No. 20-6399

IN THE SUPREME COURT OF THE UNITED STATES

DUWAYNE JONES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions under Fla. Stat. § 893.13(1) (2003, 2008, and 2015) qualified as "controlled substance offense[s]" under Sentencing Guidelines § 4B1.1.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Jones, No. 19-cr-80004 (Apr. 12, 2019)

United States Court of Appeals (11th Cir.):

United States v. Jones, No. 19-11655 (July 6, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-2) is not published in the Federal Reporter but is reprinted at 814 Fed. Appx. 553.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2020. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on

November 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of distributing heroin and cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1. He was sentenced to 144 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1, at 1-2.

1. In September 2018, a confidential source informed the Palm Beach County Sheriff's Office (PBSO) that petitioner was distributing illicit narcotics. Presentence Investigation Report (PSR) ¶ 3. A PBSO deputy, acting in an undercover capacity, called petitioner on October 2, 2018, to arrange for the purchase of crack cocaine and heroin. PSR ¶ 4. Petitioner directed the PBSO deputy to a specific area to complete the transaction. Ibid.

After reaching the predetermined location, the deputy, accompanied by another undercover PBSO deputy, called petitioner. PSR ¶ 4. Petitioner arrived and handed one of the deputies a loose piece of what they suspected was crack cocaine and a folded piece of paper containing suspected heroin. PSR ¶ 5. One of the deputies paid for the drugs. Ibid. Before leaving, petitioner told them that the heroin was safe because it did not contain fentanyl. Ibid. Laboratory tests determined that the deputies received

0.1956 grams of cocaine and 0.0509 grams of heroin, which contained suspected fentanyl. PSR ¶ 6.

After filing a criminal complaint and securing an arrest warrant, one of the undercover deputies arranged to buy $40 of heroin from petitioner on December 12, 2018. PSR ¶ 7. Petitioner was arrested after completing the sale. Ibid. A search of petitioner uncovered pill bottles containing heroin and crack cocaine, a razor blade, tinfoil containing a small amount of marijuana, and $415. PSR ¶ 8. Laboratory tests determined that the suspected heroin actually contained heroin, cocaine, and additional suspected substances, with a net weight of 0.0968 grams. PSR ¶ 9. The seized cocaine had a net weight of 6.5653 grams. Ibid.

2. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with knowingly and intentionally distributing controlled substances (heroin and cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Indictment 1. Petitioner pleaded guilty without a plea agreement. Pet. 5. At the request of the district court, the government orally provided a factual proffer of evidence (consistent with the facts set forth above) to support the charged count. 2/1/19 Tr. 15-17. Petitioner agreed that the facts included in the proffer were "true and correct" and could be proved at trial beyond a reasonable doubt. Id. at 17-18. The court accepted the plea. Id. at 18.

In its presentence report, the Probation Office determined that petitioner was a career offender under Sentencing Guidelines § 4B1.1. PSR ¶ 20. Section 4B1.1 prescribes an increased offense level where a defendant who is convicted of a felony controlled-substance offense is (1) at least 18 years old at the time of the offense; and (2) has at least two prior felony convictions for "controlled substance offense[s]." Sentencing Guidelines § 4B1.1(a). Section 4B1.2(b) defines the term "controlled substance offense" to include "an offense under * * * state law, punishable by imprisonment for a term exceeding one year, that prohibits the * * * possession of a controlled substance * * * with intent to * * * distribute." Id. § 4B1.2(b).

The Probation Office cited petitioner's three previous convictions for possession of cocaine with intent to deliver or sell, and a previous conviction for possession of cocaine with intent to sell, all in violation of Fla. Stat. § 893.13(1) (2003, 2008, and 2015). PSR ¶¶ 20, 35, 38-39, 45. The Probation Office calculated petitioner's enhanced offense level to be 32, because the statutory maximum penalty for petitioner's Section 841 offense was 20 years of imprisonment. PSR ¶ 20 (citing Sentencing Guidelines § 4B1.1(b)(3)). Petitioner's career-offender classification resulted in a criminal-history category of VI. PSR ¶ 48; see Sentencing Guidelines § 4B1.1(b). After subtracting three levels for petitioner's timely acceptance of responsibility, the Probation Office calculated an advisory guidelines range of 151 to

188 months of imprisonment. PSR ¶¶ 21-22, 89; see Sentencing Guidelines §§ 3E1.1(a) and (b).

Petitioner objected to his career-offender classification. He argued that Fla. Stat. § 893.13(1) (2003, 2008, and 2015) does not constitute a controlled substance offense because it does not require the government to prove that the defendant knew the substance he possessed was illicit, with Florida law instead treating lack of such knowledge as an affirmative defense. See D. Ct. Doc. 26, at 1-2 (Mar. 25, 2019); see State v. Adkins, 96 So. 3d 412, 414-416 (Fla. 2012); see also Shelton v. Secretary, Dep't of Corr., 691 F.3d 1348, 1354-1355 (11th Cir. 2012), cert. denied, 569 U.S. 923 (2013); Donawa v. United States Att'y Gen., 735 F.3d 1275, 1281 (11th Cir. 2013). Petitioner acknowledged, however, that the court of appeals had rejected that argument in United States v. Smith, 775 F.3d 1262, 1264 (11th Cir. 2014), cert. denied, 576 U.S. 1013 (2015). In Smith, the court had recognized that a mens rea element is neither expressed nor implied by the definition of "controlled substance offense" in Section 4B1.2(b), and that the "plain language of the definition[]" is "unambiguous" and requires only that the predicate offense prohibit certain activities related to controlled substances. Id. at 1267.

The district court, relying on Smith, overruled petitioner's objection to his career-offender designation. Sent. Tr. 3. The court imposed a below-Guidelines sentence of 144 months of imprisonment. Id. at 22.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. A1, at 1-2. The court rejected petitioner's argument that his convictions under Section 893.13 were not controlled-substance offenses under Section 4B1.2(b). Id. at 2. Relying on its decision in Smith, the court explained that convictions under Section 893.13 are "controlled substance offense[s]," even though Section 893.13 "does not contain a mens rea element regarding the illicit nature of the controlled substance," because Section 4B1.2(b) does not include either an "express[] or implied" mens rea element as to the illicit nature of the controlled substance. Id. at 1-2.

ARGUMENT

Petitioner renews his claim (Pet. 11-14) that the career-offender guideline applies only to state drug offenses that require proof of the defendant's knowledge of the illicit nature of the substance. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted. This Court has recently and repeatedly denied petitions for writs of certiorari raising the same or similar issues involving the same Florida statute.* See, e.g., Givens v. United States, 141 S. Ct. 605 (2020) (No. 20-5670); Hughes v.

* The petition for a writ of certiorari in Billings v. United States, No. 20-7101 (filed Feb. 4, 2021), raises the same issue presented here.

United States, 138 S. Ct. 976 (2018) (No. 17-6015); Kelly v. United States, 137 S. Ct. 2317 (2017) (No. 16-9320); Durham v. United States, 137 S. Ct. 2264 (2017) (No. 16-7756); Russell v. United States, 137 S. Ct. 2091 (2017) (No. 16-6780); Telusme v. United States, 137 S. Ct. 2091 (2017) (No. 16-6476); Jones v. United States, 137 S. Ct. 316 (2016) (No. 16-5752); Johnson v. United States, 136 S. Ct. 2531 (2016) (No. 15-9533); Blanc v. United States, 136 S. Ct. 2038 (2016) (No. 15-8887); Gilmore v. United States, 136 S. Ct. 1476 (2016) (No. 15-8137); Chatman v. United States, 577 U.S. 1085 (2016) (No. 15-7046); Bullard v. United States, 577 U.S. 994 (2015) (No. 15-6614); Smith v. United States, 576 U.S. 1013 (2015) (No. 14-9713); Smith v. United States, 135 S. Ct. 2333 (2015) (No. 14-9258). The same result is warranted here, particularly because this case involves only the advisory Sentencing Guidelines.

1. Sentencing Guidelines § 4B1.2(b) defines the term "controlled substance offense" to include "an offense under * * * state law, punishable by imprisonment for a term exceeding one year, that prohibits the * * * possession of a controlled substance * * * with intent to * * * distribute." Id. § 4B1.2(b). The court of appeals correctly determined that petitioner's prior convictions under Fla. Stat. § 893.13(a) (2003, 2008, and 2015) for possessing cocaine with the intent to sell or deliver it constitute controlled-substance offenses under that definition, notwithstanding the Florida statute's treatment of the

defendant's knowledge of the illicit nature of the substance, or lack thereof, as an affirmative defense rather than an offense element. Pet. App. A1, at 1-2.

As the court of appeals explained, Section 893.13 "criminalizes the * * * possession of a controlled substance * * * with intent to sell, manufacture, or deliver," Pet. App. A1, at 1, which readily satisfies Section 4B1.2(b)'s definition of a controlled-substance offense as including "the possession of a controlled substance * * * with intent to manufacture" or "distribute" it. Ibid. The court correctly recognized that "no mens rea element with respect to the illicit nature of the controlled substance is expressed or implied" by that definition. Id. at 2.

2. Petitioner's contrary arguments lack merit.

a. Petitioner asserts (Pet. 11) that the Guidelines' definition of a controlled-substance offense "originally * * * tracked the language of 28 U.S.C. 994(h)," a statute that directed the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for" certain types of recidivist offenders. 28 U.S.C. 994(h). But as the commentary accompanying current Section 4B1.1 confirms, while the Guidelines continue to "implement[] th[e] directive" of Section 994(h), the current framework rests on the Commission's "general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under

28 U.S.C. § 994(o) and (p)," and adopts a different definition of qualifying offenses. Sentencing Guidelines § 4B1.1, comment. (backg'd) (explaining that the Commission "modified [Section 994(h)'s] definition in several respects"); see Pet. 13.

Petitioner additionally errs in describing (Pet. 11) Section 893.13 as imposing "strict liability" for possession offenses. Section 893.13(1) requires that a defendant have "knowledge of the presence of the substance." State v. Adkins, 96 So. 3d 412, 416 (Fla. 2012). To be convicted of the particular possession offenses under Section 893.13(1)(a) of which petitioner was convicted -- three previous convictions for possession of cocaine with intent to deliver or sell, and one previous conviction for possession of cocaine with intent to sell, see PSR ¶¶ 20, 35, 38-39, 45 -- Section 893.13(1)(a) requires that the defendant possess a controlled substance "with intent to sell * * * or deliver" it. Fla. Stat. § 893.13(1)(a) (2003, 2008, and 2015). And a separate provision of Florida's drug law provides that "[l]ack of knowledge of the illicit nature of a controlled substance is an affirmative defense." Fla. Stat. § 893.101(2); see Adkins, 96 So. 3d at 415-416, 420-421. A defendant who is "[c]harged under Fla. Stat. § 893.13(1)(a)" with possessing a controlled substance with intent to sell or deliver it, but who was "unaware of the substance's illicit nature" when he possessed it with that intent, thus "can raise that unawareness as an affirmative defense." Shular v. United States, 140 S. Ct. 779, 787 (2020). No sound basis exists

to suppose that the Commission, in prescribing enhanced offense levels for offenders with certain qualifying prior drug convictions, intended the application of the enhanced offense level to turn on precisely how state law allocated the burden of proof for that particular fact concerning the defendant's mental state.

b. Petitioner does not contend that the decision below conflicts with any decision of this Court construing the relevant language of the Guidelines. As he observes, the Court recently declined in Shular v. United States, supra, to pass on the similar question whether a conviction under Section 893.13(1)(a) constitutes a "serious drug offense" under 18 U.S.C. 924(e)(2)(A)(ii) -- a provision that petitioner describes (Pet. 11) as "identical" in scope to Section 4B1.2 -- despite the lack of a requirement under Florida law that the prosecution affirmatively prove a defendant's knowledge of the illicit nature of the substance. Shular, 140 S. Ct. at 787 n.3.

Petitioner errs in contending (Pet. 12-13, 16-18) that the decision below conflicts with this Court's decisions in Staples v. United States, 511 U.S. 600 (1994), Elonis v. United States, 135 S. Ct. 2001 (2015), and McFadden v. United States, 576 U.S. 186 (2015). Those decisions determined what mens rea is required by certain substantive federal criminal statutes, not the question here of whether petitioner's prior convictions under state drug statutes qualify him for an enhanced offense level under the

Sentencing Guidelines. In Staples, invoking a "presumption that a defendant must know the facts that made his conduct illegal," the Court held that the federal firearm-registration offense required proof that the defendant knew that his weapon fell within the statutory definition of a machine gun. 511 U.S. at 619. Similarly, the Court's decision in Elonis rested on the principle that, where a substantive criminal statute is "silent on the required mental state," the Court will "read into the statute" the "mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" See 135 S. Ct. at 2010 (citation omitted); accord United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994). And in McFadden, this Court interpreted a federal drug statute -- the Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. E (§ 1207 et seq.), 100 Stat. 3207-13 -- to require proof that the defendant "knew he was dealing with 'a controlled substance.'" 576 U.S. at 188-189. None of those decisions supports reading into Section 4B1.2's definition of a controlled-substance offense an unstated requirement of a particular mens rea with respect to the illicit nature of the substance.

3. Petitioner's contention (Pet. 14-16) that review is warranted to resolve a conflict among the courts of appeals lacks merit. Petitioner points (Pet. 14-15) to the Second Circuit's decision in United States v. Savage, 542 F.3d 959 (2008), which concluded that a Connecticut drug statute did not categorically

qualify as a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b). 542 F.3d at 964-966. That conclusion, however, was based on the Connecticut statute's inclusion of fraudulent offers to sell a controlled substance, where the defendant lacked any actual intent to distribute it. See id. at 965-966. The decision did not address what, if any, mens rea the Guideline requires as to the illicit nature of the substance.

Likewise, no conflict exists with the Fifth Circuit's decision in United States v. Fuentes-Oyervides, 541 F.3d 286 (2008) (per curiam), on which petitioner relies (Pet. 15). In Fuentes-Oyervides, the court concluded that, to qualify as a "serious drug offense" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii), a state crime must require an intent to distribute controlled substances, and not only proscribe "mere possession or transportation." 541 F.3d at 289. That decision did not address the defendant's knowledge of the illicit nature of the substance possessed.

Petitioner's reliance (Pet. 15-16) on the Fifth Circuit's decisions in United States v. Medina, 589 Fed. Appx. 277 (2015) (per curiam), Sarmientos v. Holder, 742 F.3d 624, 627-631 (2014), and United States v. Teran-Salas, 767 F.3d 453, 457 n.1 (2014), cert. denied, 575 U.S. 986 (2015), is likewise misplaced. Those decisions involved the definition in the Immigration and Nationality Act, 8 U.S.C. 1101, of "aggravated felony," which defines "drug trafficking crime[s]" as including state laws that

"proscribe[] conduct [that would be] punishable as a felony under" the federal Controlled Substances Act. Moncrieffe v. Holder, 569 U.S. 184, 188 (2013) (citation omitted). Those decisions do not inform the interpretation of Section 4B1.2's differently worded definition of "controlled substance offense."

4. Even if a lower-court conflict existed, further review would be unwarranted for the independent reason that the question presented concerns interpretation of the Sentencing Guidelines, which the Sentencing Commission can amend to address any disagreements. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348; see United States v. Booker, 543 U.S. 220, 263 (2005). Particularly because the Guidelines are now advisory, see Booker, 543 U.S. at 245, this Court's review of the court of appeals' decision applying the Guidelines is not warranted. Any claim that the career offender guideline should not include Florida controlled substance convictions as predicate offenses is best addressed to the Commission.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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