

No. 20-7742

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IN THE SUPREME COURT OF THE UNITED STATES

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DEANDRE JOSEPH WARREN, 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 EIGHTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 4-8) 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 “has at least two prior felony convictions” for such offenses. Sentencing Guidelines § 4B1.1(a). In particular, petitioner contends (Pet. 5-8) that his prior state convictions for delivering or distributing a controlled substance are not “controlled substance offense[s]” on the theory that the least culpable conduct prohibited by the relevant state statutes is attempted delivery; the text of the career-offender guideline’s definition of

"controlled substance offense" excludes attempt offenses; and Application Note 1 to the definition is invalid insofar as it interprets that definition to include attempt offenses. See Sentencing Guidelines § 4B1.2, comment. (n.1) ("For purposes of [the career-offender] guideline \* \* \* '[c]rime 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 (filed Oct. 28, 2020), petitioner's challenge to the validity of Application Note 1 does not warrant this Court's review at this time.\* Petitioner's argument 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. 6-8) 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

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\* We have served petitioner with a copy of the government's brief in opposition in Tabb.

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 the petition for a writ 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)).

This case would be a particularly unsuitable case for further review, because any error was harmless. Although the court of appeals did not need to address the point, the district court stated that it would have imposed the identical sentence regardless of the career-offender enhancement. See Pet. App. B7-B8. Petitioner accordingly would not be entitled to relief on appeal, irrespective of any potential resolution of the question presented in his favor.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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