

No. 20-6807

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMAL CLINTON, AKA MORELESS, 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 SECOND CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 14-17) that the district court erred in calculating his advisory Sentencing Guidelines range under the career-offender guideline, which applies if the defendant commits a felony "crime of violence or a controlled substance offense" and the defendant "has at least two prior felony convictions" for such offenses. Sentencing Guidelines § 4B1.1(a). In particular, petitioner contends (Pet. 14) that his conviction in this case for conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846, is not a "controlled substance offense." Petitioner notes (Pet. 14) that the same question is presented in the pending

petition for a writ of certiorari in Tabb v. United States, No. 20-579 (filed Oct. 28, 2020).

To the extent that petitioner presses the same arguments as the petitioner in Tabb (cf. Pet. 14), his challenge to the validity of Application Note 1 to Sentencing Guidelines § 4B1.2, which makes clear that the definition of "controlled substance offense" includes conspiracies, see Sentencing Guidelines § 4B1.2, comment. (n.1), does not warrant this Court's review at this time for the reasons stated at pages 9 to 27 of the government's brief in opposition in Tabb.<sup>1</sup> Such a 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 over the validity of Application Note 1. See id. at 23-25. No sound basis exists for this Court to depart from its usual practice of leaving to the Commission the task of resolving Guidelines issues. Cf. Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari) (observing, with respect to another Guidelines dispute, that the

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<sup>1</sup> We have served petitioner with a copy of the government's brief in opposition in Tabb.

"Commission should have the opportunity to address [the] issue in the first instance, once it regains a quorum of voting members") (citing Braxton v. United States, 500 U.S. 344, 348 (1991)).

This case would also be an unsuitable vehicle in which to address petitioner's career-offender status because petitioner "did not challenge the procedural reasonableness of his sentence before the District Court," so the issue is subject only to plain-error review. Pet. App. A3. Even in this Court, petitioner does not clearly press the arguments at issue in Tabb, which concern the validity of Application Note 1 to Sentencing Guidelines § 4B1.2, but instead contends that a Section 846 drug-distribution conspiracy is not a "controlled substance offense" for purposes of the career-offender guideline because Section 846 purportedly "criminalizes more conduct, and is broader than, the generic definition of a conspiracy." Pet. 18-19; see Pet. 17-22; Pet. C.A. Br. 22-27. This Court has repeatedly declined to grant petitions for writs of certiorari raising similar claims. See, e.g., Morales-Lopez v. United States, 577 U.S. 1052 (2015); Hernandez-Hernandez v. United States, 572 U.S. 1063 (2014); Gutierrez-Landeros v. United States, 571 U.S. 1205 (2014); Rodriguez-Escareno v. United States, 569 U.S. 967 (2013). The same course is warranted here.

The petition for a writ of certiorari should be denied.<sup>2</sup>

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<sup>2</sup> The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.

Respectfully submitted.

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APRIL 2021