NASIR, ADAIR, AND THE RETURN OF TEXTUALISM TO FEDERAL SENTENCING
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Notes

[1] *United States v. Adair*, 38 F.4th 341 (3d Cir. 2022),
[2] *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021),
[3] *United States v. Banks*, Nos. 19-3812 & 20-2235, __ F.4th __ (3d Cir. Nov. 30, 2022).
[4] *See* https://www.ussc.gov/ (last accessed Oct. 19, 2022).
[5] *See Nasir*, 17 F.4th at 470 (citing *Stinson v. United States*, 508 U.S. 36 (1993), *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).
[6] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), *Auer v. Robbins*, 519 U.S. 452 (1997).
[7] 139 S. Ct. 2400 (2019).
[8] *Kisor*, 139 S. Ct. at 2415.
[9] *Id.* at 2415-17.
[10] *See Nasir*, 17 F.4th at 472 ("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.").
[11] *See id.* at 469 ("After evaluating Nasir's criminal history, the Court concluded that two of his prior convictions in Virginia state court also qualify as predicate controlled substance offenses: a 2000 conviction for an attempt to possess with intent to distribute cocaine and a 2001 conviction for possession of marijuana and cocaine with intent to distribute.").
[12] *See id.* at 469-70.
[13] 25 F.3d 182 (3d Cir. 1994).
[14] *Id.* at 469.
[15] *See id.* at 470-71 (emphasizing the importance of *Kisor* and applying the *Kisor* framework to the applicable guideline).
[16] *See id.* at 471-72 (providing *Kisor* analysis and commenting, *inter alia*, that the plain text of the guideline suggested an intentional exclusion of inchoate offenses).
[17] *Id.* at 472.
[18] *See Adair*, 38 F.4th at 346 ("Adair gained access to prescription opiate pills as a treatment for back pain. A physician prescribed her 300 opioid pills per month (240 oxycodone and 60 oxymorphone), and she became addicted. Despite her addiction, Adair recognized that a broader market existed for prescription pills. . . . For the next several years, Adair participated in and coordinated transactions for prescription pills.").
[19] *See id.* at 354-55 (discussing evidence of record that supported Adair being an "organizer" based on "her efforts [that] gave functional structure to a coordinated opiate distribution scheme that involved at least five participants" and also that Adair could be considered a "leader" given that she "retain[ed] control over the prescription-pill scheme that she coordinated" and "made high-level decisions essential to its continued operation.").
[20] *See id.* at 346.
[21] *See id.* at 346-47 (providing overview of sentencing proceedings at the District Court). In addition, the government did not move for a third-point acceptance-of-responsibility reduction following her timely notice of her guilty plea, which was one of Adair's bases for appealing her sentence. *See Adair*, 38 F.4th at 346-47 (internal citations omitted).
[22] *See id.* at 347.
[23] *See* U.S.S.G. § 3B1.1(a).
[24] *See* U.S.S.G. § 3B1.1(a), cmt. n.4.
[25] *See Adair*, 38 F.4th at 354.
[26] *See id.* at 351-55.
[27] *See id.* at 354-55.
[28] *See id*. at 349.
[29] *Id.* at 350.

[30] *See Adair*, 38 F.4th at 355. Before reaching the merits of Adair's argument on this point, the Court first examined whether Adair adequately preserved the argument at the lower level, explaining that whether the issue was preserved dictates the applicable standard on appeal. *See id.* at 355 ("If Adair preserved her acceptance-of-responsibility argument, then on appeal, legal issues are examined de novo, and factual findings are reviewed for clear error. . . . But if she did not, then to prevail, she must meet the four requirements of plain-error review." (citations omitted)). The Court ultimately concluded that such an analysis was not necessary because Adair was not entitled to relief on this point. *See id.* at 356.
[31] U.S.S.G. 3E1.1.
[32] *See Adair*, 38 F.4th at 357. For a more extensive summary of the history of this guideline and its various amendments, see the discussion at pages 356-358 of *Adair*.
[33] *See id.* at 357-58.
[34] *See id.* at 358.
[35] *See id.* (quoting PROTECT Act § 401(j)(4)).
[36] *See id.* (quoting U.S.S.G. § 3E1.1, cmt. n.6 (2013); U.S.S.G. app. C amend. 775 (effective Nov. 1, 2013)).
[37] The Court found that the amendment "violates § 401(j)(4) of the PROTECT Act, which prevents the Commission from altering or repealing Congress's amendments to § 3E1.1(b)"; that the amendment "exceeds the Commission's delegated powers"; and that the amendment does not warrant controlling deference because it "is not the product of agency subject-matter expertise, but rather the Commission's application of the traditional tools of construction." *See id.* at 359-60.
[38] *See id.* at 361.
[39] The unconstitutional-motive standard was articulated in *United States v. Drennon*, 516 F.3d 160 (3d Cir. 2008). In *Drennon*, the Court stated that "an unconstitutional motive exists when the government's decision is based on the defendant's race, religion, or gender." *See id.* at 162 (quoting *United States v. Abuhouran*, 161 F.3d 206, 212 (3d Cir.1998)). The Court also commented that the "government also acts from an unconstitutional motive when its 'refusal to move was not rationally related to any legitimate government end.'" *See id.* at 162-63 (quoting *Abuhouran*, 161 F.3d at 212).
[40] *See id.* at 361.
[41] *See id.*
[42] *Id.* at 230.
[43] *United States v. Banks*, Nos. 19-3812 & 20-2235, __ F.4th __ (3d Cir. Nov. 30, 2022).
[44] *Banks*, slip op. at 17.
[45] *Banks*, slip op. at 20.
[46] For a discussion of the significance of probation officers in connection with sentencing, see generally Hon. William H. Pryor, Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, 81 FED. PROBATION, September 2017, at 13. Notably, as Judge Pryor has observed, "[f]ederal probation officers have sometimes been called the 'guardians of the guidelines' based on their neutral, unbiased role in implementing the guidelines sentencing regime in our adversarial system . . . [which] is an appropriate appellation, with the important qualifier that probation officers should not be considered 'blindly allegiant' guardians." *See id.* at 17 (footnotes omitted).
[47] *See, e.g.*, Kevin L. Daniels, *Criminal Law-All Mixed Up and Don't Know What to Do: A Review of the Tenth Circuit's Approach to Sentencing in Federal Methamphetamine Production Cases;* United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996) (en banc)*, 10 WYO. L. REV. 339, 356 (2010) (describing the Guidelines' purposes generally as "uniformity, honesty, and consistency in sentencing").
[48] For authority endorsing this interpretation of the Guidelines and commentary, *see United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021). For an example of a circuit indicating support for the framework used in the Third Circuit, *see United States v. Vargas*, 35 F.4th 936 (5th Cir. 2022), *vacated by* 45 F.4th 1083 (5th Cir. 2022). The Fourth Circuit appears to be split as to the applicability of this approach. *Compare United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022) (endorsing the Third Circuit view); *with United States v. Moses*, 23 F.4th 347 (4th Cir. 2022) (declining to adopt the Third Circuit's approach).

For other decisions declining to take up the approach employed by the Third Circuit in *Nasir* and *Adair*, *see*, *e.g.*, *United States v. Pratt*, No. 20-10328, 2021 WL 5918003 (9th Cir. Dec. 15, 2021), *United States v. Richardson*, 958 F.3d 151 (2d Cir. 2020), *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020), *United States v. Broadway*, 815 F. App'x 95 (8th Cir. 2020).