No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRYSHUN GENARD FURLOW,

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

I. Whether the Fourth Circuit should be required to use the categorical approach, applying the parameters set by this Court, to its determination that a prior conviction is a "serious drug offense" under the Armed Career Criminal Act and a controlled substance offense pursuant to U.S.S.G. §4B1.1.

II. Whether this Court should revisit its holding in *Custis v. United States,* 511 U.S. 485 (1994), as discussed in the dissent in this Court's *Daniels v. United States*, 532 U.S. 374, 383 (2001) opinion, to allow collateral challenges under the circumstances present here, where the law created by the Fourth Circuit's opinion holds that Petitioner was subjected to an unconstitutional state conviction, but he was never afforded the opportunity to challenge the conviction as unconstitutional.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bryshun Genard Furlow, respectfully prays that a writ of certiorari issues to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 18-4531, entered on June 27, 2019.

OPINION BELOW

The Fourth Circuit panel issued its published opinion on June 27, 2019, affirming the judgment of the United States District Court for the District of South Carolina. This opinion is reported as *United States v. Furlow*, 928 F.3d 311 (4th Cir. 2019) and is attached as App. 1A-26A. On July 22, 2019, Furlow filed a petition for rehearing and rehearing *en banc*, which was denied on August 2, 2019. App. 28A.

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment on June 27, 2019. App. 1A-27A. Furlow filed a petition for rehearing and rehearing *en banc* with the circuit court, which was denied on August 2, 2019. App. 28A. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

At issue is 18 U.S.C. §924(e), which reads:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title 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).
>
> (2) As used in this subsection - -
>
> > (A) the term "serious drug offense" means -
> >
> > * * *
> >
> > (ii) 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 . . . .

South Carolina Code §44-53-375(B) reads:

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of section 44-53-370, is guilty of a felony. . . .

STATEMENT OF THE CASE

Bryshun Genard Furlow pled guilty to the crime of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. §922(g). He also pled guilty to one count of possession with intent to distribute cocaine and methamphetamine, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(C). JA 118-28.[1] The probation officer classified Furlow as an armed career criminal and a career offender, with his previous conviction under South Carolina Code §44-53-375(B) identified as a predicate. *See* Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e) (providing mandatory minimum term of 15 years and maximum of life in prison for one convicted of violating §922(g) where the defendant has at least three prior convictions for a "violent felony" or a "serious drug offense") and U.S.S.G. §4B1.1 (providing an increased guideline range when a defendant has two or more convictions for a qualifying "controlled substance offense").

Before pleading, Furlow had filed a motion for pretrial determination about whether he would be an armed career criminal under 18 U.S.C. §924(e) and/or a career offender pursuant to U.S.S.G. §4B1.1. JA 29-31. Furlow particularly argued that South Carolina Code §44-53-375(B) was an indivisible statute that listed alternatives ways to commit a single offense. JA 92-94. In support of his argument, Furlow pointed to the indictment in his case, which listed all the means from §44-53-375(B), which is typically how this offense is indicted in South Carolina. *Furlow*, No.

[1] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. *See United States v. Furlow*, No. 18-4531, *Joint Appendix, Vol I & II* (ECF Nos. 11-12) (4th Cir. filed Oct. 1, 2018).

18-4531, *Petition for Rehearing and Rehearing En Banc* at Ex. 3. The government had filed informations pursuant to 21 U.S.C. §851, notifying Furlow he was subject to enhanced penalties based on several convictions, including the South Carolina Code §44-53-375(B) conviction. JA 5, ECF No. 23; JA 18-19. The district court ultimately agreed that Furlow would likely be an armed career criminal and career offender. JA 101-03. The district court determined that the modified categorical approach should be applied to determine which of the alternatives in South Carolina Code §44-53-375(B) resulted in the conviction. *Id.*

The presentence report ("PSR") identified Furlow as both an armed career criminal and career offender. JA 249-51. Furlow lodged objections to these classifications, referencing his previously filed memoranda which submitted §44-53-375(B) is indivisible. His objections were overruled.

Furlow's guideline range was 188-235 months. Based on Furlow's request for a downward variance, the district court sentenced him to 180 months on each count to be served concurrently and a six-year term of supervised release.

Furlow appealed the decision of the district court that he was an armed career criminal and career offender. His main appellate argument revolved around whether South Carolina Code §44-53-375(B) was an indivisible, and, therefore, an overbroad statute. In particular, in Furlow's case and as is typical in South Carolina indictments, the entire list of alternatives found in §44-53-375(B) are pled in state indictments. JA 74; *Furlow*, No. 18-4531, *Petition for Rehearing and Rehearing En*

Banc at Ex. 3. The alternatives include purchasing, which would not qualify as a predicate for ACCA or the career offender guideline.

The Fourth Circuit issued a published opinion, affirming the district court's sentence and judgment. App. 1A-26A. In doing so, the Fourth Circuit rejected several parameters set forth by this Court for determining divisibility. The Fourth Circuit disregarded the text of the statute, pertinent case law, and the indictment. In reaching this conclusion, the Fourth Circuit approved the use of constitutionally infirm convictions to enhance federal sentences, while leaving defendants who, under the view of the Fourth Circuit, were convicted under duplicitous indictments, without any recourse to remedy the illegal convictions.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT FAILED TO PROPERLY APPLY THE CATEGORICAL APPROACH TO DETERMINE IF FURLOW'S PRIOR STATE DRUG CONVICTION WAS AN ACCA AND CAREER OFFENDER PREDICATE

This Court should grant the writ because the circuit court departed from the established rule of *Taylor v. United States*, 495 U.S. 575 (1990), requiring a categorical approach to determine whether a prior state conviction constitutes a predicate offense under ACCA and for the career offender guideline. The Fourth Circuit rejected, and, in fact, stated that it need not follow, this Court's guidance for determining divisibility and for application of the categorical approach. App. 14A, 17A-20A.

In holding that South Carolina Code §44-53-375(B) is divisible, the Fourth Circuit disregarded this Court's authority on what indicators are relevant to determine divisibility, and what level of certainty is required. Instead, the Fourth Circuit focused on certain factors to determine divisibility, and ignored other pertinent indicators, contrary to precedent and its own cases. Specifically, the court rejected that an indictment listing all the statutory means is indicative of an indivisible statute, ignored relevant state law, and disregarded the single penalty imposed for all the alternatives in the statute. App. 14A, 17A-20A.

In the context of the ACCA, 18 U.S.C. §924(e), this Court gave guidance on the categorical approach almost 30 years ago in *Taylor*, 495 U.S. 575. "The Courts of Appeals uniformly have held that §924(e) mandates a formal categorical approach,

looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 600.

Initially, under the categorical approach, courts are to look "only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. If alternatives are listed, the statute might answer the divisibility question by identifying what elements must be charged or whether the alternatives carry different punishments. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). In reliance on *Mathis*, analyzing another South Carolina statute, the Fourth Circuit correctly recognized this principle in a published opinion:

> the ABWO statute does not provide for any alternative punishments that depend on whether the defendant had either assaulted, beaten, or wounded the officer. *See Mathis*, 136 S.Ct. at 2256 (explaining that court can look to whether "statutory alternatives carry different punishments"). We are therefore satisfied to apply the categorical approach to the ABWO offense.

United States v. Jones, 914 F.3d 893, 900–01 (4th Cir. 2019) (quoting *Mathis* 136 S. Ct. at 2256); *see also United States v. Edwards*, 836 F.3d 831, 837 (7th Cir. 2016) ("Reinforcing that conclusion [that the statute is not divisible] is the fact that those alternatives carry the same punishment."); *United States v. Mapuatuli*, 762 Fed. Appx. 419, 422 (9th Cir. 2019) (holding CA Hlth. & S. §11366.5(a), which prohibits maintaining property "for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance for sale or distribution", was not divisible because it provided a single punishment for violating any one of these alternatives).

As directed by *Taylor*, if the statute itself does not provide clear answers under the categorical approach, then the courts should turn to the indictment and jury

instructions to determine divisibility. *Taylor*, 495 U.S. at 602. For 30 years, this Court has emphasized the importance of the charging document to the determination of divisibility and means versus elements. *Id.*; *Shepard v. United States*, 544 U.S. 13, 20 (2005) (emphasizing the "best way to identify generic convictions in jury cases" is use of indictment and jury instructions, and similar documents when a bench trial or plea is involved); *Descamps v. United States*, 570 U.S. 254, 261 (2013) (reaffirming *Taylor*'s directive to look at the charging paper and jury instructions to determine divisibility). In determining whether statutory alternatives are means or elements, this Court recently held:

> Suppose, for example, that one count of an **indictment** and correlative jury instructions charge a defendant with burgling a "building, structure, or vehicle"—thus reiterating all the terms of Iowa's law. That is **as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt**. So too if those documents use a single umbrella term like "premises": Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. See *Descamps,* 570 U.S., at ——, 133 S.Ct., at 2290. Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime.

Mathis, 136 S. Ct. at 2257 (emphasis added).

If, after a review of approved *Shepard* documents, it is not clear whether the statute is divisible, then the issue must be decided in favor of the defendant. "[S]uch [state] record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy '*Taylor* 's demand for certainty' when determining whether a defendant was convicted of a generic offense." *Mathis*, 136 S. Ct. at 2257 (quoting *Shepard,* 544 U.S. at 21). This Court demands certainty "when

identifying a generic offense by emphasizing that the records of the prior convictions used" must be "free from any inconsistent, competing evidence on the pivotal issue of fact separating generic from nongeneric" offenses. *Shepard*, 544 U.S. at 21–22.

Despite this clear directive, the *Furlow* opinion failed to apply the identified factors to determine if the statute at issue is divisible. South Carolina Code §44-53-375(B) reads:

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony . . . .

The statute provides the same punishment for the listed alternatives, depending on whether it is a first, second, or third or subsequent conviction. S.C. Code §44-53-375(B)(1-3).

Although this Court has provided two indicators that can be apparent from the face of a statute to evaluate whether it is divisible, the *Furlow* panel rejected this Court's holding. *Mathis*, 136 S. Ct. at 2256 (whether the text identifies the alternatives as elements or illustrative examples and if the statute offers multiple punishments for discrete offenses). *Furlow* recognized that *Mathis* dictates the divisibility analysis can be solved if the statute itself lists what elements must be charged or if it offers only illustrative examples, and a single punishment is identified in the statute. App. at 14A. The Fourth Circuit rejected both criteria. App. 14A, 18A-19A.

The Fourth Circuit then shifted its analysis to South Carolina case law. The Fourth Circuit focused, not on the drug indictments routinely filed in South Carolina, but instead relied almost solely on ambiguous South Carolina case law to decide S.C. Code §44-53-375(B) is divisible. The panel concluded: "Our review of South Carolina precedents leads us to conclude that the state courts have treated the alternatives specified in section 44-53-375(B) as distinct offenses with different elements." App. 14A-15A. The Fourth Circuit cited to several appellate state court cases that are more than 20 years old. App. 15A.

The Fourth Circuit relied on three state Court of Appeals cases. App. 15A (citing *State v. Brown*, 461 S.E.2d 828, 831 (S.C. Ct. App. 1995); *State v. Gill*, 584 S.E.2d 432, 434 (S.C. Ct. App. 2003); *State v. Watts*, 467 S.E.2d 272, 277 (S.C. Ct. App. 1996)). The court placed great weight on the state court's passing comment "In South Carolina, the offenses of distribution of crack cocaine and possession of crack cocaine with the intent to distribute are statutory crimes, found in S.C. Code Ann. Section 44–53–375(B) (Supp.1994)", while ignoring the next sentence which indicates these alternatives "are criminalized in the same subsection, and both carry a maximum sentence of fifteen years and a fine of at least $25,000 for a first time offender." *Brown*, 461 S.E.2d at 831. Again, the text of §44–53–375(B) and the case law support that this is one offense found in the same subsection subject to the same punishment. *Mathis* 136 S. Ct. at 2256. At worst, given this Court's guidance, the case is ambiguous regarding divisibility, which fails to satisfy this Court's "demand for certainty." *Shepard,* 544 U.S. at 21-22; *Mathis*, 136 S.Ct. at 2257.

Gill is also ambiguous. *Furlow* relied on *Gill* because the case allegedly sets forth the elements of distribution. However, the case recites the indictment, which alleges several alternatives from §44-53-375(B):

> Gill's indictment for distribution of crack cocaine alleged that he "did **distribute, dispense, or deliver** a quantity of crack cocaine ... or did otherwise **aid, abet, attempt, or conspire to distribute, dispense, or deliver** crack cocaine, all in violation of Section 44–53–375...."

Gill, 584 S.E.2d at 434 (emphasis added). *See Furlow*, No. 18-4531, *Petition for Rehearing and Petition for Rehearing En Banc* at Ex. 1 (state indictment from *Gill*) and Ex. 3 (numerous state court indictments pled listing all the alternatives from the state drug statutes).

The Fourth Circuit relied greatly on its prior unpublished opinions, such as *United States v. Marshall*, 747 Fed. Appx. 139 (4th Cir. 2018), which similarly relied on ambiguous South Carolina cases, including an unpublished South Carolina opinion, which has no precedential value in South Carolina.[2] App. 16A-17A. (citing *State v. Watson*, No. 2013-UP-312, 2013 WL 8538756, at *2 (S.C. Ct. App. 2013) (unpublished)). Even if *Watson* were reliable authority, the Fourth Circuit failed to reconcile that the *Watson* indictment alleged multiple alternatives from the statute. *Furlow,* No. 18-4531, *Brief* and *Addendum* (ECF No. 10), Add. 2, 4, 6. Furthermore, Furlow raised the issue, but the Fourth Circuit failed to address, that the jury in

[2] South Carolina Appellate Court Rule 268, https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=268.0&subRuleID=&ruleType=APP ("unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved").

Watson appeared to find him guilty of two of the alternatives, PWID and possession, yet only a single conviction was imposed. *Id.* at 18-20; Add. 7-8.

Nonetheless, in the face of overwhelming evidence that all the alternatives in §44-53-375(B) and similar South Carolina drug statutes are pled with all the statutory alternatives, the Fourth Circuit determined that "the sloppy drafting of indictments on some occasions [does not] override[] the state courts' clear indications that the alternatives specified in section 44-53-375(B) are distinct offenses". App. 19A-20A. Inclusion of all the listed alternatives in §44-53-375(B) and other similar drug statutes is routine, not merely "sloppy drafting" on an occasional basis. *Furlow*, No. 18-4531, *Petition for Rehearing and Petition for Rehearing En Banc* at Ex. 3.

The Fourth Circuit's holding is error both because South Carolina case law is ambiguous at best, and because it ignores this Court's holding in *Mathis* that listing all statutory alternatives in indictments "is **as clear an indication as any** that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." *Mathis*, 136 S. Ct. at 2257 (emphasis added). In other words, the court's observation that it need not look at the statute's penalties, or other indications of indivisibility, because a state court decision allegedly answered the question, is contrary to *Mathis* and *Taylor*'s demand for certainty.

Furthermore, the Fourth Circuit failed to address a South Carolina Supreme Court case directly on point, which explicitly interpreted South Carolina Code §44–53–370(e)(2) to list means by which the crime of trafficking can be accomplished.

State v. Raffaldt, 456 S.E.2d 390, 394 (S.C. 1995); *Furlow*, No. 18-4531, *Brief* at 20-21. A longstanding principle espoused by this Court is that "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986) (citing *Helvering v. Stockholms Enskilda Bank,* 293 U.S. 84, 87 (1934), which is in turn quoting *Atlantic Cleaners & Dryers, Inc. v. United States,* 286 U.S. 427, 433 (1932)) (internal quotation marks omitted). "When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

The South Carolina Supreme Court has definitively held that the alternatives listed in S.C. Code §44-53-370(e)(2), which closely match those in §44-53-375(B), are **means** of accomplishing the trafficking offense, not elements. *Raffaldt*, 456 S.E.2d at 394. *Raffaldt* supports that the statutory alternatives in §44-53-375(B) are means, not elements. The state court held that denial of the defendant's request for jury charges on "conspiracy to distribute, conspiracy to possess with intent to distribute and conspiracy to possess" were not error because the requested charges were merely "various ways to commit distribution and possession", referencing §44-53-370(a) and (d)(3). *Id.* at 393-94. The only difference between trafficking (§44-53-370(e)(2)) and conspiracy, PWID, distribution and simple possession (§44-53-370(a)(1)) is the amount of drugs involved. *Raffaldt*, 456 S.E.2d at 394. South Carolina's drug

statutes are integrally related to each other, as a conviction under §44-53-375(B) first requires a "violation of the provisions of Section 44-53-370". In turn, South Carolina Code §44-53-370(a) is a lesser included offense of the trafficking statute §44-53-370(e) at issue in *Raffaldt*. *State v. Peay*, 468 S.E.2d 669, 671 (S.C. Ct. App. 1996); *Raffaldt*, 456 S.E.2d at 393-94.

In failing to address *Raffaldt* at all, the Fourth Circuit again rejected the holdings of this Court for determining divisibility and applying the categorical approach. Federal courts have no "authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Rather, "[t]o the extent that the statutory definition of the prior offense has been interpreted by the state's highest court, that interpretation constrains [a federal court's] analysis of the elements of state law." *United States v. Aparicio-Soria*, 740 F.3d 152, 154 (4th Cir. 2014). *See also United States v. Shell*, 789 F.3d 335, 339 (4th Cir. 2015) (courts look to state statute and "the state precedent construing it."). "Where the state's highest court has not decided an issue of state law, the federal courts defer to state intermediate appellate court decisions, unless . . . convinced that the state supreme court would rule to the contrary." *United States v. Vann*, 660 F.3d 771, 777 (4th Cir. 2011) (King, J., concurring) (*en banc*).

In sum, the Fourth Circuit could not, in conformance with precedential cases of this Court, hold that S.C. Code §44-53-375(B) is divisible. Furlow submits that the Fourth Circuit failed to consider relevant state case law, that South Carolina indictments pled the statutory means, and that the statute identifies a single

punishment for all the listed alternatives. The Fourth Circuit's analysis is contrary to the long-established holdings of this Court.

In many ways, the Fourth Circuit's holding aligns with the issue raised in a case pending before this Court, *United States v. Shular*, No. 18-6662 (S.Ct. docketed Nov. 13, 2018). As argued by Shular, there is a circuit split regarding application of the categorical approach to ACCA serious drug offenses, a dispute revolving around whether the elements of a generic drug offense must be compared to the elements of the state drug conviction at issue in a classic categorical analysis.

Although the Fourth Circuit's opinion indicates that the district court compared the elements of §44-53-375(B) to the elements of "serious drug offense" and "controlled substance offense (App. 9A), the transcript from the sentencing hearing proves no such analysis was conducted. JA 182-83. This failure to apply the categorical approach by comparing the elements of §44-53-375(B) to the generic offenses, while not raised below, could be relevant in light of this Court's review of *Shular*. Therefore, at a minimum, this petition should be held in abeyance pending the outcome of *Shular*.

II. ALTERNATIVELY, THE OPINION CREATED A DUE PROCESS VIOLATION THAT FURLOW WAS NEVER ABLE TO ASSERT, BECAUSE SOUTH CAROLINA DOES NOT TREAT ITS DRUG STATUTES AS DIVISIBLE

The Fourth Circuit's decision results in approval of the widespread violation of the constitutional rights of defendants charged with drug offenses in South Carolina, as, under the reasoning of *Furlow*, these defendants were charged and convicted under duplicitous indictments. The Fourth Circuit addressed this serious constitutional issue in a footnote, indicating duplicitousness is best addressed in the state courts. App. 20A, n.15. This comment ignores that drug defendants in South Carolina would never have raised unconstitutionality because the violation was created by this opinion. *Id.* Federal courts should not be allowed to create an infirmity in a defendant's prior conviction and then use that infirm conviction to cause further injustice by enhancing federal sentences.

Under this opinion, defendants convicted under duplicitous state indictments will have their constitutional rights again violated through imposition of a greater federal sentence than would otherwise be sanctioned. Allowing a second violation of these defendants' fundamental rights certainly does not serve the interests of justice.

In considering a 28 U.S.C. §2255 collateral attack on a prior state conviction, this Court held: "We recognize that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own." *Daniels v. United States*, 532 U.S. 374, 383 (2001). Justice Scalia, concurring, further recognized that "Perhaps precepts of fundamental fairness inherent in 'due process' suggest that a forum to litigate challenges like petitioner's

must be made available *somewhere* for the odd case in which the challenge could not have been brought earlier', but thought federal sentencing or §2255 proceedings were not the proper place to do so. *Id.* at 386-87. (Scalia, J. concurring). However, Justice Scalia's belief was based on the fact that "Fundamental fairness could be achieved just as well-indeed, better-by holding that the rendering jurisdiction must provide a means for challenge when enhancement is threatened or has been imposed." *Id.* at 387. His opinion did not anticipate that it would be a federal court ruling that triggered the need to challenge a previously imposed state conviction. *Id.*

Other justices recognized a need to re-visit or abrogate its prior holding in *Custis v. United States,* 511 U.S. 485 (1994). "I believe that Congress intended courts to read the silences in federal sentencing statutes as permitting defendants to challenge the validity of an earlier sentence-enhancing conviction *at the time of sentencing." Daniels*, 532 U.S. at 392 (Breyer, J. dissenting). "I believe this is one of those rare instances in which the Court should reconsider an earlier case, namely *Custis*, and adopt the dissenters' views." *Id.* As further opined, "Why should it be easy to subject a person to a higher sentencing range and commit him for nearly nine extra years (as here) when the prisoner has a colorable claim that the extended commitment rests on a conviction the Constitution would condemn?" *Id.* at 389 (Souter, J., joined by Ginsburg, J. and Stevens, J., dissenting). "The language of §2255 . . . is obviously broad enough to include a claim that a prior conviction used anew to mandate sentence enhancement under the ACCA was obtained

unconstitutionally, so that the new sentence itself violates the terms of the ACCA or the Constitution." *Id.* at 388.

Since Furlow's position on appeal was that his prior conviction was under an indivisible statute, and therefore, not duplicitous, he has never had the opportunity to challenge as unconstitutional the conviction now being used to enhance his sentence in federal proceedings. Based on fundamental fairness afforded by due process, this Court should reconsider whether a defendant can make a collateral challenge to a prior state conviction under these circumstances.

Based on *Raffaldt* and the complete lack of state cases that have challenged the duplicitous drug indictments in South Carolina, it is clear defendants convicted of drug offenses in South Carolina have never had the opportunity assert a constitutional challenge to these state convictions. The result of *Furlow* is that federal defendants are now being sentenced more harshly under unconstitutional convictions, but were never afforded an opportunity to challenge their infirm indictments and convictions. Because *Furlow*'s holding creates a rare circumstance where these defendants never had an opportunity to challenge their prior convictions as duplicitous, because no state authority recognizes them as such, federal defendants should now be allowed to collaterally challenge their prior drug convictions, when the infirm convictions are being used to increase their sentences, or, if such an opportunity has passed, in 28 U.S.C. §2255 proceedings. *Daniels*, 532 U.S. 374.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit in this case. Petitioner also respectfully requests that this petition be held pending this Court's decision in *Shular*.[3]

Respectfully submitted.

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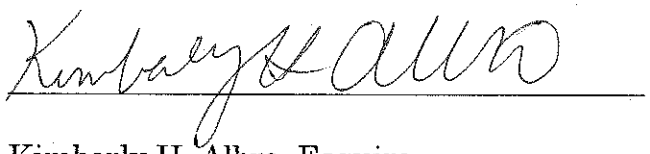
December 13, 2019

[3] Petitioner never raised an issue related to *Rehaif v. United States*, 139 S. Ct. 2191 (2019), as the opinion issued just days before the Fourth Circuit's opinion issued in Furlow's case. The Fourth Circuit recently heard oral argument *en banc* in *United States v. Lockhart*, No. 16-4441 (4th Cir. Docketed July 18, 2016), which addresses the applicability of *Rehaif* to cases pending on appeal, including whether a *Rehaif* error is a structural error. Although Furlow filed a premature 28 U.S.C. §2255 motion in the district court to raise a *Rehaif* issue, Petitioner submits it would be appropriate for this Court to remand Furlow's case to the Fourth Circuit for consideration of this issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit in this case. Petitioner also respectfully requests that this petition be held pending this Court's decision in *Shular*.[3]

Respectfully submitted.



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