No. _____

IN THE
Supreme Court of the United States

SHANNON L. COTTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. PATTON
Federal Public Defender

THOMAS A. DRYSDALE
Assistant Federal Public Defender
Counsel of Record
OFFICE OF THE FEDERAL PUBLIC DEFENDER
300 W. Main Street
Urbana, Illinois 61801
Phone: (217) 373-0666
Email: thomas_drysdale@fd.org
Counsel for Petitioner

QUESTION PRESENTED

This Court has consistently held "that the ordinary meaning of the language chosen by Congress accurately expresses the legislative purpose." *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 101 (2011). It has repeatedly cautioned against rewriting statutes, even when Congress's plain language yields objectionable or absurd results. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004).The language of 18 U.S.C. § 3583(e)(3) is clear and unambiguous. When a criminal defendant's term of supervised release is revoked, the statutory maximum sentence that may be imposed upon revocation is determined by what class of felony the defendant's original "offense . . . is." 18 U.S.C. §3583(e)(3).

In 2007, Shannon Cotton pled guilty to what was, at the time, a Class A felony for distribution of five grams or more of crack cocaine in violation of 21 U.S.C. §§ 841(a) and (b)(1)(B). In 2010, Congress enacted the Fair Sentencing Act, which altered the amount of crack cocaine needed to trigger 21 U.S.C. §841(b)(1)(B), increasing the threshold from five (5) grams to twenty-eight (28) grams. In 2018, Congress passed the First Step Act, which made the Fair Sentencing Act retroactively applicable at courts' discretion. Under Section 404(b) of the First Step Act, Mr. Cotton's sentence was reduced from 262 months to 188 months.

After being released from custody, Mr. Cotton violated the terms of his supervised release in 2022. In 2023, he was sentenced to two-years in prison by the district court under 18 U.S.C. § 3583(e)(3).

The question presented is:

Whether the plain language of 18 U.S.C. § 3583(e)(3) requires a district court to determine the current classification of a defendant's felony by looking to what his "offense is" at the time of revocation or whether the court must look to what the "conviction is" or "offense was" at the time of the original judgment.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

DIRECTLY RELATED CASES

This case arises from the following proceedings:

United States of America v. Shannon L. Cotton, 108 F.4th 987 (7th Cir. 2024) (reversing the district court's holding that Cotton's offense "is" a class C felony)

United States of America v. Shannon L. Cotton, Criminal No. 07-cr-20019-MMM-EIL (C.D. Ill. February 27, 2023) (district court holding that Cotton offense "is" a class C felony).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Shannon Cotton respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The Seventh Circuit's decision is published at 108 F.4th 987 and is included as Appendix A. The Seventh Circuit denied Mr. Cotton's petition for rearing on October 7, 2024. That decision is included as Appendix B. The United States District Court for the Central District of Illinois did not issue a written order. The transcript of the district court's oral ruling is included as Appendix C.

JURISDICTION

The Seventh Circuit entered judgment on July 26, 2024. Pet. App. 1a. A petition for rehearing was filed on August 23, 2024, which the Seventh Circuit denied on October 7, 2024. Pet. App. 21. This petition is filed within 90 days of the Seventh Circuit's October 7, 2024, denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

I. Section 841, Title 21 of the United States Code (2007)

In 2007, Title 21 U.S.C. § 841(b)(1)(B) provided in relevant part:

> (b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

> (1)(B) In the case of a violation of subsection (a) of this section involving—
>
> > (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

II. 18 U.S.C. § 3559

Title 18 U.S.C. § 3559 provides in relevant part:

> An offense that is not specifically classified by a letter grade in the section defining, is classified if the maximum term of imprisonment authorized is -
>
> (1) Life imprisonment, or if the maximum penalty is death, as a Class A felony;
>
> (2) Twenty-five years or more, as a Class B felony;

(3) Less than twenty-five years but ten or more years, as a Class C felony;

(4) Less than 10 years but five or more years, as a Class D felony;

III. The Fair Sentencing Act of 2010

Entitled "Cocaine Sentencing Disparity Reduction," Section 2 of the Fair Sentencing Act of 2010 provides, in relevant part:

> (a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—
>
> (1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and
>
> (2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams."

Pub. L. No. 111-220, 124 Stat. 2372, § 2(a).

IV. The First Step Act of 2018

Entitled "Application of the Fair Sentencing Act," Section 404 of the First Step Act of 2018 provides in full:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b)DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(b) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by 2 sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Pub L. No. 115-391, 132 Stat. 5194, § 404.

V. Section 841, Title 21 of the United States Code

As amended by the Fair Sentencing Act of 2010, 21 U.S.C. § 841 provides, in pertinent part:

(a) Unlawful acts Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * *

(b) Penalties Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(1)(B) In the case of a violation of subsection (a) of this section involving—

* * *

(iii) 28 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] which contains cocaine base;

* * *

> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment . . . .

VI. 18 U.S.C. § 3583(e)

Title 18 U.S.C. § 3583(e)(3) provides in relevant part that a court, upon finding a violation of supervised release, may:

> revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release ... except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.

INTRODUCTION

Enacted with overwhelming bipartisan support, the First Step Act of 2018 sought to make the criminal justice system a bit more just. Section 404 was a centerpiece provision. It made Section 2 of the Fair Sentencing Act of 2010 retroactive. Section 2 reduced the infamous 100-to-1 crack-to-powder cocaine sentencing disparity by raising the amount of crack determining the statutory

penalties in 21 U.S.C. § 841(b)(1). For the top-tier penalties in § 841(b)(1)(A)(iii), Section 2 increased the threshold from 50 to 280 grams. And, for the mid-tier penalties in § 841(b)(1)(B)(iii), Section 2 increased the threshold from 5 to 28 grams.

Those statutory penalties matter not only for custodial sentencing, but also for anyone whose sentence includes a term of supervised release. Pursuant to 18 U.S.C. § 3583(e)(3), the maximum custodial sentence that may be imposed upon revocation of supervised release depends on the defendant's felony classification. Because Section 3583(e) speaks in terms of offenses (and not convictions) and is phrased in the present tense, the operative question when determining a defendant's maximum sentencing exposure upon a revocation is what their offense currently is at the time of their revocation proceedings

But that is not what the Seventh Circuit held. Bypassing the plain language of 18 U.S.C. § 3583(e)(3) and the purpose and intent of the First Step Act and Fair Sentencing Act, the Seventh Circuit rewrote Section 3583(e)(3) and held that the statutory maximum sentence upon revocation is determined by what the "conviction" is. But the word "conviction" does not appear in 18 U.S.C. § 3583(e). The statute requires courts to set the statutory maximum based on what the "offense that resulted in the term of supervised release is . . ." 18 U.S.C. § 3583(e).

The Seventh Circuit's holding conflicts with the plain language of 18 U.S.C. § 3583(e)(3) and results in an impermissible rewrite of Congressional language. It is also in clear conflict with this Court's holding in *Johnson v. United States*, 529 U.S. 694 (2000), which held that "post revocation proceedings relate to the original

"offense," not the original conviction. 529 U.S. at 701. The Seventh Circuit has thwarted Congress's intent in passing the First Step Act, and turned back the clock on landmark, bipartisan legislation designed to reduce the sentencing disparities in crack cocaine cases. *See Dorsey v. United States*, 567 U.S. 260, 276 (2012).

This is an ideal vehicle for this Court to intervene. Mr. Cotton fully preserved his statutory maximum argument in the district court and on appeal. The district court agreed that Mr. Cotton's interpretation of 18 U.S.C. § 3583(e)(3) was correct. And the Seventh Circuit reversed on the sole ground that the statutory maximum term of imprisonment under 18 U.S.C. § 3583(e)(3) is determined not by what the "offense is," but by what the "conviction is." Mr. Cotton is precisely the type of person that Congress sought to help when it amended the crack-cocaine penalties with the Fair Sentencing Act and then made those changes retroactive through the First Step Act. This Court should grant review to ensure that defendants like Mr. Cotton are receiving the remedial benefits that Congress intended.

STATEMENT OF THE CASE

I. Statutory Background

1. In the Anti-Drug Abuse Act of 1986, Congress enacted criminal prohibitions and penalties for various drug offenses, including those involving crack and powder cocaine. Those prohibitions and penalties are codified at 21 U.S.C. § 841.

Entitled "Unlawful Acts," § 841(a)(1) prohibits any person from knowingly or intentionally manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense a "controlled substance." Entitled "Penalties,"

§ 841(b) prescribes three tiers of sentencing ranges for "any person who violates subsection (a)." These tiers depend on the type and weight of the drug. Under the 1986 Act, there was a 100-to-1 disparity between crack and powder cocaine. *See Kimbrough v. United States*, 552 U.S. 85, 95–96 (2007).

Section 841(b)(1)(A) prescribed an unenhanced statutory range of 10-years-to-life for crack offenses involving 50 grams of more and powder offenses involving 5,000 grams or more. Section 841(b)(1)(B) prescribed an unenhanced statutory range of 5-to-40 years for crack offenses involving 5 grams or more and powder offenses involving 50 grams of more. Section 841(b)(1)(C) served as a residual provision, prescribing an unenhanced statutory range of 0-to-20 years for all offenses, "except as provided in subparagraphs (A), (B)," and another provision not relevant here.

2. "During the next two decades, the [Sentencing] Commission and others in the law enforcement community strongly criticized Congress' decision to set the crack-to-powder mandatory minimum ratio at 100-to-1." *Dorsey*, 567 U.S. at 268. "The Commission issued four separate reports telling Congress that the ratio was too high and unjustified because, for example, research showed the relative harm between crack and powder cocaine less severe than 100-to-1, because sentences embodying that ratio could not achieve the Sentencing Reform Act's 'uniformity' goal of treating like offenders alike, because they could not achieve the 'proportionality' goal of treating different offenders (e.g., major drug traffickers and low-level dealers) differently, and because the public had come to understand

sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences." *Id.* Ultimately, the Sentencing Commission "asked Congress for new legislation embodying a lower crack-to-powder ratio." *Id.* at 269.

"In 2010, Congress accepted the Commission's recommendations and enacted the Fair Sentencing Act into law." *Id.* Section 2(a) of the Fair Sentencing Act amended the text of §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii). Specifically, Section 2(a) "increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5-year minimum [in § 841(b)(1)(B)(iii)] and from 50 grams to 280 grams in respect to the 10-year minimum" in § 841(b)(1)(A)(iii). *Id.*; *see* Pub. L. No. 111-220, 124 Stat. 2372, § 2(a). "The change had the effect of lowering the 100-to-1 crack-to-powder ratio to 18-to-1." *Dorsey*, 567 U.S. at 269. However, these amendments applied only to those sentenced after their effective date of August 3, 2010. *Id.* at 264, 281.

3. Enacted with overwhelming bipartisan support, Section 404 of the First Step Act sought to remedy that injustice. Pub. L. No. 115-391, 132 Stat. 5194. It did so by making the Fair Sentencing Act retroactive. Specifically, Section 404(b) provides that a district "court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." § 404(b) (emphasis added; internal citation omitted). Thus, eligibility for relief is keyed to a "covered offense." In Section 404(a), Congress defined that term to "mean[ ] a violation of a Federal criminal statute, the statutory penalties for which were modified by section

2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010."

4. In conjunction with the statutory maximum sentence that applies for a crack-cocaine offense, 18 U.S.C. § 3559 classifies offenses as felonies or misdemeanors. Any offense that has a statutory maximum penalty of less than twenty-five years, but ten or more years is a Class C felony. 18 U.S.C. § 3559(a)(3). If the offense has a maximum sentence of twenty-five years or more, it is a Class B felony. *Id.* at (a)(2). If the statutory maximum sentence is life imprisonment or death, the offense is a Class A felony. *Id.* at (a)(1).

5. The statutory maximum sentence and subsequent felony classification control not only a defendant's penalty at sentencing, but also the statutory maximum penalty that a defendant can face if their supervised release is revoked following their release from custody. Pursuant to 18 U.S.C. § 3583(e)(3), if a defendant violates their conditions of supervised release, the district court may revoke that supervision and sentence them to a term of imprisonment. The statutory maximum term that the district court can impose is controlled by the felony classification of the offense at the time of revocation. If the offense that the defendant is on supervised release for is a Class A felony, the court can impose up to five years in custody. 18 U.S.C. § 3583(e)(3). If the offense that resulted in the term of supervised release is a Class B felony, the statutory maximum penalty is three years' imprisonment. *Id.* Finally, if the offense is a class C or D felony, the statutory maximum penalty upon revocation of supervision is two years. *Id.* The offense

classification at the time of the revocation directly affects the maximum sentence that can be imposed.

II. Proceedings Below

1. On February 8, 2007, a two-count indictment was filed in the U.S. District Court against Mr. Cotton. *See United States v. Cotton*, Criminal No. 07-cr-20019, R. 6 (C.D. Ill. 2007). Count 1 charged Mr. Cotton with distribution of five grams or more of crack cocaine which, at the time, was a violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B). *Id.* Count 2 charged Mr. Cotton with possession with the intent to distribute the same amount of crack-cocaine in violation of the same statutes. *Id.* On August 20, 2007, Mr. Cotton pled guilty to both counts. *See Cotton*, No. 07-cr-20019, R. 17, PSR ¶ 4.

On March 19, 2007, the government filed notice pursuant to 21 U.S.C. § 851 that it would seek an enhanced statutory sentence. PSR ¶ 2. Specifically, the government's Section 851 notice was based on two prior Illinois convictions for possession with intent to deliver less than 15 grams of cocaine and delivery of less than a gram of cocaine, neither of which should have been used to enhance Mr. Cotton's statutory penalties. *Cotton*, 07-cr-20019, R. 7; PSR at ¶ 29; *id.* at ¶ 30. However, because of the erroneous Section 851 notice based on, at most, 15 grams of cocaine, Mr. Cotton faced 10 years to life imprisonment at the time. PSR ¶ 65; 21 U.S.C. § 841(b)(1)(B) (2006). Because Mr. Cotton faced a statutory maximum term of life in prison, his offenses were Class A felonies in 2007, prior to the Fair Sentencing Act. *See* 18 U.S.C. § 3559(a)(1).

Mr. Cotton's guideline range and sentence were based primarily on his past, rather than his current offense. This is because the two prior Illinois convictions for, at most, 15 grams of cocaine, deemed him a career offender. Meaning, Mr. Cotton's guideline range dramatically increased to 262 to 327 months' imprisonment based on two low-level Illinois drug convictions. PSR ¶ 66. This guideline range was based, in part, on the government's decision to use Mr. Cotton's previous convictions to raise his statutory mandatory minimum to ten years and his statutory maximum to life imprisonment. Had the government used its discretion not to file the invalid Section 851 notice, the guideline range under the career offender guideline would have been 188 to 235 months. *See* U.S.S.G. § 4B1.1(b).

On November 20, 2007, Mr. Cotton was sentenced to 262 months' imprisonment to be followed by an 8-year enhanced term of supervised release. *Cotton*, 07-cr-20019, R. 20 (C.D. Ill. 2007).

2. For the next 11 years Shannon Cotton would sit in federal prison assuming that is where he would remain for over two decades. As time went by attitudes toward the "war on drugs" and the "social justice" of locking up mainly young black men for long periods in federal prisons for selling small amounts of drugs changed. Indeed, attitudes and laws regarding how to weigh punishment for crack-cocaine as opposed to powder cocaine are an example of this change.

The Fair Sentencing of 2010 passed him by because it was not retroactive. Then, finally, in 2018, Mr. Cotton received some hope that his draconian sentence would be reduced. Almost immediately after the First Step Act was passed in

December 2018, Mr. Cotton filed for First Step Act relief on January 30, 2019. By that point, he had already been in prison for 12 years. Mr. Cotton's *pro se* motion was amended by counsel on April 13, 2020. *Cotton*, 07-cr-20019, R. 28 (C.D. Ill. 2017). On April 24, 2020, over a year after Mr. Cotton filed his pro se motion, his sentence was reduced to 188 months and his term of supervised release was reduced to six (6) years under Section 404(b) of the First Step Act. *Id.* at R. 32. He was released from prison on October 9, 2020, after serving just shy of 14 years in custody and his term of supervised release started on the same day. *Id.* at R. 38.

3. On April 7, 2022, after Mr. Cotton had been on supervised release for 18 months, the government filed a petition to revoke, alleging a positive sweat patch test that revealed the use of controlled substances. R. 38. The petition was amended on April 26, 2022, to add two additional sweat patch tests that allegedly showed the use of marijuana. R. 42. These were Grade B supervised release violations with a guideline range of 21 to 27 months' imprisonment. *See* R. 51 at 5; *see also* U.S.S.G. § 7B1.4(a).

On October 24, 2022, the government filed a supplemental revocation petition, this time alleging a new law violation based on Mr. Cotton allegedly possessing controlled substances with the intent to distribute. R. 57. Because this allegation constituted a new law violation, it was a Grade A supervised release violation. *See* U.S.S.G. § 7B1.1(a)(1). Probation determined that Mr. Cotton had a statutory maximum 5-year term of imprisonment based on what his felony offense

was in 2007, suggesting a guideline range of 51-60 months' imprisonment, capped by a 5-year statutory maximum. *See Cotton*, 07-cr-20019, R. 58 at 3.

On January 17, 2023, the district court held Mr. Cotton's revocation hearing. Mr. Cotton admitted to violation number one of the original petition (possession and use of cocaine and cannabis), violation number two of the first supplemental petition (cannabis use), and violation number three of the second supplemental petition (possession with intent to deliver a controlled substance). *See Cotton*, 07-cr-20019, January 17, 2023, Text Order.

During the hearing, a dispute arose concerning the applicable statutory maximum penalty in relation to Mr. Cotton's revocation sentence. Mr. Cotton argued that a statutory maximum two-year term of imprisonment applied, which is the highest penalty that he could face on a revocation under 21 U.S.C. § 841(b)(1)(C), his offense of conviction after the retroactive Fair Sentencing Act. The government suggested that the statutory maximum was five years based on the statutory maximum that applied under the now-defunct pre-Fair Sentencing Act sentencing regime. The district court ordered briefing on the topic by January 31, 2023. *Cotton*, 07-cr-20019, R. 63; R. 64.

The final revocation hearing was held on February 21, 2023. The district court agreed with Mr. Cotton. Tr. at 36. As such, the court determined that the statutory maximum penalty was 24 months' imprisonment. The district court ultimately imposed a 24-month sentence to be followed by a 3-year term of supervised release. Tr. at 59. The government filed a timely notice of appeal. R. 72.

4. On July 26, 2024, the Seventh Circuit issued a 2-1 split opinion vacating the district court's revocation sentence and remanding for resentencing. *United States v. Cotton*, 108 F.4th 987 (7th Cir. 2024). In doing so, the court correctly noted that "the maximum revocation sentence depends on whether 'the offense that resulted in the term of supervised release is a class A felony,' or a class B felony, and so on." *Cotton*, 108 F.4th at 991. It also accurately held that "[t]he present-tense verb—'is'—cannot be divorced from what it modifies: 'the *offense* that resulted in the term of supervised release.'" *Id.* (emphasis added).

Yet, inexplicably, the Seventh Circuit switched to discussing Cotton's "conviction" rather than his "offense," as 18 U.S.C. § 3583(e)(3) instructs. The court noted that "Cotton's 2007 conviction" that resulted in his term of supervised release was under Section 841(b)(1)(B) and that "Section 3583(e)(3) does not ask whether *someone else's* conviction for the same conduct 'is' or would be a class A, B, C, or D felony under current law." *Id.* (emphasis in original). The Court continued, pointing out that "[t]he statute asks whether *Shannon Cotton's* conviction under the 2007 version of 21 U.S.C. § 841(a)(1) and (b)(1)(B) 'is' a class A, B, C, or D felony." *Id.* (emphasis in original). It concluded that "[t]he answer is yes: Cotton's 2007 conviction was for a class A felony and that remains true today." *Id.*; *see also id.* at 8 ("Cotton's 2007 federal cocaine conviction remains and therefore "is" a class A felony.").

The court believed that its holding aligned with this Court's observation in *Johnson v. United States*, 529 U.S. 694, 700 (2000), which held that post-revocation

penalties arise from and are "treated as part of the penalty for the initial offense." *Cotton*, 108 F.4th at 991 (cleaned up). The Seventh Circuit closed by noting that revocation sentencing proceedings are not an opportunity to challenge convictions and that Section 3583(e)(3) "does not sit alongside § 2255 and present an alternative means available to federal prisoners to challenge some aspect of their conviction." *Id.* While the panel found that Cotton faced a five-year statutory maximum sentence, it further held that the district court as was not prohibited from taking changes in the law, such as the Fair Sentencing Act, into account when fashioning an appropriate sentence under Section 3553(a). *Id.*

Judge Pryor concurred in part and dissented in part. *Cotton*, 108 F.4th at 992-996 (Pryor, J., dissenting). Judge Pryor expressly noted that the majority's incorrect use of "conviction" instead of "offense" could undermine the text of 18 U.S.C. § 3583. *Cotton*, 108 F.4th at 993, n.1. Moreover, she also opined that the district court's 2020 grant of discretionary relief did alter Cotton's felony classification from class A to class B. *Id.* at 994-996. As such, Judge Pryor would have held that Cotton's underlying offense was a class B felony, subjecting him to no more than three years in prison upon resentencing.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to ensure that lower courts follow Congress's plain language and express intent, as well as the established precedent of this Court. The Seventh Circuit's holding is contrary to plain statutory language and rewrites Section 3583(e)(3) to use the word "conviction" instead of "offense."

Without this rewrite, the panel opinion cannot be reconciled with Section 3583(e)(3) because offenses are defined by law and their elements. *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019); *Hughey v. United States*, 495 U.S. 411, 416 (1990). The word "offense," combined with the present tense use of the word "is" in Section 3583(e)(3) leads to one permissible conclusion: possession with intent to distribute five or more grams of crack cocaine with a prior qualifying drug felony "is" a class B felony. Because the Seventh Circuit's opinion rewrites 18 U.S.C. § 3583(e)(3), this Court should intervene.

Moreover, the Seventh Circuit's opinion is in direct conflict with this Court's decision in *Johnson v. United States*, 529 U.S. 694, 701 (2000), which squarely holds that "post revocation penalties relate to the original offense," not the original conviction. The opinion is also inconsistent with Congress's purpose in passing the Fair Sentencing and First Step Acts, reverting to defunct penalties that Congress has expressly deemed too harsh and motivated by unwarranted racial disparities.

This case meets all the Court's criteria for granting certiorari. First, the question presented concerns an important issue of statutory interpretation and directly implicates well-established precedent of this Court. Second, the Seventh Circuit's holding presents an issue of great importance as it currently undermines the very purpose of passing both the Fair Sentencing and First Step Acts. Fourth, the question presented will profoundly affect many defendants who, under the Seventh Circuit's holding, will be subject to higher criminal penalties that are based

on outdated and unjust laws. Finally, this case is an ideal vehicle to resolve the question presented.

I. The Seventh Circuit has rewritten 18 U.S.C. § 3583(e)(3) in a way that directly conflicts with this Court's holding in *Johnson v. United States*, 529 U.S. 694 (2000) and frustrates Congress's intent in passing the First Step Act.

To reach its conclusion, the Seventh Circuit rewrote the plain the language of 18 U.S.C. § 3583(e)(3) to read "conviction . . . is" instead of honoring the plain language of the statute that says "offense . . . is." That opinion directly conflicts with this Court's precedent in *Johnson v. United States*, and runs afoul of Congressional intent in passing the First Step Act. Any of these reasons, standing alone, would be enough to warrant this Court's intervention. Combined, they make this case an ideal candidate for certiorari.

A. The Seventh Circuit rewrote 18 U.S.C. § 3583(e)(3).

The text of the statute itself is the most reliable indicator of congressional intent. *See Snyder v. United States,* 603 U.S. 1, at 22-23 (2024) (Jackson, J., joined by Sotomayor, J., and Kagan, J., dissenting). Courts must assume "that the ordinary meaning of the language chosen by Congress accurately expresses the legislative purpose." *Microsoft Corp. v. i4i Ltd. Partnership,* 564 U.S. 91, 101 (2011). The plain language of 18 U.S.C. § 3583(e)(3) asks whether "the *offense* that resulted in the term of supervised release is" a class A or B felony. 18 U.S.C. § 3583(e)(3) (emphasis added). The Seventh Circuit correctly recognized that the present tense use of "is" in Section 3583(e)(3) cannot be divorced from the phrase it modifies, which is "the offense that resulted in the term of supervised release." *Cotton*, 108

F.4th at 991. Yet, at the same time, the Seventh Circuit replaced "offense" with "conviction" in Section 3583(e)(3), multiple times. *See id.* at 991. But "offense" and "conviction" are not interchangeable.

"An offense is defined by law," which in turn means by its elements. *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019); *Carachuri-Rosendo v. Holder*, 560 U.S. at 563, 572 (2010) ("most federal offenses are defined by their elements"). Offenses, on the other hand, are criminal acts. *Cotton*, 108 F.4th at 993, n.1 (*citing Offense*, BLACK'S LAW DICTIONARY (12th ed. 2024)). Conviction is not defined in Section 3583(e) because Congress did not use that term. However, a "'conviction' is equivalent to a 'judgment.'" *Cotton*, 108 F.4th at 993, n.1 (*citing Conviction*, BLACK'S LAW DICTIONARY (12th ed. 2024)); *see also Carachuri-Rosendo*, 650 U.S. at 582-83 (Scalia, J., concurring) (noting that "conviction" in the Immigration and Nationality Act is defined as "formal judgment of guilt of the alien entered by a court.").

Substituting "conviction" for "offense" rewrites the statute and changes the outcome of the case. Keeping in mind that the present tense use of "is" modifies "offense" (*Cotton*, 108 F.4th at 991), the question, then, is what are the current elements of Cotton's offense? Put another way, what "is" Cotton's criminal act of possession with intent to distribute five grams or more of crack cocaine? There is only one way to answer that question – the "offense" of possession with intent to distribute five or more grams of crack cocaine with a qualifying prior conviction "is" a class B felony because it carries a statutory maximum 30-year term of

imprisonment, with a prior felony conviction. 21 U.S.C. § 841(b)(1)(C); 18 U.S.C. § 3559(a)(2).

Meaning, Cotton's *conviction* was for a class A felony "and that remains true today." *Cotton*, 108 F.4th at 991. No one disputes that the "conviction," or "judgment" as that term is defined, is a class A felony. But that is not the focus of 18 U.S.C. § 3583(e)(3). The plain language of Section 3583(e) focuses on whether Cotton's *offense* that resulted in his term of supervised release "is" as class A or B felony. 18 U.S.C. § 3583(e)(3). And the answer is a class B felony when the inquiry focuses on the criminal act. The Seventh Circuit was correct that the statute does not ask what someone else's conviction for the same conduct "is" under current law (*Cotton*, 108 F.4th at 991), but that is because the statute does not ask about anyone's *conviction*. The operative inquiry is focused on someone's *offense*. 18 U.S.C. § 3583(e)(3).

B. The Seventh Circuit's opinion conflicts with *Johnson v. United States*, 529 U.S. 694 (2000).

Although the Seventh Circuit believes its view "aligns" with *Johnson v. United States*, 529 U.S. 694 (2000) (*Cotton*, 108 F.4th at 991), the opposite is true. As the panel recognized, "post revocation penalties relate to the original *offense*." *Johnson*, 529 U.S. at 701 (emphasis added). Like Section 3583(e)(3), *Johnson* does not say that post revocation penalties relate to the original *conviction*. Thus, if the "original offense" has been changed by Congress, as is the case here, then to align with *Johnson*, as well as the plain language of Section 3583(e)(3), which uses "is,"

the operative inquiry must ask what the "offense . . . is" and not what the "conviction . . . is" or the "offense . . . was."

Moreover, the Seventh Circuit's opinion is inconsistent with *Johnson*'s discussion of Congressional intent to give retroactive effect to subsequent legislation. *Johnson*, in its discussion of post revocation penalties relating to the original offense, noted that when there is a "a clear statement of [Congressional] intent" to "give retroactive effect" to subsequent legislation, the Court will indeed honor that intent. *Johnson*, 529 U.S. at 701-02 (emphasis added). That is precisely what we have here. Congress, through the First Step Act, made such a statement with respect to the Fair Sentencing Act. Meaning, Cotton's statute of conviction "is" a Class B felony, and, via clear Congressional intent on retroactivity, the current classification of felony "relates to" the original "offense." *Johnson*, 529 U.S. at 701-02; *See also United States v. Sanders*, 909 F.3d 895, 901 (7th Cir. 2018) (noting that Congress can give retroactive effect to changes in the law for the purpose of future proceedings).

C. The Seventh Circuit's opinion frustrates Congressional purpose in passing the First Step Act.

The First Step Act has been billed as "the most significant criminal justice reform bill in a generation." *Pulsifer v. United States*, 601 U.S. 124, 155 (2024) (Gorsuch, J., dissenting) (citation omitted). Setting aside whether the First Step Act changed the felony classification for everyone, it certainly did for Cotton who received a reduction under Section 404(b) of the First Step Act. Any other

conclusion "turns back the clock and erases the impact of Cotton's resentencing." *Cotton*, 108 F.4th at 992 (Pryor, J., dissenting).

When a district court finds a defendant eligible for First Step Act relief, the Court is required to "recalculate the statutory minimum and maximum that would have applied had . . . the Fair Sentencing Act been in effect at the time the defendant was originally convicted." *Cotton*, 108 F.4th at 995 (*citing United States v. Fowowe*, 1 F.4th 522, 529 (7th Cir. 2021) (cleaned up)). When the district court chose to exercise its discretion to reduce Cotton's sentence under Section 404(b) of the First Step Act, it necessarily had to consult – and apply – the Fair Sentencing Act's penalties before reducing the sentence. "These changes in the statutory maximum wrought by Cotton's resentencing caused Cotton's offense to become a class B felony." *Id.*

Otherwise, the district court's decision to resentence Cotton to a six-year term of supervised release would have been illegal because a class A felony would have carried, at minimum, an eight-year term of supervised release. *Cotton*, 108 F.4th at 996; 21 U.S.C. § 841(b)(1)(B). If the district court understood Cotton's mandatory minimum term of supervised release to be six years and not eight, it then also understood Cotton's offense to be a violation of 21 U.S.C. § 841(b)(1)(C) or, in other words, a class B felony. *Id.*

And, as the dissent recognized, the Seventh Circuit had already assumed in non-precedential orders that the granting of a Section 404(b) motion reduces the defendant's felony class. *United States v. Perkins*, No. 21-1421, 2021 WL 515800, at

*2 (7th Cir. Nov. 5, 2021) (class A felony "became a class B felony" "through the retroactive application of the Fair Sentencing Act."); *United States v. Baker*, No. 21-2182, 2022 WL 523084, at *3 (7th Cir. Feb. 22, 2022) (same). The Fifth Circuit also found that the First Step Act "revealed a 'clear intention' to change sentencing laws retroactively, opening the door for the defendant's felony classification to be re-evaluated." *Cotton*, 108 F.4th at 996 (*citing United States v. Jones*, No. 22-30480, 2023 WL 6458641, at *4 (5th Cir. Oct. 4, 2023)); The Fourth Circuit has agreed. *See United States v. Venable*, 943 F.3d 187, 193 (4th Cir. 2019) (Fair Sentencing and First Step Acts reclassified felonies).

These courts hold this way because anything else frustrates the purpose of the Fair Sentencing and First Step Acts. The entire purpose of these Acts, undoubtedly, is to reduce the sentencing disparities in crack cocaine cases. *See Dorsey*, 567 U.S. at 276; *Fowowe*, 1 F.4th at 532. Prior to Congress passing the First Step Act, the Seventh Circuit had commented that the Fair Sentencing Act might more accurately be known as "The Not Quite as Fair as it could be Sentencing Act of 2010." *United States v. Fisher*, 635 F.3d 336, 338 (7th Cir. 2011), *rev'd sub nom. Dorsey*, 567 U.S. at 282. Congress thought so too. *See, e.g.*, 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Feinstein) ("Unfortunately, [the Fair Sentencing Act] did not apply retroactively, and so there are still people serving sentences under the [prior sentencing regime].").

Now the Seventh Circuit has inexplicably reverted to the "Not Quite as Fair as it could be Sentencing Act of 2010." *Fisher*, 635 F.3d at 338. It clawed back the

relief that the district court granted and reinstated the 1986 Anti-Drug Abuse Act penalties that the DOJ told Congress "make little sense" and are "not fair." Statement of the U.S. Department of Justice Before the Committee on the Judiciary, p. 5.[1] The same penalties that resulted in unjust sentencing disparities that are "still baked into federal law." *Id.* at 7; *see also* 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) (Under the Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841, thousands of people—"90 percent [of them] African Americans; 96 percent [of them] Black and Latino"—received harsh crack-cocaine sentences under a system that treated crack offenses 100 times more severely than equivalent powder-cocaine offenses).

Cotton's class of felony was reduced when his amended judgment was entered under the First Step Act. This Court's intervention is necessary to protect the relief granted under the First Step Act and ensure that the Fair Sentencing Act is as fair as it could be.

II. The question presented warrants review.

The question presented has "significant implications for many federal prisoners." *United States v. Brit*, 966 F.3d 257 (3d Cir. 2020). As it stands, at least in the Seventh Circuit, defendants will be subject to increased statutory maximum penalties that Congress never intended and, in fact, expressly disavowed in passing the Fair Sentencing and First Step Acts. In adopting 18 U.S.C. § 3583(e)(3), Congress never intended for revocation sentences to be based on the classification of

[1] Available at https://sentencing.typepad.com/files/doj-equal-act-testimony--final.pdf (accessed December 16, 2024).

convictions or, worse, an outdated and irrelevant view of what an "offense was." And it certainly never intended the result that the Seventh Circuit has reached, whereby defendants are being subjected to increased statutory maximum penalties based on racially motivated crack-cocaine disparities that a bipartisan Congress expressly abolished.

Yet, that is now the law in the Seventh Circuit. Defendants who face revocations of supervised release will be subjected to increased statutory maximums based on crack-cocaine laws that Congress has eliminated. Offenders cannot be treated differently than similarly situated revocation defendants who happened to have committed their offense after 2018. *Cf.* 18 U.S.C. § 3553(a)(6) (directing courts to "avoid unwarranted sentence disparities"). And they certainly cannot be sent to prison for longer periods of time based on racially motivated laws that Congress fought to eliminate.

III. This is an ideal vehicle.

Procedurally, Cotton argued below that the retroactive application of the Fair Sentencing Act through the First Step Act meant that his offense "is" a Class B or C felony. He made these arguments at every available opportunity. He did so in the district court and the district court agreed. Pet. App. at 22-84. And he did so on appeal. Pet. C.A.7 Br. R. 17; Pet. C.A.7 Petition for Rehearing R. 36.

Moreover, the district court squarely decided the issue and held that the statutory maximum is based on what the felony classification currently "is." The court of appeals reversed on the sole ground that the statutory maximum penalty is

determined by what the "conviction is," rather than what the "offense is." And although the Seventh Circuit held that the Petitioner could still raise his argument in relation to the factors articulated at 18 U.S.C. § 3553(a), it held that the statutory maximum penalty was determined used pre-Fair Sentencing Act crack-cocaine penalties that no longer exist.

Factually too, Petitioner's case presents a clean vehicle. This is not a case where the district court indicated that the Petitioner's sentence would have been the same regardless of the applicable statutory maximum. In fact, the district court clearly stated that it would likely impose a *higher* sentence if it had the statutory authority to do so. Pet. App. at 80. Thus, the outcome of this question will likely determine Cotton's ultimate sentence. At this time, Cotton has already been released from custody and is serving his term of supervised release.[2] If the Seventh Circuit's decision is not rectified, the district court will likely send him back to prison.

IV. The decision below is incorrect.

This Court's intervention is necessary because the Seventh Circuit was wrong. The Seventh Circuit's holding that the statutory maximum sentence on revocation depends on what an offender's "conviction is" rather than what their "offense is" cannot be reconciled with the plain language of 18 U.S.C. § 3583(e)(3). Offenses and convictions are not the same in the law and Congress's express choice to use one instead of the other must be respected.

[2] https://www.bop.gov/inmateloc/ (accessed December 16, 2024) (showing Cotton's release date as June 26, 2024).

Neither the Seventh Circuit's opinion nor the government's interpretation of Section 3583(e)(3) can work without rewriting the statute. To illustrate, the Seventh Circuit would undoubtedly be correct if Congress had used "conviction" instead of "offense" in conjunction with the present tense use of "is." It is accurate to say that Cotton's *conviction* is for a class A felony, because conviction means "judgment." Likewise, if Congress had used the past tense "was" instead of "is" to modify "offense," then the Seventh Circuit's outcome would also be correct, because Cotton's offense *was* a class A felony in 2007. But Congress did not choose either of those options. It wrote "offense" and "is." The only way to honor the plain language of the statute without rewriting it is to adopt Cotton's interpretation. *United States v. Pace*, 48 F.4th 741, 763 (7th Cir. 2022) (Wood, J., dissenting) ("The words mean what they mean, whether or not we like the outcome.").

Congress used the word "offense," not "conviction." And although the Seventh Circuit is correct that Congress's choice of the present tense use of the word "is" cannot be divorced from the phrase it modifies (*Cotton*, 108 F.4th at 991), the very phrase that "is" modifies also cannot be rewritten to mean something else. This distinction was not an accident. For example, the Armend Career Criminal Act speaks of convictions, not offenses. 18 U.S.C. § 924(e); *see also McNeil v. United States*, 563 U.S. 816, 820 (2011) (the plain text of ACCA relies on convictions). So too does the recidivism enhancement in 21 U.S.C. §§ 841(b)(1)(A)-(C), which increases statutory penalties for prior "convictions." In short, Congress knows the difference between "offense" and "conviction" and its decision to choose "offense" in

Section 3583(e)(3) must be honored. *See Pace*, 48 F.4th at 761 (Wood, J., dissenting) ("as judges it is our duty to apply the law as it is written").

This Court has squarely held that "post revocation penalties relate to the original offense." *Johnson*, 529 U.S. at 701. That does not mean that post revocation penalties relate to the original "conviction," as the Seventh Circuit stated, multiple times. The dissent is in line with previous decisions of the Seventh Circuit, as well as other federal courts of appeal. In *United States v. Corner*, 967 F.3d 662 (7th Cir. 2020), the Seventh Circuit held that when a defendant raises Section 404(b) arguments at a revocation hearing, the district court is required to consider the updated penalties of the Fair Sentencing Act. If the district court is required to consider those penalties and then, in its discretion, goes a step further and applies them to reduce a defendant's sentence, it makes little sense to hold that it is not required to apply those same penalties in a later proceeding. Put another way, once a district court applies the Fair Sentencing Act penalties through the First Step Act, it would be an afront to Congress's remedial purpose to apply pre-Fair Sentencing Act penalties later during a revocation hearing.

The Seventh Circuit was wrong to revert to penalties that Congress expressly disavowed in passing the Fair Sentencing and First Step Acts. This Court should intervene to ensure that Congressional intent is respected and that all defendants are treated the same regardless of when their original sentence was imposed. Anything else turns back the clock to a pre-Fair Sentencing Act world that Congress fought hard to eliminate.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

THOMAS W. PATTON
Federal Public Defender

s/ Thomas A. Drysdale
THOMAS A. DRYSDALE
Assistant Federal Public Defender
Counsel of Record
OFFICE OF THE FEDERAL PUBLIC DEFENDER
300 W. Main Street
Urbana, Illinois 61801
Phone: (217) 373-0666
Email: Thomas_drysdale@fd.org
Counsel for Petitioner

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