

APPENDIX

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-15031
Non-Argument Calendar

D.C. Docket No. 9:19-cr-80085-RAR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VIGUENS CIUS,

Defendant-Appellant.

Appeal from the United States District Court
Southern District of Florida

(October 22, 2020)

Before ROSENBAUM, JILL PRYOR, and LAGOA, Circuit Judges.

PER CURIAM:

Viguens Cius (“Cius”) appeals his sentence following his guilty plea for one count of distribution of a controlled substance and one count of possession with intent to distribute a controlled substance, both in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), as well as one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). On appeal, Cius argues that the district court erred in classifying him as a career offender under the U.S. Sentencing Guidelines because his four prior state felony convictions under Florida Statute § 893.13 do not constitute “controlled substance offenses” under the Sentencing Guidelines. Because our precedent forecloses Cius’s argument, we affirm his sentence.

I. FACTUAL AND PROCEDURAL HISTORY

Cius entered into a plea agreement, which specifically acknowledged the possibility of the district court classifying him as a career offender. After the district court accepted Cius’s guilty plea, a probation officer prepared a presentence investigation report. Under U.S. Sentencing Guidelines § 2K2.1, a defendant who previously committed “at least two felony convictions of . . . a *controlled substance offense*” receives a base offense level of twenty-four. U.S.S.G. § 2K2.1(a)(2) (emphasis added). The Sentencing Guidelines define a “controlled substance offense” as a state or federal law offense, “punishable by imprisonment for a term exceeding one year, 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). The probation officer determined that Cius’s four prior convictions for selling cocaine, in violation of Florida Statute § 893.13, warranted applying the career offender enhancement, resulting in a base offense level of thirty-two. *See* Fla. Stat. § 893.13(1)(a)(1) (stating that it is a second-degree felony to “sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance” described in Florida Statute § 893.03(2)(a)); *id.* § 893.03(2)(a) (listing cocaine and any of its derivatives); *id.* § 775.082(3)(d) (stating that a term of imprisonment for a second-degree felony is a term not exceeding fifteen years). After applying the career offender enhancement and accounting for Cius’s timely acceptance of responsibility, the probation officer calculated Cius’s offense level as twenty-nine and his criminal history category as VI, which yielded a guidelines range of 262 to 327 months of imprisonment. *See* U.S.S.G. § 4B1.1(c)(3).

Cius objected to the calculations in the presentence investigation report. Specifically, he argued that because Florida Statute § 893.13 does not require a *mens rea* element, his prior convictions under that statute should not qualify as a predicate controlled substance offense under the Sentencing Guidelines. While Cius acknowledged that this Court’s precedent precludes his argument, he argued that the district court should adopt the approach taken by the Second, Fifth, and Ninth

Circuits, which have required a *mens rea* element in state statutes before applying similar enhancements. The district court sentenced Cius below the Sentencing Guidelines range to 240 months of imprisonment. This timely appeal followed.

II. STANDARD OF REVIEW

“This Court reviews *de novo* whether a prior conviction is a ‘controlled substance offense’ under Section 4B1.2(b)” of the Sentencing Guidelines. *United States v. Lange*, 862 F.3d 1290, 1293 (11th Cir. 2017) (quoting *United States v. Frazier*, 89 F.3d 1501, 1505 (11th Cir. 1996)).

III. ANALYSIS

On appeal, Cius argues that the district court erred in finding that his state-law convictions for selling cocaine were predicate offenses for a career offender determination given the lack of a *mens rea* requirement for those convictions. Cius, however, acknowledges that his argument is contrary to this Court’s decision in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014). In *Smith*, we rejected the generic-offense analysis that Cius now advocates for in this case and concluded that a court need not determine whether the elements of a state law conviction serving as a predicate drug offense match “the elements of ‘generic’ definitions of ‘serious drug offense’ and ‘controlled substance offense’” under federal law, but instead, stated that the definitions of “serious drug offense” and “controlled substance offense” in § 924(e)(2)(A) and U.S. Sentencing Guidelines § 4B1.2(b) should be compared to

the state offense. *Smith*, 775 F.3d at 1267. As a result, we held that a conviction under Florida Statute § 893.13(1) is a “serious drug offense” under § 924(e)(2)(A) and a “controlled substance offense” under Sentencing Guidelines § 4B1.2(b). *Smith*, 775 F.3d at 1268. The Supreme Court subsequently affirmed this Court’s approach in *Shular v. United States*, 140 S. Ct. 779 (2020), determining that a sentencing enhancement is appropriate when the conviction involves certain specified conduct, even if the elements of the state law crime are not the same as those of the generic offense. *See id.* at 787.

Until the Supreme Court or this Court sitting *en banc* overrules *Smith*, it remains binding precedent in this Circuit, and we must apply it to this case. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (describing the prior precedent rule). Under *Smith*, Florida Statute § 893.13(1) is both a “serious drug offense” under § 924(e)(2)(A) and a “controlled substance offense” under Sentencing Guidelines § 4B1.2(b). 775 F.3d at 1268. Because *Smith* remains binding precedent, Cius’s four Florida convictions for the sale of cocaine in violation of Fla. Stat. § 893.13 are qualifying predicate convictions and the district court did not err in sentencing Cius under the career offender enhancement.

Accordingly, we affirm Cius’s sentence.

AFFIRMED.

UNITED STATES DISTRICT COURT
Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA**JUDGMENT IN A CRIMINAL CASE****v.**Case Number: **19-CR-80085-RUIZ-1**USM Number: **19844-104****VIGUENS CIUS**Counsel for Defendant: **Timothy Day**Counsel for The United States: **Jennifer C. Nucci**Court Reporter: **Gizella Baan-Proulx****The Defendant pleaded guilty to Counts 1, 2, and 3.**

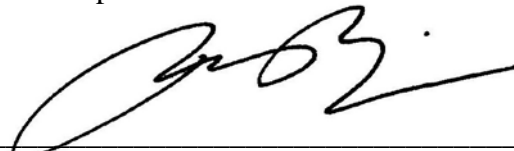
The Defendant is adjudicated guilty of these offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
21 U.S.C. § 841(a)(1), (b)(1)(C)	Distribution of a controlled substance, a mixture and substance containing a detectable amount of heroin and cocaine	02/28/2019	1
21 U.S.C. § 841(a)(1), (b)(1)(C)	Possession with intent to distribute a controlled substance, a mixture and substance containing a detectable amount of heroin and cocaine	04/09/2019	2
18 U.S.C. § 924(c)(1)(A)(i)	Possession of a firearm in furtherance of a drug trafficking crime	04/09/2019	3

The Defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

All remaining counts are dismissed on the motion of the Government.

It is ordered that the Defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the Defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **12/16/2019**


RODOLFO A. RUIZ
UNITED STATES DISTRICT JUDGE

Date: 12/16/2019

DEFENDANT: **VIGUENS CIUS**
CASE NUMBER: **19-CR-80085-RUIZ-1**

IMPRISONMENT

The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **240 months**. The term consists of 180 months as to Counts One and Two, to be served concurrently, and 60 months as to Count Three, to be served consecutively to Counts One and Two.

The Court makes the following recommendations to the Bureau of Prisons:

- Designation in or as near to the Southern District of Florida as possible.
- Placement in the Residential Drug Abuse Treatment Program (i.e. 500-hour drug treatment program) at a designated Bureau of Prisons institution.

The Defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: **VIGUENS CIUS**
CASE NUMBER: **19-CR-80085-RUIZ-1**

SUPERVISED RELEASE

Upon release from imprisonment, the Defendant shall be on supervised release for a term of **three (3) years**. This term consists of three (3) years as to Counts One, Two and Three, all such terms to run concurrently.

The Defendant must report to the probation office in the district to which the Defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The Defendant shall not commit another federal, state or local crime.

The Defendant shall not unlawfully possess a controlled substance. The Defendant shall refrain from any unlawful use of a controlled substance. The Defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

The Defendant shall cooperate in the collection of DNA as directed by the probation officer.

The Defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the Defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The Defendant must comply with the standard conditions that have been adopted by this Court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The Defendant shall not leave the judicial district without the permission of the Court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The Defendant shall support his or her dependents and meet other family responsibilities;
5. The Defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The Defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The Defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The Defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The Defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and
13. As directed by the probation officer, the Defendant shall notify third parties of risks that may be occasioned by the Defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the Defendant's compliance with such notification requirement.

DEFENDANT: **VIGUENS CIUS**
CASE NUMBER: **19-CR-80085-RUIZ-1**

SPECIAL CONDITIONS OF SUPERVISION

Permissible Search - The Defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The Defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The Defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Unpaid Restitution, Fines, or Special Assessments - If the Defendant has any unpaid amount of restitution, fines, or special assessments, the Defendant shall notify the probation officer of any material change in the Defendant's economic circumstances that might affect the Defendant's ability to pay.

DEFENDANT: **VIGUENS CIUS**
CASE NUMBER: **19-CR-80085-RUIZ-1**

CRIMINAL MONETARY PENALTIES

The Defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$300.00	0	0

If the Defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>
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- Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **VIGUENS CIUS**
CASE NUMBER: **19-CR-80085-RUIZ-1**

SCHEDULE OF PAYMENTS

Having assessed the Defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of \$300.00 due immediately.

Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including Defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

<u>CASE NUMBER</u>	<u>TOTAL AMOUNT</u>	<u>JOINT AND SEVERAL</u>
<u>DEFENDANT AND CO-DEFENDANT NAMES</u>		<u>AMOUNT</u>
<u>(INCLUDING DEFENDANT NUMBER)</u>		

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and Court costs.