In the

United States Court of Appeals

For the Seventh Circuit

No. 23-1591

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

SHANNON L. COTTON,

Defendant-Appellee.

Appeal from the United States District Court for the
Central District of Illinois.
No. 2:07-cr-20019-MMM-EIL-1 — **Michael M. Mihm**, *Judge*.

ARGUED DECEMBER 12, 2023 — DECIDED JULY 26, 2024

Before SCUDDER, ST. EVE, and PRYOR, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Shannon Cotton violated his supervised release by using cocaine and losing all contact with his probation officer. After the district court revoked the release, a dispute arose over the maximum period of imprisonment Cotton could face for the violations. The district court determined that the answer was two years, disagreeing with the government's contention that Cotton faced a maximum revocation sentence of five years. The question is difficult but,

in the end, we conclude the answer is five years based on the language Congress used in 18 U.S.C. § 3583(e)(3). That leads us to vacate Cotton's revocation sentence and to remand for resentencing.

I

Even though the question presented is primarily one of statutory construction, the issue presented arises from a complex procedural history. What's important is keeping track of Cotton's original conviction and sentence, the discretionary sentence reduction he later received, and intervening changes in law.

Everything began in 2007, when Cotton pleaded guilty in federal court to two counts of violating 21 U.S.C. § 841(a)(1), (b)(1)(B) for distributing and possessing with intent to distribute at least five grams of cocaine. Each count brought with it a mandatory minimum term of five years' imprisonment and a maximum term of forty years. See *id.* § 841(b)(1)(B), (b)(1)(B)(iii) (2007). But Cotton's sentencing exposure increased to a mandatory minimum of 10 years and a maximum of life because the government, as was its right, invoked 21 U.S.C. § 851 and filed prior felony information based on Cotton's two prior Illinois felony convictions for possessing and delivering cocaine in violation of 720 ILCS 570-401(c)(2), (d)(i).

At sentencing the district court applied the Sentencing Guidelines, determined that Cotton qualified as a career offender, and imposed a sentence of 262 months (almost 22 years) and eight years of supervised release.

In 2010, and while Cotton was serving his sentence, Congress passed the Fair Sentencing Act. See Pub. L. 111-220, 124

Stat. 2372 (Aug. 3, 2010). The statute altered the threshold of crack cocaine required to trigger certain statutory minimum and maximum sentences under 21 U.S.C. § 841—the statute under which Cotton had been convicted. Specifically, Congress increased the quantity of cocaine necessary to trigger a mandatory minimum five-year term of imprisonment from 5 grams to 28 grams. By its terms, however, the Fair Sentencing Act applied only prospectively, not retroactively.

The law later changed again, this time in a way favorable to Cotton. In 2018 Congress enacted the First Step Act, giving district courts the discretion to resentence an applicant "as if" the new penalties of the Fair Sentencing Act were in effect at the time of the commission of the offense. See Pub. L. 115-391, 132 Stat. 5194 (Dec. 21, 2018). Cotton noticed the change in law and moved for a reduction in his sentence. The district court granted his motion and, in its discretion, reduced Cotton's sentence from 262 months to 188 months. The district court's order also expressly stated that "[e]xcept as provided above, all provisions of the [original] judgment dated 11/20/2007 shall remain in effect."

Cotton finished serving his sentence in the fall of 2020 and began his term of supervised release. As too often happens, though, Cotton's struggle with substance abuse and drug dealing got the better of him, leading in time to his probation officer petitioning the district court to revoke supervised release based on positive tests for using cocaine and marijuana and being arrested for possessing a sizeable quantity of marijuana.

A dispute then arose about the maximum revocation sentence Cotton faced for his violations of supervised release. Consistent with the view of the Probation Office, the

government took the position that the answer was five years. But Cotton believed any revocation sentence could not exceed two years. The different perspectives rooted themselves primarily in competing interpretations of 18 U.S.C. § 3583(e)—the statutory provision addressing maximum penalties attaching to revocations of supervised release.

The district court grappled with the statutory questions and in the end sided with Cotton and imposed a revocation sentence of two years with a new three-year term of supervised release to follow.

The government now appeals, renewing the legal contentions it pressed in the district court.

II

A

The proper starting point is § 3583(e)(3), which tell us that a court, upon finding a violation of supervised release, may

> revoke a term of supervised release, and require the defendant to 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 ... except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.

Id. § 3583(e)(3).

Notice at a basic level how Congress structured this provision: by hinging the maximum revocation sentence upon the class of felony—A, B, C, or D—of the offense of conviction. What the parties dispute is the measurement point—whether the § 841 conviction is a class A, B, C, or D felony as a function of Cotton's 2007 judgment (the government's view) or, instead whether the class of felony turns on what the conviction and sentence would be under current law (Cotton's view).

An altogether different statute—18 U.S.C. § 3559—provides an essential link in the chain of reasoning necessary to answer who has the better interpretation of § 3583(e)(3). Class A felonies are those with a maximum prison sentence of life. 18 U.S.C. § 3559(a)(1). Class B felonies are those with a maximum term of 25 years or more (but less than life). *Id.* § 3559(a)(2). Class C felonies are those with a maximum term of 10 to 25 years in prison. *Id.* § 3559(a)(3). And, finally, class D felonies are those whose maximum is less than ten but five or more years. *Id.* § 3559(a)(4).

Returning to § 3583(e)(3), both sides insist that the statute's plain language supports their respective positions, with the government urging us to focus on Congress's use of the past tense when stating that the class-of-felony determination depends on "the offense that resulted in such term of supervised release." For the government, then, Cotton faced a maximum revocation sentence of five years because his original conviction in 2007 under § 841(a) and (b)(1)(B) exposed him to a maximum sentence of life imprisonment—a class A felony. The government gets there by reminding us that its filing of the § 851 prior felony information in Cotton's original case

had the effect of increasing the statutory maximum sentence from 40 years to life.

Cotton advances a different interpretation of § 3583(e)(3), directing our attention to Congress's use of the present tense for determining what the class of Cotton's original offense of conviction would be today—not, as the government would have it, what it was in 2007. To put the point in statutory terms, Cotton implores us to ask more generally whether an equivalent § 841 offense "is" (if it resulted in conviction today) a class A, B, C, or D felony.

Asking the question in the present tense yields clear benefits for Cotton. He recognizes that, if convicted today of the same § 841 offense to which he pleaded in 2007, he would face a maximum sentence of 20 years. He gets there in two steps. First, he points to the Fair Sentencing Act's modified drug quantity thresholds for cocaine charges under § 841 and correctly observes that his five-gram offense today would result in the new (and not enhanced) twenty-year maximum term of imprisonment. Second—to explain why his sentence would not be enhanced today upon the government's filing of a § 851 prior felony information—Cotton points to our 2020 decision in *United States v. Ruth*, where we concluded that prior Illinois cocaine convictions like Cotton's do not trigger an enhancement under 21 U.S.C. § 841. See 966 F.3d 642, 644 (7th Cir. 2020).

Cotton presses both points, for their combined effect reveals that if charged today with the same charges he faced in 2007, he would face a maximum sentence of 20 years—a class C felony—and thus, under the terms of § 3583(e)(3), a 2-year maximum revocation sentence. This is the reasoning the district court agreed with and adopted.

B

The government has the better position. We arrive at that conclusion by taking a step back and returning, as we must, to the language Congress employed in § 3583(e)(3).

Recall that the maximum revocation sentence depends on whether "the offense that resulted in the term of supervised release is a class A felony," or a class B felony, and so on. The present-tense verb—"is"—cannot be divorced from what it modifies: "the offense that resulted in the term of supervised release." Everyone agrees that Cotton's 2007 conviction under § 841(a)(1) and (b)(1)(B) resulted in his term of supervised release. See *United States v. Ford*, 798 F.3d 655, 662 (7th Cir. 2015) (explaining that the "offense that resulted in the term of supervised release" is "the offense for which the defendant was initially placed on supervised release").

We can put the point another way. Section 3583(e)(3) does not ask whether *someone else's* conviction for the same conduct "is" or would be a class A, B, C, or D felony under current law. The statute asks whether *Shannon Cotton's* conviction under the 2007 version of 21 U.S.C. § 841(a)(1) and (b)(1)(B) "is" a class A, B, C or D felony. The answer is yes: Cotton's 2007 conviction was for a class A felony and that remains true today.

This construction of § 3583(e)(3)'s language aligns with the Supreme Court's observation in *Johnson v. United States* that post-revocation penalties arise from and are "treat[ed] ... as part of the penalty for the initial offense." 529 U.S. 694, 700 (2000); see also *United States v. Snyder*, 635 F.3d 956, 960 (7th Cir. 2011) (suggesting that § 3583(e)(3) refers to the felony

classification of the defendant's offense as of the time of sentencing).

In the final analysis, then, we conclude that Cotton's 2007 federal cocaine conviction remains and therefore "is" a class A felony. And that remains so notwithstanding the passage of the First Step Act or our decision in *Ruth*. Indeed, nothing about a favorable exercise of the discretion conferred by the First Step Act to reduce a sentence—a benefit Cotton received—alters an original judgment of conviction. As the district court stated in reducing Cotton's term of imprisonment under the First Step Act, "all other provisions of the [original] judgment … shall remain in effect." Cotton's sentence was reduced, but his original conviction is intact.

Nor did our decision in *Ruth* alter Cotton's felony classification. In *Ruth* we held that an Illinois conviction for cocaine distribution does not qualify as a predicate for enhanced penalties under § 841 and § 851 because the state's definition of cocaine is categorically broader than the parallel definition in the Federal Criminal Code. See 966 F.3d at 646–50. Cotton is right that if he were sentenced today, he would not be subject to the same penalties under § 841, nor would he receive a statutory sentencing enhancement based on his Illinois cocaine convictions. Again, though, Cotton is not being sentenced today: he remains convicted of the same offense and pursuant to the same judgment entered in 2007. Nothing we decided in *Ruth* modified Cotton's 2007 judgment of conviction. See *United States v. Jones*, 833 F.3d 341, 344 (3d Cir. 2016) (holding that intervening Supreme Court case law does not change the felony classification of the base offense under § 3583(e)(3)).

A broader point also deserves emphasis. This entire appeal is about the maximum revocation sentence Cotton faced

upon the district court's determination that he violated the conditions of supervised release. A revocation sentencing proceeding is not an opportunity to challenge an underlying conviction, and, even more specifically, § 3583(e)(3) does not sit alongside § 2255 and present an alternative means available to federal prisoners to challenge some aspect of their conviction or sentence. This point is clear in our case law. See *United States v. Torrez-Flores*, 624 F.2d 776, 781 (7th Cir. 1980) (holding that challenges to an original sentence cannot be raised during probation revocation proceedings); accord *United States v. Brock*, 39 F.4th 462, 465–66 (7th Cir. 2022) (employing similar reasoning with respect to the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A)).

C

No doubt today's decision will disappoint Shannon Cotton. He is represented by a very able counsel who devised the best available arguments for preserving the district court's determination that the maximum revocation sentence cannot exceed two years. While we have concluded that the maximum is five years, it warrants underscoring that the district court on remand has discretion in applying the 18 U.S.C. § 3553(a) factors to select a reasonable revocation sentence below that upper limit. See 18 U.S.C. § 3583(e) (authorizing the consideration of specified § 3553(a) sentencing factors). In doing so, moreover, the district court may consider intervening changes in law since the time of Cotton's original sentencing in 2007 and the reduction he received under the First Step Act. Cf. *Concepcion v. United States*, 597 U.S. 481, 502 (2022) (holding that a district court may consider nonretroactive legal changes when resentencing under the First Step Act).

With this closing observation, we VACATE Cotton's revocation sentence and REMAND to the district court for resentencing.

PRYOR, *Circuit Judge*, concurring in part and dissenting in part. When Shannon Cotton was originally sentenced in 2007, he faced a maximum of life in prison, meaning his offense was a class A felony. More than a decade later, however, Cotton was resentenced under the First Step Act. And when the district court resentenced Cotton, it was required to recalculate Cotton's new statutory sentencing range. This range, in turn, became zero to 30 years in prison—reclassifying Cotton's offense as a class B felony. In other words, the district court used its discretion—as it was empowered to do by Congress—and retroactively applied the Fair Sentencing Act through the First Step Act to resentence Cotton.

The majority opinion, however, turns back the clock and erases the impact of Cotton's resentencing. I cannot agree with this conclusion, as it undermines the very purpose of the retroactive effect of the First Step Act. I therefore respectfully dissent in part.

I. BACKGROUND

A. Cotton's Sentencing and Intervening Events

In 2007, Shannon Cotton was charged with, and pleaded guilty to, distributing and possessing with intent to distribute at least five grams of cocaine. 21 U.S.C. § 841(a)(1), (b)(1)(B) (2007). Because Cotton had two prior state felony drug convictions, he was required to spend between 10 years and life in prison. §§ 841(b)(1)(B)(iii), 851 (2007). The district court was also obligated to impose at least eight years of supervised release. *Id.* § 841(b)(1)(B)(iii).

Later, the district court sentenced Cotton to almost 22 years (262 months) in prison. And it ordered eight years of supervised release to follow.

While Cotton was serving his sentence, Congress passed the Fair Sentencing Act in 2010. Pub. L. No. 111-220, 124 Stat. 2372 (2010). This Act—which applied only prospectively—increased the amount of crack cocaine needed to trigger certain mandatory minimum sentences under § 841. *Id.* § 2.

In 2018, Congress made the Fair Sentencing Act's benefits retroactive for certain defendants, including Cotton, through the First Step Act. Pub. L. No. 115-391, 132 Stat. 5194 (2018). This Act allowed district courts to resentence a defendant "as if" the Fair Sentencing Act's penalties were in effect when the offense was committed. *Id.* § 404(b). Cotton moved for a sentence reduction under the First Step Act. The district court granted the request in 2020, reducing Cotton's sentence to slightly more than 15 years (188 months). It also shortened Cotton's supervised release term to six years.

Several months after Cotton's resentencing, we decided *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020). In that case, we determined that prior Illinois cocaine convictions—like the ones used to increase Cotton's maximum sentence—do not trigger the § 841 sentencing enhancement. *Id.* at 644.

B. Supervised Release Revocation

After Cotton completed the reduced sentence and was released from prison, he violated the terms of his supervised release. Because of this misstep, the district court was entitled to "revoke [Cotton's] term of supervised release" and require him to serve a term of imprisonment. 18 U.S.C. § 3853(e)(3).

Here, the government is asking us to decide the maximum sentence of imprisonment that the district court could have imposed on Cotton following the revocation. To answer this question, we must look to § 3583(e)(3), which sets the

maximum prison term for sentences following a revocation based on the classification of the underlying offense. "[I]f the offense that resulted in the term of supervised release is a class A felony," then the reimprisonment term is limited to five years. § 3853(e)(3).[1] A class B felony has a three-year maximum, a class C or D felony has a two-year maximum, and any other felony type has a one-year maximum. *Id.* These classifications are generally based on the maximum term of imprisonment authorized by the statute of conviction. § 3559(a).

Recall that, when Cotton was originally sentenced in 2007, he could have been sentenced to life imprisonment. That means his offense was a class A felony. § 3559(a)(1). Cotton points to the intervening events that, he believes, have sent his felony classification cascading down. First, Cotton argues that his receipt of First Step Act relief retroactively reduced the maximum sentence he could receive, thereby changing his class A felony into a class B felony. Second, he argues that our decision in *Ruth*, 966 F.3d at 644, made clear that his prior drug felonies were improperly used to hike up his maximum sentence. Applying *Ruth*, he contends, means that his offense classification should drop again—this time to a class C felony. The district court agreed with all of this and found that Cotton's underlying offense was a class C felony because he no longer had any prior drug convictions for a sentencing

[1] The majority uses interchangeably the terms "offense" and "conviction." *See Ante*, at 5, 7. Section 3583, however, speaks only to offenses—and not to convictions. In general, an "offense" is a criminal act, whereas a "conviction" is equivalent to a "judgment." *Offense*, BLACK'S LAW DICTIONARY (12th ed. 2024); *Conviction*, BLACK'S LAW DICTIONARY (12th ed. 2024). Because Cotton does not base his argument on the meaning of the word "offense," I refrain from considering whether the majority's use of the word "conviction" instead of "offense" undermines the statutory text in § 3583.

enhancement and his maximum term of imprisonment was now 20 years.

II. Analysis

The question presented in this appeal is whether these three intervening events—the Fair Sentencing Act, First Step Act relief, and *Ruth*—changed the classification of Cotton's "offense that resulted in the term of [his] supervised release." § 3583(e)(3).

Intervening events that do not have retroactive effect cannot alter the classification of an underlying felony because the underlying offense has not been altered. But intervening events that *are* retroactive in nature—like First Step Act relief—could change how a felony is classified. I agree with the majority that this question is a difficult one. But I see a dividing line that is well-supported by existing precedent.

A. Non-Retroactive Changes—Fair Sentencing Act and *Ruth*

Non-retroactive changes in the law would not change the classification of an "offense" under § 3583(e)(3). That's because the "offense" is not affected by the new legal rule with only prospective effect. New statutes or judicial decisions that arise after sentencing generally do not bear on the statutory penalties for § 3583(e)(3) revocation sentences. *United States v. Ortiz*, 779 F.3d 176, 180–82 (2d Cir. 2015) (per curiam) (intervening decision on ACCA eligibility); *United States v. Johnson*, 786 F.3d 241, 244 (2d Cir. 2015) (Fair Sentencing Act); *United States v. Turlington*, 696 F.3d 425, 427–28 (3d Cir. 2012) (Fair Sentencing Act). This rule aligns well with our precedent that prohibits defendants from collaterally attacking their underlying conviction in the revocation context. *E.g.*, *United States*

v. Torrez-Flores, 624 F.2d 776, 781 (7th Cir. 1980). Although the majority does not say so explicitly, I understand it to be adopting this rule. I would as well.

This rule eliminates any argument that the passage of the Fair Sentencing Act of 2010 changed how Cotton's offense should be classified. The Act was not retroactive, *United States v. Clay*, 50 F.4th 608, 610 (7th Cir. 2022), and therefore fails to apply to defendants like Cotton. *Turlington*, 696 F.3d at 428 (noting that the Fair Sentencing Act does not apply to defendants who were both convicted and sentenced prior to the effective date of the Act).

Similarly, our 2020 decision in *Ruth*, 966 F.3d at 644, which came months after Cotton's resentencing, does not alter the classification of Cotton's offense. We have noted that *Ruth* generally does not have retroactive effect. *See United States v. Vaughn*, 62 F.4th 1071, 1072 (7th Cir. 2023). Therefore, *Ruth* "cannot be applied" to reclassify Cotton's offense because he was sentenced and resentenced before *Ruth* was handed down. *Ortiz*, 779 F.3d at 180–81. Indeed, the Second Circuit came to the same conclusion when a defendant argued that an intervening case that was much like *Ruth* undermined his previous drug convictions and therefore changed the classification of his original offense. *Id.*

So, to the extent the majority concludes that non-retroactive changes in the law cannot alter the classification of Cotton's offense, I concur.[2]

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[2] Of course, nothing stops a district judge from considering non-retroactive changes in the law in formulating the appropriate revocation sentence. *See Ante*, at 9; *see also* 18 U.S.C. §§ 3553(a)(6), 3583(e) (requiring the

B. Retroactive Changes—First Step Act Relief

Cotton's argument about First Step Act relief, however, has merit. I respectfully part ways with my colleagues on the impact of the district court's discretionary application of the Fair Sentencing Act to Cotton in 2020.

"[T]he First Step Act's central goal" was "to make retroactive the changes in the Fair Sentencing Act." *Concepcion v. United States*, 597 U.S. 481, 497 (2022). And when the district court exercised its discretion and gave Cotton this retroactive relief, Cotton's offense of conviction was reclassified because the maximum term of imprisonment was decreased. The majority instead concludes that Cotton's offense was not reclassified. This determination—which is unsupported by cited authority—undermines the very purpose of the First Step Act.

As we have instructed, when a district court finds a defendant eligible for relief under the First Step Act, the court must "recalculat[e] the statutory minimum and maximum that would have applied had … the Fair Sentencing Act been in effect at the time the [defendant] was originally convicted." *United States v. Fowowe*, 1 F.4th 522, 529 (7th Cir. 2021). The court may then reduce the defendant's sentence within those bounds. *See id.* at 529, 532. The court, however, is not required to do so; it has broad discretion to refuse to resentence an otherwise-qualified defendant. *Id.* at 527.

Here, the district court chose to use its discretion to resentence Cotton. It did not hold a hearing on Cotton's motion and its order was brief. But there's no reason to doubt that the

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consideration of unwarranted sentencing disparities before sending a defendant back to prison).

court followed our instructions in *Fowowe*, and recalculated Cotton's new statutory minimum and maximum sentence "as if" the Fair Sentencing Act was in effect when Cotton was convicted. *See* 1 F.4th at 532.

Recall that Cotton was charged with, and pleaded guilty to, distributing and possessing with intent to distribute at least five grams of cocaine. A five-gram crack-cocaine offense with a prior felony drug conviction yielded a maximum of life in prison in 2007 and at least eight years of supervised release. 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(iii), 851 (2007).

The Fair Sentencing Act, however, increased the threshold of crack cocaine necessary to trigger certain mandatory minimums. *Fowowe*, 1 F.4th at 525. And if this Act had been in place before Cotton's conviction, his five-gram crack-cocaine offense—with a prior felony drug conviction—would have yielded, at most, a 30-year prison sentence and a statutory minimum of six years of supervised release. §§ 841(b)(1)(C), 851.

This recalculated statutory sentencing range—zero to 30 years in prison—is what the district court was required to consult before resentencing Cotton in 2020. In other words, the district court retroactively reduced the maximum sentence that Cotton could face for his offense. These changes in the statutory maximums wrought by Cotton's resentencing caused Cotton's offense to become a class B felony. 18 U.S.C. § 3559(a)(1)–(2) (providing that offenses with maximum sentences of 25 years or more, but less than life, are class B felonies).

One other aspect of Cotton's resentencing confirms this. The district court, in addition to giving Cotton a shorter

prison sentence, also lowered his term of supervised release from eight years to six years. This is notable. A six-year supervised release term is legally permissible only if the district court believed that Cotton's offense now was one arising under § 841(b)(1)(C), which supplies a minimum of six years of supervised release, and not under § 841(b)(1)(B)(iii), which provides for at least eight years of supervised release. And if the district court understood Cotton's offense to be subject to § 841(b)(1)(C)'s penalties, then it also understood that Cotton could be sentenced to no more than 30 years in prison, given Cotton's prior felony drug convictions. Again, that means that Cotton's offense became a class B felony. 18 U.S.C. § 3559(a)(2).

The majority opinion resists this conclusion by highlighting that the district court stated in its First Step Act relief order that, except as otherwise provided, "all provisions of the [original] judgment … shall remain in effect." In the majority's view, this means that the class A nature of Cotton's offense was explicitly left untouched by the district court. But that overlooks the fact that the district court exercised its discretion and reclassified Cotton's offense through the retroactive application of the Fair Sentencing Act. This reclassification again is evidenced by the district court giving Cotton six years of supervised release at resentencing. This would not have been statutorily permissible if the court desired Cotton's offense remain a class A felony under § 841(b)(1)(B)(iii), which carries with it both a maximum of life in prison and a minimum of eight years of supervised release, given Cotton's prior felony drug convictions.

Our circuit has never explicitly held that First Step Act relief reclassifies offenses in this way. But we have assumed in

non-precedential *Anders* orders that this is the case. In *United States v. Perkins*, for example, the defendant received First Step Act relief and, at his ensuing revocation hearing, we noted that his 2007 crack-cocaine offense, which was once a class A felony, "became a [c]lass B felony" "[t]hrough the retroactive application of the Fair Sentencing Act." No. 21-1421, 2021 WL 5158000, at *2 (7th Cir. Nov. 5, 2021); *see United States v. Baker*, No. 21-2182, 2022 WL 523084, at *3 (7th Cir. Feb. 22, 2022) (same).

It appears that very few courts nationwide have addressed this specific issue. But the only federal appellate court to analyze the problem generally came to the same conclusion, albeit also in non-precedential fashion. *United States v. Jones*, No. 22-30480, 2023 WL 6458641, at *4 (5th Cir. Oct. 4, 2023). In *Jones*, the defendant moved for First Step Act relief at his supervised release revocation hearing. *Id.* at *1. He argued that the Act reclassified his original crack-cocaine offense from a class A felony to a class B felony. *Id.* The district court, however, determined it was required to apply the original class A classification. *Id.* at *2. The Fifth Circuit disagreed. *Id.* at *5. It found that the First Step Act revealed a "clear intention" to change sentencing laws retroactively, opening the door for the defendant's felony classification to be re-evaluated. *Id.* at *4. I am aware of no case that has come to the opposite conclusion.

In sum, Cotton's resentencing under the First Step Act in 2020 retroactively changed the classification of his underlying offense—that is, from a class A to a class B felony. To hold otherwise would be to deny Cotton the benefit of what might be "the most significant criminal justice reform bill in a

generation." *Pulsifer v. United States*, 601 U.S. 124, 155 (2024) (Gorsuch, J., dissenting) (citation omitted).

* * *

For these reasons, I concur with the majority to the extent that non-retroactive changes in the law—including the passage of the Fair Sentencing Act and our decision in *Ruth*—do not change the classification of Cotton's underlying offense. But I respectfully dissent from the majority's holding that Cotton's resentencing under the First Step Act did "nothing" to alter his offense classification. For these reasons, I would hold that Cotton's underlying offense is a class B felony and the district court on remand could sentence Cotton to no more than three years in prison.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 7, 2024

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-1591

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

SHANNON L. COTTON,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 2:07-cr-20019-MMM-EIL-1

Michael M. Mihm,
Judge.

O R D E R

Defendant-appellee filed a petition for rehearing and rehearing en banc on August 23, 2024. No judge in regular active service has requested a vote on the petition for rehearing en banc. Judges Scudder and St. Eve voted to deny panel rehearing; Judge Pryor voted to grant panel rehearing.

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

E-FILED
Tuesday, 07 March, 2023 04:29:50 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Criminal No. 2:07-20019
SHANNON L. COTTON, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHAEL M. MIHM
FINAL HEARING ON
REVOCATION OF SUPERVISED RELEASE
FEBRUARY 21, 2023; 10:12 A.M.
URBANA, ILLINOIS

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Central District of Illinois

Proceedings recorded by mechanical stenography; transcript produced by computer

EXHIBITS

(Proceedings held in open court.)

THE COURT: Good morning.

MR. PATTON: Good morning.

THE COURT: This is the case of the United States of America v. Shannon Cotton, Criminal Number 07-20019.

The defendant is in court represented by his attorney, Tom Patton. The United States is represented by Eugene Miller.

The matter is set today for a continued hearing on the petition to revoke supervised release. The defendant has entered pleas in that case, but there's an issue concerning whether this should be labeled as a Grade A violation or something other than that.

So, counsel have both filed pleadings concerning this matter, and I just received one -- actually, I think I just saw it yesterday, but it was filed on Friday from the government.

So, I think maybe to begin this discussion we should -- the government, in this reply, makes a couple of objections. Perhaps we could start with those. Okay?

Please take off your mask when you're talking. Stay seated, keep the microphone close to your

mouth.

MR. MILLER: Yes, Your Honor. And hopefully they were laid out sufficiently in the pleadings so I won't belabor the point.

But the first one is simply to the DOJ policy memoranda that was attached by the defense. We object to that filing based on law that states that -- including that the memoranda itself, that it may not be relied upon by a party in litigation with the United States. That's our first objection.

The second was simply to the relevance --

THE COURT: Well, let's stop there. What's your response to that?

MR. PATTON: Sorry, habit.

Your Honor, you can consider -- we didn't argue that you were bound by the Department of Justice memoranda they're putting out, but certainly they exist as a matter of fact, and we've cited them to you as something to consider in imposing sentence.

So, I don't think that they're -- I think it is incorrect to say as a matter of law you cannot consider it.

THE COURT: I'm not going to strike it, but I note for the record that I'm not going to really

rely on it. But I do note it.

What's the second objection?

MR. MILLER: And the second objection, it's really just to relevance, Your Honor, so the Court can give it whatever weight, but we think that the other exhibit that was filed by the defense that relates to 2016 purported sentencing data is irrelevant to any issue in this case, and, therefore, we're asking the Court -- basically our objection is that it doesn't have any relevance to any issue in this sentencing.

THE COURT: Because this is a 2020 or '21?

MR. MILLER: Because the original sentencing of Mr. Cotton was in 2007, and his First Step Act reduction was in 2020, and now it's 2023. Those are, if at all relevant, the relevant dates, not 2016.

THE COURT: All right.

MR. PATTON: Well, Your Honor, it is our position when you are trying to impose a sentence that avoids unwarranted sentencing disparity, you should consider the fact that the sentences in the Central District of Illinois are warped and warped high based on U.S. Attorney's Office 851 policies. And it's not purported sentencing data; it's data

from the United States Sentencing Commission.

THE COURT: Well, let me -- what I'm concerned about as to this argument is it seems to suggest that other districts made correct decisions, and incorrect decisions were made here. I don't see how that necessarily follows. The fact that they did this in a much higher percentage of cases really -- that doesn't tell me in and of itself whether it was good or bad.

MR. PATTON: Well, it tells you -- look, the U.S. Attorney's Office gets to make those decisions, Your Honor. All right?

THE COURT: Yes, it's a matter of discretion.

MR. PATTON: I understand that.

The other data we cited to you was the study from the Ohio State University School of Law that showed that from -- I think it was 1990 through 2020, the Central District of Illinois had the second highest life drug sentences in the country.

THE COURT: Okay.

MR. PATTON: And so what it does show you is if you're trying to avoid unwarranted sentencing disparity, that can't simply be the disparity between the sentences that are imposed in the Central District of Illinois. The whole idea of

the sentencing guidelines was supposed to be national consistency.

THE COURT: I understand that. I'm also concerned that there may be other judges in other districts that don't view the facts or the application of the law the same way that I do.

MR. PATTON: But, Your Honor, when it comes to mandatory minimums, it doesn't matter how a judge views the facts of the law.

THE COURT: That's true.

MR. PATTON: That's the point of them.

THE COURT: Right.

MR. PATTON: And it is -- and I think the biggest point to make of it is the, the falsity of the idea that by imposing mandatory minimums and guidelines -- mandatory guidelines for a number of years got rid of unwarranted sentencing disparity because it put limits on what judges could do.

What difference does that make when you give control over the disparity to the prosecutor who decides, based on filing an 851 notice, or what charge to file to start with, then if you file an 851 notice, that they're driving that factor. And so I think it's extremely relevant.

And yes, I do think that perhaps the players

in the Central District of Illinois ought to pause a little bit when they see those statistics and say, *Hey, maybe this isn't the right way to do it*.

And that if you really are trying to avoid sentencing disparities nationwide, you have to consider the fact that the majority of the country -- the vast majority of the country isn't doing things this way. And that has to be a relevant consideration if you are actually trying to avoid unwarranted sentencing disparities.

THE COURT: All right. Thank you.

Do you have a --

MR. MILLER: And, Your Honor, I didn't want to -- if we want to open this can of worms, but the truth is since -- I was at the Department of Justice from 1999 to up until around 2016 which is why this is filed. The Department of Justice policy was -- throughout the country was for every U.S. attorney to file an 851 any time it was appropriate. That certainly avoided unwarranted sentencing disparities, which is Mr. Patton's concern here, when that policy was followed. And so that took place for years, as this Court is well aware, if they were appropriate -- I should say if they existed, they were filed to avoid unwarranted

sentencing disparities.

This 2016 snapshot happens to be around the time that the Department of Justice, when Eric Holder was the Attorney General, implemented a Smart on Crime policy that allowed more individualized sentencing, including discretion on 851s, that resulted in unwarranted sentencing disparity.

But at the time this defendant, Mr. Cotton, was sentenced in 2007, he was treated the same as, at least according to DOJ policy, defendants throughout the country. He had two prior qualifying convictions. They were filed as 851s, as they were in every case. Defendants could avoid those 851s if they chose by deciding to cooperate with the government. And if they didn't cooperate or they weren't safety-valve eligible, then Congress decided that the mandatory minimum applied.

So, that's the -- that's a little more the history here of, of those disparities. And I don't think they have any application in this case.

THE COURT: Well, all right. I'm not going to strike it, but while it may have some materiality, as far as I'm concerned, it's not dramatic.

There's a third item about race?

MR. MILLER: Yes, Your Honor. Just to the extent, we just wanted the record to be clear because there was a comment in the defense commentary which we quoted about *locking up mainly young black men*, and we just pointed out that any consideration of race is inappropriate at sentencing, citing both the guidelines and the statutory cases.

I understand the argument about disparity between crack and powder cocaine. We cite the cases from the Seventh Circuit that say those disparities don't rise to any constitutional basis.

And also as far as young black men at the time, we just cite the Seventh Circuit case that points out that that argument -- courts have rejected that youth argument where other millions of people of the same age have been able to comply with the law to suggest that somebody can't comply with the law.

So, that was the basis of that objection, Your Honor.

THE COURT: All right. What's the response?

MR. PATTON: Anybody who doesn't think the war on drugs has disproportionately impacted young

black men is studiously ignoring the statistics.

THE COURT: Okay. Both sides, fair comment.

Let's get into the merits of this now. It's your position -- well, why don't you lay this out for me? I've spent a fair amount of time on this, going through it because it's -- maybe it should all be crystal clear to me, but it's not, so I'd like you to walk through this with me. I'll have questions.

And then I'll ask you to do the same.

MR. PATTON: Yes, Your Honor.

In any revocation of supervised release, to be able to determine what the statutory maximum penalty is under 3583, you have to decide -- find out what class of felony the person was convicted of, right, because that is what sets the statutory maximums for revocation purposes.

THE COURT: And when he pled in 2007, this was a Grade A.

MR. PATTON: Yes. But then Congress has made a retroactive change to 21 U.S. Code Section 841 --

THE COURT: You mean the First Step Act.

MR. PATTON: -- (b)(1)(A), (b)(1)(B) and (b)(1)(C).

Yes, sir.

THE COURT: Not in the Fair Sentencing Act, but the First Step Act.

MR. PATTON: Well, they lowered the penalties in the Fair Sentencing Act and then made those changes retroactive in the First Step Act.

THE COURT: Right.

MR. PATTON: Right? So --

THE COURT: What does that mean in that context? Retroactive in what respect? Every respect or retroactive in terms of sentencing reductions?

MR. PATTON: Well, what -- for -- as it's relevant for today's purposes, I would just say what the Seventh Circuit said in the *Perkins* case: "Through the retroactive application of the Fair Sentencing Act, Perkins' 2007 crack cocaine offense (which would now carry a maximum 30-year sentence given Perkins' prior convictions) became a Class B felony."

THE COURT: Was that *Perkins* case a First Step Act case or a -- something else?

MR. PATTON: No.

THE COURT: I'm sorry?

MR. PATTON: No, it's not. It was a revocation of supervised release.

THE COURT: And what was the date --

MR. PATTON: So, what the retroactive change did --

THE COURT: What's the date on the *Perkins* case?

MR. PATTON: It's unpublished, Your Honor. It is from 2021. And it's consistent with what the Seventh Circuit said in *Corner*, too, because in *Corner*, that was a First Step Act case about not -- denying a motion for a reduction for a person who got his supervised release revoked. But even there, the district court, at the revocation in *Corner*, found that the retroactive changes of the First Step Act lowered the statutory maximum. Just the judge imposed a sentence that was below the lower statutory maximum so it wasn't an issue on appeal.

THE COURT: Was that something that happened automatically, or did it happen if the judge exercised discretion in that?

MR. PATTON: The statutory maximums changed, and, therefore, the grade -- the class of felony changed automatically because it was made retroactive. But because Congress doesn't have to make changes retroactive, when they do make them

retroactive, they can put limits on what remedies are available for people who are already serving their sentences. And a limit that Congress put on people who were in prison serving their drug sentence, they said, *Hey, the judge -- Your sentencing judge or whatever judge it gets assigned to can reduce your sentence if he or she wants to, but they're not required to.*

And so Congress could put that limitation on somebody who's in prison serving a sentence for a crack offense whose statutory maximum got changed.

THE COURT: But you're saying, as I understand it, that when that discussion occurred in the context of the First Step Act, you're saying even if the judge decided not to reduce the sentence, the First Step Act would have automatically reduced the grade pursuant to that.

MR. PATTON: Yes.

THE COURT: Are you saying that?

MR. PATTON: Yes. Because as an operation of law, that's what it means to make a change to the statutory maximum of a statute retroactive. But again, Congress gets to set limits on the remedy.

THE COURT: So, because Congress, by the First Step Act, changed the max -- statutory maximums,

that automatically changed the category of the felony.

MR. PATTON: Right. And so while Mr. Cotton was in serving his sentence, you didn't have to reduce the sentence. You could or you couldn't. And it didn't make the sentence illegal if you didn't do it because, again, Congress gets to put whatever limitations it wants on the -- their retro-- their making a statutory change retroactive.

THE COURT: So, then in 2020, Judge Darrow had a First Step Act hearing and reduced the sentence. I think the amended judgment indicated that it was reducing the custody amount and maybe the period of supervised release. In other respects, it would remain the same.

But you're saying by operation of law, it became a B?

MR. PATTON: A C.

THE COURT: A C?

MR. PATTON: Class C felony because it had a statutory maximum of 20 years because, again -- and that's based on *Ruth*.

THE COURT: Well, initially -- yes. Initially you said a B, didn't you?

MR. PATTON: Right. But -- so, there's an interaction between the First Step Act making the Fair Sentencing Act retroactive and *Ruth*. *Ruth* was just a mistake everybody made at the time. There wasn't a way to raise it in a collateral proceeding. But again, we're not on a collateral proceeding. You have to decide today, when you're sentencing him for a violation of supervised release, what grade felony.

THE COURT: But *Ruth*, if I recall -- that was my case, by the way. I don't know why they always choose my cases to change the law.

MR. PATTON: I've heard Mark Bennett say the same thing.

THE COURT: But if I'm not mistaken, *Ruth* also said that it didn't change his career criminal designation, correct?

MR. PATTON: Yes. *Ruth*, yes. The same analysis that *Ruth* applied to whether or not a prior offense was a prior felony drug offense for statutory purposes, they said that the way the career offender -- the guidelines defined for career offender purposes what is a controlled substance offense is different. It's a different test.

THE COURT: The career offender guideline was what?

MR. PATTON: In his case?

THE COURT: Yes.

MR. PATTON: Originally --

THE COURT: Life?

MR. PATTON: -- he was a 37 because he was at life and came down to a 34 with acceptance, but --

THE COURT: But you -- in terms of the sentencing guidelines, it's your position that that has nothing to do with whether the grade felony was changed?

MR. PATTON: No, not the sentencing guidelines, I mean, because -- I would just say, look, at the time his career offender guideline shouldn't have been that high because under *Ruth* the two priors that they used to increase the statutory maximum which, of course, then drives the career offender --

THE COURT: But under *Ruth*, that's what *Ruth* ruled, that they were.

MR. PATTON: Yes. But my point is if his statutory maximum would have been lower at the time because we now know that the two Illinois cocaine convictions should not have increased the statutory

maximum. That with a lower statutory maximum, the career offender guideline would have been lower, but he still would have been a career offender.

But so, yeah, getting back to, you know, what grade felony it is, when Congress changes the statutory maximum and makes that change retroactive, then, yes, it changes the grade of felony. Congress then chose to say, *Hey, the remedy for people that are serving -- now serving a sentence that would be over the statutory maximum, we didn't have to make this retroactive if we didn't want to, so we can put whatever conditions we want.*

THE COURT: The First Step Act doesn't itself say that it changes the grade of the felony, does it?

MR. PATTON: Well, no, because all the First Step Act says is that the changes made by Sections 2 and 3 of the Fair Sentencing Act are retroactive. And those are the sections that did lower the grade of felony for crack offenses.

THE COURT: All right. So, the Fair Sentencing Act did lower the grade of the felony?

MR. PATTON: Correct, because it changed -- it lowered the statutory maximums.

THE COURT: I mean, but does the Fair Sentencing Act use those words? Is it referenced specifically in the Fair Sentencing Act?

MR. PATTON: No, because the Fair Sentencing Act just -- it changed the amounts of crack it takes to trigger the various (b)(1)(A) and (b)(1)(B)s that then set the statutory maximums. It is then 18 U.S. Code Section 3559 that defines the classes of felony, and those classes of felony are defined based on the statutory maximum provided by the statute so there would be no reason --

THE COURT: So, the Fair Sentencing Act reduced the statutory maximum which would, you're saying, automatically reduce the grade felony, but it was not retroactive. And then when the First Step Act came along, it made that retroactive?

MR. PATTON: That is correct.

THE COURT: Okay.

MR. PATTON: There would be no reason in the Fair Sentencing Act for Congress to say this lowers the grade of felony because it is a separate statute -- 3559 -- that defines what is a Class A felony, Class B felony, Class C felony. And those definitions are done based on the statutory maximum of the offense of conviction.

THE COURT: All right. Thank you.

What's the response?

MR. MILLER: Your Honor, we do -- we disagree that the First Step Act retroactively reduced statutory maximums, and we'll explain why that is.

But as an initial point that I think it's important to make here is that neither the Fair Sentencing Act or the First Step Act in this case would reduce the class of Mr. Cotton's conviction on Count II which involved 40 grams of crack cocaine. The Fair Sentencing Act didn't lower mandatory minimums as has been said. What it did was it raised the statutory threshold of drugs that would then invoke those mandatory minimums. So, the life --

THE COURT: Let me stop you there for a minute because in -- I'm looking in my notes here. At some point -- I guess in the defendant's memo somewhere, you said -- your argument was it was 28 -- I'm sorry, it was 40 --

MR. MILLER: Correct.

THE COURT: -- in Count II.

MR. MILLER: Correct.

THE COURT: The Fair Sentencing Act raised it to 28.

MR. MILLER: Correct.

THE COURT: 40 was above 28 so it wouldn't change the statutory maximum of life for that.

MR. MILLER: Correct, Your Honor.

THE COURT: As I understand it, in the defense memo, you don't -- didn't appear to recognize this 40.

MR. PATTON: We recognize it, Your Honor, but the Seventh Circuit has already dismissed this argument in *United States v. Shaw*. They say what matters is what the person was charged with and convicted of.

Mr. Cotton was charged with distributing -- in Count II possessing with intent to distribute more than 5 grams.

THE COURT: Oh, I see.

MR. MILLER: They -- *Shaw* held that a defendant under the First Step Act was eligible for a reduction based on what they were charged with. They didn't hold that the mandatory minimum changed.

I mean, it's pretty obvious here, right? If Mr. Cotton had been charged after 2007 and the Fair Sentencing Act with more than 40 grams, he would have been charged with still the same offense under

18 841(a)(1)(b). It would have been an offense that carried a sentence of ten to life.

THE COURT: So, the question on that becomes, if he wasn't charged with that for whatever reason, then can you use it for that purpose under our discussion today?

MR. MILLER: And --

THE COURT: Is there some basis --

MR. MILLER: I say we can, Your Honor, and I'm going to get to why. We're completely outside of anything that either the Fair Sentencing Act or the First Step Act says in regard to the prior conviction here, so I think it's certainly important for the Court and I believe the Court absolutely can consider the fact that when he was convicted, he not only was convicted, as we all agree, at that time of a sentence with a maximum sentence of life imprisonment, which is a Class A felony, even after the First Step Act -- I'm sorry, after the Fair Sentencing Act was passed, on Count II, he would have been convicted of an offense -- possession of 40 grams of crack cocaine with the intent to distribute it -- that still carried a life sentence after the Fair Sentencing Act.

THE COURT: I understand, but he wasn't charged with that.

MR. MILLER: Well, that's correct, Your Honor, because as Mr. Patton talks about, we all know that *Ruth* wasn't, you know, in effect so he was charged incorrectly. Those weren't the minimums. He was charged with the possession of 5 grams or more, so he was charged with it. It's simply that later in *Shaw* what the defense successfully argued was, *Well, we don't know just -- If we just look at the charges, let's not look at any of the facts, then 5 grams to 28 would be less, whereas it could be more than 28.*

THE COURT: Is there any case that has specifically addressed this issue where -- that we're talking about right now?

MR. MILLER: There is no case that I found that has addressed this broader issue, let alone this specific issue, Your Honor, in relation to -- so I think we are in uncharted territory, so to speak.

THE COURT: Let me go back.

Mr. Patton?

MR. PATTON: Your Honor, *Shaw* controls this because if Mr. Miller -- the argument Mr. Miller's

making to you right now is the argument the government made to the Seventh Circuit in *Shaw*, saying that Mr. Shaw was not eligible for -- even to be considered for a reduction because he wasn't convicted of a covered offense because the offense really involved more than 28 grams, even though all he was -- what he was charged with and convicted of was more than 5 grams. The Seventh Circuit said no -- and every other circuit, by the way. You have to base it off what he was charged with and convicted of. *Shaw* controls this.

MR. MILLER: And our position, Your Honor, is that *Shaw* is a First Step Act case, and we're not here on a First Step Act motion.

But let me go on to the broader question, Your Honor. Even assuming the defense were correct and the question is whether he -- for example, Count I, whether Count I is still a Class A felony in terms of revocation today, and our argument is it is.

And here's the example we would give Your Honor and why we disagreed that the First Step Act automatically lowered statutory maximums.

As the defense has pointed out, the First Step Act, in fact, it doesn't -- the First Step Act, I don't believe it says anything about retroactive.

What it says is a district court may sentence a defendant who's eligible as if -- as if the penalties for the Fair Sentencing Act were in effect at the time.

And that's why, in fact, in Mr. Cotton's case the argument was, from the government, Judge Darrow had discretion, but, Judge, you shouldn't reduce it because those penalties, if they had been in effect at the same time, he's still on Count II, he's eligible under *Shaw*, but still you shouldn't reduce the penalty because he still would have faced the exact same penalty.

But let's step back because the First Step Act also says a court is never required to reduce a sentence.

And so under Mr. Patton's theory, if I understand it correctly, we know under the First Step Act that somebody -- let's just take a defendant, a hypothetical defendant who faced ten to life, and the court looked at the case, perhaps there was relevant conduct; we've had cases like that where the defendant was involved in a murder of a rival drug defendant. And the court says, *You're looking at ten to life here. I look at this relevant conduct; I think a life sentence is*

appropriate for you. And the court gives that defendant a life sentence.

The Fair Sentencing Act obviously wouldn't change that at all because he was sentenced before the Fair Sentencing Act.

Then we get to the First Step Act. And the defendant was sentenced for a crack cocaine offense so he is eligible for reduction. He makes the motion for reduction. And we know the court, under the First Step Act, can look at that and say, *I understand your motion for a reduction, but I look at the relevant conduct in this case. I believe the life sentence was appropriate. Nothing requires me to reduce the sentence. You remain sentenced to a life sentence.*

According to Mr. Patton, Congress could do that even though -- and the Court could do that even though it automatically had lowered the penalty from a Class A felony, for example, to a Class C felony.

We'd say that cannot be what Congress intended. They can't have intended for courts to be able to impose what would essentially be an illegal sentence, a sentence that is above the statutory maximum, yet the First Step Act makes

clear a court is never required to reduce a sentence, and, therefore, it could maintain that maximum sentence the court originally sentenced, and, therefore, after that date, it hasn't reduced -- the court hasn't reduced.

THE COURT: Hold on a minute.

MR. MILLER: Yes.

THE COURT: So, if I understand this, you're saying the First Step Act did change some of the statutory maximums.

MR. MILLER: It permitted the court to sentence as if the Fair Sentencing Act were in place, yes.

THE COURT: But not retroactively. And then the First Step Act made it retroactive.

MR. MILLER: The Fair Sentencing Act changed the thresholds, not the statutory maximum, but what drugs would qualify.

And then the First Step Act allowed courts, for eligible defendants, to sentence them as if the first -- Fair Sentencing Act were in effect.

THE COURT: The point you're making, if I understand what you're saying, he's saying it automatically reduced.

MR. MILLER: Right.

THE COURT: You're saying, *Well, wait a minute. If that's true, then a court couldn't decide to not reduce.*

MR. MILLER: That's correct. If the penalty was already above what's the new statutory maximum.

THE COURT: Right.

MR. MILLER: So, our position has been the Fair Sentencing Act is its own vehicle. Congress said what it said there which is, *We're going to give courts discretion. They don't have to reduce the sentence, but they can.*

In this case, Judge Darrow did reduce the sentence from 262 to 180 months. She reduced the supervised release from eight years to six years. That is all that took place in this case. If you look at her order, it makes it clear, that is all that took place. Everything else, including the maximum penalties and the class of felony, our position is, remained intact. And, therefore, that's why --

THE COURT: Is there an argument that by reducing it she was -- that the effect of that was to change the grade of the felony?

MR. MILLER: Again, Your Honor, it's its own -- you could make that argument, but there's just

nothing in the statute that would suggest that it changes the class.

THE COURT: There are a lot of things that aren't in the statutes that end up coming true.

MR. MILLER: Well, I don't disagree with you there, Your Honor, but in here where we are, there's no -- and I'll talk about *Perkins*. There's no controlling authority or explanation at this point, I think, that under the statute we would suggest that that interpretation is that all that changed -- all it changes under the First Step Act is a court can change the sentence.

THE COURT: I understand.

Let me ask, Mr. Patton, your argument is that the First Step Act had the effect of retroactively changing the statutory maximum, correct?

MR. PATTON: Yes, sir.

THE COURT: So, if that's true, then how could it be that a judge would have discretion under that Act to not reduce it and leave it at life which would be above the amended statutory maximum?

MR. PATTON: Because when Congress made --

THE COURT: I'm sorry?

MR. PATTON: Because Congress is allowed to set the scope of relief for a defendant when it

decides to make a change retroactive.

THE COURT: I agree with that, but then that seems to me to raise the question of, if that's true, what is the effect of exactly what they did?

In other words, if they said, *We leave it up to the judge to decide whether in this case to go below life,* that doesn't necessarily mean that's going to change the grade of the felony.

MR. PATTON: Your Honor, it's -- I'm not saying that what Congress -- the choice it made makes perfect, logical sense in that your -- it is correct that if a judge decided not to grant a First Step Act motion, the person who has a sentence that's higher than the new statutory maximum that is driven by the amount of crack involved in the case, that -- at the time the sentence was imposed, it was legal; it was within the statutory maximum at the time it was imposed. And Congress just said, *Even though we've retroactively lowered the penalty, we're not saying defendants automatically get a reduction. We're leaving it up to the judge.*

But, Your Honor, we list out the Fourth Circuit case in *United States v. Venable* that agrees with our position and then a string of cited

district court cases that's a page long, starting on Page 12 to Page 13 of our memo, so there are courts that have weighed in on this and --

THE COURT: Courts have what?

MR. PATTON: That have weighed in on it and agreed with our position. And, you know, we're -- we think we're right; we think the Seventh Circuit has said we're right; and numerous district court cases have said we're right.

THE COURT: What were the pages those cases were on? 11 and 12?

MR. PATTON: They start on 12 is when we start talking about --

THE COURT: What about those? Are those all First Step Act cases?

MR. MILLER: And we'll talk about *Concepcion*. Those cases are First Step Act cases, those long string of cites where courts -- as *Concepcion* says, once the court is going to reduce the sentence that it needs to consider all of those new penalties. That's -- we, we agree with that. And we don't suggest the Court here can't take into consideration what new penalties are in effect and all those things, but the question here is this is not a First Step Act proceeding, Judge.

And if we look at -- the *Perkins* case is, as they've acknowledged, is a non-precedential order, first of all, so it's not controlling here. It also was an *Anders* brief, Judge. That was the case where --

THE COURT: That was very unusual in that sense.

MR. MILLER: So, they were just trying to go through what issues possibly could have been raised, and they cited *Corner*. Our position is they actually cited *Corner* for a proposition that it didn't -- that *Corner* doesn't state. They cited *Corner* for the proposition that it directed the district court to use the First Step Act's modified statutory penalties when calculating a revocation sentence.

What *Corner* held was that the court must consider those lower statutory penalties. It didn't state that the court must use them because, again, in the First Step Act the court has discretion whether or not to reduce the penalty.

THE COURT: So, it's a difference between you saying it says *consider* and him saying it says *you must use*.

MR. MILLER: Correct.

THE COURT: Can't say both.

MR. MILLER: Right. Does it change the statutory maximum so that the Court's discretion is limited?

And our position -- this is where we differ with the defense on the application of the First Step Act. If Congress -- Congress only changes statutory penalties to limit a court's discretion. That is the purpose for a statutory penalty, whether it's a maximum or a minimum. So, if the Court -- Congress in the First Step Act is giving the Court discretion to still sentence at the statutory maximum, then Congress by its own nature is not changing the statutory maximum.

THE COURT: What about the *Venable* case from the Fourth Circuit?

MR. MILLER: I believe that case, Your Honor, also is a First Step Act case. We found no case on point where after a First Step Act reduction has been granted, so we're not in a First Step Act.

THE COURT: Which is true here. It was granted.

MR. MILLER: It's already been granted, and you're not allowed a second First Step Act motion. So, this is simply a supervised release violation

after the Court had previously granted a First Step Act motion.

So, our position is those cases aren't particularly helpful.

THE COURT: All right. Mr. Patton?

MR. PATTON: Your Honor, the district court cases we cite are revocation cases where the district court has said the class of felony has been reduced, reducing the statutory maximum on revocation.

What the -- in *Corner*, the district court agreed that, pursuant to the First Step Act, the statutory maximum on revocation was lowered to 24 months and gave a sentence below that. And so the Seventh Circuit didn't have to deal with the issue because the district court agreed with the position that we've had.

In the Fourth Circuit *Venable* case, the Fourth Circuit says that the -- not only that the reclassification of the original offense, quote, not only reduces the original statutory penalties for the term of imprisonment for the drug conviction, but also shortens the maximum revocation sentence for a violation of supervised release from three years (authorized for Class B

felonies) to two years (authorized for Class C felonies).

That's what --

THE COURT: In your view, what makes this a Class C now as opposed --

MR. PATTON: Because what he was convicted of on both counts was either distributing or possessing with intent to distribute more than 5 grams. That makes it a -- now a (b)(1)(C) offense because more than 5 grams is an 841(b)(1)(C) offense that has a 20-year statutory maximum. We now know under *Ruth* that neither of his prior Illinois cocaine convictions are prior felony drug convictions that can increase that statutory maximum beyond 20 years. And a statute that has a 20-year statutory maximum is a Class C felony under 18 U.S. Code Section 3559(a)(3).

THE COURT: Okay.

MR. MILLER: And just to address *Ruth* because I don't believe I did address that, and we addressed in our motion, Your Honor, *Ruth* is a case of statutory interpretation so it does not apply retroactively. We've cited the cases.

In this case, there was two convictions filed as an 851 against Mr. Cotton. Those were not

appealed, of course, at the time. They then exist. There are those two 851s that he was originally sentenced for.

I understand the argument that, *Oh, if Ruth* had been passed before then, those wouldn't have been considered convictions, but that's not the landscape we have. Those 851s were filed. They're still in effect. They weren't appealed. There's no basis on a 2255 to remove those 851s, and therefore, our position is that *Ruth* has no application at this time.

THE COURT: All right. I think we could spend the rest of the day here. You've both given me good briefs and really good oral argument. Doesn't make my decision any easier.

But having considered all of this, I'm going to adopt the position of the defense. And I will tell you, quite frankly, I have little confidence in that ruling. This is one of those situations where I wouldn't have -- I would have less confidence going the other way, so I'm really hoping that there will be an appeal in this case, and the Seventh Circuit can properly instruct me about this.

The government certainly has a good point here

about that the Court doesn't have to, under the First Step Act, reduce. And I'm well aware of that. But considering everything else here, I think that's the effect of it. The focus, I believe, of the First Step Act was on the custody portion of this. Maybe I'm wrong about that, too, but --

MR. MILLER: The Court did reduce the supervised release period in this case.

THE COURT: Okay. Anyway, that's my ruling. I think both sides have set out very carefully your positions. And so we've reduced this to a Class C, and -- well, let me ask the government, do you agree that, based on my ruling, it becomes a Class C?

MR. MILLER: We agree that's your ruling, Your Honor, yes.

THE COURT: Okay. Fine. All right.

So, then let me ask, Mr. Patton, have you had a reasonable opportunity to read the report and review it with your client?

MR. PATTON: Yes, Your Honor.

THE COURT: Based on your reading and review, is there anything in the report you feel is inaccurate or incomplete that you wish to

challenge?

MR. PATTON: No, Your Honor. If you recall at our last hearing, we -- I'd just ask that you recall our position that for the third violation, the possession with intent to distribute, we talked about Mr. Cotton was just kind of holed up in his trailer with the marijuana, that -- but he would give some to some people who would come over.

THE COURT: Right. I remember that.

MR. PATTON: So, with that, no, there's nothing we want to object to.

THE COURT: Mr. Cotton, have you had a reasonable opportunity to read this report and review it with your attorney?

THE DEFENDANT: Yes, Your Honor, I did.

THE COURT: Based on your reading and review, is there anything in the report you feel is inaccurate or incomplete that you wish to challenge?

THE DEFENDANT: No, sir.

THE COURT: You understand you have the opportunity to present evidence in mitigation here today. You also have the right to make a statement to the Court on your own behalf before I impose sentence.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Oh, and by the way, Mr. Patton, there was a reference to SIU Medicine Patient Chart. The clerk informed me this morning, she has that, but I don't believe it was offered.

MR. PATTON: I gave it up to the Court at the end of the last hearing so that you would maybe have the opportunity to read it beforehand. I would move for its admission. I think I marked it as Defendant's A.

THE COURT: All right. Mr. Miller, have you seen that?

MR. MILLER: I believe he showed it to me before, Your Honor, so we have no objection.

THE COURT: All right. Can I see that briefly?

MR. PATTON: Your Honor, I think I highlighted -- the point I wanted to make is he went in for some memory testing because he was having memory issues. His sister went with him corroborating he had some memory issues. They did some testing and found that it was consistent with him having some memory issues.

THE COURT: Okay.

MR. PATTON: That's the extent of it.

THE COURT: All right. Thank you.

So, it is admitted.

(Whereupon, Defendant Exhibit A was admitted.)

THE COURT: Mr. Miller, anything else in aggravation?

MR. MILLER: Your Honor, we had alluded to, in our commentary, we did receive a couple of reports from the marshals regarding some disciplinary matters while he's been in. I believe in his cell he had -- we would just proffer three months of no commissary with several other people because in their pod there was discovered illegal items.

And then specifically he also received mail on January 23rd, 2023, that appeared to contain drugs. And so they ran a K-9 around, and the K-9 alerted to the presence of drugs in a letter that was sent to him in jail.

Those are the only two incidents that we're aware of since he's been locked up. And that would be the extent of our proffer.

THE COURT: All right. Any response to that?

MR. PATTON: No, Your Honor, other than, you know, group punishment for a pod is not an unusual thing.

THE COURT: Do you have any additional evidence in mitigation?

MR. PATTON: No, sir.

THE COURT: All right. So, we're now -- we've got a Class C violation, Criminal History Category VI. What is the new -- the range? It's 24 months max.

Jason, is -- I assume it would be 24 months?

PROBATION OFFICER: Judge, are you considering the third petition a class -- Grade A violation?

THE COURT: No, it's a C.

PROBATION OFFICER: C felony, Grade A violation.

MR. MILLER: To be clear, Your Honor, the Court found his previous felony to be a Class C felony, but his violation was Grade A.

THE COURT: You're right. I'm sorry. I apologize.

PROBATION OFFICER: So, Judge, on both counts, maximum statutory of two years, and the sentencing guideline provision would be --

THE COURT: Probably be above that.

PROBATION OFFICER: It would be 33 to 41 months, so it's 24 months on both Counts I and II.

THE COURT: And the supervised release range?

PROBATION OFFICER: Would be six years, Judge, minus the term of custody imposed.

THE COURT: Okay. So, Mr. Miller, do you have a statement to make regarding sentence?

MR. MILLER: Yes, Your Honor, and I believe most of it's laid out in the commentary so I'll try to be brief. And, obviously, we want to make it clear we would be recommending more than the 24 months had the Court's ruling been different. We wouldn't want to prejudice our ability to ask for that 60-month sentence if there were an appeal and the case came back.

But given the Court's rulings, we're asking for the guideline sentence of 24 months of imprisonment. In a nutshell, the defendant, Mr. Shannon (sic), received a sentence reduction from this Court from 262 to 180 months, was released very soon thereafter, and then unfortunately immediately began violating the conditions of his supervised release, mostly related to using controlled substances, but there are other aspects of that, including failing to report for testing, submitting compromised samples, or tampering with sweat patches, failing to attend counseling sessions, all those things that -- and

this is not an unusual case, Your Honor, in the sense that it escalated to the point where the Court imposed a modification of four weekends in jail. The defendant continued to commit these violations. A warrant was issued. The Court again, after having reduced Mr. Cotton's sentence, trying an intermediary punishment, then even when he was arrested, gave him the ability to be released on bond.

So, now he's both on supervised release and on bond, and the probation office worked with him and put him into intensive outpatient treatment which, frankly, Your Honor, the thought was and the discussion with Defense Counsel that if he complies with this and successfully completes the outpatient counseling, doesn't have any more issues, that we might have a sentence of -- a recommendation of time served.

But, unfortunately, after successfully completing the inpatient portion, he was released and then began to have violations again which ultimately culminated with him simply fleeing, not taking advantage of any of the probation services, being a fugitive. I believe his statement was he just didn't want to be caught at that point.

THE COURT: He was a fugitive for, what, a couple weeks?

MR. MILLER: I think a couple of months, Your Honor. I know that we obtained multiple orders for the United States Marshal Service to try to find Mr. Shannon (sic).

THE COURT: Okay.

MR. MILLER: And so he was -- I believe it was around August that he was in fugitive status and in October that he was arrested, Your Honor.

THE COURT: Okay.

MR. MILLER: And so then he was arrested, and we know he was arrested with about a kilogram of marijuana. Whatever the circumstances described it, obviously, is an amount that's intended for distribution.

So, we believe that under those circumstances, Your Honor, that a 24-month sentence is appropriate.

There is discussion in the commentary to the guidelines that where a defendant receives some type of favorable reduction that sometimes even an upward departure -- that's not possible in this case -- is appropriate to reflect that they took the benefit that they got and, unfortunately,

squandered it. And that's exactly what happened in this case.

Your Honor, it's disappointing; it's sad that Mr. Cotton didn't take advantage of all the opportunities that he had and the opportunities that Probation gave him, but under these circumstances we believe that a 24-month sentence is appropriate, and we would ask for that. That a four-year period of supervised release to be imposed. He completed -- I don't think we can say successfully completed perhaps around two years or so of supervised release of his six years, and so we think it would be appropriate to impose an additional four years of supervised release where hopefully he'll turn the corner, take advantage of the services provided by the probation office, and not be back.

THE COURT: All right. Thank you.

Mr. Patton?

MR. PATTON: Your Honor, as we argued in our memo, we think the appropriate sentence is time served and no more supervision.

I just have to sit here thinking, you know, What is it that's trying to be accomplished by sending Mr. Cotton to prison at this point? He was

selling drugs before, and he was convicted of that and given a really long sentence, and he served a really long time.

And he's on supervised release, and he's -- yeah, he's been using mostly marijuana; occasionally, sometimes he tested positive for cocaine. But not selling; you know, just, just using. You know, why the federal government wants to put somebody in prison for using marijuana is just beyond me.

MR. MILLER: Your Honor, just to comment on that --

THE COURT: Hold on.

MR. PATTON: It's -- you know, are we trying to prove to him that, *Look, we have the power to further punish you*? He knows that. He's been sitting in prison for months. He knows you can punish him because he sat in prison for 13 or so years.

He -- look, I think using drugs is a bad idea, you know. It doesn't -- it's not a great idea, although I will say that as a person that doesn't mind having a beer once in awhile and which is a controlled substance as well. And --

THE COURT: I don't think beer is a controlled

substance.

MR. PATTON: Well, it's not controlled. It's a drug, you know. Sorry.

THE COURT: I hope it's not a controlled substance.

MR. PATTON: But it's -- you know, this war on drugs, it's, you know, what, been going on since the Nixon administration and going on in earnest since the Sentencing Reform Act of 1984, and, you know, clearly it just has been a failure if you're defining success by trying to reduce the amount of drugs.

Driving over here this morning, I listened to an extended story on NPR about fentanyl importation into the country, where, you know, a congressman who actually had studied it, sat on a commission, said, *Look, it's getting made in Mexico. The Mexican government isn't going to stop them from making it. We're not going to send the military into Mexico to blow up the labs. And as long as there's people in the country, in the United States that want drugs, people are going to supply it to them.*

That's just the nature -- heck, our whole economy is -- all of capitalism is supply and

demand. That if there's a demand for a good, somebody's going to supply it. And that seems like the only sensible way is to maybe treat it as a public health issue and not as a crime because you know sending people to prison doesn't cause -- cure addiction, nor does it stop people from using drugs. And, you know, if you're wealthy and you got a good insurance plan, you can go see your doctor and get your drugs that way -- get your Xanax or your Prozac, have them with a bottle of wine or a glass of whiskey at night and get your buzz that way. But if you don't do that, and you choose to do it through marijuana or cocaine, well, then that's bad.

And, look, I get it; it's illegal. But, you know, the federal government's not in the business of prosecuting simple possession of cocaine or simple possession of marijuana, and that's what you have here.

And, look, I know that he was convicted of selling before, but again, he just served his time, and he served a ton of time, and I stand by what's in the memo that it's longer than he would get in other places. I practiced in a different federal district for 15 years, from 2000 to 2015. I

guarantee you, 851 notices were not filed every time there was one. I guarantee you, the way they do cooperation is just monstrously different. You know, the standard is you get 50 percent off the bottom of the guideline range. I mean, it is -- the way it's done in the Central District of Illinois is not written in stone that that is the proper way to do it. And statistics show that the sentences here in drug cases are longer than other places, and that's just a reality. Those numbers are what they are.

And I don't question anyone's motives. I don't think anybody is acting with evil intent. But at some point, if you keep doing the same thing over and over and over and over and not having success, why keep doing it that way? I just -- Mr. Cotton wasn't hurting other people. He was surviving the best as he could, and sometimes he was using marijuana and occasionally cocaine to help him get through the world, and I just think it's wrong to give him two years in prison for that.

THE COURT: All right. Thank you.

Did you --

MR. MILLER: Your Honor, if I may, because he

asked the question of the government, Why did the government want to put him in prison for using drugs?

First of all, that's not what we're here for. There's been no new charges filed against Mr. Cotton. He could be charged in state court, could be charged in federal court, frankly, for possession of marijuana with the intent to distribute. There's no new charges. He's not being sentenced here today based on drug charges. He's being sentenced here today based on his woeful failure to follow this Court's orders and conditions.

And the question we have to have -- the question being asked by Mr. Patton is, Are we going to throw up our hands and say those conditions are meaningless? Because if that's what we're going to do, then we should stop imposing any conditions.

MR. PATTON: I'm fine with that.

MR. MILLER: If the Court -- and I understand you are. But if the Court is imposing conditions to help a defendant succeed, there is both a carrot and a stick. And the carrot here is what Probation did throughout this case. They worked with him; they got him treatment; they put him in counseling.

And there's also a stick. There's drug testing. And, unfortunately, he didn't take the carrot all the way to the finish line, and instead we have, in this case, the stick to hopefully, when he gets back out, to say, *I'm going to take the carrot, and I'm not going to take the stick*.

So, that's the point I wanted to address.

The other point, Your Honor, that goes into the deeper questions as far as what good is it doing to imprison people for certain one of these offenses, and an argument can certainly be made when we did have those, the time period he's talking about in the early 2000s, I can say right around in our district our rates of both overdose deaths and our rates of homicides were incredibly lower than they are now. And where we are now is we see people dying of fentanyl overdoses; we see people being shot on the streets, and a lot of it is drug-related, Your Honor. And I understand Mr. Patton's argument would be just give people social services. That's not the position of those in the prosecutor's office, that we can simply give everybody who decides to violate the law social services without having, as we put it, the carrot and the stick.

And so that's our position, Your Honor.

THE COURT: All right. Thank you.

Did you have some other comment?

MR. PATTON: I would just note that Mr. Cotton wasn't shooting people in the streets or overdosing on fentanyl.

THE COURT: All right. The Court adopts the factual findings and guideline application as contained in the presentence report, except for the change that was made.

I appreciate that Mr. Patton's not suggesting that my sentences -- in imposing my sentences I'm acting with evil intent because I've been a judge in this court for 40 years. Some of that time was before the guidelines, some of it during the period when the guidelines were mandatory, and since then when they were not mandatory. I've always tried to take my responsibilities regarding sentencing as very serious.

I often say, when I first took this job, I thought, gee, this -- the sentencing's going to be easy because I was a prosecutor at one time and then a defense lawyer for a shorter period of time, so I know all about that. And, of course, once I got here and started doing it, I realized it wasn't

easy at all. And then, of course, the enlightenment came to me at that time and many times since, it's not supposed to be easy. If it were easy, then I shouldn't be doing it.

The arguments about what other judges have done in other parts of the country, I acknowledge the reality maybe of differences in statistics. I know judges, when the guidelines were mandatory, who always departed below the guidelines even if they had really no reason to do it, and their Court of Appeals would back them up on it. If I ever was forced to, I could give examples.

I remember being at a -- being a lecturer at a school for new judges one time when the guidelines were mandatory, and there were about 30 new judges there, and one of the judges raised their hand, and she said, *Well, you know, I have all these situations where the guidelines are way up here, and I want to impose a sentence way down there. So what am I supposed to do?*

And I said, *I'll take that.* And I said, *Well, there may be circumstances where you can justify going below where the guideline is, but otherwise, you basically got two choices: Either impose the sentence that's required by law or resign your*

commission.

And when I said that, then one of the other judges said, *Wait a minute. Wait a minute. You can always find a way to go below the guidelines. Always.*

So, I guess I'm just saying this to try to make it clear that different judges have different views.

I always try to impose the sentence that I think is the correct one. I don't know what the statistics are, but my guess is that I normally impose a sentence that's below the guidelines, probably 70 or 80 percent. Maybe not dramatically, but -- so, I try to do what I believe is right under the circumstances based on the facts and the law.

In this case --

MR. PATTON: Your Honor, if I could, Mr. Cotton hasn't had his --

THE COURT: Oh, I apologize. Thank you.

Mr. Cotton, sir, you certainly have an opportunity now to make a statement to the Court on your own behalf before I impose sentence.

THE DEFENDANT: Yes, sir.

THE COURT: Would you like to say something?

THE DEFENDANT: Yes, sir. I basically -- I don't think I realized until after I did the 14 years I did in prison that I had changed as much as I really did. But I didn't realize also that it was -- I don't think nobody would really understand how hard it was.

I didn't even understand how the world changed so much. It was -- that I wasn't adapting to, and I couldn't really keep up with like appointments and, and all these different things I had to do. I mean, I did way better than I thought even from staying away from people and crowds and my past and stuff like that.

I knew for sure I would never sell drugs again, but I never thought that I would kind of turn into almost like a -- to using drugs. And I don't know -- you know, talking to the drug counselors in Danville was really good. Parole Officer Alisha Waite, I thought she was mean at first, but she was trying to help.

Actually, I kind of figured out I had an issue kind of with just maybe from repeatedly doing the same things over and over and over in prison, where it didn't take much thought for my day, to where when I got out, I had to either -- somebody had to

help me do everything. I didn't know how to use a phone at all. I just got almost like -- there was almost a time where I didn't want to turn myself in, when I knew they was looking for me, I found I had an issue with -- I kind of got an issue now still with kind of even talking, staying on the same page. I can't really keep up with a lot.

But, yeah, I just had issues. I didn't like not go places that I was supposed to go intentionally; I just couldn't remember sometimes. I'd be even on the way there and forget on the way there where I was going or something. I don't know if it's -- I don't know why. I didn't realize that at first, but I don't know if it's because of so many years of doing the same repeatedly things in prison, but I know it took until almost a year to figure out like what kind of job. You know, I was delivering for Wal-Mart, and that was about the best thing that I could do because I didn't have to be at a certain time exactly they had to be there, and I could still be kind of free moving around at the same time and away from people. I didn't really like to be around a lot of people either.

But, but I did start using drugs, and people was -- a lot of people was surprised because it

wasn't really -- before, I did sell drugs, from probably the age of 14 all the way up to this federal case I caught. But -- and, you know, that's just about -- I could probably talk for an hour about my life, but basically I didn't really mean the -- the hardest thing I ever did was turn myself into the jail for four weekends. And even Mr. Bice, he said, *You really did every weekend?* He said, *You went in there?*

I said, *Yeah, I did.* And I couldn't believe myself I went in there. Definitely don't like to be in jail. People think it's easy to do once you've been there so much, but I don't know about everybody else, but I definitely can't even really take the -- I gotta go back into this county here again or whatever.

But got some issues that I didn't come out perfect, but I definitely was a lot better than people would think.

And that's about all I can think of right now.

THE COURT: All right. Thank you very much.

Well, you did receive a reduction. You got out. Soon after, you started violating, using, failing to report. Some of the samples you gave were diluted. The patches -- one or more patches

were compromised. That kind of activity, as far as I'm concerned, goes beyond just having a little trouble getting your footing or forgetting something. If you diluted a sample or compromised your patch, you knew exactly what you were doing. And then -- and failure to attend. Then you get the four weekends in jail.

I would think, having spent all that time in prison earlier, that this four weekends in jail would have been a real wake-up call for you. You said you didn't want to go in and turn yourself in; I fully understand that. But you did. And you had to do that because of these violations that we were -- you were committing. But even after that, when you got out, there were additional. And then you fell off the map. And then when you were found, you had a kilo of marijuana on you.

With all due respect, I think that's more than just having trouble finding your way. There's some very intentional decisions involved here.

So, I do have a duty to impose a sentence that reflects the seriousness of the offense, promotes respect for law, provides just punishment, provides adequate deterrence to others and to you. And I think the last part in your case is important, to

make one additional effort to get your attention because I'm not sure that we have it totally yet.

Frankly, if I had ruled on -- in the other way on this earlier matter, I'm pretty confident I would have imposed a sentence above 24 months, but having determined that the proper maximum is 24 months, I believe that that is the appropriate sentence.

Supervised release is revoked. It is the judgment of the Court that you be committed to the custody of the Bureau of Prisons for a term of 24 months. That will consist of 24 months on each of Counts I and II to be served concurrently.

Following your release from custody, you shall serve a 36-month term of supervision consisting of 36 months on Counts I and II to be served concurrently.

While on supervision, you shall not commit another federal, state or local crime. You shall not possess a controlled substance.

You shall submit to one drug test within 15 days of release and at least two drug tests thereafter as directed. You shall cooperate in the collection of DNA as directed.

The probation office provided both sides with

detailed -- proposed detailed conditions of supervision.

Mr. Patton, did you have an opportunity to carefully go over those with your client?

MR. PATTON: I did, Your Honor. Yes.

THE COURT: Is there any objection?

MR. PATTON: Your Honor, we're objecting to the last one, the cognitive behavioral therapy, and just for this reason alone: It is very difficult for Mr. Cotton to get to appointments in between drug treatment, drug testing and other stuff. I would suggest that it's just -- the burden that would place on him to go and get to that is greater than any benefit that he would receive from it.

THE COURT: Actually, I think, based on everything I know about him, that this is especially important. I'm not blowing off the --

MR. PATTON: I understand.

THE COURT: -- idea that he may -- that he will have problems, and I certainly expect that Probation -- that he needs to make Probation aware of those problems as they come up, not after he, you know, is thrown out of a program or something because he didn't go to class.

You've got to let people know what your

problem is, and based on my years of experience, I believe Probation will help you work those out.

So, I'm going to deny that objection.

MR. PATTON: Then we've gone over all of them, both the language of the conditions and the reasons for the conditions, and we would waive the Court's reading of those.

THE COURT: Thank you.

MR. MILLER: We would as well, Your Honor.

THE COURT: Okay. So, I am going to impose each and every one of these. I think they're all important if there's to be any hope of your successfully completing your supervised release, so they are ordered.

You do, of course, have the right to file a notice of appeal in this case. If it is your wish to appeal, I instruct you that any notice of appeal must be filed with the clerk of the court within 14 days of today's date. As your attorney, Mr. Patton has an absolute responsibility to file that notice for you if that is your wish.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you have any recommendations for the Bureau of Prisons?

MR. PATTON: If I can have a moment?

(Defense counsel and the defendant conferred off the record.)

MR. PATTON: FCI Greenville, please, Your Honor.

THE COURT: Okay. I'll recommend that.

Recommend that you be allowed to participate in whatever drug treatment, mental health counseling, vocational and educational opportunities can be made available to you.

Anything else?

MR. MILLER: No, Your Honor. Thank you.

THE COURT: All right. I hope the government appeals this.

MR. MILLER: Thank you.

THE COURT: All right. Thank you.

Oh, this medical report, I assume -- I think that should stay sealed.

MR. PATTON: Yes, sir.

COURTROOM DEPUTY: Thank you.

MR. MILLER: No objection.

THE COURT: Thank you.

I want to thank both sides. Your papers and your arguments were really good. Thank you.

MR. MILLER: Thank you, Your Honor.

MR. PATTON: Mr. Drysdale did it from our side, Your Honor.

(Proceedings concluded at 11:27 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Jennifer E. Johnson, CSR, RMR, CBC, CRR, in and for the United States District Court for the Central District of Illinois, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 7th day of March, 2023.

/s/ Jennifer E. Johnson
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