

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARIO ALBERTO NETRO PERALES – PETITIONER

v.

UNITED STATES OF AMERICA – RESPONDENT

PETITION FOR WRIT OF CERTIORARI

FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. The circuits have split over the extent of deference that is to be given to the commentaries to the Federal Sentencing Guidelines after the decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). The Fifth Circuit follows the rule stated in Stinson: *In Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993), the Court held that the guidelines commentary is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *United States v. Vargas*, 74 F.4th 673, 677 (5th Cir. 2023). The Third, Fourth, Sixth, Ninth, and Eleventh Circuits say that the Supreme Court replaced Stinson's highly deferential standard with a less deferential one in *Kisor v. Wilkie*.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Mario Alberto Netro Perales, Defendant-Appellant.
2. United States of America, Plaintiff-Appellee.
3. Counsel for Plaintiff-Appellee:
Assistant United States Attorneys David Coronado (in district court), and Alamdar S. Hamdani, Carmen Castillo Mitchell and Brent D. Chapell (on appeal).
4. Counsel for Defendant-Appellant:
Maria Linda Gonzalez (in district court), and Ed Stapleton (on appeal).

TABLE OF CONTENTS

Contents	Page
QUESTIONS PRESENTED	2
LIST OF PARTIES	3
OPINIONS BELOW	6
JURISDICTION	6
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	6
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	8

INDEX TO APPENDICES

Decision of U.S. Court of Appeals for the 5 th Circuit	APPENDIX A
Decision of U.S. District Court for Southern District of Texas	APPENDIX B

TABLE OF AUTHORITIES CITED

Cases

<i>Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives</i> , 140 S. Ct. 789, 790 (2020)	12
<i>In Stinson v. United States</i> , 508 U.S. 36, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993).....	2, 8
<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 (2019).....	2, 8
<i>Molina-Martinez v. United States</i> , 578 U.S. 189, 191 (2016).....	11
<i>Rita v. United States</i> , 551 U.S. 338, 347 (2007)	11
<i>United States v. Havis</i> , 907 F.3d 439, 450 (6th Cir. 2018).....	12
<i>United States v. Malik Nasir</i> , 17 F.4th 459, 472 (3d Cir. 2021)	9
<i>United States v. Vargas</i> , 74 F.4th 673, 677 (5th Cir. 2023)	2, 8
<i>United States v. White</i> , 850 F.3d 667, 674 (4th Cir. 2017)	11
<i>Whitman v. United States</i> , 574 U.S. 1003 (2014)	12
<i>Wooden v. United States</i> , 142 S. Ct. 1063, 1082 (2022).....	12

Statutes

18 U.S.C. 3553	7
28 U.S.C. § 1254(1)	6
8 U.S.C. 1326	7

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to this petition and is unpublished.

The judgment of the United States District Court appears at Appendix B to this petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided Mr. Netro Perales' case was October 2, 2023.

A petition for rehearing was not urged.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves issues under 8 U.S.C. 1326.

STATEMENT OF THE CASE

A. The offenses and plea.

Mr. Netro Perales, a citizen of Mexico, was charged by indictment on September 27, 2022, in Brownsville, Texas. Mr. Netro Perales was charged with the following:

COUNT 1: 8:1326(a)(1)/(b)(1) Alien who had previously been denied admission, excluded, deported, or removed, knowingly and unlawfully was present in the United States, said defendant having not obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States

On October 6, 2022, Mr. Netro-Perales entered his plea of not guilty. On October 28, 2022, Mr. Netro-Perales entered a plea of guilty to Count 1 of the indictment.

B. Statement of Facts

Mr. Netro-Perales pleaded guilty to illegal reentry and his lawyer argued at sentencing that the previous criminal history was over-represented because of a consecutive sentence previously imposed. This ground is not included in the Commentaries to either of the Guideline Sections involved in this case. Although the trial judge considered criminal history, he made no reference to the argument of defense counsel that was not included in the Commentaries.

C. Sentencing

On January 30, 2023, Mr. Netro-Perales was sentenced to 21 months for counts 1.

D. Appeal

Mr. Netro Perales timely filed his appeal to the United States Court of Appeals for the Fifth Circuit and affirmed the District Courts judgment.

REASONS FOR GRANTING THE PETITION

1. The circuits have split over the extent of deference that is to be given to the commentaries to the Federal Sentencing Guidelines after the decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). The Fifth Circuit follows the rule stated in Stinson: *In Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993), the Court held that the guidelines commentary is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *United States v. Vargas*, 74 F.4th 673, 677 (5th Cir. 2023). The Third, Fourth, Sixth, Ninth, and Eleventh Circuits say that the Supreme Court replaced Stinson's highly deferential standard with a less deferential one in *Kisor v. Wilkie*.

Mr. Netro-Perales urges that the Guideline commentary should not be given deference in the decision for a downward departure. The Fifth Circuit stated in rejecting Mr. Netro-Perales claim:

"To the extent that Netro-Perales relies on *Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019), in support of his assertion that [*2] the Guidelines commentary is not due any deference, that assertion is repudiated by our recent decision in *United States v. Vargas*, 74 F.4th 673, 680-83 (5th Cir. 2023) (en banc). *United States v. Netro-Perales*, No. 23-40074, 2023 U.S. App. LEXIS 26072, at *1-2 (5th Cir. Oct. 2, 2023).

However, the Fifth Circuit also acknowledged in the *Vargas* decision upon which Mr. Netro-Perales' repudiation is based:

"Some of our sister circuits contend the Supreme Court replaced Stinson's highly deferential standard with a less deferential one in *Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019)." *United States v. Vargas*, 74 F.4th 673, 678 (5th Cir. 2023).

We here review the decisions of the sister circuits which reject the Fifth Circuit findings in *Vargas* and *Netro-Perales*.

Third Circuit.

The Third Circuit rejects the application of the Commentary finding inchoate crimes will not support a career criminal finding.

Congress has delegated substantial responsibility to the Sentencing Commission, but, as the Supreme Court emphasized in *Kisor*, the interpretation of regulations ultimately "remains in the hands of the courts." 139 S.Ct. at 2420. In light of *Kisor*'s limitations on deference to administrative agencies, and after our own careful consideration of the guidelines and accompanying commentary, we conclude that inchoate crimes are not included in the definition of "controlled substance offenses" given in section 4B1.2(b) of the sentencing guidelines. Therefore, sitting en banc, we overrule *Hightower*, and, accordingly, **Nasir** is entitled to be resentenced without being classified as a career offender.

United States v. Malik Nasir, 17 F.4th 459, 472 (3d Cir. 2021)

Mr. Nasir's sentence was vacated and remanded for resentencing.

Fourth Circuit

The Fourth Circuit made the same finding regarding inchoate offenses:

In short, the plain text of U.S.S.G. § 4B1.2(b) is inconsistent with the Commission's Commentary to that Guideline, and this is the only "reasonable construction of" U.S.S.G. § 4B1.2(b). See *Kisor*, 139 S. Ct. at 2415. In such circumstances, "a court has no business deferring to any other reading, no matter how much the [Government] insists it would make more sense." *Id.* Rather, when commentary is inconsistent with an unambiguous guideline, "the Sentencing Reform Act itself commands [**16] compliance with the guideline." *Stinson*, 508 U.S. at 43. *United States v. Campbell*, 22 F.4th 438, 447 (4th Cir. 2022).

Mr. Campbell's sentence was vacated and remanded for resentencing. *Id* at 449.

Sixth Circuit

The Sixth Circuit rejected the Commentary that put a minimum \$500.00 value on stolen gift cards:

For whatever reason, the Commission opted to place its \$500 minimum in § 2B1.1's commentary, not in § 2B1.1. So Riccardi alternatively asserts that the \$500 minimum conflicts with § 2B1.1. We agree. Commentary may only interpret the guideline. And a \$500 mandatory minimum cannot be described as an interpretation of the word "loss." Rather, it is a substantive legislative rule that belongs in the guideline itself to have force.

United States v. Riccardi, 989 F.3d 476, 483 (6th Cir. 2021)

Ms. Riccardi's 56-month sentence was reversed, and her case was remanded for resentencing. *Id.* at 490.

Ninth Circuit

The Ninth Circuit agreed with the Third, Fourth, and Eleventh Circuits that the commentary about inchoate offenses did not govern:

Because the text of § 4B1.2(b) unambiguously does not include inchoate offenses, and because we are no longer permitted to rely on the commentary of an unambiguous guideline after *Kisor*, we hold that Castillo's conspiracy conviction is not a "controlled substance offense" under the career offender enhancement, § 4B1.1 *United States v. Castillo*, 69 F.4th 648, 664 (9th Cir. 2023)

Mr. Castillo's sentence was vacated and remanded for resentencing. *Id.*

Eleventh Circuit

The Eleventh Circuit agreed:

The definition of "controlled substance offense" in § 4B1.2(b) of the Sentencing Guidelines does not include inchoate offenses like conspiracy and attempt. To the extent that this holding conflicts with our prior precedent, that precedent is overruled. *United States v. Dupree*, 57 F.4th 1269, 1280 (11th Cir. 2023).

Mr. Dupree's sentence was vacated and remanded for resentencing. *Id.*

This Question Matters

The question of whether and in what circumstances courts must defer to the Guidelines commentary has consequences. The Guidelines play a "central role in sentencing." *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016). "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." Gall, 552 U.S. at 50 n.6 (emphasis added). "A district court that improperly calculates a defendant's Guidelines range * * * has committed a significant procedural error." *Molina-Martinez*, 578 U.S. at 199 (quotation marks and brackets omitted). By contrast, a sentence within a properly calculated Guidelines range may be presumed reasonable. *See Rita v. United States*, 551 U.S. 338, 347 (2007); see also, e.g., *United States v. White*, 850 F.3d 667, 674 (4th Cir. 2017). The *Stinson* rule transforms the sentencing court's task—from applying the Guidelines to applying the commentary.

Where courts are asked to defer to a government agency's interpretation of the law in criminal cases, "alarm bells should be going off." *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring), opinion vacated on reh'g en banc, 927 F.3d 382 (6th Cir. 2019) (per curiam). Whatever else one thinks about agency deference, it should have "no role to play when liberty is at stake." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020)

(Gorsuch, J., respecting denial of certiorari). “Courts play a vital role in safeguarding liberty and checking punishment.” *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). Acting in that role, common-law courts apply the rule of lenity, under which courts must construe penal laws “strictly.” *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in the judgment). This rule reflects “the tenderness of the law for the rights of individuals,” *id.* (citation omitted), and “serves our nation’s strong preference for liberty,” *Nasir*, 17 F.4th at 473 (Bibas, J., concurring). In light of this “presumption of liberty,” there is “no compelling reason to defer to a Guidelines comment that is harsher than the text.” *Id.* at 474; cf. *Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia, J., respecting the denial of certiorari) (deference in criminal cases turns normal interpretive principles “upside-down, replacing the doctrine of lenity with a doctrine of severity.” (quotation marks omitted)).

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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