No. 22-6264

IN THE SUPREME COURT OF THE UNITED STATES

RANDALL EDDIE MELLON, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6) that the district court erred in applying Sentencing Guidelines § 2K2.1(b)(4) to calculate his advisory sentencing range. Section 2K2.1(b)(4) provides for a two-level enhancement to the base offense level otherwise prescribed in the Guidelines for offenses involving the unlawful receipt, possession, or transportation of firearms "[i]f any firearm * * * was stolen." Sentencing Guidelines § 2K2.1(b)(4). The Sentencing Commission's commentary to Section 2K2.1 states that the two-level enhancement "applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen." Sentencing Guidelines § 2K2.1, comment. (n.8(B)).

In petitioner's view, the two-level enhancement applies only if the defendant "knew the gun was stolen." Pet. 16. Petitioner argues that the commentary disclaiming any knowledge requirement is invalid; that the court of appeals erred in adhering to its precedent adopting the commentary's approach; and that the decision below implicates a division of authority among the courts of appeals regarding the relevance of this Court's decision in Kisor v. Wilkie, 139 S. Ct. 2400 (2019), to interpreting the Guidelines and commentary. See Pet. 7-18.

For reasons set forth in the government's brief in opposition in Moses v. United States, cert. denied, No. 22-163 (Jan. 9, 2023), the Kisor question raised in the petition for a writ of certiorari does not warrant this Court's review. See Br. in Opp. at 13-15, 18-20, Moses, supra (No. 22-163) (Moses Br. in Opp.).[1] Petitioner overstates the degree of any conflict of authority about whether and how Kisor applies in the distinct context of the Commission's commentary to the Guidelines, and in any event the Commission is already undertaking a "[m]ultiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary." Id. at 20 (quoting 87 Fed. Reg. 67,756, 67,756 (Nov. 9, 2022)); see id. at 18-20. This Court has repeatedly and recently denied petitions for writs of certiorari seeking review of questions concerning the applicability of Kisor

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

to the Guidelines, and the same course is warranted here. See id. at 9 n.2 (collecting cases).

After the petition in this case was filed, the Eleventh Circuit determined in United States v. Dupree, No. 19-13776, 2023 WL 227633 (Jan. 18, 2023) (en banc), that "Kisor's refined deference scheme" applies in the context of the Guidelines, as the government had urged. Id. at *6. The court also declined to follow the Commission's commentary to the particular guideline at issue there, which the court found "unambiguously" foreclosed the commentary's direction. Id. at *6-*8. But that decision did not meaningfully alter the status quo in the circuit courts. See Moses Br. in Opp. at 18-19 (noting that no circuit decision cited there "definitively holds that Kisor is altogether inapplicable to Guidelines commentary"). Dupree also does not suggest that the Eleventh Circuit would reach a different result with respect to the firearm guideline applied in petitioner's case. To the contrary, the court has long held that the text of the guideline at issue here is "not ambiguous" and "clearly" contains no "mens rea requirement." Pet. App. 1, at 5 (citation omitted).

This case would therefore be an unsuitable vehicle for further review of any Kisor question. The commentary at issue here simply confirms what the plain text of Section 2K2.1(b)(4) already directs. The text of the stolen-firearm enhancement guideline, like the commentary, does not require proof that the defendant knew that the firearm was stolen. See Sentencing Guidelines

§ 2K2.1(b)(4) ("If any firearm * * * was stolen, increase by 2 levels.") (emphasis omitted). As petitioner acknowledges (Pet. 17), the courts of appeals have unanimously recognized that the stolen-firearm enhancement applies "on a strict liability basis, without regard to whether the defendant knew the firearm was stolen."

The courts of appeals reached that uniform consensus even before the Sentencing Commission promulgated commentary confirming that knowledge is not required -- commentary that was, notably, subject to both notice-and-comment and congressional-review procedures. See Sentencing Guidelines App. C, Amend. 478 (Nov. 1, 1993) (adding the commentary now found at Application Note 8(B), quoted at p. 1, supra); 58 Fed. Reg. 27,148, 27,150 (May 6, 1993); 57 Fed. Reg. 62,832, 62,838 (Dec. 31, 1992); see also, e.g., United States v. Schnell, 982 F.2d 216, 220 (7th Cir. 1992) (observing that "the guideline is unambiguous," that "the language of [the enhancement] makes no reference to mental states," and that "both the structure and the history of the guidelines clearly show that the Sentencing Commission intended to omit the element of mens rea"); id. at 219 (collecting cases). Here, the court of appeals adhered to a precedent decided shortly after the promulgation of the relevant commentary, in which the court rejected any mens rea requirement without relying on the commentary. See United States v. Richardson, 8 F.3d 769, 770 (11th Cir. 1993), cert. denied, 510 U.S. 1203 (1994).

To the extent that any doubt might remain, this Court would not be a suitable forum for that guideline-specific issue. See Braxton v. United States, 500 U.S. 344, 347-349 (1991); Sup. Ct. R. 10. That is likewise true of petitioner's subsidiary argument that Section 2K2.1(b)(4) applies only if the gun at issue was stolen "during the course of the offense." Pet. 16. Petitioner does not identify any conflict of authority on that issue. Furthermore, the text of the stolen-firearm enhancement contains no such requirement, and the context of the enhancement strongly counsels against petitioner's reading.

The stolen-firearm enhancement applies to offenses involving the unlawful receipt, possession, sale, or transportation of firearms, see Sentencing Guidelines § 2K2.1, not to theft offenses. Although theft might be the immediate means by which a defendant comes into unlawful possession of the gun or guns at issue, nothing in the text or context of Section 2K2.1 suggests that the stolen-firearm enhancement applies only in such narrow circumstances -- and not, for example, when the defendant buys a stolen firearm. Petitioner's reliance (Pet. 15-16) on Sentencing Guidelines § 1B1.3 is misplaced. Section 1B1.3 specifies which conduct is relevant to calculating the defendant's current offense level, as opposed to the defendant's criminal history category. Nothing in that provision speaks to whether the stolen-firearm enhancement is limited to guns stolen during the commission of the current offense. By its plain terms, the enhancement is not so limited.

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.