

No. 23-5358

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IN THE SUPREME COURT OF THE UNITED STATES

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DEVIN JERROD LONG, 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 SIXTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 8-9, 18-21) that his prior marijuana-related conviction under Tennessee law, Pet. App. 1, is not a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) because he was convicted of that crime at a time when the state definition of marijuana included hemp, which had been removed from the state and federal drug schedules by the time of his federal sentencing, Pet. App. 1-2. Petitioner argues (Pet. 8-9, 18-21) that the classification of his prior state conviction as a "controlled substance offense," Sentencing Guidelines § 4B1.2(b), should depend on the drug schedules in effect at the

time of his federal sentencing, rather than at the time of his state crime.

For the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Demont v. United States, cert. denied, No. 22-7904 (Oct. 10, 2023), which presented a similar claim, the correct approach in determining whether a defendant's prior state drug crime qualifies as a predicate under Section 4B1.2(b) is to look to the state drug schedules applicable at the time that crime occurred. See Gov't Br. in Opp. at 15-18, Demont, supra (No. 22-7904).<sup>1</sup> As that brief also explains, any conflict on the question 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.

The brief in opposition in Demont also explains that while this Court has granted certiorari in Jackson v. United States, No. 22-6640 (May 15, 2023), and Brown v. United States, No. 22-6389 (May 15, 2023), 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 like this one pending the Court's decision on the ACCA question, because the ACCA and

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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.

Guidelines questions are distinct. See Gov't Br. in Opp. at 16-18, Demont, supra (No. 22-7904). And the ACCA conflict provides no sound reason for plenary consideration of the separate Guidelines question. Accordingly, this Court has repeatedly and recently denied petitions for writs of certiorari raising this issue, including this Term.<sup>2</sup> It should follow the same course here.<sup>3</sup>

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<sup>2</sup> See Adzemovic v. United States, 2023 WL 6378792 (Oct. 2, 2023) (No. 23-5164); Tate v. United States, 2023 WL 6378716, (Oct. 2, 2023) (No. 23-5114); Hoffman v. United States, 2023 WL 6378471 (Oct. 2, 2023) (No. 22-7903); Wright v. United States, 2023 WL 6378468, (Oct. 2, 2023) (No. 22-7900); Lawrence v. United States, 2023 WL 6378466 (Oct. 2, 2023) (No. 22-7898); Turman v. United States, 2023 WL 6378348 (Oct. 2, 2023) (No. 22-7792); Williams v. United States, 2023 WL 6378308 (Oct. 2, 2023) (No. 22-7755); Moore v. United States, 2023 WL 6378267 (Oct. 2, 2023) (No. 22-7716); Ivery v. United States, 2023 WL 6378221 (Oct. 2, 2023) (No. 22-7675); Baker v. United States, 2023 WL 6378060 (Oct. 2, 2023) (No. 22-7359); Harbin v. United States, 2023 WL 6378004 (Oct. 2, 2023) (No. 22-6902); Clark v. United States, 2023 WL 6378001 (Oct. 2, 2023) (No. 22-6881); Edmonds v. United States, 2023 WL 6377999 (Oct. 2, 2023) (No. 22-6825); Demont v. United States, supra (No. 22-7904); Altman v. United States, 143 S. Ct. 2437 (2023) (No. 22-5877). Several other pending petitions for writs of certiorari raise the same issue. See Aurelien v. United States, No. 23-5236 (filed July 25, 2023); Lewis v. United States, No. 23-198 (filed Aug. 31, 2023); Ordunez v. United States, No. 23-5604 (filed Sept. 12, 2023); Johnson v. United States, No. 23-5665 (filed Sept. 26, 2023).

<sup>3</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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