

No. 17-7717

IN THE SUPREME COURT OF THE UNITED STATES

JASON LYDELL ORR, 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 conviction for "trafficking in cocaine" by possessing between 28 and 200 grams of cocaine, in violation of Fla. Stat. § 893.135(1)(b) (1995), was a conviction for a "controlled substance offense" for purposes of Sentencing Guidelines § 4B1.2(b) (2013).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 705 Fed. Appx. 892.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2017. A petition for rehearing was denied on November 2, 2017 (Pet. App. 8a). The petition for a writ of certiorari was filed on January 31, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Jury Verdict 1; Judgment 1. He was sentenced to 90 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-7a.

1. On April 21, 2013, police officers in Merritt Island, Florida, responded to reports of shots fired. Presentence Investigation Report (PSR) ¶ 4. When the officers arrived, one of the callers told them that she had seen a black Dodge truck driving in the area where the shots had been fired. PSR ¶ 5. The officers located a black Dodge truck in the front yard of a nearby residence occupied by petitioner and two other individuals. PSR ¶¶ 6, 8. Three spent shell casings were in the open bed of the truck. PSR ¶ 6. A second car, a Chevrolet sedan, was also parked in the front yard. PSR ¶ 7. An officer obtained consent from the owner to search the sedan and found a firearm underneath the driver's seat. PSR ¶ 12. DNA swabs taken from the firearm matched petitioner's DNA profile. PSR ¶ 17.

A federal grand jury in the Middle District of Florida indicted petitioner on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. A jury found petitioner guilty. Jury Verdict 1.

2. The Sentencing Guideline for possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), provides for a base offense level of 24 if the defendant has at least two prior "felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 2K2.1(a)(2) (2013). Section 4B1.2(b) defines a "controlled substance offense" as "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 the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense." Id. § 4B1.2(b); see id. § 2K2.1, comment. (n.1).

The Probation Office found that petitioner had a prior conviction for aggravated assault that qualified as a crime of violence. PSR ¶¶ 24, 38. The Probation Office also found that petitioner had a prior conviction that qualified as a controlled substance offense, PSR ¶¶ 24, 39 -- namely, a 1999 conviction for "trafficking in cocaine" by possessing between 28 and 200 grams of cocaine, in violation of Fla. Stat. § 893.135(1)(b) (1995). Pet. App. 9a (capitalization omitted); see id. at 10a, 32a-33a. Accordingly, the Probation Office assigned petitioner a base offense level of 24 under Section 2K2.1(a)(2). PSR ¶ 24. The Probation Office then applied a two-level enhancement because petitioner's Section 922(g)(1) offense involved a stolen firearm. PSR ¶ 25. Based on a total offense level of 26 and a criminal

history category of VI, the Probation Office determined that petitioner's advisory guidelines range would otherwise be 120 to 150 months of imprisonment. PSR ¶¶ 32, 59, 94. But because the statutorily authorized maximum sentence was ten years, 18 U.S.C. 924(a)(2), the Probation Office calculated an advisory guidelines sentence of 120 months. PSR ¶ 94.

Petitioner objected to the calculation of his base offense level, arguing that his Florida trafficking conviction did not qualify as a controlled substance offense because, in pleading guilty to trafficking, he "necessarily admitted" only to "possessing the cocaine." 4/14/14 Sent. Tr. 9. The district court overruled petitioner's objection and adopted the Probation Office's calculation of an advisory guidelines sentence of 120 months. 5/16/14 Sent. Tr. 8. The court then granted a downward variance and sentenced petitioner to 90 months of imprisonment. Id. at 21.

3. The court of appeals affirmed in an unpublished, nonprecedential opinion. Pet. App. 1a-7a. The court explained that in United States v. James, 430 F.3d 1150 (11th Cir. 2005), aff'd on other grounds, 550 U.S. 192 (2007), overruled on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015), it had determined that "Florida's drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more" of cocaine. Pet. App. 5a (quoting James, 430 F.3d at 1155-1156). The court thus determined that

even though the statute “does not include an express element of intent,” ibid., petitioner’s conviction -- which “was premised upon possession of more than 28 grams of cocaine,” id. at 7a -- “meets the Guidelines definition of a controlled substance offense,” ibid.

ARGUMENT

Petitioner contends (Pet. 6-14) that the court of appeals erred in determining that his prior conviction for “trafficking in cocaine” by possessing between 28 and 200 grams of cocaine, in violation of Fla. Stat. § 893.135(1)(b) (1995), was a conviction for a “controlled substance offense” for purposes of Sentencing Guidelines § 4B1.2(b) (2013). The court of appeals’ decision is correct and does not conflict with any decision of this Court. Although the courts of appeals disagree on whether a state conviction for possession of a controlled substance may qualify as a “controlled substance offense” or “drug trafficking offense” under the Guidelines if the offense does not include a formal element of intent to distribute, the Sentencing Commission is capable of resolving the disagreement by amending the Guidelines. The Court has previously denied review of a similar question, see Campos v. United States, 565 U.S. 964 (2011) (No. 11-5343), and the same result is warranted here.¹

¹ A similar issue is raised in the pending petitions for writs of certiorari in Kitchen v. United States, No. 17-7521 (filed Jan. 18, 2018), and Dover v. United States, No. 17-7991 (filed Mar. 1, 2018).

1. a. Petitioner is correct (Pet. 6-11) that the courts of appeals are divided on whether a state conviction for possession of a controlled substance may qualify as a "controlled substance offense" or "drug trafficking offense" under the Guidelines if the offense does not include a formal element of intent to distribute. Under the Guidelines, a "controlled substance offense" or "[d]rug trafficking offense" is defined, in relevant part, as "an offense under federal or state law * * * that prohibits * * * the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense." Sentencing Guidelines § 4B1.2(b) (2013); see id. § 2L1.2, comment. (n.1(B)(iv)) (defining "[d]rug trafficking offense" similarly). The Eleventh Circuit has concluded that a state conviction for possession of a controlled substance may satisfy that definition even if the offense does not include a formal element of intent to distribute. See United States v. Madera-Madera, 333 F.3d 1228, 1232-1234 (construing "drug trafficking offense" under Section 2L1.2), cert. denied, 540 U.S. 1026 (2003). The Fifth, Sixth, and Ninth Circuits have concluded that the definition requires a formal element of intent to distribute. See United States v. Sarabia-Martinez, 779 F.3d 274, 276-277 (5th Cir. 2015) (construing "drug trafficking offense" under Section 2L1.2); United States v. Lopez-Salas, 513 F.3d 174, 179 (5th Cir. 2008) (per curiam) (same); United States v. Villa-Lara, 451 F.3d 963, 965 (9th Cir. 2006) (same); see also United States v. Montanez, 442 F.3d 485, 493-494

(6th Cir. 2006) (construing "controlled substance offense" under Section 4B1.2).²

b. The disagreement in the courts of appeals does not warrant this Court's review. Even when the Sentencing Guidelines were mandatory, this Court stated that it would not ordinarily resolve circuit conflicts over interpretation of the Guidelines because Congress expected the Sentencing Commission itself to do so through amendments to the Guidelines and commentary. See Braxton v. United States, 500 U.S. 344, 347-349 (1991) (declining to resolve circuit conflict on guidelines provision). As the Court noted, 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) ("The Sentencing Commission will continue to collect

² Petitioner is mistaken in contending (Pet. 8-9) that the Eleventh Circuit's decision in Madera-Madera is contrary to the Tenth Circuit's decision in United States v. Herrera-Roldan, 414 F.3d 1238 (2005), a case involving the Guidelines' definition of a "drug trafficking offense." Although the Tenth Circuit in Herrera-Roldan declined "to infer an intent to distribute based on the structure of the Texas statutory scheme," id. at 1241, it did not foreclose the possibility that a different State's scheme could "imply an intent to distribute from the fact of possession" and thereby satisfy the relevant definition, id. at 1243; see id. at 1242 (explaining that Georgia's scheme, which "draws a clear line at a particular quantity of drugs * * * at which point it no longer distinguishes between simple possession and other acts," "gives rise to the inference that Georgia is punishing not just simple possession, but possession with an implied intent to distribute").

and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.”); Buford v. United States, 532 U.S. 59, 66 (2001) (“Insofar as greater uniformity is necessary, the Commission can provide it.”); 82 Fed. Reg. 39,949, 39,950 (Aug. 22, 2017) (identifying the “[r]esolution of circuit conflicts as warranted” as among the Commission’s “priorities” for the guidelines “amendment cycle ending May 1, 2018”). The Court in Braxton further observed that Congress’s decision to “grant[] the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect” has led the Court to be even “more restrained and circumspect in using [its] certiorari power as the primary means of resolving such [circuit] conflicts.” 500 U.S. at 348 (emphasis omitted).

The Court’s longstanding reluctance to decide interpretive questions about the Guidelines is even more appropriate after Booker, which rendered the Guidelines advisory only. See 543 U.S. at 245. Even if this Court were to agree with petitioner that a state conviction for possession of a controlled substance may not qualify as a “controlled substance offense” or “drug trafficking offense” under the Guidelines unless the offense includes a formal element of intent to distribute, district courts would remain free to consider such convictions in fashioning the ultimate sentence under 18 U.S.C. 3553(a). See, e.g., 18 U.S.C. 3661; Booker, 543

U.S. at 251-252. Indeed, in Lopez-Salas, the Fifth Circuit vacated the defendant's sentence on the ground that his conviction under the North Carolina statute at issue in that case did not qualify as a "drug trafficking offense" for purposes of Section 2L1.2, but it noted that the district court could nonetheless impose an upward variance on remand based on that conviction. 513 F.3d at 180-181.

Conversely, district courts now have discretion to vary below a properly calculated guidelines range based on the considerations set forth in 18 U.S.C. 3553(a). The district court in this case varied downward from an advisory guidelines sentence of 120 months of imprisonment to a sentence of 90 months. 5/16/14 Sent. Tr. 19-22. That significant downward variance provides additional confirmation that this Court's review of petitioner's guidelines claim is unwarranted.³

2. In any event, the court of appeals correctly determined that petitioner's prior conviction for "trafficking in cocaine" by possessing between 28 and 200 grams of cocaine, in violation of

³ Petitioner also contends that the Eleventh and Fourth Circuits disagree about "whether intent to distribute could be inferred" from "between 28 and 200 grams of cocaine." Pet. 12-13 (citing United States v. Brandon, 247 F.3d 186 (4th Cir. 2001)). But that narrow disagreement between two circuits over the requisite quantity of a single drug is not of sufficient legal importance to warrant further review. This Court has recently denied review of that issue in cases arising under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), see Wilcoxson v. United States, cert. denied, No. 17-669 (Mar. 19, 2018); White v. United States, cert. denied, No. 17-6668 (Mar. 19, 2018), and the same result is warranted here, particularly given that this case arises under the Guidelines, see pp. 7-9, supra.

Fla. Stat. § 893.135(1)(b) (1995), was a conviction for a "controlled substance offense" for purposes of Sentencing Guidelines § 4B1.2(b) (2013), which defines that term to include "an offense under * * * state law * * * that prohibits * * * the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense."

Florida generally divides drug possession crimes into three tiers: (1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a) (2017); (2) possession with intent to distribute a controlled substance, id. § 893.13(1)(a); and (3) "trafficking" in a controlled substance, which includes possessing, selling, purchasing, or manufacturing at least a specified amount of the drug, id. § 893.135. See Pet. App. 5a. Petitioner was convicted of a "[t]rafficking" offense under Section 893.135(1)(b) for possessing cocaine. PSR ¶ 39; see Pet. App. 9a-10a, 32a-33a.⁴ At the time of his offense, Section

⁴ In a supplemental brief, petitioner contends that this case should be remanded in light of two recent Eleventh Circuit decisions determining that Section 893.135 is not divisible. Supp. Br. 1-2 (citing Cintron v. U.S. Att'y Gen., 882 F.3d 1380 (2018), and Francisco v. U.S. Att'y Gen., 884 F.3d 1120 (2018)). Petitioner argued below, however, that Section 893.135(1)(b) is divisible. See 4/14/14 Sent. Tr. 8 ("We would agree that the Court has to engage in what's called a 'modified categorical approach' to determine whether or not this prior conviction constitutes a controlled substance offense."); id. at 20 ("[T]he Florida State Statute 893.135 is divisible."); Pet. C.A. Br. 22 ("It was therefore appropriate to use the modified categorical approach to try to determine the elements of the actual crime for which [petitioner] was convicted."). Petitioner has thus waived any contention to the contrary and invited any error in applying the

893.135(1)(b) provided that any person who knowingly possessed between "28 grams or more, but less than 200 grams," of cocaine was guilty of "trafficking in cocaine," "a felony of the first degree." Fla. Stat. § 893.135(1)(b)(1)(a) (1995).

It is well-settled that possession of a large amount of drugs can demonstrate beyond a reasonable doubt the intent to distribute those drugs. See, e.g., Madera-Madera, 333 F.3d at 1233; United States v. Franklin, 728 F.2d 994, 998-999 (8th Cir. 1984) (collecting cases from other circuits). Florida's drug-trafficking statute reflects that principle. See Pet. App. 5a ("Florida's drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more.") (citation omitted). The statute itself states that it is targeted at "trafficking in cocaine." Fla. Stat. § 893.135(1)(b)(1) (1995). Possession of between 28 and 200 grams of cocaine in violation of Fla. Stat. § 893.135(1)(b) therefore qualifies as "an offense under * * * state law * * * that prohibits * * * the possession of a controlled substance * * * with intent to manufacture, import,

modified categorical approach in this case. See Johnson v. United States, 318 U.S. 189, 200-201 (1943); Shields v. United States, 273 U.S. 583, 586 (1927); United States v. Ross, 131 F.3d 970, 988 (11th Cir. 1997), cert. denied, 525 U.S. 913 (1998). Petitioner contends (Supp. Br. 2 n.1) that the invited-error doctrine is inapplicable because "the law change[d] while the case [wa]s pending on appeal." But contrary to petitioner's contention (ibid.), the Eleventh Circuit's recent decisions in Cintron and Francisco did not overrule any prior circuit precedent on the divisibility of Section 893.135(1)(b).

export, distribute, or dispense.” Sentencing Guidelines § 4B1.2(b) (2013). Indeed, a contrary conclusion would lead to the “anomalous result” that a defendant convicted of possession with intent to distribute even a small amount of cocaine under Section 893.13(1)(a) would qualify for enhanced sentencing under the Guidelines, while a defendant like petitioner, who was convicted of the “more serious” offense of trafficking in 28 grams or more of cocaine, would not. Madera-Madera, 333 F.3d at 1233-1234; cf. 18 U.S.C. 3553(a)(6) (directing sentencing courts to avoid unwarranted disparities).

Petitioner contends (Pet. 11) that his Florida conviction for “trafficking in cocaine” does not qualify as a “controlled substance offense” because intent to distribute is not a formal element of the offense. Under the Guidelines, however, the relevant portion of the definition of a “controlled substance offense” does not turn on whether intent to distribute is itself a formal element of the offense that must separately be proved to secure a conviction, but instead on whether the statute of conviction “prohibits” possession with intent to distribute. Sentencing Guidelines § 4B1.2(b) (2013) (emphasis added). Immediately before defining the term “controlled substance offense” to include an offense under state law that “prohibits” possession with intent to distribute, Section 4B1.2 defines the term “crime of violence” to include “any offense * * * , punishable by imprisonment for a term exceeding one year, that

* * * has as an element the use, attempted use, or threatened use of physical force against the person of another.” Id. § 4B1.2(a) (emphasis added).

The Sentencing Commission’s use of the disparate phrases “prohibits” and “has as an element” in close proximity within the same guideline section demonstrates that it did not intend the two phrases to have the same meaning. Cf., e.g., Russello v. United States, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (brackets and citation omitted). Rather, the word “prohibits” makes clear that the term “controlled substance offense” may include even those state offenses that do not have as a formal element an intent to distribute, where (as here) the statutory context of the state offense illustrates that it necessarily reflects such criminal behavior.

Contrary to petitioner’s contention (Pet. 8), the court of appeals’ decision does not conflict with Taylor v. United States, 495 U.S. 575 (1990), Descamps v. United States, 570 U.S. 254 (2013), or Mathis v. United States, 136 S. Ct. 2243 (2016). Those decisions endorsed a “categorical approach,” Taylor, 495 U.S. at 600, to determining whether a prior offense is one that can trigger a sentencing enhancement under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e). Under that approach, courts look to “the

statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” Taylor, 495 U.S. at 600. The court of appeals’ determination in this case rested on the statutory definition of the offense of “trafficking in cocaine,” Fla. Stat. § 893.135(1)(b)(1) (1995), not any particular facts underlying petitioner’s prior conviction. And as explained above, unlike other guidelines predicates, a “controlled substance offense” is not strictly defined by reference to formal offense “elements,” such that the categorical approach would require a solely element-based analysis.

Petitioner’s reliance (Pet. 7) on Salinas v. United States, 547 U.S. 188 (2006) (per curiam), is likewise misplaced. In Salinas, the Solicitor General acknowledged that the Fifth Circuit had incorrectly determined that a conviction for “simple possession” of a controlled substance qualified as a “controlled substance offense” under the Guidelines. Id. at 188. Petitioner’s prior conviction in this case, however, was not for simple possession -- i.e., possession of any amount of a controlled substance. See Madera-Madera, 333 F.3d at 1231-1232. Rather, petitioner’s conviction was for the more serious offense of possession of a specified amount of drugs from which “Florida’s drug trafficking statute necessarily infers an intent to distribute.” Pet. App. 5a (citation omitted). The decision below accordingly does not conflict with any decision of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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