No. 19-7007

IN THE SUPREME COURT OF THE UNITED STATES

BRYSHUN GENARD FURLOW, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prior conviction for distribution of cocaine base, in violation of S.C. Code Ann. § 44-53-375(B) (2015), is a "serious drug offense" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A)(ii), and a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) (2016).

2. Whether petitioner was entitled to collaterally attack his prior state conviction in his federal sentencing proceeding.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.S.C.):

United States v. Furlow, No. 17-cr-862 (July 12, 2018)

United States Court of Appeals (4th Cir.):

United States v. Furlow, No. 18-4531 (June 27, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 928 F.3d 311.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2019. A petition for rehearing was denied on August 2, 2019 (Pet. App. 28a). On October 10, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 17, 2019. The petition for a writ of certiorari was filed on December 13, 2019. 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 District of South Carolina, petitioner was convicted of possessing cocaine and methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1), and 924(a)(2) and (e). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by six years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-26a.

1. Law enforcement officials in Lexington County, South Carolina, conducted three controlled buys of cocaine base from petitioner at his apartment. Presentence Investigation Report (PSR) ¶¶ 22-24. A subsequent search of the apartment revealed two firearms, ammunition, drugs, drug paraphernalia, and cash. PSR ¶¶ 26-29. Petitioner pleaded guilty to one count of possession with intent to distribute cocaine and methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). See PSR ¶¶ 5, 6, 12.

A conviction for violating 18 U.S.C. 922(g)(1) carries a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, a defendant has at least three prior convictions for "a violent felony or a serious drug offense," committed on different occasions, the Armed

Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), specifies a statutory sentencing range of 15 years to life imprisonment. Ibid. The ACCA defines "'serious drug offense'" to include any state offense punishable by ten years or more of imprisonment that "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. 924(e)(2)(A)(ii). In addition, the advisory Sentencing Guidelines prescribe an enhanced "career offender" sentencing range if a defendant has, among other things, at least two prior felony convictions for a "crime of violence" or "controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2016). The Guidelines define "'controlled substance offense'" to include any state-law offense punishable by more than one year of imprisonment that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance." Id. § 4B1.2(b).

To determine whether a prior offense qualifies as a serious drug offense under the ACCA or a controlled substance offense under the advisory Sentencing Guidelines, courts generally apply a "categorical approach." See, e.g., Stokeling v. United States, 139 S. Ct. 544, 555 (2019). As this Court explained in Mathis v. United States, 136 S. Ct. 2243 (2016), under that approach, a court "focus[es] solely" on "the elements of the crime of conviction," not "the particular facts of the case." Id. at 2248. "Some statutes, however, have a more complicated (sometimes called 'divisible') structure" in which they "list elements in the

alternative, and thereby define multiple crimes." Id. at 2249 (citation omitted). When a defendant's statute of conviction is divisible, the sentencing court may apply the "modified categorical approach." Ibid. Under that approach, a court may "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of." Ibid.; see Shepard v. United States, 544 U.S. 13, 26 (2005).

For the modified categorical approach to apply, the state statute must set out alternative elements (facts that the jury must find or that the defendant must admit for a conviction) rather than alternative means ("various factual ways of committing some component of the offense" that "a jury need not find (or a defendant admit)" with specificity for conviction). Mathis, 136 S. Ct. at 2249. "The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means." Id. at 2256. That determination may be resolved by examining "authoritative sources of state law." Ibid. For example, a "statute on its face may resolve the issue," as when "statutory alternatives carry different punishments," indicating that those alternatives "must be elements." Ibid. If "state law fails to provide clear answers," however, courts may "'peek at the record documents'" from the prior conviction, such as the charging instrument or plea

agreement. Ibid. (brackets and citation omitted). One indication that "the statute contains a list of elements, each one of which goes toward a separate crime," is if those documents list "one alternative term," that is, one way of violating the statute, "to the exclusion of all others." Id. at 2257.

In this case, the Probation Office determined that petitioner was subject to sentencing under the ACCA based on three prior state convictions. See PSR ¶¶ 43, 44, 46. As relevant here, one was a 2016 conviction under South Carolina law for distribution of cocaine base, in violation of S.C. Code Ann. § 44-53-375(B) (2015), which the Probation Office determined to be a conviction for a serious drug offense under the ACCA. See PSR ¶ 46. That statute provides in relevant part:

> 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, * * * is guilty of a felony.

S.C. Code Ann. § 44-53-375(B) (2015). The Probation Office also recommended that petitioner be designated a career offender under the Sentencing Guidelines based on the same three convictions. See PSR ¶ 81. That designation resulted in a recommended advisory sentencing range of 188 to 235 months of imprisonment. See PSR ¶ 108.

At sentencing, petitioner contended that his prior South Carolina offense was neither a "serious drug offense" under the

ACCA nor a "controlled substance offense" under the advisory Guidelines. See Sent. Tr. 11. Petitioner argued that the South Carolina statute is broader than the definitions of those terms because it prohibits the "purchase[]" of cocaine base, S.C. Code Ann. § 44-53-375(B) (2015), and that the statute is not divisible into discrete crimes. See Sent. Tr. 3-4. The court agreed that the statute as a whole is overbroad, but determined that it is divisible and that under the modified categorical approach, petitioner's conviction would qualify as both a serious drug offense under the ACCA and a controlled substance offense under the advisory Guidelines. See id. at 11. The court imposed a below-guidelines sentence of 180 months of imprisonment. Id. at 35.

2. The court of appeals affirmed. Pet. App. 1a-26a.

The court of appeals agreed that the South Carolina statute as a whole "is not a categorical match with the federal definitions of 'serious drug offense' and 'controlled substance offense'" because it "prohibits the mere 'purchase' of * * * crack cocaine." Pet. App. 14a (brackets omitted). The court explained that it "must therefore assess and decide whether the statute is divisible, and thus amenable to the modified categorical approach," by "look[ing] to sources like the statutory text and South Carolina court decisions interpreting it." Ibid. (citing Mathis, 136 S. Ct. at 2257). The court found that "nothing" in the statutory

text "clearly suggests that the various specified actions are means rather than elements." Ibid.

The court of appeals thus reviewed South Carolina case law, from which it determined that "state courts have treated the alternatives specified in" the statute "as distinct offenses with different elements." Pet. App. 14a-15a. "By way of example," the court cited State v. Brown, 461 S.E.2d 828 (S.C. App. 1995) (per curiam), which "explained that two of the" statutory alternatives -- "distribution of crack cocaine and possession of crack cocaine with intent to distribute -- are separate 'statutory crimes'"; Carter v. State, 495 S.E.2d 773 (S.C. 1998), which "treated manufacturing as a separate offense"; and State v. Mouzon, 485 S.E.2d 918 (S.C. 1997), which "treat[ed] conspiracy * * * as a distinct offense." Pet. App. 15a; see ibid. (citing additional cases). The court explained that "[b]ecause the South Carolina courts treat the alternatives specified in section 44-53-375(B) as separate offenses with different elements, we are satisfied that the statute is divisible." Ibid. Applying the modified categorical approach, the court found that the relevant documents from petitioner's prior conviction showed that he had "pleaded guilty to distribution of crack cocaine," id. at 20a, which satisfied the relevant ACCA and Guidelines definitions, id. at 21a.

The court of appeals observed that petitioner had "identifie[d] several state court indictments that list many of

the alternatives specified in various South Carolina drug statutes," but observed that "other state court indictments charging violations of those statutes are more specific." Pet. App. 19a. In a footnote, the court rejected petitioner's claim that finding the South Carolina statute divisible rendered various South Carolina indictments under Section 44-53-375(B) "duplicitous." Pet. App. 20a n.15. The court explained that "[e]ven if correct, [petitioner] identifies a potential issue best raised with -- and resolved by -- state prosecutors and the South Carolina courts." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 6-15) that his prior South Carolina conviction for distributing cocaine base is not a serious drug offense under the ACCA or a controlled substance offense under the advisory Sentencing Guidelines. He also contends in the alternative (Pet. 16-18) that he should be permitted to raise a collateral duplicitousness challenge to his state conviction in his federal sentencing proceeding. The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. a. The court of appeals correctly applied this Court's decision in Mathis v. United States, 136 S. Ct. 2243 (2016), to determine that the South Carolina statute under which petitioner was convicted is divisible. Consistent with Mathis, the court

consulted "the statutory text and South Carolina court decisions interpreting it." Pet. App. 14a (citing Mathis, 136 S. Ct. at 2257). Although the court found that the text by itself did not "clearly" answer the divisibility question, ibid., it determined that "South Carolina courts treat the alternatives specified in section 44-53-375(B) as separate offenses with different elements," id. at 15a.

As the court of appeals explained (Pet. App. 15a), South Carolina courts have treated distribution as a separate offense from possession with intent to distribute; manufacturing as a separate offense from the other acts in the statute; and also conspiracy as a separate offense. See State v. Brown, 461 S.E.2d 828, 831 (S.C. App. 1995) (per curiam); Carter v. State, 495 S.E.2d 773, 776-777 (S.C. 1998); State v. Mouzon, 485 S.E.2d 918, 922 (S.C. 1997). Those decisions indicate that the statutory alternatives set forth elements of different crimes, not means of committing a single crime. Indeed, in State v. Watson, No. 2013-up-312, 2013 WL 8538756 (July 3, 2013) (per curiam), the Court of Appeals of South Carolina upheld a jury charge and verdict form that "reflect[ed] [possessing with intent to distribute] heroin and purchasing heroin as two separate offenses" under an identically worded statute, S.C. Code Ann. § 44-53-370 (2012). Watson, 2013 WL 8538756, at *1; see id. at *2 (explaining that "purchasing heroin does not" contain "the elements required to prove * * * possession"). It follows that purchasing cocaine

base also is a separate offense from, and requires different elements to prove than, possessing with intent to distribute cocaine base -- and, therefore, the other statutory alternatives in Section 44-53-375(B) as well.

Petitioner errs in suggesting (Pet. 9) that the specification of a "single punishment" for each statutory alternative clearly resolves the divisibility question. Had the "statutory alternatives carr[ied] different punishments," that alone would have shown that they are elements, not means. Mathis, 136 S. Ct. at 2256 (emphasis added). But the inverse is not true: statutory alternatives that carry the same punishments are not necessarily means; they could be either means or elements. Similarly, had the statutory alternatives been phrased as a list of "illustrative examples," ibid. (citation omitted), that would have indicated they are means, not elements; but because they are not so phrased, they could be either. Contrary to petitioner's assertion (Pet. 9), therefore, the court of appeals did not "reject[] both [of those] criteria" or "reject[] this Court's holding" in Mathis. Instead, the court of appeals correctly recognized (Pet. App. 14a) that because the statutory "text does not have those indicators," it did not clearly answer the divisibility question, and therefore the court's task was "to turn to the relevant state court decisions." That is precisely what Mathis instructs. 136 S. Ct. at 2256.

Petitioner's reliance (Pet. 13-14) on State v. Raffaldt, 456 S.E.2d 390 (S.C. 1995), is misplaced. Raffaldt held that a defendant convicted of cocaine trafficking under S.C. Code Ann. § 44-53-370(e) (1993) was not entitled to a jury charge on a lesser-included distribution or possession offense because "[i]t is the amount of cocaine, rather than the criminal act, which triggers the trafficking statute," and "all the evidence indicated that [the defendant] was dealing in quantities of cocaine" much larger than the triggering amount. 456 S.E.2d at 394. Raffaldt also stated that "trafficking may be accomplished by a variety of criminal acts" and that "the charges requested by [the defendant] relate to the various ways to commit distribution and possession." Ibid. But even if those statements, made in the context of a different portion of South Carolina's criminal code, can be read to suggest that the trafficking statute is indivisible under Mathis, it does not mean that the differently worded distribution statute under which petitioner was convicted is indivisible as well. Compare S.C. Code Ann. § 44-53-370(e) (1993), with § 44-53-375(B) (2015).

Petitioner also is incorrect in suggesting (Pet. 10) that the court of appeals should have "focused * * * on the drug indictments routinely filed in South Carolina" instead of on South Carolina case law. Mathis indicates that courts should examine indictments, jury instructions, and other such record documents only "if state law fails to provide clear answers" on divisibility.

136 S. Ct. at 2256. Here, as the court of appeals explained (Pet. App. 14a), the state court decisions did "definitively answer[] the question[]" of divisibility. Mathis, 136 S. Ct. at 2256.

Finally, although petitioner has suggested (Pet. 15) a possible overlap, this Court's recent decision in Shular v. United States, 140 S. Ct. 779 (2020), does not support his position here. Shular held that the ACCA's definition of a "'serious drug offense'" as including certain state crimes that "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. 924(e)(2)(A)(ii), describes conduct -- not some sort of generic offense -- that a court should compare against the elements of a state offense. See Shular, 140 S. Ct. at 785. Petitioner does not dispute that if the South Carolina statute is divisible, his prior offense necessarily involved distribution as an element, and is thus a serious drug offense under the ACCA. Cf. Pet. App. 20a (observing that petitioner "pleaded guilty to distribution of crack cocaine"). Shular thus does not provide any basis for questioning the decision below.

b. Petitioner does not contend that any other court of appeals has found S.C. Code Ann. § 44-53-375(B) (2015) to be indivisible. Instead, petitioner simply disagrees with the court of appeals' resolution of the state-law question of whether the South Carolina statute is divisible. This Court frequently denies certiorari to petitions seeking review of a lower court's

determination of a state statute's divisibility. See, e.g., Myers v. United States, No. 19-6720 (Mar. 30, 2020); Lamb v. United States, No. 17-5152 (Apr. 2, 2018); Gundy v. United States, No. 16-8617 (Oct. 2, 2017); Rice v. United States, No. 15-9255 (Oct. 3, 2016). This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). No sound reason exists to depart from that "settled and firm policy" here.

2. Petitioner alternatively contends (Pet. 16-18) that he should be permitted to collaterally attack his prior state conviction in the sentencing proceedings here on the theory that if the South Carolina statute is divisible, the indictment there was duplicitous, cf. United States v. Burfoot, 899 F.3d 326, 337 (4th Cir. 2018) ("An indictment is duplicitous if it 'charges two offenses in one count.'") (citation omitted). That contention lacks merit.

In Custis v. United States, 511 U.S. 485 (1994), this Court held that in federal sentencing proceedings, a defendant may not collaterally attack a prior state conviction that qualifies him for an enhanced sentence under the ACCA, "with the sole exception of convictions obtained in violation of the right to counsel."

Id. at 487; see id. at 490-497; see also Daniels v. United States, 532 U.S. 374, 384 (2001) (extending Custis to postconviction proceedings under 28 U.S.C. 2255). The Court explained that the proper forum in which to collaterally attack a prior state conviction is the state court system. Custis, 511 U.S. at 497; Daniels, 532 U.S. at 382. Petitioner does not allege that his South Carolina conviction was obtained in violation of his right to counsel. As he appears to recognize (Pet. i), Custis accordingly forecloses his contention here.

This would not be an appropriate case in which to reconsider Custis, because petitioner pleaded guilty to the South Carolina offense. See PSR ¶ 46; Pet. App. 20a. By pleading guilty, petitioner waived all claims of nonjurisdictional defects, see Tollett v. Henderson, 411 U.S. 258, 267 (1973), which include claims of defects in the indictment, see United States v. Cotton, 535 U.S. 625, 631 (2002), which in turn include a claim that the indictment was duplicitous, see United States v. Lampazianie, 251 F.3d 519, 525-526 & n.19 (5th Cir. 2001) (citing cases); cf. United States v. Broce, 488 U.S. 563, 571 (1989).

3. Petitioner suggests in passing (Pet. 19 n.3) that his conviction for possessing a firearm and ammunition as a felon might be infirm under Rehaif v. United States, 139 S. Ct. 2191 (2019), which held that the mens rea of knowledge in 18 U.S.C. 922(g) and 924(a)(2) applies "both to the defendant's conduct and to the defendant's status." 139 S. Ct. at 2194. On that basis,

petitioner suggests (Pet. 19 n.3) that it would be "appropriate" for this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings (GVR) in light of Rehaif.

That course is unwarranted here. This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Applying that rule here would preclude a grant of certiorari because, as petitioner acknowledges (Pet. 19 n.3), he did not challenge his guilty plea or conviction below on the ground that he lacked knowledge regarding his status as a felon.

This Court sometimes has entered a GVR order when an "intervening" event has given new vitality to an argument that was not previously raised. See Lawrence v. Chater, 516 U.S. 163, 167-168 (1996) (per curiam) (describing this Court's "intervening development" GVR practice); see also id. at 180-181 (Scalia, J., dissenting) (explaining that the Court's "intervening event" GVR practice involves "a postjudgment decision of this Court" or, occasionally, a decision of this Court that "preceded the judgment in question, but by so little time that the lower court might have been unaware of it") (emphasis omitted). Here, however, this Court decided Rehaif on June 21, 2019, while petitioner's direct appeal

still was pending before the panel. And even after the panel issued its decision, petitioner failed to seek panel rehearing or rehearing en banc to raise a belated Rehaif-based claim before the mandate issued on August 12, 2019 -- approximately seven weeks after Rehaif was decided.

Nothing warrants a departure from this Court's ordinary practice of granting certiorari with regard only to claims that were pressed or passed upon below. Although the Fourth Circuit recently concluded that a Rehaif claim raised for the first time in an appeal from a guilty plea was structural error and warranted vacatur of the plea, see United States v. Gary, 954 F.3d 194, 205-206 (2020), that decision is incorrect and the government's time for seeking further review has not yet expired. This Court has denied petitions in which previously available Rehaif claims were raised for the first time in seeking certiorari. See Golden v. United States, No. 19-7011 (Mar. 23, 2020); Mohr v. United States, No. 19-6289 (Jan. 27, 2020); Leach v. United States, No. 19-6722 (Jan. 27, 2020). It should follow the same course here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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