

No. _____

In the

Supreme Court of the United States

SCHYLER ALGERNON SMITH
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

The Petitioner raises the same issue that is currently pending consideration by this Court in *Andres Vargas v. United States of America*, 23-5875, petition for certiorari filed October 23, 2023, to wit:

Whether the standard for triggering judicial deference to an agency's interpretation of its own regulations, as clarified in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), governs the extent to which courts must defer to the Sentencing Commission's interpretations of its own guidelines and policy statements for federal criminal sentencing.

Table of Contents

Question Presented	i
Table of Authorities	iii
Petition for Certiorari	1
Jurisdiction	1
Opinions Below	1
Authority Involved	1
Statement of the Case	2
Reasons for Granting the Petition	
Although the Sentencing Commission has just amended the career-offender guidelines so as to include inchoate offenses, the deep circuit split on the general issue regarding Guideline interpretation and the wide disparity of sentences left in the wake of that split merit review by this Court.	3
1. The courts of appeals are divided over the question presented.	3
2. The question presented is important.	4
3. The Fifth Circuit's decision in Vargas is incorrect.	4
Conclusion	5
Appendix A - Opinion of the United States Court of Appeals for the Fifth Circuit	

Table of Authorities

Cases

<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 (2019)	i, 3, 4, 5
<i>Stinson v. United States</i> , 508 U.S. 36 (1993)	4
<i>United States v. Vargas</i> , 74 F.4th 673 (5th Cir. 2023) (en banc)	i, 3, 4, 5

Statutes

21 U.S.C. § 841	
21 U.S.C. § 846	
U.S.S.G. § 4B1.1	1, 2, 3, 4

Petition for Certiorari

Schyler Algernon Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered below.

Opinion Below

The unpublished opinion of the Court of Appeals is attached as an Appendix to this Petition.

Jurisdiction

The Court of Appeals for the Fifth Circuit rendered judgment on November 14, 2023. This petition is filed within 90 days of that date. *See* SUP. CT. R. 13.1. Section 1254(1), 28 U.S.C., confers jurisdiction on this Court to review the judgment through certiorari.

Authority Involved

Relevant to this petition is section 4B1.1(a) of the 2018 U.S. Sentencing Guidelines Manual (subsequently amended effective November 1, 2023), which provided:

- (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Section 4B1.2(b) of the Guidelines Manual provides:

- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or

the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 of the commentary to Section 4B1.2 provides:

1. **Definitions.**—For purposes of this guideline—

“***Crime of violence***” and “***controlled substance offense***” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

Statement of the Case

After a controlled purchase of 103 grams of methamphetamine, the Government charged Schuyler Algernon Smith with one count of distribution of 50 grams or more of a substance containing a mixture of methamphetamine and one count of conspiracy to do so. Pursuant to a plea agreement, Smith pleaded guilty to the conspiracy count, and the court sentenced him to 262 months in prison.

Smith’s 22-year sentence is at the bottom of the guideline ranged determined by application of the career-offender guideline, which the court applied in light of two prior state-court marijuana related convictions. Smith objected to the application of that guideline provision on the ground that the instant offense does not qualify as a controlled-substance offense as defined by the career-offender guideline. If the guideline range in this case was determined without reference to the career-offender guideline, the applicable range would have been dramatically lower—100 to 125 months.

Smith appealed, explaining that he raised the issue to preserve it for review in this Court. While his case was pending in the court of appeals, the Fifth Circuit addressed the matter *en banc* in another case, *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (*en banc*), *petition for cert.*

filed, (July 24, 2023) (23-5875), and, in a fractured opinion, ruled that “controlled substance offense” for purposes of U.S.S.G. § 4B1.1, includes inchoate offenses such as conspiracy and attempt. Based on its decision in *Vargas*, the court of appeal affirmed Smith’s conviction on November 14, 2023.

As of the time of the filing of the instant petition, Vargas’s petition is pending before this Court.

Reasons for Granting the Petition

Although the Sentencing Commission has just amended the career-offender guidelines so as to include inchoate offenses, the deep circuit split on the general issue regarding Guideline interpretation and the wide disparity of sentences left in the wake of that split merit review by this Court.

Smith adopts the reasons and arguments presented to this Court by the petitioner in *United States v. Vargas*, reasons which are summarized here:

1. The courts of appeals are divided over the question presented.¹

The circuits are split, in the wake of *Kisor v. Wilkie*,² on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines. Eleven circuits openly disagree over whether *Kisor*’s recalibration of the *Seminole Rock* deference standard governs the same doctrine’s application to Guidelines commentary. Four circuits answer, “yes,” and so follow *Kisor*; six respond, “no,” and thus do not; and one has published a pair of opinions going each way. The predictable result is that various guidelines mean different things and apply to similarly situated

¹ *Vargas* Petition 14-23.

² 139 S. Ct. 2400 (2019)

defendants in different ways in large areas of the country. This Court alone can resolve the dispute over this important question of federal sentencing law.

2. The question presented is important.³

The deep and acknowledged circuit split over *Kisor*'s relevance in the Guidelines context will not dissipate without this Court's intervention. Although the Sentencing Commission has "fixed" the problem going forward with respect to § 4B1.1, the question here presented concerns the *standard* governing a federal court's decision whether to defer to *any* commentary's gloss on *any* guideline in the first place. Moreover, the deep split among the circuits has left numerous and dramatic unfair disparities among sentences for similarly situated defendants, depending only on which circuit they were convicted in. That disparity cannot be corrected without this Court's intervention, for as the Government has recently opined in its response to the *Vargas* petition, ex post facto considerations prevent the 2023 amendments from applying to those defendants sentenced "in circuits that previously declined to defer to former Application Note 1."⁴

3. The Fifth Circuit's decision in *Vargas* is incorrect.

Smith relies on the arguments made by Vargas in his petition at pp. 29-35, which conclude as follows:

The Fifth Circuit identified no persuasive reason why *Kisor*, *Stinson* [v. *United States*, 508 U.S. 36 (1993)], or any of this Court's cases would condone deference to the Commission—and that agency alone—in those circumstances. "It does not take a great stretch of the imagination to see the pitfalls of a rule that writes the Sentencing Commission that kind of blank check." [*Vargas*, 74 F.4th at 704]

³ *Vargas* Pet. 23-28.

⁴ Response by U.S. to *Vargas* Pet. 3, n.2.

(Elrod, J., dissenting). And the fact that the Fifth Circuit’s acceptance of this bifurcated deference regime depends on adherence to a formulation of the *Seminole Rock* test that *Kisor* labeled a “caricature of the doctrine,” 139 S. Ct. at 2415, is as telling a sign as any that the court of appeals has strayed from the path of this Court’s precedent.⁵

Conclusion

The conflict over *Kisor*’s relevance to Guidelines commentary demonstrates that the question presented warrants urgent attention. The answer is exceptionally important to both the efficient and fair administration of the federal sentencing scheme. Accordingly, this Court should grant certiorari in *Vargas* and hold this case pending this Court’s resolution of that petition. Alternatively, this Court should grant certiorari in this case.

Respectfully submitted,

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⁵ *Vargas* Pet. 35.