No. 20-7069

IN THE SUPREME COURT OF THE UNITED STATES

MARTELL ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-7069

MARTELL ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 5-9) that the district court erred in calculating his advisory Sentencing Guidelines range based on an enhancement that applies to defendants who commit certain firearms offenses after "sustaining at least two felony convictions of either a crime of violence or a controlled substance offense," Sentencing Guidelines § 2K2.1(a)(2), as those terms are defined in the career-offender guideline, id. § 4B1.2(a) and (b); see id. § 2K2.1, comment. (n.1). In particular, petitioner contends (Pet. 8-9) that his prior state convictions for manufacturing or delivering a controlled substance and for possessing cocaine base (crack cocaine) with intent to deliver are

not "controlled substance offense[s]" on the theory that the least culpable conduct prohibited by the relevant state statutes is attempted delivery; the text of the career-offender guideline's definition of "controlled substance offense" excludes attempt offenses; and Application Note 1 to the definition is invalid insofar as it interprets that definition to include attempt offenses. See Sentencing Guidelines § 4B1.2, comment. (n.1) ("For purposes of [the career-offender] guideline * * * '[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.") (emphasis omitted).

For the reasons stated at pages 9 to 27 of the government's brief in opposition to the petition for a writ of certiorari in Tabb v. United States, No. 20-579, petitioner's challenge to the validity of Application Note 1 does not warrant this Court's review at this time.[1] Petitioner's challenge is inconsistent with the text, context, and design of the guideline and its commentary, see Br. in Opp. at 9-13, Tabb, supra (No. 20-579); is not supported by this Court's precedent, see id. at 13-17; and is based on an incorrect understanding of Application Note 1 and its history, see id. at 18-23. In any event, the United States Sentencing Commission has already begun the process of amending the Guidelines to address the recent disagreement in the courts of appeals (see

[1] We have served petitioner with a copy of the government's brief in opposition in Tabb.

Pet. 7-8) over the validity of Application Note 1. Br. in Opp. at 23-25, Tabb, supra (No. 20-579). No sound basis exists for this Court to depart from its usual practice of leaving to the Commission the task of resolving Guidelines issues. Cf. Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari) (observing, with respect to another Guidelines dispute, that the "Commission should have the opportunity to address [the] issue in the first instance, once it regains a quorum of voting members") (citing Braxton v. United States, 500 U.S. 344, 348 (1991)).

The petition for a writ of certiorari should be denied.[2]

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

APRIL 2021

[2] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.