No. 17-7521

IN THE

Supreme Court of the United States

SADONNIE KITCHEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO THE BRIEF IN OPPOSITION

Donna Lee Elm
Federal Defender

M. Allison Guagliardo, Counsel of Record
Assistant Federal Defender
Federal Defender's Office
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-mail: allison_guagliardo@fd.org

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REPLY TO THE BRIEF IN OPPOSITION

As the government acknowledges (Br. Opp. 6-8), the circuits are split on the important question of whether the offense of possession of a specified quantity of drugs, which lacks as an element the intent to distribute, qualifies as a "controlled substance offense" for federal sentencing guidelines enhancement purposes. The Fifth, Sixth, Ninth, and Tenth Circuits have rejected the government's argument that a court may infer a missing element (the intent to distribute) to enhance a defendant's guidelines range. *See* Pet. 8-9. The Eleventh Circuit is the lone circuit that permits the enhancement of a defendant's guidelines range based upon such a judicial inference. *See id.* Petitioner's case presents an ideal vehicle to resolve this split.

As Petitioner explained in his supplemental brief, the Eleventh Circuit issued two published decisions after his petition was filed that resolve that the enhancement should not have applied in his case. *See* Supp. Br. 1-2. Petitioner, while maintaining his request for review of the circuit conflict presented in his petition, alternatively requests that this Court grant his petition, vacate the judgment, and remand to the Eleventh Circuit in light of these new decisions.

1. This Court's Review is Needed to Resolve the Circuit Split on Whether a Court May Infer a Missing Element to Enhance a Defendant's Sentence

a. The Circuits are Divided

The Eleventh Circuit is the only circuit that permits the enhancement of a defendant's sentence under the guidelines based upon an inference – i.e., an inferred intent to distribute – which is not an element of the drug possession offense. *See* Pet. App. A (the decision below); *United States v. Madera-Madera*, 333 F.3d 1228, 1233-34 (11th Cir. 2003). The Fifth, Sixth, Ninth, and Tenth Circuits have disagreed with the Eleventh Circuit, rejecting guidelines enhancements based upon such a non-elemental inference. *See United States v. Sarabia-Martinez*, 779 F.3d 274, 276-77 (5th Cir. 2015); *United States v. Lopez-Salas*, 513 F.3d 174, 178-81 (5th Cir. 2008); *United*

States v. Montanez, 442 F.3d 485, 493-94 (6th Cir. 2006); *United States v. Villa-Lara*, 451 F.3d 963, 964-65 & n.2 (9th Cir. 2006); *United States v. Herrera-Roldan*, 414 F.3d 1238, 1240-43 (10th Cir. 2005).[1]

b. The Eleventh Circuit's Decision is Incorrect

Contrary to the government's argument (Br. Opp. 10-16), the Eleventh Circuit's decision is incorrect. The guidelines define a "controlled substance offense" to mean an offense "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b) (emphasis added). Florida Statute § 893.135(1)(c)(1)(a) does not prohibit possession with intent to manufacture, import, export, distribute, or dispense. *See* Fla. Stat. § 893.135(1)(c)(1)(a) (2010). Florida law is clear that Fla. Stat. § 893.135 prohibits possession of specified quantities of drugs; an intent to distribute is not an element of the offense. Pet. 3 (citing Florida law).

The Eleventh Circuit is therefore relying upon its own judicial inference of an intent to distribute, based upon the drug quantity, to enhance defendants' sentences under the guidelines. *See* Pet. App. A. The Eleventh Circuit's reliance upon a non-elemental inference, however, is not consistent with the text of the guidelines. *See* U.S.S.G. § 4B1.2(b). As the Tenth Circuit has concluded, the guidelines require an examination of "what the state law prohibits," which

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[1] The government suggests that the Eleventh Circuit's decision in *Madera-Madera* is not in conflict with the Tenth Circuit's decision in *Herrera-Roldan*. Br. Opp. 8 n.4. The Tenth Circuit, however, rejected the government's argument (i) that the guidelines permit reliance upon a non-elemental inference, and (ii) that an inference of an intent to distribute could be drawn from the Texas statutory scheme. *See Herrera-Roldan*, 414 F.3d at 1240-43. The first conclusion is contrary to the Eleventh Circuit's decision in *Madera-Madera*, which permits reliance upon a non-elemental inference for guidelines enhancement purposes. *See Madera-Madera*, 333 F.3d at 1233. Thus, the circuits are divided on the question presented by this petition.

"confines [the] inquiry to the terms of the statute of conviction just as much as the phrase . . . 'that has as an element.'" *Herrera-Roldan*, 414 F.3d at 1241; *accord Montanez*, 442 F.3d at 492 ("For federal sentencing purposes, a sentencing court looks to the *elements* of the prior offense to determine whether it qualifies under the Guidelines."). Indeed, the text of the guidelines makes clear that the term "controlled substance offense" only includes an offense that "prohibits" possession "with intent to . . . distribute," meaning that an intent to distribute must be an element of the offense. U.S.S.G. § 4B1.2(b); *Sarabia-Martinez*, 779 F.3d at 277 ("The Guidelines could have defined a drug trafficking offense based on the quantity of drugs possessed. Instead, they require that a state prove an intent to manufacture, import, export, distribute, or dispense.") (quotation marks and citation omitted).[2]

The Eleventh Circuit's reading of the guidelines – which is not limited to the elements of the prior offense – would mean that each court would be permitted to decide for itself whether an intent to distribute may be inferred based upon a particular drug quantity. But, such a reading only presents additional issues that will lead to further circuit conflicts. For example, the Eleventh Circuit has inferred an intent to distribute based upon the possession of more than 28 grams of cocaine, but the Fourth Circuit has rejected that such an inference can be drawn from that same quantity. *Compare United States v. Orr*, 705 F. App'x 892, 895 (11th Cir. 2017), *pet. for cert. filed*, No. 17-7717 (U.S. Jan. 31, 2018), *with United States v. Brandon*, 247 F.3d 186, 192, 196-97

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[2] The government, like the Eleventh Circuit, points to amendment 632 to suggest that an anomaly would result because a prior conviction for possession with intent to distribute smaller quantities of drugs would qualify for the enhancement. *See* Br. Opp. 13 (citing *Madera-Madera*, 333 F.3d at 1233-34). Notably, however, amendment 632 defined a "drug trafficking offense" for U.S.S.G. § 2L1.2 purposes to include only an offense that "prohibits" possession "with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. app. C amend. 632 (Nov. 2001); U.S.S.G. § 2L1.2 cmt. n.1(B)(iii) (Nov. 2001). Amendment 632 therefore does not support the government's argument.

(4th Cir. 2001). The Eleventh Circuit's reliance upon non-elements will therefore undermine the goal of uniformity in sentencing. *See* 18 U.S.C. § 3553(a)(6).

The Eleventh Circuit is also not correct that an intent to distribute can be inferred in every Florida drug-trafficking case. *See* Pet. App. A. The government suggests that the Eleventh Circuit's inference is correct, but the government merely relies upon the state's label of the offense ("trafficking"). Br. Opp. 12, 14-16. The government ignores Florida law, which makes clear that a conviction under Fla. Stat. § 893.135 may rest upon the mere possession of the specified quantity of drugs. *See* Pet. 3; *Greenwade v. State*, 124 So. 3d 215, 220 (Fla. 2013) (describing the "three essential elements" of a trafficking-in-cocaine offense, § 893.135, as "(1) the defendant . . . possessed a certain substance; (2) the substance was cocaine; and (3) the quantity of the substance met the statutory weight threshold"); *Johnson v. State*, 712 So. 2d 380, 381 (Fla. 1998) (concluding that the possession component of § 893.135 does not have as an element the intent to sell); *Pallin v. State*, 965 So. 2d 1226, 1228 (Fla. 1st DCA 2007) ("under Florida law, a conviction for trafficking may be obtained based on mere possession"). Because an intent to distribute is not an element of a Florida trafficking-by-possession offense, it cannot be said that a defendant "necessarily" had such an intent. *Compare* Br. Opp. 14-15, *with Descamps v. United States*, 570 U.S. 254, 266 n.3 (2013) (questioning "how a factfinder can have 'necessarily found' a non-element—that is, a fact that by definition is *not* necessary to support a conviction").[3]

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[3] The government relies upon *United States v. Franklin*, 728 F.2d 994 (8th Cir. 1994), to assert that "possession of a large amount of drugs can demonstrate beyond a reasonable doubt the intent to distribute those drugs." *See* Br. Opp. 12. *Franklin* involved a prosecution under 21 U.S.C. § 841(a), which (unlike Fla. Stat. § 893.135) includes the intent to distribute as an element that must be proven to a jury beyond a reasonable doubt in every case. *See Franklin*, 728 F.2d at 995; 21 U.S.C. § 841(a)(1); Eleventh Circuit Pattern Jury Instructions (Criminal) – Offense Instruction O98 (including, as an element, "the Defendant intended to distribute the [substance]").

Based upon the proper reading of the guidelines and the elements of the Florida drug-trafficking offense, a prior conviction under Fla. Stat. § 893.135 resting upon possession never qualifies as a controlled substance offense. *See Salinas v. United States*, 547 U.S. 188, 188 (2006) (vacating and remanding because "the Fifth Circuit erred in treating petitioner's conviction for simple possession as a 'controlled substance offense'"). The government attempts to distinguish *Salinas* (Br. Opp. 15-16), but the possession offenses involved in *Salinas* (simple possession) and the instant case (possession of a specified quantity of drugs) both lack an element of the intent to distribute. The Eighth and Ninth Circuits have relied upon *Salinas* to conclude that the offense of possession of a specified quantity of drugs, lacking an element of intent to distribute, does not qualify as a controlled substance offense. *See United States v. Robinson*, 639 F.3d 489, 495-98 (8th Cir. 2011) (relying upon *Salinas* to conclude that the possession of a specified quantity of drugs does not constitute a "controlled substance offense" under § 4B1.2); *Villa-Lara*, 451 F.3d at 965 & n.1 (concluding, in accordance with *Salinas*, that possession of a specified quantity of drugs does not constitute a guidelines predicate).

c. This Court's Review is Warranted to Resolve this Long-Standing Circuit Split

Despite the circuit split, the government asserts that this Court's review is not warranted, because the Sentencing Commission could amend the guidelines. Br. Opp. 6, 8-9. The Sentencing Commission, however, has yet to act on this circuit split, which has existed for well over a decade. This split, moreover, will apparently persist well into the future, as the government points to no pending amendments before the Sentencing Commission to resolve this issue. *See id.*

In the meantime, Petitioner is left to serve his enhanced sentence – an enhancement that would not have applied in at least the Fifth, Sixth, Ninth, or Tenth Circuits. Without the

enhancement, Petitioner will soon be eligible for a time-served sentence. *See* Pet. 5; Supp. Br. 2. It is unlikely that the district court would vary upward (Br. Opp. 10), especially considering Petitioner's post-sentencing medical condition.[4] In any event, a resentencing would be required based upon the guidelines error. *See Gall v. United States*, 552 U.S. 38, 49 (2007) (requiring that "all sentencing proceedings" begin with the correctly calculated guidelines range).

Petitioner's only hope for relief from his enhanced sentence, imposed within the Eleventh Circuit's jurisdiction, is this Court. In opposing this Court's review, the government ignores that the Eleventh Circuit (at the government's request) has foreclosed any post-conviction relief from guidelines errors. *See* Supp. Br. 2. Therefore, Petitioner's only available avenue for relief is this direct appeal. Petitioner accordingly requests this Court's review.

2. Alternatively, Petitioner Respectfully Requests a Remand

After it affirmed Petitioner's enhanced sentence, the Eleventh Circuit issued two published decisions that establish that Petitioner's sentence should not have been enhanced based upon his prior conviction under Fla. Stat. § 893.135. *See* Supp. Br. (citing *Cintron v. U.S. Att'y Gen.*, 882 F.3d 1380 (11th Cir. 2018); *Francisco v. U.S. Att'y Gen.*, 884 F.3d 1120 (11th Cir. 2018)). While maintaining his request for review of the circuit conflict presented in his petition, Petitioner alternatively requests that this Court grant his petition, vacate the judgment, and remand to the Eleventh Circuit in light of *Cintron* and *Francisco*. *See id.*

The government does not dispute, should these cases be applied to Petitioner's case, that his guidelines enhancement would be erroneous. *See* Br. Opp. 11 n.6. Instead, the government

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[4] Records received from the U.S. Bureau of Prisons reveal that, after sentencing, Petitioner suffered a medical emergency and was then diagnosed with a significant medical condition.

contends that, based upon the invited-error doctrine, Petitioner has waived the argument that the statute is indivisible and that the modified categorical approach therefore does not apply. *See id.*

The invited-error doctrine, however, does not apply where (as here) the law changes while the case is pending on appeal. *See Associated Indem. Corp. v. Scott*, 103 F.2d 203, 209 (5th Cir. 1939); *United States v. Jones*, 743 F.3d 826, 827-28 & n.1 (11th Cir. 2014); *United States v. Tittle*, 852 F.3d 1257, 1264 & n.5 (10th Cir. 2017) (citing *Jones*).[5] At the time that Petitioner was sentenced (on June 6, 2016), the Eleventh Circuit applied the modified categorical approach to Fla. Stat. § 893.135. *See* Doc. 45; *United States v. Shannon*, 631 F.3d 1187, 1189-90 (11th Cir. 2011); *id.* at 1191-94 (Marcus, J., concurring); *see also* Brief of the United States, *United States v. Rodriguez*, No. 15-15088, at 11 (11th Cir. Jan. 19, 2018) (citing *Shannon* to contend that the Eleventh Circuit had held "that the statute [Fla. Stat. § 893.135] is divisible and therefore is subject to the modified-categorical approach"). This Court decided *Mathis v. United States*, 136 S. Ct. 2243 (June 23, 2016), after Petitioner was sentenced. *Cintron* is the first published decision of the Eleventh Circuit to address whether Fla. Stat. § 893.135 is indivisible in light of *Mathis*, and it held that the statute is indivisible. *See Cintron*, 882 F.3d at 1384-88.

The invited error doctrine should therefore not apply to Petitioner. Indeed, in *Francisco*, the Eleventh Circuit applied *Cintron*, even though "the parties" had agreed "[t]hroughout this litigation" "that the modified categorical approach applies to Fla. Stat. § 893.135(1)(b) because it is a divisible statute." *Francisco*, 884 F.3d at 1134. In any event, whether the invited-error doctrine applies should be left to the Eleventh Circuit on remand. *See, e.g., Tapia v. United*

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[5] Fifth Circuit decisions issued on or before September 30, 1981, are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

States, 564 U.S. 319, 335 (2011) (leaving to the Ninth Circuit to address on remand any application of the plain-error standard of review).

As Petitioner has demonstrated, *Cintron* and *Francisco* resolve that the enhancement should not have applied in Petitioner's case. *See* Supp. Br. 1-2. Petitioner, while maintaining his request for this Court's review, therefore alternatively requests that this Court remand to the Eleventh Circuit in light of *Cintron* and *Francisco*. Petitioner respectfully seeks this relief in this direct appeal, because there is no post-conviction avenue available for guidelines errors in the Eleventh Circuit. *See id.* at 2-3.

CONCLUSION

Petitioner respectfully requests that this Court grant his petition or, alternatively, grant his petition, vacate the judgment, and remand to the Eleventh Circuit in light of *Cintron* and *Francisco*.

Respectfully submitted,

Donna Lee Elm
Federal Defender

M. Allison Guagliardo
Assistant Federal Defender
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-mail: allison_guagliardo@fd.org
Counsel of Record for Petitioner