

**In The
Supreme Court of the United States**

JASON LYDELL ORR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Petitioner Jason Lydell Orr, pursuant to Supreme Court Rule 15.8, brings to this Court's attention two published decisions of the U.S. Court of Appeals for the Eleventh Circuit that were issued after Mr. Orr's petition for writ of certiorari was filed. *See Cintron v. U.S. Att'y Gen.*, 882 F.3d 1380 (11th Cir. Feb. 20, 2018) (attached hereto); *Francisco v. U.S. Att'y Gen.*, 884 F.3d 1120 (11th Cir. 2018) (attached hereto). These decisions establish that Petitioner's sentence should not have been enhanced under U.S.S.G. § 2K2.1(a)(2) based in part upon a prior conviction for drug trafficking under Fla. Stat. § 893.135, and that he should be resentenced with the lesser offense level provided in U.S.S.G. § 2K2.1(a)(4)(A).

1. Until *Cintron*, the Eleventh Circuit had applied the modified categorical approach to Fla. Stat. § 893.135. *See, e.g., United States v. Shannon*, 631 F.3d 1187, 1189-90 (11th Cir. 2011); *id.* at 1191-92 (Marcus, J., concurring); Pet. App. at 4a. In Petitioner's case, the Eleventh Circuit applied the modified categorical approach to conclude that his prior conviction under Fla. Stat. § 893.135 rested upon the possession of a specified quantity of drugs and qualifies as a "controlled substance offense" for federal sentencing guidelines purposes. Pet. App. at 6a. Petitioner has sought this Court's review, because the Eleventh Circuit's decision that trafficking-by-possession qualifies as a guidelines predicate conflicts with other circuits' decisions. Pet. at 6-11. Petitioner maintains his request for this Court's review.

2. Petitioner alternatively requests a remand to the Eleventh Circuit to apply its published decisions in *Cintron* and *Francisco* to his case. *Cintron* is the first published decision of the Eleventh Circuit to address the indivisibility of § 893.135 in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See Cintron*, 882 F.3d at 1384-88. *Cintron* now holds that

§ 893.135 is indivisible and that the modified categorical approach therefore does not apply. *Id.* *Francisco* accords with the binding decision in *Cintron*. See *Francisco*, 884 F.3d at 1134-35.

In light of *Cintron* and *Francisco*, the modified categorical approach should not have been applied in Petitioner's case.¹ Moreover, using the categorical approach, a prior conviction under § 893.135 never qualifies as a guidelines predicate. The Eleventh Circuit has already held that § 893.135 is overbroad because the statute includes "purchasing," whereas the guidelines definition of a "controlled substance offense" does not. See *Shannon*, 631 F.3d at 1188-90. Thus, if *Cintron* and *Francisco* were applied to Petitioner's case, those decisions would resolve that his guidelines range was erroneously enhanced and that resentencing is required. See *Gall v. United States*, 552 U.S. 38, 49 (2007) (requiring that "all sentencing proceedings" begin with the correctly calculated guidelines range); 18 U.S.C. § 3742(f)(1).

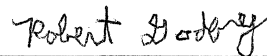
Moreover, this direct appeal may be Petitioner's only avenue for relief from the guidelines error. Despite this Court's recognition of the importance of the correct guidelines

¹ Petitioner did argue in the district court and in his appellate brief filed in August 2014 that § 893.135(1)(b) was divisible. Petitioner, however, has not invited error or waived the argument that the statute is indivisible and that the modified categorical approach therefore does not apply. The invited-error doctrine 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). At the time that Petitioner was sentenced (on May 16, 2014), the Eleventh Circuit applied the modified categorical approach to Fla. Stat. § 893.135. See Doc. 81; *United States v. Shannon*, 631 F.3d 1187, 1188-90 (11th Cir. 2011); *id.* at 1191-92 (Marcus, J., concurring). 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 States*, 564 U.S. 319, 335 (2011) (leaving to the Ninth Circuit to address on remand whether plain-error review applied).

calculation, the Eleventh Circuit has thus far foreclosed post-conviction relief from guidelines errors. *See Spencer v. United States*, 773 F.3d 1132, 1135 (11th Cir. 2014) (en banc) (holding that guidelines errors are not cognizable under 28 U.S.C. § 2255); *Gilbert v. United States*, 640 F.3d 1293, 1295 (11th Cir. 2011) (en banc) (holding that guidelines errors may not be brought under 28 U.S.C. § 2241). Accordingly, Petitioner, while maintaining his request for review of the circuit conflict presented in his petition, alternatively requests a remand to the Eleventh Circuit to apply its published decisions in *Cintron* and *Francisco* to his case.

Respectfully submitted,

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