

No. 23-6150

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IN THE SUPREME COURT OF THE UNITED STATES

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QUINDELL TYREE MALOID, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6-8, 11-17) that the district court erred in applying Sentencing Guidelines § 2K2.1, which increases the offense level if the defendant commits the offense “subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense,” in calculating his advisory Sentencing Guidelines range. Application Note 1 to Section 2K2.1 provides that “[c]rime of violence” has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.” Sentencing Guidelines § 2K2.1, comment. (n.1) (2018). And under the version of the Guidelines applicable to petitioner,

Application Note 1 of the commentary to Section 4B1.2 interpreted the definition of “crime of violence” to include inchoate offenses. See Sentencing Guidelines § 4B1.2, comment. (n.1) (2018) (defining “[c]rime of violence” [to] include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.”); see also § 4B1.2(b) (2018).

Petitioner contends that “crime of violence” does not include inchoate offenses, and he 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. 11-17. For reasons set forth in the government’s brief in opposition to the petition for a writ of certiorari in Ratzloff v. United States, cert. denied, No. 23-310 (Jan. 8, 2024), a copy of which is being served on petitioner’s counsel, 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). 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 recently denied certiorari in Ratzloff, which petitioner specifically identifies as presenting “the same question” that his own petition presents. Pet. 5; see Pet. 14

(primarily requesting that the Court grant certiorari in Ratzloff or another case and hold his petition pending the disposition of that one). And the Court has likewise repeatedly and recently denied certiorari in other cases seeking review of questions concerning the applicability of Kisor to the Guidelines, see Br. in Opp. at 8 n.2, Ratzloff, supra (No. 23-310) (collecting cases). The same course is warranted here.<sup>1</sup>

Moreover, the Sentencing Commission -- which has now returned to full strength after lacking a quorum of voting members in recent years -- has amended Section 4B1.2, effective November 1, 2023, to incorporate the substance of former Application Note 1 of that section into the guideline text itself. Sentencing Guidelines App. C Supp., Amend. 822; see Sentencing Guidelines § 4B1.2(d) (2023) ("The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense."). The deference owed to former Application Note 1 is thus of diminishing importance.<sup>2</sup>

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<sup>1</sup> 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); Choulat v. United States, No. 23-5908 (filed Oct. 25, 2023); Netro-Perales v. United States, No. 23-6157 (filed Nov. 29, 2023).

<sup>2</sup> In circuits that previously declined to defer to former Application Note 1, the government has agreed that the 2023 amendment should not be applied to defendants who committed their offenses before its effective date. See Peugh v. United States, 569 U.S. 530, 544 (2013) (finding that Ex Post Facto Clause is implicated for Guidelines enhancements enacted between the time of the crime and the time of sentencing).

As that episode illustrates, the Commission is fully capable of resolving disputes concerning the application of particular commentary by amending the text of the Guidelines. Indeed, the Commission 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.<sup>3</sup>

Respectfully submitted.

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<sup>3</sup> The government waives any further response to the petition unless this Court requests otherwise.