No. 21-6403

IN THE SUPREME COURT OF THE UNITED STATES

GARLAND GUILLORY, 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
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. 21-6403

GARLAND GUILLORY, 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. 20-32) that the district court erred in calculating his advisory Sentencing Guidelines range under the career-offender Guideline, which applies if "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense" and the defendant "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2018). In particular, petitioner contends that his conviction for conspiring to possess 500 grams or more of cocaine hydrochloride and 28 grams or more of cocaine base with intent to distribute, in violation of 21 U.S.C. 846, is not a "controlled

substance offense" within the meaning of Section 4B1.1 and that Application Note 1 to the definition of "controlled substance offense" is invalid insofar as it interprets that definition to include conspiracy offenses. See Sentencing Guidelines § 4B1.2, comment. (n.1) (2018) ("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.") (emphases omitted).

This Court has recently and repeatedly declined to review similar challenges to the validity of Application Note 1. See United States v. Tabb, 949 F.3d 81 (2d Cir. 2020), cert. denied, 141 S. Ct. 2793 (2021) (No. 20-579); United States v. Kendrick, 980 F.3d 432 (5th Cir. 2020), cert. denied, 141 S. Ct. 2866 (2021) (No. 20-7667); United States v. Broadway, 815 Fed. Appx. 95 (8th Cir. 2020) (per curiam), cert. denied, 141 S. Ct. 2792 (2021) (No. 20-836); United States v. Sorenson, 818 Fed. Appx. 668 (9th Cir. 2020), cert. denied, 141 S. Ct. 2822 (2021) (No. 20-7099); United States v. Wiggins, 840 Fed. Appx. 498 (11th Cir.) (per curiam), cert. denied, 142 S. Ct. 139 (2021) (No. 20-8020). For the reasons stated at pages 9 to 27 of the government's brief in opposition in Tabb, supra (No. 20-579), the same course is warranted here.[1]

Petitioner's argument is inconsistent with the text, context, and design of the career-offender guideline and its commentary,

---

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

see Br. in Opp. at 9-13, Tabb, supra (No. 20-579); is not supported by either Kisor v. Wilkie, 139 S. Ct. 2400 (2019), or other precedent of this Court, see Br. in Opp. at 13-17, Tabb, supra (No. 20-579); and is based on an incorrect understanding of Application Note 1 and its history, see id. at 18-23. Moreover, the United States Sentencing Commission has already begun the process of addressing the recent disagreement in the courts of appeals (see Pet. 20-24) 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 the petition for a writ 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)).

In any event, this case would be an unsuitable vehicle in which to address petitioner's contention. Petitioner failed to raise this claim before the district court, so the issue is subject only to plain-error review. Pet. App. 3a; see Pet. 19 (acknowledging that petitioner "did not object to the career offender enhancement" at sentencing). And petitioner acknowledges that his plea agreement included "a broad and restrictive appeal waiver, waiving his right to appeal any sentence below the

statutory maximum." Pet. 20 n.2. While petitioner suggests (ibid.) that the government's conduct "in the proceedings below" renders this waiver unenforceable, those proceedings consisted of petitioner's own motion for summary affirmance. Petitioner does not explain why the government's decision not to oppose that motion would constitute waiver of its rights under the plea agreement. See ibid. (citing only United States v. Story, 439 F.3d 226, 229-231 (5th Cir. 2006), which concluded only that an appeal waiver was "not binding" on a government-waiver rationale where "neither party mention[ed] the appeal waiver in their respective briefs").

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

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

DECEMBER 2021

[2] The government waives any further response to the petition unless this Court requests otherwise.