No. 20-7667

IN THE SUPREME COURT OF THE UNITED STATES

TROY KENDRICK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH 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. 20-7667

TROY KENDRICK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

_______________

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

_______________

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

_______________

Petitioner contends (Pet. 31-33) that the district court erred in calculating his advisory Sentencing Guidelines range under the career-offender guideline, which applies if the defendant commits a felony "crime of violence" or "controlled substance offense" and "has at least two prior felony convictions" for such offenses. Sentencing Guidelines § 4B1.1(a). In particular, petitioner contends (Pet. 31) that his conviction in this case for conspiring to distribute and possess with intent to distribute powder cocaine, cocaine base, and marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846, is not a "controlled substance offense." 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). Petitioner notes (Pet. ii) that the same question is presented in the pending petition for a writ of certiorari in Tabb v. United States, No. 20-579 (filed Oct. 28, 2020).

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, petitioner's challenge to the validity of Application Note 1 does not warrant this Court's review at this time.[1] Petitioner's argument 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 Pet. 32-33) 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.

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

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

JUNE 2021

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