

No. 20-291

---

---

IN THE  
*Supreme Court of the United States*

JAMELL BIRT,  
*Petitioner,*

v.

UNITED STATES,  
*Respondent.*

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

SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI

HEIDI R. FREESE  
FREDERICK W. ULRICH  
TAMMY L. TAYLOR  
FEDERAL PUBLIC DEFENDER  
MIDDLE DISTRICT OF  
PENNSYLVANIA  
100 Chestnut St., Suite 306  
Harrisburg, PA 17101  
(717) 782-2237

ZACHARY C. SCHAUF  
*Counsel of Record*  
ELIZABETH B. DEUTSCH  
JENNER & BLOCK LLP  
1099 New York Ave., NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000  
zschauf@jenner.com

---

---

## ARGUMENT

Pursuant to this Court’s Rule 15.8, Petitioner Jamell Birt files this Supplemental Brief to inform the Court of two recent developments. The first is the Seventh Circuit’s December 7 decision in *United States v. Hogsett*, No. 19-3465 (7th Cir. Dec. 7, 2020),<sup>1</sup> which deepens the split on the Question Presented. The second is Third Circuit’s December 1 *en banc* decision in *United States v. Nasir*, No. 18-2888, \_\_\_ F.3d \_\_\_, 2020 WL 7041357 (3d Cir. Dec. 1, 2020), which is relevant to the government’s argument that this case is an “unsuitable vehicle.” BIO 26.

### **I. The Seventh Circuit’s *Hogsett* Decision Makes Clear That The Split Is At Least 5-3.**

In its Brief in Opposition, the government conceded at least a 5-2 split on the Question Presented, with the Third, Fifth, Sixth, Tenth, and Eleventh Circuits agreeing with the government and the First and Fourth Circuits agreeing with Birt. BIO 22-23, 25; Reply 2. It disputed Birt’s claim that the Seventh Circuit had sided with the First and Fourth Circuits. BIO 24.

*Hogsett* resolves that dispute, squarely holding that a conviction for “possession with intent to distribute crack cocaine, in violation of § 841(a)(1), (b)(1)(C), is a covered offense.” *Hogsett*, slip op. at 2. *Hogsett* expressly agreed with the “First and Fourth Circuits” and expressly “disagree[d] with the Third Circuit’s approach” in Birt’s case. *Id.* at 6-7. *Hogsett* explained

---

<sup>1</sup> *Hogsett* is not yet available on Westlaw.

that the Fair Sentencing Act “modified” Subparagraph C by shifting it “for the first time ... to cover convictions involving quantities between 5 grams and 28 grams” of crack cocaine. *Id.* at 7-8.

*Hogsett* thus confirms that the split on the Question Presented is at least 5-3. That includes at least five Circuits that have resolved the issue in binding and published decisions, with those decisions breaking 3-2 in Birt’s favor (with the First, Fourth, and Seventh Circuits on one side, and the Third and Eleventh Circuits on the other). *See* Reply 2-3 (addressing the Eleventh Circuit). Indeed, *Hogsett* further refutes the government’s already meritless argument that “the First and Fourth Circuit panel decisions were rendered without the benefit of the Third Circuit’s analysis in” *Birt*. BIO 25; Reply 4-5. The Seventh Circuit had the “benefit” of that analysis—and rejected it.

Certiorari is richly warranted to address the deep, entrenched, and important division of authority on an issue that recurs so frequently.

## **II. The Third Circuit’s *Nasir* Decision Underscores That Government’s Sole Vehicle Argument Lacks Merit.**

In its Brief in Opposition, the government raised only one argument for why this case is an “unsuitable vehicle” to resolve the 5-3 split. BIO 26. That argument was the following: Even if this Court agrees with Mr. Birt that he has a “covered offense” and is eligible for relief under the First Step Act, the government predicts that on remand Birt is unlikely to “actually receive a sentence reduction” because he is a “career offender” whose

sentence is at the low end of the Guidelines range. BIO 26-27. Birt's Reply Brief explained why the government's predictions about the outcome on remand create no genuine vehicle problem and why, in any event, Birt has every reason to expect substantial relief on remand. Reply 7-9.

Now, however, even the government's premise—that Birt on remand would be treated as a career offender—is untrue. Birt was deemed a career offender because he had two prior felony convictions for “controlled substance offenses,” *see* U.S. Sentencing Guidelines § 4B1.1, one of which was for “[a]ttempted sale of a controlled substance.” Presentence Investigation Report ¶¶ 25, 30 (Oct. 22, 2003). But in *Nasir*, the *en banc* Third Circuit overruled its precedent and held that “inchoate crimes,” including “attempt,” “are not included in the definition of ‘controlled substance offenses.’” 2020 WL 7041357, at \* 9 (slip op. at 26). Birt calculates that *Nasir* would reduce his base offense level from 34 to 26 and his Guidelines range from 210-240 months, *see* BIO 6, to 92-115 months.

Birt recognizes that on remand the government may argue that *Nasir*, because it post-dated Birt's original sentencing, should not apply to the calculation of Birt's Guidelines range. Birt disagrees with that argument. *See United States v. Easter*, 975 F.3d 318, 319, 327 (3d Cir. 2020) (holding that in a First Step Act proceeding, a court “must consider anew all of the § 3553(a) factors,” “includ[ing] post-sentencing developments”). But for present purposes, this issue only further undercuts the government's already meritless claim that the outcome on remand is foreordained. At minimum, *Nasir* and the

Guidelines reduction it yields would weigh heavily in a district court's discretionary determination about whether to reduce Birt's sentence. *See* Br. of Appellee United States at 22-28, *United States v. Murphy*, No. 20-1411 (3d Cir. Aug. 28, 2020), Dkt. 21, 2020 WL 5110432 (arguing that the district court properly declined to "reconsider [the defendant's] original designation as a career offender in light of subsequent changes in" law, but conceding that the district court did not err by taking into account the change in law in "var[ing] downward": "In other words, while Murphy was still determined to be a career offender, he was sentenced as if he wasn't one.").

*Nasir* therefore underscores the lack of merit to the government's sole vehicle argument. And it further demonstrates Birt's overriding personal stake in prevailing before this Court and becoming eligible for relief under the First Step Act.

### CONCLUSION

Given the clear 5-3 split, the importance of the Question Presented, and the patent lack of merit to the government's sole vehicle argument, the Court should grant the Petition.

Respectfully submitted,

HEIDI R. FREESE  
FREDERICK W. ULRICH  
TAMMY L. TAYLOR  
FEDERAL PUBLIC DEFENDER  
MIDDLE DISTRICT OF  
PENNSYLVANIA  
100 Chestnut St.  
Suite 306  
Harrisburg, PA 17101  
(717) 782-2237

ZACHARY C. SCHAUF  
*Counsel of Record*  
ELIZABETH B. DEUTSCH  
JENNER & BLOCK LLP  
1099 New York Ave., NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000  
zschauf@jenner.com