

No. 17-7991

IN THE SUPREME COURT OF THE UNITED STATES

JASON LEE DOVER, 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 for trafficking in methamphetamine, in violation of Fla. Stat. § 893.135(1)(f)(1) (2005), were convictions for "controlled substance offense[s]" for purposes of Sentencing Guidelines § 4B1.2(b) (2015 Supp. (Aug. 1, 2016)).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the Federal Reporter but is reprinted at 710 Fed. Appx. 380.¹

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2017. A petition for rehearing was denied on December 6, 2017 (Pet. App. B1). The petition for a writ of certiorari was filed

¹ The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the pages in each lettered appendix as if they were consecutively paginated.

on March 1, 2018. 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 Middle District of Florida, petitioner was convicted of conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(B)(viii), and 846. Judgment 1. He was sentenced to 151 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A7.

1. In November 2015, petitioner and a co-conspirator sold large amounts of methamphetamine to an undercover detective from the Hernando County Sheriff's Office. Plea Agreement 14. A month later, law enforcement agents arrested petitioner. Ibid.

A federal grand jury in the Middle District of Florida returned a four-count indictment charging petitioner with one count of conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(B)(viii), and 846; one count of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and two counts of possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(viii). Indictment

1-3. Petitioner pleaded guilty to the drug-conspiracy count. Judgment 1.

2. The Probation Office classified petitioner as a "career offender" under Sentencing Guidelines § 4B1.1 (2015 Supp. (Aug. 1, 2016)). Presentence Investigation Report (PSR) ¶ 26; see PSR ¶ 19 (applying the August 1, 2016 version of the Guidelines). Under Section 4B1.1, a defendant is subject to enhanced punishment as a "career offender" if (1) he was at least 18 years old at the time of the offense of conviction, (2) the offense of conviction is a felony "crime of violence" or "controlled substance offense," and (3) he had at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2015 Supp. (Aug. 1, 2016)). 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).

The Probation Office determined that petitioner had three prior felony convictions for a controlled substance offense, PSR ¶ 26, including two prior convictions for trafficking in methamphetamine in violation of Fla. Stat. § 893.135 (2005) -- one trafficking conviction for possessing 28 grams or more of

methamphetamine, see PSR ¶ 38; Pet. App. C1, C7, and the other trafficking conviction for possessing 14 grams or more of methamphetamine, see PSR ¶ 39; Pet. App. C3, C6. With the career-offender enhancement, the Probation Office calculated a total offense level of 31 and a criminal history category of VI, corresponding to an advisory Guidelines range of 188 to 235 months of imprisonment. PSR ¶¶ 30, 42, 79.

Petitioner objected to application of the career-offender enhancement, arguing that his Florida trafficking convictions did not qualify as controlled substance offenses because Section 893.135 “does not ‘prohibit’ possession with intent,” but rather “merely prohibits possession of a threshold amount.” D. Ct. Doc. 78, at 8 (Oct. 28, 2016). The district court overruled petitioner’s objection and adopted the Probation Office’s calculation of an advisory Guidelines range of 188 to 235 months. C.A. App. 120-121, 143. The court then granted a downward variance and sentenced petitioner to 151 months of imprisonment. Id. at 144.

3. The court of appeals affirmed in an unpublished, nonprecedential opinion. Pet. App. A1-A7. Relying on circuit precedent, the court explained that Section 893.135 “infers intent to distribute from the quantity of drugs.” Id. at A4 (citing 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)). The court thus

determined that even though the statute does not include an "explicit" "intent-to-distribute element," ibid., petitioner's prior Florida trafficking convictions qualified as controlled substance offenses for purposes of the career-offender guideline because each "met the threshold quantity amount" of methamphetamine for "inferr[ing]" an "intent to distribute," id. at 5; see id. at 7.

ARGUMENT

Petitioner contends (Pet. 8-13) that the court of appeals erred in determining that his prior convictions for trafficking in methamphetamine, in violation of Fla. Stat. § 835.135(1)(f)(1) (2005), were convictions for a "controlled substance offense" for purposes of Sentencing Guidelines § 4B1.2(b) (2015 Supp. (Aug. 1, 2016)). 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.²

² A similar issue is raised in the pending petitions for writs of certiorari in Kitchen v. United States, No. 17-7521 (filed

1. a. Petitioner is correct (Pet. 11-13) 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) (2015 Supp. (Aug. 1, 2016)); see id. § 2L1.2, comment. (n.2) (2016) (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)

Jan. 18, 2018), and Orr v. United States, No. 17-7717 (filed Jan. 31, 2018).

(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).³

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 and commentary to the Guidelines. 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,

³ Petitioner is mistaken in contending (Pet. 12) 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").

263 (2005) ("The Sentencing Commission will continue to collect 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."). 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 range of 188 to 235 months of imprisonment to a sentence of 151 months. C.A. App. 143-144. That significant downward variance provides additional confirmation that this Court's review of petitioner's Guidelines claim is unwarranted.⁴

2. In any event, the court of appeals correctly determined that petitioner's prior convictions for trafficking in methamphetamine, in violation of Fla. Stat. § 893.135(1)(f)(1) (2005), were convictions for "controlled substance offense[s]" for purposes of Sentencing Guidelines § 4B1.2(b) (2015 Supp. (Aug. 1, 2016)), which defines that term to include "an offense under * * * state law * * * that prohibits * * * the possession of a

⁴ Petitioner acknowledges (Pet. 10) that the definition of a "serious drug offense" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), contains "different language" from the Guidelines' definition of a "controlled substance offense" or "drug trafficking offense." Accordingly, even if this Court were to agree with petitioner that the court of appeals' interpretation of the Guidelines' definition is overly broad, such a decision would not control the interpretation of the ACCA.

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. Petitioner was convicted of “[t]rafficking” offenses under Section 893.135(1)(f)(1) for possessing methamphetamine. PSR ¶¶ 26, 38-39; see Pet. App. C1-C7. Section 893.135(1)(f)(1) provides that any person who knowingly possesses 14 grams or more of methamphetamine is guilty of “trafficking in amphetamine,” “a felony of the first degree.” Fla. Stat. § 893.135(1)(f)(1) (2005).

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. A4 (“Florida’s drug-trafficking statute has an implicit intent-to-distribute element.”). The statute itself states that it is targeted at “trafficking in amphetamine.” Fla. Stat. § 893.135(1)(f)(1) (2005). Possession of more than 14 grams of

methamphetamine in violation of Section 893.135(1)(f)(1) therefore qualifies as "an offense under * * * state law * * * that prohibits * * * the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense." Sentencing Guidelines § 4B1.2(b) (2015 Supp. (Aug. 1, 2016)). Indeed, a contrary conclusion would lead to the "anomalous result" that a conviction for possession with intent to distribute even a small amount of methamphetamine under Section 893.13(1)(a) -- a second-degree felony -- would qualify as a predicate offense under the career-offender guideline, while a conviction for the "more serious" offense of trafficking in 14 grams or more of methamphetamine -- a first-degree felony -- 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. 8-9) that his Florida convictions for trafficking in methamphetamine do not qualify as controlled substance offenses 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) (2015 Supp. (Aug. 1, 2016)) (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 Guidelines 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. 8-10), 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 methamphetamine, see Fla. Stat. § 893.135(1)(f)(1) (2005), 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. 4, 8, 12) 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 convictions in this case, however, were 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 convictions were for the more serious offense of possession of a specified amount of drugs from which Florida's

drug-trafficking statute “infers intent to distribute.” Pet. App. A4. The decision below accordingly does not conflict with any decision of this Court.

3. Petitioner notes that in a recent decision, the court of appeals determined that Section 893.135 is not divisible. Pet. 7 (citing Cintron v. U.S. Att’y Gen., 882 F.3d 1380 (11th Cir. 2018)). That determination may render the question of Section 893.135(1)(f)(1)’s classification under the Guidelines irrelevant in future cases, in which defendants can argue that convictions under Section 893.135 categorically do not qualify as sentence-enhancing predicates because some means of violating that statute fall outside the relevant Guidelines definitions. See Pet. App. A6.

To the extent that the Court might consider granting the petition for a writ of certiorari, vacating the judgment below, and remanding the case for further consideration, such a course is unlikely to change the disposition of petitioner’s case. Petitioner argued below that Section 893.135 is divisible. C.A. App. 68; Pet. C.A. Br. 14. Petitioner has thus waived any contention to the contrary and invited any error in applying the 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). Any exception to the invited-error doctrine for intervening changes in the law

is inapplicable here because Cintron did not overrule any prior circuit precedent on the divisibility of Section 893.135(1)(f)(1). The court of appeals recently denied petitioner's motion to recall the mandate in light of Cintron.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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