

No. 23-5908

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL JAMES CHOULAT, 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. 23-5908

MICHAEL JAMES CHOULAT, 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. 12-19) that the district court erred in calculating his advisory Sentencing Guidelines range by applying the four-level enhancement in Section 2K2.1(b)(6)(B), which applies when (*inter alia*) the defendant "used or possessed any firearm or ammunition in connection with another felony offense." Sentencing Guidelines § 2K2.1(b)(6)(B) (2021). Petitioner argues that Application Note 14(B) to Sentencing Guidelines § 2K2.1 invalidly interprets the enhancement as applying when "a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia." § 2K2.1, comment. (n.14(B)) (2021).

Petitioner seeks certiorari on the question whether this Court's decision in Kisor v. Wilkie, 139 S. Ct. 2400 (2019), which concerns the degree of deference to an agency's interpretation of its own regulations, applies to Guidelines commentary. Pet i; see Pet. 5-22. For reasons set forth in the government's brief in opposition to the petition for a writ of certiorari in Ratzloff v. United States, No. 23-310, a copy of which is being served on petitioner's counsel and which addressed the same application note at issue here, while the government agrees that Kisor does apply to the Guidelines and commentary, that question does not warrant this Court's review. See Br. in Opp. at 12-18, Ratzloff, supra (No. 23-310) (filed Dec. 6, 2023). In particular, petitioner overstates the degree of any conflict about whether and how Kisor applies in the distinct context of the Sentencing Commission's commentary to the guidelines. Id. at 15-17. This Court has repeatedly and recently denied petitions for writs of certiorari seeking review of questions concerning the applicability of Kisor to the guidelines, see id. at 8 n.2 (collecting cases), and the same course is warranted here.¹

Moreover, the Sentencing Commission -- which has now returned to full strength after lacking a quorum of voting members in recent years -- is fully capable of resolving disputes concerning the

¹ Other pending petitions for writs of certiorari also raise the Kisor question. See, e.g., Vargas v. United States, No. 23-5875 (filed Oct. 23, 2023); Maloid v. United States, No. 23-6150 (filed Nov. 22, 2023); Netro-Perales v. United States, No. 23-6157 (filed Nov. 29, 2023).

application of particular commentary by amending the text of the Guidelines. See, e.g., Sentencing Guidelines Supp. to App. C, at 245 (Amendment 822) (eff. Nov. 1, 2023) (moving certain definitions in application notes to the relevant guideline text). Although the Commission has not done so for the particular application note at issue here, it has announced that one of its policy priorities for the immediate future is the “[c]ontinuation of its multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary.” 88 Fed. Reg. 60,536, 60,537 (Sept. 1, 2023); cf. Braxton v. United States, 500 U.S. 344, 348 (1991) (explaining that this Court should be “restrained and circumspect in using [its] certiorari power” to resolve guidelines issues in light of the Commission’s “statutory duty ‘periodically to review and revise’ the Guidelines”) (brackets and citation omitted).

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

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

DECEMBER 2023

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