

No. 23-198

In the Supreme Court of the United States

JAMAR M. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

In the Supreme Court of the United States

No. 23-198

JAMAR M. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 21-23, 28-32) that his New Jersey marijuana conviction is not a “controlled substance offense” under Sentencing Guidelines § 4B1.2(b) (2018) for two alternative reasons. He argues (Pet. 28-32) 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 New Jersey drug schedules include a broader range of substances than the federal schedules. He further argues (Pet. 21-23) that a court should consult the drug schedules (whether state or federal) as they existed at the time when federal consequences associated with the state crime attach, rather than at the time of his prior state crime, and that in his case, state as well as federal law narrowed the range of controlled substances between those two crimes.

(1)

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 (Aug. 30, 2023), which presents similar claims, 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).¹ 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 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.

The brief in opposition in *Demont* additionally 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 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

¹ The government has served petitioner with a copy of its brief in *Demont*, which is also available on this Court’s online docket.

question. This Court has recently and repeatedly denied petitions for writs of certiorari raising this issue, including the petition in *Demont* and other petitions this Term,² and should follow the same course here.³

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NOVEMBER 2023

² See *Aurelien v. United States*, 2023 WL 7117099 (Oct. 30, 2023) (No. 23-5236); *Demont v. United States*, *supra* (No. 22-7904); *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); *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 *Long v. United States*, No. 23-5358 (filed Aug. 10, 2023); *Nerius v. United States*, No. 23-5364 (filed Aug. 14, 2023); *Ordunez v. United States*, No. 23-5604 (filed Sept. 12, 2023); *Johnson v. United States*, No. 23-5665 (filed Sept. 26, 2023).

³ The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.