) that this Court and others have rejected and that, if accepted, would create constitutional problems. Because Elijah falls short of proving his claim warrants the extraordinary relief he requests, the Court's final decision in *Under Seal* should not be disturbed.

ARGUMENT

I. The Decision Below Should Be Vacated and Remanded for the District Court to Further Address Elijah's First Step Act Claim.

A. Standard of Review

This Court reviews *de novo* whether a party properly objected to a magistrate judge's report and recommendation. *See, e.g.*, *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315–16 (4th Cir. 2005).

B. The district court did not sufficiently address Elijah's objection regarding his First Step Act claim.

This is a narrow issue. Elijah criticizes how the district court handled all of his objections. *See* Appellant's Br. at 21. However, Elijah's First Step Act claim is the only one from below that he raises on appeal; he has not renewed his claims about getting credit for time on supervised release or that § 3583(e)(3) is unconstitutional. Consequently, how the district court handled his objections on those other two claims is immaterial.

Elijah also makes a broad attack, arguing at length that the district court analyzed his objection using a constitutionally impermissible standard that effectively precludes litigants from continuing to pursue their claims after getting an unfavorable R&R. Appellant's Br. at 13–21. The Warden disagrees that the district court employed such a standard here, but this Court need not resolve that dispute; the Warden concedes that the district court should have found Elijah's objection was proper and then addressed it and Elijah's underlying claim *de novo*.

This Court has previously held a *pro se* prisoner sufficiently objected to an R&R by submitting a short objection with a proposed amended complaint that largely realleged the claims the R&R recommended dismissing. *See Martin v. Duffy* 858 F.3d 239, 245 (4th Cir. 2017). Liberally construed, as it had to be, his submission was enough to alert the district court that he wanted it to review the R&R's treatment of his claims. *Id.* And in *Cruz v. Marshall*, this Court stated that "[w]hen a party raises new information in objections to an R & R, regardless of whether it is new evidence or a new argument, the district court must do more than simply agree with the magistrate." 673 F. App'x 296, 299 (4th Cir. 2016) (unpublished) (footnote omitted). Rather, the district court must provide "independent reasoning" that is "tailored to the objection" and "permits meaningful appellate review." *Id.*

The district court's treatment of Elijah's objection did not comply with those cases. If Martin's proposed pleading was enough, so was Elijah's claim-specific objection. And as Elijah points out, his objection offered a new argument in support of his claim: that *Haymond* invalidates this Court's prior decision in *United States v. Ward*, 770 F.3d 1090 (4th Cir. 2014). Appellant's Br. at 21. Under *Cruz*, the district court had to do more than summarily agree with the R&R.

The only thing for the Court to resolve on this issue is what remedy it should provide. The proper course is to vacate remand so the district court can provide the

meaningful adjudication Elijah claims he was denied.[1] *See Cruz*, 673 F. App'x at 299; *see also Springs v. Ally Fin. Inc.*, 657 F. App'x 148, 152–53 (4th Cir. 2016) (unpublished) (remanding where district court applied wrong standard to review magistrate judge's ruling). That would be in line with this Court's role as one "of review, not first view," *Biggs v. N.C. Dep't of Pub. Safety*, 953 F.3d 236, 243 (4th Cir. 2020) (citing *Wood v. Milyard*, 566 U.S. 463, 474 (2012)), and is the most logical remedy for the heart of Elijah's complaint: that no Article III judge meaningfully adjudicated his claim in the first instance, *see* Appellant's Br. at 15–16.

In the event the Court reaches the other issues Elijah raises, the Warden addresses them below.

[1] Elijah's brief appears to contemplate remand as the appropriate remedy here. *See* Appellant's Br. at 4 (suggesting the Court should "reverse" on this issue and "remand[] for further proceedings); *id.* at 12, 22 (suggesting what the Court should do "[i]f" it reaches the merits of his claims). The Warden proposed that the parties move to remand this case to the district court so it can analyze Elijah's claim in the first instance. Elijah rejected that proposal, citing his belief that he would not win below and his desire to have this Court address his arguments regarding his § 2255 appeal. Because the Court has tentatively scheduled oral argument in March, the parties agreed to address the proper remedy in briefing rather than through a contested motion to remand.

II. The District Court Properly Held the First Step Act Does Not Allow Elijah to Shorten His Revocation Sentence with Additional, Retroactive Credit from His Completed Original Sentence.

A. Standard of Review

A district court's decision on a prisoner's eligibility for additional good-conduct credits under the First Step Act is reviewed *de novo*. *White v. Sproul*, No. 21-2202, 2022 WL 728967, at *2 (7th Cir. Mar. 10, 2022) (unpublished).

B. The district court properly concluded Elijah could not get additional credit on a prison term he had already completed.

The BOP has the authority to give "a prisoner who is serving a term of imprisonment of more than 1 year" (except for a life sentence) credit against that term as a reward for good behavior. 18 U.S.C. § 3624(b)(1). Previously, a prisoner could earn up to 47 days of good-conduct credit for each year he served in prison. The First Step Act changed both the amount of credit available and how it is measured: now, the BOP may give a prisoner "up to 54 days [of credit] for each year of the prisoner's sentence imposed by the court." First Step Act, Pub. L. 115-391, §102(b)(1)(A)(i). That change took effect in July 2019. It applies to prison sentences being served for offenses committed between November 1, 1987, and December 21, 2018. *See* First Step Act § 102(b)(3).

The Warden agrees with Elijah that this change applies to his 36-month revocation sentence in the 2007 case and to his 108-month sentence in the 2015 case.

Thus, on those combined 144 months, Elijah is eligible for up to 648 days (12 years x 54 days) of credit. JA 68.

But Elijah contends he should get even more credit, based on the original sentence in his 2007 case that he completed in 2014. His theory is that the First Step Act's change to the amount of credit available applies retroactively to *all* prison terms from November 1987 onward—even those that defendants finished serving before the Act took effect. Between that and *Haymond*'s statement that an original prison sentence and a revocation term constitute part of a unified sentence, *see* 139 S. Ct. at 2379–80, Elijah asserts he should have additional good-conduct credits from his original sentence applied to his current imprisonment.

For several reasons, Elijah's position should be rejected.

1. Courts have uniformly rejected Elijah's position.

Other prisoners have asserted what Elijah claims here. Elijah has not cited any case where a court has accepted it. To the contrary, it appears every court that has addressed Elijah's theory has rejected it and held the First Step Act does not create additional good-conduct credits in already completed prison terms that supervisees can use if they later return to prison on revocation. *See, e.g.*, *White*, 2022 WL 728967, at *2; *Hedges v. U.S. Marshals Serv.*, No. CV 5:22-294-DCR, 2022 WL 17177630, at *3 (E.D. Ky. Nov. 23, 2022); *Wilson v. Andrews*, No. 1:20CV470 (RDA/MSN), 2020 WL 5891457, at *7 (E.D. Va. Oct. 5, 2020); *Kmiecik*

v. Hudson, No. 20-3219-JWL, 2020 WL 8669813, at *2 (D. Kan. Nov. 24, 2020) (collecting cases); *Kidd v. Fikes*, No. 20-cv-287 (SRN/TNL), 2020 WL 7210025 (D. Minn. Aug. 17, 2020), *R&R adopted*, 2020 WL 7166239 (D. Minn. Dec. 7, 2020), *appeal dismissed*, No. 20-3628, 2021 WL 2460239 (8th Cir. Feb. 25, 2021); *Branan v. Cox*, No. 4:20-cv-04002-KES, 2020 WL 3496961, at *1 (D.S.D. June 29, 2020); *Parks v. Quay*, No. 1:20-cv-437, 2020 WL 2525957, at *2 (M.D. Penn. May 18, 2020); *Beal v. Kallis*, No. 19-cv-3093 (DSD/HB), 2020 WL 818913, at *1 (D. Minn. Feb. 19, 2020); *Jamison v. Warden*, No. 1:19-cv-789, 2019 WL 6828358, at *1 (S.D. Ohio Dec. 12, 2019); *Kieffer v. Rios*, No. 19-cv-0899, 2019 WL 3986260, at *1 (D. Minn. Aug. 23, 2019) (noting authority that "a revocation sentence is separate and distinct from the original underlying sentence for purposes of calculating good-conduct time"); *aff'd*, No. 19-2933, 2019 WL 8194484 (8th Cir. Oct. 2, 2019) (unpublished); *Barkley v. Dobbs*, No. 1:19-cv-3162-MGL-SVH, 2019 WL 6330744, at *3 (D.S.C. Nov. 12, 2019) (concluding petitioner's revocation sentence was separate from his original sentence "for the purpose of calculating good-time credit"), *R&R adopted*, 2019 WL 6318742 (D.S.C. Nov. 25, 2019).

This Court appears to agree as well. In *Andrews v. Dobbs*, one of Elijah's fellow inmates at FCI Williamsburg filed a § 2241 petition raising the same three arguments in Elijah's petition: (1) time spent on supervised release must be credited against a revocation sentence under *Haymond*; (2) the First Step Act created

additional good-conduct credits on his original sentence that reduce his time in prison on revocation; and (3) *Haymond* invalidates § 3583(e)(3). *Andrews v. Dobbs*, No. 6:20-cv-3026-DCN, ECF No. 1 (D.S.C. Aug. 21, 2020).[2] The district court dismissed the petition on procedural grounds, but this Court affirmed on the merits. *Andrews v. Dobbs*, 848 F. App'x 568, 569 (4th Cir. 2021) (unpublished), *cert. denied*, 142 S. Ct. 1221 (2022). Relevant here, the Court expressly relied on *Kidd*, a detailed opinion explaining why the First Step Act does not give defendants serving revocation terms additional credits for completed prison sentences. 848 F. App'x at 569.[3]

To be sure, this Court cited *Kidd* after stating Andrews' supervised-release time could not be credited against his revocation term, *see* 848 F. App'x at 569, and so one might think the Court was citing *Kidd* for that point. But *Kidd* did not address that issue; rather, *Kidd* discusses only whether the First Step Act allows prisoners to "mine their completed underlying sentences for additional good-conduct time." 2020 WL 7210025 at *3. Consequently, the only reason to cite *Kidd* was to show that the Court rejected Andrews' First Step Act argument—the same argument

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[2] Andrews' and Elijah's petitions appear to have been penned by the same person; they share the same distinctive handwriting.

[3] After this Court denied rehearing, Andrews reasserted his First Step Act claim in a Rule 60(b) motion to vacate the district court's decision. The district court denied that motion; this Court affirmed the denial. *Andrews v. Dobbs*, No. 22-6018, 2022 WL 17091861, at *1 (4th Cir. Nov. 21, 2022) (unpublished).

Elijah presses here. Thus, although *Andrews* is unpublished, it shows Elijah is mistaken in suggesting the Court has not considered this issue. *See* Appellant's Br. at 23.

Andrews also shows why Elijah is mistaken in downplaying the district court opinions the R&R cites. *See* Appellant's Br. at 28. In citing *Kidd*, this Court noted that opinion "collect[ed] cases." 848 F. App'x at 569. Those cases included many of the same cases the R&R cites. *Compare* JA 127–129 (citing *Beal*, *Barkley*, *Jamison*, *Kieffer*, and *Wilson*) *with Kidd*, 2020 WL 7210025 at *3 (citing those cases, plus *Parks* and *Branan*). In other words, the R&R relied upon cases that this Court has indirectly cited with approval.

2. Courts have correctly rejected Elijah's argument.

The BOP is to release a prisoner "on the date of the expiration of [his] term of imprisonment, less any time credited toward the service of [his] sentence." 18 U.S.C. § 3624(a). As amended by the First Step Act, § 3624(b)(1) then provides that—

> a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, 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.

The operative language here is "is serving a term of imprisonment": a prisoner may receive good-conduct credits on "a term of imprisonment" that he "is serving." Elijah is serving his current term of imprisonment; he was doing so when the

amendment to § 3624(b)(1) took effect in July 2019; and he was (and is) eligible to earn up to 54 days per year of credit against that term as long as he "is serving" it.

But at no point since then has Elijah been able to say he "is serving" his original term of imprisonment. Rather, he finished that term years before the Act passed. Thus, he cannot get additional credits on that sentence.

That is how the Seventh Circuit analyzed § 3624(b)(1) in *White*. Like Elijah, White argued BOP was improperly denying him additional good-conduct credit for a prison term he had previously completed. 2022 WL 728967, at *1. The district court held § 3624(b)(1) made him eligible for additional credit only on the revocation term he was currently serving, not on the original term that he had already satisfied. *Id.* The Seventh Circuit affirmed, finding the text of § 3624(b)(1) itself—particularly, its "is serving" language—refuted White's position. *Id.* at *2. Because he was not serving that original term, he could not get credit on it. *Id.*

White is on point, and its straightforward textual analysis is sound. Elijah's claim should be rejected on the same basis.

To be sure, the amendment to § 3624(b)(1) applies to sentences for offenses committed before the First Step Act was passed. FSA § 102(b)(3). Elijah's position hinges substantially on that provision. *See* Appellant's Br. at 22–23. However, the Act does not say the amendment applies to already-completed prison terms. And in amending § 3624(b)(1), Congress left in place the statute's present-looking "is

serving" language. When § 102(b)(3) is read in light of that choice, Congress's intent becomes clear: a prisoner who is serving a prison term of more than a year (but less than life) for an offense committed on or after November 1, 1987, is eligible for the increased amount of annual credit. Elijah fits that definition as to his current term, but not as to his original, long-expired term.

The Warden also recognizes that the Act "was the result of years of Congressional debate on how to reduce the size of the federal prison population." *United States v. Bond*, 56 F.4th 381, 385 (4th Cir. 2023) (citation omitted). "But that doesn't mean Congress sanctioned sentence reductions for all." *Id.*

Rather, the Act's mechanisms for reducing prison populations all relate to sentences either currently being served or not yet imposed. For example, it reduces some statutory minimum prison terms on new offenses, *see* FSA § 401, and it allows prisoners to petition their sentencing courts for orders reducing certain prior "covered offenses," FSA § 404. It also expands prisoners' opportunities to hasten release by maintaining a low recidivism risk and participating in certain evidence-based recidivism reduction programs. *See* FSA § 101. Notably, however, the Act precludes current prisoners from getting time credit for any recidivism programs they completed before the Act was passed. *See* FSA § 101(a) (creating 18 U.S.C. § 3632(d)(4)(B)). In drawing that line, Congress showed its intent was to incentivize good behavior in the future but not reward past accomplishments. It is thus unlikely

that Congress wanted to deny people still in prison a way to shorten their current sentences but allow people released from prison to bank time for future offenses.

If Congress had so intended, it could have easily accomplished that through drafting. For example, it could have added to § 3624(b)(1) to say that a defendant who "is serving or has served" a qualifying sentence is eligible for "credit toward the service of any term imprisonment he is serving or is later ordered to serve" on that sentence. But it did not do that or anything else indicating such an intent. And when one considers more broadly what the Act *does* say, there is no reason to believe Congress desired to give supervised-release violators advance reductions on punishments for breaching district courts' trust.

3. Elijah's counterarguments are unpersuasive.

Elijah asserts all the decisions on this issue are wrong; the "better" option is to reject them and adopt his view. Appellant's Br. at 24. The arguments he offers for that proposal are unavailing.

He first contends that because both original prison terms and revocation terms are part of a unitary sentence, courts should hold that the word "sentence" in § 3624(b)(1) means both the original prison term and any revocation imprisonment later imposed. Appellant's Br. at 24.

Elijah bases his construction on the unitary-sentence framework, which holds that original prison terms, supervised release, and revocation prison terms are all part

of one sentence for the underlying offense. *See Haymond*, 139 S. Ct. at 2379–80. That doctrine does not support his position.

For one thing, his proposed construction of "sentence" only selectively embraces it. According to Elijah, "sentence" refers only to prison terms. But if the unitary sentence doctrine informed the meaning of "sentence" in § 3624(b)(1), then that word would also encompass supervised release. Elijah offers no explanation why supervised release would not be part of the "sentence" under the construction he offers.

A construction that truly incorporated unitary sentencing would make § 3624(b)(1) difficult, if not impossible, for the BOP to administer. For example, the statute allows the BOP to award credits to prisoners who, in its determination, have "displayed exemplary compliance with institutional disciplinary regulations." If supervised release were part of the "sentence" that could be credited, how would the BOP go about monitoring and evaluating a supervisee? No institutional regulations would apply to him, and he would not even be in BOP custody.

Second, Elijah's position assumes that components of a sentence are unitary for all purposes, including the BOP's awarding of prison credits. He cites no authority for that, though. And later in his brief, he says something to the contrary—

> [a] revocation sentence is 'part and parcel' of the original offense . . . only in the sense that the punishment is constitutionally authorized, for purposes of the Ex Post Facto Clause and *Apprendi v. New Jersey*, 530

> U.S. 466 (2000), by the original offense rather than by the new misconduct.

Appellant's Br. at 35. That undercuts Elijah's position: if the unitary sentencing framework speaks only to those constitutional issues, it does not inform the separate issue of how BOP may, within its discretion, award credit against individual prison terms within a unitary sentence. Elijah offers nothing to show that Congress extended the framework beyond its constitutional roots to § 3624(b)(1); he seems to believe the framework applies here simply because it exists elsewhere.

Third, Elijah's construction of § 3624(b)(1) does not account for the statute's additional "is serving" requirement. Even if "sentence" meant both an initial prison term and a revocation term, that would not change the statute's condition that a prisoner be serving a term to get credits against it. Because a prisoner could never simultaneously serve both his initial prison term and his revocation term, he can only get credit on the one term he "is serving."

Finally, Elijah's position would make § 3624(b)(1) operate contrary to its purpose. The First Step Act's amendment to § 3624(b)(1) sits within a title of the Act explicitly aimed at reducing recidivism. *See* 132 Stat. 5194, 5915. Elijah's interpretation of the statute would not advance that purpose; if anything, accepting his reading would undermine it. *See United States v. Davila*, No. CR 109-060, 2020 WL 6875214, at *1 (S.D. Ga. Nov. 23, 2020) (rejecting claim like Elijah's and noting "the deterrent and punitive purposes of a sentence would not be achieved if a

defendant were allowed to build a 'time bank' . . . and commit a new crime knowing he had already served his time in advance of the violation").

Elijah next criticizes the R&R for citing *United States v. McNeil* for the proposition that "the imprisonment that ensues from revocation is partly based on new conduct, is wholly derived from a different source, and has different objectives altogether; it is therefore a different beast." 415 F.3d 273, 277 (2d Cir. 2005). Elijah asserts the R&R should not have relied on *McNeil* because it predates the First Step Act and does not account for the unitary sentencing framework. Appellant's Br. at 29.

Elijah's criticisms of *McNeil* are unpersuasive. *McNeil* explicitly recognized the unitary sentencing framework: the opinion states "supervised release is 'part of the penalty for the initial offense'" and quotes *Johnson v. United States*, 529 U.S. 694, 700 (2000), a leading case on unitary sentencing. *McNeil*, 415 F.3d at 277. That quotation shows the Second Circuit had unitary sentencing in mind in *McNeil*, just as this Court did in the *Venable* and *Ketter* decisions Elijah cites. *See United States v. Venable*, 943 F.3d 187, 193 (4th Cir. 2019) (citing *Johnson* proposition and stating *United States v. Ketter*, 908 F.3d 61, 65 (4th Cir. 2018), follows *Johnson*'s reasoning). Elijah is mistaken in suggesting *McNeil* fails to account for the unitary sentencing framework.

Indeed, immediately after acknowledging that framework, *McNeil* went on to conclude that supervised release and revocation are nevertheless distinct from the original prison term: "supervised release and the sanctions for violation are authorized by a statute and Guidelines scheme that is separate from the regime that governs incarceration for the original offense, and the supervised release scheme serves purposes distinct from the goals of the original punishment." 415 F.3d at 277 (citations omitted). Those reasons were what led the Second Circuit to call revocation imprisonment "a different beast."

That conclusion was not incongruent with unitary sentencing; rather, it simply recognizes that different components of a unitary sentence can address separate facts and serve distinct purposes. This Court has recognized that as well. *See United States v. Jackson*, 952 F.3d 492, 498 (4th Cir. 2020).

As for Elijah's criticism that *McNeil* does not discuss the First Step Act, he fails to explain how the Act negates any of *McNeil*'s reasoning. After all, it is not the Act that, according to Elijah, makes credits transferrable across separate prison terms; rather, he argues unitary sentencing does that. And as discussed above, *McNeil* acknowledges unitary sentencing but goes on to conclude it does not apply in this context.

Lastly, Elijah explains that the BOP treats his current prison terms in his two separate cases as a single aggregate sentence. Appellant's Br. at 29–32. He appears

to discuss this in recognition that he has finished serving his revocation sentence; he asserts he can nevertheless get the credits he seeks due to aggregation. *See id.* at 29. However, because Elijah is not entitled to additional credits from his original sentence, aggregation of his current terms is immaterial.

In sum, the R&R (and thus the district court) properly rejected Elijah's claim. If the Court reaches this issue, it should affirm.

III. This Court Should Not Take the Extraordinary Measure of Reopening Elijah's § 2255 Appeal and Undoing Its Certificate of Appealability Decision.

Finally, Elijah asks the Court to go past its core role of reviewing lower court judgments by recalling the mandate in his § 2255 appeal and then issuing a certificate of appealability in that appeal. Appellant's Br. at 32. Elijah cites no authority suggesting a litigant may use an appeal of one judgment as a vehicle for reopening a separate appeal he previously lost. In any event, this Court should decline to give Elijah the doubly extraordinary relief he seeks.

A. Legal Standards

Elijah equivocates on whether the Court issued a mandate in his § 2255 appeal, *see* Appellant's Br. at 41, but the Court in fact did so, *see Under Seal*, No. 20-7352, Dkt. No. 28. Recalling the mandate after judgment is a remedy reserved for extraordinary circumstances. *United States v. Smith*, 694 F. App'x 147, 148 (4th Cir. 2017) (unpublished). That action is sparingly taken and "is one of last resort, to

be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). The party seeking recall has the burden to demonstrate such circumstances exist. *In re Brown*, 95 F. App'x 520, 520 (4th Cir. 2004) (unpublished).

In addition to recalling the mandate in *Under Seal*, Elijah wants the Court to reverse its decision denying a certificate of appealability. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Elijah has not satisfied either standard.

B. Elijah has already litigated his claim.

Elijah's request overlooks the complete history of his revocation sentence.

Elijah first brought his sentence before this Court through a direct appeal the Court dismissed as untimely. Notably, when Elijah sought recall of the mandate so he could pursue the direct appeal, he affirmatively stated his sentence was at the statutory maximum, not above it. *Elijah*, No. 15-4712, Dkt. No. 33 at 1.

After that, he changed his position: in his § 2255 motion, he claimed his sentence exceeded the statutory maximum. *See Elijah*, 4:15-cr-00070-D, ECF No. 138 at 23–24; *see also id.* at 27–28. In his brief here, he contends his motion was "not a model of clarity" and so the sentencing court "did not directly" address his claim "on the merits." Appellant's Br. at 39, 40. He thus suggests the sentencing court overlooked his claim. *Id.* at 40.

Elijah's description of his § 2255 proceedings is inaccurate. Elijah asserted his claim fairly clearly, placing it under a heading that mentioned *Haymond*. *See Elijah*, 4:15-cr-00070-D, ECF No. 138 at 23. Following suit, the sentencing court described the claim as alleging that "*United States v. Haymond*, 139 S. Ct. 2369 (2019), applies to [Elijah's] supervised release revocation sentence of August 17, 2015." *Elijah*, 2020 WL 5028767, at *2. The sentencing court then denied that claim as procedurally defaulted. *Id.* Thus, contrary to Elijah's description, the sentencing court squarely acknowledged and disposed of the claim. That the court did so on procedural grounds does not mean the court overlooked it.

Elijah then brought the order denying his § 2255 motion before this Court. After "independently review[ing] the record," this Court declined to issue a certificate of appealability and dismissed the portion of the appeal challenging the § 2255 ruling. *Under Seal*, 856 F. App'x at 477. Elijah petitioned for panel

rehearing and rehearing en banc; the Court denied his requests. *Under Seal*, No. 20-7352, Dkt. Nos. 24 & 26.

In his current brief, Elijah suggests this Court may have overlooked his excessive-sentence claim when it decided *Under Seal*. Appellant's Br. at 40. The undersigned has not been able to see Elijah's sealed filings in that appeal and has been unable to determine precisely what Elijah argued. However, it does not matter here. If he challenged the denial of his excessive-sentence claim, then that issue was squarely before the Court and it need not be litigated again. If he did not challenge it, though, his omission would not warrant reopening the case. And as just noted, the Court independently reviewed the record, which included a ruling that explicitly addressed and rejected Elijah's claim. Particularly given that the Court knew Elijah was *pro se*, *see id.* at 476, it would have granted a certificate on that issue if it felt one was warranted.

That appeal was not the last of Elijah's prior challenges. He then made a Rule 60(b) motion in the sentencing court; among other things, Elijah argued the court had failed to rule on his excessive-sentence claim. *See Elijah*, 4:15-cr-00070-D, ECF No. 176 at 6–7. The sentencing court disagreed and denied his motion. *Elijah*, 4:15-cr-00070-D, ECF No. 179. He appealed that order but then voluntarily dismissed his appeal. *See Elijah*, No. 21-7502.

To summarize, Elijah has had ample opportunities to litigate his claim, and all signs indicate that both the sentencing court and this Court have considered it. His present request is essentially a successive, untimely rehearing petition. His desire to take yet another shot at his claim does not warrant recalling the mandate.

C. Elijah's claim lacks merit.

The "extraordinary circumstances" standard for recalling a mandate contemplates scenarios where recall will prevent or undo a manifest injustice. *See, e.g.*, *Dingle v. Dir. of Dep't of Corr.*, 698 F. App'x 140, 140 n.* (4th Cir. 2017) (unpublished) (recalling mandate in 28 U.S.C. § 2254 appeal after Court determined petitioner's case had been misdocketed). Elijah cannot show that recalling the mandate will have such an effect here. Similarly, he cannot show he has been denied relief on a debatable constitutional claim.[4] He cannot do so because the keystone to his request—his assertion that his revocation sentence exceeded the statutory maximum—is defective.

18 U.S.C. § 3583(e)(3) is the law that authorizes revocation and imprisonment for supervised-release violations. It states a district court may order a defendant "to

[4] Elijah neither acknowledges nor discusses § 2253(c)(2)'s standards for granting a certificate of appealability. Even if his substantive arguments could be construed as addressing the requirement that he has a debatable constitutional claim, nothing in his brief addresses the additional requirement that the sentencing court's procedural ruling—that Elijah's claim was defaulted—is debatable. He may not do so for the first time on reply. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017).

serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release." It also sets additional limits on how long the defendant may be imprisoned upon revocation: 5 years "if the offense that resulted in the term of supervised release is a class A felony"; 3 years "if such offense is a class B felony"; 2 years "if such offense is a class C or D felony; and 1 year "in any other case." *Id.*

Here, the offense that resulted in Elijah's (later-revoked) term of supervised release was possession with intent to distribute more than 5 grams of crack cocaine and quantities of heroin, powder cocaine, and MDMA. JA 72. When Elijah committed that offense, the penalty for his offense was 5–40 years in prison. 21 U.S.C. § 841(b)(1)(B) (2006). An offense with such a penalty is a class B felony. *See* 18 U.S.C. § 3559(a)(2). Thus, Elijah committed a class B felony.

Elijah contends, however, that when he violated his supervised release conditions in 2015, the Fair Sentencing Act of 2010 made his original offense a class C felony. Appellant's Br. at 33. He thus asserts the sentencing court erroneously imposed a 3-year revocation sentence (the maximum available where the original offense was a class B felony), when the maximum was 2 years (the maximum for a class C felony). *Id.* at 34.

Elijah's argument lacks legal support and poses constitutional problems.

1. Caselaw rejects Elijah's view.

After the Fair Sentencing Act took effect, pre-Act offenders who later had supervised release revoked challenged their revocation sentences' lengths using the theory Elijah presses here. Multiple circuit courts—including this Court—rejected it. *See, e.g.*, *United States v. Pope*, 749 F. App'x 903, 906 (11th Cir. 2018) (unpublished); *United States v. Brown*, 710 F. App'x 722, 723 (8th Cir. 2018) (unpublished); *United States v. Purifoy*, 672 F. App'x 600, 602 (7th Cir. 2017) (unpublished); *United States v. Barrett*, 691 F. App'x 722, 723 (4th Cir. 2017) (unpublished); *United States v. Johnson*, 786 F.3d 241, 245 (2d Cir. 2015); *United States v. Newman*, 568 F. App'x 246, 247 (4th Cir. 2014) (unpublished); *United States v. Brewer*, 549 F. App'x 228, 229 (4th Cir. 2014) (unpublished); *United States v. Turlington*, 696 F.3d 425, 427 (3d Cir. 2012). Those decisions had three conclusions in common: (1) because a revocation sentence is part of (and thus relates back to) the original sentence, district courts in revocation should look to how the original offense was classified at the original sentencing; (2) consistent with that principle of unitary sentencing, § 3583(e)(3) looks backwards to that point in time as well; and (3) because the Fair Sentencing Act does not apply retroactively to defendants sentenced before its effective date, it does not provide an exception to those other two principles of how revocation works.

Turlington is a leading decision on this issue; this Court cited it in *Barrett*, *Newman*, and *Brewer*. Elijah criticizes it as wrongly decided. Appellant's Br. at 35. He contends it relies too heavily on the Supreme Court's decision that the ACCA is backwards-looking even though that statute uses present-tense language. *See id.* at 35–37 (discussing *McNeill v. United States*, 563 U.S. 816 (2011)).

As this Court and others have concluded, *Turlington* correctly relies on *McNeill*. As *Turlington* explains, § 3583(e)(3)'s use of the past tense—"the offense that *resulted* in the term of supervised release"—directs the reader to look back to the offense's original penalties. 696 F.3d at 428. The fact that the statute also uses "is" merely reflects the reality that a defendant's particular offense retains its original felony classification: an offense "is" a class B felony because it was at original sentencing. *See id.* at 427 ("The length of a new term of imprisonment for violating supervised release—a penalty which is attributed to the original conviction according to *Johnson*—'can only be answered by reference to the law under which the defendant was convicted.'" (quoting *McNeill*, 563 U.S. at 820)).

Elijah argues *Turlington* failed to recognize *McNeill* is distinguishable because the ACCA's recidivist focus is necessarily retrospective, while supervised release revocation involves new conduct. Appellant's Br. at 36–37. But as *Turlington* recognized, the text of § 3583(e)(3) looks to what crime the defendant originally committed, just as the ACCA looks to the defendant's prior offenses.

Moreover, unitary sentencing makes revocation part of the original sentence. Those statutory and constitutional considerations make *McNeill*'s analysis analogous.

Notably, the appellant in *Newman* made the same argument Elijah makes here. *See United States v. Newman*, No. 13-4690, 2013 WL 6079253, Brief of Appellant at 8–9 (4th Cir. Nov. 19, 2013). This Court rejected it and instead followed *Turlington*. *See* 568 F. App'x at 247.

Admittedly, the decisions cited above all predate the First Step Act. But that statute confirms those cases continue to be good law. Even now, after the First Step Act made parts of the Fair Sentencing Act retroactive, a reduction in penalties is not automatic. Rather, as this Court recognized in *Venable*, the decision to reduce a revocation sentence based on a retroactive change in felony classification is a matter committed to the sentencing court's discretion. *See* 943 F.3d at 194 & n.10. And as this Court recently held, neither the First Step Act nor the Fair Sentencing Act retroactively changes how an offense was originally classified. *United States v. Payne*, 54 F.4th 748, 754 (4th Cir. 2022) (defendant could not have his felony conviction reclassified as a misdemeanor under First Step Act or Fair Sentencing Act; neither statute extinguished the penalties or liabilities for pre-Fair Sentencing Act offenses); *see also id*. (stating the First Step Act gives courts discretion "to change the length of [an eligible defendant's] sentence but not the classification of

his offense"). Elijah's revocation term cannot be illegally long if it was authorized back in 2007 and now is subject to change only within a judge's discretion.

2. Elijah's proposal presents constitutional problems.

Elijah next contends his reading of § 3583(e)(3) leads to a reasonable outcome. Appellant's Br. at 38. He overlooks the problems it could produce.

First, it presents *ex post facto* issues. Elijah appears to assume that offense classifications would only ever move downward, but they could just as easily move in the other direction. For example, under Eljiah's position, a defendant originally convicted of a Class C felony could find at a later revocation proceeding that his offense is now a Class A felony and that his maximum revocation sentence has swelled from two years to five. Because the unitary sentencing framework would attribute that newly enlarged penalty to the original conviction, *Johnson*, 529 U.S. at 701, the change in classification would increase punishment after the fact. That would violate the Ex Post Facto Clause, which bars application of any law "'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" *Id.* at 699 (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798)).

Second, it would create a significant notice problem. If the maximum revocation term associated with a crime is not fixed until revocation, someone contemplating committing that crime (or facing prosecution thereafter) could not

reliably predict the potential punishment he faces; indeed, under Elijah's proposal, even a supervisee could not say for sure how much prison time he could face for violating his supervised-release conditions until after he violates them. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) (observing that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"). Elijah offers no reason to conclude Congress intended an important feature of the federal criminal justice system involve the uncertainty his position invites.

Third, Elijah's reading would lead to unjustified disparities. Two defendants could commit identical crimes (or even commit the same crime together), be sentenced to prison and to the same amount of supervised release, and then violate their supervision conditions. If their original offense was reclassified after the first defendant's revocation, but before the other's, they would face different revocation terms for no reason other than timing. Although Congress sometimes draws such distinctions, nothing suggests it did so with § 3583(e)(3), and Elijah offers no evidence of such an intent. *Cf. McNeill*, 563 U.S. at 823 (noting McNeill could not explain why a similar disparity would be warranted).

The time-of-conviction approach that this Court and other circuit courts follow avoids all those problems and follows unitary sentencing principles. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485

U.S. 568, 575 (1988) (discussing canon of constitutional avoidance). It also would uphold, rather than neutralize, Congress's choice to have First Step Act sentence reductions processed through discretionary motions.

Finally, Elijah contends his reading of § 3583(e)(3) is correct because *Dorsey v. United States*, 567 U.S. 260 (2012), "recognized in a different context that sentencing under the Fair Sentencing Act should proceed under the law as it exists at the time of sentencing." Appellant's Br. at 38. Elijah is correct that *Dorsey*'s context is different: that case says nothing about revocation. And as *Turlington* and other cases recognize, neither the Fair Sentencing Act nor *Dorsey* affects the revocation range of defendants who (like Elijah) were sentenced before August 2010. *See, e.g.*, *Purifoy*, 672 F. App'x at 602; *Turlington*, 696 F.3d at 428.

The point of the above discussion is not to litigate the merits of Elijah's claim; Elijah is currently asking only for permission to put his claim before the Court. However, that his claim is untenable under existing law and invites constitutional problems is additional reason to not recall the mandate in his previous appeal and issue a certificate of appealability.

CONCLUSION

For the above reasons, the judgment below should be affirmed, and the mandate in *Under Seal* (Appeal No. 20-7352) should not be recalled.

Respectfully submitted,

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

The Warden respectfully suggests that oral argument is not necessary in this case. The facts and legal issues are adequately presented in the materials before the Court, and oral argument likely would not aid the Court in reaching its decision.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 21-7352 Caption: ***Larone F. Elijah v. Richard S. Dunbar, Warden***

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