No. 24-

IN THE

Supreme Court of the United States

IN RE

JAMIE VARIEUR,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Petitioner Jamie Varieur appealed her probation revocation sentence on the grounds that her prior attorney provided ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), by failing to present arguments or objections relating to two discrete issues. The government then filed a response brief in which it did not acknowledge the petitioner's presented *Strickland* claims. Instead, the government purported to respond to two frivolous Sixth Amendment arguments the petitioner did *not* present. The petitioner subsequently filed a reply brief in which she explained that the government had overlooked and misrepresented her arguments.

Pursuant to the petitioner's request for an expedited appeal, the case was submitted without oral argument. The Court of Appeals for the Second Circuit ultimately entered a "summary order" that does not acknowledge the petitioner's *Strickland* claims but instead resolves the non-presented arguments described in the government's response. The petitioner filed a timely petition for rehearing in which she explained that the summary order overlooks her presented arguments and contains no indication that her briefs were reviewed in connection with the determination of her appeal. The Second Circuit denied the petition through a brief order that likewise does not acknowledge the petitioner's arguments.

The question presented is whether, as a matter of procedural due process, a writ of mandamus directing the Second Circuit to consider and issue a decision on the points presented in the petitioner's appellate briefs is warranted.

STATEMENT OF RELEATED PROCEEDINGS

United States v. Varieur, No. 24-985-cr (L), 24-2967-cr (Con), U.S. Court of Appeals for the Second Circuit. Summary Order and Judgment issued February 28, 2025; petition for rehearing denied April 25, 2025.

United States v. Varieur, No. 1:22 Cr. 56 (AMN), U.S. District Court for the Northern District of New York. Judgment entered November 30, 2022; Judgment for Revocation of Probation entered April 5, 2024.

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PETITION FOR A WRIT OF MANDAMUS

Jamie Varieur respectfully petitions this Court for a writ of mandamus directing the Second Circuit to consider and issue a decision on the two *Strickland* claims presented in her appellate briefs, rather than the frivolous claims falsely attributed to her in the government's response brief.

INTRODUCTION

The Second Circuit's failure to provide sufficient protection against arbitrary adjudication in cases involving indigent criminal defendants-appellants has reached the point where presented arguments on appeal may not even be acknowledged, let alone carefully considered and resolved, unless they have been accurately summarized in a government-appellee brief.

By issuing a "summary order" that amounts to little more than an executive summary of the government's filing in this case, the Second Circuit not only overlooked relevant facts and authorities, it entirely overlooked half of the petitioner's appeal and issued decisions on claims that were not presented to it. This particularly conspicuous form of "arbitrary and inaccurate adjudication," *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994), warrants the issuance of a writ of mandamus under 28 U.S.C. § 1651(a), where the absence of such relief would prevent the petitioner's presented arguments from *ever* being considered by a reviewing court and would encourage similar outcomes in future appeals.

OPINIONS BELOW

The Second Circuit's non-reported summary order affirming the district court judgment is available at 2025 WL 655582, and is attached at App. 1a-8a. The district court's non-reported order denying the petitioner's motion for a modification of sentence is attached at App. 9a-20a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 28, 2025. App. 1a. The Second Circuit denied a timely petition for rehearing on April 25, 2025. App. 28a. This Court's jurisdiction is invoked under 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 7(3): Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 13(a): Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 3553(a)(6): The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.

N.Y. Penal Law § 140.15(1): A person is guilty of criminal trespass in the second degree when . . . he or she knowingly enters or remains unlawfully in a dwelling[.] . . . Criminal trespass in the second degree is a class A misdemeanor.

N.Y. Penal Law § 60.01(2)(d): In any case where the court imposes a sentence of imprisonment not in excess of sixty days, for a misdemeanor or not in excess of six months for a felony or in the case of a sentence of intermittent imprisonment not in excess of four months, it may also impose a sentence of probation or conditional discharge provided that the term of probation or conditional discharge together with the term of imprisonment shall not exceed the term of probation or conditional discharge authorized by article sixty-five of this chapter. The sentence of imprisonment shall be a condition of and run concurrently with the sentence of probation or conditional discharge.

N.Y. Penal Law § 65.00(3)(b)(i): For a class A misdemeanor, other than a sexual assault, the period of probation shall be a term of two or three years[.]

N.Y. Penal Law § 70.15(1): A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed three hundred sixty-four days.

STATEMENT OF THE CASE

I. Proceedings Before the District Court

The United States District Court for the Northern District of New York had subject matter jurisdiction over this case pursuant to 18 U.S.C. § 3231.

Amendment 821 to the U.S. Sentencing Guidelines went into effect nearly five months before the petitioner's probation revocation proceeding, and there is no dispute that Part A of that amendment lowered the guidelines range applicable to the petitioner's underlying assimilated offense. However, the petitioner's prior attorney did not raise a sentencing argument under 18 U.S.C. § 3553(a)(6) relating to the fact that, even if the district court was not required to consider the reduced guideline range in determining a sentence for probation violations, nearly all other criminal defendants in the federal system with similar records who have been convicted of similar conduct *are* entitled to benefit from Amendment 821-based criminal history calculation reductions.

Moreover, even though the petitioner was convicted under the Assimilative Crimes Act ["ACA"] for committing a New York State misdemeanor that carries a maximum punishment of either 364 days' imprisonment *or* a combined prison-and-supervision sentence of up to 60 days' imprisonment and two or three years of probation, the district court imposed a combined sentence of 364 days' imprisonment and one year of supervised release, and the petitioner's attorney did not raise a timely objection based on the ACA's "like punishment" requirement. 18 U.S.C. § 13(a). *See United States v. Sharpnack*, 355 U.S. 286, 291 (1958) (noting

that various ACA "re-enactments demonstrate[] a consistent congressional purpose to apply the principle of conformity to state criminal laws in punishing most minor offenses committed within federal enclaves.").

A. The 2022 Guilty Plea and Probation Sentence

On July 6, 2022, the petitioner pled guilty to an assimilated trespassing misdemeanor, in violation of the ACA and New York Penal Law ["P.L."] § 140.15(1). C.A. App. 60; 93. The petitioner's underlying offense conduct "consisted of breaking a window and entering a Veterans Affairs facility to steal food." App. 10a. *See* C.A. App. 18, 24.

Under New York law, the relevant trespassing offense is punishable by: (1) a maximum of 364 days' imprisonment; or (2) a maximum of 60 days' imprisonment with a concurrent probationary term of "two or three years." P.L. §§ 60.01(2)(d), 65.00(3)(b)(i), 70.15(1). However, the 364-day maximum jail sentence under P.L. § 70.15(1) was the only state sentencing provision discussed in connection with the district court proceedings below; the relevant New York statutory limitations on combined sentences of incarceration and supervision were not mentioned by the petitioner's assigned counsel, the government, the Probation Office, or the district court. Indeed, while the government's November 8, 2022 sentencing memorandum observed that the ACA "requires that a federal offender receive a 'like punishment' to that available under state law for the same offense," and that a term of federal supervised release "is 'like' New York State parole . . . for purposes of the ACA," the government nevertheless argued that "[t]he application of the ACA to assimilate

New York State law does not alter this Court's statutory authority to impose a term of supervised release of up to one year" under 18 U.S.C. § 3583(b)(3). C.A. App. 97-99. The petitioner's attorney did not object to that statement or otherwise reveal an awareness of the relevant New York sentencing provisions permitting a supervisory "probation" sentence only *if* the imposed jail sentence does not exceed 60 days.

With respect to the sentencing guidelines calculation, a Presentence Investigation Report issued on September 16, 2022 noted that the petitioner would ordinarily have five criminal history points, but two "status points" were added under the then-effective version of U.S.S.G. § 4A1.1(d) because the petitioner was serving a term of probation imposed by the Sidney, New York Village Court at the time of the charged trespassing offense. PSR ¶¶ 44-45. Accordingly, the Probation Office determined that the petitioner fell within criminal history category IV, rather than III, *id.* at ¶ 46, a determination that increased the advisory sentencing range from 0-6 months to 2-8 months. U.S.S.G. Chapter 5, Part A (Sentencing Table).

At the outset of the November 29, 2022 sentencing proceeding, the district court observed that there were no objections "to either the factual content of the presentence report or the scoring of the guidelines, which in this case reflect a level 4, criminal history category 4, with an advisory guideline range of two to eight months, [a] supervised release range of one year, [and a] probation range of one to three years." C.A. App. 117. After hearing arguments from counsel and a personal statement from the petitioner, the district court imposed a sentence of time served and three years of probation. *Id.* at 124.

B. The 2023 Enactment of U.S.S.G. Amendment 821

On April 5, 2023, the U.S. Sentencing Commission voted to promulgate Amendment 821 (Part A) to the sentencing guidelines and thereby "eliminat[e] Status Points for those with six or [fewer] criminal history points."[1] Amendment 821 took effect on November 1, 2023.[2]

On November 15, 2023, the Northern District of New York issued an Order appointing the Office of the Federal Public Defender, who represented the petitioner before the district court, "to represent any defendant previously determined to have been entitled to appointment of counsel . . . to determine whether that defendant is eligible for a reduced sentence and to seek relief" under Amendment 821.[3] Approximately 18 months later (as of the morning of this filing), a Westlaw search for all cases within the Second Circuit containing the term "Amendment 821" returns 263 results—*none* from the Northern District.

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[1] United States Sentencing Commission, 2023 Amendments in Brief – Amendment #821 - Criminal History, *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/amendments-in-brief/AIB_821R.pdf.

[2] United States Sentencing Commission, Part A of the 2023 Criminal History Amendment Retroactivity Data Report, 1 (July 2024), *available at* https://www.ussc.gov/sites/ default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202407-CH-Retro-Part-A.pdf. The Commission subsequently promulgated Amendment 825 in order to make Amendment 821 retroactively applicable for defendants sentenced prior to November 1, 2023. *Id*. at 1-2.

[3] United States District Court for the Northern District of New York, Application of Retroactive 2023 Criminal History Elements to the Sentencing Guidelines – Standing Appointment Order, *available at* https://www.nynd.uscourts.gov/sites/nynd/files/Amendment%20821%20Standing%20Order%20%28002%29.pdf.

C. The 2024 Probation Revocation Sentence

On February 21, 2024, the Probation Office filed a "Petition for Warrant or Summons" alleging that the petitioner committed two "Grade C" probation violations. C.A. Sealed App. 5-6. The petition included a "Violation Guideline Calculation" advising that the applicable "range of imprisonment" is the "Guideline Range at [the] time of original sentencing (2-8) months." *Id.* at 8. In addition, the Probation Office asserted (twice) that:

> If probation is revoked, the Court may sentence the defendant up to the maximum statutory sentence available for the offense of conviction, in this case 364 days, pursuant to 18 U.S.C. § 3565(a). If a term of imprisonment is imposed, the Court may impose a term of supervised release of not more than 1 year, pursuant to 18 U.S.C. § 3583(b). Notably[,] the guideline range at the time of the offender's original sentencing was 2 to 8 months.

Id. at 8, 11. The parties appeared in court the following day, and counsel for the government advised that:

> [I]f the probation is revoked, . . . and a term of imprisonment is imposed, the Court may impose an additional term of supervision of not more than one year. But I would note that the guideline range for this offense[,] which becomes the guideline range for this supervised release [sic] case[,] is approximately two to eight months.

C.A. App. 140 (emphasis added).

On March 22, 2024, the petitioner's case was reassigned to a different district court judge. C.A. App. 6. One week later, the petitioner appeared in court and admitted to the two alleged probation violations. *Id.* at 171. After hearing arguments from the parties, the district court proceeded to impose sentence:

> The probation office has found and the Court agrees that the violation constitutes a grade C violation, and your criminal history category is 4.

> Therefore, in accordance with the policy statements set forth in the United States Sentencing Guidelines Chapter 7B1.1 and 4, the Court finds that your guideline imprisonment range is 6 to 12 months. *The statutory maximum term of imprisonment is 365 days* pursuant to 18 United States Code Section 3565(a), which is based on the underlying offense of conviction. . . . *[I]t is the judgment of the Court that you are hereby committed to the custody of the Bureau of Prisons for a term of 12 months.*

Id. at 196-97 (emphasis added). The district court then explained that it "chose a sentence at the high end of the applicable guideline range and finds the sentence is sufficient to meet the goals of sentencing[.]" *Id.* at 197. Finally, after imposing and explaining the prison sentence, the district court stated: "Upon your release from imprisonment, you shall be placed on supervised release for a term of 12 months." *Ibid.*

The petitioner's attorney did not raise an objection to any aspect of this sentence. However, before the hearing was adjourned, counsel for the government interjected to offer a correction, which the district court accepted, based on the fact that a 12-month prison sentence is greater than the 364-day maximum permitted "due to a nuance in the fact that this is an assimilated crime." C.A. App. 202.

II. Appellate Proceedings

A. The Petitioner's Motions for a Remand, for a Modification of Sentence, and for an Expedited Appeal

The Court of Appeals for the Second Circuit had subject matter jurisdiction over the petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3472(a). After the petitioner filed a timely notice of appeal from the probation revocation

sentence, the undersigned was assigned as substitute appellate counsel under the Criminal Justice Act, 18 U.S.C. § 3006A.

On July 12, 2024, the petitioner filed a motion for a remand to the district court "for resentencing in accordance with [Amendment 821], or for alternative relief." C.A. Mot. 1. The petitioner's motion observed that, "[a]t no point before, during or after [the probation revocation] proceeding did the district court or counsel for either party mention Amendment 821 or its potential effect on [the petitioner's] Criminal History Category." *Id.* at 4. In addition, the petitioner noted that her prior attorney did not "raise an objection to the imposition of the statutory maximum custodial sentence *plus* one year of post-release supervision on the grounds that a 'like punishment' under § 13(a) could not have been imposed under New York law." *Id.* at 5-6 (citing *United States v. Marmolejo*, 915 F.2d 981, 985 (5th Cir. 1990)). In light of these deficiencies, the petitioner argued that "a summary remand for resentencing is appropriate, . . . as that is the best and perhaps only reliable means of affording her an opportunity, before time runs out on her prison sentence, to seek relief based on an empirically supported [g]uidelines amendment that has already been applied to thousands of other federal inmates." *Id.* at 8.

The government opposed the petitioner's motion for a remand on the grounds that "Amendment 821 did not require recalculation of Varieur's original criminal history category for purposes of determining the imprisonment range under U.S.S.G. § 7B1.4 (Revocation Table)." C.A. Mot. Opp'n 1. However, the government

also conceded that the district court could have considered Amendment 821 as a factor supporting a downward variance from the applicable guidelines range:

> The government agrees that had Varieur been sentenced for the original offense today, the elimination of "status points" under Amendment 821 would have reduced [her] criminal history category from IV to III. Ideally, at the revocation hearing below, the district court would have heard arguments from the parties concerning Amendment 821 and considered whether it supported varying from the imprisonment range recommended by the Revocation Table at U.S.S.G. § 7B1.4, even if it did not alter the applicable range itself.

Id. at 6.

On September 23, 2024, the petitioner filed an emergency motion in the district court "for a modification of sentence under 18 U.S.C. § 3582(c) and U.S.S.G. Amendments 821 and 825." C.A. App. 211-17. Among other things, the petitioner observed that "it appears unlikely that the Court of Appeals will decide Varieur's motion for a remand until she has completed so much of her imposed term of imprisonment that the resentencing proceeding sought therein could not provide her the benefit she would have received if either of the parties had drawn this Court's attention to Amendment 821 [at] or before the . . . probation revocation proceeding." *Id.* at 215.

In opposing the emergency § 3582(c) motion, the government argued that Amendment 821 does not apply to probation revocation proceedings. C.A. App. 230. However, the government reiterated its prior concession regarding the fact that the district court could have considered Amendment 821 in determining whether a variance from the calculated guideline range was appropriate:

> The government acknowledges that, had Varieur been sentenced today for the original offense (i.e., not for violating her probation), the elimination of 'status points' under Amendment 821 would have reduced her criminal history category from IV to III, . . . Even if Amendment 821 did not alter the applicable imprisonment range recommended by the Revocation Table at U.S.S.G. § 7B1.4, the Court could have considered that information when imposing its sentence in these revocation proceedings in March 2024.

C.A. App. 235.

The Court of Appeals subsequently denied the petitioner's motion for a remand "without prejudice to renewal should the district court issue a favorable indicative ruling on the pending . . . § 3582(c)(2) motion[.]" The district court subsequently denied the petitioner's § 3582(c) motion on the grounds that modifications of sentence "based on amendments to the guidelines have no application to the term of imprisonment imposed upon a defendant's violation of the terms of his supervised release" or probation. C.A. App. 257 (cleaned up).

On November 15, 2023, the petitioner filed a motion in the Second Circuit "for an expedited briefing schedule and an expedited decision to account for the fact that [the petitioner] is due to complete her custodial sentence and begin serving a term of supervised release in less than six weeks." C.A. Mot. 1. That motion was granted on November 19, 2024.

B. The Petitioner's Principal Brief on Appeal.

The petitioner filed a timely notice of appeal from the district court's denial of her § 3582(c) motion, and that appeal was consolidated with her previously docketed appeal from the probation revocation sentence.

Two questions were presented in the petitioner's opening brief to the Second Circuit. First, the petitioner argued that the district court "misapprehended relevant principles of law when it determined that Amendment 821 . . . does not apply to probation revocation proceedings." C.A. Br. 1. The Second Circuit ultimately determined that this argument was moot because the petitioner completed her prison sentence before the court's decision was issued. App. 4a-5a.

Second, the petitioner's opening brief presented the question of whether she received ineffective assistance of counsel under *Strickland*:

> where her [prior] attorney failed to raise an argument relating to Amendment 821 and also failed to raise an argument or objection relating to the fact that the [ACA] . . . precludes the imposition of a more severe combined sentence of imprisonment and post-release supervision than New York State has authorized for the class A misdemeanor to which she pled guilty.

C.A. Br. 1.

1. The First Presented *Strickland* Claim, Relating to Trial Counsel's Failure to Raise an Amendment 821-Related Argument Under 18 U.S.C. § 3553(a)(6).

With respect to the first presented *Strickland* claim, the "summary of the argument" set forth in the petitioner's opening brief asserts that:

> [T]rial counsel failed to raise an argument relating to Amendment 821, which had been in effect for nearly five months and was plainly applicable to [this] case. Even if the district court had only agreed to consider the amendment as a relevant factor under § 3553(a)(6), there is a reasonable probability that a timely and relevant argument would have affected the sentence imposed.

C.A. Br. 30-31. The "argument" section of the petitioner's brief then states:

> Even if it were true that . . . [A]mendment [821] cannot affect the guidelines range or ranges that are arguably applicable to probation

> revocation sentences, . . . the fact that all other criminal defendants in the federal system "with similar records who have been found guilty of similar conduct" are subject to lower guidelines ranges as a consequence of Amendment 821, § 3553(a)(6), is a highly relevant fact that should have been brought to the district court's attention.

Id. at 38-39 (internal quotation omitted). The petitioner's opening brief then emphasized that *the government itself* had previously argued that the district court "[i]deally . . . would have heard arguments" relating to Amendment 821 and "considered whether it supported varying from the imprisonment range . . . even if it did not alter the applicable guideline range itself." C.A. Br. 21 (quoting C.A. Mot. Opp'n 6). *See supra* pp.10-12.

The petitioner's opening brief did *not* include a claim, or even a suggestion, that her prior attorney provided ineffective assistance of counsel by failing to argue, at the time of the probation revocation proceeding, that the district court was required to consider the reduced guideline range applicable to her underlying offense, or that Amendment 821 somehow applied to the sentencing range recommended under U.S.S.G. § 7B1.4. *Contra* App. 5a-6a.

2. The Second Presented *Strickland* Claim, Relating to Trial Counsel's Failure to Object to a More Severe Combined Sentence of Imprisonment and Post-Release Supervision than Permitted Under the Assimilative Crimes Act and New York law.

Turning to the second *Strickland* claim presented on appeal, the "summary of the argument" in the petitioner's opening brief asserts that "counsel failed to raise an argument or objection relating to the ACA's 'like punishment' requirement and relevant provisions of New York State sentencing law, which forbid the imposition

of a prison sentence of more than 60 days *plus* a term of post-release supervision." C.A. Br. 31. The relevant "argument" section of the opening brief then states that:

> If . . . trial counsel had raised an appropriate argument or objection relating to the incarceration and probationary sentences [the petitioner] could have lawfully received for a P.L. § 140.15(1) violation in New York State court, there is at least a reasonable probability that [she] either: (1) would not have received the maximum available prison sentence *plus* a term of post-release supervision; or (2) would have received a 'split sentence' of up to 60 days [of] imprisonment followed by two or three years of supervised release.

Id. at 40-41. The petitioner's opening brief explains that this is because "[t]he parties here agree that New York probation and federal supervised release are 'like' punishments under the ACA," and because the Second Circuit previously held, in *United States v. Vaughan*, 682 F.2d 290, 294 (2d Cir. 1982), that "the word 'punishment'" in § 13(a) "has a broad and inclusive meaning," and that "federal prosecutions under the [ACA] should reflect local policies of the various states." *Id.* at 41-42. *See also Lewis v. United States*, 523 U.S. 155, 160 (1998) (citing *Sharpnack*, 355 U.S. at 291, 293).

In concluding the relevant portion of her opening brief, the petitioner argued that, "[l]ike the 364-day maximum incarceration sentence the district court accepted here, even when it wished to impose a full year of imprisonment in accordance with federal law," *see supra* p.9, the relevant New York sentencing provisions "merely limit[] the extent of the combined incarceration-plus-supervision sentence that may be imposed," and are thus "little different from 'a state statute that fixes [only] the length of a prison term.'" C.A. Br. 49 (quoting *Vaughan*, 682 F.2d at 294).

At no point did the petitioner argue that the ACA's "like punishment" requirement would have, if mentioned by her prior attorney, precluded the district court from imposing any sentence of supervised release. *Contra* App. 7a.

C. The Government's Response Brief

The government's response brief presented detailed arguments in opposition to the petitioner's first point on appeal, relating to the district court's denial of her emergency motion for a modification of sentence under § 3582(c). C.A. Resp. 28-48. As the government noted, that point would become moot eight days after the government filed its brief, when the petitioner was projected to complete her prison sentence. However, the government did *not* respond to either of the petitioner's two presented ineffective assistance of counsel claims. Instead, the government purported to oppose two frivolous *Strickland* arguments that were not raised in the petitioner's opening brief.

First, the government did not address the petitioner's argument relating to her prior attorney's failure to argue for a sentencing variance under § 3553(a)(6). *See* C.A. Br. 38-39. *Indeed, the government's response did not mention § 3553(a)(6).* Nor did the government offer any acknowledgement of the fact that it previously conceded, in two separate court filings, that the district court properly could have considered Amendment 821 as a factor supporting a downward variance. *Supra* pp.10-12. Instead, the government falsely asserted that the petitioner had instead asked the Second Circuit to decide whether her prior attorney provided ineffective assistance of counsel by failing to argue that Amendment 821 affected the § 7B1.4

"policy statement" applicable to probation revocation proceedings. *See* C.A. Resp. 59-60.

Second, the government did not acknowledge the petitioner's argument relating to her prior attorney's failure to object to the imposition of "a more severe combined sentence of imprisonment and post-release supervision than New York State has authorized for the class A misdemeanor to which she pled guilty." C.A. Br. 1. Instead, the government presented an extensive response to the non-presented question of "whether a district court sentencing a defendant for an assimilated crime under the ACA can impose a term of federal supervised release where the underlying state statute does not authorize it." C.A. Resp. 53. *See id.* at 51-55, 60-62. In addressing this hypothetical issue, the government did not mention the fact that the parties had previously agreed that "probation" under New York law and federal supervised release are "like" punishments within the meaning of § 13(a). C.A. App. 98-99; C.A. Br. 42.

D. The Petitioner's Reply Brief

In her reply brief to the Second Circuit, the petitioner noted that the government had conspicuously "decline[d] to respond" to her presented § 3553(a)(6) argument. C.A. Reply 9. This and other related facts were presented under a bold-faced section heading that states: "**Even if Amendment 821 did not affect the Guidelines calculation, it should have been raised and considered as a relevant sentencing factor under § 3553(a)(6).**" *Id.* at 8.

The petitioner's reply brief also noted that the government's response "does not even attempt to explain why the applicable New York State limitations on *combined terms of imprisonment and post-release supervision* are materially different from the state law 364-day maximum jail term it repeatedly invoked below." C.A. Reply 11-12. "Instead," the petitioner argued, "the government would prefer for this Court to address an entirely different question," one that is "plainly not the question at hand." *Id.* at 12. Moreover, the petitioner emphasized that "[t]he government's desire to avoid the relevant issue is accentuated by its decision to *entirely* ignore . . . *Marmolejo*, in which the Fifth Circuit explained that, 'when the applicable state law provides for parole, a sentence of imprisonment plus [federal] supervised release is "like punishment" *when the period of imprisonment plus the period of supervised release does not exceed the maximum sentence allowable under state law*.'" *Ibid.* (quoting 915 F.2d at 985) (emphasis in C.A. Reply).

E. The Second Circuit's Summary Order

On February 28, 2025, the Second Circuit issued a non-precedential "summary order" affirming the probation revocation sentence and dismissing the petitioner's appeal of the district court's § 3582(c) order as moot. App. 1a-8a.[4]

At no point did the Second Circuit address the petitioner's actual *Strickland* arguments. Indeed, like the government's response brief, *the summary order does not once mention § 3553(a)(6)* or otherwise reveal an awareness of the fact that the

[4] The Second Circuit further held that "we can resolve [the petitioner's] ineffective assistance claims on this direct appeal on the present record." App. 6a n.1.

first *Strickland* claim presented in the petitioner's appellate briefs is based entirely on the absence of a sentencing argument from her prior attorney relating to Amendment 821's impact on the sentences applicable to other federal defendants with similar criminal histories who have been convicted of similar conduct. *Supra* pp.13-14, 17. Nor does the summary order recognize that the petitioner's second presented *Strickland* claim is based entirely on the absence of an objection from her prior attorney to the district court's imposition of a more severe combined sentence of imprisonment and post-release supervision than permitted under the ACA and New York law. *Supra* pp.14-16, 18.

The Second Circuit instead considered and resolved the two frivolous *Strickland* arguments attributed to the petitioner in the government's response brief. At one point, the summary order falsely states that the petitioner "contends that she received ineffective assistance of counsel at her probation revocation sentencing because her lawyer . . . failed to draw the District Court's attention to Amendments 821 and 825[5] and to argue that the Amendments reduced the Guidelines range for her original criminal trespass conviction and thus her revocation of probation." App. 5a-6a. At another point, the summary order states: "Nor are we persuaded that Varieur's trial counsel should have informed the District Court that the Amendments lowered her criminal history category for purposes of U.S.S.G. § 7B1.4." App. 6a. In disposing of these non-presented

[5] Amendment 825 is almost entirely irrelevant to the petitioner's appeal and played no role in the arguments presented in her appellate briefs.

arguments, the Second Circuit emphasized that "[w]e have not yet addressed whether Amendment 821 reduces a defendant's criminal history category during a probation revocation proceeding." App. 7a.

The summary order then describes the petitioner's purported "argument that her lawyer provided ineffective assistance by failing to argue that the District Court was prohibited from imposing a one-year term of supervised release based on an ACA conviction for criminal trespass under New York law." App. 7a. In rejecting *that* non-presented argument, the Second Circuit noted that "[t]his Court has not even addressed whether supervised release remains available as part of a sentence for a conviction under the ACA when it is not otherwise contemplated by state law." *Ibid.* Like the government's response brief, the summary order does not acknowledge the relevant question of whether applicable New York limitations on combined terms of imprisonment and post-release supervision preclude the imposition of a supervisory sentence, by whatever name, *only if* the imposed prison term exceeds 60 days.

F. The Petition for Rehearing

The petitioner filed a timely petition for panel rehearing or rehearing *en banc*. In seeking to draw the Second Circuit's attention to her first presented *Strickland* claim, the petitioner argued that "[r]ehearing should be granted because, like the government's response brief, the [s]ummary [o]rder does not even acknowledge this presented argument." C.A. Pet. Reh'g. 1. *See id.* at 10-11. With respect to her second briefed *Strickland* claim, the petitioner noted that, "[o]nly by

reviewing the government's brief in a vacuum could one be left with the impression that Varieur instead presented . . . the argument that the district court was simply not 'entitled to impose a term of supervised release.'" *Id.* at 13 (quoting App. 7a).

On April 25, 2025, the Second Circuit entered an order that states:

> Appellant, Jamie Varieur, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.
>
> IT IS HEREBY ORDERED that the petition is denied.

App. 28a.

REASONS FOR GRANTING THE PETITION

I. As a matter of procedural due process, the Second Circuit should be required to consider and issue a decision on the arguments presented in the petitioner's appellate briefs.

"[T]he Constitution recognizes higher values than speed and efficiency," *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), and this case illustrates, as clearly as any could, why relying on government-appellee briefs to get a sense of the issues and facts relevant to a criminal defendant's appeal is a recipe for poor decision-making. While ordinarily there is no mechanism available to determine whether a court of appeals panel has reviewed anything relating to a fully briefed appeal outside of the appellee's submission, the summary order herein makes it as clear as any written decision could that it likely did not.[6]

[6] *Compare* C.A. Br. 39 ("[T]he fact that all other criminal defendants in the federal system 'with similar records who have been found guilty of similar conduct' are subject to lower guidelines ranges as a consequence of Amendment 821,

Where the right to an appeal is provided by statute, "that appeal must accord with due process." *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990) (citing *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985)).[7] Accordingly, "a criminal appellant pursuing a first appeal as of right" should be afforded the "minimum safeguards necessary to make [her] appeal 'adequate and effective.'" *Evitts*, 469 U.S. at 392 (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)). *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (confirming that the right to "a fair tribunal" applies to appellate proceedings). Just as the right to counsel on appeal "cannot be satisfied by [the] mere formal appointment" of an attorney, an appeal of right itself must be "more than a meaningless ritual," *Evitts*, 469 U.S. at 394, 395 (internal quotations omitted), resulting in a decision that does not acknowledge the appellant's presented arguments but instead resolves frivolous arguments the appellee has attributed to her. *See also* Merritt E. McAlister, *Bottom-Rung Appeals*, 91 Fordham L. Rev. 1355, 1374 (2023) (noting that the "summary" nature of an

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§ 3553(a)(6), is a highly relevant fact that should have been brought to the district court's attention."), *and* C.A. Reply 8 ("**Even if Amendment 821 did not affect the Guidelines calculation, it should have been raised and considered as a relevant sentencing factor under § 3553(a)(6)"**), *with* App. 5a-6a ("Varieur next contends that she received ineffective assistance of counsel . . . because her lawyer . . . failed to draw the District Court's attention to Amendments 821 and 825 and to argue that the Amendments reduced the Guidelines range for her original criminal trespass conviction and thus her revocation of probation."), *and* App. 6a ("Nor are we persuaded that Varieur's trial counsel should have informed the District Court that the Amendments lowered her criminal history category for purposes of U.S.S.G. § 7B1.4).

[7] Section 1291 of Title 28 provides for appeals "from all final decisions of the district courts."

appellate decision itself "may lead the litigant to question whether they have received attention or respect from the court.").

Decisions issued by appellate courts in cases involving a criminal defendant's liberty interests should amount to something more than a *précis* of the government-appellee's response brief. While this is true in all cases, even those involving indigent defendants represented by CJA counsel, it is *particularly* true where, as here, the government's brief does not acknowledge (let alone refute) presented arguments with respect to the only point on appeal that did not become moot with the passage of time. Attempts to distract appellate courts from arguments presented by criminal defendants should not so easily succeed, and this case presents "exceptional circumstances warrant[ing] [an] exercise of this Court's discretionary powers," Rule 20.1, to discourage future similar outcomes by requiring the Second Circuit to review the petitioner's appellate briefs, consider her presented *Strickland* claims, and provide an appellate review process that amounts to something "more than a meaningless ritual," *Evitts*, 469 U.S. at 395. *See Oberg*, 512 U.S. at 430 (noting that, when the absence of a procedure grounded in common law traditions "would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.").

II. There are no other adequate means for the petitioner to obtain the relief sought herein.

The petitioner made extensive, but ultimately unsuccessful, efforts to prevent the government's strategic refusal to acknowledge her presented *Strickland*

arguments from influencing the outcome of her appeal. After the government filed its response brief, the petitioner filed a reply in which she explained that the government had "decline[d] to respond" to her first *Strickland* argument and sought to have the Second Circuit "address an entirely different question" than the one she had presented in relation to her second *Strickland* claim. C.A. Reply 9, 12. After the Second Circuit issued its summary order, the petitioner filed a timely petition for panel rehearing or rehearing *en banc* in which she argued, among other things, that the order "contains no indication that [her] briefs were reviewed in connection with the panel's determination of her appeal." C.A. Pet. Reh'g 10-11.

The Second Circuit summarily denied the petition for rehearing. As such, "adequate relief cannot be obtained in any other form or from any other court," Rule 20.1, and the issuance of a writ of mandamus is now the only means through which the petitioner's presented *Strickland* claims may finally be considered and decided by the Second Circuit before she completes the imposed term of supervised release in December of 2025.[8]

III. The requested writ is in aid of this Court's jurisdiction.

Because the Second Circuit had jurisdiction over the petitioner's appeal, this Court has jurisdiction to issue a writ of mandamus under § 1651(a). *See A.A.R.P. v. Trump*, 145 S.Ct. 1034, 1034-35 (2025) (Mem.) (Alito, J., dissenting) (noting that the Court has jurisdiction under the All Writs Act "only if the court of Appeals had

[8] The petitioner was released from prison and began serving the imposed 12-month term of supervised release on December 26, 2024.

jurisdiction of the applicants' appeal[.]"). Moreover, the requested writ would be "in aid of the Court's appellate jurisdiction," Rule 20.1, which is severely undermined by the promulgation of circuit court decisions that either intentionally or carelessly misrepresent presented arguments. In this case, by failing to acknowledge the *Strickland* claims set forth in the petitioner's appellate briefs, the Second Circuit has effectively prevented her from seeking this Court's review of its decision pursuant to a writ of *certiorari*. Indeed, the petitioner could not credibly request *certiorari* review where, in her appellate reply brief and her petition for rehearing, she repeatedly disavowed the frivolous *Strickland* arguments attributed to her in the government's response brief and the summary order.

Finally, the issuance of a writ of mandamus would be likely to discourage the Second Circuit and other courts of appeals from continuing to rely primarily (or entirely) on government-appellee briefs for accurate and fair assessments of the relevant issues and arguments presented by indigent criminal defendants-appellants. This, in turn, would contribute to an improvement in the clarity and probity of government appellate briefs and the quality and credibility of circuit court decisions, thereby providing the Court a more precise view of how the law is developing and being applied in the lower courts.

IV. If mandamus is granted, the petitioner is likely to succeed on the merits of her presented *Strickland* claims.

To date, no prosecutor or court has acknowledged the petitioner's presented *Strickland* claims, much less the facts and authorities on which they are based. If those claims were to be properly considered, there is a substantial likelihood that a

careful and impartial review of the relevant issues would result in a reversal or reduction of the imposed term of supervised release.

Criminal defense attorneys have an "overarching duty to advocate the defendant's cause," *Strickland*, 466 U.S. at 688, and not only with respect to arguments that are guaranteed, at the time they are first made, to succeed. It has long been established that "[t]he proper measure of attorney performance" is "simply reasonableness under prevailing professional norms," and that a criminal defendant may establish prejudice resulting from her attorney's performance if, but for asserted unprofessional errors, there is a "reasonable probability" the outcome would have been different. *Id.* at 688, 694 (explaining that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."). Moreover, the Court has confirmed that "[a] standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules," *Rompilla v. Beard*, 545 U.S. 374, 381 (2005),[9] and has referred to American Bar Association Standards as "guides to determining what is reasonable," *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688). As such, it is worth emphasizing that

[9] The Second Circuit has previously held that "hypothetical sentencing arguments proffered by [a defendant's] new counsel, along with the district court's reference to some of them as *potentially 'effective' arguments*, suffice to undermine our confidence in the outcome of [the] original sentencing and thus to show that the reasonable-probability standard with respect to the sentencing claim was met." *Gonzalez v. United States*, 722 F.3d 118, 136 (2d Cir. 2013) (emphasis added). *See also Johnson v. United States*, 313 F.3d 815, 818-19 (2d Cir. 2002) (holding that a defense attorney's "failure to object to a sentencing calculation error that *likely* resulted in an increase in [the] defendant's period of incarceration constituted ineffective assistance of counsel.") (emphasis added).

ABA Criminal Justice Standard 4-8.3(c) confirms that "[d]efense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused." This provision reinforces the intuitive point that it is unreasonable under prevailing professional norms for a defense attorney to fail to alert a sentencing court to a relevant sentencing guidelines amendment *or* a statutory "like punishment" requirement of which the newly assigned judge plainly was unaware. *See* C.A. App. 202 (district court imposing 12-month prison sentence until corrected by counsel for the government).

If there were a good argument that it is professionally reasonable for a defense attorney to refrain, at a probation revocation and sentencing proceeding, from even mentioning a relevant, nearly-five-month-old guidelines amendment that has reduced the advisory sentencing range applicable to almost every other federal criminal defendant with a similar criminal history who has been convicted of similar conduct, the government likely would have presented that argument in its response brief on appeal.[10] And if there were viable grounds to refute the petitioner's claim that New York State *limitations on combined sentences of imprisonment and supervision*, no less than the relevant state law 364-day cap on jail sentences for class "A" misdemeanors, must apply to a federal misdemeanor

[10] In responding to the petitioner's post-sentencing motions to the court of appeals and the district court, the government repeatedly conceded that the district court could have considered Amendment 821 as a factor supporting a downward variance from the applicable guidelines range if it had been brought to that court's attention at the probation revocation proceeding. *Supra* pp.11-12.

prosecution under the ACA, and that it was therefore unreasonable for the petitioner's prior attorney to not raise a timely objection based on those limitations, the government had every opportunity to present that argument to the Second Circuit below.

The *Strickland* claims at issue are straightforward: Relevant and then-apparent sentencing arguments that a criminal defense attorney acting in accordance with prevailing professional norms would have raised, and that likely would have affected the imposed probation revocation sentence if they had been raised, were not presented to the district court. If the Second Circuit were required to consider and impartially apply the law to those presented claims before the petitioner completes her supervised release term in December of 2025, she would likely succeed on the merits.

CONCLUSION

The petition for a writ of mandamus should be granted.

Dated: May 13, 2025
New York, New York

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of February, two thousand twenty-five.

PRESENT: JOSÉ A. CABRANES,
RAYMOND J. LOHIER, JR.,
RICHARD J. SULLIVAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. Nos. 24-985-cr (L),
24-2967-cr (CON)

JAMIE VARIEUR,

Defendant-Appellant.

FOR DEFENDANT-APPELLANT:	Lucas Anderson, Rothman, Schneider, Soloway & Stern, LLP, New York, NY
FOR APPELLEE:	Alexander Wentworth-Ping, Rajit S. Dosanjh, Assistant United States Attorneys, *for* Daniel Hanlon, Acting United States Attorney for the Northern District of New York, Syracuse, NY

Appeal from a judgment and order of the United States District Court for the Northern District of New York (Anne M. Nardacci, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the April 5, 2024 judgment of the District Court is AFFIRMED, the appeal of the District Court's November 6, 2024 post-judgment order is DISMISSED as moot, and the cause is REMANDED.

Appellant Jamie Varieur appeals from a judgment of the United States District Court for the Northern District of New York (Nardacci, *J.*) sentencing her to 364 days in prison and one year of supervised release, as well as a post-judgment order insofar as it denies her motion for a sentence modification under 18 U.S.C. § 3582(c)(2). We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision.

"The federal Assimilative Crimes Act [ACA] assimilates into federal law, and thereby makes applicable on federal enclaves . . . , certain criminal laws of the State in which the enclave is located." *Lewis v. United States*, 523 U.S. 155, 158 (1998). Varieur pleaded guilty to one count of Second-Degree Criminal Trespass under New York law, a federal crime under the ACA because it took place on property owned by the United States Department of Veterans Affairs. The District Court sentenced Varieur principally to three years of probation and imposed certain conditions of probation.

Sixteen months later, Varieur admitted to violating the conditions of her probationary sentence. Prior to her admission and sentencing on the violations, the United States Sentencing Commission had promulgated Amendments 821 and 825, which, respectively, eliminated "status points" for criminal defendants with six or fewer criminal history points and applied that change retroactively. At sentencing, neither the District Court nor Varieur mentioned these Amendments or their effect on her possible sentence. The District Court calculated that Varieur's recommended sentencing range of imprisonment was six to twelve months and sentenced Varieur to 364 days in prison followed by a one-year term of supervised release. Varieur timely appealed.

On appeal, Varieur moved in this Court to remand for resentencing to permit the District Court to apply Amendment 821. Varieur then also filed a motion directly in the District Court seeking an indicative ruling for a modification of her sentence under 18 U.S.C. § 3582(c)(2) in light of Amendment 821. When the District Court denied the motion, Varieur also appealed the denial. Varieur completed her term of imprisonment in December 2024.

I. Mootness

Varieur first argues that the District Court erred when it denied her motion for a sentence modification under 18 U.S.C. § 3582(c)(2). When a defendant challenging her sentence has been released from prison while her appeal is pending, her challenge is moot even if she is still serving a term of supervised release, so long as there is "no possibility or only a remote and speculative possibility" that the district court would impose a reduced term of supervised release upon remand. *United States v. Key*, 602 F.3d 492, 494 (2d Cir. 2010) (quotation marks omitted).

That is the case here. Varieur's motion under 18 U.S.C. § 3582(c)(2) was governed by U.S.S.G. § 1B1.10, *see United States v. Erskine*, 717 F.3d 131, 135 (2d Cir. 2013), which provides that when a court cannot reduce a term of

imprisonment for practical reasons, it may terminate a term of supervised release if permitted to do so under 18 U.S.C. § 3583(e)(1), *see* U.S.S.G. § 1B1.10 cmt. 8(B). Section 3583(e)(1) in turn authorizes a termination of supervised release only if the defendant has served more than one year of supervised release. 18 U.S.C. § 3583(e)(1). Varieur, who was sentenced to exactly one year of supervised release, is thus ineligible for a sentence modification under § 3583(e)(1). Her claim under Section 3582(c)(2) is therefore moot. *Key*, 602 F.3d at 494.

"When a case becomes moot on appeal, the established practice in the federal system is to reverse or vacate the judgment below and remand with a direction to dismiss." *Hassoun v. Searls*, 976 F.3d 121, 130 (2d Cir. 2020) (cleaned up). Accordingly, we dismiss as moot Varieur's appeal of the District Court's order, vacate that order insofar as it denies her motion for a sentence modification under Section 3582(c)(2), and remand with instruction to dismiss as moot Varieur's motion under Section 3582(c)(2).

II. Ineffective Assistance of Counsel

Varieur next contends that she received ineffective assistance of counsel at her probation revocation sentencing because her lawyer (1) failed to draw the District Court's attention to Amendments 821 and 825 and to argue that the

Amendments reduced the Guidelines range for her original criminal trespass conviction and thus her revocation of probation, and (2) failed to argue that a one-year term of supervised release is not authorized under the ACA or New York law.[1]

We disagree. As to the first argument, a district court sentencing a defendant for a probation violation is neither "restricted by the original Sentencing Guidelines range applicable to his or her [underlying] crime" nor required to make a specific "departure therefrom." *United States v. Goffi*, 446 F.3d 319, 323 (2d Cir. 2006) (quotation marks omitted); *see also* U.S.S.G. § 7B1.3(b) ("[T]he applicable range of imprisonment [for probation violations] is that set forth in § 7B1.4."). Nor are we persuaded that Varieur's trial counsel should have informed the District Court that the Amendments lowered her criminal history category for purposes of U.S.S.G. § 7B1.4. "The criminal history category" relevant to sentencing for probation violations "is the category applicable at the time the defendant originally was sentenced to a term of

[1] Varieur's ineffective assistance claims, by contrast, are not moot, since we could in principle remand for plenary resentencing if we find that they are meritorious. *See Pepper v. United States*, 562 U.S. 476, 507 (2011). We conclude that we can resolve Varieur's ineffective assistance claims on this direct appeal on the present record. *See United States v. Ortiz*, 100 F.4th 112, 118 (2d Cir. 2024).

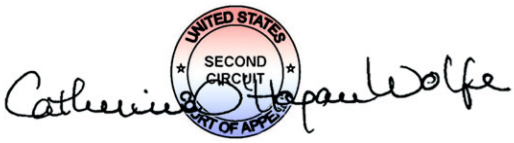
supervision." U.S.S.G. § 7B1.4(a) n.*; *see also United States v. Leon*, 663 F.3d 552, 554 (2d Cir. 2011). We have not yet addressed whether Amendment 821 reduces a defendant's criminal history category during a probation revocation proceeding. We cannot conclude that Varieur's trial counsel was ineffective for failing to raise an "open question, one not yet squarely decided either by [the Supreme Court] or this Circuit." *Parisi v. United States*, 529 F.3d 134, 141 (2d Cir. 2008).

Finally, we reject Varieur's argument that her lawyer provided ineffective assistance by failing to argue that the District Court was prohibited from imposing a one-year term of supervised release based on an ACA conviction for criminal trespass under New York law. As relevant here, Varieur was sentenced after violating the conditions of her probation, not for her underlying ACA crime. After revoking Varieur's probation and imposing a term of imprisonment, the District Court was clearly also entitled to impose a term of supervised release. *See* U.S.S.G. § 7B1.3(g)(1). This Court has not even addressed whether supervised release remains available as part of a sentence for a conviction under the ACA when it is not otherwise contemplated by state law. Accordingly, Varieur has not demonstrated, "from [her] attorney's perspective at

the time, that it was objectively unreasonable not to" raise the argument at sentencing. *Parisi*, 529 F.3d at 141.

We have considered Varieur's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED, the appeal of the District Court's post-judgment order is DISMISSED as moot, the order is VACATED insofar as it denies her motion under Section 3582(c)(2), and the cause is REMANDED with instructions to dismiss Varieur's motion as moot, consistent with this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. 1:22-cr-56 (AMN)

JAMIE VARIEUR,

Defendant.

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Hon. Anne M. Nardacci, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Presently before the Court is Defendant Jamie Varieur's ("Defendant") emergency motion for an indicative ruling, pursuant to Fed. R. Crim. P. 37(a), regarding a modification of sentence under 18 U.S.C. § 3582(c). Dkt. No. 55 (the "Motion").[1] The Government opposes the Motion, Dkt. No. 56, and Defendant filed a reply, Dkt. No. 57. For the reasons that follow, the Motion is denied.

II. BACKGROUND

On July 6, 2022, Defendant pled guilty to one count of the assimilated New York State crime of trespass in the second degree. Dkt. No. 21. Defendant's offense conduct consisted of breaking a window and entering a Veterans Affairs facility to steal food. *Id.* at 4.[2]

Prior to her sentencing, the Probation Office issued a Presentence Investigation Report. Dkt. No. 24 ("PSIR"). The PSIR allotted two additional "status points" to Defendant because she was serving a term of probation imposed by the Sidney, New York Village Court at the time of the offense. *Id.* ¶¶ 44-46. The two additional "status points" had the effect of elevating Defendant's Criminal History Category from III to IV. *Id.* Using a Criminal History Category of IV and a Total Offense Level of 4, which was separately calculated, the Guidelines Calculation advised that a sentence of 2-8 months imprisonment be imposed. *Id.* at ¶¶ 27, 46, 77.

On November 29, 2022, during sentencing, Judge Gary L. Sharpe adopted the Guidelines Calculation, which itself relied on the PSIR's calculation of Defendant's Criminal History Category, and determined that the Guidelines range was 2-8 months. Dkt. No. 28. However, Judge Sharpe imposed a lesser sentence: probation for a period of three years. *Id.*

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[1] Citations to court documents utilize the pagination generated by CM/ECF, the Court's electronic filing system. If no such pagination exists, the document's internal page number is used.

[2] This case was reassigned to the undersigned on March 22, 2024. Dkt. No. 40.

A few months later, on April 5, 2023, the U.S. Sentencing Commission voted to promulgate Amendment 821. Amendment 821 eliminated Status Points for those with six or fewer criminal history points. On August 24, 2023, the U.S. Sentencing Commission enacted Amendment 825, which made Amendment 821 retroactively applicable. The parties agree that under Amendment 821, Defendant's Criminal History Category for her initial crime would have decreased from IV to III, which in turn, would have impacted the Guidelines Calculation provided to Judge Sharpe and adopted by him. Dkt. No. 55-3 at 7.

On March 29, 2024, Defendant pled guilty to two probation violations. Dkt. No. 43. Amendment 821 was not mentioned during the revocation sentencing proceedings. After oral argument, the Court stated that "[t]he probation office has found and the Court agrees that . . . [Defendant's] criminal history category is 4. Therefore . . . the Court finds that your guideline imprisonment range is 6 to 12 months." Dkt. No. 51 at 35. The Court then imposed a sentence of 364 days imprisonment to be followed by one year of supervised release. *Id.* at 36.

On July 12, 2024, Defendant filed a motion before the Second Circuit Court of Appeals requesting a remand based on the lack of this Court's consideration of Amendments 821 and 825.

Only September 23, 2024, anticipating the Second Circuit would not soon rule on the motion requesting remand, Defendant filed the instant motion for an indicative ruling. Dkt. No. 55. Defendant requests an indicative ruling primarily on whether the court would grant relief pursuant to 18 U.S.C. § 3582(c)(2).[3] In the alternative, Defendant requests an indicative ruling on

[3] The Government appears to construe the instant motion as one in which Defendant seeks an indicative ruling on whether the Court would grant a sentence reduction pursuant to 18 U.S.C. § 3582(c) only in the alternative. Dkt. No. 56 at 1. It is unclear what the Government sees as the primary basis for Defendant's motion. As clarified in Defendant's reply, Dkt. No. 57 at 2-3, the Court finds Defendant's motion, in its entirety, is made pursuant to 18 U.S.C. § 3582(c). *See* Dkt. No. 55-1 at 2.

whether the Court would grant relief pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). On October 23, 2024, pursuant to a request made by Defendant, this Court held in abeyance Defendant's request for an indicative ruling until the Second Circuit issued a determination on Defendant's request for a remand. Dkt. No. 58.

On October 29, 2024, the Second Circuit denied Defendant's request for a remand without prejudice to renewal should this Court issue a favorable ruling on the pending request for an indicative ruling. Dkt. No. 60.

III. JURISDICTION

As to jurisdiction, when an incarcerated individual makes a motion for reduction in sentence while that inmate's appeal is pending, the district court lacks jurisdiction to grant the motion. *See, e.g., United States v. Martin*, 18-cr-834-7 (PAE), 2020 WL 1819961, at *1 (S.D.N.Y. Apr. 10, 2020). "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). However, "Federal Rule Criminal Procedure 37(a) anticipates precisely the jurisdictional issue present here." *Martin*, 2020 WL 1819961, at *1. Rule 37(a) provides that "[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Crim. P. 37(a). Rule 37(a) is commonly used to request indicative rulings on motions made pursuant to 18 U.S.C. § 3582(c) ("§ 3582(c)"). *Martin*, 2020 WL 1819961, at *1.

Thus, despite lacking jurisdiction to grant a motion pursuant to § 3582(c), Rule 37(a)

bestows this Court with jurisdiction to deny such a motion or indicate that it would grant such a motion on remand.

IV. STANDARD OF REVIEW

a. Relief Pursuant to 18 U.S.C. § 3582(c)(2)

Pursuant to 18 U.S.C. § 3582(c)(2), a defendant "who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the [United States] Sentencing Commission" may be eligible for a sentence reduction. After an appropriate motion, a "court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). One such policy statement is United States Sentencing Guidelines ("U.S.S.G.") § 1B1.10, which permits a sentence reduction when "the guideline range applicable to th[e] defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d)." U.S.S.G. § 1B1.10(a)(1). Listed therein, and effective November 1, 2023, Amendment 821 principally permits retroactive adjustments to (i) criminal history calculations for certain defendants with "status points," *see* U.S.S.G. § 4A1.1, and (ii) offense level calculations for certain defendants without such points, *see* U.S.S.G. § 4C1.1.

Whether a defendant is eligible for a sentence reduction is a threshold question under Section 3582(c)(2). If such a reduction is authorized, a court must then consider the 18 U.S.C. § 3553(a) factors in determining what sentence is appropriate. *See, e.g., Dillon v. U.S.*, 560 U.S. 817, 826 (2010) (holding that Section 3582(c)(2) "establishes a two-step inquiry. A court must first determine that a reduction is consistent with § 1B1.10 before it may consider whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in

§ 3553(a)"). Finally, a court generally cannot reduce a sentence under Section 3582(c)(2) "to a term less than the minimum term of imprisonment specified by a subsequently lowered Guidelines range." *U.S. v. Young*, 998 F.3d 43, 46 n.1 (2d Cir. 2021); *see also* U.S.S.G. § 1B1.10(b)(2).

b. Relief Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)

The First Step Act of 2018 expanded access to so-called "compassionate release," a statutory mechanism for sentence modification. *United States v. Brooker*, 976 F.3d 228, 233 (2d Cir. 2020). Pursuant to the amended statute, a court may now reduce a defendant's sentence on the defendant's own motion. 18 U.S.C. § 3582(c)(1)(A). Section 3582(c)(1)(A) authorizes a court to reduce a previously imposed term of imprisonment upon finding that "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). A court deciding a compassionate release motion can consider "the full slate of extraordinary and compelling reasons that an imprisoned person might bring before [it]." *Brooker*, 976 F.3d at 237.

Three statutory requirements must be met for a court to find the defendant eligible for such relief. 18 U.S.C. § 3582(c)(1)(A). *First*, a defendant must "fully exhaust[]" all administrative remedies with the Bureau of Prisons ("BOP"), although this requirement "is not a jurisdictional limitation." *United States v. Saladino*, 7 F.4th 120, 121 (2d Cir. 2021) (*per curiam*). *Second*, a defendant must demonstrate that "extraordinary and compelling reasons" warrant the requested sentence reduction. 18 U.S.C. § 3582(c)(1)(A)(i). *Third*, the Court must also consider whether the Section 3553(a) sentencing factors weigh in favor of a reduced sentence. 18 U.S.C. § 3582(c)(1)(A). If a court determines that any one of these requirements "is lacking, it need not address the remaining ones." *United States v. Keitt*, 21 F.4th 67, 73 (2d Cir. 2021) (*per curiam*) (citing *United States v. Jones*, 17 F.4th 371, 374 (2d Cir. 2021) (*per curiam*)). Throughout, however, "[t]he burden of showing that the circumstances warrant a sentence reduction is on the

defendant." *United States v. Fernandez*, 104 F.4th 420, 427 (2d Cir. 2024) (citing *Jones*, 17 F.4th at 375).

V. DISCUSSION

a. Indicative Ruling on the § 3582(c)(2) Motion

Again, to grant a reduction in sentence pursuant to § 3582(c)(2) "[a] court must first determine that a reduction is consistent with § 1B1.10 before it may consider whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in § 3553(a)." *Dillon*, 560 U.S. at 826. A reduction in Defendant's revocation imprisonment term is inconsistent with § 1B1.10, and thus, Defendant's motion fails at the first step of the inquiry.

A plain reading of § 1B1.10 precludes relief pursuant to § 3582(c)(2). § 1B1.10 only applies where "defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual." *Id.* The Second Circuit has previously explained that, in contrast to initial sentencings for the underlying crime, "[t]here is no sentencing guideline governing violations of supervised release." *United States v. Pelensky*, 129 F.3d 63, 69 (2d Cir. 1997). Instead "non-binding *policy statements*" govern sentencings for violations of probation and supervised release. *Id.* (emphasis added); *see also U.S. v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008) ("In formulating sentencing ranges for violations of probation and supervised release, the Sentencing Commission specifically limited itself to policy statements rather than formal guidelines").[4] Therefore, a plain reading of § 1B1.10 limits its applicability to reductions in sentences imposed for initial crimes rather than for

[4] Relevant here, § 7B1.4 provides the "policy statement" which governs terms of imprisonment for violations of supervised release/revocation.

revocation because it refers to a change in the guideline range which is inapplicable to violations of probation or supervised release.[5]

This reading is reinforced by the commentary to U.S.S.G. §1B1.10, which states, "[o]nly a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section.[6] This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release." *Id.* at n.8(a). Therefore, this Court has held that reductions based on amendments to the guidelines have "no application to the term of imprisonment imposed upon [a defendant]'s violation of the terms of his supervised release." *U.S. v. Lawrence*, 3:00-CR-269, 2009 WL 1158689, at *2 (N.D.N.Y. Apr. 28, 2009); *see also Belfon v. United States*, 10-cr-763 (DLI), 2021 WL 3054909, at *5 (E.D.N.Y. July 20, 2021); *United States v. Rosa*, No. 88 Cr. 111 (LAP), 2020 WL 5774909, at *3 (S.D.N.Y. Sept. 28, 2020). That the comment and our precedent refer to "revocation of supervised release" rather than probation is of no importance; the language is clear that the policy statement can only be utilized to reduce "a term of imprisonment *imposed as part of the original sentence*." §1B1.10 at n.8(a) (emphasis added). Defendant's revocation sentence was not "imposed as part of the original sentence," and thus, cannot be reduced through operation of §1B1.10.

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[5] Defendant argues that this plain reading is incorrect because courts may consider not just policy statements but also guideline ranges in imposing a sentence where a defendant violates a condition of probation. Dkt. No. 57 at 5 (citing Mot. Ex. C. at 2) (other citations omitted). Defendant relies on 18 U.S.C. § 3565(a)(2), which mandates that a court must consider the factors set forth in section 3553(a) "to the extent they are applicable" in imposing such a sentence. But, as made clear by the Second Circuit precedent cited by this Court, the section 3553(a) factor of "the applicable sentencing Guidelines range" is in fact inapplicable to a sentencing based on violation of probation because informal policy statements govern such sentencings. *See, e.g., Pelensky*, 129 F.3d at 69.

[6] In her reply before the Second Circuit and her reply here, Defendant argues that the commentary's focus on supervised release, rather than probation, suggests it should not be applied to limit relief here. Dkt. No. 55-4; Dkt. No 57 at 8. Defendant excludes the first sentence of Application Note 8, which explicitly limits a reduction to "the original sentence." This Court sees no reason to distinguish between supervised release and probation in this context.

Thus, § 1B1.10 precludes a reduction in Defendant's sentence through § 3582(c)(2) at step one of the required analysis, and the Court must deny the motion to the extent it seeks relief through § 3582(c)(2).[7]

b. Indicative Ruling on the § 3582(c)(1)(A) Motion

The Court also denies Defendant's request for resentencing under 18 U.S.C. § 3582(c)(1)(A).

First, an inmate must exhaust administrative remedies by requesting such relief from prison authorities. Specifically, an inmate may ask the sentencing court to consider reducing a sentence only "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). This requirement has been satisfied. According to the papers submitted by Defendant, more than 30 days has passed since Defendant requested that the Director of the Bureau of Prisons bring a motion on her behalf. Dkt. No. 55-5.

Second, a court must "consider[] the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(1)(A). Section 3553(a), in turn, lists numerous factors a court must review when imposing a sentence. These include, as most relevant here, "the

[7] Because § 1B1.10 precludes a reduction, the Court need not reach the Government's argument regarding U.S.S.G. §7B1.4. Dkt. No. 56 at 5-6. However, the Court agrees with the Government that it made no error by relying on the law in effect at the time of the underlying offense in imposing the post-revocation sentence. *See United States v. Samas*, 23-6578, 2024 WL 3243713, at *2 (2d Cir. July 1, 2024). That *Samas* is not precisely procedurally identical does not alter the applicability of its conclusion that a District Court acts within its discretion when it calculates a revocation sentence based on the law at the time of the underlying offense rather than subsequent amendments to the guidelines. *Contra* Dkt. No. 57 at 7 n.7; 2024 WL 3243713, at *2. But again, the Court relies on the Government's other arguments involving the interpretation of § 1B1.10 to deny Defendant's motion.

nature and circumstances of the offense and the history and characteristics of the defendant"; "the need for the sentence imposed ... to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "the need for the sentence imposed ... to provide the defendant with ... correctional treatment in the most effective manner"; and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a). "[C]onsidering the factors set forth in [18 U.S.C. §] 3553(a)," the Court finds a reduction in Defendant's sentence is not warranted. Defendant's 364-day sentence was imposed only after the Court (Sharpe, J.) initially showed leniency toward Defendant in imposing a probation sentence for the original offense. Thus, "to promote respect for the law" and "to reflect the seriousness of the offense," including the breach of the Court's trust, a 364-day sentence was appropriate. Additionally, given Defendant's repeated contact with a felon despite directives to the contrary from the probation officer and the Court, Dkt. No. 51 at 36:10-15, the Court views the 364-day sentence as aligned with the need for "correctional treatment in the most effective manner." These factors outweigh any concern regarding sentencing disparities.

Third, "the inmate must demonstrate that his proffered circumstances are indeed 'extraordinary and compelling' such that, in light of these § 3553(a) factors, a sentence reduction is justified under § 3582(c)(1)(A) and would not simply constitute second-guessing of the sentence previously imposed." *Keitt*, 21 F.4th at 71. The Court has broad discretion in assessing whether Defendant's request is based on extraordinary and compelling circumstances. "The only statutory limit on what a court may consider to be extraordinary and compelling is that '[r]ehabilitation . . .

alone shall not be considered an extraordinary and compelling reason.'" *Brooker*, 976 F.3d at 238 (citing 28 U.S.C. § 994(t)).

The relevant policy statement, § 1B1.13(c), provides that "a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement." Though not binding on this Court[8], the Court finds the policy statement relevant to its consideration of whether extraordinary and compelling reasons exist to reduce the sentence. Pursuant to this Court's discretion, the Court finds that the relevant amendments do not provide an extraordinary and compelling reason to reduce Defendant's sentence.

VI. CONCLUSION

Accordingly, the Court hereby

ORDERS that pursuant to Defendant's Motion, Dkt. No. 55, and this Court's powers under Fed. R. Crim. P. 37(a), the Court **DENIES** the request for resentencing pursuant to 18 U.S.C. § 3582(c)(2); and the Court further

[8] The policy statement does not limit the Court's ability to grant relief here, but the Court notes it as useful in determining whether compelling circumstances exist. The Second Circuit has found that a district court, in granting relief pursuant to § 3582(c)(1)(A), need not find that such relief would be consistent with the applicable policy statements so long as the relief is being sought by the defendant directly, not the Director of the Bureau of Prisons. *Keitt*, 21 F.4th at 71 n.2 (citing *Brooker*, 976 F.3d at 238). "In other words, if a compassionate release motion is not brought by the BOP Director, Guideline § 1B1.13 does not, by its own terms, apply to it. Because Guideline § 1B1.13 is not applicable to compassionate release motions brought by defendants, [section (c)] cannot constrain district courts' discretion to consider whether any reasons are extraordinary and compelling." *Brooker*, 976 F.3d at 238 (internal quotations omitted). Though not constrained by the applicable policy statement, the Court finds no reason to stray from its suggestion that amendments alone are not compelling circumstances.

ORDERS that pursuant to Defendant's Motion, Dkt. No. 55, and this Court's powers under Fed. R. Crim. P. 37(a), the Court **DENIES** the request for resentencing pursuant to 18 U.S.C. § 3582(c)(1); and the Court further

ORDERS that the Clerk serve a copy of this Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: November 6, 2024
Albany, New York

Anne M. Nardacci
U.S. District Judge

UNITED STATES DISTRICT COURT

Northern District of New York

UNITED STATES OF AMERICA
v.

Jamie Varieur

JUDGMENT IN A CRIMINAL CASE

Case Number: DNYN 1:22CR000056-001
USM Number: 81442-509

Timothy E. Austin
54 State Street, Suite 310
Albany, NY 12207
518-436-1850
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1, of the Indictment on July 6, 2022.
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☐ was found guilty on count(s) of the on after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 7(3) & 13 & N.Y.P.L. § 140.15(1)	Assimilated Crime of Criminal Trespass, 2nd (a lesser included offense of the original charge of Assimilated Crime of Burglary, 2nd).	08/22/2021	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed in accordance with 18 U.S.C. § 3553 and the Sentencing Guidelines.

☐ The defendant has been found not guilty on count(s)
☒ Count(s) 1 of the Assimilated Crime of Burglary, 2nd contained in the Indictment ☒ is ☐ are dismissed on the motion of the United States.

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

November 29, 2022
Date of Imposition of Judgment

Gary L. Sharpe
Senior U.S. District Judge

November 30, 2022
Date

DEFENDANT: Jamie Varieur
CASE NUMBER: DNYN 1:22CR000056-001

PROBATION

You are hereby sentenced to probation for a term of:

3 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(deselect if inapplicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*
7. ☒ You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(check if applicable)*
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: Jamie Varieur
CASE NUMBER: DNYN 1:22CR000056-001

STANDARD CONDITIONS OF SUPERVISION

As part of your probation, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the court determines in consultation with your probation officer that, based on your criminal record, personal history and characteristics, and the nature and circumstances of your offense, you pose a risk of committing further crimes against another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

14. You must provide the probation officer with access to any requested financial information.

15. You must submit your person, and any property, house, residence, vehicle, papers, effects, computer, electronic communications devices, and any data storage devices or media, to search at any time, with or without a warrant, by any federal probation officer, or any other law enforcement officer from whom the Probation Office has requested assistance, with reasonable suspicion concerning a violation of a condition of probation or supervised release or unlawful conduct by you. Any items seized may be removed to the Probation Office or to the office of their designee for a more thorough examination.

DEFENDANT: Jamie Varieur
CASE NUMBER: DNYN 1:22CR000056-001

DEFENDANT: Jamie Varieur
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SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a mental health program which may include medical, psychological, or psychiatric evaluation and outpatient treatment as recommended by the treatment provider based upon your risk and needs. You may also be required to participate in inpatient treatment upon recommendation of the treatment provider and upon approval of the Court. The probation office must approve the location, frequency, and duration of outpatient treatment. You must abide by the rules of the program which may include a medication regimen. You must contribute to the cost of any evaluation and/or treatment in an amount to be determined by the probation officer based on your ability to pay and the availability of third party payments.

2. You must participate in a program for substance abuse which will include testing for use of controlled substances, controlled substance analogues, and alcohol. This may include outpatient treatment as recommended by the treatment provider based upon your risk and needs. You may also be required to participate in inpatient treatment upon recommendation of the treatment provider and upon approval of the Court. The probation office must approve the location, frequency, and duration of outpatient treatment. You must abide by the rules of any treatment program which may include abstaining from the use of any alcohol. You must contribute to the cost of any evaluation and/or treatment in an amount to be determined by the probation officer based on your ability to pay and the availability of third party payments.

3. Based upon your history of substance abuse, and for the purpose of effective substance abuse treatment programming, you must refrain from the use of alcohol and be subject to alcohol testing and treatment while under supervision.

4. You must not possess, use, or sell marijuana or any marijuana derivative (including any product containing cannabidiol (CBD) or THC) in any form (including but not limited to edibles) or for any purpose (including medical purposes).

DEFENDANT'S ACKNOWLEDGMENT OF APPLICABLE CONDITIONS OF SUPERVISION

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

The conditions of supervision have been read to me. I fully understand the conditions and have been provided a copy of them. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant	Date
U.S. Probation Officer/Designated Witness	Date

DEFENDANT: Jamie Varieur
CASE NUMBER: DNYN 1:22CR000056-001

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	AVAA Assessment**	Fine	Restitution
TOTALS	$ 25.00 (Remitted)	$	$	$	$ 1,124.00

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

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
Albany Stratton VA Medical	$ 1,124.00	$ 1,124.00	
Totals	$ 1,124.00	$ 1,124.00	

☒ Restitution amount ordered pursuant to plea agreement $ 1,124.00

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

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

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
**Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
***Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Jamie Varieur
CASE NUMBER: DNYN 1:22CR000056-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ In full immediately; or

B ☐ Lump sum payment of $ due immediately; balance due

☐ not later than, or

☐ in accordance with ☐ D, ☐ E, ☐ F, or ☐ G below; or

C ☐ Payment to begin immediately (may be combined with ☐ D, ☐ E, or ☐ G below); or

D ☐ Payment in equal installments of $ over a period of, to commence after the date of this judgment; or

E ☐ Payment in equal installments of $ over a period of, to commence after release from imprisonment to a term of supervision; or

F ☐ Payment during the term of supervised release will commence within after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

G ☒ Special instructions regarding the payment of criminal monetary penalties:
The $25 Special Assessment is remitted by the Court. The $1,124 in restitution is payable immediately, with any outstanding restitution to be paid at a minimum rate of 10% of your gross income or $100 per month, whichever is greater. If at any time you have the resources to pay full restitution, you must do so immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **Clerk, U.S. District Court, Federal Bldg., 100 S. Clinton Street, P.O. Box 7367, Syracuse, N.Y. 13261-7367,** or to pay electronically, visit www.nynd.uscourts.gov for instructions, unless otherwise directed by the court, the probation officer, or the United States attorney. If a victim cannot be located, the restitution paid to the Clerk of the Court for that victim shall be sent to the Treasury, to be retrieved when the victim is located.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

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

☐ The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of April, two thousand twenty-five.

United States of America,

Appellee,

v.

Jamie Varieur,

Defendant - Appellant.

ORDER

Docket Nos: 24-985 (L),
24-2967 (Con)

Appellant, Jamie Varieur, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk