FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LAWRENCE WILLIAMS, AKA Mikaeel Youf Azeem, *Defendant-Appellant.*	No. 20-30201 D.C. Nos. 2:20-cr-00119-TOR-1 2:20-cr-00119-TOR OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, District Judge, Presiding

Argued and Submitted June 9, 2021
Seattle, Washington

Filed July 16, 2021

Before: Ronald M. Gould, Richard R. Clifton, and
Eric D. Miller, Circuit Judges.

Opinion by Judge Miller

SUMMARY*

Criminal Law

The panel vacated a sentence imposed upon revocation of supervised release following the defendant's commission of another crime, and remanded for resentencing.

Under the advisory Sentencing Guidelines, U.S.S.G. § 7B1.1(a)(2), the appropriate penalty upon the revocation of supervised release following commission of another crime is greater if the new crime is "punishable by a term of imprisonment exceeding one year." The panel held that the Washington offense of theft from a vulnerable adult in the second degree was not "punishable by a term of imprisonment exceeding one year" when the statutory maximum sentence exceeded one year but the maximum sentence allowed under the State's mandatory sentencing guidelines did not. Accordingly, the district court erred in determining that the defendant committed a Grade B supervised release violation.

The panel further held that the district court plainly erred in ordering the defendant's sentence to be served consecutively to any other term of imprisonment. The panel held that a district court may order a sentence to run consecutively to an anticipated state sentence, but not consecutively to another federal sentence that has yet to be imposed.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Houston Goddard (argued), Federal Defenders of Eastern Washington & Idaho, Spokane, Washington, for Defendant-Appellant.

Michael J. Ellis (argued), Assistant United States Attorney; William D. Hyslop, United States Attorney; United States Attorney's Office, Spokane, Washington; for Plaintiff-Appellee.

OPINION

MILLER, Circuit Judge:

When a federal criminal defendant is serving a term of supervised release and commits another crime, the court may revoke supervised release and impose a penalty. Under the advisory Sentencing Guidelines, the appropriate penalty upon the revocation of supervised release is greater if the new crime is "punishable by a term of imprisonment exceeding one year." U.S.S.G. § 7B1.1(a)(2); *see id.* § 7B1.4. This case presents the question whether a Washington offense is "punishable by a term of imprisonment exceeding one year" when the statutory maximum sentence exceeds one year but the maximum sentence allowed under the State's mandatory sentencing guidelines does not. We hold that it is not.

I

Lawrence Williams pleaded guilty to conspiracy to distribute cocaine base, in violation of 21 U.S.C. §§ 841 and 846, and witness tampering, in violation of 18 U.S.C. § 1512. He was sentenced to 108 months of imprisonment,

to be followed by five years of supervised release. As required by statute, one condition of supervised release was that Williams not "commit another Federal, State, or local crime during the term of supervision." 18 U.S.C. §§ 3563(a)(1), 3583(d).

During Williams's term of supervised release, he engaged in a fraudulent scheme to obtain part of the Social Security payments belonging to a mentally ill homeless woman in Spokane, Washington. He called the woman's Social Security payee, falsely claiming that he was an employee of a company called Phoenix Counseling Services and that he was owed money for counseling services. He asked the payee to send him a check payable to "Mikaeel Azeem." After mailing the check, the payee learned that Phoenix Counseling Services employed no one by that name. By then, Williams had already cashed the check. The payee contacted the police; when questioned, Williams confessed to the scheme.

The Sentencing Guidelines provide for different "grades of . . . supervised release violations." U.S.S.G. § 7B1.1(a). As relevant here, a Grade B violation includes "conduct constituting any . . . federal, state, or local offense punishable by a term of imprisonment exceeding one year." *Id.* § 7B1.1(a)(2). A Grade C violation includes "conduct constituting . . . a federal, state, or local offense punishable by a term of imprisonment of one year or less." *Id.* § 7B1.1(a)(3)(A). The grade of the violation depends on "the defendant's actual conduct," and a violation "may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct." *Id.* § 7B1.1 cmt. n.1.

After a hearing, the district court found that Williams's conduct constituted the Washington offense of theft from a

vulnerable adult in the second degree, which carries a maximum prison term of five years. *See* Wash. Rev. Code §§ 9A.20.021(1)(c), 9A.56.400(2)(b). Notwithstanding the statutory maximum, however, a Washington court must impose a sentence within the range of the State's sentencing guidelines—unlike the federal Sentencing Guidelines, "the Washington sentencing guidelines are mandatory, not advisory." *State v. Woodruff*, 151 P.3d 1086, 1087 n.7 (Wash. Ct. App. 2007); *see* Wash. Rev. Code § 9.94A.505(2)(a) ("The court shall impose a sentence as provided" under the guidelines.). The mandatory guidelines range is determined by the seriousness of the offense and the defendant's criminal history. *See* Wash. Rev. Code § 9.94A.510. Under Washington law, an above-guidelines sentence may be imposed only when certain aggravating circumstances are present. *See id.* §§ 9.94A.535(2)–(3), 9.94A.537.

Williams argued that his conduct constituted a Grade C violation because he faced no more than one year in prison under Washington's mandatory sentencing guidelines. For a Grade C violation, the Sentencing Guidelines range would have been four to ten months of imprisonment. The district court disagreed and instead concluded that Williams had committed a Grade B violation, with a Sentencing Guidelines range of six to twelve months of imprisonment. It reasoned that the statutory maximum sentence, not the mandatory guidelines range, determines the term by which a Washington offense is punishable because a Washington court may impose a sentence "up to the maximum penalty" if aggravating factors exist. But the district court did not decide whether any such factors were present.

The district court sentenced Williams to twelve months of imprisonment, to be followed by four years of supervised

release. The district court stated that it would have imposed the same sentence if Williams had committed a Grade C violation. It directed that the sentence "be served consecutively to any and all other terms of imprisonment, including any and all future state sentences."

II

Williams challenges the district court's determination that he committed a Grade B violation of supervised release. We review the district court's interpretation of the Sentencing Guidelines de novo. *United States v. Denton*, 611 F.3d 646, 650 (9th Cir. 2010).

Williams's appeal turns on what it means for an offense to be "punishable by" a particular term of imprisonment—specifically, on whether an offense is punishable by the statutory maximum term of imprisonment or instead by the maximum term that a court could impose under Washington's mandatory guidelines. We answered that question in *United States v. Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019), and the answer is the same here: The term by which a Washington offense is punishable is limited by the upper bound of the mandatory guidelines range.

In *Valencia-Mendoza*, we considered Sentencing Guidelines § 2L1.2, which increases the offense level for unlawfully reentering the United States if the defendant was previously convicted of a felony. 912 F.3d at 1218. That provision defines "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year." *Id.* at 1216 (quoting U.S.S.G. § 2L1.2 cmt. n.2). Valencia-Mendoza had been convicted of an offense under Washington law that had a statutory maximum term of imprisonment of five years. *Id.* But under Washington's mandatory sentencing guidelines, "the maximum sentence

that he *actually* could have received was only six months" because "neither the court nor the jury found an aggravating circumstance" that could have resulted in a higher sentence. *Id.* at 1218. We held that "when considering whether a crime is 'punishable' by more than one year, the court must examine both the elements *and the sentencing factors* that correspond to the crime of conviction." *Id.* at 1222. The term "punishable," we reasoned, "suggests a realistic look at what a particular defendant actually could receive," rather than "a mechanistic examination of the highest possible term in the statute." *Id.* at 1223. We therefore concluded that the prior conviction was not a felony.

We applied similar reasoning in *United States v. McAdory*, 935 F.3d 838 (9th Cir. 2019), in which we considered whether the defendant's prior Washington convictions were for crimes "punishable by imprisonment for a term exceeding one year" under 18 U.S.C. § 922(g)(1), which prohibits felons from possessing firearms. 935 F.3d at 841–42. Again, we held that offenses are "punishable by imprisonment for a term exceeding one year . . . only if [they] actually exposed [the defendant] to sentences of that length." *Id.* at 844. Because "[n]one of McAdory's prior convictions had standard sentencing ranges exceeding one year, nor were any accompanied by written findings of any of the statutory factors that would justify an upward departure," we determined that they were not predicate felonies under section 922(g)(1). *Id.*

The government attempts to distinguish *Valencia-Mendoza* and *McAdory* on the ground that those cases involved provisions that require a prior conviction, whereas section 7B1.1 refers to "conduct constituting an offense" for which the defendant might not have been convicted. *See* U.S.S.G. § 7B1.1 cmt. n.1. The distinction matters,

according to the government, because without a conviction it might be difficult to determine whether the facts satisfy one of the aggravating factors under Washington's guidelines.

We disagree. As an initial matter, the government offers no textual basis for reading the phrase "offense punishable by" differently here than in *Valencia-Mendoza*. The relevant language in the two Sentencing Guidelines provisions is exactly the same. *Compare* U.S.S.G. § 2L1.2 cmt. n.2, *with id.* § 7B1.1(a)(1)–(3). It is a "'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)); *see United States v. Lopez*, 998 F.3d 431, 437 (9th Cir. 2021). The text and structure of the Sentencing Guidelines suggest no reason to depart from the rule.

In any event, the difficulties of proof that the government imagines are not likely to be so difficult in practice. Under section 7B1.1, the government already must prove the facts constituting the offense itself. The task of determining a defendant's criminal history and whether the defendant's conduct satisfies one or more aggravating factors under the Washington guidelines is not meaningfully different. *Cf. United States v. Willis*, 795 F.3d 986, 993–94 (9th Cir. 2015) (assessing whether defendant's conduct constituted one crime or another under a divisible statute). Because most cases are likely to implicate only a few potentially relevant aggravating factors—here the government cites just two—the government can readily demonstrate which, if any, apply. If the district court finds those factors to be present, it will have determined that the offense is "punishable by" the increased sentence the Washington guidelines prescribe.

Notably, we already require district courts to conduct a similar inquiry for certain offenses in California. *See Denton*, 611 F.3d at 652. Under California law, some offenses "can be punished either as a felony or as a misdemeanor," at the trial court's discretion. *Id.* at 651. When conduct constituting such an offense forms the basis for revoking supervised release, a district court must apply the factors relied upon by California courts to "evaluate the seriousness of the defendant's uncharged conduct" in order "to decide whether that conduct would be punishable by more than one year's imprisonment." *Id.* at 652. That process, we have explained, "is consistent with the commentary to the Sentencing Guidelines, which urges courts to determine the grade of a defendant's violation based on the defendant's actual conduct." *Id.* Determining a defendant's mandatory guidelines range under Washington law involves the same type of assessment.

We acknowledge that the district court stated that it would have imposed the same sentence even if Williams's conduct constituted a Grade C offense, resulting in a lower advisory Guidelines range. An error in calculating the applicable Guidelines range may be harmless if the district court "acknowledges that the correct Guidelines range is in dispute and performs [its] sentencing analysis twice." *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 n.5 (9th Cir. 2011) (per curiam). But at the same time, "[a] district court's mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand" if "the court's analysis did not flow from an initial determination of the correct Guidelines range." *Id.* at 1031. Here, although the district court stated that it would impose an alternative sentence above the Guidelines range, it gave no explanation of why an above-Guidelines sentence would

be appropriate. Accordingly, we cannot rely on its alternative finding to hold the error harmless. *See United States v. Miqbel*, 444 F.3d 1173, 1179 (9th Cir. 2006).

We therefore vacate the sentence and remand for resentencing based on an assessment of the punishment that Williams faces under Washington's mandatory guidelines, as determined by his actual conduct, including any aggravating factors that the district court may find. Once the court has determined the grade of the violation, it may consider whether to impose a sentence outside of the advisory Guidelines range, and, if it does, it must explain its reasons for doing so. *See United States v. Leonard*, 483 F.3d 635, 637 (9th Cir. 2007); *see also United States v. Carty*, 520 F.3d 984, 991–93 (9th Cir. 2008) (en banc).

III

The district court ordered that Williams's sentence "be served consecutively to . . . any and all other terms of imprisonment, including any and all future state sentences." Williams argues that the court erred by ordering the sentence to run consecutively to any future federal sentence. Because Williams did not object at sentencing, we review for plain error. *United States v. Gallegos*, 613 F.3d 1211, 1213 (9th Cir. 2010). "Plain error is (1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, [we] may then exercise [our] discretion to grant relief if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Wang*, 944 F.3d 1081, 1085 (9th Cir. 2019) (alterations in original) (quoting *United States v. Hammons*, 558 F.3d 1100, 1103 (9th Cir. 2009)); *see United States v. Marcus*, 560 U.S. 258, 262 (2010).

A district court may order a sentence to run consecutively to an anticipated state sentence. *Setser v. United States*, 566 U.S. 231, 244–45 (2012). But our precedent "does not permit a federal sentencing court to impose a sentence to run consecutively to another federal sentence that has yet to be imposed." *United States v. Montes-Ruiz*, 745 F.3d 1286, 1293 (9th Cir. 2014). The district court's order that the sentence run consecutively to "any and all other terms of imprisonment" plainly includes future federal terms of imprisonment and is therefore erroneous. Because that error is "clear or obvious" and it is undisputed that the other requirements of plain-error review are satisfied, "we will exercise our discretion to correct the error." *Wang*, 944 F.3d at 1088–90 (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). On remand, the district court should not order that the term of imprisonment for the violation of supervised release run consecutively to future federal sentences. That decision must be left to the district court responsible for the imposition of any future federal sentence. *See Setser*, 566 U.S. at 241 n.4.

VACATED and REMANDED.