

FILED: April 22, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7116
(1:22-cv-02371-DKC)

WILLIAM A. WHITE,

Petitioner - Appellant,

v.

WARDEN OF FEDERAL CORRECTIONAL INSTITUTION - CUMBERLAND,

Respondent – Appellee.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40.

Judge Wilkinson and Judge Niemeyer voted to deny the petition for panel rehearing. Judge King voted to grant the petition for panel rehearing.

For the Court

/s/ Nwamaka Anowi, Clerk

NIEMEYER, Circuit Judge, with whom Judge WILKINSON joined, denying the motion for panel rehearing:

William White, the petitioner in this habeas case, has come forward with new information that he claims should justify our withdrawing the opinion we issued in this case. Nonetheless, we vote to deny his motion for panel rehearing.

Based on the record in this case, we concluded in our opinion that White was not entitled to First Step Act time credits for the three-day period he was held at the Federal Transfer Center Oklahoma City because he did not, during that time, “participate” in recidivism reduction programming, much less “successfully complete[]” such programming, as required to earn First Step Act time credits. *See* 18 U.S.C. § 3632(d)(4). Indeed, the government stated that such programming was not offered to prisoners in transit centers, and particularly to a prisoner assigned to a Special Housing Unit, as White was for security reasons during that three-day period.

Judge King would opt to begin this habeas proceeding all over again — after more than three years of litigation — because White now claims that he met a psychologist while in the Transfer Center, who provided him with some materials. He argues that this could be considered participation in recidivism reduction programming. While this new factual claim would hardly satisfy the First Step Act requirements, his new information and argument are totally inconsistent with the position that White has consistently taken throughout this litigation up to now. The habeas record supports *only* the conclusion that White was never given recidivism reduction programming at the Transfer Center *so as to enable* him to earn time credits.

In his pro se habeas petition, White claimed that while in the Transfer Center, he was confined, without due process, to a Special Housing Unit (sometimes “SHU”) where no programming was offered and that therefore he was denied “*the ability* to earn credits.” (Emphasis added). He thus argued that the lack of due process in confining him to the SHU “permitted [the BOP] to impose loss of [time credits] as a collateral consequence of SHU confinement without Due Process. . . . [The BOP] had to either give me programming and [time credits] or not place me in SHU at all.” White thereupon concluded that “[his placement in the SHU] . . . *cost him the ability to earn* [time credits] without any due process.” (Emphasis added).

After counsel was appointed for White, White’s counsel continued to press the same position taken by White, arguing:

But it is fundamentally unfair to deny White FSA time credits when it’s the BOP’s flaunting of its statutory obligation to provide [recidivism reduction programming] in all facilities during the entirety of an individual’s incarceration that caused *the unavailability of programming*.

(Emphasis added).

And White’s position was consistent with the government’s position that the BOP did not offer recidivism reduction programming to prisoners while at the Transfer Center, and, in particular, to prisoners confined in a Special Housing Unit.

Finally, the district court, reviewing the habeas record, found:

Accordingly, while housed at SHU while in transfer status at FTC-Oklahoma City . . . Mr. White *was prevented* from earning [First Step Act time credits].

(Emphasis added).

As reflected by this record, White took the position and maintained it throughout this three-year litigation that confining him to a Special Housing Unit without due process denied him the *ability* to earn First Step Act credits because no programming was offered there. Moreover, during these years, he had numerous opportunities to come forward with any correction of that position, but he did not do so. The information he now presents to us is thus not only new, but inconsistent with the information he provided to us over the years, including while represented by counsel.

For these reasons, we opt to stand with the opinion that we issued and which still, we conclude, properly denies White First Step Act time credits because he failed to “participate” in and “successfully complete” recidivism reduction programming, as required by the First Step Act to earn credits, during the three days he spent at Federal Transfer Center Oklahoma City.

KING, Circuit Judge, dissenting from the denial of panel rehearing:

In this matter, petitioner William A. White challenges the district court's rejection of his statutory and constitutional claims alleging the wrongful denial of a single time credit under the First Step Act of 2018 (the "FSA") relating to three days he spent in the Federal Transfer Center ("FTC") at Oklahoma City, Oklahoma. Over my dissent, our Court's panel majority affirmed. *See White v. Warden of Fed. Corr. Inst. – Cumberland*, 164 F.4th 326 (4th Cir. 2026). With respect to the statutory claim, the majority relied on a theory that only actual participation qualifies as "successful participation" under the plain text of the FSA, *see* 18 U.S.C. § 3632(d)(4), and that White did not actually participate in programming at FTC-Oklahoma City because no programming was provided to him during his short stint there.

Among the flaws in the majority's actual participation theory that I identified and discussed in my dissent are that (1) the government waived the theory by failing to raise it in the district court and (2) the theory lacked factual substantiation. *See White*, 164 F.4th at 339-40 (King, J., dissenting). As I explained, the government having relied on a wholly different theory in the district court — i.e., that a Bureau of Prisons ("BOP") regulation had rendered White categorically ineligible to earn FSA time credits at FTC-Oklahoma City due to his so-called "transfer status," as well as his assignment to a special housing unit (the "SHU") — the parties understandably did not present evidence on the then-irrelevant topic of whether programming was or was not available to White at FTC-Oklahoma City. *Id.* at 340.

It was not until this appeal that the government raised the actual participation theory, in its response brief. Even then, the government offered only uncorroborated and equivocal assertions that programming is not — or “is *not necessarily*” — offered at FTC-Oklahoma City and other federal transfer centers. *See White*, 164 F.4th at 340 (King, J., dissenting) (quoting Br. of Appellee 19). In reply, a blindsided White emphasized the lack of relevant evidence and “rightfully request[ed], ‘at minimum, reversal and remand’ for factual development.” *Id.* at 340 n.4 (quoting Reply Br. of Appellant 8). Nevertheless, the majority disregarded White’s remand request, excused the government’s waiver, and took the government at its word that White was not provided and thus did not participate in any programming at FTC-Oklahoma City.

White has now filed a petition for panel rehearing and rehearing en banc, attaching not only a declaration executed under penalty of perjury in which he swears that he was provided and actually participated in programming at FTC-Oklahoma City, but also a corroborating BOP record. *See White v. Warden of Fed. Corr. Inst. – Cumberland*, No. 23-7116, at 21-22 (4th Cir. Feb. 23, 2026), ECF No. 43. Specifically, the declaration states — and the BOP record corroborates — that upon White’s arrival at FTC-Oklahoma City, he “met with a psychologist [who] provided [him] with the workbooks for the [BOP]’s Evidence-Based Recidivism Reduction (EBBR) Trauma and Criminal Thinking programs, which [he] completed at the transfer facility.” *Id.* The declaration confirms that White, who had initially proceeded *pro se*, “did not mention [his FTC-Oklahoma City programming] in [his] *pro se* pleadings before the district court because the government only ever objected to [his statutory claim for an FSA time credit] on the ground that [he]

was ineligible due to [his] transfer status, not due to any lack of participation.” *Id.* at 21. Further, the declaration specifies that “[i]f the government had argued that [White] failed to sufficiently allege participation, [he] would have amended [his] habeas petition to plead the participation described above and/or would have provided evidence to the [district court] of this participation.” *Id.*

In its response to White’s rehearing petition, the government has no good answer to White’s declaration and the corroborating BOP record. *See White v. Warden of Fed. Corr. Inst. – Cumberland*, No. 23-7116, at 11-14 (4th Cir. Mar. 12, 2026), ECF No. 46. Rather, the government gripes that the BOP record is partially redacted and does not irrefutably show that the materials provided to White at FTC-Oklahoma City “constitute approved, qualifying FSA programming.” *Id.* at 12-14. The government also accuses White of seeking to improperly expand the record, in contravention of Rule 10 of the Federal Rules of Appellate Procedure. *Id.* at 11-12. Quite brazenly, the government asserts that “[t]he mere fact that [White’s] litigation strategy evolved between the record below and the arguments on appeal does not permit him to introduce new factual information that was available at the time he filed his [habeas petition].” *Id.* at 12. Of course, White is just now proffering his declaration and the corroborating BOP record not because of a change in his litigation strategy, but because of the government’s change in its litigation strategy.

Based on White’s declaration and the corroborating BOP record, I have urged the majority to join me in granting panel rehearing, vacating the prior decision, and remanding for the district court to consider the evidence of White’s FTC-Oklahoma City programming in the first instance. Regrettably, however, my distinguished colleagues stubbornly refuse

to do so and continue to condone the government's very troubling and unfair conduct in this matter.

The majority seeks to justify its denial of panel rehearing by summarily declaring that the activities described in White's declaration and the corroborating BOP record "would hardly satisfy the [FSA] requirements." *See ante* 1. Additionally, the majority rewrites history, asserting that White claimed from the start of the district court proceedings to be aggrieved by a lack of programming at FTC-Oklahoma City, and that the government promptly responded with the actual participation theory. As the majority would thus have it, White's "new information and argument are totally inconsistent with the position that White has consistently taken throughout this litigation up to now." *Id.*

For support, the majority cherry-picks quotations from White's *pro se* habeas petition, his appellate reply brief, and the district court's opinion. Meanwhile, the majority quotes nothing from the government's district court pleadings. I have carefully reviewed all those documents and can confidently say that, under any fair reading of them, none substantiates the majority's version of events.

First of all, White's habeas petition neither alleges that he was provided no programming at FTC-Oklahoma City nor blames a lack of programming for the challenged FSA time credit denial. Rather, the petition clearly ties the denial to White's categorical ineligibility under the BOP regulation, regardless of the availability of programming. Indeed, the petition specifies that the BOP regulation rendered White categorically ineligible to earn time credits "*even if I program*," belying any notion that White was alleging or complaining of a lack of programming. *See* J.A. 8-9 (emphasis added)

(explaining that “[w]hen not [subject to the BOP regulation], I earn 10 days of [time credits] for every 30 days I’m imprisoned as long as I do not refuse programming,” but “[w]hen [subject to the BOP regulation], I earn 0 days, even if I program”).

For their part, the government’s district court pleadings in no way raise and preserve the actual participation theory. Those pleadings fail to state, *inter alia*, that programming is unavailable at federal transfer centers, that no programming was provided to White at FTC-Oklahoma City, or that White was denied the sought-after FSA time credit because of a lack of programming or failure to actually participate.

As for the district court’s opinion, the language quoted by the majority merely says that “Mr. White *was prevented* from earning [FSA time credits at FTC-Oklahoma City].” *See White v. Warden of Fed. Corr. Inst. – Cumberland*, No. 1-22-cv-02371, at 3 (D. Md. July 31, 2023), ECF No. 12 (emphasis added). Importantly, that language does not say that White was prevented from earning FSA time credits *by a lack of programming*. Rather, the quoted language is part of a larger passage in which the opinion describes White’s argument as being that he was prevented from earning FSA time credits *by the BOP regulation*. Under the heading “The Positions of the Parties,” the opinion states:

Mr. White explains that, pursuant to [the BOP regulation], federal inmates are guaranteed to earn [FSA time credits] throughout their incarceration, except in several circumstances, including while an inmate is housed in the SHU. Accordingly, while housed in SHU while in transfer status at FTC-Oklahoma City, . . . Mr. White was prevented from earning [FSA time credits].

Id. at 2-3 (citation omitted). The balance of the opinion confirms that, in the district court, it was understood by all involved — White, the government, and the court itself — that the

parties' dispute was over the applicability and enforceability of the BOP regulation, not the availability of programming.

Finally, White's appellate reply brief firmly maintains that because of the government's failure to raise the actual participation theory until this appeal, the availability of programming was never at issue in the district court. *See, e.g.*, Reply Br. of Appellant 3 (arguing that the actual participation theory "should not even be considered, as it is brand new, differs from the argument and reasoning below, and relies on facts not in the record"). Far from conceding a lack of programming, the reply brief emphasizes the absence of relevant evidence and addresses the legal implications "*if*" no programming was provided to White. *See, e.g., id.* at 8 (underscoring that "[t]here is no evidence in the record about White's supposed failure to participate in [programming] while in the FTC, nor the availability of programming at the FTC"); *id.* at 12 (contending that "[i]f White did not participate in [programming] in the FTC, that is because BOP violated its statutory obligation to provide programming").

In these circumstances, it is entirely appropriate and reasonable that White is just now presenting evidence — with his petition for panel rehearing and rehearing en banc — demonstrating that he was provided and did actually participate in programming at FTC-Oklahoma City. What is not justified is the majority's refusal to grant panel rehearing,

vacate our prior decision, and remand for the district court to consider White's evidence in the first instance. I therefore dissent.*

* To be clear, I have not requested a poll on rehearing en banc in this matter, but I believe it likely that our en banc Court will need to revisit the panel majority's opinion in a future case. As I said in my earlier dissent, the majority's ruling on the merits of White's statutory claim "does not just flout the plain text of the FSA and the BOP's policies and practices," but "also threatens chaos, unequal treatment, and other unfairness in the FSA time credit system." *See White*, 164 F.4th at 342 (King, J., dissenting). Additionally, White's rehearing petition alleges serious errors in the majority's ruling on his separate constitutional claim, which I did not address in my dissent because I would have granted relief on the statutory claim. *See id.* at 335 n.1 (invoking the constitutional avoidance doctrine under *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).