No. _____

In The
Supreme Court of the United States

BRYAN CHRISTOPHER MARSHALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Bryan Marshall had the incredibly bad fortune to fall victim to two very different, and very wrong, rulings. Each ruling defied this Court's precedent and represented a lower court struggling with authority that must be clarified to avoid continuing confusion.

Marshall protested police action in a constitutionally-protected manner. Despite that protection, he was arrested and searched. The search revealed a gun which triggered a harsh Armed Career Criminal Act sentence based on prior convictions not properly considered serious drug offenses under federal law.

Having faced incorrect legal decisions related to both the beginning and end of his case, Marshall presents these questions to the Court:

1. Whether a state drug statute that lists a variety of means by which it can be violated, including one which does not meet the definition of a drug distribution crime, is categorically a predicate offense for purposes of the Armed Career Criminal Act?

2. Whether a crowd protesting police action can remove an individual's speech from the protections of the First Amendment with presenting an immediate threat to law enforcement officers?

LIST OF PARTIES

Petitioner Bryan Marshall was the Defendant and Appellant below.

The United States of America was the Plaintiff and Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and there are no corporate interests to disclose.

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The district court issued a written opinion on the motion to suppress (Issue 2) which is located at 168 F. Supp. 3d 846 (D.S.C. Mar. 11, 2016). The Fourth Circuit's opinion is at ___ Fed. Appx. ____. Both opinions are unpublished and both are in the attached appendix. (1a-35a)

STATEMENT OF JURISDICTION

The Fourth Circuit denied a petition for rehearing and rehearing *en banc* on October 1, 2018. 28 U.S.C. § 1254(1) authorizes jurisdiction in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first question presented involves the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) which states:

> In the case of a person who violates section 922(g) of this title [18 U.S.C.S. § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 U.S.C.S. § 922(g)(1)] for a violent felony or a serious drug offense, or both, committed on occasions different from one another,

> such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) [18 U.S.C.S. § 922(g)].

This case involves the "serious drug offense" portion of the statute, 18 U.S.C. § 924(e)(2)(ii), which states:

> …an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law…

The second question presented involved the First Amendment to the United States Constitution, which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment is applicable to the States by the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner Bryan Marshall was at a cookout at a friend's house. Shots were fired in the neighborhood and Marshall and several others drove around the neighborhood looking for the shooter. At the same time, a neighbor made a 911 call reporting the shots. The 911 caller reported that Marshall and the other men in Marshall's truck were not the shooter.

Police responded to the neighborhood to investigate the shots that were fired (and did not hit anyone). They approached the house where the cookout was being held at the same time Marshall and his friends returned to the house. There was no traffic stop. Marshall parked his truck on private property. As Marshall exited the truck, police started to question him and repeatedly asked to search his truck.

Marshall objected. He protested the police questioning and refused to allow a search of his vehicle. Marshall's protests were loud, boisterous, and involved profanity. As the police continued questioning him, people from the house walked outside. Though they never came close to the police officers, they joined in Marshall's protest of the police questioning and attempts to search his vehicle.

Marshall was arrested for disorderly conduct under a Columbia, South Carolina city ordinance which states in relevant part:

> It shall be unlawful for any person within the city limits to engage in the following conduct, *knowing or having reasonable grounds to know that it will tend to promote or provoke a fight*, *assault or brawl*:
>
> (1) To utter, while in the presence of others, any lewd or obscene epithets or make any lewd or obscene gestures with his hands or body…

Columbia, South Carolina City Ordinance 14-91, located at https://library.municode.com/sc/columbia/codes/code_of_ordinances (emphasis added). The police used that arrest as a reason to tow and then search Marshall's vehicle. They found a gun and marijuana. He pled guilty in state court to the

marijuana and received probation. Marshall's gun case was dismissed. However, as Marshall was pleading guilty, the federal government was planning to adopt the very same charges for federal prosecution.

Marshall moved to suppress the evidence, arguing there was no probable cause to arrest him for engaging in protected speech.[1] The district court denied the motion.

As Marshall continued negotiating with the federal government, his prior record became critical to the outcome of his case. He had four prior drug convictions, all of which involved marijuana and only one of which involved Marshall serving any jail time. After a series of Pre-sentence Reports (PSRs) which went back and forth between designating Marshall subject to the Armed Career Criminal Act (ACCA) and not applying the Act, the Probation Office finally decided it applied. The district court sentenced Marshall to 262 months in prison. His conditional plea agreement preserved the arguments related to both his sentence and the illegal arrest and resulting search.

The Fourth Circuit affirmed Marshall's conviction and sentence. It found the fruits of the search of the vehicle should not be suppressed because the arrest was proper. The Fourth Circuit agreed Marshall's actions were not in violation of the law, but the hostility of a crowd in the vicinity allowed the officers to arrest him. It also found the ACCA

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[1] Marshall raised other grounds at the suppression hearing but they are not before this Court.

enhancement was proper, claiming the statute Marshall pled under was divisible.

REASONS FOR GRANTING THE PETITION

Marshall's conviction and sentence were legally flawed. His conviction was founded on an arrest for actions clearly protected by the First Amendment. The Fourth Circuit used the actions of the crowd to strip Marshall of his First Amendment right to protest police action, despite the crowd also engaging in protected protest of police action.

Marshall's sentence was based on a fundamental misunderstanding of both the ACCA and this Court's precedent interpreting it. The Circuits' difficulty applying *Mathis* to state drug statutes has led to growing Circuit disagreement and confusion on that issue.

1. Whether a state drug statute that lists a variety of means by which it can be violated, including one which does not meet the definition of a drug distribution crime, is categorically a predicate offense for purposes of the Armed Career Criminal Act?

The decision below was wrong

The Fourth Circuit found the convictions used to enhance Marshall's sentence were predicates for ACCA enhancement, in violation of this Court's holding in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

A court may not look behind the elements of a generally drafted statute to see how a crime was committed. *Mathis*, 136 S. Ct. at 2255 (citing *Descamps v. United States*, 133 S. Ct. 2276 (2013)). This analysis is often relatively simple. It becomes more involved when statutes are drafted with lists of activities that may violate the statute. In those circumstances, courts must determine if they are dealing with "means" or "elements." If the statute contains means, or various ways it can be violated, a court applies the categorical approach and only looks to the least culpable conduct that violates the statute. If the statute lists various elements constituting separate crimes, a court applies the modified categorical approach and can consult reliable documents in the record to determine what the defendant pled guilty to.

Mathis instructs courts to start with two obvious observations. If a state appellate opinion clearly resolves the matter, it should be followed. *Id.* at 2256. The face of the statute may also reveal the answer. *Id*. If neither of those sources clarify the issue, the court can look at the record of the actual conviction. *Id*. If there is still no answer, the court will apply the categorical analysis. What the court cannot do is apply the modified categorical approach in every case where there is no clear answer.

The first two steps favor Marshall's statute of conviction being indivisible. Numerous South Carolina cases hold the drug statute in South Carolina can be violated in a variety of ways. The Supreme Court of South Carolina has approved of a possession with intent to distribute indictment listing

all the ways the statute can be violated. *Edwards v. State*, 642 S.E.2d 738, 739 (S.C. 2007).

The South Carolina trafficking statute is nearly identical to the drug statutes at issue in Marshall's case. The only difference between trafficking and the statutes in this case is the weight of the drugs involved.[2] The Supreme Court of South Carolina has held that the trafficking statute contains a variety of different ways to commit the crime. *State v. Raffaldt*, 456 S.E.2d 390, 394 (S.C. 1995).

It is unclear how the Fourth Circuit avoided these opinions. Its decision was based on cases that do not address the ultimate questions of means versus elements, including an unpublished opinion which carries no weight in South Carolina courts.[3] When

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[2] South Carolina pattern jury instructions are no longer listed on the State's judicial website, but can be found here: https://web.archive.org/web/20160113231514/http:/www.sccourts.org/juryCharges/GSInstructions.2015.pdf (last accessed January 1, 2019).

The referenced jury instruction is at pp.191-92 of those instructions.

[3] The Fourth Circuit relied on *State v. Watson*, 2013 WL 8538756 (S.C. Ct. App. 2013) and *United States v. Rodriguez-Negrete*, 772 F.3d 221, 226-27 (5th Cir. 2014) in support of finding the South Carolina drug statutes contain elements, not means. *Rodriguez-Negrete* also cites *Watson* in support of this finding. SCACR, Rule 268(d)(2) states unpublished opinions in South Carolina have no precedential value and should not be cited as authority. *Watson* is not the law in South Carolina.

Even if *Watson* was the law, the opinion in that case draws little distinction between "PWID" and "purchasing." While it makes a

cases that do address those questions are reviewed, they reveal the South Carolina drug statute simply lists alternative ways to commit a crime, not various crimes.

The plain language of the statute supports this conclusion. It lists out a variety of ways it can be violated:

> (a) Except as authorized by this article it shall be unlawful for any person:
>
> (1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or a controlled substance analogue;

S.C. Code Ann. § 44-53-370(a)(1). The only difference in punishments for violations relates to the type of

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reference to the two being separate crimes, it also finds they are generally the same and allows an amended indictment under the drug statute to go forward without being considered by the grand jury. This is as clear a sign as any that S.C. Code § 44-53-370 is a crime that can be committed a variety of ways. If it listed different crimes, no new crime could be added without additional grand jury consideration.

drug and its weight, not which way the statute was violated. *Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under Apprendi they must be elements."). There are no additional statutes setting out separate definitions for the means listed in the statute.

The first two considerations point to an indivisible statute that describes means, not elements. While that should end the analysis, the third instruction in *Mathis* offers even more support for Marshall's position. Looking at the record documents in this case confirm the statute is indivisible.

Marshall's PSR lists describes five indictments for the drug statutes at issue.[4] Of the four charges used to enhance Marshall's sentence, two indictments list "distribution" as the sole means of committing the crime. However, the other two list all the means in the statute. There is a fifth indictment referenced that is not part of this case but further illustrates the way this crime is charged, listing all the ways the statute can be violated. This manner of charging is critically important to determining how to consider this statute.

In *Descamps*, the United States Supreme Court recognized a simple test for determining when a statute is divisible. When dealing with a divisible statute, a charging prosecutor must select the specific

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[4] One of those indicted charges is not at issue here because the PSR reflects it was pled down to a possession charge. It is useful for illustrative purposes.

crime to allege in the indictment. *Descamps v. United States*, 133 S. Ct. 2276, 2290 (2013).

Well-settled precedent holds that an indictment charging several offenses in one count is "wholly insufficient." *The Confiscation Cases*, 87 U.S. 92, 104 (1874). Such an indictment fails to provide "definite notice of the offence charged" and does not protect against "subsequent prosecution for one of the several offences." *Id*. South Carolina law has long had the same requirement. In a case nearly as old as the *Confiscation Cases*, the South Carolina Supreme Court was clear that a statute forbidding several things in the alternative is one offense and the indictment can charge all the acts in the statute. *State v. Johnson*, 20 S.C. 387, 391 (1884). If the statute should be considered disjunctively, the pleader must elect the acts to charge. *Id.*

Despite drug charges often being indicted with multiple means of committing the offense in the body of the indictment, no South Carolina court has found drug offense indictments defective for duplicity. The South Carolina Supreme Court has noted that a duplicitous indictment is defective. *State v. Samuels*, 743 S.E.2d 773, 774 (S.C. 2013). Such an indictment would not go unnoticed.

Both this Court and the Supreme Court of South Carolina hold that a divisible statute must be charged by selection of the appropriate crimes within the statute. Simply listing all the terms in a statute would only be appropriate if those terms were alternative ways to commit a specific crime, as is the case with South Carolina drug offenses.

All three ways of analyzing the divisibility of a statute under Mathis confirm the statute in this case is indivisible. Because the statute prohibits "purchasing" drugs, it is categorically overbroad and Marshall should not have been sentenced under the ACCA.

Why this Court should grant certiorari

The opinion below is more than just a wrong decision. It reflects a fundamental misunderstanding of this Court's precedent. Many drug statutes are drafted the way South Carolina's is, prohibiting a wide variety of ways one can be involved with illegal drugs. It is not just the Fourth Circuit that is struggling with the instructions from this Court in *Mathis*. A growing split and sense of confusion in the Circuits compels this Court to grant certiorari and resolve the conflict among lower courts.

Because of the incredibly long sentences the ACCA imposes, this matter is also of significant importance to defendants and the judicial system. Defendants face a disadvantage in plea negotiations when it is difficult to tell whether the ACCA will apply. Because it is a statutory mandatory minimum, there is nothing that can be done once it applies.

At the same time, most of the litigation in the district courts and the Circuits continues to focus on the ACCA (and career offender enhancements, which are often dictated by the same opinions). There is little to no certainty in how a prior drug conviction will affect a sentence.

The Fourth Circuit provides a prime example of the confusion in this arena. No published opinion offers the sentencing courts any guidance on how to consider the South Carolina drug statute, which is categorically overbroad. One panel of the Fourth Circuit, in this case, found the modified categorical approach should be used and granted no relief to Marshall. In another case, a different panel assumed the modified categorical approach applied but held relief was warranted on nearly identical facts. *United States v. Rhodes*, 736 Fed. Appx. 375 (4th Cir. 2018). There are two brand new opinions from a South Carolina district court finding neither *Marshall* nor *Rhodes* is binding and that both were likely decided incorrectly. *United States v. Goodwin*, 3:17-cr-01143-JMC (D.S.C. December 14, 2018); *United States v. McDow*, 0:17-cr-01142-JMC (D.S.C. December 14, 2018).

A defendant in the Fourth Circuit is faced with a difficult choice. Either plead to what the Government offers or gamble on which way the district court views this matter. While the matter is not as markedly confusing in other Circuits as it is in the Fourth Circuit, there is enough conflict between the Circuits on the general application of the divisibility analysis to state drug statutes to warrant this Court's involvement.

The First Circuit considered a similar statute; trafficking cocaine in Massachusetts. *United States v. Bain*, 874 F.3d 1 (1st Cir. 2017). That statute also contains a variety of ways it can be violated, including one which would not categorically match ACCA enhancement. *Id.* at 28-29. Operating under the plain

error standard, the First Circuit held state law on the statute was unclear and the record lacked documentation to decide the matter. In denying relief, that Court decided it could not decide. This is the opposite conclusion reached by *Rhodes* in the Fourth Circuit, which held in similar circumstances the ACCA did not apply.

The Fifth Circuit analyzed a Texas drug statute as instructed by *Mathis*. *United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016).[5] The opinion reveals a nearly identical situation in state law as the one in this case. *Id.* at 575-76. The Fifth Circuit found the ACCA did not apply. It considered state case law that held various ways of committing a crime could be listed in an indictment, much like the South Carolina cases cited here. *Id.* Though a prosecutor could specify means in a Texas indictment, he or she was not required to. This is consistent with *Mathis*. Had the Fourth Circuit considered this case the same way, it would have been compelled to grant Marshall relief.

The Sixth Circuit has held a similar Michigan statute was divisible, based on how it is charged in Michigan (the specific act was listed in the indictment) and the sentencing provision (different alternatives carried different sentences). *United States v. House*, 872 F.3d 748, 753 (6th Cir. 2017) (citing with approval the unpublished opinion in *United States v. Tibbs*, 685 Fed. Appx. 456, 462-63

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[5] *Hinkle* considered a career offender enhancement under the Guidelines, not an ACCA enhancement. However, the wording of the two enhancements results in courts using the law that applies to one interchangeably with the other.

(6th Cir. 2017). The Fourth Circuit's decision in this case found divisibility despite the exact opposite conditions; South Carolina charges include every way to violate the statute and the sentence remains the same no matter which means of commission is present in a case.

The Ninth Circuit recently took an entirely different tack in determining whether a Nevada state drug law was divisible. Faced with an inability to decide the matter, it just asked, by way of a certified question to the Nevada Supreme Court. *United States v. Figueroa-Beltran*, 892 F.3d 997, 1004 (9th Cir. 2018). While that may seem a good way to determine divisibility, *Mathis* suggests the uncertainty inherent in a case where such a request is made should result in a finding of indivisibility. *Mathis*, 136 S. Ct. at 2257.

The Tenth Circuit opinion in *United States v. Madkins* is somewhat confusing, because it applies the modified categorical approach but seems to consider an act contained in the statute that is broader than the generic definition of a serious drug offense. 866 F.3d 1136, 1145 (10th Cir. 2017). Relying on Kansas case law, the Tenth Circuit found a term in the statute encompassed activity that would not trigger an ACCA enhancement and did not apply the Act. *Id*. at 1147-48.

The Eleventh Circuit has considered an almost identical situation to Marshall's, analyzing a Florida trafficking statute that also prohibited the purchase of drugs. *United States v. Shannon*, 631 F.3d 1187, 1188 (11th Cir. 2011). The statute is similar to the

South Carolina statute under which Marshall was convicted. *Id.* at 1189. Interestingly, this case was decided before the *Mathis* opinion but is in line with that decision.

A more recent Eleventh Circuit opinion, also considering a Florida drug statute, reaches the conclusion a Florida trafficking statute is indivisible. *Cintron v. United States AG*, 882 F.3d 1380 (11th Cir. 2018).[6] Using Florida state appellate opinions, the Eleventh Circuit found the statute could be violated in a variety of ways, as it contained means of violation instead of separate crimes. *Id.* at 1385-86.

The Circuits approach these cases differently. In some instances, lack of clarity leads to indivisibility, while in others the same lack of clarity leads to divisibility. Marshall's case is a particularly bad example of a Circuit stretching logic to make a case fit into the ACCA enhancement when it should not. Despite multiple signals under the *Mathis* analysis that the South Carolina drug statute is indivisible, the Fourth Circuit insisted on finding ways to apply the modified categorical approach and ultimately the ACCA.

Mathis recognized that "coherence has a claim on the law." *Mathis*, 136 S. Ct. at 2257. State drug laws, often drafted in a broad manner, are considered in relation to the ACCA like any other laws. This Court has made it clear facts simply do not matter to the ACCA. *Id*. A statute containing various ways it

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[6] This case involves an immigration matter but recognizes the analytical framework in ACCA cases is analogous to the framework in immigration cases. *Cintron*, 882 F.3d at 1384, n.3.

can be violated is considered categorically. Marshall's prior conviction was under a statute that is categorically overbroad and should not trigger a sentence under the ACCA.

2. Whether a crowd protesting police action can remove an individual's speech from the protections of the First Amendment without presenting an immediate threat to law enforcement officers?

The decision below was wrong

Marshall was arrested because the police claimed he was inciting a crowd to violence. Because both Marshall, and the crowd at issue, were merely protesting police action, his arrest was improper and invalidates the subsequent search.

The concurring opinion from the Fourth Circuit states Marshall's counsel failed to raise the proper argument and used the incorrect test for the argument he did raise, which led to the Fourth Circuit's decision on this issue. The concurring opinion stated counsel used the "clear and present danger" test instead of a purportedly more protective "incitement to imminent lawlessness" test.

Hess v. Indiana held that language could not be punished unless it was likely to produce imminent disorder. 414 U.S. 105, 108 (1973). Over a decade later, this Court held a significant amount of verbal criticism and challenge to police officers was protected by the First Amendment, quoting the requirement from *Terminiello* that speech must be likely to produce a clear and present danger of a serious

substantive evil. *City of Houston v. Hill*, 482 U.S. 451, 463 (1987)(quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

Both tests invoke similar protection. Speech must be calculated to provoke specific, immediate unlawfulness before it loses First Amendment protection. Inconvenience, annoyance, or unrest does not meet the test; it must rise "far above" those terms. *Id.*

The district court described a crowd protesting police action; it did not find any threatening behavior. In fact, the law is clear the crowd would need to be an immediate and specific threat to the officers as a direct result of Marshall's speech before he would lose his protections under the First Amendment.

The crowd may have been hostile towards the police. But it was not so far beyond unrest as a result of anything Marshall said as to authorize his arrest.

The case law in this area is settled and clear; police protest is not illegal. More importantly, an individual citizen cannot be arrested because of another's legitimate protest of police action. That is exactly what happened here. Despite recognizing two tests from this Court that require far more than "hostility" the Fourth Circuit insisted the arrest in this case was proper. The decision to arrest was not a result of Marshall's actions, but a result of a crowd that admittedly posed no danger, imminent, clear and present, or otherwise.

Why this Court should grant certiorari

This argument goes to the heart of American protest against police action. It is of exceptional importance that the traditional Supreme Court test of "serious substantive evil" (or "incitement to imminent lawfulness") not be replaced with the far lower bar of "hostile." The Fourth Circuit held Marshall could be arrested not for his speech, but for the actions of a crowd that neither the district court nor the Court of Appeals found ever came near the officers. This is a unique twist on the Government's ability to suppress speech.

No one seems to disagree that Marshall could curse at the police. It is the actions of a crowd at the house where the encounter took place the Fourth Circuit used to strip Marshall of his First Amendment right to protest police action, despite the fact the crowd had the same First Amendment right.

This is a novel issue. The Fourth Circuit cited no case law to support its divergence from this Court's well-settled law on a citizen's ability to protest. In fact, it cites *North Carolina v. Heien*, for the claim that it was unclear whether the officers could arrest Marshall. 135 S. Ct. 530, 536-40 (2014). *Heien* involves a reasonable mistake as to the application of a statute. There is no real question this Court has repeatedly held that police can only arrest for protest speech in the face of imminent, clear, and present danger. In other words, hostility is never enough. There must be an immediate danger. None was present here.

The Fourth Circuit seems to be creating its own, dangerous Circuit split with its opinion. By lowering the bar for an arrest based on protected speech, the speech is no longer protected. This Court should grant the writ to clarify the contours of First Amendment protection of protest speech, lest such protection be lost to citizens.

CONCLUSION

Marshall respectfully requests this Court grant the petition, vacate the decision of the Fourth Circuit, and remand this matter with instructions to either suppress the evidence found as a result of the illegal arrest of Marshall or sentence Marshall without the career offender or Armed Career Criminal enhancement.

Respectfully submitted,

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