No. 24-

IN THE

Supreme Court of the United States

JAMES LITTLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

JOSHUA B. CARPENTER
Counsel of Record
Appellate Chief
1 Page Avenue, Suite 210
Asheville, NC 28801
(828) 232-9992
joshua_carpenter@fd.org

Attorney for Petitioner
James Little

381057

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

James Little pled guilty to a single petty offense arising from the events at the U.S. Capitol on January 6, 2021. After a successful appeal challenging his initial sentence, Little was resentenced by the district court in January 2024. Little filed a second appeal, contending that the district court violated the double jeopardy clause—as interpreted by *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *In re Bradley*, 318 U.S. 50 (1943)—when it imposed an increased prison sentence at resentencing. On December 20, 2024, the D.C. Circuit issued a published opinion that affirmed Little's sentence and rejected his double jeopardy argument. *See United States v. Little*, 123 F.4th 1360 (D.C. Cir. 2024).

Then, on January 20, 2025, the President issued an Executive Order titled "Granting Pardons and Commutation of Sentences for Certain Offenses Relating to the Events at Or Near the United States Capitol on January 6, 2021." Among other things, that Order directed the Attorney General to seek dismissal with prejudice of all pending cases against individuals for "conduct related to the events at or near the United States Capitol on January 6, 2021." In accord with the Executive Order's directive, the government filed a motion to dismiss the information in Little's case on February 27, 2025.

The question presented is:

Should this Court grant the petition, vacate the judgment below, and remand the case for further consideration of the government's pending motion to dismiss?

RELATED PROCEEDINGS

United States v. Little, No. 1:21-cr-315 (D. D.C.), amended judgment entered January 29, 2024.

United States v. Little, No. 22-3018 (D.C. Cir.), judgment entered August 18, 2023.

United States v. Little, No. 24-3011 (D.C. Cir.), judgment entered December 20, 2024.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes, Rules and Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner James Little respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

DECISIONS BELOW

The first opinion of the court of appeals (Pet. App. 1a-21a) is published at 78 F.4th 453 (D.C. Cir. 2023); the second opinion (Pet. App. 39a-71a) is published at 123 F.4th 1360 (D.C. Cir. 2024). The district court's order addressing Little's double jeopardy argument is at Pet. App. 22a-34a. The judgment of the district court, entered upon resentencing, is at Pet. App. 35a-38a.

JURISDICTION

The court of appeals entered judgment on December 20, 2024. Pet. App. 1a. On March 14, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 19, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Double Jeopardy Clause of the Fifth Amendment provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

Rule 48(a) of the Federal Rules of Criminal Procedure says: "The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent."

STATEMENT OF THE CASE

The opinion of the court of appeals addressed a novel, but potentially recurring, issue regarding the application of the Double Jeopardy Clause, as interpreted by this Court in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *In re Bradley*, 318 U.S. 50 (1943). Although that issue might have merited this Court's review, such review was rendered unnecessary when the President issued an Executive Order on January 20, 2025, titled "Granting Pardons and Commutation of Sentences for Certain Offenses Relating to the Events at Or Near the United States Capitol on January 6, 2021." Pursuant to that Order, the government has moved to dismiss the information in this case with prejudice. This Court should vacate the judgment below and remand for the district court to address that motion in the first instance.

Following the events of January 6, 2021, Little pled guilty to a single petty offense for parading, demonstrating, or picketing in a Capitol building in violation of 40 U.S.C. § 5104(e)(2)(G). Unlike many of the people charged with January 6 offenses, the government conceded throughout the case that Little did not personally engage in any violent or assaultive behavior. At sentencing in March 2022, the district court imposed a dual sentence of 60 days in prison plus three years of probation. Pet. App. 72a-78a.

On appeal, Little argued that the controlling statutes authorized the alternative options of imprisonment *or* probation, but not a dual sentence of

imprisonment *and* probation. The D.C. Circuit agreed in a divided opinion and remanded for resentencing. Pet. App. 39a-71a.

By the time of the remand proceedings, Little had served his entire 60-day term of imprisonment. He had also served 18 months of his probation term. Before resentencing, he argued that the double jeopardy clause—as interpreted by *Ex parte Lange* and *In re Bradley*—prohibited the district court from imposing any additional punishment because he had already served his entire 60-day prison term. That double jeopardy question produced conflicting judicial opinions in similar cases. *Compare* Memorandum and Order (Doc. 69), *United States v. Little*, No. 1:21-CR-315 (D. D.C. Jan. 17, 2024) *with* Report and Recommendation (Doc. 88), *United States v. Pryer*, No. 1:21-CR-667 (D. D.C. Jan. 17, 2024) (Faruqui, J.). After rejecting Little's double jeopardy argument, the district court imposed an increased prison sentence of 150 days while giving Little credit of 30 days for the 18 months of time served on probation. *See* Pet. App. 5a. The result was an increased sentence that would require Little to serve an additional 60 days in prison. *Id.*

On appeal, the D.C. Circuit granted Little's motion for release pending appeal. Then, on December 20, 2024, the D.C. Circuit issued a published opinion that affirmed Little's sentence and rejected his double jeopardy argument. Pet. App. 1a-21a. Based on that outcome, Little intended to seek this Court's review of the double jeopardy issue, one that had the potential to recur in other January 6 petty offense prosecutions.

Then, on January 20, 2025, the President issued an Executive Order titled "Granting Pardons and Commutation of Sentences for Certain Offenses Relating to the Events at Or Near the United States Capitol on January 6, 2021." Among other things, that Order directed the Attorney General to seek dismissal with prejudice of all pending cases against individuals for "conduct related to the events at or near the United States Capitol on January 6, 2021."

Based on that Executive Order, the government moved on February 27, 2025, to dismiss the information in Little's case pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. That motion remains pending before the district court.

REASONS FOR GRANTING THE WRIT

Based on the government's pending motion to dismiss the information in this case, the Court should grant the petition, vacate the judgment below, and remand the case for further proceedings.

This course of action is supported by the Court's longstanding practice in similar cases where the government moves to dismiss a criminal charge after the issuance of an appeals court opinion. For example, in *Bronsozian v. United States*, No. 19-6220, the defendant filed a petition for certiorari after the Ninth Circuit affirmed his conviction. Upon review of the case, the government filed a motion in the district court seeking to dismiss the indictment. It then asked this Court to grant the defendant's petition, vacate the judgment and remand for consideration of the pending motion to dismiss. *See* Brief for the United States, *Bronsozian v. United States*, No. 19-6220 (March 2020), at 8-9 (collecting numerous examples of the Court

following this practice). The Court again followed that practice in *Bronsozian*. *See Bronsozian v. United States*, No. 19-6220, 2020 WL 1906543, at *1 (U.S. Apr. 20, 2020) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of the pending application to vacate the judgment and dismiss the indictment.").

Moreover, the government's motion to dismiss in Little's case is procedurally proper. As an initial matter, Little's case was (and still is) "pending" such that the Attorney General was required by the Executive Order to seek dismissal. *See Clay v. United States*, 537 U.S. 522, 525 (2003) ("a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction"). And Rule 48(a) is the proper mechanism for seeking dismissal. That rule provides that "[t]he government may, with leave of court, dismiss an indictment, information, or complaint." Consistent with this Court's practice in cases like *Bronsozian*, Rule 48(a) has been interpreted to permit dismissal during a defendant's appellate proceedings. *See also United States v. Burdeau*, 168 F.3d 352, 359 (9th Cir. 1999) ("Under Federal Rule of Criminal Procedure 48(a), the government has the power to move to dismiss any count of the indictment as long as the defendant's appeal is pending and the decision is therefore not final."); *United States v. Knight*, 981 F.3d 1095, 1109 (D.C. Cir. 2020) (holding, in a case on direct appeal, that ""[e]ven now, the prosecution may seek dismissal of some or all of the charges against Thorpe under Rule 48(a) of the

Federal Rules of Criminal Procedure.") (citing *Rinaldi v. United States*, 434 U.S. 22 (1977)).

In any event, to the extent there are any questions about the propriety of the government's motion, they would be best addressed by the district court in the first instance on remand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further proceedings.

Respectfully submitted,

/s/ Joshua B. Carpenter
Joshua B. Carpenter
Counsel of Record
Appellate Chief
1 Page Avenue, Suite 210
Asheville, NC 28801
Telephone: (828) 232-9992
Facsimile: (828) 232-5575
Email: joshua_carpenter@fd.org

APPENDIX

TABLE OF CONTENTS

Page

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 24, 2024 Decided December 20, 2024

No. 24-3011

UNITED STATES OF AMERICA,
APPELLEE

v.

JAMES LITTLE,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cr-00315-1)

Joshua B. Carpenter, Appellate Chief, Office of the Federal Public Defender for the Western District of North Carolina, argued the cause and filed the briefs for appellant.

Reuven Dashevsky, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Matthew M. Graves*, U.S. Attorney, and *Chrisellen R. Kolb*, *Nicholas P. Coleman*, and *Patrick Holvey*, Assistant U.S. Attorneys.

Before: WALKER and PAN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* PAN.

PAN, *Circuit Judge*: James Little pleaded guilty to one count of Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G). The district court sentenced him to 60 days' imprisonment, followed by three years of probation. In a prior appeal, Little successfully challenged that sentence. We agreed with him that the applicable statutes did not authorize a "split sentence" that included both imprisonment and probation for the commission of a single violation. *See United States v. Little*, 78 F.4th 453 (D.C. Cir. 2023). We therefore vacated his sentence and remanded his case to the district court. The district court resentenced Little to 150 days in prison, with credit for the 60 days in prison he had already served, and an additional credit of 30 days for the time he had spent on probation. Little claims that his new sentence violates the Double Jeopardy Clause. We disagree and affirm.

I.

A.

On January 6, 2021, James Little took part in the riot at the United States Capitol. He roamed the third-floor Senate Gallery, taking photographs and sending messages to his family and friends. In those messages, he said things like: "We just took over the Capital [sic]," and "We are stopping treason! Stealing elections is treason! We're not going to take it anymore!" J.A. 33. Little ultimately pleaded guilty to one count of Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G). That crime carries a maximum punishment of six months in prison or five years of probation. 40 U.S.C. § 5109(b); 18 U.S.C. § 3561(c)(2). The district court sentenced Little to 60 days in prison followed by three years of probation. The court

reasoned that "some term of imprisonment is essential in these cases now to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense." J.A. 149. In addition, because the court did "not have confidence that the same [conduct] would not happen in the next election cycle," it imposed a probation term so that Little "[would] not be without court supervision during the next election cycle." J.A. 150.

Little appealed his sentence, arguing that the district court erred by imposing both a term of imprisonment and a term of probation. We agreed with Little that the relevant statutes — 18 U.S.C. §§ 3551(b) and 3561 — authorize a sentence of either probation or imprisonment for a single violation, but not both. *United States v. Little* (*Little I*), 78 F.4th 453, 454–56 (D.C. Cir. 2023).[1] We thus vacated Little's sentence and remanded his case to the district court for resentencing. *Id.* at 461.

B.

By the time the case was remanded, Little was in the midst of serving the originally imposed sentence: He had finished serving the term of imprisonment and was in the middle of his

[1] We reasoned that the "menu" of sentencing options under 18 U.S.C. § 3551(b) authorizes "(1) a term of probation"; "(2) a fine"; "*or*" "(3) a term of imprisonment" (emphasis added). The statute further allows the imposition of a fine "in addition to any other sentence," but makes no other exceptions to allow for more than one punishment. *Id.* § 3551(b). The text and structure of § 3551(b) thus "show that probation and imprisonment may not be imposed as a single sentence." *Little I*, 78 F.4th at 455. Moreover, we interpreted 18 U.S.C. § 3561(a)(3) to preclude a sentence of imprisonment and probation for a single violation. *Id.* at 456.

time on probation. Little filed a motion to amend the judgment, asking the district court to forgo resentencing and to terminate his probation. He noted that 18 U.S.C. §§ 3551(b) and 3561 authorized a sentence of *either* imprisonment *or* probation, yet he had been sentenced to both. Relying on two Supreme Court cases — *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *In re Bradley*, 318 U.S. 50 (1943) — he argued that imposing further punishment on him under those circumstances would violate the Double Jeopardy Clause because he had fully satisfied one of the alternative punishments authorized by statute.

The district court denied Little's motion, ruling that our mandate required Little to be resentenced. *See* J.A. 281 (noting that the mandate "vacate[d] Little's sentence and remand[ed] to the district court for resentencing" (quoting *Little I*, 78 F.4th at 461)). The district court also rejected Little's argument that the Double Jeopardy Clause barred the imposition of additional punishment. The court concluded that a later Supreme Court case — *Jones v. Thomas*, 491 U.S. 376 (1989) — requires courts to read the *Lange* and *Bradley* cases narrowly. Relying on *Jones* and *North Carolina v. Pearce*, 395 U.S. 711 (1969), the district court held that resentencing Little would be lawful "as long as [the court] credits the time already served in prison or probation against any new punishment." J.A. 283.

The district court also noted that "an increase in a sentence" does not violate the Double Jeopardy Clause unless the defendant had a "legitimate" "expectation of finality" in the original sentence. J.A. 285. The court concluded that Little lacked such a legitimate expectation of finality because Little chose to appeal the original sentence, and because that sentence was, in any event, illegal.

The district court then resentenced Little to 150 days of imprisonment. To account for the time that Little had served on the original sentence, the court gave Little credit for the 60 days he spent in prison, as well as an additional credit of 30 days for the 18 months that he had spent on probation. In arriving at the 30-day credit, the court opined that Little's probation "should count for relatively little" because he "spent essentially *no time* in compliance with the terms and conditions of his probation." J.A. 309 (emphasis in original). After noting Little's failure to pay restitution, his lack of remorse, and his refusal to take responsibility for his actions, the court concluded that "too great a sentence reduction" would fail to satisfy the "purposes of sentencing," including the need for a sentence "to reflect the seriousness of the offense." J.A. 310–11. Ultimately, Little's new sentence required him to spend an additional 60 days in prison. After the district court pronounced its sentence, Little argued for a different credit for his probation time, requesting "a 5 to 1 ratio" between the time spent on probation and the time to be subtracted from his sentence. J.A. 346. But Little did not object to the general practice of crediting time on probation against time spent in prison.

Little now appeals his resentencing. We have jurisdiction under 18 U.S.C. § 3742.

II.

The Double Jeopardy Clause "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Little argues that his new sentence violates the Double Jeopardy Clause because the district court imposed additional punishment after Little had already completed the term of incarceration that was part of his illegal split sentence. He also contends that he had a legitimate

expectation of finality in his original sentence. Both of Little's arguments are unpersuasive.

A.

As a threshold matter, the government argues that we should not consider Little's double jeopardy argument because we already decided in Little's previous appeal that additional jail time could be imposed at his resentencing. We disagree.

Under the law-of-the-case doctrine, "decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). The doctrine encompasses "questions decided explicitly or by necessary implication." *Id.* at 1394. That principle is not applicable here because Little's double jeopardy claim was not briefed, argued, or resolved in the prior appeal.

Little I considered and decided only one issue: whether the district court could lawfully impose a split sentence of probation and imprisonment for a single offense of conviction under 18 U.S.C. §§ 3551(b) and 3561. *Little I*, 78 F.4th at 454. To be sure, Little asked us in that appeal "to reverse and remand with instructions that [he] be immediately discharged from probation and that an amended judgment be issued reflecting no probationary term." Brief of Appellant, *Little I*, 78 F.4th 453 (D.C. Cir. 2023) (No. 22-3018), 2022 WL 3010141, at *40. But neither party asked us to consider how the Double Jeopardy Clause would affect a resentencing. We denied Little's requested remedy and instead "vacat[ed] Little's sentence and remand[ed] to the district court for resentencing." *Little I*, 78 F.4th at 461. Our opinion did not address the implications of the Double Jeopardy Clause, and we are not bound by a footnote in the dissenting opinion that touched upon that issue. *See id.* at 469 n.3 (Wilkins, J., dissenting) (noting that "it

appears" that the district court "could impose" "a longer prison or probationary term" upon resentencing).

Because *Little I* did not decide any double jeopardy issue "explicitly or by necessary implication," *LaShawn A.*, 87 F.3d at 1394, Little may raise a double jeopardy claim in the instant appeal.

B.

1.

Little renews his argument that *Lange* and *Bradley* barred the district court from imposing further punishment when he was resentenced because the original sentence was an illegal split sentence, and Little had fully served one of the alternative sentences permitted by statute. Little raises a question of law that we review de novo. *See United States v. McCallum*, 721 F.3d 706, 709 (D.C. Cir. 2013).

We begin with some basic principles that Little does not contest. It is well established that the Double Jeopardy Clause's protection "against multiple punishments for the same offense" does not preclude retrial and resentencing after a defendant successfully appeals his or her conviction. *Pearce*, 395 U.S. at 717. In such a situation, the protection against multiple punishments "requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *Id.* at 718–19. The court may even "impose upon reconviction a longer prison sentence than the defendant originally received," so long as the years already spent in prison are "returned" to the defendant "by subtracting them from whatever new sentence is imposed." *Id.* at 719; *see also Hayes v. United States*, 249 F.2d 516, 517 (D.C. Cir. 1957) ("[I]f the sentence were invalid and defendant

successfully attacked it, he could be validly resentenced though the resentence increased the punishment.").

Although Little acknowledges that general rule, he argues that his case falls within an exception established by *Lange* and *Bradley*. He contends that those cases compel the vacatur of any additional sentence when a defendant already has served one of the alternative sentences permitted by statute.

In *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), the defendant was convicted of stealing U.S. Post Office mail bags. He was sentenced to both the statutory maximum term of one year of imprisonment *and* the maximum fine of $200. *See id.* at 164. The defendant paid the fine in full and began serving his sentence of imprisonment. *Id.* Five days into his imprisonment, a reviewing court vacated the judgment, holding that the governing statute allowed a sentence of imprisonment *or* a fine, but not both. The sentencing court then imposed a sentence of one year of imprisonment and no fine. *Id.* The Supreme Court discharged the defendant, holding that the resentencing violated double jeopardy principles. *Id.* at 167–68, 175. In relevant part, the Court noted: "[W]hen the prisoner . . . had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176. The Court's reference to the defendant's "full[]" service of "one of the alternative punishments" appeared to place significance on the defendant's payment of the maximum allowable fine — *i.e.*, "fully" serving one of the permissible sentences apparently precluded any additional punishment. *See id.*

But the Supreme Court seemed to retreat from that reasoning in *In re Bradley*, 318 U.S. 50 (1942). There, the sentencing court imposed both a six-month sentence of imprisonment and a $500 fine for the defendant's crime of

contempt, despite the applicable statute authorizing only a fine *or* imprisonment. *See Bradley*, 318 U.S. at 51. The same day that the court imposed the dual sentence, it realized its mistake and *sua sponte* sought to amend the sentence by reimbursing the fine and requiring only the six months' imprisonment. *See id.* at 51–52. The defendant refused to accept the refund and appealed his sentence. *Id.* at 52. Unlike in *Lange*, the relevant statute in *Bradley* did not prescribe a maximum term of imprisonment or a maximum fine. *See* 28 U.S.C. § 385 (1940). Still, the Supreme Court relied on *Lange* to order the defendant discharged from custody, reasoning that an "amendment of the sentence could not avoid the satisfaction of the judgment." *Bradley*, 318 U.S. at 52–53. The Court held that "[s]ince one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint." *Id.*

Little relies on *Bradley* to argue that he too must be discharged from any further punishment. Similar to the defendant in *Bradley*, Little was originally sentenced to a term of imprisonment *and* probation, even though the applicable statutes authorized a sentence of either probation or imprisonment, but not both. *See Little I*, 78 F.4th at 454–56. Like Bradley, Little did not receive the statutory maximum, but he had fully satisfied "one valid alternative provision of the original sentence" — the term of incarceration — by the time his illegal sentence was vacated. *Bradley*, 318 U.S. at 52. Little thus argues that, like Bradley, he is entitled to be freed from further restraint.

The problem for Little is that both *Lange* and *Bradley* were interpreted narrowly by a more recent Supreme Court case, *Jones v. Thomas*, 491 U.S. 376 (1989). *Jones* clarified that a key fact in *Lange* was that the defendant had completed a statutory maximum sentence; and a key fact in *Bradley* was that

the defendant's alternative sentences were a *fine* and imprisonment, and a fine cannot be credited against a prison sentence. Those important distinctions foreclose Little's double jeopardy claim.

In *Jones*, the sentencing court imposed two consecutive sentences of imprisonment — one for felony murder and the other for the underlying felony — despite state law not authorizing separate sentences in that circumstance. 491 U.S. at 378–79. The defendant argued that "the Double Jeopardy Clause requires immediate release for the prisoner who has satisfied the shorter of two consecutive sentences that could not both lawfully be imposed." *Id.* at 382. In rejecting that argument and upholding Jones's resentencing, the Court first distinguished *Lange*, in which the defendant had already completed the statutory maximum punishment, so that any additional punishment "would obviously have exceeded that authorized by the legislature." *Id.* at 383. The Court explained that "*Lange* . . . stands for the uncontested proposition that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature." *Id.*

The *Jones* Court next distinguished *Bradley*, in which the two sentences imposed "were of a different type, fine and imprisonment." 491 U.S. at 384. While "it would not have been possible to 'credit' a fine against time in prison," the same was not true of the two prison sentences in *Jones* because "crediting time served under one sentence against the term of another has long been an accepted practice." *Id.* The *Jones* Court further noted that it did "not think the law compels application of *Bradley* beyond its facts." *Id.* at 386. Thus, the Court upheld the resentencing in *Jones* because the sentencing court could credit the time that the defendant had already served against any future punishment. *Id.* at 384. In other words, where that defendant was subjected to two sentences

when only one was permissible, and he had already fully served one of the sentences, he still could be resentenced without violating the Double Jeopardy Clause because the time that he had served on the original sentence could be credited against his new sentence. That holding is consistent with the well-established double jeopardy principles that generally allow a full resentencing after a successful appeal. *See Pearce*, 395 U.S. at 718–19.

Accordingly, *Jones* precludes Little's reliance on *Lange* and *Bradley*. Little's case is easily distinguished from *Lange* because neither Little's original sentence (of 60 days' imprisonment and three years' probation) nor his new sentence (of 150 days' imprisonment) exceeded the statutory maximum of six months' imprisonment or five years of probation. *See* 40 U.S.C. § 5109(b); 18 U.S.C. § 3561(c)(2). Moreover, *Bradley* is inapposite because Little's sentence involved incarceration and *probation* — not incarceration and a *fine* — and the district court gave Little credit for the time that he spent on probation. When Little was resentenced to 150 days' incarceration, his prison time was reduced to reflect a credit of 60 days for the time that he had already spent in prison *and* a credit of 30 days for the 18 months he had served on probation. Thus, under *Jones* and *Pearce*, the resentencing was permissible under the Double Jeopardy Clause because the time Little served on the original sentence was "returned" to him when it was "subtract[ed] . . . from whatever new sentence [was] imposed." *Pearce*, 395 U.S. at 719.

2.

Little's arguments to the contrary are unconvincing. First, he asserts that when he was erroneously sentenced to probation *and* imprisonment, despite the statute allowing only one of those options, his punishment was "in excess of that authorized

by the legislature." Little Br. 17 (quoting *Jones*, 491 U.S. at 383). But saying that is so does not make it so. The determinative fact in *Lange* was that the defendant had already paid the statutory maximum fine and no more punishment was permissible under the statute. Because he then was subjected to a resentencing that imposed time in prison, the additional punishment plainly was unlawful. *See Lange*, 85 U.S. at 175; *Jones*, 491 U.S. at 382–83. That is not Little's situation.

Next, Little argues that time on probation cannot be credited against a sentence of imprisonment. *See* Little Br. 26. Alternatively, he asks us to "hold that 'credit' for [d]ouble [j]eopardy purposes" requires a "1:1 ratio" — *i.e.*, that he should receive a day's worth of credit for every day that he spent on probation. *Id.* But Little did not raise those arguments before the district court, and he therefore forfeited them.

"Basic in our criminal procedure is the rule that" a defendant "must, at the time the ruling or order of the court is made or sought, make known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor." *United States v. Lewis*, 433 F.2d 1146, 1152 (D.C. Cir. 1970) (cleaned up); *see also* Fed. R. Crim. P. 51(b). Neither Little's written nor oral advocacy alerted the district court to any argument that probation cannot be credited against imprisonment, or that a 1:1 crediting ratio is required.

In his papers in support of his motion to terminate his probation, Little argued that the "still-binding precedent" of *Lange* and *Bradley* "dictates" the outcome in his "single-count, alternative-options case." J.A. 269–70. Although he quoted relevant language in *Jones*, he argued only that *Jones* "reaffirmed" "the continuing viability of *Lange* and *Bradley*" for cases concerning "a single count of conviction." J.A. 190,

194. The government's opposition to Little's motion specifically argued that, unlike the fine in *Bradley*, Little's sentence of probation could be credited against a future term of imprisonment. The government also argued that the crediting ratio need not be a day-to-day offset. Little's reply did not respond to those arguments. Then, at sentencing, Little's only objection was "to the ratio that was used" because he "believe[d]" "a 5 to 1 ratio" was "a better ratio than the 18 to 1 that the [c]ourt used." J.A. 346. Because Little never disputed the availability of crediting and merely requested a different crediting ratio, Little "failed to put the district court on notice of the argument[s] he now raises" — *i.e.*, that crediting is not possible, or that a 1:1 ratio is required. *United States v. Mohammed*, 89 F.4th 158, 163 (D.C. Cir. 2023).[2]

Little says that, even if he did not alert the district court to the specific arguments he advances on appeal, his "argument about crediting" is preserved as "simply a different theory in support of the double jeopardy claim." Oral Arg. 12:14–12:30. To make that argument, Little relies on *Yee v. City of Escondido*, 503 U.S. 519 (1992), in which the Supreme Court held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534.

Although the cited statement in *Yee* is broad, our subsequent cases have made clear that *Yee*'s holding is not as sweeping as Little would like it to be. *See Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007) (citing *Yee* to allow a party to "adduce[] additional support for his side of an issue upon which the district court did rule, much like citing a case for the first time on appeal"); *Teva Pharms., USA, Inc. v. Leavitt*, 548 F.3d 103, 105 (D.C. Cir. 2008) (citing *Yee* to allow a party to "refine

[2] On appeal, Little does not renew his request for a 5:1 crediting ratio.

and clarify its analysis in light of the district court's ruling"); *Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 11–12 (D.C. Cir. 2016) (citing *Yee* and saying we should not "reach the theory raised on appeal" if it "would require this court to recast appellants' position in the district court" (cleaned up)).

Yee and its progeny clearly did not displace the general rule in criminal cases that a defendant must "make known" to the district court "his objection to the action of the court and the grounds therefor." *Lewis*, 433 F.2d at 1152. In *United States v. Stevens*, 105 F.4th 473 (D.C. Cir. 2024), we rejected a similar request to treat a defendant's new argument as preserved under *Yee*. In that case, the district court had applied the Sentencing Guideline for aggravated assault, defined as "felonious assault" involving "an intent to commit another felony." *Id.* at 476 (quoting U.S.S.G. § 2A2.2 cmt. n.1). The defendant had argued before the district court that the Guideline was inapplicable because he did not commit the relevant felony with intent to commit "*another* felony." *Id.* at 477 (emphasis in original). On appeal, the defendant added a new theory: He claimed that he was not convicted of "felonious assault" and only aided and abetted that offense. *Id.* at 479. Even though the new argument challenged the same Guideline addressed by the district court, we rejected the defendant's argument under *Yee* that he "simply ma[de] new arguments in support of a preserved claim." *Id.* at 479 n.10. Instead, we held that the defendant "made two distinct claims challenging different elements of the 'aggravated assault' commentary definition," and reviewed the new argument only for plain error. *Id.*

This case requires the same result. Little argued before the district court that he should be discharged from further punishment because *Bradley* applies to all "single-count,

alternative-options case[s]." J.A. 270. That claim differs significantly from the arguments that he now makes, challenging the practice of crediting probation time against jail time and the crediting ratio that was applied at his resentencing. Little thus makes "distinct claims" on appeal that challenge "different" aspects of the *Bradley* decision. *See Stevens*, 105 F.4th at 479 n.10. His specific argument invoking *Bradley* before the district court did not preserve every possible argument that flows from that case or from the Double Jeopardy Clause.

Because Little's arguments were "not raise[d] before the district court," we review them "only for plain error." *United States v. Long*, 997 F.3d 342, 353 (D.C. Cir. 2021). "Under plain error review, we may reverse only if (1) the district court committed error; (2) the error is plain; (3) the error affects the defendant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (cleaned up). Little's arguments fail because the alleged errors he identifies were not "plain" — *i.e.*, there was no "controlling precedent on the issue or some other absolutely clear legal norm." *United States v. Pyles*, 862 F.3d 82, 88 (D.C. Cir. 2017) (cleaned up).

To begin, Little points to no Supreme Court case nor any case from this circuit that addresses whether time served on probation can be credited against time spent in prison. He therefore fails to identify any "controlling precedent on the issue." *Pyles*, 862 F.3d at 88.

To the extent other courts have addressed the crediting issue, the cases foreclose any claim of a "clear legal norm" that forbids crediting probation time against sentences of imprisonment. *Pyles*, 862 F.3d at 88. To the contrary, other courts have endorsed that practice. For example, in *United*

States v. Martin, 363 F.3d 25 (1st Cir. 2004), the court held that the "impossibility of crediting [the sentences in *Bradley*] does not apply to the alternative sentences of probation, including home detention, and imprisonment." *Id.* at 38. Because "probation and imprisonment . . . each restrict[] a defendant's liberty (albeit to varying degrees) over a specific period of time," the court reasoned, the two "different types of sentences" "are sufficient[ly similar] to allow crediting of probation against imprisonment." *Id.*; *see also United States v. Carpenter*, 320 F.3d 334, 344–45 & n.10, 346 (2d Cir. 2003) (instructing the district court to credit home detention already served against future imprisonment); *United States v. Miller*, 991 F.2d 552, 554 (9th Cir. 1993) (same); *United States v. Lominac*, 144 F.3d 309, 318 (4th Cir. 1998) (crediting time on supervised release against future imprisonment). Thus, Little has failed to establish that the district court "plainly" erred — or erred at all — when it credited the time he spent on probation against his new sentence of imprisonment.

Nor was it plain error for the district court to employ a fact-specific crediting ratio. Little does not cite any "controlling precedent on the issue" of *how* to credit probation against imprisonment, *Pyles*, 862 F.3d at 88, and he concedes that there is "disagreement on the methodology for providing credit," Little Br. 25. That alone precludes him from demonstrating that there is an "absolutely clear legal norm" that supports a 1:1 crediting ratio. *Pyles*, 862 F.3d at 88.

Little pulls his suggested 1:1 ratio from an Iowa Supreme Court case. *See State v. Jepsen*, 907 N.W.2d 495, 504 (Iowa 2018). But ample precedent supports not applying a 1:1 ratio when crediting probation time. For example, in *Martin*, the court said that "fully crediting probation against a subsequent sentence of imprisonment does not require a day-to-day offset," observing that "time served in home detention is

normally far less onerous than imprisonment." 363 F.3d at 39 (cleaned up); *see also Carpenter*, 320 F.3d at 346 (noting the court "would be puzzled if, on remand, the district court reduced Carpenter's term of imprisonment by more than half the time he spent in home detention," but declining to hold that "a reduction of greater magnitude would be factually insupportable, or a lesser reduction inappropriate"); *Miller*, 991 F.2d at 554 (noting a 1:1 ratio would not be inappropriate, but directing the district court to balance the § 3553 factors when deciding on its ratio); *United States v. Derbes*, 2004 WL 2203478, at *2 n.6 (D. Mass. Oct. 1, 2004) (treating "three days of home detention and five days of probation as the equivalents of a day in custody"). Because there is no controlling precedent in this jurisdiction nor any clearly accepted rule for determining crediting ratios, the district court's decision to conduct a fact-specific inquiry and to apply a 30-day credit for Little's 18 months of probation time was not plainly erroneous.

C.

Little argues that the district court was barred from increasing his sentence because he had a legitimate expectation of finality in the original sentence. Again, we disagree.

The Supreme Court has recognized that, under the Double Jeopardy Clause, defendants have "legitimate expectation[s] of finality" in their sentences. *Jones*, 491 U.S. at 385; *see United States v. DiFrancesco*, 449 U.S. 117, 132–38 (1980). That constitutionally protected interest allows defendants "to be free from being compelled to live in a continuing state of anxiety and insecurity." *United States v. Fogel*, 829 F.2d 77, 88 (D.C. Cir. 1987) (cleaned up). But courts "may permissibly increase a [defendant's] sentence" if "there is some circumstance which undermines the legitimacy of that expectation." *Id.* at 87.

Here, Little may not claim an expectation of finality in a sentence that he voluntarily appealed. Little does not dispute that a defendant who successfully attacks a conviction or sentence may generally be resentenced to increased punishment. *See* Little Br. 33–35; *see also Pearce*, 395 U.S. at 719–20 ("Long-established constitutional doctrine makes clear that, beyond the requirement [that punishment already exacted must be fully 'credited'], the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction."); *Hayes*, 249 F.2d at 517 ("[I]f the sentence were invalid and defendant successfully attacked it, he could be validly resentenced though the resentence increased the punishment."); *Murphy v. Massachusetts*, 177 U.S. 155, 158 (1900) ("[I]t is well settled that a convicted person cannot by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy."). Because Little appealed his sentence and sought to have it amended or vacated, he "is held to have waived his protection against double jeopardy." *Hayes*, 249 F.2d at 517.

Little's reliance on *United States v. Fogel*, 829 F.2d 77 (D.C. Cir. 1987), is misplaced. That case stands for the proposition that a court may not *sua sponte* change a defendant's final sentence; it has nothing to do with defendants who themselves seek to alter their sentences by filing appeals. In *Fogel*, the sentencing court increased Fogel's sentence after realizing it "made a mistake" in its original pronouncement. 829 F.2d at 80–81. We held that a court cannot, on its own initiative, increase a defendant's sentence because "after a defendant is sentenced, he is entitled to have a legitimate expectation that the district court has reviewed all of the relevant circumstances, and has finally determined the severity of the punishment that should be imposed." *Id.* at 89. By changing Fogel's sentence without warning, the court impermissibly "compelled" him to "live in a continuing state

of anxiety and insecurity." *Id.* at 88. Little, by contrast, chose to appeal his sentence — he thereby precipitated and consented to any state of uncertainty.

Nor are we persuaded by Little's argument that he challenged only a *defect* in his sentence (*i.e.*, "that the statutory scheme did not authorize both imprisonment *and* probation"), and therefore did not waive his legitimate expectation of finality in the *length* of his sentence. Little Br. 35 (emphasis in original). We are unaware of any precedent that supports carving out special treatment for certain types of legal arguments challenging a sentence. When a defendant successfully challenges his or her sentence or conviction, the prior sentence is "wholly nullified and the slate wiped clean." *Pearce*, 395 U.S. at 721. With that clean slate, the district court is permitted on resentencing "to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence [previously] imposed." *Id.* at 720.

That is especially appropriate when the original sentence included interdependent components. In *United States v. Townsend*, 178 F.3d 558 (D.C. Cir. 1999), we held that a defendant sentenced on multiple counts of conviction "can have no legitimate expectation of finality regarding the sentence previously allocated to certain counts while simultaneously challenging his sentence on other counts of the package." *Id.* at 570. That principle recognizes the "strong likelihood that the district court [] craft[ed] a disposition in which the sentences on the various counts form[ed] part of an overall plan, and that if some counts are vacated, the judge should be free to review the efficacy of what remains in light of the original plan." *Id.* at 567 (cleaned up); *see also United States v. Morris*, 116 F.3d 501, 505 (D.C. Cir. 1997) (holding defendants "could not — at the moment of launching their challenges [against one sentence] — have entertained any

reasonable expectation in the finality of their [non-challenged] sentences" "given the interdependency" of the sentencing package).

Little's split sentence is analogous. When pronouncing Little's original sentence, the district court stated: "I believe some term of imprisonment is essential in these cases now to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense." J.A. 149. Then, because "the [c]ourt [did] not have confidence that the same [conduct] would not happen in the next election cycle," it included a probationary term so that Little "[would] not be without court supervision during the next election cycle." J.A. 150. The district court's decision to impose a short prison sentence was intertwined with its decision to impose a longer term of probation. After we made clear that a term of imprisonment and a term of probation could not both be imposed, the district court was allowed to "review the efficacy of what remains [of the sentence] in light of the original plan." *Townsend*, 178 F.3d at 567; *accord United States v. Versaglio*, 85 F.3d 943, 949 (2d Cir. 1996) (setting aside a term of imprisonment in a split-sentence case but remanding for the sentencing court to "consider[] whether to make an upward adjustment in the amount of the fine").[3]

* * *

[3] Little argues for the first time in his reply brief that the government was required to cross-appeal to provide Little with notice that pursuit of his own appeal would expose him to a higher sentence. *See* Little Reply Br. 5. Putting aside the dubious logic of that argument, it is forfeited. *See Fore River Residents Against the Compressor Station v. FERC*, 77 F.4th 882, 889 (D.C. Cir. 2023) ("Arguments raised for the first time in a reply brief are forfeited.").

We conclude that the Double Jeopardy Clause was not violated when Little was subjected to additional punishment upon his resentencing. The district court properly exercised its discretion to impose a sentence that accounted for all relevant sentencing factors. The new sentence was lawful because the district court provided credit for the time that Little had served on the original sentence — both in prison and on probation — and neither the original sentence nor the new sentence exceeded the statutory maximum. We further conclude that the district court did not plainly err when it provided a 30-day credit to account for the 18 months that Little spent on probation; and that Little had no legitimate expectation of finality in his original sentence because he appealed that sentence. We therefore affirm the judgment of the district court.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **v.** **JAMES LITTLE**, *Defendant*.	**Case No. 1:21-cr-315-RCL**

MEMORANDUM AND ORDER

For his involvement in the January 6, 2021 attack on the United States Capitol, Defendant James Little pleaded guilty to a petty offense. This Court imposed a sentence of imprisonment, followed by probation. On appeal, the D.C. Circuit held that Little's "split sentence" was unlawful. It therefore "vacate[d] Little's sentence and remand[ed] to the district court for resentencing." *United States v. Little*, 78 F.4th 453, 461 (D.C. Cir. 2023).

Now, Little asks the Court to disregard the D.C. Circuit's directive to resentence him and to instead simply let him off probation. Yet the Court is bound by the mandate rule to follow the instructions from the D.C. Circuit. The Court will thus **DENY** Little's motion and proceed to resentencing as scheduled on January 25, 2024. Little's double jeopardy objection to resentencing is squarely foreclosed by governing precedent, so when the Court resentences Little, it may lawfully impose an additional term of imprisonment or probation, if it chooses to do so.

I. BACKGROUND

1. Little's Initial Sentence

The Court previously summarized Little's contribution to the events of January 6, 2021:

> January 6, 2021, marked a tragic day in American history. The peaceful transfer of power—one of our most important and sacred democratic processes—came under

> a full-fledged assault. While the immediate threat may have subsided, the damage from January 6 persists. Rioters interrupted the certification of the 2020 Electoral College vote count, injured more than one hundred law enforcement officers, and caused more than a million dollars of property damage to the U.S. Capitol. Some of the rioters—now defendants in criminal cases—directly contributed to this violence by assaulting members of law enforcement or by planning, preparing, and facilitating this violence. Others, like Little here, did not directly assault officers. But even Little and those who engaged in this "lesser" criminal conduct were an essential component to the harm. Law-enforcement officers were overwhelmed by the sheer swath of criminality. And those who engaged in violence that day were able to do so because they found safety in numbers.

United States v. Little, 590 F. Supp. 3d 340, 342 (D.D.C. 2022), *vacated and remanded*, 78 F.4th 453 (D.C. Cir. 2023).

On November 16, 2021, Little pleaded guilty to Parading, Demonstrating, or Picketing in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(G). *See* Plea Agr., ECF No. 25. Little admitted to entering the United States Capitol, despite knowing that he lacked permission, and then parading, demonstrating, and/or picketing within the building. Statement of Offense, ECF No. 26, 4.

On March 14, 2022, the Court sentenced Little to a "split sentence," meaning "a term of imprisonment followed by a term of probation." *Little*, 590 F. Supp. 3d. at 343. The Court recognized that because the statutory maximum term of imprisonment for Little's offense was six months, federal law classifies the crime as a petty offense. *Id.* (citing 40 U.S.C. § 5109(b), 18 U.S.C. § 3559(a)(7), and 18 U.S.C. § 19). But it held that a split sentence was legally permissible for a defendant convicted of a petty offense. It also concluded that a split sentence was warranted in this case, because "[s]ome term of imprisonment may serve sentencing's retributive goals . . . [b]ut only a longer-term period of probation is adequate to ensure that Little will not become an active participant in another riot." *Little*, 590 F. Supp. 3d at 344. It therefore sentenced Little to

60 days' imprisonment, 36 months' probation, $500 in restitution, and $10 in special assessment. *Id.* at 351.

2. Little's Appeal

On appeal, Little challenged his sentence, arguing that a split sentence for a single conviction for a petty offense was illegal. Br. for Appellant *40, *United States v. Little*, 78 F.4th 453 (D.C. Cir. 2023) (No. 22-3018). He argued that because he had "already served his entire term of imprisonment, the proper remedy is to reverse and remand with instructions that Little be immediately discharged from probation and that an amended judgment be issued reflecting no probationary term." *Id.*

A divided panel of the D.C. Circuit agreed with Little's substantive argument, holding that under 18 U.S.C. § 3561(a)(3), a court could impose imprisonment or probation but not both. *Little*, 78 F.4th at 454. However, it rejected Little's proposed remedy of instructing the district court to discharge Little from probation and issue an amended judgment reflecting no term of probation. Instead, the court of appeals "vacate[d] Little's sentence and remand[ed] to the district court for resentencing." *Id.* at 461. Writing in dissent, Judge Wilkins stated that "[f]ollowing vacatur of the sentence on remand, it appears that the district judge could impose a sentence of imprisonment or probation, and that he would not be limited to the 90 days or three years that were imposed before if he concluded that either a longer prison or probationary term were required to meet the goals of 18 U.S.C. § 3551." *Id.* at 469 n.3 (Wilkins, J., dissenting) (citing *Davenport v. United States*, 353 F.2d 882, 884 (D.C. Cir. 1965)).

3. The Present Dispute

Little completed his sixty days of imprisonment on July 8, 2022, and is currently on probation. *See* Gov. Opp'n 4. According to the Government, he has failed to pay either the $500 restitution or the $10 special assessment ordered by the Court. *Id*.

On November 9, 2023, the Court received the mandate from the D.C. Circuit. ECF No. 57. Little moved for the Court to amend the judgment to remove the term of probation, to terminate the term of probation, or to do both. Def. Mot., ECF No. 58. The Government initially moved to hold Little's motion in abeyance pending the D.C. Circuit's decision in *United States v. Caplinger*, No. 22-3057, ECF No. 61, but then withdrew that motion as filed in error, ECF No. 63. The Government then filed an opposition to Little's motion. *See* Gov. Opp'n, ECF No. 65. Little filed a reply. *See* Def. Reply, ECF No. 66.

Little's motion is now ripe for review.

II. DISCUSSION

Given the mandate from the D.C. Circuit, the Court must resentence Little. In doing so, double jeopardy principles do not prevent the Court from imposing additional punishment, so long as the Court credits the punishment already served by Little against any further penalty.[1]

[1] Little also argues that even if double jeopardy does not require termination of probation, the Court should release him from probation because "[h]e has been compliant with the terms of probation as far as counsel is aware, and presents no future danger to the community." Def. Mot. 10. He also contends that resentencing him to time served without a hearing would be in compliance with the D.C. Circuit's mandate. Def. Reply at 4. However, whenever the Court imposes a sentence, it must carefully consider the factors provided in 18 U.S.C. § 3553(a). The Court will not short-circuit the usual process for considering those factors by deciding the issue at this stage.

A. Under the Mandate Rule, the Court Must Resentence Little

The D.C. Circuit did not leave Little's remedy as an open question. Instead, it "vacate[d] Little's sentence and remand[ed] to the district court for resentencing." *Little*, 78 F.4th at 461. The mandate rule requires the Court to obey that directive by resentencing Little.

The mandate rule means a district court must do as it was told by the court of appeals. "Under the mandate rule, 'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'" *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 596 (D.C. Cir. 2001) (quoting *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948)); *see also* 28 U.S.C. § 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."). Therefore, "[a] trial court is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case." *Yablonski v. United Mine Workers of Am.*, 454 F.2d 1036, 1038 (D.C. Cir. 1971) (internal quotation marks and citation omitted).[2]

Little's argument that this Court may disregard the mandate fails for two reasons. He contends that the Court cannot resentence him as instructed because imposing any additional punishment would violate double jeopardy. Def. Mot. 1–2. The first problem with this approach is that the Court does not agree that double jeopardy precludes resentencing in this case, for the

[2] The mandate rule applies to criminal sentencing appeals. *See* 18 U.S.C. § 3742(g) ("A district court to which a case is remanded pursuant to [§ 3742(f)(1), which permits a defendant to appeal a sentence "imposed in violation of law," or (f)(2)] shall resentence a defendant in accordance with [§ 3553] and with such instructions as may have been given by the court of appeals . . . .").

reasons stated below. But even if the Court were inclined to agree with Little on that, it still could not flout the mandate of the D.C. Circuit. In arguing that the Court should refuse to resentence him, Little asks the Court to do something it has no authority to do, since the Court lacks discretion to deviate from the mandate. *See Yablonski*, 454 F.2d at 1038.

Similarly, Little's argument that the mandate rule does not apply because the D.C. Circuit did not consider double jeopardy, Def. Reply 2–3, fails because a higher court's decision is binding, even if that decision did not take into account a relevant but unraised argument. Little points out that the briefing on appeal did not raise the double jeopardy argument and that the resulting opinion does not reference double jeopardy. *Id.* 3. But he offers no authority for the radical idea that this absence saps the force of the mandate. His reliance on *Independent Petroleum Association of America v. Babbit* is misplaced. 235 F.3d 588 (2001). In that case, a party argued that the D.C. Circuit had already decided that the party had taken a certain action, and that the mandate rule thus prevented the district court from holding otherwise. *Id.* at 596. The D.C. Circuit rejected this argument on the basis that " [a]lthough some portions of" its earlier "decision may be read to suggest that" the party had taken that action, that question "was not before us, nor decided by us, even by implication." *Id.* at 597.

The Court's point was simply that the mandate rule does not control a district court's decision of a question not actually before or decided by the court of appeals. That is quite different from Little's suggestion that when the court of appeals expressly decides a matter without considering a relevant but unraised argument, its directive to the lower court becomes optional. Were he right, a district court could disregard instructions from above whenever a litigant advanced a previously unraised objection to the otherwise binding decision. That cannot be correct, because "[a] trial court is without power to do anything which is contrary to either the

letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case." *Yablonski*, 454 F.2d at 1038. Accordingly, the Court will not give Little the remedy refused by the D.C. Circuit.

B. Double Jeopardy Principles Do Not Prevent the Court From Imposing Additional Punishment on Little, so Long as It Credits the Punishment Already Incurred

Principles of double jeopardy do not prohibit the Court from imposing an additional term of imprisonment or probation when it resentences Little, as long as it credits the time already served in prison or probation against any new punishment. Little's argument disregards established principles of law, according to which a defendant who appeals an illegal sentence has no legitimate expectation of finality in that sentence and therefore may be resentenced even if he receives additional punishment and even if he has already served part of the original sentence. Applying these principles, it is clear that in resentencing Little, the Court may impose additional penalties, provided it appropriately reduces the new punishment to reflect the time he has already served of his initial terms of imprisonment and probation.

Little relies on two Supreme Court decisions to argue that because he has already fully served his term of imprisonment, double jeopardy prohibits the Court from imposing any additional punishment. *See* Def. Mot. 2–9. He principally invokes the Supreme Court's decision in *Ex Parte Lange*, 85 U.S. 163 (1873). In that case, the defendant's single statute of conviction permitted imposition of a fine *or* imprisonment, but the judge imposed a maximum prison term *and* a maximum fine. *Id.* at 164. The Supreme Court vacated the sentence and, applying double jeopardy principles, held that because the defendant "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176. Little also cites *In re Bradley*, 318 U.S. 50 (1943). There, as in *Lange*, the

judge sentenced the defendant to both a fine and imprisonment although the statute permitted only one or the other. *Id.* at 51. After the defendant had already paid the fine, the court amended the judgment to omit the fine but keep the imprisonment. *Id.* at 51–52. Citing *Lange*, the Supreme Court concluded in a brief opinion that "[a]s the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end." *Id.* at 52 (citing *Lange*, 85 U.S. at 176). Based on these two cases, Little says that the completion of his term of imprisonment amounts to "full satisfaction of one of the alternative penalties of the law" and that the Court thus lacks authority to further punish him. Def. Mot. 3 (quoting *Bradley*, 318 U.S. at 52). Little's argument fails, however, because the case law does not support such a stark, sweeping reading of *Lange* or *Bradley*.

Indeed, the Supreme Court has read those cases narrowly. In *Jones v. Thomas*, the Court emphasized that in *Lange*, the defendant had already paid the statutorily maximum fine and served five days of his maximum one-year prison sentence when the trial court attempted to resentence him to no fine but a further year in prison. 491 U.S. 376, 383 (1989) (citing *Lange*, 85 U.S. at 175). The Court explained that "*Lange* therefore stands for the uncontested proposition that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature . . . and not for the broader rule suggested by its dictum." 491 U.S. at 383 (citing *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980)). The Court also stated that "we do not think the law compels application of *Bradley* beyond its facts." *Id.* at 386. And based on *United States v. DiFrancesco*, 449 U.S. 117 (1980), the D.C. Circuit has concluded that "the holdings in *Ex parte Lange* and [*United States v. Benz*, 282 U.S. 304 (1931)] now mean only that a court which imposes a sentence greater than that authorized by the legislature subjects a defendant to multiple

punishment in violation of the double jeopardy clause." *United States v. Fogel*, 829 F.2d 77, 86–87 (D.C. Cir. 1987).

By now it is well-established that the Constitution does not categorically bar additional punishment at resentencing. In *DiFrancesco*, the Supreme Court held that neither a statutorily authorized government appeal of a criminal sentence nor an increase of the sentence upon post-appeal resentencing violates double jeopardy. 449 U.S. at 132, 136–37. The Court noted that its precedents "clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." *Id.* at 134. And it observed that because the statute clearly permitted appellate review of the sentences at issue, "[t]he defendant . . . has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired." *Id.* at 136; *see also id.* at 139.

From this statement in *DiFrancesco*, the D.C. Circuit has derived the principle that "whether 'an increase in a sentence' violates the Double Jeopardy Clause 'turns on the extent and legitimacy of a defendant's expectation of finality in that sentence.'" *United States v. Casseday*, 807 F. App'x 5, 7 (D.C. Cir. 2020) (quoting *Fogel*, 829 F.2d at 87).[3] When does a defendant not have a legitimate expectation in the finality of a sentence? When "he is or should be aware at sentencing that the sentence may permissibly be increased." *Fogel*, 829 F.2d at 88. "If . . . there is some circumstance which undermines the legitimacy of" the defendant's expectation of finality, "then a court may permissibly increase the sentence." *Id.* at 87.

[3] Little asserts that "the 'expectation of finality' cases are not on point for a single-count, alternative-options case like this one." Def. Reply at 6. He seems to read *DiFrancesco* as applying only to instances in which the government appeals the sentence pursuant to specific statutory authorization. *See id.* But there is no warrant to read *DiFrancesco* as limited to its facts when the D.C. Circuit has already used it to distill a broader principle—in a single-count case, no less. *See Fogel*, 829 F.2d at 79.

Here, Little lacked a legitimate expectation of finality under *Fogel* because he received an illegal sentence and challenged it on direct appeal. First, Little did not have a legitimate expectation that his sentence was final because it was illegal. *See Fogel*, 829 F.2d at 88 (finding that one reason the defendant had a legitimate expectation of finality was because "an increase in appellant's term of probation was not necessary to bring the sentence into compliance with any statute" as "[t]he originally imposed sentence was not impermissible under the penalty statute"); *see also United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992) ("A defendant cannot acquire a legitimate expectation of finality in a sentence which is illegal, because such a sentence remains subject to modification.").

Second, Little did not legitimately expect his sentence to be final because he challenged it on direct appeal. *Fogel*'s holding that the district court violated double jeopardy by "unnecessarily increase[ing]" the defendant's sentence on its own initiative, *Fogel*, 829 F.2d at 80–81, 90, is "inapposite" when, as in this case, the defendant "voluntarily placed his sentence at issue by challenging it." *United States v. Townsend*, 178 F.3d 558, 567 n.1 (D.C. Cir. 1999); *see also United States v. Andersson*, 813 F.2d 1450, 1461 (9th Cir. 1987) ("Andersson has no legitimate expectation of finality in the original sentence when he has placed those sentences in issue by direct appeal and has not completed serving a valid sentence.").

The fact that Little has already served part of his initial sentence does not change the result. An increased punishment is permissible even if the defendant has begun serving the original, illegal sentence, although any punishment already incurred must be credited against the increased punishment. "[T]here no longer exists a *per se* rule that prohibits a court from increasing a defendant's sentence after service has begun." *Fogel*, 829 F.2d at 86–87. A defendant whose initial sentence was "plainly illegal" may receive additional punishment at resentencing. *United*

States v. Evans, 459 F.2d 1134, 1136 (D.C. Cir. 1972) ("It is well settled that a sentence in all respects legal cannot be increased after the defendant has begun serving it . . . . A sentence plainly illegal, however . . . may be corrected even after the defendant has begun serving it.") (citations omitted) (collecting cases); *see also Hayes v. United States*, 249 F.2d 516, 518–19 (D.C. Cir. 1957) ("True it is that defendant had begun to serve time; but as we read [*Bozza v. United States*, 330 U.S. 160 (1947)] this time was not lawful punishment the augmentation of which, to make the sentence equal to the statutory penalty, constituted double jeopardy."); *Davenport v. United States*, 353 F.2d 882, 884 (D.C. Cir. 1965) (affirming the holding of *Hayes* "that a defendant who successfully attacks an invalid sentence can 'be validly resentenced though the resentence increased the punishment'" (quoting *Hayes*, 249 F.2d at 517)). Therefore, because Little's sentence was illegal, he can receive further penalties at resentencing.

This is not a case in which imposing an additional penalty would fall afoul of the *Lange* rule that a defendant cannot be made to suffer greater criminal punishment than that prescribed by the legislature. *See Fogel*, 829 F.2d at 86–87 (citing *Lange*, 85 U.S. 163). The defendant in *Lange* had already paid the maximum fine permitted by law, *Lange*, 85 U.S. at 164, and so any further penalty would have resulted in his total punishment exceeding the maximum set by Congress. In contrast, although Little has fully served his term of imprisonment, those two months fall well short of the statutory maximum of six months. *See Little*, 590 F. Supp. 3d at 343.

And Little is misguided in arguing that under *Bradley* he can suffer no further penalty because "one valid alternative provision of the original sentence has been satisfied" by his completion of the term of imprisonment imposed. Def. Mot. 3 (quoting *Bradley*, 318 U.S. at 52). Little can receive additional punishment so long as the Court credits the punishment already incurred against the new punishment. In *Thomas*, the Supreme Court explained that the

"alternative sentences in *Bradley*" of fine and imprisonment "were of a different type," meaning that "it would not have been possible to 'credit' a fine against time in prison." 491 U.S. at 384. By contrast, "crediting time served under one sentence against the term of another has long been an accepted practice." *Thomas*, 491 U.S. at 384 (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)). Crediting time ensures the defendant's punishment does not exceed the maximum prescribed by the legislature, which would violate *Lange*. *See Fogel*, 829 F.2d at 86–87 (citing *Lange*, 85 U.S. 163); *cf. Pearce*, 395 U.S. at 718–19 ("[T]he constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense."), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 798–803 (1989).

Accordingly, the Court may impose an additional punishment on Little so long as it appropriately credits the time Little served in prison and on probation against the punishment. *See United States v. Lominac*, 144 F.3d 308, 318 (4th Cir. 1998) ("Unlike the monetary sanction of a fine, which cannot be converted into an equivalent temporal sanction, Lominac's term of supervised release restrained his liberty for a known period of time that can be credited against any future sentence of imprisonment. Accordingly, *Bradley* does not bar resentencing."), *abrogated on other grounds by Johnson v. United States*, 529 U.S. 694 (2000); *United States v. Martin*, 363 F.3d 25, 38 (1st Cir. 2004) ("[W]e join other courts of appeals in holding that these similarities [between probation and imprisonment] are sufficient to allow crediting of probation against imprisonment" upon resentencing after an appeal) (collecting cases).

If the Court decides to impose additional punishment, it must reduce that punishment to reflect the punishment already incurred by Little of 60 days' imprisonment and approximately 18 months' probation. *See Thomas*, 491 U.S. at 384. In crediting time served on probation against a

later sentence of imprisonment, or vice versa, the Court would not engage in a "day-to-day offset" because probation is much less onerous than imprisonment. *See Martin*, 363 F.3d at 39. If the Court chooses to impose additional punishment, it will use its judgment to select an appropriate, fact-sensitive ratio based on "the specific conditions of [the defendant's] probation and the effect of a sentence reduction on the underlying purposes of the Guidelines as set out in 18 U.S.C § 3553(a)." *Id.*

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Little's Motion to Alter the Judgment is **DENIED**. Resentencing remains set for January 25, 2024.

IT IS SO ORDERED.

Date: 1-17-24

Royce C. Lamberth
United States District Judge

AO 245C (Rev. 09/19) Amended Judgment in a Criminal Case Sheet 1

(NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT

District of Columbia

UNITED STATES OF AMERICA
v.
JAMES LITTLE

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 21cr315 (RCL)
USM Number: 36398-509

Date of Original Judgment: 3/14/2022 *(Or Date of Last Amended Judgment)*

Joshua Carpenter
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) Four (4) of the Information.

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
40 USC 5104(e)(2)(G)	Parading, Demonstrating or Picketing in a Capitol Building	1/6/2021	4

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) all remaining counts ☐ 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.

1/25/2024
Date of Imposition of Judgment

Royce C. Lamberth
Signature of Judge

Royce C. Lamberth US District Court Judge
Name and Title of Judge

1/29/24
Date

DEFENDANT: JAMES LITTLE
CASE NUMBER: 21cr315 (RCL)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

One Hundred and Twenty days with credit for the 60 days already served.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☑ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JAMES LITTLE
CASE NUMBER: 21cr315 (RCL)

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 10.00	$ 500.00	$	$	$

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

☐ The defendant shall 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
Architect of the Capitol Office of the Chief Financial Officer Attention: Kathy Sherrill, CPA Ford House Office Building Room H2-205B Washington, DC 20515		$500.00	

TOTALS	$ 0.00	$ 500.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ 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 ☐ fine ☑ restitution.

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** 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: JAMES LITTLE
CASE NUMBER: 21cr315 (RCL)

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 510.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

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

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) 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

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The financial obligations are immediately payable to the Clerk of the Court for the U.S. District Court, 333 Constitution Ave NW, Washington, DC 20001. Within 30 days of any change of address, you shall notify the Clerk of Court of the change until such time as the financial obligation is paid in full.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate.

☐ 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) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 2, 2022 Decided August 18, 2023

No. 22-3018

UNITED STATES OF AMERICA,
APPELLEE

v.

JAMES LITTLE,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cr-00315-1)

Joshua B. Carpenter, Federal Public Defender for the Western District of North Carolina, argued the cause and filed the briefs for appellant.

James I. Pearce, Appellate Counsel, U.S. Department of Justice, argued the cause for appellee. With him on the brief were *Matthew Graves*, U.S. Attorney for the District of Columbia, *Kenneth A. Polite*, Assistant Attorney General, *Lisa H. Miller*, Deputy Assistant Attorney General, and *John Crabb Jr.*, Chief, Capitol Siege Section.

Before: WILKINS and WALKER, *Circuit Judges*, and ROGERS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WALKER.

Dissenting opinion by *Circuit Judge* WILKINS.

WALKER, *Circuit Judge*: James Little committed a petty offense. The district court sentenced him to prison, followed by probation. The only question on appeal is whether that sentence is authorized by statute.

It is not. Probation and imprisonment are alternative sentences that cannot generally be combined. So the district court could not impose both for Little's petty offense.

I. Background

A. James Little's Offense and Sentence

On January 6, 2021, James Little rioted inside the United States Capitol. In his own words, he "took over the Capital [sic]" because "[s]tealing elections is treason." JA 32. He later pleaded guilty to a petty offense: Parading, Demonstrating, or Picketing in a Capitol Building. 40 U.S.C. § 5104(e)(2)(G).

That crime carries a sentence of six months in prison, a fine, or both.[1] *Id.* § 5109(b). As an alternative sentence, a court may give a defendant up to five years of probation, with or without a fine. 18 U.S.C. §§ 3551(b), 3561. But here, the district court chose to mix and match those options, sentencing

[1] Because that offense carries a prison term of six months, it is a Class B misdemeanor. 18 U.S.C. § 3559(a)(7). That makes it a "petty offense." 18 U.S.C. § 19 (defining "petty offense" to include Class B misdemeanors).

Little to sixty days in prison followed by three years of probation.

To support Little's sentence, the district court relied on § 3561(a)(3), which describes some of the circumstances in which probation is available. Before introducing that provision, we first discuss the federal sentencing scheme and probation's role within it.

B. Authorized Sentences

The Sentencing Reform Act of 1984 "comprehensively" outlines the federal sentencing scheme. *Cunningham v. California*, 549 U.S. 270, 286 (2007). The Act's opening section lists a menu of "authorized sentences" under the Federal Criminal Code:

> An individual found guilty of an offense shall be sentenced . . . to —
>
> (1) a term of probation as authorized by subchapter B;
>
> (2) a fine as authorized by subchapter C; or
>
> (3) a term of imprisonment as authorized by subchapter D.
>
> A sentence to pay a fine may be imposed in addition to any other sentence.

Pub L. No. 98-473 § 212(a)(2), 98 Stat. 1873, 1988 (codified at 18 U.S.C. § 3551(b)).

That menu makes five sentences available. The first is probation — which lets a court sentence a defendant to a term of court supervision, with an option for short periods of intermittent confinement. 18 U.S.C. § 3563(b)(10). The

second is a fine. The third is imprisonment. The fourth is probation plus a fine. And the fifth is imprisonment plus a fine.

Notice that imprisonment plus probation is not an available option. That's because the list of sentences is disjunctive ("probation . . . fine . . . *or* . . . imprisonment"), indicating that the options on the menu are alternatives that cannot be combined. *Id.* § 3551(b) (emphasis added).[2]

The provision following the list confirms that reading. Notwithstanding the disjunctive menu, "a fine may be imposed in addition to any other sentence." *Id*. That exception allows a sentencing judge to combine a fine with probation or imprisonment. Congress's decision to make an exception for fines but not probation strongly suggests that probation cannot be combined with imprisonment. *Nasdaq Stock Market LLC v. SEC*, 38 F.4th 1126, 1137 (D.C. Cir. 2022) ("mention of one thing" implies the "preclusion" of others).

In other words, the Code's text and structure show that probation and imprisonment may not be imposed as a single sentence. They are separate options on the menu.[3]

---

[2] The Code's chapter on sentencing mirrors the structure of the menu, dividing probation, fines, and imprisonment into three separate subchapters. 18 U.S.C. ch. 227. Subchapter A houses general provisions. Subchapter B discusses probation. Subchapter C covers fines. And Subchapter D lays out the rules for imprisonment.

[3] To be sure, Congress *can* make exceptions to that general rule. Indeed, the Code's chapter on sentencing applies "[e]xcept as otherwise specifically provided." 18 U.S.C. § 3551(a). So when we say that a court may not impose probation and imprisonment for a single offense, we mean that § 3561(a)(3) does not allow it — not that there are no exceptions to that general rule elsewhere in the

C. Probation and Petty Offenses

To ensure that probation remains a standalone sentence — not a punishment in addition to imprisonment — the Sentencing Reform Act of 1984 put a further restriction on its use. Under the Act, a defendant could not get probation if he was "sentenced at the same time to a term of imprisonment for the same *or a different offense*." Pub. L. 98-473, § 212(a)(2), 98 Stat. 1873, 1992 (emphasis added).

Put differently, in 1984, sentencing judges could not impose probation and imprisonment for *a single offense* — the general rule discussed above. Nor could they impose probation for one offense and imprisonment for a *different offense* sentenced at the same time. *Id.* [4]

Code. But there is no exception for Little's offense. *See* 40 U.S.C. § 5104(e)(2)(G).

Pushing back, the Government says 18 U.S.C. § 3561(a)(3) *is* the kind of specific exception contemplated by § 3551(a), allowing a sentencing court to impose probation and imprisonment for a single petty offense. We disagree. First, § 3551(a) contemplates that exceptions will generally be found outside the Code's chapter on sentencing. *See id.* § 3551(a) (noting that the "provisions of *this* chapter" apply "except as otherwise specifically provided" (emphasis added)). Second, as we explain, § 3561(a) is not an exception to the general rule. *See infra* Part II.

[4] Though the Sentencing Reform Act made probation a sentencing option distinct from imprisonment — and barred giving a defendant probation after imprisonment — it put in place a separate mechanism for monitoring offenders after they are released from prison: supervised release. 18 U.S.C. § 3583; *see United States v. Granderson*, 511 U.S. 39, 43 n.3 (1994) ("before 1984, probation [was] an alternative to a sentence," but the Sentencing Reform Act, "for the first time, classified probation as a sentence"). We discuss supervised release in greater detail in Section II.B.

But that regime proved too restrictive. So in 1994, Congress amended the statute. It now reads:

> A defendant who has been found guilty of an offense may be sentenced to a term of probation unless . . . the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense *that is not a petty offense*.

Pub. L. No. 103-322, § 280004, 108 Stat. 1796, 2096 (codified at 18 U.S.C. § 3561(a)(3)) (emphasis added).

This case turns on those six new words. Does the italicized phrase modify only "a different offense"? If so, a court *may not* impose both imprisonment and probation for a single offense (though it can impose imprisonment for one petty offense and probation for a different offense). Or does the italicized phrase modify "the same or a different offense"? In that case, a sentencing court *may* impose both probation and imprisonment for a single petty offense.

The district court adopted the latter reading and sentenced Little to sixty days in prison plus three years of probation for a single petty offense.

II. A Defendant May Not Get Probation and Imprisonment for a Single Petty Offense

We disagree with the district court's reading of § 3561(a)(3). *See United States v. Cordova*, 806 F.3d 1085, 1098 (D.C. Cir. 2015) (we review the district court's interpretation of a statute de novo).

A. Text

Like many statutory lists, § 3561(a)(3) poses a problem: Does a qualifier at the end of the list modify just the list's final item, or all the items that come before it?

The Supreme Court's "typical[ ]" approach to that problem is to apply "the rule of the last antecedent." *Lockhart v. United States*, 577 U.S. 347, 351-52 (2016). That rule commands "that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Id.* at 351 (cleaned up). Thus, when Chief Justice Marshall interpreted a statute defining "piracy" as committing "upon the high seas . . . murder or robbery, or any other offense . . . punishable with death," he held that all robberies at sea were piracies — not just robberies punishable by death. *United States v. Palmer*, 16 U.S. 610, 626 (1818) (cleaned up).

Applied here, the last-antecedent rule tells us that the qualifier "that is not a petty offense" modifies only the phrase that immediately precedes it: "a different offense." 18 U.S.C. § 3561(a)(3). Read like that, the statute bars a court from imposing probation and imprisonment for a single offense. A court may impose both only if a defendant gets imprisonment for one petty offense and probation for a different offense.

Of course, the last-antecedent rule is not inexorable. *See Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021) ("The rule of the last antecedent is context dependent."). And the Government contends that this statute is a poor fit for the rule. It says we can't divide up the phrase "the same or a different offense" and apply the qualifier to only part of it. In the Government's view, "the same or a different" is an adjectival phrase modifying the noun "offense." If that's correct, then

there is only one noun ("offense") for the qualifier ("that is not a petty offense") to modify:

the same or a different	offense	that is not a petty offense
adjectival phrase	*noun*	*qualifier*

Read that way, it is natural to read the qualifier to reach "the same." And it would follow that prison plus probation is an authorized sentence for a single petty offense.

But that is not the only plausible interpretation of the statute. Rather than reading "the same" as part of an adjectival phrase, "the same" can be read as a pronoun. That's because "the same" is often used as a pronoun meaning "something that has previously been defined or described." Same (pronoun, def. 2), *Webster's Third New International Dictionary* (1993).[5] For example, when describing a recent meal at my favorite restaurant, I could say: "My friend had a steak, and I had the same."

[5] True, *Webster's Third* doesn't list that meaning of "same" as the first definition, instead giving precedence to the adjectival meaning. *Cf.* Dissenting Op. 9-10. But that just shows that the adjectival meaning of "same" has been in use for longer. *Webster's Third*, *supra*, at 4a ("In definitions of words of many meanings, the earliest ascertainable meaning is given first. Meanings of later derivation are arranged . . . by dated evidence and semantic development.").

It also may be true that using "the same" as a pronoun is "legalese." Dissenting Op. 10. But Congress often borrows established legal phrasing when it writes statutes. *See FAA v. Cooper*, 566 U.S. 284, 292 (2012). And "the same" has been used as a pronoun in some of this nation's most important legal documents. *See, e.g.*, U.S. Const. art. I, § 5 ("Each House shall keep a journal of its proceedings, and from time to time publish the same . . . .").

If "the same" takes that meaning in § 3561(a)(3), the statute makes perfect sense. The first part reads: "A defendant who has been found guilty of *an offense* may be sentenced to a term of probation unless . . . [he] is sentenced at the same time to a term of imprisonment for *the same*." 18 U.S.C. § 3561(a)(3) (emphases added). The final phrase then adds an item to the list: "or a different offense that is not a petty offense." *Id.*

Reading "the same" as a pronoun also explains why Congress used different articles before the items in the list in § 3561(a)(3) ("*the* same"; "*a* different"). By using the definite article "the" before "same," Congress made clear that it was referring to the offense mentioned earlier in the provision. And by using the indefinite article "a" before "different," Congress captured the universe of other offenses for which a defendant might be sentenced. *See Slack Technologies, LLC v. Pirani*, 143 S. Ct. 1433, 1440 (2023) (relying on Congress's use of the "definite article" to interpret a statute).

If "the same" is a pronoun, the end of § 3561(a)(3) is grammatically structured in a way that makes the last-antecedent rule a natural fit:

the same	or	a different	offense	that is not a petty offense
[_____]		[_____]	[_____]	[_____]
pronoun		*adjectival phrase*	*noun*	*qualifier*

As with other statutory lists, it is less awkward "to apply th[e] modifier only to the item directly before it" than to all the preceding items. *Lockhart*, 577 U.S. at 351; *see FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389-90 (1959). That is particularly true here because there is an intervening adjectival phrase ("a different") between the qualifier ("that is not a petty offense") and the first item in the list ("the same"). *Cf.* Antonin

Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 147 (2012) (reading a qualifier to apply to a whole list is most appropriate "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series").

Little offers a third interpretation of the text. He suggests that "the same or a different offense" is an "elliptical construction." Little Br. 16-17. An elliptical construction is one in which a word or phrase is omitted from a sentence because it is implied from context — for instance, "I went to dinner, and John went [to dinner] too." Thus, Little says, § 3561(a)(3) should be read as if Congress had written "the same *offense* or a different offense." If correct, that reading would also make the rule of the last antecedent a natural fit because there are two nouns (one implied and one express) preceding the qualifier ("that is not a petty offense").

To be sure, § 3561(a)(3) is no model of clarity. The text alone struggles to supply an answer to today's case. But we don't read text in a vacuum. And the rest of the statutory scheme confirms that the Government's reading is second best.

B. Structure

Courts "must read the words Congress enacted in their context and with a view to their place in the overall statutory scheme." *Turkiye Halk Bankasi v. United States*, 598 U.S. 264, 275 (2023) (cleaned up). Doing so here confirms — for four reasons — that a court cannot impose both imprisonment and probation for a single petty offense.

First, the Government's reading would subvert the Sentencing Reform Act's general rule that probation is a

standalone sentence, combinable only with a fine, not with imprisonment.

The Act sets up that rule by listing a menu of "[a]uthorized sentences" for a single offense. 18 U.S.C. § 3551. Those sentences are (1) probation, (2) a fine, (3) imprisonment, (4) probation and a fine, or (5) imprisonment and a fine. *Id.*; *see supra* Section I.B. That menu is the cornerstone of the Criminal Code's chapter on sentences. 18 U.S.C. ch. 227.

So when the Government reads § 3561(a)(3) to add a new option — probation plus imprisonment — it's a heavy lift. Unlike mystery novels, statutes rarely end with a surprise twist. And here, the surprise would be especially strange. It would attach a double punishment to petty offenses but not to felonies. So you could get probation plus prison for speeding in a national park, but not for assaulting a park ranger.

Second, the Government's reading would turn a *limit* on probation into an *expansion* of its availability.

Section 3561(a) is a restriction on a sentencing court's power. It lists three limits on a sentencing court's authority to select probation as a sentence from the menu in § 3551(b). Those limits are:

> (1) when a defendant is sentenced for "a Class A or B felony";
>
> (2) when another statute "expressly preclude[s]" probation; or
>
> (3) when "the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense."

18 U.S.C. § 3561(a).

From the third of those limits, the Government would forge an expansion of probation's availability. That's an odd way to read a limit. Imagine your friend said, "You can borrow my car when I'm out of town, except for three scenarios when you cannot." Would you read into the third scenario an occasion to borrow his car when he's *in town*? Probably not if you wanted to stay friends. That's because speakers — including legislatures — do not typically hide new expansions of authority within limits on a grant of authority.

Third, the Government's reading of the statute would turn the Sentencing Reform Act's post-confinement-monitoring scheme on its head, subverting two of Congress's deliberate choices.

Choice 1: Congress made *supervised release*, not *probation*, the mechanism for court supervision after time in prison. Supervised release is a term of "postconfinement monitoring," which runs from the time a defendant is released. *Johnson v. United States*, 529 U.S. 694, 696-97 (2000). It is not a standalone sentence, but rather is imposed as "part of" the defendant's term of imprisonment. 18 U.S.C. § 3583(a). Unsurprisingly, the rules governing supervised released are housed within the Code's subchapter on imprisonment. *Id.* ch. 227, subch. D (imprisonment). By contrast, probation is a distinct sentence, housed in its own subchapter. *See id.* § 3551(b); ch. 227, subch. B (probation).[6]

[6] Probation and supervised release thus play different roles in the sentencing scheme. "Probation is a standalone sentence that might allow for intermittent imprisonment during its term, while supervised *release* . . . follows a term of imprisonment that has been completed

Choice 2: Congress expressly barred supervised release for petty offenses. 18 U.S.C. § 3583(b)(3). And because supervised release is the Code's exclusive form of post-confinement monitoring, that choice ruled out monitoring after prison for single-count petty offenders. Once a petty offender is done with imprisonment he may move on with his life — whereas more serious offenders may be supervised to keep them on the straight and narrow.

The Government's reading of § 3561(a)(3) subverts both those choices. In its view, whenever a defendant is sentenced to imprisonment for a petty offense, the court may *also* impose a term of probation to follow time in prison. Yet that turns probation into a form of post-confinement monitoring. *Cf.* U.S.S.G. ch. 7, pt. A, note 2(b) ("[t]he conditions of supervised release" are almost "the same as those for . . . probation"). And it imposes post-confinement monitoring on single-count petty offenders even though Congress expressly exempted them from it. 18 U.S.C. § 3583(b)(3).

Fourth, the Government's reading of § 3561(a)(3) would let a court impose *more* post-confinement monitoring for a petty offense than for more serious misdemeanors and most felonies.

The maximum term of supervised release increases with the severity of the offense. 18 U.S.C. § 3583(b). The most serious felons get five years, some other felons get three years, nonpetty misdemeanants get one year, and petty offenders get none. *Id.*

---

in full." *United States v. Panayiotou*, 2023 WL 417953, at *2 (D.D.C. Jan. 25, 2023).

Reading § 3561(a)(3) to prohibit probation and imprisonment for a single petty offense — as we do — preserves that neat correspondence between the severity of the offense and the length of post-confinement monitoring. By contrast, because the Government's reading turns probation into a form of post-confinement monitoring, it would let a court impose *more* monitoring for a petty offense than for more serious misdemeanors and most felonies:

Offense	Term of Post-confinement Monitoring	
	Our Reading	Government Reading
Class A felony	5 years	5 years
Class B felony	5 years	5 years
Class C felony	3 years	3 years
Class D felony	3 years	3 years
Class E felony	1 year	1 year
Nonpetty misdemeanor	1 year	1 year
Petty offense	None	**5 years**[*]

If Congress wanted to impose more post-confinement monitoring for petty offenses than for all but the most serious felonies, it could. But we would expect clear language authorizing that bizarre result. Instead, we're left with

[*] That's five years of *probation*, to run after a defendant's confinement. In contrast, the table's other figures refer to *supervised release*, also to run after a defendant's confinement.

§ 3561(a)(3) — and its text is at best equivocal. *See supra* Section II.A; *cf. Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001).

To sum up, there are two possible readings of § 3561(a)(3). Our reading keeps probation and imprisonment as separate sentences. 18 U.S.C. § 3551(b). It takes seriously Congress's instruction not to impose post-confinement monitoring on petty offenders. *Id.* § 3583(b)(3). And it gives § 3561 a serious role to play in the statutory scheme — allowing imprisonment for one petty offense and probation for a *different* offense, while confirming that prison plus probation is not an available sentence for the same offense. *Id.* § 3561(a)(3).

The other possible reading is the Government's. It is at odds with the Act's opening list of available sentences. It turns a limit on probation into an expansion of it. It sidesteps the bar on supervised release for petty offenders. And it subjects petty offenders to a term of post-confinement monitoring five times longer than the term imposed on some felons.

That cannot be right. Congress isn't in the business of putting a statute "at war with itself." *United States v. American Tobacco Co.*, 221 U.S. 106, 180 (1911). We thus avoid that unnecessary conflict by reading § 3561(a)(3) to preserve the statutory scheme's bar on sentences of prison plus probation for the same offense.[7]

[7] As a fallback, the Government argues that Little's sentence is authorized by 18 U.S.C. § 3563(b)(10), which lets a sentencing court require a defendant on probation to "remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time." So the Government says the district court's reliance on § 3561(a)(3) was harmless. *See United States v. Simpson*, 430 F.3d

* * *

Section 3561(a)(3) is no model of clarity. For that reason, thoughtful district judges have divided over the best reading of it. *See United States v. Panayiotou*, 2023 WL 417953, at *1 & n.2 (D.D.C. Jan. 25, 2023) (disagreeing with the Government, even though "nine judges have adopted [its] position").

But the Government's interpretation is second best. It says § 3561(a)(3) lets a sentencing court impose probation plus imprisonment for a single petty offense. Yet that reading conflicts with the statutory scheme. Congress made probation and imprisonment separate options for separate offenses; barred supervised release for petty offenders; and linked the

---

1177, 1184 (D.C. Cir. 2005) (setting out harmless error test for both constitutional and nonconstitutional errors). But the Government has not shown that § 3563(b)(10) authorizes a *sixty-day* stint in custody at the start of a defendant's sentence. Indeed, the statute contemplates *short* periods of confinement like "nights" and "weekends" interspersed throughout probation. 18 U.S.C. § 3563(b)(10); *see United States v. Forbes*, 172 F.3d 675, 676 (9th Cir. 1999) ("a straight sentence of six months is not the intermittent incarceration that this statute permits"). In any event, the district court expressly ruled out imposing intermittent confinement as a condition of probation. It noted that "the government did not . . . request [it] in Little's case." JA 130-31. And it said intermittent confinement "would be unwise" because there were "COVID-19 safety concerns inherent in repeatedly entering and leaving detention facilities." *Id.* So the Government cannot show, as it must, that the district court "*would* have" imposed the same sentence had it not misunderstood its sentencing power under § 3561(a)(3). *United States v. Ayers*, 795 F.3d 168, 176 (D.C. Cir. 2015) (emphasis added).

length of post-confinement monitoring to the severity of an offense. The Government's reading subverts those choices.

We cannot divorce § 3561(a)(3)'s hazy text from that clarifying context. So we vacate Little's sentence and remand to the district court for resentencing.[8]

So ordered.

[8] In his plea agreement, Little waived most of his appellate rights. But he reserved the right to appeal a sentence "above the statutory maximum." JA 22-23. Little argues that reservation allows this appeal. Little Br. 38. Because the Government "opted not to enforce" Little's waiver, we need not decide whether Little reserved the right to bring this appeal. Govt. Br. 17 n.4; *see United States v. Ortega-Hernandez*, 804 F.3d 447, 451 (D.C. Cir. 2015) (appellate waiver not jurisdictional).

WILKINS, *Circuit Judge*, dissenting: James Little pleaded guilty to a petty offense under 40 U.S.C. § 5104(e)(2)(G) related to his participation in the January 6, 2021 insurrection at the United States Capitol. The District Court sentenced him to 60 days' imprisonment, followed by three years of probation. On appeal, Little offers several different reasons why his split sentence violates federal sentencing statutes. The majority agrees. Because I believe that the majority and Little are mistaken, I respectfully dissent.

I.

A few weeks after the 2020 election, Little uploaded an almost 23-minute YouTube video contesting the election results and mentioning a potential civil war. On January 5, 2021, Little traveled from North Carolina to Washington, D.C. to attend former President Trump's "Stop the Steal" rally the following day—January 6. J.A. 54; Appellant Br. 8.

"January 6, 2021, marked a tragic day in American history. The peaceful transfer of power—one of our most important and sacred democratic processes—came under a full-fledged assault." *United States v. Little*, 590 F. Supp. 3d 340, 342 (D.D.C. 2022). While Congress assumed its constitutional duty to certify the results of the 2020 election, "[r]ioters" forced their way into the Capitol building. *Id.* This violent attack resulted in multiple deaths, injuries, and "inflicted millions of dollars in damage to the Capitol." *Trump v. Thompson*, 20 F.4th 10, 15 (D.C. Cir. 2021). Little joined the other rioters who forced their way into the Capitol.

While inside the building, Little smiled and first-bumped other rioters, took photographs of himself, J.A. 13, and sent a text message stating, "We just took over the Capital [sic]!" J.A. 12. The individual who received the message responded, "And you are bragging? 'We'? THIS IS TREASON!!! IF YOU DON'T CONDEMN THIS, NEVER BOTHER SPEAKING

TO ME AGAIN! HORRIBLE, HORRIBLE PEOPLE. IT'S A COUP! YOU OBVIOUSLY HATE AMERICA!!!" *Id.* To this, Little stated, "We are stopping treason! Stealing elections is treason! []We're not going to take it anymore!" and "[y]ou'll thank me for saving your freedom . . . later!" *Id.*

Although Little "did not directly assault officers[,]" his participation was essential because those who *did* engage in violence "were able to do so because they found safety in numbers." *Little*, 590 F. Supp. 3d at 342.

Little was ultimately arrested and charged with four counts: (1) entering and remaining in a restricted building or grounds in violation of 18 U.S.C. § 1752(a)(1); (2) disorderly and disruptive conduct in a restricted building or grounds in violation of 18 U.S.C. § 1752(a)(2); (3) disorderly conduct in a Capitol building or grounds in violation of 40 U.S.C. § 5104(e)(2)(D); and (4) parading, demonstrating, or picketing in a Capitol building in violation of 40 U.S.C. § 5104(e)(2)(G). J.A. 16–17.

In November 2021, Little pleaded guilty to one count of parading, demonstrating, and picketing in a Capitol building in violation of 40 U.S.C. § 5104(e)(2)(G). *See* J.A. 19–33. As a Class B misdemeanor carrying a six-month statutory maximum penalty, this is a petty offense. *See* 18 U.S.C. § 19 (defining petty offenses as including Class B); *id.* § 3559(a)(7) (establishing Class B misdemeanors as offenses carrying a maximum of six months' imprisonment). Little was sentenced to a term of 60 days' imprisonment, followed by a term of three years' probation. J.A. 227–28. In doing so, the District Court noted that this sentence was necessary to "not only punish Little for his conduct but also ensure that he will not engage in similar conduct again during the next election." *Little*, 590 F.

Supp. 3d at 344 ("Only a split sentence would adequately serve the goals of sentencing described in 18 U.S.C. § 3553.").

II.

Little contends that his sentence of incarceration, followed by a term of probation (commonly called a "split sentence") is illegal. Resolution of the issue turns on the interpretation of 18 U.S.C. § 3561(a), which provides as follows:

> **(a) In general.**--A defendant who has been found guilty of an offense may be sentenced to a term of probation unless--
>
> > **(1)** the offense is a Class A or Class B felony and the defendant is an individual;
> >
> > **(2)** the offense is an offense for which probation has been expressly precluded; or
> >
> > **(3)** the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

As we see, Section 3561(a) is a list of exceptions—instances when the district judge *cannot* impose a sentence of probation. It provides that a defendant "may be sentenced to a term of probation unless" one of the three enumerated exceptions in subsections (a)(1), (a)(2), or (a)(3) applies.

The District Court found that the probation exception in § 3561(a)(3) did not apply to Little, and thus the court imposed a split sentence, a term of imprisonment followed by a term of probation.

A.

To understand the probation exception in § 3561(a)(3), we need to take a step back. Prior to the Sentencing Reform Act of 1984, federal prison sentences were by default indeterminate: if the court imposed a prison sentence, the defendant would be eligible for parole after serving one-third of the prison term, but whether and when the defendant was released on parole was solely within the discretion of the U.S. Parole Commission. *See generally United States ex rel. D'Agostino v. Keohane*, 877 F.2d 1167, 1169–70 (3d Cir. 1989). Hence, even though the court imposed the prison term, the amount of time that the defendant would actually spend in prison was "indeterminate" at the time of sentencing. As the Supreme Court explained, "under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which [the judge] usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment." *Mistretta v. United States*, 488 U.S. 361, 365 (1989).

On the other hand, "[d]eterminate sentences are those whose length can be measured with relative certainty at the time they are imposed." ARTHUR W. CAMPBELL, LAW OF SENTENCING § 4:3 (3d ed. 2022). To impose a determinate sentence prior to the Sentencing Reform Act, courts used split sentences. In a split sentence, the court imposed a term of imprisonment, but suspended the execution of all except a specific number of days or months, followed by a term of probation. In this manner, the court could determine exactly

how much time the defendant spent in prison, and the defendant was supervised on probation, rather than parole, after his release. If the defendant violated probation, the court could then impose the remainder of the prison term that was suspended.

The preceding example is how the court imposed a split sentence in a single-count case. In a multiple-count case, the court could impose a split sentence by imposing a prison term on one count and a probation term on the second count. *See, e.g.*, *United States v. Nunez*, 573 F.2d 769, 770–72 & n.5 (2d Cir. 1978) (finding split sentence in a single-count case was lawful where court imposed a three-year term of imprisonment with all but six months suspended, followed by a four-year term of probation and noting that "[a] judge could achieve this result . . . on a multi-count indictment by giving a prison sentence on one count and a period of probation on another[]"); *Green v. United States*, 298 F.2d 230, 231–33 (9th Cir. 1961) (affirming a split sentence imposed in a multiple-count case).

The Sentencing Reform Act "makes all [prison] sentences basically determinate. A prisoner is to be released at the completion of his sentence reduced only by any credit earned by good behavior while in custody." *Mistretta*, 488 U.S. at 367 (citing 18 U.S.C. § 3624(a), (b)). Upon release from prison, the defendant is placed on supervised release, and if the defendant violates those terms and conditions, supervised release can be revoked and the defendant can be sent back to prison. *See* 18 U.S.C. § 3583. As a result, split sentences were no longer needed to achieve determinate sentences—every prison term imposed was now determinate, and post-release supervision was handled by supervised release, rather than parole or probation.

The Sentencing Reform Act basically replicated the split sentencing method of imposing a determinate sentence by creating its "functional equivalent," which used "a term of imprisonment followed by a period of supervised release." U.S.S.G. § 5.B1.1 cmt. background (citing former 18 U.S.C. § 3561 (repealed 1984); 18 U.S.C. § 3583; and quoting S. S. REP. NO. 98–225 (1983)).

Because the use of split sentences was no longer necessary to achieve determinate sentencing, the Sentencing Reform Act eliminated split sentences in single-count and multiple-count cases. The Act did so by prohibiting the imposition of probation when "the defendant is sentenced at the same time to a term of imprisonment *for the same or a different offense*." Pub. L. No. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1992 (emphasis added). (This was the original language of § 3561(a)(3) in the Sentencing Reform Act.).

For reasons it never articulated, Congress eliminated the option of imposing supervised release following a term of imprisonment for petty offenses shortly after the October 1, 1987, effective date of the Sentencing Reform Act. Sentencing Act of 1987, Pub. L. No. 100–182, § 8, 101 Stat. 1266 (1987) (amending the supervised release statute, 18 U.S.C. § 3583(b)(3), to add the words "other than a petty offense").

It thus appears undisputed that as of the end of 1987, Congress abolished split sentences for all offenses, whether effectuated by imposing imprisonment and probation in a single-count case or by doing so in a multiple-count case. It is also undisputed that as of the end of 1987, Congress eliminated supervised release as an option for court supervision following a prison sentence for petty offenses, whether in a single-count case or a multiple-count case.

B.

In 1994, Congress amended the prohibition on split sentences appearing at 18 U.S.C. § 3561(a)(3) "by inserting 'that is not a petty offense' before the period." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XXVIII, § 280004, 108 Stat. 1796 (1994). Thus, the provision now prohibits the imposition of probation when "the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense *that is not a petty offense*." 18 U.S.C. § 3561(a)(3) (emphasis added). The present dispute centers on how to interpret the 1994 amendment.

As described above, Little was given a split sentence on a single petty offense count: 60 days' imprisonment followed by three years of probation. Little concedes that the 1994 amendment created an exception to allow for split sentences in cases involving petty offenses, but he contends that Congress only intended to allow split sentences in multiple-count petty offense cases—not in single-count petty offense cases:

> If the restrictive phrase ("that is not a petty offense") modifies only the phrase that precedes it ("a different offense"), then the provision permits a defendant convicted of two petty offenses to receive a sentence of imprisonment on one offense and probation on the other, but prohibits dual punishment—imprisonment and probation—for a single petty offense.

Appellant Br. 14–15.

For several reasons, Little's interpretation of the statute is untenable.

Recall the text of 18 U.S.C. § 3561(a)(3) following the 1994 amendment: probation may be imposed "unless . . . the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense." Importantly, the adjectives "same" and "different" modify the same word: "offense." Immediately after the word "offense[,]" we find the restrictive clause at issue: "that is not a petty offense." Invoking the last antecedent rule, Little argues that the restrictive clause, "that is not a petty offense," modifies the phrase that precedes it, "a different offense," but not the word "same."

This is an improper application of the rule of the last antecedent. The rule provides that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 343 (2005) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). The most obvious application of the rule is to construe the limiting clause "that is not a petty offense" as modifying the noun that it immediately follows: "offense." Alternatively, we could consider the limiting clause as modifying the prepositional phrase that precedes it—"for the same or a different offense"—because "the most natural way to view the modifier is as applying to the entire preceding clause" since "that clause hangs together as a unified whole . . . ." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018). Thus, whether the limiting clause modifies "offense" or "for the same or a different offense," either construction results in an exception to the split sentence prohibition in both single-count and multiple-count petty offense cases.

Little's argument that the limiting clause instead modifies only the phrase "different offense" turns the sentence into a

grammatical jumble. The adjective "same" still modifies the exact word as the adjective "different," but in Little's construct, the identical word now means "any offense" when modified by "same," and it means "any offense that is not a petty offense" when modified by "different." The word "offense" cannot have two different meanings when simultaneously modified by separate adjectives. Further, Little's construct gives meaning to "different offense," but it makes the adjective "same" an orphan, because it no longer has a noun to modify. When used, the last antecedent rule must be applied "without impairing the meaning of the sentence[,]" NORMAN SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47:33 (7th ed. 2022) (citation omitted). Little's application of the last antecedent rule fails this fundamental test.[1]

The majority tries to evade this grammatical confusion by asserting that Congress used "same" as a pronoun rather than an adjective. Maj. Op. 8. However, at the time of the 1994

[1] If Congress had intended to reach the result sought by Little, it would have set forth "same offense" separately, so that "different offense" could be considered a separate referent for the limiting clause that follows. For instance, Congress could have added the word "offense" and said that probation may be imposed "unless . . . the defendant is sentenced at the same time to a term of imprisonment for the same offense or a different offense that is not a petty offense." *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 148–49 (2012) (comparing "Institutions or societies that are charitable in nature (the institutions as well as the societies must be charitable)[]" with the alternative drafting, "An institution or a society that is charitable in nature (any institution probably qualifies, not just a charitable one)[]"). Even if Congress had added the word "offense" after "same," the sentence would still only "probably" have the meaning that Little would prefer. *Id*. at 149. But it is a moot point, because that is not what Congress did here.

amendment at issue, every major English dictionary (including the one cited by the majority) listed "same" in its adjective form as the first definition. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2007 (1993); OXFORD ENGLISH DICTIONARY 427 (1989); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1033 (1993); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1088 (1985); RANDOM HOUSE COLLEGE DICTIONARY 1165 (1982).

The majority also relies on Congress's use of the definite article as support for the contention that "same" is being used as a pronoun. Maj. Op. 8-9. That is rather weak sauce, given that the definite article almost always precedes "same," even when the word is clearly used as an adjective. No one says, "My friend had a steak, and I had *a* same steak."

Thus, "same" as an adjective was indisputably the most common usage of the word at the time Congress wrote the statutory text at issue. As one prominent commentator has put it, using same as a pronoun is "legalese" that should be "avoided by all that have any skill in writing," because "[t]he words *it, them,* and the noun itself . . . are words that come naturally to us all; *same* or *the same* is an unnatural English expression[.]" BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 796 (3d ed. 2011) (citation omitted). Of course, "the same" can be used as a pronoun properly in some instances, but just because "a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012) (emphasis in original). Consequently, I cannot agree with the majority's attempt to shoehorn the usage of "same" as a pronoun into the statutory text to support Little's interpretation.

My interpretation of the statute also comports more with the purpose of the 1994 amendment, as reflected in its title "Authorization of Probation for Petty Offenses in Certain Cases." *See Dubin v. United States*, 143 S. Ct. 1557, 1567 (2023) (noting that a title can be used to find meaning of a statute); *accord Yates v. United States*, 574 U.S. 528, 539–40 (2015); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). With the 1994 amendment, Congress clearly intended to authorize probation "for petty offenses" in instances where probation was not previously allowed. The one instance in which we are guaranteed to manifest Congress's intent is in a single offense case. Let me explain.

Suppose Mr. Little had stopped at a bank on his way to the Capitol on January 6, 2021 and handed the teller a note demanding cash, violating 18 U.S.C. § 2113, a felony. If Little pleaded guilty to bank robbery *and* the instant petty offense—the district judge could sentence Little to three years' probation for the bank robbery, if the judge sentenced Little at the same time to 90 days' imprisonment for the petty offense of parading and demonstrating at the Capitol. This is so pursuant to either my or the majority's interpretation of Section 3561(a)(3), because the statute allows a sentence of probation to be imposed for the bank robbery "*unless* . . . the defendant is sentenced at the same time to a term of imprisonment for . . . a different offense that is not a petty offense." Because the "different offense" (parading and demonstrating) is a petty offense, the judge could impose probation for the felony bank robbery, to follow the prison sentence for the petty offense.[2]

[2] Conversely, if the judge instead sentenced Little to 90 days' imprisonment on the bank robbery, he could not sentence Little to three years' probation on the parading and demonstrating charge. Because bank robbery is not a petty offense, the exception in Section 3561(a)(3) would apply that disallows a probationary sentence to be imposed at the same time as a prison sentence for a different offense.

Thus, even though Congress apparently intended to "authoriz[e] . . . probation for petty offenses" with the amendment, Violent Crime Control and Law Enforcement Act § 280004, the language authorizes probation for any offense, including felonies, so long as the probation is imposed at the same time as a prison sentence for a petty offense. And while this is perhaps an unintended consequence—yet nevertheless the result of Congress's drafting—it remains true because the limitation to petty offenses was placed on the offense that received the prison term, but no similar limitation was placed on the offense that could simultaneously receive the probationary term.

Where the defendant is convicted of only a single petty offense, such as in this case, my reading of the statute would authorize probation to be imposed for that petty offense where it was previously prohibited and in accordance with the intent of Congress as described in the title of the 1994 amendment. Indeed, cases in which there is only a single petty offense are the only instances where that outcome is guaranteed. Where there are two different offenses, application of the 1994 amendment could not only authorize probation when there are two petty offenses, but it could also authorize probation for a *felony* that is sentenced at the same time as a petty offense, as shown in the hypothetical above. Thus, construing the 1994 amendment to apply to a single offense not only comports with the natural and ordinary meaning of "same," it also ensures that Congress's desire to authorize probation for petty offenses where it had previously been prohibited can actually occur in those instances where that outcome is guaranteed.

Construing the text to modify the split sentence exception to apply regardless of whether there is one petty offense or multiple petty offenses also comports with the statutory scheme. In 1984, Congress drafted § 3651(a)(3) in a manner

to prohibit split sentences in all instances, regardless of whether the defendant was being sentenced on one count or multiple counts. It would stand to reason that when Congress made an exception to the split-sentence prohibition for petty offenses, it would do so for all split sentences involving petty offenses, regardless of whether the defendant was being sentenced on one count or multiple counts.

Indeed, precluding split sentences for single petty offenses affirmatively frustrates the purposes of sentencing as set forth in the Sentencing Reform Act. "When meting out sentences, judges must consider the goals of punishment, deterrence, incapacitation, and rehabilitation." *United States v. Godoy*, 706 F.3d 493, 496 (D.C. Cir. 2013) (citing 18 U.S.C. § 3553(a)(2)). "These four considerations—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally, and a court must fashion a sentence 'to achieve the[se] purposes ... to the extent that they are applicable' in a given case." *Tapia v. United States*, 564 U.S. 319, 325 (2011) (quoting 18 U.S.C. § 3553(a)). *See also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018); *Rita v. United States*, 551 U.S. 338, 347–48 (2007). However, Congress's message in the Sentencing Reform Act was, "Do not think about prison as a way to rehabilitate an offender," *Tapia*, 564 U.S. at 330, because the Act "expressly prohibited a district court in crafting an initial sentence from considering a defendant's need for rehabilitation in support of a prison sentence." *Concepcion v. United States*, 142 S. Ct. 2389, 2400 (2022) (citing 18 U.S.C. § 3582(a)). *See also Mistretta*, 488 US. at 367 (explaining that the Act "rejects imprisonment as a means of promoting rehabilitation"). Rather than prison, probation and supervised release are the proper means of effectuating the rehabilitative purposes of sentencing under the Act. *See Tapia*, 564 U.S. at 330.

The district judge has a duty to "consider all of the. § 3553(a) factors to determine whether they support the sentence requested by a party," *Gall v. United States*, 552 U.S. 38, 49–50 (2007), when sentencing a defendant for a single petty offense, just as in any other case. *See* 18 U.S.C. § 3553(b) (in absence of a sentencing guideline, "court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2)"); U.S.S.G. § 1B1.9 (sentencing guidelines do not apply to Class B and C misdemeanors or infractions). Accordingly, when imposing a sentence for a single petty offense, the judge *must* consider "the overarching sentencing purposes of "retribution, deterrence, incapacitation, and rehabilitation." *Rosales-Mireles*, 138 S. Ct. at 1903 (quoting *Tapia*, 564 U.S. at 325). The judge could reasonably conclude that a short prison sentence is necessary as a means of retribution and deterrence in a single petty offense case. But what if the judge also finds that the defendant needs rehabilitation? The Sentencing Reform Act "instruct[s] sentencing courts to consider rehabilitation as one of the purposes of *sentencing* but bars them from seeking to achieve rehabilitation through imprisonment." *In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009) (citing 18 U.S.C. § 3582(a) and 18 U.S.C. § 3553(a)). Consequently, where supervised release is not an option, the only way that the judge can comply with the foundational requirements of the Sentencing Reform Act is to impose a sentence of imprisonment to be followed by a term of probation – a split sentence. Indeed, in this very case, the district judge found that "[o]nly a split sentence would adequately serve the goals of sentencing described in 18 U.S.C. § 3553," *Little*, 590 Supp. 3d at 344.

The majority's interpretation prevents this district judge from complying with Section 3553(a), a bedrock mandate of the Sentencing Reform Act. That's a colossal lift for a secondary definition of a word.

If petty offenders need a short prison sentence to punish them, to reflect the seriousness of the offense and to deter them from future criminal conduct, they need it regardless of whether they committed one petty offense or two. If petty offenders need rehabilitation following imprisonment, they need it regardless of whether they committed one petty offense or two. If Congress no longer wanted to force judges to choose either punishment or rehabilitation for petty offenses – contrary to the dictates of Section 3553(a) – there is no reason to believe it intended to eliminate this Hobson's choice only when the defendant was convicted of two petty offenses, but not one. It should go without saying that Congress intended for district judges to comply with Section 3553(a) in *every* sentencing of a petty offense, whether for a single count or for multiple counts. The majority points to nothing indicating that Congress intended to render Section 3553(a) impotent in single petty offense cases when it enacted the 1994 amendment. We should not do so here. *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 222 (2008) (construction of a statutory term "must, to the extent possible, ensure that the statutory scheme is coherent and consistent"); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ....") (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp.181–186 (rev. 6th ed.2000)).

The majority makes much of the anomalies between imprisonment followed by supervised release and imprisonment followed by probation. Maj. Op. 11-15. But the majority must concede that, notwithstanding any such anomalies that might result, Congress intended to allow imprisonment followed by probation for defendants sentenced to multiple offenses, whether it is two petty offenses or a felony

and a petty offense. That concession seriously undermines any concern about anomalies and incongruities, given that there is no question that Congress intended to allow one form of split sentences (the multiple-count form involving at least one petty offense). The only question is whether we must override the most natural reading of the text based on something never uttered by Congress: it could live with the resulting anomalies created by split sentences in multiple offense cases, but the anomalies that result in the other form of split sentences (the single-count form) were simply a bridge too far. The majority points to no such evidence, and I find none.

* * *

In sum, the majority has departed from the natural and common reading of the statutory text, and in doing so, has undermined 18 U.S.C. § 3553(a), the foundational provision governing the crafting of sentences under the Sentencing Reform Act. The District Court should be affirmed,[3] and I respectfully dissent.

---

[3] Following vacatur of the sentence on remand, it appears that the district judge could impose a sentence of imprisonment or probation, and that he would not be limited to the 90 days or three years that were imposed before if he concluded that either a longer prison or probationary term were required to meet the goals of 18 U.S.C. § 3551. *See Davenport v. United States*, 353 F.2d 882, 884 (D.C. Cir. 1965) (per curiam) ("[A] defendant who successfully attacks an invalid sentence can 'be validly resentenced though the resentence increased the punishment.'") (quoting *Hayes v. United States*, 249 F.2d 516, 517 (D.C. Cir. 1957)).

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Columbia

UNITED STATES OF AMERICA
v.
JAMES LITTLE

JUDGMENT IN A CRIMINAL CASE

Case Number: 21-CR-315 (RCL)

USM Number: *36398-509

Peter Stewart Adolf
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) Four (4) of the Information

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
40 USC § 5104(e)(2)(G)	Parading, Demonstrating or Picketing in a Capitol Building	1/6/2021	4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) One through Three ☐ 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.

3/14/2022
Date of Imposition of Judgment

Royce C. Lamberth
Signature of Judge

Honorable Royce C. Lamberth, U.S.D.C. Judge
Name and Title of Judge

3/24/22
Date

DEFENDANT: JAMES LITTLE
CASE NUMBER: 21-CR-315 (RCL)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

60 days

☑ The court makes the following recommendations to the Bureau of Prisons:

Placement for the Defendant at Catawba County Jail.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☑ as notified by the United States Marshal or as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JAMES LITTLE
CASE NUMBER: 21-CR-315 (RCL)

PROBATION

You are hereby sentenced to probation for a term of:

36 months (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 placement on probation 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. *(check if applicable)*
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 other conditions on the attached page.

DEFENDANT: JAMES LITTLE
CASE NUMBER: 21-CR-315 (RCL)

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 the time you were sentenced, 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 probation officer determines that you pose a risk to 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.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: JAMES LITTLE
CASE NUMBER: 21-CR-315 (RCL)

ADDITIONAL PROBATION TERMS

The Court authorizes supervision of this case to be transferred to the United States District Court for the Western District of North Carolina.

You are ordered to make restitution to Architect of the Capitol Building in the amount of $500. Restitution payments shall be made to the Clerk of Court for the United States District Court, District of Columbia.
SEE PAGE 6 FOR DISBURSEMENT DETAILS.

You shall abide by the following special condition:

Social Media Restriction -- You shall not access, view or use any online social media, chat services, blogs, instant messages, SMS, MMS, digital photos, video sharing websites, emails or any other interactive, online or electronic communication applications or sites without the approval of the Probation Officer.

The Probation Office shall release the presentence investigation report to all appropriate agencies, which includes the United States Probation Office in the approved district of residence, in order to execute the sentence of the Court. Treatment agencies shall return the presentence report to the Probation Office upon the defendant's completion or termination from treatment.

NOTICE OF APPEAL

Pursuant to 18 USC § 3742, you may have a right to appeal the sentence imposed by this Court . If you choose to appeal, you must file any appeal within 14 days after the Court enters judgment.

As defined in 28 USC § 2255, you also have the right to challenge the conviction entered or sentence imposed if new and currently unavailable information becomes available to you or, on a claim that you received ineffective assistance of counsel in entering a plea of guilty to the offense(s) of conviction or in connection with sentencing.

If you are unable to afford the cost of an appeal, you may request permission from the Court to file an appeal without cost to you.

DEFENDANT: JAMES LITTLE
CASE NUMBER: 21-CR-315 (RCL)

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 10.00	$ 500.00	$	$	$

☐ 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
Architext of the Capitol Office of the Chief Financial Officer Attention: Kathy Sherrill, CPA Ford House Office Building Room H2-205B Washington, DC 20515	$500.00	$500.00	

TOTALS	$ 500.00	$ 500.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ 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:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** 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: JAMES LITTLE
CASE NUMBER: 21-CR-315 (RCL)

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 510.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

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

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* 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

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The financial obligations are immediately payable to the Clerk of the Court for the U.S. District Court, 333 Constitution Ave NW, Washington, DC 20001. Within 30 days of any change of address, you shall notify the Clerk of the Court of the change until such time as the financial obligation is paid in full.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ 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) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.