

No. 21-496

In The
Supreme Court of the United States

MARTEZ L. SMITH, PETITIONER,

v.

UNITED STATES OF AMERICA

*ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

**SUPPLEMENTAL BRIEF FOR
THE PETITIONER**

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Martez Smith submits this supplemental brief (1) to bring to the Court's attention a court of appeals decision, *United States v. Nasir*, No. 18-2888, __ F.3d __, 2021 WL 5173485 (3d Cir. Nov. 8, 2021) (en banc) (*Nasir II*), issued after the filing of petitioner's certiorari petition, and (2) to note that the Court has called on the United States to respond to a certiorari petition presenting the same question presented as this one.

1. In *Nasir*, the defendant Malik Nasir was sentenced pursuant to the career offender enhancement of the United States Sentencing Guidelines—the same enhancement applied to petitioner Smith here. *Compare United States v. Nasir*, 982 F.3d 144, 156 (3d Cir. 2020) (en banc) (*Nasir I*), with Pet. App. 13a. In December 2020, the en banc Third Circuit unanimously held that the enhancement had been improperly applied because Nasir's prior conviction for attempt to possess with intent to distribute cocaine, on which the enhancement hinged, did not qualify as a controlled substance offense under the guideline. *See Nasir I*, 982 F.3d at 156-60. In so holding, the court declined to defer to the Sentencing Commission's commentary, which "expand[ed] the definition of 'controlled substance offense' to include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses" because the text of the guidelines is not ambiguous. *Id.* at 157 (alterations omitted). A divided court also separately held, on plain-error review, that Nasir's conviction as a felon in possession of a firearm must be vacated in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), where this

Court held that such a conviction requires the government to prove that the defendant knew he was a felon. *Nasir I*, 982 F.3d at 160-76. Writing only for himself, Judge Bibas concurred with respect to the court's sentencing ruling to emphasize that that "[t]he judge's lodestar must remain the law's text, not what the Commission says about that text." *Id.* at 177.

After *Nasir I*, this Court issued its decision in *Greer v. United States*, 141 S. Ct. 2090 (2021), where it clarified the circumstances in which an unpreserved *Rehaif* error may be a basis for plain-error relief. On the United States' petition, this Court vacated *Nasir I* and remanded for reconsideration in light of *Greer*. See *United States v. Nasir*, No. 20-1522, __ S. Ct. __, 2021 WL 4507560, at *1 (Oct. 4, 2021).

As relevant here, the en banc Third Circuit on remand "reiterate[d] that the sentencing enhancement was not properly applied." *Nasir II*, 2021 WL 5173485, at *1. The court adhered to its conclusion that "the plain language of the guidelines does not include inchoate crimes" and so *Nasir* "must be resentenced." *Id.* at *6. The court emphasized that "[i]n *Kisor*, [this] Court cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer*, or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous." *Id.* at *8. And it maintained that "[i]n light of *Kisor*'s limitations on deference to administrative agencies" it was compelled to overrule prior circuit precedent deferring to the Sentencing Commission's commentary because "inchoate crimes are not included in the definition of 'controlled substance

offenses’ given in section 4B1.2(b) of the sentencing guidelines.” *Id.* at *9.

Judge Bibas too reiterated his concurrence. *Nasir II*, 2021 WL 5173485, at *9-*11. This time, however, he was joined by Judges Ambro, Jordan, Greenaway, Jr., Krause, and Restrepo. *Ibid.* These judges all recognized that *Nasir*’s holding “hints at a broader problem.” *Id.* at *9. “For decades, [the Third Circuit] and every other circuit” have given “nearly dispositive weight to the Sentencing Commission’s commentary, not the Guidelines’ plain text.” *Id.* at *9. But since *Kisor* “the winds have changed,” and courts “must look at things afresh” and “[o]ld precedents that turned to the commentary rather than the text no longer hold.” *Id.* at *9-*10.

As *Nasir II* shows, the circumstances under which the Sentencing Commission’s commentary to the Sentencing Guidelines should be granted deference continues to be a pressing issue that divides the circuits. Unlike the Third Circuit, many circuits—like the Seventh Circuit in petitioner’s case—continue to rely on prior circuit precedent that reflexively deferred to the Sentencing Commission’s commentary. Pet. App. 16a-17a (relying on pre-*Kisor* precedent); *see also United States v. Miller*, 857 F.App’x 877, 878 (8th Cir. 2021) (per curiam) (refusing to reconsider deference to Sentencing Commission’s commentary to § 4B1.2(b) in light of *Kisor* because “*Kisor* reaffirmed existing law on the legal force of guideline commentary”). These circuits refuse to “look at things afresh,” and instead insist that “old precedents that turned to the commentary rather than the text” continue to “hold.” *Nasir II*, 2021 WL 5173485, at *9-*10. Had petitioner here

been sentenced in the Third, Sixth, or D.C. Circuits, he would not have received the career offender enhancement. Pet. 36.

2. This issue also continues to generate petitions seeking this Court's review. Just a few weeks ago, this Court called for a response to the petition in *Wynn v. United States*, No. 21-5714, which—just like the petition here—asks whether “the Circuit below properly [held] that the Guidelines commentary properly expanded the definition of ‘controlled substance offense’ to include inchoate offenses.” Compare Pet. i, *Wynn v. United States*, No. 21-5714 with Pet. i, *Smith v. United States*, No. 21-496. The Court should likewise call for a response here and then grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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