The Future of Criminal Statutory Interpretation

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During the October 2024 term, Hewitt v. United States[1] *and its companion case* Duffey v. United States[2] *garnered little attention amongst the slate of cases. Nevertheless, the case, which some may have thought would be an uneventful unanimous decision affirming the Fifth Circuit, instead became one of the last decisions issued and came out a 5–4 closely divided opinion.[3] More significantly, the decision marked a departure from previous First Step Act jurisprudence and produced one of the "most intense dissents of the term."[4] This Article examines the unexpected aspects of the majority opinion, written by Justice Jackson, and its turn toward Justice Gorsuch's long-standing push to consider the rule of lenity more seriously. Then, this Article analyzes the implications of the shifting majority in the area of penal and criminal statutory interpretation. This Article also advocates for more frequent grants of certiorari in cases involving criminal statutory interpretation. Lastly, it previews the First Step*

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1 145 S. Ct. 2165 (2025).

2 *Id.* (consolidated cases).

3 *Id.* at 2168, 2179.

4 Zachary Shemtob, *The Most Intense Dissents of the Term*, SCOTUSBLOG (July 21, 2025, at 12:17 ET), https://www.scotusblog.com/2025/07/the-most-intense-dissents-of-the-term/ [https://perma.cc/Z6S8-7DPX].

> *Act cases for the Supreme Court's October 2025 term, in which the Court—on June 6, 2025—granted certiorari in two competing Third Circuit cases,* Rutherford v. United States *and* Carter v. United States*, addressing the construction of the Act's sentence-reduction provisions.*[5]

The First Step Act amended 18 U.S.C. § 924(c), under which criminal defendants faced a twenty-five-year mandatory minimum sentence for a "second and subsequent" use of a firearm in furtherance of a drug trafficking or violent offense in the same criminal incident.[6] This was commonly called the "stacking" provision because prosecutors could charge two violations concurrently to trigger the enhanced mandatory minimum.[7] The First Step Act's amendment clarified that the mandatory minimum applies when the defendant has a prior conviction for use of a firearm in furtherance of a drug trafficking or violent crime from a previous criminal prosecution, not the present prosecution.[8] This change applies "to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."[9] On June 26, 2025, the U.S. Supreme Court decided *Hewitt v. United States*, holding that the First Step Act's elimination of the stacking provision applies "when a § 924(c) offender had been sentenced as of the Act's enactment, but that sentence was subsequently vacated, such that the offender must face a post-Act resentencing."[10] This change marks a significant difference in the length of sentences for these offenders. Pre-Act resentencing would lead to mandatory minimums of twenty-five years for each stacked

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[5] Rutherford v. United States, 145 S. Ct. 2776, 2776 (2025) (consolidated cases).

[6] First Step Act of 2018, Pub. L. No. 115-391, § 403(a), 132 Stat. 5194, 5221 (2018) ("striking 'second or subsequent conviction under this subsection'").

[7] *See Hewitt*, 145 S. Ct. at 2169; 18 U.S.C. § 924(c)(1)(C)(i) (2006) (amended 2018).

[8] First Step Act of 2018 § 403(a) (replacing second or subsequent conviction with "violation of this subsection that occurs after a prior conviction under this subsection has become final").

[9] First Step Act of 2018 § 403(b).

[10] *Hewitt*, 145 S. Ct. at 2169.

§ 924(c) count; meanwhile, post-Act resentencing would impose only a five-year mandatory minimum.[11]

Justice Jackson's majority opinion in *Hewitt* wields the statutory interpretation tools of textualism and purposivism to determine that the First Step Act's more lenient penalties apply to post-Act resentencing after vacatur. Beginning with the text of § 403(b), the majority emphasized the legislature's use of the present-perfect tense to describe a sentence that "has been imposed."[12] The tense indicates that the text's "focus is on the present," but "the past maintains 'current relevance.'"[13] To exemplify the role of the past-perfect tense, the majority uses an Olympic gold medalist; the athlete may say that a medal "has been awarded" if the medal has continuing validity.[14] But if the medalist stated that a medal "had been awarded" to her, using the past-perfect tense, that phrasing would be more accurate to describe the situation where the athlete had their medal stripped away.[15]

Next, the majority compares the adjacent provisions of the statute that use the past tense.[16] This familiar statutory interpretation principle requires that the text be read as a whole and that the surrounding provisions give meaning to differences in the text.[17] In the words of the majority, "the verb tense at issue here ('has been') is conspicuously different—making only clearer that a past sentence must have a relevant connection to the present for purposes of the retroactivity provision."[18] Thus, the plain meaning of a sentence that

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[11] First Step Act of 2018 § 403(b).

[12] *Hewitt*, 145 S. Ct. at 2171–73.

[13] *Id.* at 2171 (quoting RODNEY HUDDLESTON & GEOFFREY K. PULLUM, THE CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE 143 (2002)).

[14] *Id.* at 2172.

[15] *Id.* at 2172–73 (citing BRYAN A. GARNER, MODERN ENGLISH USAGE 1082 (5th ed. 2022)).

[16] *See id.* at 2173.

[17] This principle is termed the "whole-text canon." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012); *see also* United States v. Morton, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole."). *But see* Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 344 (2005) (Where "[e]ach clause is distinct and ends with a period," this "strongly suggest[s] that each may be understood completely without reading any further.").

[18] *Hewitt*, 145 S. Ct. at 2173.

has been imposed led the majority to conclude "that § 403(b) covers only past sentences with continued legal validity, not those that have been vacated."[19]

Thereafter, the majority recognized the looming background principle in this case: vacatur.[20] Put succinctly, the Court assumes that Congress knows that "court orders are void *ab initio* and thus lack any prospective legal effect."[21] Accordingly, Congress legislated against the backdrop of vacatur—that is, with an understanding that there would be offenders who did not have valid sentences at the time of the Act's enactment. Thus, a sentence has not been imposed on a defendant who is resentenced after the Act; this is the very reason that the defendant must be resentenced because he or she has no sentence.

The dissent accuses the majority of "invent[ing] a novel 'vacatur' principle."[22] Indeed, Justice Alito's dissent wages two arguments against the mere statement that vacatur "wipe[s] the slate clean" generally and its specific application in this case.[23] First, the dissent argues that the vacatur principle does not exist because its reading of the cited precedents "indicate[s] that vacatur does not erase the historical fact of a previously imposed conviction or sentence."[24] Further, the dissent argues that the Court failed to "'sho[w] that its own rule . . . existed as a background matter when Congress enacted' the First Step Act," and this "is fatal to its position."[25]

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[19] *Id.*

[20] *Id.*; *see, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) (stating that Congress is presumed to enact legislation with knowledge of existing law and its judicial construction). Recall when the Eleventh Circuit interpreted this statutory provision, the majority called this background principle "the strongest counterargument" against imposing the pre-Act stacking provisions to post-Act resentencings. United States v. Hernandez, 107 F.4th 965, 971 (11th Cir. 2024). With the hindsight that the Court did not put all of its proverbial statutory interpretation eggs in the vacatur basket and the understanding that background principles are a disfavored interpretative tool of pure textualists, this statement of the panel of the Eleventh Circuit is increasingly interesting.

[21] *Hewitt*, 145 S. Ct. at 2173.

[22] *Id.* at 2180 (Alito, J., dissenting).

[23] Pepper v. United States, 562 U.S. 476, 507 (2011).

[24] *Hewitt*, 145 S. Ct. at 2185 (Alito, J., dissenting).

[25] *Id.* at 2187 (quoting Coinbase, Inc. v. Bielski, 599 U.S. 736, 753–54 (2023) (Jackson, J., dissenting) (alteration in original)).

Although not specifically showing the existence of the vacatur, the three-Justice portion of the opinion demonstrates the practical effect Congress intended this provision to have in post-Act resentencing:

> [T]hough it would make sense to draw the line as *amicus* and the dissent do if the prior imposition of a sentence helped judges to more accurately identify serious first-time § 924(c) offenders—potentially justifying the harsh and outdated stacked penalties that the First Step Act supplanted—nothing in the legislative record suggests this is so.[26]

Put differently, assuming that the legislature knew that sentences would be vacated pursuant to other provisions of the First Step Act,[27] there is not a textualist *or* intentionalist reason why Congress would further subdivide these first-time sentencings and resentencings to impose harsher penalties.

Second, and more ideologically, pure textualism rejects the notion that background principles are needed to supplant the text of a statute.[28] Rather, at times, Justice Scalia's textualism "recharacterizes at least some 'substantive' canons as background conventions that a reasonable reader would consider in discerning what a lawmaker actually meant by the enacted text."[29] However, using *Hewitt* as a case study, the disagreement seems to be over whether the text of the First Step Act and § 403(b) requires the use of background

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[26] *Id.* at 2178 (majority opinion).

[27] *See, e.g.*, United States v. Davis, 588 U.S. 445, 470 (2019).

[28] Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 403 (2005) ("[T]he judges whom we think of as intentionalists are simply more receptive to a background presumption of judicial discretion than the judges whom we think of as textualists."); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 120, 123–24 (2010) (arguing that "linguistic canons, which pose no challenge to legislative supremacy, are preferable to substantive canons, which do.").

[29] Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 521 (2023) (first citing SCALIA & GARNER, *supra* note 17, at 30–31; then citing Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RSRV. L. REV. 581, 583 (1989); then citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001); and then citing John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467–68 (2003)).

principles and substantive canons to correctly discern its meaning and, if so, whether the use of such principles must have a "foothold in the Act's text" and whether there is an "obvious" or "discrete" gap in the text.[30] Even so, the dissent counters the vacatur principle with the Sentencing Reform Act's "special background principle."[31] The dissent explains: "[A]fter a sentence is vacated, a district court during resentencing must apply the Sentencing Guidelines that 'were in effect on the date of the previous sentencing of the defendant prior to the appeal.'"[32] Further, the dissent argues that the "Federal Saving Statute sets forth '[another] important background principle of interpretation' that 'a new criminal statute that "repeal[s]" an older criminal statute shall not change the penalties "incurred" under that older statute "unless the repealing Act shall so expressly provide."'"[33] Thus, though the dissent characterizes the majority opinion as atextual, it also employs the backdrops upon which Congress legislates.

Further, Justice Jackson's opinion relied on the "context and enactment history of the First Step Act and § 403(b)" to underscore the interpretation.[34] This portion of the opinion commanded the votes of three Justices and laid out "the litany of criticisms" of the stacking provision from district and appellate judges as well as legislators.[35] The three-Justice portion of the opinion explained how "Congress made clear that the First Step Act's more lenient penalties were to apply to some 'pending' cases, too—*i.e.*, the new penalties would be applicable to certain defendants who had committed their offenses before the First Step Act."[36] This demonstrates how the Act addressed the harsh penalties and partly displaced normal retroactivity rules. But the Court's understanding does not make § 403(b) fully retroactive and keeps finality intact.

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[30] *Hewitt*, 145 S. Ct. at 2187 (Alito, J., dissenting).

[31] *Id.* at 2186.

[32] *Id.* (quoting 18 U.S.C. § 3742(g)(1)).

[33] *Id.* at 2188 (quoting Dorsey v. United States, 567 U.S. 260, 272, 274 (2012)).

[34] *Id.* at 2174–75 (majority opinion).

[35] *Id.* at 2175 (quoting United States v. Hunter, 770 F.3d 740, 746–47 (8th Cir. 2014) (Bright, J., concurring)).

[36] *Hewitt*, 145 S. Ct. at 2176–77.

In interpreting the legislative history of the First Step Act, the three-Justice portion of the opinion stated, "[t]he reading of § 403(b) that petitioners and the Government promote thus coheres with the text, context, and history of that provision."[37] This begs the question: was "text, context, and history" Justice Jackson's statutory interpretation olive branch to the "text, history, and tradition" members of the Court that could entice five members of the current Court to sign on to the opinion? Unfortunately not. Notably, the Chief Justice and Justice Gorsuch did not sign on to the "context and enactment history" portion of the opinion.[38] This split highlights the contrast between the judicial ideology spectrum of the textualist Justices on the Court. The Chief Justice and Justice Gorsuch may not have signed on to this portion of the opinion because of textualism's "insistence that courts should not consult legislative history when interpreting statutes."[39] Nevertheless, it is interesting that Justice Gorsuch and the Chief Justice did not write separately to respond to the dissent's critiques of the invocation of the background principle of vacatur. Indeed, one may assume that the two more conservative Justices simply agreed that the most natural reading was the majority's and that this may be a case that begins and ends with the text.

The dissent's characterization of the Court's opinion as "atextual" is rooted in its concern that the majority did not consider the full text of the statute. First, the dissent interprets the word "imposed," proposing that the word is "most naturally understood to refer to a concrete 'action by a district court' that occurs at a specific point in time."[40] Second, the dissent finds significant that Congress used the indefinite article "a" instead of "any sentence."[41] In the view of the dissenters, "[i]n conjunction with the word 'imposed,' the phrase 'a sentence' thus puts the statutory focus on the existence of any kind of sentence pronounced in the record, regardless of that sentence's present legal status."[42] Third, the dissent considers the

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[37] *Id.* at 2177.

[38] *See id.* at 2174–76.

[39] Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 263 (2022).

[40] *Hewitt*, 145 S. Ct. at 2182 (Alito, J., dissenting) (quoting United States v. Uriarte, 975 F.3d 596, 607 (7th Cir. 2020) (en banc) (Barrett, J., dissenting)).

[41] *Id.* at 2183.

[42] *Id.*

provision's title, "APPLICABILITY TO PENDING CASES," to conclude that "Congress was concerned with the finite population of defendants who, on the date of the First Step Act's enactment, lacked an initial sentence for § 924(c) offenses" rather than cases that could become "pending" if the Court decides a case that allows for resentencing.[43]

Perhaps what is most interesting is the open questions left by the *Hewitt* decision. Despite the characterization of this case as a candidate for the Court to keenly address the rule of lenity, the Court did not wrestle with the lenity question.[44] The dissent explicitly acknowledges that the "Act's 'grammatical structure conceivably leaves some room for either reading'. . . ."[45] Yet, the majority does not outright state that the language is ambiguous. Thus, the looming question is whether the rule of lenity should have applied to this case.

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."[46] In other words, "[w]hen Congress has the will it has no difficulty in expressing it" but "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."[47] The rule of lenity "is 'perhaps not much less old than' the task of statutory 'construction itself.'"[48] "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the

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[43] *Id.* at 2188 (citing BLACK'S LAW DICTIONARY 1366 (12th ed. 2024) (defining "pending" as "[r]emaining undecided; awaiting decision"); and then citing GARNER, *supra* note 15, at 813 (defining "pending" as "awaiting an outcome")).

[44] *See* Isabelle Carbajales & Lauren O'Neil Hamilton, *Imposing Restrictions on the First Step Act's Retroactive Application to Vacated Sentences*, 79 U. MIA. L. REV.714, 756–57 (2025).

[45] *Hewitt*, 145 S. Ct. at 2181 (Alito, J., dissenting) (quoting *Uriarte*, 975 F.3d at 607 (Barrett, J., dissenting)).

[46] Ladner v. United States, 358 U.S. 169, 178 (1958).

[47] Bell v. United States, 349 U.S. 81, 83 (1955).

[48] Davis v. United States, 588 U.S. 445, 464 (2019) (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)).

appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."[49]

Some invocations of the rule described it as mandatory—that is, the rule "*requires* a court to resolve statutory ambiguity in favor of a criminal defendant, or to strictly construe the statute against the state" when the Court is faced with an ambiguous statute.[50] Others proclaim the rule states "the ambit of criminal statutes *should* be resolved in favor of lenity,"[51] but seldom invoke the rule.[52] *Hewitt* is one such example of grievous ambiguity where the Court did not consider the rule necessary to the resolution of the case. Interestingly, Justices Gorsuch, Sotomayor, and Jackson—all in the majority here—recognize that when Congress intends to impose harsher penalties, it must do so clearly "because a free nation operates against a background presumption of individual liberty."[53] The rule appeals to originalism,[54] the separation of powers principles,[55] as

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[49] Liparota v. United States, 471 U.S. 419, 427 (1985) (citing United States v. Bass, 404 U.S. 336, 348 (1971)).

[50] David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524 (2018) (emphasis added); *accord Wiltberger*, 18 U.S. (5 Wheat.) at 95. "Almost one-third (13) of the 42 appellate judges surveyed considered lenity . . . [an] 'actual rule[]' of 'mandatory application.'" Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 180 (2018) (quoting Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1331–32 (2018)).

[51] *Liparota*, 471 U.S. at 419 (emphasis added).

[52] *See Davis*, 588 U.S. at 495–96 (Kavanaugh, J., dissenting) (collecting cases standing for "the Court's oft-repeated statement[ ] that the rule of lenity is a tool of last resort that applies only when, after consulting traditional canons of statutory construction, grievous ambiguity remains." (internal quotation marks and citations omitted)).

[53] Pulsifer v. United States, 601 U.S. 124, 185 (2024) (Gorsuch, J., dissenting); Wooden v. United States, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring).

[54] *See Wooden*, 595 U.S. at 388–89 (first citing 1 WILLIAM BLACKSTONE, COMMENTARIES *88; and then citing 2 M. Hale, The History of the Pleas of the Crown 335 (1736)); *see also* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749–51 (1935) (cataloging the history of the rule of lenity).

[55] Rabb, *supra* note 50, at 194 n.77 (collecting sources stating that the separation of powers is one rationale for the rule); *id.* at 208 n.148 ("The rule of lenity . . . preserves the separation of powers by ensuring that legislatures, not

well as core values of life and liberty.[56] Thus, it is somewhat surprising that the Justices in the majority did not invoke the rule on this interpretative question that divided the circuits and the Court so staunchly.

"Because our legal system relies not just on written texts, but also an *unwritten* law, we need to supplement textualism with this unwritten law—law that governs both interpretation and background principles against which interpretation takes place."[57] In the context of criminal questions, the Court's shrinking docket in this area limits the opportunity to take seriously the rule of lenity.[58] Nevertheless, the Court granted certiorari on two cases out of the Third Circuit for the October 2025 term.[59] The Court granted certiorari in *Rutherford v. United States* and its consolidated case *Carter v. United States* to decide "[w]hether . . . a district court may consider disparities created by the First Step Act's prospective changes in sentencing law when deciding if 'extraordinary and compelling reasons' warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i)."[60] While the petition does not advocate for the Court to answer a lenity question, these cases once again bring to the Court's attention an opportunity to address a split in the circuit courts in which six circuits prohibit a lenient interpretation of sentencing law.[61] Specifically, the "First, Fourth, Ninth, and Tenth

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executive officers, define crimes." (quoting Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1023 (6th Cir. 2016), *rev'd*, 137 S. Ct. 1562 (2017)).

[56] *See Pulsifer*, 601 U.S. at 185 (Gorsuch, J., dissenting).

[57] Rachel Reed, *Textualism Is 'Missing Something*,*'* HARV. L. TODAY (Mar. 1, 2023), https://hls.harvard.edu/today/textualism-is-missing-something/ [https://perma.cc/RFP5-J9R5].

[58] Stephen Vladeck, *SCOTUS's Declining State Criminal Appeals*, STATE CT. REP. (Dec. 17, 2024), https://statecourtreport.org/our-work/analysis-opinion/scotuss-declining-state-criminal-appeals [https://perma.cc/AQ45-FBSV]; Ryan Owens & David Simon, *Legal Scholarship Highlight: An Empirical Analysis of the Court's Shrinking Docket*, SCOTUSBLOG (June 20, 2012, at 00:00 ET), https://www.scotusblog.com/2012/06/legal-scholarship-highlight-an-empirical-analysis-of-the-courts-shrinking-docket/ [https://perma.cc/9FNA-XLU3].

[59] Rutherford v. United States, 145 S. Ct. 2776, 2776 (2025) (granting certiorari).

[60] Petition for a Writ of Certiorari at i, Rutherford v. United States, 145 S. Ct. 2776 (2025) (No. 24-820).

[61] *See id.* at 2.

Circuits allow district courts to consider—as one of several case specific factors—the fact that a defendant would have received a significantly lower sentence if sentenced today, as a result of the First Step Act's changes."[62] Meanwhile, "the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits have held that courts may never consider the First Step Act's changes—either alone or with other factors—because doing so would undermine Congress's nonretroactivity choices."[63] While the author expresses no opinion about the ultimate "correct" outcome of the *Rutherford* case at the Court's next term, the American criminal justice system continues to task the judiciary with criminal statutory interpretation questions—nearly seven years after the passage of the First Step Act. Thus, time will tell whether *Hewitt* was indicative of the Court's unwillingness to invoke the rule of lenity or whether litigants will continue to ask judges to treat the rule as mandatory in criminal statutory interpretation challenges.

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[62] *Id. See* United States v. Chen, 48 F.4th 1092, 1095–98 (9th Cir. 2022); United States v. Ruvalcaba, 26 F.4th 14, 25 (1st Cir. 2022); United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); United States v. McGee, 992 F.3d 1035, 1047 (10th Cir. 2021).

[63] Petition for a Writ of Certiorari, *supra* note 60, at 2; *see also* United States v. McCall, 56 F.4th 1048, 1065–66 (6th Cir. 2022) (en banc) (explaining the presumption of nonretroactivity in sentencing laws).