No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL RAY BISHOP,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

***RICHARD M. SUMMA**
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 890588
227 N. Bronough Street, Suite 4200
Tallahassee, Florida 32301
Telephone: (850) 942-8818
FAX: (850) 942-8809
Attorney for Petitioner

* Counsel of Record

QUESTION PRESENTED

I

Whether an offense-matching categorical approach applies to the determination of a "controlled substance offense" under the Sentencing Guidelines?

[NOTE: This petition is related, logically, to the petition filed in *Shular v. United States*, No. 18-6662, *cert. granted*, 139 S.Ct. 2772 (June 28, 2019). *Shular* involves an issue regarding the application of the categorical approach to the "serious drug offense" provision of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii). This case involves the same question regarding the application of the categorical approach to the Guidelines' definition of "controlled substance offense" in USSG § 4B1.2(b), which is substantially similar to ACCA's "serious drug offense" provision.**]**.

PARTIES INVOLVED

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Michael Ray Bishop respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. 17-15473, on October 11, 2019, affirming in part, and reversing in part, the judgment of the District Court for the Northern District of Florida.

OPINION BELOW

The published decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Michael Ray Bishop,* 940 F.3d 1242 (11th Cir. 2019), was issued on October 11, 2019, and is attached as Appendix A to this Petition.

JURISDICTION

The Court of Appeals filed its decision in this matter on October 11, 2019. Petitioner did not move for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

GUIDELINE PROVISIONS INVOLVED

This petition involves the application of USSG §§ 2K2.1(a)(3) and 4B1.2 (2016), which provide in pertinent part:

> (a) Base Offense Level (Apply the Greatest):
>
> * * * * * *
>
> > (3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845 (a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.

USSG § 2K2.1(a)(3) (November 1, 2016 Guidelines Manual).

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> * * * * *
>
> (b) The term "controlled substance offense" means an 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(a)(1) (November 1, 2016 Guidelines Manual).

FLORIDA STATUTES INVOLVED

Section 893.13(1)(a), Florida Statutes, provides:

> (1)(a) Except as authorized by this chapter and chapter 499, 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).

Section 777.04(3), Florida Statutes, provides:

> (3) A person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing as provided in subsection (4).

Fla. Stat. § 777.04(3).

Section 893.101, Florida Statutes, provides:

> (1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So. 2d 736 (Fla. 1996, holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.
>
> (2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.
>
> (3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

Fla. Stat. § 893.101.

INTRODUCTION

The categorical approach applies in a variety of contexts – in the construction of criminal statutes, immigration statutes, criminal sentencing provisions, and Guideline sentencing provisions. In the sentencing context, the categorical approach promotes the interests of efficiency, uniformity and fairness. The circuit courts generally employ an offense-matching categorical approach in the interpretation of enumerated "crimes of violence" and "controlled substances offenses" under the Sentencing Guidelines. In the enumerated offense context, the categorical approach compares the elements of the prior state conviction to the elements of the generic federal crime to determine if the state offense is the same as, or narrower than, the generic crime, and thus qualifies for purposes of a federal sentencing enhancement. The Eleventh Circuit is among a minority which interprets the Guidelines definition of "controlled substance offense" as an elements clause which requires a comparison of only an element of the prior state conviction with a corresponding element listed in the Guidelines definition of "controlled substance offense." The Eleventh Circuit's approach misinterprets the Guideline and undercuts the interests of efficiency, uniformity and fairness without adequate support from its text. The rule of the Eleventh Circuit exacerbates a deep and intractable split among the circuits and is incompatible with the Court's prior precedent. Due to the widespread application of the Guidelines' "controlled substance offense" provision, this case is worthy of certiorari review.

STATEMENT OF THE CASE

Petitioner, Michael Ray Bishop, pled guilty to the offense of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The probation office prepared a Presentence Investigation Report (PSR). Pertinent to this petition, the probation officer established Bishop's base offense level at 22, pursuant to USSG § 2K2.1(a)(3), because the offense involved a semiautomatic firearm capable of accepting a large capacity magazine and Bishop committed the offense after a felony conviction of either a "crime of violence" or a "controlled substance offense." (PSR ¶ 20). Bishop's qualifying felony was a 2013 Florida conviction for "conspiracy to sell, manufacture, deliver, or possess with the intent to sell, manufacture, or deliver a controlled substance." (PSR ¶ 38). Based upon a total offense level of 25 and a criminal history category of III, Bishop had an advisory guidelines range of 70-87 months in prison. (PSR ¶ 86); (Doc. 33) (sealed).

Defense counsel objected to the suggested base offense level, arguing that the Guidelines' definition of "controlled substance offense" did not encompass Bishop's prior Florida conviction because the crime lacked a mens rea element, specifically, knowledge that "the substance was some kind of controlled substance." (Doc. 29) (sealed). At the same time, counsel acknowledged that the Eleventh Circuit had previously held, in *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014), that "[n]o element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied" in the definition of "controlled substance offense" in USSG § 4B1.2(b). (Doc. 29).

At sentencing, the district court overruled Bishop's objection, stating that "the *Smith* case controls," and "it's the law of the Circuit." (Doc. 44 at 3). Bishop's plea agreement "reserve[d] the right to appeal any sentence imposed." (Doc. 22 at 4).

Bishop raised this issue, among others, on direct appeal. He argued, specifically, that the term "controlled substance offense" includes a number of enumerated offenses which qualify to enhance the defendant's base offense level. He further argued that *Smith* deviated from *Taylor v. United States*, 495 U.S. 575 (1990), by disavowing an essential feature of the categorical approach – the determination of the elements of the generic offense. Bishop argued that the generic controlled substance offenses, such as distribution and sale of a controlled substance require a mens rea element, citing 21 U.S.C. § 841(a), *McFadden v. United States*, 135 S. Ct. 2298 (2015), and a survey of federal and state law. He noted that his prior Florida conviction was broader than the generic drug crimes because his Florida offense lacked a mens rea element under Fla. Stat. § 893.101 (knowledge of the illicit nature of the substance is not an element of any offense under chapter 893). And he argued *Smith* was wrongly decided on the basis of the following pronouncement:

> We need not search for the elements of "generic" definitions of "serious drug offense" and "controlled substance offense" because these terms are defined by a federal statute and the Sentencing Guidelines, respectively. . . . No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either definition. We look to the plain language of the definitions to determine their elements. . . .

Smith, 775 F.3d at 1267.

The circuit court rejected Bishop's argument, writing: "We are bound by *Smith* unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting en banc." (App. A at 16).[1]

[1] The circuit court granted partial relief, ruling that the district court erred in the application of USSG § 2K2.1(b)(6)(B), pertaining to possession of a firearm in connection with another felony offense. The circuit court thus remanded the case for resentencing on that issue which *may* result in a four-level reduction of Bishop's offense level.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the decision below defines a split of authority among the circuit courts and erodes the rules guiding the categorical and modified categorical approaches articulated in decisions such as *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard v. United States*, 544 U.S. 13 (2005), *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S.Ct. 2243 (2016.

I. The decision below conflicts with the Court's decision in *Taylor* and its progeny.

In *Taylor*, the Court articulated a categorical approach to determine whether a prior state conviction for burglary constituted an enumerated predicate "burglary" offense for purposes of sentencing under the Armed Career Criminal Act (ACCA). The Court found that the categorical approach was intended by Congress as a means of promoting efficiency, uniformity and fairness in sentencing.

In *Taylor* the defendant had a prior California conviction for burglary which was, nominally, a "match" for the ACCA's enumerated burglary offense. Notwithstanding the match, the Supreme Court required a comparison of the elements of the prior California burglary to the elements of the "generic" burglary to determine whether the California burglary qualified as a "violent felony" under ACCA.

In the intervening years, the circuit courts have applied the categorical and modified categorical approaches to the determination of qualifying offenses under the Sentencing Guidelines. In the context of "controlled substance offenses" under §

4B1.2(b), *see e.g.*, *United States v. Bryant*, 571 F.3d 147 (1st Cir. 2009); *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018); *United States v. Glass*, 904 F.3d 319 (3rd Cir. 2018); *United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016); *United States v. Montanez*, 442 F.3d 485 (6th Cir. 2006); *United States v. Smith*, 921 F.3d 708 (7th Cir. 2019); *United States v. Maldonado*, 864 F.3d 893 (8th Cir. 2017); *United States v. Brown*, 879 F.3d 1043 (9th Cir. 2018); *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017); *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), *cert. denied*, 135 S.Ct. 287 (2015).

In the context of "crimes of violence" under § 4B1.2(a), *see e.g.*, *United States v. Winter*, 22 F.3d 15, 18 (1st Cir. 1994); *United States v. Walker*, 595 F.3d 441, 443-44 (2d Cir. 2010); *United States v. Ramos*, 892 F.3d 599, 606 (3rd Cir. 2018); *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018); *United States v. Howell*, 838 F.3d 489, 494 (5th Cir. 2016); *United States v. Covington*, 738 F.3d 759, 762 (6th Cir. 2014); *United States v. Edwards*, 836 F.3d 831, 833 (7th Cir. 2016); *United States v. McMillan*, 863 F.3d 1053, 1056 (8th Cir. 2017); *United States v. Quintero-Junco*, 754 F.3d 746, 751 (9th Cir. 2014); *United States v. Armijo*, 651 F.3d 1226, 1230 (10th Cir. 2011); *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014); *United States v. Brown*, 892 F.3d 385, 402 (D.C. Cir. 2018).

The relevant Guideline provides:

> The term "controlled substance offense" means an 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)(1) (November 1, 2016 Guidelines Manual).

Like the enumerated offense clause in ACCA, the "controlled substance offense" provision of the Guidelines creates a class of enumerated offenses. The enumerated offenses are: (1) manufacture of a controlled substance; (2) import of a controlled substance; (3) export of a controlled substance; (4) distribution of a controlled substance; (5) dispensing a controlled substance; (6) possession of a controlled substance with intent to manufacture; (7) possession of a controlled substance with intent to import; (8) possession of a controlled substance with intent to export; (9) possession of a controlled substance with intent to distribute; (10) possession of a controlled substance with intent to dispense; (11) possession of a counterfeit controlled substance with intent to manufacture; (12) possession of a counterfeit controlled substance with intent to import; (13) possession of a counterfeit controlled substance with intent to export; (14) possession of a counterfeit controlled substance with intent to distribute; and (15) possession of a counterfeit controlled substance with intent to dispense. These are the names of the generic controlled substance offenses enumerated in § 4B1.2(b). *Cf.* 21 U.S.C. § 841(a) (listing drug trafficking crimes under federal law).

In accordance with the framework established in *Taylor*, to determine whether a prior state offense constitutes a "controlled substance offense" under the Guidelines, the district court should compare the elements of the state offense with the elements of the generic federal crime.

In *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), and the present case, the circuit court deviated from the established methodology by disavowing an essential feature of the categorical approach – the determination of the elements of the "generic" offense.

> We need not search for the elements of "generic" definitions of "serious drug offense" and "controlled substance offense" because these terms are defined by a federal statute and the Sentencing Guidelines, respectively. . . . No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either definition. We look to the plain language of the definitions to determine their elements. . . .

Id. at 1267.

The Eleventh Circuit seems to have construed the "controlled substance offense" provision as an elements clause setting forth elements of unspecified state controlled substance offenses. Under traditional elements clause analysis, the sentencing court need only compare a specific element of a state crime with the corresponding element in § 4B1.2(b) to determine whether the state element is the same as, or narrower than, the corresponding federal element. The rule of the Eleventh Circuit is actually broader than the established elements clause analysis. *Smith* held that § 4B1.2(b) requires only that the predicate offense "prohibit" "certain activities related to controlled substances." *Id*.

In the context of the present case, Bishop argued the lack of a mens rea element made his Florida conviction for conspiracy to sell, manufacture, deliver, etc. a controlled substance broader than its federal generic counterpart and, therefore, not a qualifying controlled substance offense. Under the Eleventh Circuit's model,

however, the plain language of § 4B1.2(b) did not include a mens rea element, so mens rea was not required, and Bishop's prior Florida offense was no broader than the requirements of the Guideline. The Eleventh Circuit, therefore, rejected Bishop's argument.

The decision of the Eleventh Circuit below conflicts with the consistent pronouncements of this Court in *Taylor* and subsequent decisions such as *Descamps* and *Mathis*. Two other circuits appear, like the Eleventh, to take an elements-based approach. *See United States v. Bryant*, 571 F.3d 147 (1st Cir. 2009) (prior New York conviction for attempted sale of a controlled substance was no broader than the "federal definition;" although "sale" element encompassed an "offer to sell" which required a bona fide offer and intent and ability to sell, the indictment and plea colloquy (under modified categorical approach) proved that the defendant pled guilty to possessing with intent to distribute cocaine as required under Guideline definition); *United States v. Montanez*, 442 F.3d 485 (6th Cir. 2006) (prior Ohio convictions for possession of specific quantity of a controlled substance did not qualify as a controlled substance offense because Ohio offense did not require "intent to distribute" specifically required under Guideline definition).

The present case is worthy of certiorari review because the law of the Eleventh, First, and Sixth Circuit Courts of Appeal conflicts with the Court's well-established categorical approach applicable to enumerated offense clauses.

II. The law of the First, Sixth and Eleventh Circuits conflicts with that of the Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits as to whether the Guideline definition of "controlled substance offense" sets forth an enumerated offense clause.

As set forth above, the First, Sixth and Eleventh Circuits appear to regard the Guideline definition of "controlled substance offense" as an elements clause. Under that model, the federal sentencing court need only inquire whether a particular element of a prior conviction is the same, or narrower than, the corresponding element set forth in § 4B1.2(b). The minority rule should be compared to the rule in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuit Courts of Appeal.

The Second Circuit holds that the determination of a "controlled substance offense" requires the federal sentencing court to "compare the elements of [the state crime] to the elements of the corresponding generic federal crime." *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018). If the "state statute is broader than its federal counterpart," the prior offense is not a "controlled substance offense." *Id*. By referring to a "corresponding generic federal crime," the Second Circuit construes the "controlled substance offense" provision as an enumerated offense clause requiring a comparison between the elements of the prior offense of conviction with the elements of the generic federal crime identified in § 4B1.2(b).

The Third Circuit holds that a prior state conviction cannot qualify as a "controlled substance offense" "if its elements are broader than those of a listed

generic offense." See *United States v. Glass*, 904 F.3d 319, 321-22 (3rd Cir. 2018) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2551 (2016)). As indicated in *Glass*, the Third Circuit views § 4B1.2(b) as setting forth a list of generic drug offenses, while holding that the defendant's prior drug trafficking conviction did not "sweep more broadly than § 4B1.2(b)." *Id*. at 324.

In *United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017), the court held that a prior West Virginia conviction for attempted distribution of a controlled substance did not qualify as a "controlled substance offense." *Id*. at 181. Following the *Taylor* model, the court opined that the elements of the prior offense must correspond to the elements of the "enumerated offense." *Id*. at 183. Moreover, in the context of an "attempt" offense, the court must first determine whether the state's definition of attempt comports categorically with the generic attempt. *Id*. at 185. Second, the court must determine "whether the underlying state offense is a categorical match for the Guideline predicate offense." *Id*. Both inquiries are required to determine whether the state statute sweeps more broadly than the "generic crime." *Id*. at 185-86 (citing *Descamps*, 133 S. Ct. at 2281).

In *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), the court explained that it employs the categorical approach to determine "whether a prior conviction is included within an offense defined or enumerated in the Guidelines." *Id*. at 572. The defendant argued that his prior Texas conviction for delivery of heroin did not qualify as a "controlled substance offense" because the offense broadly included an "offer to sell" a controlled substance. The circuit court agreed that the prior offense proscribed

a "greater swath of conduct than the elements of the relevant [Guidelines] offense." *Id*. at 576 (quoting *Mathis*, 136 S.Ct. at 2551). This "mismatch of elements" meant that the prior conviction did not constitute a "controlled substance offense." *Id*. at 576 (quoting *Mathis*, 136 S. Ct. at 2551).

The Seventh Circuit agrees that the determination of a "controlled substance offense" requires an offense-matching categorical approach. The elements of the prior crime of conviction are examined to see if they "match" the elements of the "generic" offense. *United States v. Smith*, 921 F.3d 708, 712 (7th Cir. 2019) (quoting *Mathis*, 136 S. Ct. at 2248), *cert. filed*, No. 19-6144, Oct. 3, 2019. In *Smith*, the Seventh Circuit assumed that the Indiana offense of conviction – dealing in a controlled substance – was broader than a generic distribution offense because it included "financing" the manufacture or delivery. The court reasoned that the statute was divisible and, under the modified categorical approach, the government proved the defendant knowingly possessed with intent to deliver cocaine. *Id*. at 715. The elements of the prior offense therefore matched the elements of the offense enumerated in the Guidelines: "(1) possession (2) of a controlled substance (3) with intent to distribute that substance." *Id*. at 715-16.

United States v. Maldonado, 864 F.3d 893 (8th Cir. 2017), is the same. "To determine whether a prior conviction qualifies as a controlled substance offense," the court employs a categorical approach. *Id*. at 897 (quoting *United States v. Robinson*, 639 F.3d 489, 495 (8th Cir. 2011)). The court inquires "whether the state statute defining the crime of conviction categorically fits within the generic federal definition

of a corresponding [controlled substance offense]." *Id*. at 897 (quoting *United States v. Roblero-Ramirez*, 716 F.3d 1122, 1125 (8th Cir. 2013)). Applying the appropriate test, the court concluded that Maldonado's prior convictions for (1) attempt to conspire to distribute methamphetamine in Nebraska and (2) possession with intent to deliver marijuana in Iowa fell within the generic definitions of "distribution" or "dispensing" a controlled substance set forth in § 4B1.2(b). *Id*. at 900-01.

Similarly, the Ninth Circuit applies the categorical approach to the determination of controlled substance offenses under the Guidelines. *United States v. Brown*, 879 F.3d 1043 (9th Cir. 2018). "If the statute of conviction sweeps more broadly than the generic crime, a conviction under that law cannot categorically count as a qualifying predicate, even if the defendant actually committed the offense in its generic form." *Id*. at 1047 (quoting *United States v. Hernandez*, 769 F.3d 1059, 1062 (9th Cir. 2014)). In *Brown*, the court concluded that the Washington offense of conspiracy to distribute a controlled substance was broader than the generic federal definition because, unlike the generic crime, it criminalized an agreement with a state agent. *Id*. at 1048-49.

Rounding out the majority view, *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017), held that the categorical approach applied to the determination of "controlled substance offenses" under § 4B1.2(b). *Id*. at 1144-45. The elements of the prior conviction were compared to the elements of the "generic predicate offense." *Id*. at 1145. In *Madkins*, the prior Kansas conviction for possession with intent to sell cocaine and marijuana did not qualify as a controlled substance offense because the

Kansas statute defined "sale" to include an "offer to sell" which the court found to be broader than "distribution" under the Guidelines. *Id*. at 1145.

The above survey of circuit court decisions demonstrates a clear split in the interpretation of "controlled substance offenses" under § 4B1.2(b) of the sentencing Guidelines. The split of authority begs resolution by the Court.

III. Petitioner's case presents an appropriate vehicle for resolution of the circuit split on the important question presented.

This case involves a question which arises in a vast number of cases throughout the country, i.e., whether a prior conviction qualifies as a "controlled substance offense" for the purpose of a Guidelines sentencing range enhancement. The split of authority is well developed, mature and ripe for review. Nearly every circuit has weighed in on the question with differing results.

The record is clear. The question whether Petitioner's prior Florida conviction qualifies as a controlled substance offense was preserved for review in the district court and the circuit court.

The resolution of the question is dispositive of the case. If Mr. Bishop's prior conviction does not qualify as a controlled substance offense, his base offense level will be reduced by two, and he will be entitled to a resentencing hearing. *Cf*. USSG § 2K2.1(a)(3), with § 2K2.1(a)(4). His Guidelines sentencing range of 70-87 months would be reduced to 57-71 months. Even the Eleventh Circuit acknowledges that

where an offense-matching categorical approach applies, a Florida drug conviction is broader than its generic analogue because the Florida offense lacks the element of knowledge of the illicit nature of the substance. See *Donawa v. U.S. Att. General*, 735 F.3d 1275 (11th Cir. 2013).

IV. The decision below is wrong.

The decision below is wrong because it conflicts with the law of the Court established by *Taylor* and its progeny – absent the identification of a specific statutory crime, an enumerated offense will qualify for a federal sentencing enhancement if its elements are the same as, or narrower than, the generic federal definition. The decision below deviated from this rule because the circuit court failed to recognize the "controlled substance offense" provision of § 4B1.2(b) encompasses a list of enumerated offenses.

A split of authority developed on the same issue. A minority of circuit courts apply an elements-based analysis rather than an offense-matching analysis.

Under the offense-matching approach, the decision below is clearly wrong. In 2002, the Florida Legislature enacted a sweeping reform of its controlled substance crimes. *See* Fla. Stat. § 893.101. Under the new law, no drug offense under Chapter 893, Florida Statutes, includes a mens rea element.[2] Florida makes the unknowing

[2] Some Florida drug crimes require proof of "knowledge of the presence of the substance." While this is a "state of mind" element, it is not a guilty state of mind element or mens rea element, for it is satisfied by knowledge of the presence of an unknown substance. See *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), *superseded on other grounds by* Fla. Stat. § 893.101 (eliminating the judicially inferred element of

possessor or distributor just as guilty as the knowing. The generic federal drug trafficking offenses such as manufacturing, distributing or possessing with intent to manufacture, distribute, etc., a controlled substance, as set forth in USSG § 4B1.2(b), include the mens rea element of knowledge of the illicit nature of the substance. *See* 21 U.S.C. § 841(a); *McFadden v. United States*, 135 S. Ct. 2298 (2015), and the survey of state laws, circa 1986,[3] set forth in Appendix B, describing the mens rea requirements for drug trafficking offenses. Indeed, 48 of 50 states required a mens rea element even for the lesser offense of simple possession of a controlled substance. *See Dawkins v. State*, 547 A.2d 1041, 1044 n.6 (Md. 1988) (surveying mens rea requirement for simple possession of a controlled substance in 50 states). Accordingly, Petitioner's prior Florida conviction for conspiracy to sell, manufacture, deliver, or possess with the intent to sell, manufacture or deliver a controlled substance is broader than its generic counterpart and does not qualify as a "controlled substance offense" under § 4B1.2(b).

knowledge of the illicit nature of the substance).

[3] The current Guidelines definition of "controlled substance offense" was originally adopted November 1, 1989. *See* Federal Sentencing Guidelines Manual, Vol. 3, (2011 ed.), Appendix C, Amendment 268, effective November 1, 1989. A 1986 survey of state laws therefore reflects the presumptive knowledge of the Sentencing Commission at the time of the Amendment.

CONCLUSION

For the reasons stated above, the Court should grant the writ.

Respectfully submitted,

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

s/Richard M. Summa
***RICHARD M. SUMMA**
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 890588
227 N. Bronough Street, Suite 4200
Tallahassee, Florida 32301
Telephone: (850) 942-8818
FAX: (850) 942-8809
Attorney for Petitioner

* Counsel of Record