No. _____

In the

Supreme Court of the United States

Joshua Devon Barrow,

Petitioner,

v.

United States,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When determining the statutory maximum sentence on revocation, should courts consult current law or only the law at the time of the underlying offense?

   Specifically, when a defendant is sentenced on an offense prior to the First Step Act but whose supervised release, for that offense, is later revoked after the First Step Act, does he receive the benefit of the First Step Act when determining his underlying felony classification and the statutory maximum revocation sentence?

PARTIES TO THE PROCEEDING

Petitioner is Joshua Devon Barrow, who was the Defendant-Appellant in the court below. Respondent, the United States, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States Court of Appeals for the Fifth Circuit and the Northern District of Texas:

- *United States v. Barrow*, No. 24-10157, 2025 U.S. App. LEXIS 13107 (5th Cir. May 29, 2025)
- *United States v. Barrow*, No. 2:23-cr-00049-Z-BR-1 (N.D. Tex. Feb. 14, 2024)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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Petitioner Joshua Devon Barrow seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Barrow*, No. 24-10157, 2025 U.S. App. LEXIS 13107 (5th Cir. May 29, 2025). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on May 29, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

This Petition involves the First Step Act of 2018, in which Congress limited the predicate for a § 851 enhancement from "a felony drug offense" to a "serious drug felony":

> [I]n subparagraph (B), in the matter following clause (viii), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final".

First Step Act, § 401(a)-(b), 132 Stat. at 5220-21.

This Petition also involves 18 U.S.C. § 3583(e), in which Congress set maximum sentences on revocation based on the classification of the underlying offense:

> [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[.]

18 U.S.C. § 3583(e)(3).

Finally, this Petition involves 18 U.S.C. § 3559, in which Congress classified felony offenses based on their maximum term of imprisonment:

> (a) Classification.—An offense that is not specifically classified by a letter grade in the section defining it, 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[.]

18 U.S.C. § 3559.

STATEMENT OF THE CASE

This Petition arises from a direct appeal from a judgment revoking supervised release and imposing a revocation sentence.

In 2012, Joshua Devon Barrow, Appellant, was sentenced in the Western District of Texas, on drug charges, to 120 months imprisonment. In 2013, he received another conviction, this time for bribery, which extended his sentence of imprisonment by 37 months. In 2022, he completed his sentences of imprisonment and began his 8-year term of supervised release for the drug charges.

In 2023, police officers encountered Mr. Barrow during a traffic stop after discovering an active warrant associated with his vehicle. When they searched Mr. Barrow's vehicle, they found a firearm in the glove box. The government charged Mr. Barrow with felon-in-possession of a firearm and moved to revoke his supervised release based on the new offense as well as other instances of noncompliance.

At the revocation hearing, Mr. Barrow admitted that he violated the conditions of supervised release as alleged in the government's amended motion to revoke and the court revoked the supervision term. The policy statement range was 21 to 27 months. Believing that Mr. Barrow's underlying offense was a Class A felony and characterizing Mr. Barrow as a repeat violent offender, the court imposed a sentence of 60 months imprisonment, the statutory maximum for a Class A felony. If, however, the district court had applied current law to the revocation sentence, his statutory maximum sentence would have been 36 months imprisonment.

REASONS FOR GRANTING THIS PETITION

When Mr. Barrow was sentenced on his underlying offense in 2012, for which he was on supervised release here, it would have been classified as a Class A felony. Under current law, Mr. Barrow's underlying offense would be classified as a Class B felony due to the First Step Act's changes to the § 851 enhancement predicates. When the district court assessed Mr. Barrow's felony classification in this proceeding, it should have applied current law due to the plain language of both 18 U.S.C. § 3583(e)(3) and § 401(c) of the First Step Act. If Mr. Barrow is correct, then his five-year sentence on revocation exceeds the statutory maximum for a Class B felony. While this Petition asks the Court to return to some of the same territory it recently explored in *Hewitt v. United States*, it is not to retread the same ground but to resolve an important lingering, and repeatable, situation that *Hewitt* did not directly address.

I. When imposing a new revocation sentence, courts should rely on current law rather than the law at the time of the underlying offense. Here, a refusal to do so resulted in a revocation sentence above the statutory maximum.

A. Standard of Review: Plain Error

To prevail on plain error review, a defendant must show: (1) an error; (2) that is clear or obvious; and (3) that affected his substantial rights. If all three factors are met, this Court has discretion to correct the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Williams*, 847 F.3d 251, 254 (5th Cir. 2017).

B. The district court plainly erred because, under the Fair Sentencing Act, the First Step Act, and 18 U.S.C. § 3583(e), Mr. Barrow's 2012 cocaine conviction is a Class B felony.

Federal offenses are classified by letter, depending on the maximum punishment authorized by statute. *See* 18 U.S.C. § 3559(a). Under that classification system, any offense punishable by a maximum sentence of life or the death penalty qualifies as a Class A felony. 18 U.S.C. § 3559(a)(1). By contrast, an offense punishable by a maximum sentence of 25 years or more, but less than life, is a Class B felony. 18 U.S.C. § 3559(a)(2). Maximum penalties for supervised release revocations are tied to that classification system, namely, to whether "the offense that resulted in the term of supervised release is a class" A, B, or C felony. 18 U.S.C. § 3583(e)(3).

1. At the time he was sentenced on the underlying offense in 2012, Mr. Barrow's statutory sentencing range was 10 years to Life due to a § 851 enhancement. Without the § 851 enhancement, he would have faced 5 to 40 years.

The offense underlying Mr. Barrow's revocation is a 2012 crack-cocaine conviction. Specifically, in 2010, the government charged Mr. Barrow with conspiracy to distribute and to possess with intent to distribute fifty grams or more of crack under 21 U.S.C. § 841(b)(1)(A). *United States v. Barrow*, 557 F. App'x 362, 363 (5th Cir. 2014). At the same time, the government filed an § 851 enhancement based on a 2005 felony conviction for possession of more than one gram but less than four grams of a controlled substance. *See id*. The government's charge, in conjunction with the § 851 enhancement, initially resulted in a statutory sentencing range of 20 years to Life. *Id*. Mr. Barrow pleaded guilty in 2011 but objected that his sentencing range

should instead have been 10 years to Life under the new Fair Sentencing Act of 2010. *Id*. at 364. This Court's precedent at the time, however, did not apply the Fair Sentencing Act retroactively to defendants who committed their offenses prior to the act, even if they were to be sentenced after the act took effect. *See United States v. Tickles*, 661 F.3d 212, 215 (5th Cir. 2011).

In 2012, on the morning of Mr. Barrow's sentencing, this Court abrogated *Tickles*. *Id*. On that day, the Supreme Court held in *Dorsey v. United States* that defendants who had committed their crime prior to the Fair Sentencing Act, but were not yet sentenced, must be sentenced under the act's amendment to the crack-cocaine statute. 567 U.S. 260, 264 (2012) ("We hold that the new, more lenient mandatory minimum provisions do apply to those pre-Act offenders."). This reduced Mr. Barrow's statutory sentencing range from 20-years-to-Life to 10-years-to-Life. *Barrow*, 557 F. App'x at 364.

Before Mr. Barrow was sentenced, the government brought *Dorsey* to the district court's attention. *Id*. The district court acknowledged *Dorsey*'s effect and sentenced Mr. Barrow to ten years imprisonment. *Id*. This was the mandatory minimum under the Fair Sentencing Act as enhanced under § 851. *Id*. On appeal, although Mr. Barrow's indictment, plea, and guilty plea all reflected the incorrect statute (fifty grams or more of crack cocaine now fell under 21 U.S.C. § 841(b)(1)(B)) and incorrect statutory range (20 years to Life), this Court held that those errors were harmless given the circumstances of the case. *Id*. at 365-68. But the story does not end there.

2. Under the First Step Act of 2018, a § 851 enhancement is improper based on a simple drug possession conviction. Thus, Mr. Barrow's sentencing exposure for the 2012 offense would be 5 to 40 years today.

If not for the § 851 enhancement, at the time of his sentencing in 2012, Mr. Barrow's statutory maximum punishment would have been 40 years, not life. This is because, under the Fair Sentencing Act, a charge involving fifty grams or more or crack cocaine falls under 21 U.S.C. § 841(b)(1)(B), ordinarily punishable by 5 to 40 years imprisonment. But because of Mr. Barrow's earlier 2005 conviction for possession of one to four grams of a controlled substance, his statutory range increased, under § 851, to 10-years-to-Life. *Barrow*, 557 F. App'x at 363 ("The prosecution filed a Sentencing Enhancement Information that same day, alleging that Barrow had been convicted in 2005 of a felony drug offense for possession of more than one gram but less than four grams of a controlled substance."). At the time, that was a correct application of the law. But the law changed again in 2018.

In the First Step Act of 2018, Congress modified the requirements for a § 851 enhancement. First Step Act, § 401(a)-(b), 132 Stat. at 5220-21. One of the modifications was to narrow the available predicates from any drug felony to a "serious drug felony." *Id*. Under the new scheme, simple drug possession offenses cannot qualify for a § 851 enhancement because simple possession offenses are not "described in" 18 U.S.C. § 924(e)(2). 21 U.S.C. § 802(58) (defining "serious drug felony"); 18 U.S.C. § 924(e)(2) (limited to state offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance"); *United States v. Martinez-Cortez*, 988 F.2d 1408, 1410 (5th Cir. 1993)

(holding that possession offenses are excluded from § 924(e)(2)); *see also United States v. Daggs*, No. 09-166, 2020 U.S. Dist. LEXIS 209032, *3 (E.D. La. Nov. 9, 2020) ("[T]he government does not dispute that … Daggs's predicate offense of simple possession of cocaine does not qualify as a serious drug felony."). Thus, if Mr. Barrow were sentenced for his underlying crack offense today, he could not be enhanced under § 851 for his 2005 possession conviction.

Instead, under the Fair Sentencing Act and the First Step Act, he would face a statutory sentencing range of 5 to 40 years for possessing with intent to distribute fifty or more grams of crack cocaine. *See* 21 U.S.C. § 841(b)(1)(B). The question then becomes whether the district court should have calculated the felony classification for the offense underlying his revocation—the 2012 crack cocaine offense—under current law or only under the law at the time of prior sentencing. Here, the district court should have used current law.

3. The district court should have made a current-law assessment of Mr. Barrow's felony classification at revocation to determine what the proper felony classification "is" as opposed to what it once "was."

Based on the discussion above, two conclusions follow: (1) when Mr. Barrow was sentenced for his crack-cocaine offense in 2012, it was a Class A felony because the § 851 enhancement made it punishable by up to life in prison; and (2) if Mr. Barrow were sentenced for that same offense today, it would be a Class B felony punishable by up to 40 years imprisonment. The crux of the matter here is which classification applies at revocation: the one at the time of original sentencing or the

one at the time of revocation? Based on the plain language of the revocation sentencing statute, it should be the latter.

In 18 U.S.C. § 3583(e), Congress set maximum sentences on revocation based on the classification of the underlying offense:

> [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[.]

18 U.S.C. § 3583(e)(3). Under the plain meaning rule, courts should give ordinary words their ordinary meaning, which includes their tense. *Carr v. United States*, 560 U.S. 438, 448 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."); *see also* Dictionary Act, 1 U.S.C. § 1 ("words used in the present tense include the future as well as the present"). In § 3583(e)(3), Congress chose the present tense: "is a class [A, B, C, or D] felony." While this Court has at times viewed the tense Congress chose as a limited tool of statutory interpretation, at other times it has treated tense as central to a statute's interpretation. *E.g. Travisha Mangwiro v. Johnson*, 554 F. App'x 255, 259 (5th Cir. 2014).

Here, tense is central to differentiating the two possible approaches to felony classification: prior law → "was a Class A felony" *vs.* current law → "is a Class B felony." Other than having a separate subsection clarifying the approach, there is no better way for Congress to have expressed its intent. Thus, under the plain meaning

of § 3583(e), the court should have calculated what the felony classification "is" at the time of revocation, rather than what it "was" at the time of original sentencing. And to know what the felony classification "is" requires an application of what the law "is" today. *But see McNeill v. United States*, 563 U.S. 816, 821 (2011); *accord United States v. Cotton*, 108 F.4th 987, 991 (7th Cir. 2024).

4. Congress expressly authorized courts to apply the First Step Act's modified approach to § 851 enhancements to a sentence imposed after December 2018.

When Congress used the First Step Act to narrow the availability of § 851 enhancements in drug cases from any drug felony to a "serious drug felony," it did so prospectively:

> APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply 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.

First Step Act, § 401(c), 132 Stat. at 5221. The impact of Congress's prospective decision is that offenders who were sentenced with an § 851 enhancement prior to December 2018 are not entitled to vacate their sentence or seek resentencing. *See United States v. McGowan*, 816 F. App'x 387, 394 (11th Cir. 2020). But that is not what Mr. Barrow seeks to accomplish here.

Consistent with § 401(c)'s prospective application, Mr. Barrow is not seeking to vacate his 2012 sentence. That sentence was imposed prior to the First Step Act and he understands, under § 401(c), that § 401 is forward-looking. What he is seeking here is different: to apply § 401 to a new sentence—his revocation sentence in this

case—which was not imposed until February 13, 2024. This sentence qualifies for consideration under § 401(c) because it "has not been imposed as of such date of enactment." First Step Act, § 401(c), 132 Stat. at 5221.

The government may argue that Mr. Barrow reads § 401(c) improperly. The government may argue that § 401(c) means that § 401's changes are off the table once *any* sentence for the offense has been imposed. But Congress did not say "any" sentence. It said "a" sentence, which leaves room for another sentence (such as a revocation sentence) that arrives after the First Step Act. Thus, the best reading of § 401(c) is that a sentence imposed before the First Step Act does not benefit from § 401 but a sentence imposed after § 401 does benefit from § 401. Mr. Barrow's revocation sentence here was after the First Step Act, so the district court should consider its application when calculating Mr. Barrow's felony classification.

5. When courts have previously rejected a current-law approach to felony classification, they did so in the context of changes in case law, not changes imposed by Congress.

Some courts have rejected a current-law approach at revocation. First, in *United States v. Moody*, the Fifth Circuit held that a district court is to look to law at the time of the prior conviction when determining the maximum length of a new term of supervised release at revocation even when the maximum would be different today. 277 F.3d 719, 721 (5th Cir. 2001) ("Though Moody is correct that a defendant convicted today of possession of a drug quantity not specified in the indictment would be sentenced under § 841(b)(1)(C), that was not the state of the law at the time Moody was convicted and sentenced."). Second, in *United States v. Crumedy*, the Fifth

Circuit applied the reasoning of *Moody* to felony classifications at revocation. *See* No. 02-50158, 2002 U.S. App. LEXIS 30019, at *2 (5th Cir. Aug. 30, 2002) ("Crumedy asserts, under *Apprendi v. New Jersey*, that his original offense is a Class C felony because no drug quantity was alleged in the indictment and that, under 18 U.S.C. § 3583(e)(3), the maximum term of imprisonment he could receive is two years. … As we held in *Moody*, this language requires the district court to consider the original statute under which the defendant was sentenced."). But both *Moody* and *Crumedy* dealt with changes in case law.

More recently, courts have taken a narrower approach to the application of *Moody* and *Crumedy*. In *United States v. Jones*, the Fifth Circuit declined to apply the reasoning of *Moody* and *Crumedy* to a claim that the First Step Act modified the statutory maximum for a crack cocaine offense, holding that "when Congress properly changes a law and expresses a clear intention to allow courts to consider that change retroactively, our cases should not be read to stand in Congress's way." No. 22-30480, 2023 U.S. App. LEXIS 26365, *10 (Oct. 4, 2023). But, at the same time, the court held that such a rule would only apply when dealing with a statute that Congress "expresses a clear intention to allow courts to consider that change retroactively." *Id*. ("To the extent that caselaw or Congress modifies a law, and that modification is not retroactive, *Moody* and *Crumedy* still apply.").

Here, while Congress did not express a clear intention for courts to apply § 401 of the First Step Act retroactively, Congress did, as Mr. Barrow argues above, nonetheless allow for a sentence imposed after the First Step Act to receive the benefit

of § 401. *See* First Step Act, § 401(c), 132 Stat. at 5221 ("This section, and the amendments made by this section, shall apply 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."). Accordingly, because the First Step Act's modifications to § 851 no longer apply, his prior conviction could only be punishable by up to 40 years, a Class B felony, leaving him with a 3-year statutory maximum on revocation. 18 U.S.C. § 3559(a)(2) (a 40-year statutory maximum is a Class B felony); 18 U.S.C. § 3583(e)(3) (the maximum revocation sentence for a Class B felony is 3 years imprisonment).

C. The district court's error is clear and obvious from the plain text of the First Step Act and 18 U.S.C. § 3583(e).

In order to satisfy the second prong of plain-error review, Mr. Barrow must show that the district court's error was plain—*i.e.* clear or obvious. *United States v. Aderholt*, 87 F.3d 740, 744 (5th Cir. 1996) ("Plain means clear or obvious."); *United States v. Olano*, 507 U.S. 725, 734 (1993).

Although Mr. Barrow does not point to a published case in this jurisdiction that fully supports his Class B felony classification at revocation, his reliance on the plain text of statutory authority is enough to show that the district court's error is clear and obvious. *United States v. Aderholt*, 87 F.3d 740, 744 (5th Cir. 1996) ("The error is evident from a plain reading of the statute and thus, is obvious."); *see also United States v. Blanco*, 27 F.4th 375, 380 (5th Cir. 2022) ("When 'a straightforward application of the [G]uidelines' reveals the error in applying a defendant's criminal history points, the error was clear and obvious."). As explained above, the text of 18

U.S.C. § 3583(e) requires a calculation under current law and the text of § 401(c) of the First Step Act likewise authorizes it. Further, under current law, it should be undisputed that Mr. Barrow's prior crack cocaine offense would only be punishable by up to 40 years imprisonment. If so, 18 U.S.C. § 3559(a)(2) classifies the offense as a Class B felony. In combination, the text of these provisions demonstrate that the district court's felony misclassification was clear and obvious.

D. The district court's error affected Mr. Barrow's substantial rights because it resulted in a revocation sentence above the statutory maximum.

In order to establish the third prong of plain-error review, Mr. Barrow must show that the district court's plain error affected his substantial rights—*i.e.* "a reasonable probability, that but for the error, the outcome of the proceeding would have been different." *United States v. Blanco*, 27 F.4th 375, 380-81 (5th Cir. 2022) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)).

Mr. Barrow can easily satisfy this prong because, if the district court should have classified his prior conviction as a Class B felony, then its 5-year sentence exceeded the statutory maximum sentence of 3 years imprisonment. *United States v. Rojas-Luna*, 522 F.3d 502, 507 (5th Cir. 2008) ("Given that Rojas-Luna received a sentence of seventy-three months in prison when, absent constitutional error, his sentence would have been a maximum of two years, we have little difficulty in concluding that Rojas-Luna's substantial rights were affect[ed]."); *United States v. Pando-de Madrid*, 442 F. App'x 119, 121 (5th Cir. 2011) ("A sentence that is greater than the statutory maximum permitted affects a defendant's substantial rights.").

E. Courts have routinely exercised its discretion to correct sentences exceeding the statutory maximum because such sentences call into question the fairness and integrity of the proceedings.

Under the fourth prong of plain error review, courts consider whether the district court's error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Martinez-Rodriguez*, 821 F.3d 659, 664 (5th Cir. 2016). This prong is discretionary and "is dependent upon the degree of the error and the particular facts of the case." *United States v. Davis*, 602 F.3d 643, 651 (5th Cir. 2010) (emphasis added).

This Court explained in *Rosales-Mireles* that "[t]he possibility of additional jail time … warrants serious consideration" when a court is deciding whether to exercise its discretion to reverse and remand. *Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018). Moreover, courts have often exercised its fourth-prong discretion when a sentence exceeded the maximum permissible sentence. *United States v. Hope*, 545 F.3d 293, 297-98 (5th Cir. 2008) (remanding on plain error when the sentence was "15 months longer than is constitutionally permissible"); *United States v. Williams*, 602 F.3d 313, 319 (5th Cir. 2010) (remanding on plain error when the sentence exceeded the statutory maximum by nine months); *United States v. Rodriguez-Martinez*, 329 F.3d 419, 419 (5th Cir. 2003) (reforming the judgment, on plain error, when a term of supervised release exceeded the statutory maximum).

Here, the district court's error both increased Mr. Barrow's sentence from three to five years and left him to serve a sentence exceeding the statutory maximum.

Because this seriously affected the fairness, integrity, and public reputation of the judicial proceedings, this Court should reverse and remand for resentencing.

CONCLUSION

Petitioner respectfully requests that this Court grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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