

No. 23-6157

IN THE SUPREME COURT OF THE UNITED STATES

MARIO ALBERTO NETRO-PERALES, 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. 23-6157

MARIO ALBERTO NETRO-PERALES, 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. 7) that his "previous criminal history was over-represented" under the Sentencing Guidelines, and that the district court erred in looking to Guidelines commentary in declining to depart downward from his advisory sentencing range. Petitioner's brief in the court of appeals asserted that in denying a downward departure, the district court improperly deferred to Application Notes 3 and 6 of the commentary to Section 2L1.2 of the advisory Sentencing Guidelines and Application Note 3 of the commentary to the policy statement in Section 4A1.3. Pet. C.A. Br. 5-6, 9.

Those application notes generally concern the defendant's criminal history, but do not provide specific instructions regarding when a departure is required or forbidden. See Sentencing Guidelines § 2L1.2, comment. (n.3) (2021) (providing that a prior "conviction taken into account" for purposes of calculating the offense level "is not excluded from consideration of whether that conviction receives criminal history points" for purposes of calculating the defendant's criminal history category); § 2L1.2, comment. (n.6) (2021) (observing that "[t]here may be cases in which the offense level provided by an enhancement * * * substantially understates or overstates the seriousness of the conduct underlying the prior offense"); § 4A1.3, comment. (n.3) (2021) (explaining that a "downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period"). 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. 2; see Pet. 8-12.

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, and has repeatedly and recently denied petitions for writs of certiorari 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.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 application of particular commentary by amending the text of the Guidelines. See, e.g., Sentencing Guidelines App. C Supp., Amend. 822 (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 notes 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

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); Choulat v. United States, No. 23-5908 (filed Oct. 25, 2023); Maloid v. United States, No. 23-6150 (filed Nov. 22, 2023).

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

FEBRUARY 2024

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