No. 25-5383

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR BARRIOS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to plain-error relief on his Double Jeopardy Clause claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is available at 2025 WL 1410409. The judgment of the district court is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 15, 2025. The petition for a writ of certiorari was filed on August 13, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(B) and 18 U.S.C. 2252A(b)(1) (2018); one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(B) and 18 U.S.C. 2252A(b)(1) (2018); and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and 18 U.S.C. 2252A(b)(2) (2018). Judgment 1-2. The district court sentenced him to 144 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-2a.

1. Beginning in approximately April 2020, petitioner actively sought out, downloaded, and redistributed child pornography via the Internet. Plea Hr'g Tr. 15-19. Federal law enforcement eventually discovered petitioner's activities, and a warrant-based search of petitioner's cell phone uncovered 66 videos and one still image of child pornography. Id. at 19; Presentence Investigation Report ¶ 33.

A federal grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(B) and 18 U.S.C. 2252A(b)(1) (2018); one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(B) and 18 U.S.C. 2252A(b)(1) (2018); and one count of

possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and 18 U.S.C. 2252A(b)(2) (2018). Indictment 2-3. Petitioner pleaded guilty to all three counts without a plea agreement. Plea Hr'g Tr. 23.

At petitioner's change-of-plea hearing, the prosecutor set forth the factual basis for the charged offenses. Plea Hr'g Tr. 15-20. With respect to the distribution count, the prosecutor explained that, on a particular date, petitioner uploaded ten videos of child pornography to a social-media platform. Id. at 17. With respect to the receipt and possession counts, the prosecutor described the search of petitioner's cell phone leading to the discovery of 66 videos and one image of child pornography. Id. at 19. Defense counsel stepped in to clarify that petitioner did not agree that he had distributed all of those files, and the prosecutor agreed, explaining that "[t]he 66 videos that we're alleging, those are for the receipt and possession charges, those are not for the distribution. We're not including those in the distribution." Id. at 21-22.

The district court accepted petitioner's guilty plea, and it ultimately sentenced petitioner to 144 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4.

2. Petitioner appealed, arguing for the first time that his convictions for receipt and possession of child pornography violated the Double Jeopardy Clause. Pet. C.A. Br. 16-17. The court of appeals affirmed in an unpublished per curiam decision.

Pet. App. 1a-2a. Reviewing only for plain error, the court stated that petitioner could not "show the district court committed clear or obvious error due to the lack of binding authority as to the issue whether possession of child pornography is a lesser-included offense of receipt of child pornography." Id. at 2a.

ARGUMENT

Petitioner contends (Pet. 10-19) that the court of appeals takes a uniquely narrow approach to plain-error review, categorically declining to regard an error as "plain" in the absence of on-point precedent from that court or this Court. Petitioner's assertion that the court of appeals' view of plain error is unique is incorrect, and any intra-circuit inconsistency would not warrant this Court's review.

1. Because petitioner did not raise his Double Jeopardy Clause argument in the district court, he may obtain relief on that forfeited claim only by satisfying the requirements of plain-error review. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner would have to demonstrate (1) error (2) that is clear or obvious, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. See Olano, 507 U.S. at 732-736. "Meeting all four prongs is difficult, 'as it should be.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

Petitioner asserts (Pet. 11-19) that the unpublished decision below misapplied the second element of plain-error review. To satisfy that element, a defendant must show that an error was "clear or obvious, rather than subject to reasonable dispute." Puckett, 556 U.S. at 135. As this Court has explained, a court reviewing for plain error must assess whether an error is "so 'plain'" that a court would be "derelict in countenancing it, even absent the defendant's timely assistance in detecting it." United States v. Frady, 456 U.S. 152, 163 (1982); see United States v. Parra, 111 F.4th 651, 660 (5th Cir. 2024) (same). In making that determination, the reviewing court necessarily considers whether the error is clear "under current law." Olano, 507 U.S. at 734; see United States v. Trejo, 610 F.3d 308, 319 (5th Cir. 2010) (same).

The court of appeals has accordingly explained that in determining whether an error was "clear" or "obvious," it looks to "whether controlling circuit or Supreme Court precedent has reached the issue in question, or whether the legal question would be subject to 'reasonable dispute.'" United States v. Sanches, 86 F.4th 680, 686 (5th Cir. 2023) (per curiam) (citations omitted). And in accord with the fact that nearly every error can be traced to some well-established rule at a sufficiently high level of generality, see Henderson v. United States, 568 U.S. 266, 278 (2013), the court has stated that "[e]rror cannot be plain if it requires extending existing precedent," and "there is not plain

error unless the result 'was plainly dictated by relevant laws and decisions.'" Sanches, 86 F.4th at 686 (citation omitted). Unless the language of the relevant statute or existing precedent "plainly dictate[s]" the outcome, ibid. (citation omitted), the distinction between the first and second elements of plain-error review -- that is, between rulings that are "wrong" and those that are "plainly" wrong, Henderson, 568 U.S. at 278 -- would collapse.

Petitioner errs in asserting (Pet. 11-12) that the court of appeals requires perfect correspondence between the claim presented in the instant appeal and the claim decided in a prior appeal in that court or this one. To the contrary, the court of appeals "has held that binding 'precedent is not necessarily required to establish plain error'" when "the error was 'obvious' in light of existing law." United States v. Rao, 123 F.4th 270, 281 (5th Cir. 2024) (quoting United States v. Rodriguez-Flores, 24 F. 4th 385, 390 (5th Cir. 2022) (per curiam)) (emphasis added; brackets and ellipsis omitted). And it has repeatedly found errors to be plain notwithstanding the absence of binding circuit precedent. See, e.g., United States v. Guillen-Cruz, 853 F.3d 768, 772 (5th Cir. 2017) (finding plain error without precedent where correct result was "plain from the face of the relevant statutes and regulations"); United States v. Maturin, 488 F.3d 657, 663 (5th Cir. 2007) (acknowledging that the court had never reached a particular issue but finding error was "indisputably clear from a reading of the plain statutory language, as well as

th[e] court's pattern jury instructions"); see also, e.g., Rodriguez-Flores, 25 F.4th at 390 (finding plain error despite lack of binding precedent where intermediate state courts had considered an issue and arrived at a unanimous conclusion).

To the extent that the unpublished, per curiam opinion below may have suggested that petitioner's claim was foreclosed solely "due to the lack of binding authority" (Pet. App. 2a), or that the only relevant "authority" is caselaw from this Court or the Fifth Circuit, any such case-specific tension with circuit precedent would not warrant this Court's intervention. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). That is particularly so because the plain-error precedents cited by the decision below offer more qualified statements about plain-error review. See United States v. Gonzalez, 792 F.3d 534, 538 (5th Cir. 2015) (noting that a "lack of binding authority is often dispositive in the plain-error context") (emphasis added); United States v. Evans, 587 F.3d 667, 671 (5th Cir. 2009) ("We ordinarily do not find plain error when we have not previously addressed an issue.") (emphasis added; internal quotation marks and citation omitted), cert. denied, 561 U.S. 1011 (2010).

2. There is accordingly no sound reason to review the disposition of petitioner's specific plain-error claim. Petitioner contends (Pet. 14-16) that "[e]very other court of

appeals with criminal jurisdiction" has acknowledged that error may be clear or obvious in the absence of binding case law. As explained above, see pp. 5-7, supra, that is also the rule in the Fifth Circuit. And the courts of appeals that petitioner claims have taken opposing views have all also recognized, like the Fifth Circuit, that the absence of controlling precedent is significant in assessing whether an error is "plain."[1] The courts of appeals

[1] See, e.g., United States v. Muñoz-Gonzalez, 145 F.4th 21, 26 (1st Cir. 2025) (holding that, to establish "'clear or obvious error,'" the relevant "law or principle must also be clearly established in our precedent") (citation omitted), petition for cert. pending, No. 25-6075 (filed Oct. 23, 2025); United States v. Napout, 963 F.3d 163, 183 (2d Cir. 2020) ("'[F]or an error to be plain, it must, at a minimum, be clear under current law,' which means that 'we typically will not find such error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court.'") (brackets and citation omitted); United States v. Harris, 471 F.3d 507, 512 (3d Cir. 2006) (declining to find an error "'plain'" where "[t]he Supreme Court has never ruled on the propriety of these questions, and, until now, neither had this Court in a precedential opinion"); United States v. Davis, 855 F.3d 587, 595-596 (4th Cir.) ("[A]n error is plain if (1) the explicit language of a statute or rule resolves the question or (2) at the time of appellate consideration, the settled law of the Supreme Court or this Court establishes that an error has occurred."), cert. denied, 583 U.S. 898 (2017); United States v. Al-Maliki, 787 F.3d 784, 794 (6th Cir.) ("A lack of binding case law that answers the question presented will also preclude our finding of plain error."), cert. denied, 577 U.S. 887 (2015); United States v. Hopper, 11 F.4th 561, 572 (7th Cir. 2021) (explaining that it is "difficult" to establish "plain" error where the court of appeals "has not yet had the occasion to address the interpretive issue"); United States v. Solis, 915 F.3d 1172, 1177 (8th Cir. 2019) (per curiam) ("Usually, for an error to be plain, it must be in contravention of either Supreme Court or controlling circuit precedent.") (citation omitted); United States v. Greer, 640 F.3d 1011, 1023 (9th Cir.) (finding no plain error where "neither the Supreme Court nor this court has yet ruled on the propriety of the prosecutor's questions in this case"), cert. denied, 565 U.S. 1086 (2011);

thus apply corresponding standards, derived from this Court's precedents, to assess whether established legal principles clearly or obviously resolve an appellant's claim.

To the extent that material differences may exist, this case would be an unsuitable vehicle for considering the question presented. That question is not outcome-determinative here because the decision below could be affirmed on an alternative ground not addressed by the court of appeals. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) (prevailing party may rely on any ground to support the judgment, even if not considered below). As the government explained (Gov't C.A. Br. 13-16) in its brief before the court of appeals, it is unclear from the record whether the still image recovered from petitioner's phone undergirded his receipt offense, his possession offense, or both. See Plea Hr'g Tr. 21-22 (prosecutor stating "66 videos that we're alleging, those are for the receipt and possession charges," without mentioning image); Indictment 3 (charging receipt and possession based on overlapping but distinct dates and without setting forth specific media files). It is thus not apparent from

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United States v. Starks, 34 F.4th 1142, 1157 (10th Cir. 2022) ("In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue.") (citation omitted); United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003) (per curiam) ("In the absence of any controlling precedent, there is no plain error in this case."); United States v. Pyles, 862 F.3d 82, 88 (D.C. Cir. 2017) ("[A]bsent controlling precedent on the issue or some other 'absolutely clear' legal norm, the district court committed no plain error.") (citation omitted), cert. denied, 583 U.S. 1137 (2018).

the record whether petitioner's receipt and possession convictions were, in fact, based on identical conduct, and he cannot show a clear or obvious Double Jeopardy Clause violation for that reason alone. See United States v. Barton, 879 F.3d 595, 599-600 (5th Cir.) (concluding receipt and possession charges created no Double Jeopardy Clause problem where "a complete overlap" between files underlying the two charges "is not facially apparent from either the indictment or record"), cert. denied, 586 U.S. 859 (2018).[2]

[2] None of the decisions cited by petitioner (Pet. 16-17) to assert a direct conflict about the treatment of cases in which a defendant is charged with possession and receipt of child pornography expressly addressed whether plain-error relief would be warranted in similar circumstances. See United States v. Benoit, 713 F.3d 1, 17 (10th Cir. 2013) ("Based on the entire record, it is abundantly clear that the jury convicted [the defendant] of both receipt and possession based on the same visual depictions."); United States v. Ehle, 640 F.3d 689, 694 (6th Cir. 2011) (describing offenses as involving "the same child pornography"); United States v. Muhlenbruch, 634 F.3d 987, 1004 (8th Cir.) ("[T]he government expressly conceded that [the defendant's] convictions were based on the same facts and images."), cert. denied, 565 U.S. 873 (2011); United States v. Miller, 527 F.3d 54, 70 (3d Cir. 2008) (describing offenses as involving "the same images of child pornography"); United States v. Davenport, 519 F.3d 940, 947 (9th Cir. 2008) (stating, without elaboration, that charges were based on "the same conduct"); see also United States v. Bobb, 577 F.3d 1366, 1375 (11th Cir. 2009) (affirming where the defendant's "convictions and sentences were based on two distinct offenses, occurring on two different dates, and proscribed by two different statutes"), cert. denied, 560 U.S. 928 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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