No. _____

In the

Supreme Court of the United States

DANIEL LOPEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Petition for a Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Federal Rule of Criminal Procedure 32.1(b) defines the procedure for supervised release revocation hearings. The Ninth Circuit has split from other circuits by concluding that Rule 32.1(b) also provides the procedure for sentencing following revocation. *Compare United States v. Reyes-Solosa*, 761 F.3d 972 (9th Cir. 2014) ("Rule 32.1 is not silent on the subject of timing [of revocation sentencing]"), *with United States v. Waters*, 158 F.3d 933, 943 (6th Cir. 1998) (Rule 32.1 is "silent with respect to the sentencing phase of [a] revocation hearing"). According to the Ninth Circuit, Rule 32.1(b)'s requirement that a revocation *hearing* take place within a reasonable time also extends to revocation *sentencings*. Other circuits, on the other hand, suggest that Rule 32(b)(1)'s requirement that any sentencing occur "without unnecessary delay" also applies to revocation sentencing hearings. The question presented by this appeal is whether, and to what extent, Rule 32.1 or Rule 32 governs revocation sentencing procedures.

Statement of Related Proceedings

- *United States v. Daniel Lopez*,
    - Case No. 2:16-cr-00048-PA-1 (C.D. Cal., Mar. 8, 2023)

- *United States v. Daniel Lopez*,
    - 2024 WL 2843035 (9th Cir. June 5, 2024)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Daniel Lopez petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I. OPINIONS BELOW

The opinion of the court of appeals is unpublished, but available at 2024 WL 2843035 (9th Cir. June 5, 2024). (App. 1a.)[1]

II. JURISDICTION

The judgment of the court of appeals was entered on June 5, 2024. (App. 1a.) Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] Citations to "App." are to the appendix to this petition.

III. CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

18 U.S.C. § 3553; 18 U.S.C. § 3583; 18 U.S.C. § 3584; Fed. R. Crim. P. 32; Fed R. Crim P. 32.1.[2]

IV. STATEMENT OF THE CASE

Daniel Lopez was convicted in 2016 for being a prohibited person in possession of a firearm, 18 U.S.C. § 922(g)(1), and sentenced to 63 months' imprisonment, followed by a three-year term of supervised release. (*See United States v. Lopez*, no. 23-444, Appellant's Opening Brief, at 3.) He was released from prison and began serving his supervised-release term on November 19, 2021. (*Id.*)

On February 22, 2022, Mr. Lopez's probation officer filed a petition (the "supervised release case") seeking to revoke Lopez's supervised release. (*Id.* at 4.) The petition, as amended, alleged that Lopez violated his release conditions by committing a federal offense, specifically a violation of 18 U.S.C. § 922(g)(1). (*Id.*) Charges for that offense were pending before another judge in the same district (the "felony case"). (*Id.*)

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[2] The text of these relevant statutes and rules is reproduced in the Appendix.

Lopez admitted the allegations in the supervised release case on June 30, 2022. (*Id.*) After Lopez's admissions, the district court stated that it intended to delay his revocation and sentencing hearing until disposition of the felony case. (*Id.*) It set a final revocation hearing for July 18, 2022. (*Id.*)

On that date, and then again on August 11, 2022, and again on November 18, 2022, the court continued the hearing, through in-chambers minute orders, without explanation. (*Id.* at 5.) This occurred despite the felony case having been disposed of on August 12, 2022 by way of guilty plea, with sentencing set for December 2, 2023. (*Id.*) The court in the felony case subsequently adjourned sentencing, at the parties' request, to January 13, 2023. (*Id.*)

Meanwhile, the parties appeared in the supervised release case on December 21, 2022. (*Id.*) At that appearance, the court inquired into the status of the felony case, stating that "[i]t's the Court's practice in cases like this where there is a supervised release violation pending and the conduct also formed the charge of an indictment to sentence the defendant after the sentencing in the underlying indictment case." (*Id.*) Defense counsel responded that the court in the felony case had

indicated an intent to impose a 37-month sentence run concurrently with the sentence imposed in the supervised release case, but that was legally impossible until sentence was imposed in the felony case. (*Id.* at 5–6.)

After the district court assured defense counsel that it would sentence Lopez soon after the felony case, counsel asked the court to "mak[e] an exception" and impose sentence that day. (*Id.* at 6.) Lopez's thyroidal cyst, which had caused infections leading to several other ailments, including asthma attacks, an "especially bad" one-month-long bout with pneumonia, and bronchitis as a result. (*Id.*) The cyst was so large that it was "visible" and jail medical staff indicated he needed "immediate surgery" to address it. (*Id.*) But that surgery could not occur while these charges were pending, because Mr. Lopez's present jail placement did not permit it. (*Id.*)

The court denied counsel's request, promising to coordinate with the judge in the felony case to ensure the "whole process is completed" the same day or the following week. (*Id.*) It continued the sentencing to a date to be determined on or after January 13, 2023. (*Id.* at 6–7.)

Although Lopez was sentenced in the felony case as promised on January 13, 2023, the court in the supervised release case did not sentence Lopez the same day or the following week. (*Id.* at 7.) On January 25, 2023, in a text-only minute order, the court set the revocation hearing for February 10, 2023, but did not otherwise explain the delay. (*Id.*) Then, on February 6, 2023, the parties stipulated to—and the court approved—a continuance of the February 10, 2023 appearance to February 24, 2023 to accommodate government counsel's trial schedule. (*Id.*) On February 23, 2023, in another text-only minute order, the court postponed the hearing to March 8, 2023, again without explanation. (*Id.*) Lopez was ultimately sentenced to 21 months' imprisonment, consecutive to the felony case, on that date. (*Id.*)

On appeal, Lopez argued, *inter alia*, that the district court had erred in continuing his revocation sentencing. (*Id.* at 11–20.) Specifically, Lopez contended that Rule Federal Rule of Criminal Procedure 32.1 guaranteed him a right to be sentenced without unreasonable delay, and that delaying his revocation sentencing eight-and-a-half months in order to impose a consecutive sentence, over his

objection regarding his pressing health needs, violated this requirement.

He further argued that Rule 32(b)(1)'s requirement that sentence be imposed "without unnecessary delay" should govern the question. He acknowledged that the Ninth Circuit's decision in *United States v. Reyes-Solosa*, 761 F.3d 972 (9th Cir. 2014) technically foreclosed this argument, but stated that he was preserving the issue for review by a court of higher authority. (*Id.* at 14.)

In *Reyes-Solosa*, the Ninth Circuit recognized that, under its prior decision in *United States v. Montes-Ruiz*, 745 F.3d 1286 (9th Cir. 2014), a district court is prohibited under 18 U.S.C. § 3584 from imposing a sentence consecutive to a not-yet-imposed sentence in another federal case.[3] Nonetheless, a district court could permissibly delay revocation sentencing in order for a "sentence on revocation could follow and be

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[3] *Montes-Ruiz* relied on dicta from *Setser v. United States*, 566 U.S. 231, 241 n.4 (2012) for this proposition. In *Setser*, this Court explained that: "It could be argued that § 3584(a) impliedly prohibits such an order because it gives that decision to the federal court that sentences the defendant when the other sentence is 'already' imposed—and does not speak (of course) to what a state court must do when a sentence has already been imposed. It suffices to say, however, that this question is not before us."

consecutive to the sentencing on the underlying crime." To reach that conclusion, the Ninth Circuit held that Rule 32.1, rather than Rule 32, governed when a revocation sentencing must occur because Rule 32.1 requires that a revocation hearing occur within a "reasonable" time. *Id.* at 974.

In an unpublished memorandum disposition, the Ninth Circuit, relying on *Reyes-Solosa*, affirmed Lopez's revocation sentence, holding that the delay in his sentencing was not unreasonable, and therefore that the district court did not plainly err in delaying Lopez's revocation sentencing. *Lopez*, 2024 WL 2843035, at *1.

V. REASONS FOR GRANTING THE WRIT

A. The Circuits are Divided Regarding the Applicable Rule for Revocation Sentencing Procedure.

This Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972) first set out the "minimum requirements of due process" associated with a revocation hearing. This includes a determination of probable cause that a violation occurred and the opportunity for the parolee to be heard regarding mitigating circumstances that might not warrant revocation. *Id.* at 488. The procedure set forth in *Morrissey* was subsequently codified in Federal Rule of Criminal Procedure 32.1, which specifies

procedures for initial appearances, preliminary hearings, and final revocation hearings. The initial rule did not speak, in any form, to the matter of sentencing, at least not until 2005, when Rule 32.1(b)(1)(E) was introduced to provide for a defendant's right to allocution. To this day, however, the Rule does not speak to procedure governing the pronouncement of sentence following revocation of supervised release.

The Circuits have thus become deeply divided as to whether—and if so, to what extent—Federal Rule of Criminal Procedure 32, which governs sentencing more broadly, can be used to fill gaps in Rule 32.1 related to sentencing (and otherwise). These divisions, in fact, took root well before the 2005 amendment, and have persisted to this day.

In *United States v. Carper*, 24 F.3d 1157 (9th Cir. 1994), the Ninth Circuit held that a defendant was entitled to allocute at revocation sentencing on account of Rule 32. The Court read Rules 32 and 32.1 "as complementing rather than conflicting with one another." *Id.* at 1160. The Third, Fifth, and Eighth Circuits concurred. *United States v. Plotts*, 359 F.3d 247, 250 (3d Cir. 2004) (Rule 32's allocution requirement covers revocation sentencings); *United States v. Reyna*, 358 F.3d 344, 347 (5th Cir. 2004) (en banc) (similar); *United States v. Patterson*, 128

F.3d 1259, 1261 (8th Cir. 1997) (similar). The Sixth Circuit, on the other hand, held that Rule 32's allocution right did not apply to revocation sentencings. *United States v. Waters*, 158 F.3d 933, 944 (6th Cir. 1998). It instead exercised its supervisory power to require the opportunity to allocute. *Id.* To codify the general agreement regarding allocution and clarify the split on whether Rule 32 controlled, Rule 32.1 was amended to expressly provide "an opportunity to make a statement and present any information in mitigation." Fed. R. Crim. P. 32.1(b)(2)(E); *see* Fed. R. Crim. P. 32.1, advisory committee's note (2005 amend.).

But the 2005 amendment ultimately did little to clarify whether—and the degree to which—the procedures in Rule 32 could be imported to clarify Rule 32.1's silence on other matters related to revocation sentencing. Despite the broader consensus in favor of such an approach, the Ninth Circuit held, in *Reyes-Solosa*, that Rule 32.1 was not silent as to revocation sentencing procedure. 761 F.3d at 974–75. Instead, Rule 32.1's requirement that the court hold a revocation hearing within a reasonable time determined timing for sentencing, too. *Id.* This interpretation of Rule 32.1 weakened ordinary procedural protections

for sentencings, among them Rule 32(b)(1)'s requirement that a person be sentenced "without unnecessary delay."

The chasm on the issue has only widened in the wake of *Reyes-Solosa*. In *United States v. Ruby*, the Tenth Circuit held that "the sentencing phase of a revocation hearing is governed by the rule surrounding normal sentencing, Rule 32, not Rule 32.1." 706 F.3d 1221, 1226 (10th Cir. 2013). It explained that the purpose of Rule 32.1 is to ensure that a revocation decision "is not based on 'erroneous information." *Id.* (quoting *Morrissey*, 408 U.S. at 484). Those concerns fall away after an admission of guilt, at which point the "only task left to the court is to determine the proper sentence," and at that point Rule 32 governs. *Id.*

The Fifth Circuit appears to agree, concluding that Rule 32.1 does not require a district court to provide a defendant "with pre-sentencing notice of all points raised in the revocation sentencing colloquy. *United States v. Warren*, 720 F.3d 321, 331 (5th Cir. 2013). In a relevant, but somewhat distinct, context, the Second and Eleventh Circuits have held that a waiver of a revocation hearing also waives any Rule 32.1 rights. *United States v. Jones*, 798 F. App'x 494, 497 (11th Cir. 2020)

(unpublished); *United States v. Shapiro*, 711 F. App'x 25, 29 (2d Cir. 2017) (unpublished).

By contrast, the D.C., First, and Fourth Circuits have adopted a rule largely aligned with the Ninth Circuit's position, suggesting that Rule 32.1 applies to revocation sentencings, albeit in contexts somewhat different to the case at bar. *See United States v. Abney*, 957 F.3d 241, 251 (D.C. Cir. 2020) (allocution); *United States v. Colon-Maldonado*, 953 F.3d 1, 10 n.6 (1st Cir. 2020) (reliance on hearsay); *United States v. Combs*, 36 F.4th 502, 507 (4th Cir. 2022) (same).

Certiorari is needed to clarify the correct standard, and, as further explained below, to clarify that—contrary to the Ninth Circuit's approach—Rule 32, rather than Rule 32.1, governs revocation sentencing procedure.

B. This Court Should Grant Certiorari to Resolve the Conflict

Certiorari is needed to resolve the disagreement among Circuit Courts of Appeal as to the applicable procedural rules for revocation sentencings, including the degree of permissible delay for those sentencing proceedings. This question promises to impact the thousands of supervised release cases each year. Indeed, in fiscal year 2023

supervised release was ordered in 82.5% of criminal cases, amounting to 52,907 cases.[4] Between 2013 and 2017, 108,115 violation hearings were conducted involving 82,384 offenders.[5] While statistics do not appear to be publicly available as to the specific number of supervised-release sentencing appeals annually, they are inevitably numerous, too.

The current hodgepodge of Circuit-specific rules for revocation sentencing procedure outlined in the above section threatens uneven development of the law Circuit-to-Circuit. It is inequitable to provide criminal defendants in the Second, Fifth, Tenth, Eleventh Circuits with the procedural safeguards of Rule 32, but not afford those safeguards to defendants in the First, Fourth, Ninth, and D.C. Circuits.

This Court should grant certiorari to prevent further uneven application of these important rules of procedure. This case, as shown in the section that follows, encapsulates the prejudicial outcomes that can and often do result from the misguided approach to revocation sentencing procedure adopted by the Ninth Circuit.

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[4] *See* United States Sentencing Commission, 2023 Fiscal Year Sourcebook of Federal Sentencing Statistics, Table 18.

[5] *See* United States Sentencing Commission, Federal Probation and Supervised Release Violations, at 4.

C. The Ninth Circuit's Rule is Wrong and Prejudiced Lopez's Appeal

Originally, Rule 32.1 was "silent with respect to the sentencing phase of [a] revocation hearing." *Waters*, 158 F.3d at 943. With the sole exception of a right to allocute at the revocation hearing, Rule 32.1 is still silent regarding procedures at revocation sentencings, including the timing of those proceedings. Rule 32.1(b)(2) does provide that "[u]nless waived by the person, the court must hold the *revocation* hearing within a reasonable time[.]" (emphasis added). But this simply codifies the due-process requirement that this Court outlined in Morrissey relevant to *revocation* hearings—not *sentencing* hearings. 408 U.S. at 488 ("[t]he revocation hearing must be tendered within a reasonable time after the [supervisee] is taken into custody"). This provision was present in the original rule, and, as the advisory committee notes confirm, the provision was included only to specify the timing for the district court to "determine whether the probationer has, in fact, violated the conditions of his probation and whether his probation should be revoked." Fed. R. Crim. P. 32.1, advisory committee's notes (1979). To date, that provision hasn't been amended

and it has thus never actually addressed the time within which a supervisee must be sentenced.

The Ninth Circuit's rule is thus incorrect and inconsistent with Rule 32.1 and its history. The *Reyes-Solosa* Court reasoned that Rule 32.1 is not silent regarding the timing of sentencing because Rule 32.1(b)(2) includes an allocution right. 761 F.3d at 974–75. The inclusion of an allocution right, reasoned the Court, means that "revocation hearing" refers to sentencing in addition to a revocation hearing. *Id.* This approach is mistaken.

The inclusion of a provision for allocution does nothing to extend the timing requirement for revocation hearings to a sentencing hearing. As discussed above, the addition of the allocution requirement was a specific response to a specific issues percolating in the Circuit Courts at the time. There is no indication of an intent to broaden the scope of the rule to all revocation sentencing procedure.

Given Rule 32.1's silence as to sentencing, courts should be bound to follow Rule 32(b)(1)'s requirement that district courts sentence defendants "without unnecessary delay." "The time for sentence is[,]" after all, "of course not at the will of the judge." *Pollard v. United*

States, 352 U.S. 354, 361 (1967). It is Rule 32(b)(1)'s "unnecessary delay" requirement which gives that principle teeth. While the district court ultimately maintains discretion over the timing of sentencing, the Rule only permits delay that relates to "assur[ing] that relevant factors are considered and accurately resolved." Fed. R. Crim. P. 32, advisory committee's note (1989).

It bears noting that Rule 32(b) applies to sentences broadly, making no distinction between sentences following a conviction and sentences following revocation of supervised release. The absence of a distinction is sensible, as revocation sentencing hearings involve few meaningful differences from sentencing hearings following criminal convictions. Sentencing after conviction requires reference to the factors in 18 U.S.C. § 3553(a), 18 U.S.C. § 3582(a), *Gall v. United States*, 552 U.S. 38, 49–50 (2007), while sentencing after revocation of supervised release involves the same factors, except for the retributive factors in 18 U.S.C. § 3553(a)(2)(A). 18 U.S.C. § 3583(e). Sentencing procedure should be similarly coextensive.

The Ninth Circuit's incorrect interpretation of Rule 32.1 comes at tremendous cost to the fairness of revocation proceedings. As this case

demonstrates, it permits a district court to manipulate sentencing procedure for the sole purpose of expanding its sentencing authority. The Ninth Circuit has made abundantly clear that, in its view, this practice is permissible. *See Reyes-Solosa*, 761 F.3d at 976 (it is not "unreasonable for the district court to want to continue the revocation hearing for a reasonable time, here a few weeks, so that its sentence on revocation could follow and be consecutive to the sentencing on the underlying crime"). The delay at issue here measurably exceeded the "few weeks" of delay at issue in *Reyes-Solosa*. It was effectively indefinite, and eight-and-a-half months ultimately passed before Lopez was sentenced in his other case. And the district court insisted on further delay despite Lopez's specific request for immediate sentencing in order to address his pressing medical needs.

The district court's decisions were not attributable to the resolution of a relevant sentencing factor and were obviously targeted at manufacturing the authority to impose a harsher sentence. This is precisely the delay that Rule 32 prohibits. *See United States v. Tanner*, 544 F.3d 793, 796 (7th Cir. 2008) (under Rule 32, "[i]t is improper for a judge to grant (or deny) a continuance for the very purpose of changing

the substantive law applicable to the case"). Indeed, this case illustrates the dangers of broadening discretion to delay sentencing to the extent of the Ninth Circuit. As a precise result of the delay in this case, Lopez was sentenced to a maximum term consecutive to his felony case, despite the indication by the judge in his felony case that she intended to sentence Lopez to concurrent time, to the extent she had the discretion to do so, as the parties' plea agreement specified. As such, the district judge in the instant case (*i.e.*, the supervised release matter) won out, and its gaming of the Federal Rules and the Ninth Circuit's jurisprudence in this area inured to Lopez's prejudice.

Rule 32(b)(1) is typically available to protect precisely against this exact type of needless and prejudicial delay. But the errant interpretation of the Federal Rules adopted by the Ninth Circuit, and echoed by several others, has prompted a dangerous (and even life-threatening, as this case shows) split regarding federal courts' regulation of revocation sentencing.

VI. CONCLUSION

For the foregoing reasons, Lopez respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: August 13, 2024

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APPENDIX