

IN THE
Supreme Court of the United States

JASON LEE DOVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO THE BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
REPLY TO THE BRIEF IN OPPOSITION.....	1
I. This Court’s review is needed to resolve a long-standing circuit split over whether a district court may infer an “intent to distribute” where no such element exists to support a career offender Sentencing Guideline enhancement.	1
II. In the Alternative, Petitioner Seeks Remand In Light of Recent Change in Eleventh Circuit Law on the Issue Presented.	4
CONCLUSION.....	7

TABLE OF AUTHORITIES

Cases

<i>Braxton v. United States</i> , 500 U.S. 344 (1991).....	2
<i>Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.</i> , 331 U.S. 519 (1947).....	3
<i>Buford v. United States</i> , 532 U.S. 59 (2001).....	2
<i>Campos v. United States</i> , 565 U.S. 964 (2011).....	1
<i>Cintron v. U.S. Att’y Gen.</i> , 882 F.3d 1380 (11th Cir. 2018)	7
<i>Descamps v. United States</i> , 133 S. Ct. 2276 (2013).....	3
<i>Francisco v. U.S. Att’y Gen.</i> , 884 F.3d 1120 (11th Cir. 2018)	5, 6
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016).....	3
<i>Molina-Martinez v. United States</i> , 136 S.Ct. 1338 (2016).....	4
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	4
<i>United States v. Lopez–Salas</i> , 513 F.3d 174 (5th Cir. 2008)	2
<i>United States v. Madera-Madera</i> , 333 F.3d 1228 (11th Cir. 2003)	1
<i>United States v. Montanez</i> , 442 F.3d 485 (6th Cir. 2006)	1, 2
<i>United States v. Sarabia-Martinez</i> , 779 F.3d 274 (5th Cir. 2015)	2
<i>United States v. Shannon</i> , 631 F.3d 1187 (11th Cir. 2011)	5, 6
<i>United States v. Stone</i> , 139 F.3d 822 (11th Cir. 1998)	6
<i>United States v. Villa-Lara</i> , 451 F.3d 963 (9th Cir. 2006)	3

Statutes

Fla. Stat. § 893.135	1, 5, 6
Title 18, United States Code, Section 3553(a).....	5, 6

Rules

U.S.S.G. § 1B1.2.....	2
U.S.S.G. § 4B1.2.....	1, 8
U.S.S.G. § 2L1.2.....	4

Jury Instructions

<i>In re Standard Jury Instructions in Criminal Cases</i> (No. 2005-3), 969 So. 2d 245 (Fla. 2007).....	3
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REPLY TO THE BRIEF IN OPPOSITION

- I. This Court’s review is needed to resolve a long-standing circuit split over whether a district court may infer an “intent to distribute” where no such element exists to support a career offender Sentencing Guideline enhancement.**

The government agrees with Petitioner that the circuits are divided on whether to treat prior convictions for violating the Florida trafficking statute, Fla. Stat. § 893.135, as “controlled substance offenses” under U.S.S.G. § 4B1.2(b). But despite this intractable circuit split, the government urges this Court to leave it to the U.S. Sentencing Commission to resolve. *E.g.*, Br. Opp. at 5, 6. Petitioner, on other hand, urges this Court to grant his petition so that it may resolve what is now a long-standing circuit split that the Sentencing Commission has no apparent interest in addressing. Compare *United States v. Montanez*, 442 F.3d 485, 491-94 (6th Cir. 2006) with *United States v. Madera-Madera*, 333 F.3d 1228, 1232-1234 (11th Cir. 2003). This circuit split has been ignored by the Sentencing Commission for over ten years. Moreover, it has been seven years since this Court denied review of a similar question posed in an opinion of the Eleventh Circuit, and the Sentencing Commission has failed to address the conflict on its own. *Campos v. United States*, 565 U.S. 964 (2011) (No. 11-5343). The impact of this split has significant case-specific ramifications because now a defendant who has two prior convictions under Florida’s trafficking statute will be treated as a career offender for Sentencing Guidelines purposes if prosecuted federally in Florida, Alabama, and Georgia but the same defendant will not be treated as a career offender if prosecuted federally in Texas, California, or Ohio, among many other states that make up the Fifth, Sixth, Ninth, and Tenth Circuits.

In seeking to convince this Court to deny *certiorari*, the government overstates this Court’s alleged preference against reviewing cases involving the federal sentencing guidelines. The government states that this Court does not “ordinarily resolve circuit conflicts over interpretations

of the Guidelines...” Br. Opp. at 7. In fact, neither of the cases cited by the government in support of this argument should persuade the Court to deny review here. In *Braxton v. United States*, this Court declined to resolve the circuit split over a particular Sentencing Guideline issue, the proper interpretation of USSG § 1B1.2, because “the Commission has already undertaken a proceeding that will eliminate circuit conflict . . . and because the specific controversy before us can be decided on other grounds. . .” *Braxton v. United States*, 500 U.S. 344, 348-49 (1991). In Petitioner’s case, unlike in *Braxton*, the Sentencing Commission has declined to eliminate the circuit conflict on its own and there are no narrower, fact-specific grounds by which to decide the case. In *Buford v. United States*, this Court noted:

The legal question at issue is a minor, detailed, interstitial question of sentencing law, . . . That question is not a generally recurring, purely legal matter, such as interpreting a set of legal words, say, those of an individual guideline, in order to determine their basic intent.

Buford v. United States, 532 U.S. 59, 65-66 (2001). Significantly, unlike the minor case-specific issue in *Buford*, Petitioner’s case involves a generally recurring legal interpretation of the career offender guideline. As a result, due to the recurring nature of the issue and the fact that the Sentencing Commission appears to be ignoring the conflict, review by this Court is needed.

While the Sentencing Commission has not acted to address the split, every other federal circuit court of appeal that has addressed the issue has taken the contrary view, that is, that the sentencing court may not infer an “intent to distribute” where such an intent is not an element of the offense under state law. See *United States v. Sarabia-Martinez*, 779 F.3d 274 (5th Cir. 2015); *United States v. Lopez–Salas*, 513 F.3d 174, 180 (5th Cir. 2008) (“[t]he 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.”); *Montanez*,

442 F.3d at 491-94 (6th Cir. 2006) (“abundantly clear from the plain language of the statutes of conviction that each contains only the element of ‘possession’ and does not contain the element of ‘intent to distribute.’”); *United States v. Villa-Lara*, 451 F.3d 963, 965 & n.2 (9th Cir. 2006) (holding Nevada statute outlawing trafficking by possession did not qualify under U.S.S.G. § 2L1.2).

The Eleventh Circuit’s approach clearly contravenes this Court’s precedent--making the case particularly ripe for review. This Court has made clear on several occasions that sentencing courts utilizing the modified categorical approach must look at the elements of the offense under state law and no further. See *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (“[t]he key, we emphasized, is elements, not facts.”); *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (“[e]lements are the constituent parts of a crime’s legal definition—the things the “prosecution must prove to sustain a conviction.”). The government suggests that the sentencing court can also look at the state offense’s “statutory context,” to conjure an intent to distribute where none actually exists under Florida law. Br. Opp. at 12.

But there is no support for relying on “statutory context” to determine an offense’s elements under this Court’s precedents. To the contrary, this Court has long stressed that a statute’s title does not control over its plain language. E.g., *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947) (holding “the title of a statute and the heading of a section cannot limit the plain meaning of the text”). And the plain language of the Florida trafficking statute makes clear that an “intent to distribute” is not an element. Indeed, to convict a defendant of trafficking in Florida, all the factfinder would need to find was actual or constructive possession of a threshold amount of the drug. *In re Standard Jury Instructions in Criminal Cases* (No. 2005-3), 969 So. 2d 245, 265-66 (Fla. 2007). The government makes no effort to cite Florida law in

support of the argument that state law infers an intent to distribute, because there is clearly no such inference under state law.

The government also asserts that Title 18, United States Code, Section 3553(a) is a suitable mechanism to address disparities caused by the circuit split. While it is true that sentencing courts have discretion to vary from the sentencing guideline range, they are required by this Court's precedent to first compute the accurate sentencing guideline range as a starting point before contemplating a variance. *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1342 (2016) ("At the outset of the sentencing proceedings, the district court must determine the applicable Guidelines range.") Furthermore, a court of appeals may presume that a sentence imposed within a properly computed guideline range is a reasonable sentence on appeal. *Rita v. United States*, 551 U.S. 338, 341 (2007). Finally, Section 3553(a)(4) explicitly requires the district court to take the Sentencing Guidelines range into account as one factor for the court to consider when imposing sentence.

For these reasons, the guideline range computed by the district court is critically important. It serves both as the starting point, or anchor, for any consideration for a variance and as a backstop for appellate review due to *Rita*'s presumption of reasonableness. As an example, in Petitioner's case while he did receive a two-level variance under Section 3553(a), the starting point was the career offender guideline range which also had to be factored into the sentencing decision by operation of Section 3553(a)(4). Thus, the notion that Section 3553(a) is a suitable replacement for this Court's review of a long-standing circuit conflict does not hold up to serious scrutiny.

II. In the Alternative, Petitioner Seeks Remand In Light of Recent Change in Eleventh Circuit Law on the Issue Presented.

Should this Court decline review on the merits of the court of appeals opinion, the Petitioner respectfully asks the Court to grant his petition, vacate the judgment, and remand to the Eleventh Circuit. Remand is appropriate as an alternative remedy due to the current evolving

nature of the Eleventh Circuit’s interpretation of the Florida trafficking statute. Indeed, based on two recent opinions issued by the Eleventh Circuit holding for the first time that Fla Stat § 893.135 is indivisible, *Cintron v. U.S. Att’y Gen.*, 882 F.3d 1380 (11th Cir. 2018) (Florida trafficking conviction not an “aggravated felony” under the Immigration and Nationality Act) and *Francisco v. U.S. Att’y Gen.*, 884 F.3d 1120 (11th Cir. 2018) (same), it is likely that Petitioner would no longer be considered a career offender based on his prior convictions for trafficking in Florida.¹ Notwithstanding this significant change in circuit law, the government argues against remanding Petitioner’s case back to the Eleventh Circuit based on the invited error doctrine. Br. Opp. at 14-15.

The invited error doctrine does not apply here due to an intervening change in circuit law. While the government is correct that Petitioner agreed with the district court that Section 893.135 was a divisible statute at the time he was sentenced—that concession was based on then-binding circuit precedent which treated the Florida trafficking statute as a divisible statute for purposes of determining whether a prior conviction under that statute was a controlled substance offense under USSG § 4B1.2. *United States v. Shannon*, 631 F.3d 1187, 1189-90 (11th Cir. 2011); *id.* at 1191-94 (Marcus, J., concurring); *see also* Brief of the United States, *United States v. Rodriguez*, No.

¹ In *Cintron*, the court of appeals held that the Florida trafficking statute does not actually create several different crimes but rather merely lists out “alternative means.” 882 F.3d at 1385. As a result, the statute is not divisible but rather indivisible and overbroad. *Id.* Where an indivisible statute exists, the sentencing court must always presume, without resort to *Shepard* documents, that a conviction rests upon the least culpable act under the statute. With respect to Florida’s Trafficking statute, this Court has already held that a Florida conviction for trafficking by purchase is not a “controlled substances offense.” *See United States v. Shannon*, 631 F.3d 1187 (11th Cir. 2011). Because the statute is now deemed to be indivisible, sentencing courts must presume every Florida drug trafficking conviction is by purchase without consulting any *Shepard* documents. *Cintron*, 882 F.3d at 1385 n. 6. Therefore, convictions under Fla. Stat. § 893.135, including Mr. Dover’s prior convictions under that statute, it appears would no longer qualify as career offender controlled substance offenses in the Eleventh Circuit.

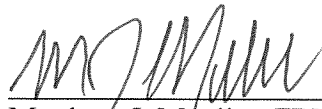
15-15088, at 11 (11th Cir. Jan. 19, 2018) (citing *Shannon* to argue that the Eleventh Circuit held “that the statute [Fla. Stat. § 893.135] is divisible and therefore is subject to the modified-categorical approach”). That concession was not made with an intention of creating grounds for reversal on appeal but rather was counsel for the Petitioner’s agreement with the district court’s application of the law of the circuit at that time. See *United States v. Stone*, 139 F.3d 822, 838 (11th Cir. 1998) (“defendant should not benefit from introducing error at trial with the intention of creating grounds for reversal on appeal”). Notably, the Eleventh Circuit applied *Cintron*’s holding that the Florida trafficking statute was indivisible in *Francisco* despite that both parties argued throughout that case that the statute was divisible. *Francisco*, 884 F.3d at 1134. In other words, the Eleventh Circuit declined to apply the invited error doctrine as the government urges here.

The law of the circuit has changed and Petitioner submits that this Court should grant his alternative relief of remanding back to the court of appeals, if it declines to review the decision below directly to resolve the circuit split.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition and hear the case on its merits or, in the alternative, grant the petition, vacate the judgment, and remand to the Eleventh Circuit for further proceedings.

Respectfully submitted,



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