No. 23-198

IN THE
Supreme Court of the United States

JAMAR LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Government's three-page letter confirms this Court should grant the petition, or at minimum, hold it in abeyance pending the decision in *Brown* and *Jackson*. To do anything else is to treat Petitioner Jamar Lewis—whose liberty is on the line—with less solicitude than this Court has traditionally shown similarly situated petitioners in similarly situated Sentencing Guidelines cases over the last two decades.

Start with why this Court should grant plenary review. The Government does not deny that the

petition squarely implicates two entrenched circuit splits on issues of national importance. The Government does not deny that the Third Circuit's combined decision on the two questions presented "turns the categorical approach on its head." *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385, 393 (2017). And the Government does not deny that this case is an ideal vehicle.

Neither of the two reasons the Government does offer to purportedly deny review carries water.

First, the Government's incorporated-by-reference brief rehashes the same merits arguments on which the courts of appeals are plainly and irrevocably split. *See* Br. in Opp. 9-13, 15-18, *Demont* v. *United States*, No. 22-7904 (Aug. 30, 2023) ("*Demont* BIO"). Those arguments are wrong, Pet. 21-23, 28-32, and beside the point: Both sides of these issues have already been thoroughly ventilated in the lower courts. This Court should resolve that debate.

Second, the Government insists the Court should never review the two questions presented—independently or in concert—simply because they involve the Sentencing Guidelines.

Wrong again. This Court should not wholly abrogate its solemn constitutional "duty" "to say what the law is" just because the law in question is the Sentencing Guidelines. *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803). Instead, this Court allows the Sentencing Commission the chance to rectify circuit splits in the "first instance." *See* Pet. 36 (quotation omitted). That first opportunity has come and gone.

In the face of the Commission's consistent failure to act, this Court should step in. To do anything less is

to surrender judicial review to an unelected agency on matters of federal law that affect every single defendant in the federal criminal justice system. That bizarre result would be as incorrect, and as unconstitutional, as it sounds.

At the very least, the Court should hold this case pending resolution of *Brown* and *Jackson*. *Brown* and *Jackson* present an identical timing question under the Armed Career Criminal Act (ACCA); the parties in *Brown* and *Jackson* dispute the proper understanding of this Court's decision in *McNeill* v. *United States*, 563 U.S. 816 (2011), which was at issue in the decision below; and this Court's decision in *Brown* and *Jackson* will thus likely affect the reasoning of the decision below. This is a textbook case for a GVR. And as the National Association for Public Defense (NAPD) explains, and as the Government completely ignores, this Court has consistently held and GVR'd dozens of similar sentencing cases in light of *Mathis* v. *United States*, 579 U.S. 500 (2016), and *Johnson* v. *United States*, 576 U.S. 591 (2015). There is no coherent reason to treat this petition any differently—especially given the unique equity and liberty interests at stake for Jamar Lewis.

Certiorari should be granted. Alternatively, this case should be held pending the resolution of *Brown* and *Jackson* and disposed of as appropriate in light of that decision.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW ON THE TIMING QUESTION, OR AT LEAST HOLD THIS PETITION.

1. The circuits are deeply divided over whether, under *McNeill*, "controlled substance" is defined as of the time when federal consequences attach, or at the time of the predicate offense. Five circuits read *McNeill* narrowly as defining only the elements of the predicate—not the comparator. Those circuits correctly look to the law in effect when federal consequences attach to define "controlled substance." Pet. 14-17. Two circuits read *McNeill* to support defining the comparator based on the law in effect at the time of the predicate. Pet. 17-19. Two more circuits adopt differing approaches under ACCA and the Guidelines. Pet. 19-20. That entrenched split, over an important question affecting thousands of criminal defendants each year, warrants certiorari. *See, e.g.*, Pet. 13-23; Br. of Amicus Curiae Nat'l Ass'n for Pub. Def. in Supp. of Pet'r 15-18, 24-29 ("NAPD Br.").[1]

2. At minimum, however, the Court should hold this case pending resolution of *Brown* and *Jackson*, which involve the identical timing question under ACCA.

As amicus NAPD explains, "if a pending case presents an issue the resolution of which could" affect a second case, the appropriate action is to hold the second case until the first is resolved, "and consider

[1] To the extent the Government argues certiorari review of the timing question is inappropriate because it involves the Guidelines, *see* BIO 2; *Demont* BIO 6-9, its argument fails for the reasons explained *infra* 9-10.

GVR if appropriate." NAPD Br. 8. GVRs are an "integral part" of this Court's practice, and the bar for a hold-and-GVR is low. *Lawrence on Behalf of Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996). This Court asks only whether there is a "reasonable probability" that an intervening event might affect the "premise" of the lower court's opinion. *Id.* at 167; *accord Grzegorczyk* v. *United States*, 142 S. Ct. 2580, 2583 (2022) (Sotomayor, J., respecting the denial of certiorari) (explaining that a petition requesting a hold need not prove with "an absolute certainty that the judgment would be different on remand"). And because "[w]hether a GVR order is ultimately appropriate depends * * * on the equities of the case," *Lawrence*, 516 U.S. at 167-168, GVRs are particularly appropriate in the criminal context, *see Stutson* v. *United States*, 516 U.S. 193, 196-197 (1996); NAPD Br. 8.

True to form, the Court has utilized this process countless times in criminal cases. Most relevant here, the Court has an established practice of holding-and-GVR'ing sentencing cases pending resolution of a case involving a similar issue under ACCA. Indeed, amicus NAPD identified over 80 such cases held and GVR'd after *Mathis* and *Johnson*. NAPD Br. 8-11.

This Court should not treat this petition any differently. There is a "reasonably probability" that resolving the timing question in *Brown* and *Jackson* will affect the proper interpretation of the first question presented. Both involve the same basic issue, both turn on the proper interpretation of *McNeill*, and both involve similar policy considerations. *See* NAPD Br. 11-15; Pet. 14-21. Indeed, in *Brown* and *Jackson*, the Government

argues at length that *McNeill* "carries over" and "applies equally" to the timing question presented under ACCA. Br. for the United States 29-33, 36-40, *Brown* v. *United States*, No. 22-6389 & *Jackson* v. *United States*, No. 22-6640 (Aug. 21, 2023). The Government leans equally heavily on *McNeill* in arguing for a time-of-conviction approach under the Guidelines. *E.g.*, *Demont* BIO 17-18. *McNeill* also played a key role in the decision below. The Third Circuit "start[ed] with *McNeill*," emphasizing that case's "persuasive" value. Pet. App. 14a-15a. The Third Circuit then invoked *McNeill* more than ten times to support its textual interpretation, its policy argument, and its break with the circuits adopting a time-of-consequences rule. Pet. App. 14a-17a. And courts adopting the time-of-consequences approach analyze and distinguish *McNeill*. *See, e.g.*, *United States* v. *Abdulaziz*, 998 F.3d 519, 525-527 (1st Cir. 2021); *United States* v. *Williams*, 48 F.4th 1125, 1142-1143 (11th Cir. 2022). Because *Brown* and *Jackson* will likely clarify the proper interpretation of *McNeill*, a hold is warranted on this basis alone.

A hold is even more appropriate here because of the unique equities and liberty interests at stake. *See Lawrence*, 516 U.S. at 167-168; *Stutson*, 516 U.S. at 196-197. Lewis is currently serving a three-year term of supervised release. The mandate in this case is stayed pending resolution of this petition. If this Court denies certiorari and declines to hold the case, Lewis will immediately be eligible to be resentenced and returned to prison. *See* Pet. 12.

3. The Government agreed with all of this—or at least it used to. In *Demont*, the Government agreed the Court could "elect to hold petitions presenting the

Guidelines issue pending its resolution of the ACCA issue in *Jackson* and *Brown*." *Demont* BIO 22. Despite incorporating that brief by reference here, the Government now says a hold pending those cases would be inappropriate. *See* BIO 3. But the Government offers no principled reason for its about-face—let alone a reason for this Court to deviate from its established practice of holding and GVR'ing Guidelines cases that may be affected by a pending ACCA case presenting the same or a substantially similar question.

The Government suggests that a hold is unwarranted here because this Court generally "leav[es] Guidelines interpretation questions to the Commission." *Demont* BIO 21. That rationale would have applied equally to the Guidelines cases held pending *Mathis* and *Johnson*, too. But this Court did not follow the Government's preferred approach. Instead, the Court GVR'd those sentencing cases. Unable to muster a response to the more than 80 cases GVR'd after *Mathis* and *Johnson*, the Government simply ignores them. But refusing to acknowledge this Court's prior decisions does not somehow erase them from the annals of the U.S. Reports—let alone justify departing from established practice in this case. Nor is a hold pending resolution of *Brown* and *Jackson* unwarranted "because the ACCA and Guidelines questions are distinct." BIO 2. The same was technically true for the Guidelines cases held pending *Mathis* and *Johnson*—and is often true in many GVR'd cases, which need not perfectly overlap with the case decided by the Court.

Finally, the Government objects that a hold is improper simply because certiorari has already been

denied in other Guidelines cases raising the timing question. But the Government offers no reason why that should overcome this Court's settled GVR practice.

Regardless, this case is readily distinguishable from the litany of past petitions the Government cites. *See* BIO 3 n.2; *Demont* BIO 15 n.3. As the Petition explained, the Third Circuit's decision is especially egregious because the confluence of *both* questions presented "turns the categorical approach on its head." *Esquivel-Quintana*, 581 U.S. at 393; *see* Pet. 35, 37. But of the twenty cases the Government identifies, seventeen involved only one of the two questions presented.[2] Of the remaining three cases, one was subject to plain error review. *United States* v. *Moore*, No. 21-14210, 2023 WL 1434181, at *3 (11th Cir. Feb. 1, 2023), *cert. denied*, No. 22-7716, 2023 WL 6378267 (Oct. 2, 2023). In the second, the court of

[2] *Altman* v. *United States*, 143 S. Ct. 2437 (2023); *Adzemovic* v. *United States*, No. 23-5164, 2023 WL 6378792 (Oct. 2, 2023); *Tate* v. *United States*, No. 23-5114, 2023 WL 6378716 (Oct. 2, 2023); *Hoffman* v. *United States*, No. 22-7903, 2023 WL 6378471 (Oct. 2, 2023); *Wright* v. *United States*, No. 22-7900, 2023 WL 6378468 (Oct. 2, 2023); *Lawrence* v. *United States*, No. 22-7898, 2023 WL 6378466 (Oct. 2, 2023); *Turman* v. *United States*, No. 22-7792, 2023 WL 6378348 (Oct. 2, 2023); *Williams* v. *United States*, No. 22-7755, 2023 WL 6378308 (Oct. 2, 2023); *Ivery* v. *United States*, No. 22-7675, 2023 WL 6378221 (Oct. 2, 2023); *Baker* v. *United States*, No. 22-7359, 2023 WL 6378060 (Oct. 2, 2023); *Harbin* v. *United States*, No. 22-6902, 2023 WL 6378004 (Oct. 2, 2023); *Clark* v. *United States*, No. 22-6881, 2023 WL 6378001 (Oct. 2, 2023); *Edmonds* v. *United States*, No. 22-6825, 2023 WL 6377999 (Oct. 2, 2023); *Johnson* v. *United States*, No. 23-5665, 2023 WL 7287201 (Nov. 6, 2023); *Long* v. *United States*, No. 23-5358, 2023 WL 8007437 (Nov. 20, 2023); *Nerius* v. *United States*, No. 23-5364, 2023 WL 8007439 (Nov. 20, 2023); *Ordunez* v. *United States*, No. 23-5604 (filed Sept. 12, 2023).

appeals summarily affirmed the district court. *United States* v. *Demont*, No. 22-3281, 2023 WL 4277642, at *1 (8th Cir. Mar. 29, 2023), *cert. denied*, No. 22-7904, 2023 WL 6558414 (Oct. 10, 2023). And in the third, the court of appeals did not address the timing question. *United States* v. *Aurelien*, No. 21-12995, 2023 WL 1466602 (11th Cir. Feb. 2, 2023), *cert. denied*, No. 23-5236, 2023 WL 7117099 (Oct. 30, 2023).

This is thus the only case that squarely raises both the timing question and the federal-or-state-law question, resulting in a uniquely egregious decision below, and in which Petitioner has unequivocally advocated for a hold based on *Brown* and *Jackson* and explained why a hold would be consistent with this Court's usual practice. Certiorari should be granted, or the case should be held pending resolution of *Brown* and *Jackson*.

II. WHETHER "CONTROLLED SUBSTANCE" INCLUDES SUBSTANCES CONTROLLED ONLY BY STATE LAW WARRANTS REVIEW.

1. Review is also warranted to resolve the 3-6 split over whether "controlled substance" includes substances controlled under federal law only or also includes substances controlled under state law. Pet. 24-28. The Government instead urges this Court to abdicate its duty to decide *any* case involving the interpretation of the Guidelines. BIO 2; *Demont* BIO 6-9. This Court should refuse that invitation.

This Court does not allow any federal agency to operate in such an unchecked manner. Nor has this Court ever endorsed the sweeping principle the Government invokes here. Instead, the Court allows the Commission an initial opportunity to resolve the

question in the first instance. *See* Pet. 36-37; NAPD Br. 21-24.

That "first instance" has come and gone. The Court has already deferred this question multiple times, *see, e.g.*, *Demont* BIO 14 n.2, and the Commission has acknowledged this split but refused to resolve it, *see* Pet. 36. This Court should not hope against reason the Commission might one day wade into the fray, particularly when the second question presented is conspicuously absent from the Commission's list of priorities for the upcoming amendment cycle. *See* U.S. Sentencing Comm'n, *Federal Register Notice of Final 2023-2024 Priorities,* https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2023-2024-priorities; *see also* Pet. 36 n.6.[3]

Clearly, the Commission is not getting the hint. This Court should step in. *See McClinton* v. *United States*, 143 S. Ct. 2400, 2403 (2023) (statement of Sotomayor, J., respecting the denial of certiorari) (when the Commission is aware of an issue but "does not act expeditiously or chooses not to act, * * * this Court may need to take up the * * * issue[ ]").

2. The Government attempts to downplay the Commission's refusal to resolve this divisive issue, but its objections don't add up.

The Government argues that this circuit split is "relatively recent." *Demont* BIO 8. Wrong. The federal-or-state-law issue has been circulating in the courts of appeals since at least 2012, and the split is three years old. *See* Pet. 24-28. Besides, age is just a

[3] The Commission has offered no indication that it intends to resolve the first question presented either, which is similarly absent from the Commission's list of priorities.

number. The proper question is whether the split has adequately percolated such that the arguments on each side are sufficiently developed. They are. *Cf., e.g.*, *Kimbrough* v. *United States*, 552 U.S. 85, 93 n.4 (2007) (granting certiorari to resolve one-year-old Guidelines-related split).

The Government protests that the Commission only recently "obtained a quorum." *Demont* BIO 8. But the Commission has had fifteen months to resolve the second question presented, or signal its intent to do so in the near future. And the Commission is capable of acting quickly when it so chooses. *See, e.g.*, U.S. Sentencing Comm'n, *Amendment to the Sentencing Guidelines*, 2 (Jan. 21, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf (striking Guidelines' residual clause seven months after *Johnson* invalidated ACCA's residual clause). The Commission has simply elected not to do so here.

The Government's suggestion that review of Guidelines decisions is unwarranted because "the Guidelines [are] advisory only" is equally meritless. *Demont* BIO 6. The Guidelines provide "the essential framework * * * for sentencing proceedings." *Molina-Martinez* v. *United States*, 578 U.S. 189, 198 (2016). "Federal courts * * * *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* (quotation omitted). Even if the sentencing judge adopts a variance, the Guidelines still functionally "anchor the [district] court's decision" by providing "the beginning point" for the initial sentencing range. *Id.* at 198-199 (cleaned up).

Finally, the Government insists that this Court should deny review because "the Commission *could* address those issues in the future." *Demont* BIO 8 (emphasis added). That is true of virtually every interpretive question on this Court's docket: Congress *could* decide whether "serious drug offense" under ACCA incorporates drug schedules in effect at the time of the federal offense or the state predicate, for example. But in light of the entrenched split and its importance to criminal defendants nationwide, this Court granted certiorari. There is no reason to treat this case differently. *See* NAPD Br. 18-19.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE IMPORTANT QUESTIONS PRESENTED.

1. The questions presented are of the utmost importance to criminal defendants. Allowing this split to persist perpetuates sentencing dis-uniformity nationwide, the precise problem the Guidelines were created to resolve. *See* Pet. 32-33. These discrepancies are particularly concerning because deeming a prior conviction a "controlled substance offense" can dramatically affect a defendant's presumptive sentencing range—often by a decade or more. *See, e.g.*, *United States* v. *Ward*, 972 F.3d 364, 368 (4th Cir. 2020) (range increased six-fold, from 24-30 months to 151-188 months); *see also* NAPD Br. 24-28 (explaining disproportionate effects of such enhancements).

2. This case is an excellent vehicle for merits review. The circuit splits are clear, the issues have been adequately ventilated, and this is the only case of which Lewis is aware that squarely tees up both the timing question and the federal-or-state-law question. The Government does not offer any vehicle objections

specific to this case, and its blanket objections to granting certiorari in any Guidelines case fail for the reasons explained.

CONCLUSION

For the foregoing reasons, and those in the petition, certiorari should be granted. Alternatively, the Court should hold this petition pending resolution of *Brown* and *Jackson* and dispose of it in light of those decisions.

Respectfully submitted,

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