

Wiley Files *Amicus Brief* Urging Supreme Court Review of Circuit Split Over Interpretation of Federal Sentencing Guidelines

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Washington, DC - Working with the Supreme Court Program at the University of North Carolina School of Law, Wiley Rein LLP filed an *amicus* brief in the U.S. Supreme Court on behalf of the National Association for Public Defense (NAPD) in a case regarding a circuit split over the correct interpretation of U.S. Sentencing Guidelines. The brief was filed October 5 in support of the petitioner in *Lewis v. United States*, No. 23-198.

The petitioner, Jamar Lewis, was convicted in 2012 under a New Jersey law criminalizing possession of marijuana, which federal and state law defined to include hemp. In 2020, Lewis pled guilty to an unrelated crime. At sentencing, the lower court had to determine whether the career offender enhancement under the Sentencing Guidelines, which results in a significantly enhanced sentence if a defendant was previously convicted of a “controlled substance offense,” applied. Courts apply the “categorical approach” to make that determination, comparing the elements of the offense underlying the previous conviction against a generic offense to determine if the two match. If they do, the harsher penalty attaches.

In Lewis’s case, the definition of marijuana under both federal and New Jersey law changed between 2012 and 2020 such that hemp was not included within the definition of marijuana when he was sentenced for the later crime. As a result, Lewis’s predicate New Jersey marijuana conviction from 2012 no longer categorically matched either the 2020 federal or New Jersey controlled substance schedules.

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This mismatch raises two legal questions that have deeply divided the circuit courts.

First, when defining a “controlled substance” to determine whether the predicate offense categorically matches the generic comparator, should the sentencing court look to the drug schedule in effect at the time when federal law imposes an additional consequence as a result of the defendant’s predicate offense, or should the court rely on an outdated drug schedule that was in place at the time of the predicate conviction? The same question arises in the context of Armed Career Criminals Act (ACCA) with respect to the “serious drug offense” enhancement. 18 U.S.C. § 924(e). The Court granted certiorari in two consolidated cases that raise that question in the ACCA context, *Brown v. United States*, No. 22-6389 and *Jackson v. United States*, No. 22-6640 (the “ACCA Cases”). As to the first question presented, the NAPD *amicus* brief urges the Court either to (1) grant Lewis’s petition because the Court has already recognized the importance of the issue, which is apt to arise more frequently in Guidelines cases, or (2) hold the petition pending the decision in the ACCA Cases, which will likely resolve or inform the answer in Guidelines cases.

Second, should the term “controlled substance” be defined by reference to drug schedules enacted under state law and federal law, or federal law only? The Third Circuit directly addressed this question in a January 26, 2023 decision, determining that the definition of “controlled substance” includes state-regulated drugs. Other circuit courts have concluded to the contrary, holding that the term can only be defined by reference to drugs listed on the federal drug schedule. The Supreme Court has previously declined to grant certiorari on this same issue. With respect to the denial of certiorari, Justice Sotomayor expressed her view that the issue is one that the Sentencing Commission can and should resolve once it achieves a quorum. The NAPD *amicus* brief highlights that, although the Commission achieved a quorum in 2022, it has taken no action to resolve the split. Further, given the purpose of the Sentencing Guidelines to achieve uniformity in federal sentencing for similarly situated defendants, the issue is a purely legal one to which there is only one possible answer: The term “controlled substance” must be defined by reference to federal drug schedules.

Regarding both questions presented, the NAPD *amicus* brief finally argues that these issues are exceptionally important because they dramatically alter the sentences imposed on similarly situated criminal defendants in different circuits. The disparities in sentencing stand to have a particularly disparate impact on Black and indigent individuals who are more likely to be prosecuted for and plead guilty to drug charges and thus be subject to the career offender enhancement in the Sentencing Guidelines.

Wiley represents NAPD, pro bono, as *amicus* in this case. The brief was written by Richard A. Simpson, partner in Wiley’s Issues and Appeals, Litigation, and Insurance practices, and Elizabeth E. Fisher, associate in the Issues and Appeals and Insurance practices, along with co-counsel Emily Hughes and Louis Sirkin of the NAPD. The attorneys were assisted by law students Joseph Stipp and Deven Upadhyay, who are participating in the Supreme Court Program at the University of North Carolina School of Law.