

No. 23-5364

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ALEXANDER NERIUS, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6-8) that his prior cocaine-related convictions under Florida law, Presentence Investigation Report (PSR) ¶ 22, are not categorically “controlled substance offense[s]” under Sentencing Guidelines § 4B1.2(b) because he was convicted of those crime at a time when the state definition of cocaine included ioflupane, which had been removed from the state and federal drug schedules by the time of his federal sentencing. Petitioner argues (Pet. 6-8) that the classification of his prior state convictions as “controlled substance offense[s],” 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 crimes.

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. 6, 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).¹ 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.

This Court has repeatedly and recently denied petitions for writs of certiorari raising this issue, including this Term.² It

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

² See Adzemovic v. United States, 2023 WL 6378792 (Oct. 2, 2023) (No. 23-5164); Tate v. United States, cert. denied, No. 23-5114 (Oct. 2, 2023); Hoffman v. United States, 2023 WL 6378471 (Oct. 2, 2023) (No. 22-7903); Wright v. United States, cert. denied, No. 22-7900, (Oct. 2, 2023); Lawrence v. United States, 2023 WL 6378466 (Oct. 2, 2023) (No. 22-7898); Turman v. United States, cert. denied, No. 22-7792 (Oct. 2, 2023); Williams v. United States, cert. denied, No. 22-7755 (Oct. 2, 2023); Moore v. United States, cert. denied, No. 22-7716 (Oct. 2, 2023); Ivery v.

should follow the same course here. As explained in the brief in opposition in Demont, although 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 question.³

This case would, moreover, be an especially poor vehicle to address the Guidelines question because this Court's "traditional rule * * * precludes a grant of certiorari * * * when the

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, cert. denied, No. 22-6881 (Oct. 2, 2023); Edmonds v. United States, 2023 WL 6377999 (Oct. 2, 2023) (No. 22-6825); Demont v. United States, cert. denied, No. 22-7904 (Oct. 6, 2023); 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); Long v. United States, No. 23-5358 (filed Aug. 10, 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).

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

question presented was not pressed or passed upon below.” United States v. Williams, 504 U.S. 36, 41 (1992) (citation and internal quotation marks omitted); see EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986) (per curiam). Addressing petitioner’s challenges to his cocaine convictions, the court of appeals discussed only the question (raised for the first time on appeal) whether the federal or state drug schedules determine whether a prior state conviction involves a “controlled substance” for purposes of Section 4B1.2(b). See Pet. App. A3-A5. The timing question was not presented in the court of appeals, see Pet. C.A. Br. 10-27, but was instead raised for the first time in the petition for a writ of certiorari.

Respectfully submitted.

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