

No. 23-5236

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IN THE SUPREME COURT OF THE UNITED STATES

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MARVAS AURELIEN, 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 ELEVENTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 4-6) that his Florida conviction for possession of cannabis with intent to sell or deliver is not a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) (2018). He argues (Pet. 5) that a prior state conviction involves a "controlled substance" for purposes of Section 4B1.2(b) only if the substance is also listed on the federal drug schedules, and that the Florida drug schedules include a broader range of substances than the federal schedules. He further argues (Pet. 4-5) that a court should consult the drug schedules (whether state or federal) as they exist at the time of

the defendant's federal offense or sentencing, rather than at the time of his prior state crime, and by those points, that state as well as federal law encompassed a narrower range of substances than the state law underlying his conviction.

As explained in the government's brief in opposition to the petition for a writ of certiorari in Demont v. United States, No. 22-7904 (June 27, 2023), which presents similar arguments, the term "controlled substance offense" in Sentencing Guidelines § 4B1.2(b) includes substances that are controlled under relevant state law but not under the federal Controlled Substances Act, 21 U.S.C. 801 et seq. See Gov't Br. in Opp. at 9-13, Demont, supra (No. 22-7904).<sup>1</sup> And as further explained in that brief, the correct approach in determining whether a defendant's prior state crime qualifies as a predicate under Section 4B1.2(b) is to look to the state drug schedules applicable at the time that the crime occurred. See id. at 15-18. That brief also explains that any conflict on the questions presented does not warrant this Court's review; this Court ordinarily does not review decisions interpreting the Guidelines because the Sentencing Commission can amend the Guidelines to eliminate any conflict or correct any error. Id. at 6-9.

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<sup>1</sup> The government has served petitioner with a copy of its brief in Demont, which is also available on this Court's online docket.

Moreover, as further explained in the brief in opposition in Demont, although this Court has granted certiorari in Jackson v. United States, 143 S. Ct. 2457 (2023) (No. 22-6640), and Brown v. United States, 143 S. Ct. 2458 (2023) (No. 22-6389), to review a similar timing question in the context of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), it is unnecessary to hold Guidelines cases pending the Court's decision on the ACCA question, because the ACCA and Guidelines questions are distinct. See Gov't Br. in Opp. at 21-22, Demont, supra (No. 22-7904). On May 1, 2023, this Court denied the petition for a writ of certiorari in Altman v. United States, 143 S. Ct. 2437 (No. 22-5877), which, like petitioner's case, raised the timing question in the Guidelines context. See Pet. at i, 8-9, Altman, supra (No. 22-5877). It should do the same here.

To the extent, however, that the Court may nevertheless perceive the Guidelines issue to be properly influenced by the ACCA issue, the Court could elect to hold petitions presenting the Guidelines issue pending its resolution of the ACCA issue in Jackson and Brown. But it need not do so, and the ACCA conflict provides no sound reason for plenary consideration of the separate Guidelines question.<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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