

No. 20-7099

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IN THE SUPREME COURT OF THE UNITED STATES

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BRANDON LAMONTE SORENSON, 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 NINTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 3, 6-14) that the district court erred in calculating his advisory Sentencing Guidelines range based on an enhancement that applies to defendants who commit certain firearms offenses after "sustaining one felony conviction of either a crime of violence or a controlled substance offense," Sentencing Guidelines § 2K2.1(a)(4)(A), as those terms are defined in Sentencing Guidelines § 4B1.2(a) and (b). In particular, petitioner contends (Pet. 14, 20) that his prior Montana conviction for distribution of dangerous drugs is not a "controlled substance offense," on the theory that the least culpable conduct prohibited by the relevant state statute is an "offer[] to sell"; that the

text of Section 4B1.2(b)'s definition of "controlled substance offense" does not include solicitation and attempt offenses; and that Application Note 1 to the definition is invalid insofar as it interprets that definition to include such offenses. See Sentencing Guidelines § 4B1.2, comment. (n.1) ("Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.") (emphasis omitted).

For the reasons stated at pages 9 to 27 of the government's brief in opposition to the petition for a writ of certiorari in Tabb v. United States, No. 20-579, petitioner's challenge to the validity of Application Note 1 does not warrant this Court's review at this time.<sup>1</sup> Petitioner's challenge is inconsistent with the text, context, and design of the 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 (see Pet. 7-13) over the validity of Application Note 1. Br. in Opp. at 23-25, Tabb, supra (No. 20-579). No sound basis exists for this Court to depart from its usual practice of leaving to 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 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 “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)).

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

Respectfully submitted.

ELIZABETH B. PRELOGAR  
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APRIL 2021

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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.