

No. 17-

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER LOUIS MORTON,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

- I. Whether error may be “plain” within the meaning of Federal Rule of Criminal Procedure 52(b) in the absence of binding judicial authority?

PARTIES

Christopher Louis Morton is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Louis Morton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Morton*, 714 Fed. Appx. 419 (5th Cir. March 8, 2018)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on April 20, 2017, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on March 8, 2018. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES AND GUIDELINES INVOLVED

Federal Rule of Criminal Procedure 52 provides:

Rule 52. Harmless and Plain Error.

(a) Harmless error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

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

USSG §2K2.1, provides in part:

(a) Base Offense Level (Apply the Greatest):

(4) 20, if--

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense...

USSG §2K2.1, comment. (n. 10), provides:

10. Prior Felony Convictions. For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under § 4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under § 4A1.1(a), (b), or (c). See § 4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

USSG §4A1.1 provides:

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

USSG §4A1.2, provides in part:

(a) **Prior Sentence**

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence. See also § 4A1.1(e).

For purposes of applying § 4A1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

USSG §4A1.2, comment. (n. 3), provides in part:

3. Application of 'Single Sentence' Rule (Subsection (a)(2)).

(A) Predicate Offenses. In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under § 4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see § 4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted "separately" from each other (see § 4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under § 4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under § 4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under § 4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under § 4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. See § 4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

STATEMENT OF THE CASE

A. Facts and Trial Court Proceedings

Petitioner Christopher Louis Morton pleaded guilty to possessing a firearm after having sustained a felony conviction. A Presentence Report (PSR) determined that the defendant's final offense level should be 12, that his criminal history category should be VI, and that his Guideline range should be 30-37 months imprisonment.

One of the defendant's prior convictions was for attempting to take a weapon from a police officer. This offense resulted in a two year jail sentence in state court, but it did not produce any extra jail time when it was imposed. This was because Mr. Morton also received a four year concurrent sentence for the state offense of unlawfully possessing a firearm after a felony. Because the two sentences: 1) arose from the same arrest date, and 2) produced sentences in the same court on the same day, Probation counted only one of them toward the defendant's criminal history score under USSG §4A1.2(a)(2). As the shorter of the two sentences, the two year weapon-taking offense was disregarded.

The government objected to the PSR. It maintained that the defendant's offense level should have been elevated by his prior convictions under USSG §2K2.1(a). Specifically, it noted the defendant's conviction for possession of a controlled substance with intent to deliver, and his weapon-taking offense.

Citing *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017), Probation disagreed that the drug conviction merited an offense level enhancement. But it agreed with the government that the weapon-taking conviction constituted a "crime of violence." It therefore elevated the defendant's base offense level from 14 to 20. And it found that his final offense level (after the subtraction of

three levels for acceptance of responsibility) should be 17. Coupled with a criminal history category of VI, this produced a Guideline range of 51-63 months imprisonment. The district court agreed with this range, and sentenced in the middle of it: 57 months. It gave no indication that it would have imposed the same sentence under a different Guideline range.

B. Appellate Proceedings

On appeal, Petitioner contended that the district court plainly erred in assessing a higher base offense level for an offense that had not received criminal history points, namely his conviction for taking a weapon. In support of that contention, he cited Note 10 to USSG §2K2.1. That Note plainly states that only prior sentences receiving criminal history points under USSG §4A1.1(a), (b), (c) should elevate the defendant's criminal history. Because the weapon taking conviction was consolidated for the purposes of USSG §4A1.1 with another, longer, offense, it did not receive criminal history points under these provisions. *See* USSG §4A1.2(a)(2). Rather, it received, or should have received, a single criminal history point under USSG §4A1.1(e). Although Petitioner conceded that the error had not drawn an objection, he maintained that the Note spoke plainly enough for reversal of unpreserved error.

The Fifth Circuit affirmed. It cited USSG §4A1.2's blanket statement that "a grouped prior sentence that did not receive criminal-history points under Guideline § 4A1.1(a)-(c) 'may serve as a predicate under . . . guidelines with predicate offenses, if it independently would have received criminal history points.'" [Appx. A](citing USSG §4A1.2, comment. n.3(A)). But it also suggested that further inquiry was unnecessary because no binding judicial precedent supported Petitioner's position:

In any event, Morton has cited no binding precedent from this court addressing the issue. In short, he has not shown the requisite clear or obvious error.

[Appx A](citing *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009)).

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided as to whether error may be “plain” in the absence of binding judicial authority.

A. The courts of appeal are divided.

Federal Rule of Criminal Procedure 52(b) states that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention.” Fed. R. Crim. P. 52(b). This Court has interpreted the Rule to require that a reversible unpreserved “be clear or obvious, rather than subject to reasonable dispute.” *Puckett v. United States*, 556 U.S. 129, 135 (2009).

The court below held that an error may not be plain unless it has been the subject of a binding judicial precedent. [Appx. A]. This is the firm position of that court, as asserted in published authority. *See United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009)

This position directly conflicts with the published opinion of the Second Circuit in *United States v. Brown*, 352 F.3d 654 (2nd Cir. 2003), which holds:

Thus, “an error is ‘plain’ if it is ‘clear’ or ‘obvious’ at the time of appellate consideration.” What is more, the “plainness” of the error can depend on well-settled legal principles as much as well-settled legal precedents. ***We can, in certain cases, notice plain error in the absence of direct precedent***, or even where uniformity among the circuits, or among state courts, is lacking. Error is plain if it is “so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object.”

Brown, 352 F.3d at 664 (emphasis added)(internal citations and footnotes omitted). Three other circuits have likewise issued opinions indicating that a finding of plain error is not foreclosed merely because controlling Circuit authority is absent. *See United States v. Neal*, 101 F.3d 993, 998 (4th Cir. 1996)(holding that settled precedent is sufficient but not necessary to establish plain error, and that

“[i]n the absence of such authority, decisions by other circuit courts of appeals are pertinent”); *United States v. Teague*, 443 F.3d 1310, 1319 (10th Cir. 2006)(“If neither the Supreme Court not the Tenth Circuit has ruled on the subject, we cannot find plain error *if the authority in other circuits is split*”)(emphasis added); *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003)(“An error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results”)(emphasis added); *United States v. Schwayder*, 312 F.3d 1109, 1121 (9th Cir. 2002)(reserving question of whether error may be plain in spite of conflicting authority where there is “near unanimity”).

B. This division of authority merits the Court’s review.

The division of authority detailed above implicates a recurring issue in federal criminal law that may be presented in any number of contexts. It also implicates a conflict between the position of a court of appeals and the precedent of this Court. In *United States v. Young*, 471 U.S. 1 (1985), this Court held flatly that “[a] *per se* approach to plain-error review is flawed.” *Young*, 471 U.S. at 16, n.14. It reiterated that holding in *Puckett v. United States*, 556 U.S. 129, 143 (2009). Yet the court below established a *per se* rule: that no error may be “plain” in the absence of a binding judicial opinion, irrespective of the clarity of the underlying non-judicial authority. Just as no class of error can *always* be deemed plain, error cannot be deemed “*per se*” not-plain merely because there is no judicial precedent bearing on the issue. Some provisions speak for themselves and do not need a judicial interlocutor.

Further, the position of the court below is 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. *See 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.”)

The rule applied below – that plain error can only be established by reference to **judicial** authority – will also needlessly complicate plain error review. This position invites a difficult inquiry into whether a particular *judicial* authority directly or plainly covered the situation arising in a subsequent case, or whether, instead, the identification of error also requires review of non-judicial authority. Such inquiries “would simply promote arguments about whether the law of the circuit initially was unclear,” without adding anything of value to the appellate process. *Henderson v. United States*, __U.S.__, 133 S.Ct. 1121, 1128 (2013).

Finally, the plain error rule applied below is without foundation in the text of Rule 52(b) or

the precedents of this court. As the Second Circuit observed in *Brown*, Rule 52(b) does not by its terms limit the body of law that a reviewing court may consult in order to determine whether an error is plain. *See Brown*, 352 F.3d at 664, n.9. It thus stands in contrast, for example, to 28 U.S.C. §2254, which explicitly limits the reviewing court to the “clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. §2254(d)(1); *Brown*, 352 F.3d at 664, n.9.

C. The present case is an apt vehicle.

Petitioner’s case squarely presents the question of whether error may be plain in the absence of controlling judicial authority. This issue was passed on directly below. Although the court below discussed the significance of USSG §4A1.2, comment. (n. 3), that provision does not speak directly to enhanced base offense levels under USSG §2K2.1. Guideline 2K2.1 has its own Commentary that directly sets forth the controlling rule. *See* USSG §2K2.1, comment. (n. 10). In the absence of the unwarranted limitation on plain error applied below, Petitioner would likely prevail in either this Court, or below, on remand.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant *certiorari*, and reverse the decision of the court below, or that it grant *certiorari*, vacate the judgment below, and remand for reconsideration.

Respectfully submitted this 6th day of June 2018.

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