No. _____

In the

Supreme Court of the United States

_____

Trystan Keun Napper,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTIONS PRESENTED

I. Whether Federal Rule of Criminal Procedure 52(b) permits courts of appeals to grant appellate relief in the absence of error shown by binding precedent, or whether it is instead sufficient to show that the district court plainly erred in light of the clear text of a Rule, Guideline, or statute?

PARTIES TO THE PROCEEDING

Petitioner is Trystan Keun Napper, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner Trystan Keun Napper seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals is reported at *United States v. Napper*, 978 F.3d 118 (5th Cir. October 8, 2020). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on October 8, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULES

Federal Rule of Criminal Procedure 32.1(b)(2) provides:

> (2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:
>
> (A) written notice of the alleged violation;
>
> (B) disclosure of the evidence against the person;
>
> (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;
>
> (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and
>
> (E) an opportunity to make a statement and present any information in mitigation.

Federal Rule of Criminal Procedure 52(b) provides:

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. Proceedings in District Court

1. Initial Proceedings

In December of 2004, Petitioner Tristan Napper pleaded guilty to one count of possessing a firearm in furtherance of a drug trafficking crime. (Record in the Court of Appeals, at 86-90). As punishment, the district court imposed five years imprisonment and a five-year term of supervised release. (Record in the Court of Appeals, at 93-97).

2. First Revocation

In November of 2009, Mr. Napper violated the terms of his release, by possessing nine grams of crack with intent to distribute, by evading arrest, and by failing to report or comply with drug treatment. (Record in the Court of Appeals, at 103-105). On February 5, 2010, the district court revoked his term of release, imposing 37 months imprisonment and 23 months of additional supervised release. (Record in the Court of Appeals, at 120-124).

3. Second Revocation

Mr. Napper achieved release again on August 31, 2012, but suffered another arrest on December 9, 2012, due to an incident in a motel. (Record in the Court of Appeals, at 135). San Angelo police received a phone call from a Motel 6, in which they overheard Mr. Napper threaten another person. (Record in the Court of Appeals, at 136). When they arrived, Mr. Napper's companion appeared nervous; they found a knife "in the parking lot of an adjacent business." (Record in the Court of Appeals, at

136). These circumstances merited Mr. Napper's arrest for aggravated assault with a deadly weapon. (Record in the Court of Appeals, at 136).

The district court below received notice of this arrest on February 28, 2013, but Probation recommended no action (and none occurred) because "at that time, the offense report had been requested and there was no disposition." (Record in the Court of Appeals, at 135, 235-236). Mr. Napper sustained a three-year sentence for this state offense on January 15, 2014. (Record in the Court of Appeals, at 135). Yet nothing happened regarding his supervised release until well after the stated reasons for inaction (absence of an offense report, and lack of a disposition) had passed. Indeed, Probation did not seek a revocation warrant until August 15, 2017. (Record in the Court of Appeals, at 134-138). By that time, Mr. Napper had completed his state sentence, had been released, and had accrued a new federal drug charge. (Record in the Court of Appeals, at 134-138). Probation correctly calculated Mr. Napper's advisory range of imprisonment under Chapter of the Sentencing Guidelines ("Policy Statement Range") as 30-37 months imprisonment. (Record in the Court of Appeals, at 137).

On March 30, 2018, Mr. Napper received a 240-month sentence in the new federal drug case, the product of an agreed sentence under Federal Rule of Criminal Procedure 11(c)(1)(C). Finally, after two defense continuances, (Record in the Court of Appeals, at 156-159), the court revoked Mr. Napper's supervised release a second time and imposed 37 months imprisonment, in a remarkably summary proceeding. (Record in the Court of Appeals, at 167). This hearing occupied just two pages and

two lines, not counting the certification and title page. (Record in the Court of Appeals, at 172-174). No party offered any advocacy or evidence, and the court's sole explanation for the sentence was its boilerplate statement "I believe this addresses the issues of adequate deterrence and protection of the public." (Record in the Court of Appeals, at 173).

B. Court of Appeals

Petitioner filed a notice of appeal, but his trial counsel filed three unsuccessful motions to withdraw under *Anders v. California*, 386 U.S. 738 (1967). (Record in the Court of Appeals, at 282-291). At that point, the Fifth Circuit denied trial counsel payment for the appeals, and substituted the Federal Defender. (Record in the Court of Appeals, at 291).

New counsel appealed on four grounds, all of which were limited by plain error review given the summary proceedings in district court. He argued: 1) that the plea agreement limited the court to a cumulative sentence of 60 months over multiple revocations, 2) that the revocation sentence was substantively unreasonable in light of a consecutive 240 month sentence for the new drug offense, 3) that the court offered almost no explanation for its 37-month sentence, and that what explanation it did offer was identical to the script it used in nearly every case, and 4) that the revocation hearing was unreasonably delayed under the Fifth and Sixth Amendments, as well as Federal Rule of Criminal Procedure 32.1's requirement that revocation hearings be brought in a reasonable time.

The court of appeals affirmed, applying plain error to each of the claims. As regards the defendant's claim that Rule 32.1 forbade a five-year delay between the court's awareness of revocation allegations and a hearing, the court held as follows:

> Because Napper failed to object on these grounds in the district court, our review again is for plain error only. Napper must show that (1) there was an error or defect in the district court proceeding; (2) the error was clear or obvious; and (3) the error affected his substantial rights. If he makes this showing, we have the discretion to remedy the error, but should do so "only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." **This court will not ordinarily find clear or obvious error when it has not previously addressed an issue.**
>
> ***
>
> Napper relies on the advisory committee notes to Rule 32.1 which require consideration of whether the defendant can be made readily available for the revocation court and whether the defendant waived appearance at the revocation hearing. He asserts that both of these factors weigh against the delay in his case because he was in Texas state custody during the delay, and the federal district court could have easily issued a habeas corpus writ to obtain his presence at a revocation hearing. He further states that he never waived appearance at a revocation hearing.
>
> This court has not previously addressed whether the "reasonable time" requirement of Rule 32.1(b)(2) is determined based on when the supervised release violation was committed or when the defendant has been taken into federal custody for the violation. We note that the Second Circuit has interpreted "person" in Rule 32.1(b)(2) to mean "a person in custody for violating a condition of supervised release." The Third Circuit also has held that the right to a timely revocation hearing under Rule 32.1(b)(2) "is measured from the time [the defendant] was taken into custody pursuant to the revocation arrest warrant." Therefore, the reasonable time requirement in Rule 32.1(b)(2) may be no different from constitutional standards. **As stated above, this court will not ordinarily find clear or obvious error when it has not previously addressed an issue. Therefore, Napper fails to demonstrate that the timing of his revocation hearing under Rule 32.1 was plainly erroneous.**

United States v. Napper, 978 F.3d 118, 127-128 (5th Cir. 2020)(emphasis added)(footnotes omitted)(citing *United States v. Tippens*, 39 F.3d 88, 89–90 (5th Cir. 1994), Fed. R. Crim. P. 52(b), *Puckett v. United States*, 556 U.S. 129, 135 (2009) *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009), *United States v. Jetter*, 577 F. App'x 5, 7 n.1 (2nd Cir. 2014)(unpublished), *United States v. Patterson*, 135 F. App'x 469, 475 (2nd Cir. 2005)(unpublished), *United States v. Goode*, 700 F. App'x 100, 103 (3rd Cir. 2017), and *United States v. Blunt*, 680 F.2d 1216, 1219 (8th Cir. 1982)); [Appx. A, at 13-15].

As can be seen, the court below relied heavily on the proposition that plain error generally requires binding precedent. It did not decide the clarity of error in light of the language of Rule 32.1 itself.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are divided as to whether a party may show plain error in the absence of binding precedent.

A. The rule applied below is the subject of pervasive conflict between and among the courts of appeals. That conflict will not resolve without the intervention of this Court.

Federal Rule of Criminal Procedure 52(b) authorizes courts of appeals to correct plain errors affecting substantial rights even in the absence of a timely objection. Such errors, however, must be clear or obvious, rather than subject to reasonable dispute. *See United States v. Olano*, 507 U.S. 725, 732 (1993).

The court below rejected Petitioner's claim under Federal Rule of 32.1 because it "will not ordinarily find clear or obvious error when it has not previously addressed an issue." *United States v. Napper*, 978 F.3d 118, 127 (5th Cir. 2020); [Appx. A, at 13, 15][citing *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009)]; *accord United States v. Lomas*, 304 Fed. Appx. 300, 301 (5th Cir. 2008)(unpublished); *United States v. Vega*, 332 F.3d 849, 852 n. 3 (5th Cir.2003)).

Prior Fifth Circuit cases have stated the rule in ever starker terms. In *United States v. Vega*, 332 F.3d 849 (5th Cir.2003), a published case, the court below held that plain error is simply impossible to show without binding precedent. *See Vega*, 332 F.3d at 852, n. 3 ("We conclude that any error by the district court in this regard was not plain or obvious, as we have not previously addressed this issue."). A host of unpublished cases likewise state this rule in absolute terms. *See United States v. Amaya* 194 Fed. Appx. 207, 209 (5th Cir. 2006)(unpublished)("Because there is no controlling authority interpreting this phrase in the comment to the guidelines, any

error on the part of the trial court could not be plain"); *accord United States v. Neuman*, 176 Fed. Appx. 480 (5th Cir. 2006)(unpublished); *United States v. Parsons*, 134 Fed. Appx. 743 (5th Cir. 2005)(unpublished); *United States v. Gordon*, 87 Fed. Appx. 384 (5th Cir. 2004)(unpublished); *United States v. Barrigas-Valdovinos*, 86 Fed. Appx. 770 (5th Cir. 2004)(unpublished); *United States v. Rollins*, 83 Fed. Appx. 611 (5th Cir. 2003)(unpublished); *United States v. Taylor*, 78 Fed. Appx. 438 (5th Cir. 2003)(unpublished); *United States v. Taff*, 72 Fed. Appx. 184 (5th Cir. 2003)(unpublished). And in *United States v. Evans*, 587 F.3d 667 (5th Cir. 2009), the court below stated that even cases governed by binding case-law could not generate clear or obvious error if they required any extension of precedent. *Evans*, 587 F.3d at 671 ("Even where the argument requires only extending authoritative precedent, 'the failure of the district court to do so cannot be plain error.'")(quoting *Lomas,* 304 Fed. Appx. at 301)(citing *United States v. Hull*, 160 F.3d 265, 272 (5th Cir.1998)).

The Fifth Circuit is joined in this restrictive view by the Third, Fourth, and Sixth Circuits. See *United States v. Turner*, 677 F.3d 570, 575 (3d Cir. 2012) ("The absence of controlling precedent forecloses Turner's plain error argument on this issue."); *accord United States v. Petlock*, No. 20-1424, 2021 WL 510235, at *3, n.25 (3d Cir. Feb. 11, 2021)(unpublished); *United States v. Hess*, 639 F. App'x 195, 196 (4th Cir. 2016)(unpublished)("because no binding precedent establishes that these conditions are unconstitutional, Hess cannot satisfy the second requirement of plain error review."); *United States v. Lantz*, 443 Fed. Appx. 135, 139 (6th Cir. 2011)("A lack of binding precedent on the specific issue indicates that there is no plain error.");

accord United States v. Washington, 726 F. App'x 483, 484–85 (6th Cir. 2018)(unpublished).

But this position has been clearly rejected by the First, Eleventh, and D.C. Circuits. All of those courts recognize that an interpreted provision – a statute, Rule, or Guideline – may speak with sufficient clarity to create plain error even in the absence of judicial precedent.

The First Circuit has repeatedly recognized that a provision's plain language may create plain error, even without a binding precedent. *See United States v. Romero*, 906 F.3d 196, 207 (1st Cir. 2018)("With no binding precedent on his side, Romero cannot succeed on plain-error review unless he shows his ransom-demand theory is compelled by the guidelines' language itself."); *see also United States v. Jones*, 748 F.3d 64, 69–70 (1st Cir. 2014)(recognizing that the defendant might be able to show plain error "if Rule 414's language clearly supported [his] position"); *United States v. Caraballo-Rodriguez*, 480 F.3d 62, 70 (1st Cir. 2007)(holding that plain error might be found if the defendant's construction of a statute "is compelled by the language of the statute itself, construction of the statute in light of the common law, or binding judicial construction of the statute."). Importantly, it has reaffirmed the "plain language" exception to the binding precedent requirement as recently as 2020. *See United States v. Clough*, 978 F.3d 810, 822–23 (1st Cir. 2020)(quoting *Romero*, *supra*).

The Eleventh Circuit has recognized that "[a]n error is obvious when it flies in the face of ***either*** binding precedent ***or*** "the explicit language of a statute or rule."

United States v. Chau, 426 F.3d 1318, 1322 (11th Cir. 2005) (emphasis added); *accord United States v. Bankston*, 945 F.3d 1316, 1318 (11th Cir. 2019); *see also United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003)("It is the law of this circuit that, ***at least where the explicit language of a statute or rule does not specifically resolve an issue***, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it.")(emphasis added).

Indeed, the Eleventh Circuit's less restrictive view of the plain error doctrine recently dictated the result in *United States v. Bankston*, 945 F.3d 1316 (11th Cir. 2019). The *Bankston* panel found plain error in the district court's application of a Guideline, even though it recognized that it had "no precedent interpreting the relevant language." *Bankston*, 945 F.3d at 1318. Because the court's "analysis begins and ends with the language of the Sentencing Guidelines," the text of the Guideline and its own commentary were sufficient to find clear or obvious error. *Id.*

Finally, the D.C. Circuit has clearly and unequivocally held that binding precedent is not necessary to show plain error when statutory language is unequivocal. *See In re Sealed Case*, 573 F.3d 844, 851–52 (D.C. Cir. 2009). Like the Eleventh Circuit, it has reversed in the absence of binding precedent, which absence it expressly recognized. *See Sealed Case*, 573 F.3d at 851. In that Circuit, moreover, the plain language of a Sentencing Guideline may generate reversible plain error even if other circuits have divided on the question. *See id.* Thus the D.C. Circuit has held:

> Generally an error is plain if it contradicts circuit or Supreme Court precedent. Even absent binding case law, however, an error can be plain if it violates an "absolutely clear" legal norm, "for example, because of the clarity of a statutory provision." This is just such a case. As explained above, section 3582(a) speaks with absolute clarity on this point.
>
> In the government's view, the circuit split on this issue necessarily means that the error could not have been plain. We disagree. To be sure, as our dissenting colleague points out … we have recognized that a division of authority on a given point may provide cause to question the plainness of an error, * but we did so in cases lacking the kind of clear statutory language at issue here. Moreover, we have not hesitated to deem an error involving clear language plain, even when another circuit considered the provision ambiguous enough to defeat a finding of plain error.

Id. (internal citations omitted)(citing *United States v. Merlos*, 8 F.3d 48, 51 (D.C.Cir.1993), *Olano*, 507 U.S. at 734, *United States v. Baldwin*, 563 F.3d 490, 491-92 (D.C.Cir.2009), *United States v. Andrews*, 532 F.3d 900, 908-909 (D.C.Cir.2008), *United States v. Sullivan*, 451 F.3d 884, 895-96 (D.C.Cir.2006), and *United States v. Joaquin*, 326 F.3d 1287, 1292-93 (D.C.Cir.2003)). This is the consistent position of the D.C. Circuit, which has repeatedly recognized that binding precedent is unnecessary upon a showing a violation of "some other absolutely clear legal norm." *United States v. Meadows*, 867 F.3d 1305, 1317 (D.C. Cir. 2017); *United States v. Williams*, 773 F.3d 98, 105 (D.C. Cir. 2014); *United States v. Nwoye*, 663 F.3d 460, 466 (D.C. Cir. 2011). And *In Re Sealed Case* – which expressly disavows the binding precedent requirement -- has been cited as good law on this question as recently as 2017. *See Meadows*, 867 F.3d at 1317.

The opinions of the federal courts of appeals have thus shown clear and direct conflict on the necessity of binding precedent to make out a claim of plain error. This

is not to say, however, that all courts implicated in the conflicting authority are free of internal conflict on this point. They are not – rather, intra-circuit conflicts regarding the need for binding precedent to show plain error are widespread.

The Fifth Circuit, for example, has sometimes hedged on the absolute requirement of a binding precedent. In *United States v. Mazarego-Salazar*, 590 F. App'x 345 (5th Cir. 2014)(unpublished), it held that persuasive authority might generate plain error. *See Mazarego-Salazar*, 590 Fed. Appx at 349–50 ("Even if a decision is persuasive authority only, it does not affect its utility in establishing an error as plain or obvious."). It held to like effect in *United States v. Medina-Torres*, 703 F.3d 770 (5th Cir. 2012). And a footnote in *United States v. Spruill*, 292 F.3d 207 (5th Cir. 2002), appears to repudiate the binding precedent requirement entirely. *See Sprull*, 292 F.3d at 215, n.10 ("The fact that the particular factual and legal scenario here presented does not appear to have been addressed in any other reported opinion does not preclude the asserted error in this respect from being sufficiently clear or plain to authorize vacation of the conviction on direct appeal."). As shown above, however, the overwhelming weight of Fifth Circuit authority demands binding precedent to show plain error.

Conversely, the First Circuit's law is now peppered with statements recognizing the possibility of plain error based on the plain language of an interpreted provision. But it has held two or three times that "that plain error cannot be found in case law absent clear and binding precedent." *United States v. Marcano,* 525 F.3d 72,

74 (1st Cir.2008); *accord United States v. Correa-Osorio*, 784 F.3d 11, 22 (1st Cir. 2015); *see also United States v. Delgado-Sanchez*, 849 F.3d 1, 10–11 (1st Cir. 2017).

And the Eleventh Circuit, which only recently held that the language of a Rule or Guideline may create plain error without a judicial interpretation, has held in both published and unpublished cases "that an error cannot be plain if it is not clear under current law, in that there is no binding precedent from our Court or the Supreme Court." *United States v. Ahearn*, 464 Fed. Appx 813, 815 (11th Cir. 2012)(unpublished)(quoting *United States v. Castro*, 455 F.3d 1249, 1253 (11th Cir.2006)); *see also United States v. Nelson*, 442 Fed. Appx 496, 499 (11th Cir. 2011)("because an error cannot be plain unless binding precedent from this Court or the Supreme Court establishes that proposition, there was no plain error in the decision to enhance his offense level under both provisions."); *United States v. Magluta*, 198 F.3d 1265, 1280 (11th Cir.1999) ("a district court's error is not 'plain' or 'obvious' if there is no precedent directly resolving an issue"), *vacated in unrelated part on other grounds*, 203 F.3d 1304 (11th Cir.2000); *United States v. Simplice*, 687 Fed. Appx 850, 851 (11th Cir. 2017)(unpublished)("To be plain error, there must be binding precedent that directly resolves the issue.").

But this is hardly a reason to decline review. Rather, the pervasive intra-circuit conflict only adds to the confusion for litigants and appellate panels -- no one litigating plain error cases can be certain what the law is even within a given jurisdiction. Further, the intra-circuit conflict endemic to the binding precedent requirement destroys any hope of a stable resolution of the circuit split without this

Court's intervention. Even if the deep and balanced circuit split described above were somehow to resolve spontaneously, the resolution would likely only be temporary. Put simply, the existence of conflicting case-law in so many circuits makes the split likely to re-emerge even if the courts of appeals momentarily achieve consensus, which does not, in any case, appear imminent.

This area of law is a mess, and only a definitive holding from this Court can sort it out.

B. The binding precedent requirement is incorrect.

Rule 52(b) requires that unpreserved error be "plain." And it contains only one other limitation on the class of errors eligible for plain error relief. Such errors must affect substantial rights. As such, this Court has repeatedly invalidated other *per se* rules that restricted the scope of plain error review. Specifically, it overturned a requirement that such errors be legal rather than factual, *Davis v. United States*, __ U.S. __, 140 S. Ct. 1060 (2020), that they "shock the conscience" or constitute a "miscarriage of justice," *Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897 (2018), and that they be plain at the time of trial, *Henderson v. United States*, 568 U.S. 266 (2013). The lesson of these precedents is clear: eligibility for plain error relief is determined by the express language of the Rule, but nothing else. As this Court recently explained:

> The text of Rule 52(b) does not immunize factual errors from plain-error review. Our cases likewise do not purport to shield any category of errors from plain-error review.

Davis, 140 S. Ct. at 1061.

The binding precedent requirement is simply one more categorical prohibition on plain error relief, divorced from the text of the Rule, and it should suffer the fate of its siblings. The Rule says that error must be plain; it does not, like 28 U.S.C. §2254(d)(1), for example, limit the body or source of law to which courts may refer to establish its clarity. *Compare* 28 U.S.C. §2254(d)(1)(authorizing relief from a state court decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."). A party seeking to establish plain error should be able to use statutes, Rules, Guidelines, precedent, or the constitution, without limitation.

Indeed, it may be that the clearest errors are the least likely to generate binding precedent. When a district court's interpretation of the law is a true outlier, its actions are likely to be, in a literal sense, unprecedented. So in such a case of egregious error, it is unrealistic to think that precedent will exist to demonstrate the error.

As the D.C. and Eleventh Circuits have observed, sometimes a review of the relevant underlying authority – a Rule, Guideline, or statute – will be sufficient to determine the law, without any need for judicial gloss. *See Sealed Case*, 573 F.3d at 851; *Bankston*, 945 F.3d at 1318. Indeed, a contrary view would be profoundly disruptive to the proper allocation of authority between the judiciary and other law-making institutions.

While it is emphatically the province of the judiciary to say what the law is, the power of other branches to make law in the first place surely also carries a power

to enunciate it. Law-making is after all a linguistic act. To say that the law is never clear or obvious unless it has been translated into a controlling judicial precedent is to say that no other branch is capable of speaking clearly. This is directly contrary to the repeated exhortations of this Court, construing a wide variety of legal authority. *Dodd v. United States*, 545 U.S. 353, 357 (2005)("We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there.'")(quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)); *accord Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006); *City of Chi. v. Morales*, 527 U.S. 41, 63 (1999)(municipal ordinance presumed to mean what it says); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 187 (1993)(United Nations Convention Relating to the Status of Refugees read in accordance with plain text rather than drafting history). Indeed, this Court has held that most issues of interpretation can be resolved by simply consulting the text at issue. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 240-241 (1989)("Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.").

Legislatures, agencies, drafting committees, and framers may be trusted to speak for themselves. There is no need for judicial interlocutors. Sometimes, non-judicial sources of law speak ambiguously – judges do too. But the binding precedent requirement amounts to a categorical holding that legislatures and other law-makers are always ambiguous unless construed. That just isn't so.

C. The present case is the appropriate vehicle to address the conflict.

This case directly presents the issue that has divided the courts of appeals. The disputed requirement of binding precedent was cited twice below to defeat the defendant's Rule 32.1 claim. *See United States v. Napper*, 978 F.3d 118, 127 (5th Cir. 2020)("This court will not ordinarily find clear or obvious error when it has not previously addressed an issue.")(citing *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009)); *id*. at 128 ("As stated above, this court will not ordinarily find clear or obvious error when it has not previously addressed an issue.")(citing *Evans*, 587 F.3d at 671); [Appx. A, at 13 15]. There can thus be no gainsaying that it played a role in the outcome.

Without the disputed requirement of binding precedent, Petitioner could likely show clear or obvious error. The plain language of Federal Rule of Criminal Procedure 32.1 gives absolutely no indication that district courts may always wait until the defendant has entered federal custody on a revocation warrant to schedule a revocation hearing. Rather, it says simply that hearings must be conducted "within a reasonable time …" Fed. R. Crim. P. 32.1(b)(2).

The defendant's presence in a state prison may sometimes make a delay reasonable, but it does not make all delays categorically reasonable in every case. In some cases, a defendant's hearing may be promptly achieved in spite of his presence in state prison. Further, in some cases, as here, a defendant's term in state prison may be so long that waiting it out could make his right to present mitigating evidence about the revocation conduct entirely meaningless.

Further, the Advisory Committee Notes make clear that it will not always do to leave the defendant languishing indefinitely in state custody without resolving his outstanding supervised release violations. The 1979 Notes to Rule 32.1(a)(2), which has since been moved to subdivision (b)(2) and broadened to include supervised release as well as probation, state:

> Subdivision (a)(2) mandates a final revocation hearing within a reasonable time to determine whether the probation has, in fact, violated the conditions of his probation and whether his probation should be revoked. Ordinarily this time will be measured from the time of the probable cause finding (if a preliminary hearing was held) or of the issuance of an order to show cause. However, what constitutes a reasonable time must be determined on the facts of the particular case, such as whether the probationer is available or could readily be made available. **If the probationer has been convicted of and is incarcerated for a new crime, and that conviction is the basis of the pending revocation proceedings, it would be relevant whether the probationer waived appearance at the revocation hearing.**

Fed. R. Crim. P. 32.1(a)(2), advisory committee's notes (1979)(emphasis added).

The last sentence of this passage clearly implies that a revocation defendant may sometimes be entitled to a hearing even if he is in custody for a new crime committed on supervised status. The Notes identify the decision of these defendants to waive their revocation hearing as "relevant" to the question of whether they have been afforded a hearing "within a reasonable time." But if all defendants in custody for another crime could be denied a revocation hearing until their other sentences were complete, the decision to insist on a revocation hearing rather than waive it would not be, as the Notes tell us, "relevant." It would instead become "irrelevant."

The Notes identify two considerations to help determine whether a delay is reasonable under Rule 32.1: 1) whether the defendant can be made readily available

to the revocation court, and 2) whether he waived appearance at the revocation hearing. *See* Fed. R. Crim. P. 32.1(a)(2), advisory committee's notes (1979). Both of these factors weigh heavily against the delay in the present case. Petitioner was in Texas state custody during most of the delay. He was merely a writ of *habeas corpus ad prosequendum* away from the district court. *See Ex Parte Bollman*, 4 Cranch 75 (1807). And he never waived a hearing. Rather, Probation and the district court deliberately chose to withhold the warrant. *See* (Record in the Court of Appeals, at 135, 235-236).

An additional factor shows the timing of the hearing to be unreasonable. The hearing occurred **five and a half years** after the events that gave rise to the first revocation allegation. The task of producing mitigation evidence with respect to these events after five and a half years poses obvious difficulties. Those difficulties only compound when the defendant has spent those five and a half years in prison. After five years in prison, the defendant may possess only a dubious ability even to contact witnesses to the event, particularly his neighbors in a Motel 6, Motel 6 employees, or even the responding officers. And if he can achieve contact, there remains the problem of faded memories concerning a five-year old domestic disturbance.

Notably, a year's delay triggers a presumption of prejudice in the speedy trial context. *See Doggett v. United States*, 505 U.S. 647, 652, n.1 (1992); *United States v. Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003). The logic of such a presumption is obvious – not only is prejudice more likely as time passes, but at some point, it

becomes more difficult to prove. This Court may safely assume that the timing of a hearing five and a half years is not reasonable.

The decision below cited three out of circuit opinions for the proposition that Rule 32.1 never requires a hearing until the defendant enters federal custody on a revocation warrant. *See Napper*, 978 F.3d at 127-128 (citing *United States v. Jetter*, 577 F. App'x 5, 7 n.1 (2nd Cir. 2014), *United States v. Patterson*, 135 F. App'x 469, 475 (2nd Cir. 2005), and *United States v. Goode*, 700 F. App'x 100, 103 (3rd Cir. 2017)). None of these authorities hold any such thing.

United States v. Jetter, 577 Fed. Appx. 5 (2d Cir. 2014)(unpublished), an unpublished case, does not pass on the question of whether the delay was reasonable or unreasonable. *See Jetter*, 577 Fed. Appx. at 7 ("…***we need not decide whether the delay was reasonable here***, because Jetter has not demonstrated that he suffered any prejudice from the delay.")(emphasis added). It resolves the case instead on the question of prejudice. *See id.*

United States v. Patterson, 135 Fed. Appx. 469 (2d Cir. 2005)(unpublished), another unpublished case, does not involve a defendant made to complete another term of imprisonment before obtaining a revocation sentence. *See Patterson*, 135 Fed. Appx. at 475. Rather, it involves the delay of revocation proceedings until the same court could ***adjudicate*** new charges. *See id.* It does not say, as a categorical matter, that all delays for intervening prison sentences, nor even for intervening charges, are always reasonable. *See id.*

Finally, the Third Circuit's unpublished case of *United States v. Goode*, 700 Fed. Appx. 100 (3rd Cir. 2017)(unpublished), does involve a defendant made to wait out a lengthy state sentence before his revocation hearing *See Goode*, 700 Fed. Appx. at 103. But it does not appear to pass on the scope of Rule 32.1. *See id*. The *Goode* panel noted in passing that the due process protection against unreasonable delay "has been codified in Fed. R. Crim. P. 32.1(b)(2)." *Id.* But it explicitly adjudicated the claim as "a straight-up due process claim." *Id.* Perhaps due process provides no protection against delay until the defendant completes an intervening state sentence. If that is so, however, the Commentary to Rule 32.1 shows that the Rule clearly provides more protection than the due process minimum. *Goode* does not hold otherwise.

In any case, at least one other Circuit – the D.C. Circuit – recognizes that error may be plain in spite of contrary out-of-circuit precedent, provided the language of an underlying non-judicial authority speaks clearly. Such is the case here. Rule 32.1 simply requires that a hearing be in a "reasonable time." It gives no suggestion that it will always be reasonable to delay a revocation hearing until a defendant enters federal custody on the revocation warrant. And the Commentary rather clearly implies the opposite.

CONCLUSION

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

Respectfully submitted this 8th day of March, 2021.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner