

No. 17-7717

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

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**JASON LYDELL ORR,**  
*Petitioner,*

v.

**UNITED STATES OF AMERICA,**  
*Respondent.*

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

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**REPLY TO THE BRIEF IN OPPOSITION**

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## REPLY TO THE BRIEF IN OPPOSITION

- I. This Court’s review is needed to resolve a circuit conflict over whether a prior conviction for drug trafficking based solely on possession of the requisite amount of drugs may be used to “infer” an intent to distribute and thus satisfy the definition of a “controlled substance offense” for sentencing purposes.**

The government acknowledges “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.” Brief of the United States in Opposition (“BIO”) at 6. On one side is the Eleventh Circuit, which “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.” *Id.* On the other side, as identified by the government, are the Fifth, Sixth, and Ninth Circuits, which “have concluded that the definition requires a formal element of intent to distribute.” *Id.*<sup>1</sup> The government’s position is that the Eleventh Circuit’s precedent “is correct,” BIO at 5, meaning, presumably, that the government thinks all of the other circuits are incorrect in holding that a prior state conviction must require a formal element of intent to distribute to be considered a “controlled substance offense” or a “drug trafficking offense” under the Guidelines. The government, though, never discusses the other circuits’ cases<sup>2</sup> and never attempts to explain why it thinks they are wrong.

This Court’s intervention is needed to resolve the circuit split. The split has existed for at

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<sup>1</sup> While the government disagrees, BIO at 7 n.2, Petitioner respectfully maintains that the Eleventh Circuit’s precedent also conflicts with that of the Tenth Circuit. See Pet. at 8-10.

<sup>2</sup> See *United States v. Sarabia-Martinez*, 779 F.3d 274, 276-77 (5th Cir. 2015); *United States v. Lopez-Salas*, 513 F.3d 174, 179-81 (5th Cir. 2008); *United States v. Montanez*, 442 F.3d 485, 488, 492-94 (6th Cir. 2006); *United States v. Villa-Lara*, 451 F.3d 963, 964-65 (9th Cir. 2006).

least a dozen years, *compare United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir. 2003), with *United States v. Montanez*, 442 F.3d 485 (6th Cir. 2006), so the competing positions are firmly entrenched and further percolation of the issue will not be beneficial. Also, while the government urges that certiorari should be denied because the Sentencing Commission is capable of resolving the disagreement by amending the Guidelines, BIO at 5, 7-8, the Commission has made no attempt to resolve the long-standing split, and the most recent proposed Guidelines amendments do not address the split.<sup>3</sup> Prior state drug convictions will thus continue to be scored differently depending on which circuit a case is in, which in turn will inevitably result in continuing sentencing disparities given that the appropriate Guidelines range is the “starting point” and “initial benchmark” for all sentencing purposes. *See Gall v. United States*, 552 U.S. 38, 49 (2007).<sup>4</sup>

On the merits, the government parrots back the previous holdings of the Eleventh Circuit, without making any effort to analyze the correctness of those holdings. Thus, the government asserts that “Florida’s drug trafficking statute reflects [the] principle” “that possession of a large amount of drugs can demonstrate beyond a reasonable doubt the intent to distribute those drugs.” BIO at 11.<sup>5</sup> The government insists that “the statutory context” of Florida’s drug trafficking law “illustrates that it necessarily reflects” “an intent to distribute.” BIO at 13; *id.* at 15 (“Florida’s

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<sup>3</sup> The proposed amendments are available through the Sentencing Commission’s website at: <https://www.ussc.gov/guidelines/amendments/preliminary-reader-friendly-amendments-effective-november-1-2018>

<sup>4</sup> The government notes, BIO at 8-9, that district courts remain free to impose a variance sentence, which of course is true, but that is not a good reason to decline to resolve the circuit split given the central importance that correctly calculating the advisory Guidelines imprisonment range has on the ultimate sentence.

<sup>5</sup> The government does not define the quantity of drugs necessary to constitute “a large amount.” *See* Argument II, *infra*.

drug trafficking statute necessarily infers an intent to distribute.”).

Florida case law shows those assertions are not true. In fact, the government’s brief is conspicuous for its utter failure to discuss any Florida state case interpreting Florida’s drug trafficking statute. Federal courts are “bound by the Florida Supreme Court’s interpretation of state law, including its determination of the elements of” Florida crimes. *Johnson v. United States*, 559 U.S. 133, 138 (2010). The government completely ignores Florida case law, which makes clear that a conviction under Fla. Stat. § 893.135 may rest upon the mere possession of the specified quantity of drugs. See Pet. at 7; *Greenwade v. State*, 124 So. 3d 215, 220 (Fla. 2013) (explaining that violation of § 893.135(1)(b)(1) can be proven by possession alone provided “the quantity of the substance met the statutory weight threshold”); *Johnson v. State*, 712 So. 2d 380, 381 (Fla. 1998) (concluding that the possession component of § 893.135 does not have as an element the intent to sell); *Pallin v. State*, 965 So. 2d 1226, 1228 (Fla. 1st DCA 2007) (“under Florida law, a conviction for trafficking may be obtained based on mere possession”). Because an intent to distribute is not an element of a Florida trafficking by possession offense, it cannot be said that a defendant “necessarily” had such an intent. Compare BIO at 11 (“Florida’s drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more.”), and 13 (“the statutory context of the state offense illustrates that it necessarily reflects” an intent to distribute), with *Descamps v. United States*, 570 U.S. 254, 266 n.3 (2013) (questioning “how a factfinder can have ‘necessarily found’ a non-element—that is, a fact that by definition is *not* necessary to support a conviction”).

The government writes that § 893.135(1)(b)(1) is targeted at “trafficking in cocaine,” so it “therefore qualifies” as an offense that prohibits possession with intent to distribute. BIO at 11-12. This assertion is a non sequitur. The term “trafficking,” as found in § 893.135, is not a

generic word to be construed by federal courts. Rather, the meaning of “trafficking,” as found in § 893.135, is determined by the plain language of the statute and by authoritative case law from Florida state courts. “Trafficking” is clearly defined in § 893.135 to include mere possession of the requisite amount of drugs, and authoritative Florida case law, discussed above, confirms that “trafficking” can be committed by simple possession of the requisite amount of drugs, without any intent to distribute.

The government also complains about the “anomalous result” that would occur if a defendant convicted of possessing a small amount of cocaine under a statute having as a formal element an intent to distribute qualified for enhanced sentencing under the Guidelines, while a defendant convicted of the “more serious” offense of trafficking would not so qualify. BIO at 11-12. The job of a court, though, is to interpret a statute or guideline; it is not to re-write a statute or guideline to achieve what it believes should be the correct result. Regardless, any perceived anomaly does not resolve the intractable circuit conflict that exists here.

The government contends that the word “prohibits” in U.S.S.G. § 4B1.2(b) must mean something different than the phrase “has as an element” found in U.S.S.G. § 4B1.2(a). BIO at 12-13. That is incorrect. As the Tenth Circuit has explained, the Guidelines require an examination of “what the state law prohibits,” which “confines [the] inquiry to the terms of the statute of conviction just as much as the phrase . . . ‘that has as an element.’” *United States v. Herrera-Roldan*, 414 F.3d 1238, 1241 (10th Cir. 2005); *accord Montanez*, 442 F.3d at 492 (“For federal sentencing purposes, a sentencing court looks to the *elements* of the prior offense to determine whether it qualifies under the Guidelines.”). Indeed, the text of the Guidelines makes clear that the term “controlled substance offense” only includes an offense that “prohibits” possession “with intent to . . . distribute,” meaning that an intent to distribute must be an element

of the offense. U.S.S.G. § 4B1.2(b); *Sarabia-Martinez*, 779 F.3d at 277 (“The Guidelines could have defined a drug trafficking offense based on the quantity of drugs possessed. Instead, they require that a state prove an intent to manufacture, import, export, distribute, or dispense.”) (quotation marks and citation omitted).

The government’s attempt to distinguish “prohibits” from “an element” also fails due to its misperception of what Florida law requires for a drug trafficking conviction. Thus, the government writes:

[T]he 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.

BIO at 13. As explained above, Florida case law (ignored by the government) makes it clear that a conviction for drug trafficking does not “necessarily reflect[]” “an intent to distribute.” Further, Petitioner was charged with possessing the least amount of cocaine (28 to 200 grams) that is needed to constitute a trafficking offense in Florida. The record does not reflect the amount of cocaine he actually possessed, other than that it was “more than 28 grams,” so it must be assumed that he possessed just over 28 grams. That same amount of cocaine was held by the Fourth Circuit to not be enough to constitute a “serious drug offense” under the Armed Career Criminal Act (“ACCA”), *United States v. Brandon*, 247 F.3d 186, 192 (4th Cir 2001), with the court explaining:

Brandon was alleged to have been in possession of between twenty-eight grams (which is just under an ounce) and two hundred grams of cocaine. Quantities at the lower end of this range are not so large that the only reasonable inference is that one who possesses that amount must intend to distribute it. While that may be a reasonable inference, another reasonable inference is that an ounce of cocaine, or even more, is intended for personal use only.

*Id.*; see Pet. at 12; see also Argument II, *infra*.

**II. If the Eleventh Circuit’s inference of intent is permissible, then this Court should establish a uniform standard for applying the inference because there is no set standard for determining the quantity of drugs needed to invoke the inference and state laws vary widely in the amount of drugs needed to constitute a trafficking by possession offense.**

Petitioner additionally argued that, even if this Court finds an inference of intent to be permissible, it should still accept this case for review because there is no uniform standard for applying the inference and no set standard for determining the quantity of drugs needed to constitute a trafficking by possession offense. Pet. at 11-14. The government has precious little to say concerning this argument.

The government recognizes a circuit split over the requisite quantity of drugs necessary to invoke an inference of intent to distribute, but asserts the conflict “is not of sufficient legal importance to warrant further review.” BIO at 9 n.3. The government notes that review of the issue was recently denied in cases arising under the ACCA, and says “the same result is warranted here.” *Id.* (citing *Wilcoxson v. United States*, cert. denied, No. 17-669 (Mar. 19, 2018); *White v. United States*, cert. denied, No. 17-6668 (Mar. 19, 2018)). The ACCA’s definition of a “serious drug offense,” though, is broader than the Guidelines’ definition of a “controlled substance offense.” The former is expansively defined to include offenses “involving” possession with intent to distribute, while the latter is more narrowly defined as an offense that “prohibits” possession with intent to distribute. Compare 18 U.S.C. § 924(e)(2)(A)(ii), with U.S.S.G. § 4B1.2(b). Thus, even if an inference of intent to distribute is permissible in ACCA cases, that does not answer whether such an inference is permissible under the narrower Guidelines’ definition of a “controlled substance offense.”

Petitioner also noted that the threshold amount for a cocaine “trafficking” offense by possession varied widely among the states, ranging from 10 grams in South Carolina to 200

grams in Arkansas. Pet. at 13-14 (citing statutes). Thus, for example, possession of 149 grams of cocaine would not be enough to constitute trafficking in Missouri or Arkansas, but would be more than five times the amount needed to constitute trafficking in Florida, Georgia, Alabama, or North Carolina, and more than 14 times the amount needed to constitute trafficking in South Carolina. *Id.* Federal sentencing courts, then, obviously cannot use the various state laws to determine when trafficking by possession constitutes a “controlled substance offense.” Permitting an enhancement for possession of 11 grams of cocaine in South Carolina while not permitting the enhancement for possession of 199 grams of cocaine in Arkansas would lead to obvious sentencing disparities and would be contrary to Congress’s intent to have a uniform national system for setting federal sentences. 18 U.S.S.C. § 3553(a)(6).

The government makes no attempt to address the divergence among the states as to the amount of drugs needed to constitute “trafficking” and thus to permit an intent of an inference to distribute (if one is ever permitted) based on the quantity of drugs. Thus, even if the Court finds an inference of intent to distribute may be inferred in trafficking by possession cases, guidance is needed on how to uniformly implement that inference in light of the varying state statutes concerning trafficking by possession.

### **III. Alternatively, Petitioner respectfully requests a remand.**

In a supplemental brief, Petitioner has alternatively requested that the Court remand to the Eleventh Circuit to permit that court to apply two recent published opinions holding that Fla. Stat. § 893.135 is indivisible and therefore the modified categorical approach does not apply. See *Cintron v. U.S. Att’y Gen.*, 882 F.3d 1380 (11th Cir. 2018); *Francisco v. U.S. Att’y Gen.*, 884 F.3d 1120 (11th Cir. 2018). The government argues that Petitioner argued below that Fla. Stat. § 893.135(1)(b) is divisible, so the doctrine of waiver or invited error applies. BIO at 10 n.4.

Petitioner argued that the invited-error doctrine does not preclude such relief because the law has changed while his case is still on direct appeal. Supp. Br. at 2 n.1. The government's response is that *Cintron* and *Francisco* "did not overrule any prior circuit precedent on the divisibility of Section 893.135(1)(b)." BIO at 10 n.4.

The government's contention is incorrect and, in fact, overlooks what it has said in other cases. *See, e.g.*, Brief of the United States at 11, *United States v. Alexis Rodriguez*, No. 15-15088 (11th Cir. Jan. 19, 2018) ("Because this statute [§ 893.135(1)(b)] defines one of its elements in the alternative, this Court has held—both before and after *Mathis*—that the statute is divisible and therefore is subject to the modified-categorical approach. And it should do so again here.") (citations omitted). Invited error, then, is not an impediment to granting the alternative relief requested because the law has changed while Petitioner's case is still on direct appeal.

### CONCLUSION

Petitioner respectfully requests that this Court grant his petition and hear the case on its merits or, alternatively, grant his petition, vacate the judgment, and remand to the Eleventh Circuit for further proceedings in light of *Cintron* and *Francisco*.

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