No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

WILLIAM JEROME HOWARD JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Drug offenses in Florida are unlike most states insofar as in Florida, the prosecution does not have to prove a defendant knew the illicit nature of a substance in his possession. In light of this fact, the question presented is whether the Florida offenses of sale of cocaine under Fla. Stat. § 893.13(1)(a)(1) and possession of cocaine under Fla. Stat. § 893.13(6)(a) are "felony drug offense[s]" under 21 U.S.C. § 841(b)(1)(B), and whether the Florida offenses of sale of cocaine and possession of cocaine with intent to distribute under Fla. Stat. § 893.13(1)(a)(1) qualifies as a "controlled substance offense[s]" under USSG § 4B1.2.

LIST OF PARTIES

Petitioner, William Jerome Howard Jr., was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

William Jerome Howard Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, 767 F. App'x 779 (11th Cir. 2019), is unpublished and provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over this criminal case under 18 U.S.C. § 3231. The Eleventh Circuit had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. On April 2, 2019, the Eleventh Circuit affirmed the district court's final judgment. Appendix A. This Court may review the Eleventh Circuit's judgment under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND GUIDELINES PROVISIONS

21 U.S.C. § 841(a)(1) makes it unlawful for any person knowingly or intelligently "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." At the time of Mr. Howard's sentencing, § 841(b)(1)(B)'s penalty provision provided, in relevant part, that if section (a) was violated, the case involved "28 grams or more of a mixture or substance" containing cocaine base, and the defendant has a prior conviction for a "felony drug offense":

> [S]uch person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . . [I]f there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment.

21 U.S.C. § 841(b)(1)(B)(iii) (2018).[1]

> A "felony drug offense" is:
>
> > [A]n offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 802(44).[2]

> Similarly, USSG § 4B1.2 defines "controlled substance offense," in pertinent part, as:
>
> > [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2(b).

At the time of Mr. Howard's convictions for sale of cocaine and possession of cocaine with intent to sell, Fla. Stat. § 893.13(1)(a)(1) provided, in pertinent part, that:

> [I]t is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture or deliver a controlled substance. Any person who violates this provision with respect to a controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4., commits a felony of the second degree . . . .

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[1] After Mr. Howard's sentencing, Congress passed the First Step Act, which amended § 841(b)(1)(B). The Act replaced the term "felony drug offense" with the terms "serious drug felony" and "serious violent felony." First Step Act § 401(a), 132 Stat. 5194. However, that amendment does not affect this case because Mr. Howard was sentenced before the enactment of the First Step Act. First Step Act § 401(c), 132 Stat. 5194 ("This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.").

[2] Each of these named categories—"narcotic drugs," "marihuana," "anabolic steroids," and "depressant or stimulant substances"—are further defined in § 802. *See* 21 U.S.C. § 802(9) ("depressant or stimulant substance"); § 802(16) ("marihuana"); § 802(17) ("narcotic drug"); § 802(41)(A) ("anabolic steroid"); *see also* 21 C.F.R. §§ 1308.11-1308.15. These categories of substance are controlled in various places within the federal Schedules of Controlled Substances.

Fla. Stat. § 893.13(1)(a)(1) (2012).

At the time of his conviction for possession of cocaine, § 893.13(6)(a) provided:

> It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree . . . .

Fla. Stat. § 893.13(6)(a) (2012).

STATEMENT OF THE CASE

On January 21, 2017, law enforcement attempted to conduct a traffic stop after witnessing Mr. Howard commit a traffic infraction. Mr. Howard fled, and after his car spun out of control, he continued to flee on foot. A law enforcement officer caught up with and tackled Mr. Howard. Mr. Howard attempted to free himself, but he was eventually subdued and arrested when other officers arrived. After the arrest, deputies found and searched a green bag Mr. Howard dropped when he was tackled. The green bag contained a black bag, and within the black bag were two clear plastic bags. One plastic bag contained 94 grams of cocaine base, and the other plastic bag contained 28 grams.

On May 17, 2017, Mr. Howard was charged with possessing 28 grams or more of cocaine base with the intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii). On December 1, 2017, he pled guilty.

Typically, a conviction under §§ 841(a)(1) and 841(b)(1)(B)(iii) carries a statutory range of 5 to 40 years' imprisonment. 21 U.S.C. § 841(b)(1)(B)(iii). However, that statutory range may be increased to 10 to life if, before the entry of a guilty plea, the government files an information stating the defendant has a prior "felony drug offense." *See* 21 U.S.C. §§

841(b)(1)(B)(iii), 851(a). Here, on the day before Mr. Howard pled guilty, the government filed such an information. The government's notice stated that:

> On or about June 22, 2012, the defendant was convicted of the following felony drug offenses in the Sixth Judicial Circuit, in and for Pinellas County, in Case No. 522011CF009750XXXXNO:
>
> a. Sale of Cocaine;
> b. Sale of Cocaine;
> c. Possession of Cocaine;
> d. Possession of Cocaine; and
> e. Possession of Cocaine.

The information also stated that these convictions qualify as "prior convictions within the meaning 21 U.S.C. § 851." Therefore, the statutory term of imprisonment for Mr. Howard's offense was 10 years to life imprisonment.

A PSR was prepared for Mr. Howard's sentencing. The United States Probation Office recommended that Mr. Howard be sentenced as a career offender based on: (1) the two sale convictions identified in the § 851 information; and (2) a 2012 Florida conviction for possession of cocaine with the intent to sell. All three convictions were imposed under Fla. Stat. § 893.13(1)(a)(1).

Because the § 851 enhancement increased Mr. Howard's statutory range to life, his base offense level under the career offender enhancement was 37. After a three level reduction for acceptance of responsibility, his total offense level was 34. The career offender guideline also mandates a criminal history category of VI. USSG § 4B1.1(b). Based on a total offense level of 34 and a criminal history category of VI, Mr. Howard's recommended guideline range was 262 to 327 months' imprisonment.[3]

[3] Without the § 851 enhancement, Mr. Howard's maximum term of imprisonment would have been 40 years, meaning his base offense level under the career offender guideline would have been 34. *See* USSG § 4B1.1(b)(2). After acceptance of responsibility, he would have had a total

At sentencing, neither party disputed the accuracy of the guidelines calculations, so the district court adopted the PSR without change. The district court granted Mr. Howard a downward variance based on the 18 U.S.C. § 3553(a) factors, sentencing him to 168 months' imprisonment, followed by 8 years' supervised release.

On appeal, Mr. Howard argued, on plain error review, that his Fla. Stat. § 893.13 convictions were neither "felony drug offense[s]" under §§ 802 and 841 nor "controlled substance offense[s]" under § 4B1.2. Mr. Howard argued that those terms are limited to substances that are federally controlled while the term "controlled substance" under Fla. Stat. § 893.13 includes substances that are not federally controlled (such as benzylfentanyl and thenylfenteanyl). Thus, according to Mr. Howard, because the term "controlled substance" under Florida law is overbroad and indivisible a Florida conviction under § 893.13 can never qualify as "felony drug offense" or "controlled substance offense."

On April 2, 2019, the Eleventh Circuit affirmed Mr. Howard's sentence. *See* Appendix A. With respect to "controlled substance offense[s]" under § 4B1.2, the Eleventh Circuit said:

> Howard's relevant drug convictions are under Fla. Stat. § 893.13(1)(a), which provides that "a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. § 893.13(1)(a).[4] This Court expressly held in United States v. Smith, 775 F.3d 1262, 1268 (11th Cir. 2014), that a drug conviction under Fla. Stat. § 893.13(1) is a "controlled substance offense" under the career offender provision in U.S.S.G. § 4B1.2(b). See also United States v. Pridgeon, 853 F.3d 1192, 1197-98 (11th Cir.) (following Smith), cert. denied, —— U.S. ——, 138 S.Ct. 215, 199 L.Ed.2d 140 (2017). In Smith, the defendant was sentenced as a career offender under § 4B1.1(a) because his prior Florida convictions for possession of marijuana with intent to sell and possession of cocaine with intent to sell, both in violation of Fla. Stat. § 893.13(1)(a), were "controlled substance offenses." 775 F.3d at 1265. In

offense level of 31 and a criminal history category of VI, resulting in a guideline range of 188 to 235 months' imprisonment. Therefore, to the extent Mr. Howard was properly classified a career offender, the § 851 enhancement had the effect of increasing the bottom of his guideline range by 74 months.

> addressing the defendant's argument, this Court determined that the definition of a "controlled substance offense" under § 4B1.2(b) did not require that a predicate state offense include an element of mens rea with respect to the illicit nature of the controlled substance, and, therefore, Fla. Stat. § 893.13(1) qualified as a "controlled substance offense." Id. at 1268. Smith involved the same definition of "controlled substance offense" in § 4B1.2(b) that applies to Howard's case. See Smith, 775 F.3d at 1267-68; U.S.S.G. § 4B1.2(b) (2016).
>
> Here, Howard's challenge to the district court's determination that his prior convictions under Fla. Stat. § 893.13(1)(a)(1) constitute "controlled substances offenses" is precluded by our binding precedent in Smith. See id. We recognize that Howard contends that the prior panel precedent rule is of little value in his case because this Court has not considered his particular argument that Fla. Stat. § 893.13 is indivisible and criminalizes substances that are not federally controlled. However, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008). "[A] prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel." Tippitt v. Reliance Standard Life Ins. Co., 457 F.3d 1227, 1234 (11th Cir. 2006).

Appendix A at 4–5.[4]

As for "felony drug offense[s]" under §§ 802 and 841, the Eleventh Circuit said:

[4] In a footnote, the Court stated:

> We reject Howard's argument that "controlled substance" under § 4B1.2 refers only to those illegal substances that are federally controlled. Instead, § 4B1.2 explicitly refers to "controlled substance offense" as an "offense under federal or state law." U.S.S.G. § 4B1.2(b). In any event, even if the text of § 4B1.2 is somehow ambiguous elsewhere as Howard argues, the main decision in this regard that Howard cites is materially distinguishable because cocaine is both federally and state controlled and his prior Florida convictions were for cocaine-related crimes, whereas the decision Howard cites involved a state controlled substance that was not federally controlled. See, e.g., United States v. Townsend, 897 F.3d 66, 68, 74-75 (2d Cir. 2018) (concluding that a defendant's prior state conviction for the sale of Human Chorionic Gonadotropin ("HCG") could not be a predicate offense for an enhanced sentence under U.S.S.G. § 2K2.1(a) because the sale of HCG is only criminalized by the state).

Appendix A at 5 n.5

> A "felony drug offense" is defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44) (emphasis added). Cocaine is a narcotic drug. Id. § 802(17)(D). To support a § 841(b)(1)(B) statutory mandatory minimum sentence, the government must file an information notifying the defendant of the enhancement and the prior convictions upon which it is based. 21 U.S.C. § 851(a)(1). The government undisputedly did that in this case.
>
> Here, Howard has not demonstrated that the district court erred, plainly or otherwise, in determining that his five 2011 offenses for the sale and possession of cocaine qualified as "felony drug offenses" for purposes of the § 841(b)(1)(B) enhancement. A "felony drug offense" under § 802(44) is defined to include an offense that is punishable by imprisonment for more than one year under any state law that prohibits conduct relating to narcotic drugs. 21 U.S.C. § 802(44).
>
> Howard's 2011 offenses were under both Fla. Stat. § 893.13(1)(a)(1) prohibiting the sale of cocaine and Fla. Stat. § 893.13(6)(a) prohibiting the possession of cocaine. Fla. Stat. §§ 893.13(1)(a), (6)(a). A violation of § 893.13(1)(a)(1) involving cocaine is punishable by up to 15 years' imprisonment, and a violation of § 893.13(6)(a) involving cocaine is punishable by up to 5 years' imprisonment. Fla. Stat. §§ 893.13(1)(a)(1), (6)(a); Fla. Stat. §§ 775.082(3)(d), (e); Fla. Stat. § 893.03(2)(a)(4). Therefore, the district court did not err in determining that Howard was subject to a ten-year statutory mandatory minimum term of imprisonment pursuant to 21 U.S.C. § 841(b)(1)(B).

Appendix A at 5–6 (footnotes omitted).

REASONS FOR GRANTING THE WRIT

Mr. Howard requests that this Court grant his petition for a writ of certiorari to review the questions of whether the Florida offenses of sale of cocaine under Fla. Stat. § 893.13(1)(a)(1) and possession of cocaine under Fla. Stat. § 893.13(6)(a) are "felony drug offense[s]" under 21 U.S.C. §§ 802 and 841, and whether the Florida offenses of sale of cocaine and possession of cocaine with intent to distribute under § 893.13(1)(a)(1) are "controlled substance offense[s]" under USSG § 4B1.2. Mr. Howard maintains a Florida conviction under § 893.13 does not satisfy either definition because these Florida offenses do not require the prosecution to prove that a defendant knew the illicit nature of a substance in his possession. Notably, the issue of whether a Florida

conviction under § 893.13 is a "serious drug offense" under the Armed Career Criminal Act (ACCA) is pending before this Court in *Shular v. United States*, Case No. 18-6662, and *Hunter v. United States*, Case No. 18-7105. Both cases make the same argument with respect to the "serious drug offense" definition, and in both cases, the Solicitor General has asked this Court to take up the issue.[5]

I. A Florida Conviction under Fla. Stat. § 893.13 does not Qualify as a "Felony Drug Offense" under 21 U.S.C. §§ 802 and 841 or a "Controlled Substance Offense" under USSG § 4B1.2.

Mr. Howard's convictions under Fla. Stat. § 893.13 are not "felony drug offense[s]" under §§ 802 and 841 or "controlled substance offense[s]" under § 4B1.2. In *Shular* and *Hunter*, both the petitioners and the Solicitor General have asked for review of whether and § 893.13 conviction qualifies as a "serious drug offense" under the ACCA. According to the petitioners, an § 893.13 does not qualify as a "serious drug offense" under the ACCA because it is a non-generic offense. In other words, the fact that Fla. Stat. § 893.13 does not require the prosecution to prove the defendant knew the illicit nature of a substance makes such a conviction overbroad in relation to the offenses enumerated in the "serious drug offense" definition. The same reasoning applies to "felony drug offense and "controlled substance offense" definitions. Thus, if this Court grants review in *Shular* or *Hunter* and the petitioner prevails, Mr. Howard will be able to prevail on plain error review.

Similar to the enumerated offenses in the "violent felony" definition of the ACCA, the "serious drug offense" definition provides a list of enumerated drug offenses that qualify—those

[5] If this Court grants certiorari review in *Shular* or *Hunter*, Mr. Howard requests that his petition be held pending the resolution of the issue. Although he did not raise this issue below, the outcome of *Shular* or *Hunter* will necessarily determine whether he can prevail on this issue on plain error review.

that "involv[e] manufacturing, distributing, or possession with intent to manufacture or distribute." According to the Ninth and Sixth Circuits, the same type of categorical analysis that applies when evaluating prior convictions under the "violent felony" definition should apply when evaluating prior convictions under the "serious drug offense" definition. *See United States v. Franklin*, 904 F.3d 793, 800–03 (9th Cir. 2018) (holding that an offense is not a "serious drug offense" if it is broader than its generic federal analogues); *United States v. Goldston*, 906 F.3d 390, 396–97 (6th Cir. 2018) (comparing the defendant's delivery offense to the "generic definition of 'deliver' under the ACCA). The same is true for the "felony drug offense" definition in §§ 802 and 841 and the "controlled substance offense" definition in § 4B1.2.

Contrary to Eleventh Circuit precedent, a Fla. Stat. § 893.13 conviction does not qualify as a "serious drug offense," "felony drug offense," or "controlled substance offense." That is because § 893.13 is broader than the generic drug offenses listed in these definitions, all of which require a mens rea element. *See McFadden v. United States*, 135 S. Ct. 2298 (2015); *State v. Adkins*, 96 So. 3d 412, 429–430 (Fla. 2012) (surveying case law nationwide).

In May 2002, the Florida legislature enacted Fla. Stat. § 893.101, which states that "knowledge of the illicit nature of a controlled substance is not an element" of a Florida drug offense. *See Shelton v. Secretary, Dep't of Corr.*, 691 F.3d 1348, 1349–51 (11th Cir. 2012); *State v. Adkins*, 96 So. 3d 412, 414–16 (Fla. 2012). Thus, Florida's drug offenses do not require the prosecution to prove that a defendant knew the nature of the substance in his possession—that it was, for example, cocaine. By removing that knowledge requirement, the Florida legislature made Fla. Stat. § 893.13 a non-generic drug offense. Therefore, Mr. Howard's § 893.13 convictions cannot qualify as a "felony drug offense[s]" or "controlled substance offense[s]."

CONCLUSION

For the above reasons, Mr. Howard respectfully requests that this Court grant his petition.

Respectfully submitted,

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