No. 22-5879

IN THE SUPREME COURT OF THE UNITED STATES

EUGENE THURMAN, 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

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Petitioner contends (Pet. 2-3) that the district court erred in calculating his advisory Sentencing Guidelines range under Section 2K2.1(a)(1) of the Guidelines, which applies if the defendant commits the current gun-related offense after having "sustain[ed] at least two felony convictions of either a crime of violence or a controlled substance offense," and which incorporates the definition of "controlled substance offense" set forth in the career-offender guideline. Sentencing Guidelines § 2K2.1(a)(1) (2018); see id. § 2K2.1, comment. (n.1). In particular, petitioner contends (Pet. 2-3) that his prior federal conviction for conspiring to distribute cocaine base (crack

cocaine) with intent to distribute is not a "controlled substance offense" and that Application Note 1 to the definition of "controlled substance offense" in the career-offender guideline is invalid insofar as it interprets that definition to include drug-trafficking conspiracies. See Sentencing Guidelines § 4B1.2, comment. (n.1) ("For purposes of this 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, 141 S. Ct. 2793 (2021) (No. 20-579), petitioner's challenge to the validity of Application Note 1 does not warrant this Court's review.[1] Petitioner's challenge is inconsistent with the text, context, and design of the career-offender 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. 4-9)

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

over the validity of Application Note 1. Br. in Opp. at 23-25, Tabb, supra (No. 20-579); cf. U.S. Sentencing Comm'n, Commission Regains a Quorum for the First Time in Three Years, Enabling it to Amend Federal Sentencing Guidelines, Issue Sentencing Policy (Aug. 5, 2022) (noting the Senate confirmation in August 2022 of "seven bipartisan members to serve" on the Commission), perma.cc/SY2N-HT4C. No sound basis exists for this Court to depart from its usual practice of leaving to the Commission the task of resolving Guidelines issues. See Braxton v. United States, 500 U.S. 344, 348 (1991).

The Commission "lacked a quorum of voting members" in recent years, Guerrant v. United States, 142 S. Ct. 640, 641 (2022) (statement of Sotomayor, J., respecting the denial of certiorari), but it has now returned to full strength and is more than capable of resolving any important controversies in the application of the Guidelines, whether based on disagreement about the commentary or otherwise. And the Commission has in fact specifically announced that one of its policy priorities for the immediate future is a "[m]ultiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary." 87 Fed. Reg. 67,756, 67,756 (Nov. 9, 2022).

This case would also be an unsuitable vehicle in which to address the validity of Application Note 1. As a threshold matter, petitioner's challenge arises in the context of Section 2K1.1, which incorporates Application Note 1 of Section 4B1.2 only

indirectly. See Sentencing Guidelines § 2K2.1, comment. (n.1). In addition, petitioner fails to demonstrate that the issue would have any practical effect on his sentence. The court of appeals found that any error in the calculation of petitioner's advisory Guidelines range would have been "harmless" here because the "district court stated it would have imposed an 'identical' sentence even if the guidelines range" as calculated under Application Note 1 had been "'incorrect.'" Pet. App. 14 n.11. Indeed, the district court indicated at sentencing that petitioner's "criminal history," including "six felony convictions" and "numerous domestic abuse battery charges and other arrests," would have warranted an even longer sentence than the 120 months -- the statutory maximum -- that the court actually imposed. Id. at 25-26.

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

Respectfully submitted.

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Solicitor General

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