No. 19-7007

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Kimberly Harvey Albro, Esquire
Assistant Federal Public Defender
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
Telephone No.: (803) 765-5088
Email: Kimberly_Albro@fd.org
Counsel of Record for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

REPLY ARGUMENT

The government submits that this Court should not grant certiorari because the court of appeals decision does not conflict with other courts of appeals or with this Court's cases. BIO at 8. However, as set forth in the petition, the Fourth Circuit's opinion is contrary to this Court's long-line of opinions from *Taylor v. United States*, 495 U.S. 575 (1990) to *Mathis v. United States*, 136 S. Ct. 2243 (2016) regarding application of the categorical approach and the divisibility of statutes. Furthermore, if the Fourth Circuit's opinion stands, defendants like Furlow are left without remedy to suffer the consequences of an unconstitutional state conviction, the harm only just being realized based on the opinion from the Fourth Circuit. Finally, the government also urges this Court not to grant Furlow's petition, vacate the judgment and remand for further proceedings, but this Court possesses the authority to do so.

I. The Fourth Circuit ignored this Court's relevant precedent when it misapplied the categorical approach and determined S.C. Code §44-53-375(B) is divisible

The government asserts that the Fourth Circuit did not erroneously reject the statutory clues that suggest S.C. Code §44-53-375(B) is not divisible and that the court of appeals was entitled to review state court decisions to the exclusion of the state court indictments that plead all the alternatives from the statute. BIO at 10-12. The government claims that the court of appeals merely followed *Mathis* by turning to "relevant state court decisions." *Id*. (quoting *Mathis*, 136 S. Ct. at 2256).

However, *Taylor* and *Mathis* show that the government's position is faulty. As directed by *Taylor*, if the statute itself does not provide clear answers under the

categorical approach, the courts should look at the indictment and jury instructions to determine divisibility. *Taylor*, 495 U.S. at 602. *Taylor* provides an example that demonstrates the Fourth Circuit's decision is wrong:

> For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

Id. This example illustrates how this Court directs the divisibility analysis to be applied and proper application of the analysis leads to the clear conclusion that S.C. Code §44-53-375(B) is not divisible. All the alternatives in §44-53-375(B) are pled in indictments in South Carolina, and in indictments for the related drug offense, S.C. Code 44-53-370, giving a clear indication that the government should **not** be allowed to use the conviction for federal sentencing enhancements, since one of the alternatives, purchasing, fails to meet the definition of serious drug offense and controlled substance offense, rendering the state drug statute overbroad. *See United States v. Furlow*, No. 18-4531, *Petition for Rehearing and Rehearing En Banc* at Ex. 3 (4th Cir. filed July 22, 2019) (numerous state court indictments pled listing all the alternatives from the state drug statutes); *see United States v. Marshall*, 747 F. App'x 139, 149–50 (4th Cir. 2018), cert. denied, 139 S. Ct. 1214 (2019) ("The South Carolina statutes on their face govern a broader range of conduct than the ACCA or the career offender guideline by prohibiting the mere 'purchase' of narcotics. Accordingly, if the statutes were indivisible, the state offenses would not categorically satisfy the

definition of 'serious drug offense' in the ACCA or 'controlled substance offense' in the career offender guideline.").

The government also overstates the guidance from *Mathis* by suggesting that it is proper to look at indictments and jury instructions "**only** 'if state law fails to provide clear answers' on divisibility." BIO at 11-12 (citing *Mathis*, 136 S. Ct. at 2256) (emphasis added). However, the correct statement of *Mathis* is: "And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself." 136 S. Ct. at 2256. Here, at best, the state law is ambiguous regarding the categorical analysis and divisibility.

If the Fourth Circuit had properly reviewed the relevant opinions from South Carolina's highest court, it would have reached a decision contrary to that in *Furlow*. The *Furlow* opinion and the government choose to point to an unpublished state court of appeals case, *State v. Watson*, 2013-UP-312, 2013 WL 8538756 at *2 (S.C. Ct. App. 2013) (unpublished), which has no precedential value. App. 16A; BIO at 9-10; Rule 268(d), SCACR (located at the South Carolina Judicial Branch Website, https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=268.0&subRuleID=&ruleType=APP)). As indicated in the petition, although it appeared the jury considered two separate offenses, Watson ultimately was convicted of a single offense, a legal point not reconciled in *Furlow*. Pet. at 11-12.

As indicated in the petition, although raised below, the Fourth Circuit did not address the South Carolina Supreme Court opinion, *State v. Raffaldt*, 456 S.E.2d 390, 394 (S.C. 1995), which definitively holds that the alternatives in a related, similarly-

worded drug statute are means, not elements. *See* Pet. at 12-14. This Court has a recognized the:

> fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a State's courts. If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.

Schad v. Arizona, 501 U.S. 624, 636 (1991). The government dismisses *Raffaldt*, without addressing this Court's cases cited in the petition (Pet. at 12-13) and without providing an explanation why similarly-worded drug offense statutes, found in the same title and chapter of the South Carolina Code, should have different meanings. BIO at 11. In fact, S.C. Code §44-53-375(B) and §44-53-370 are integrally related, as a requirement for a conviction under §44-53-375(B) is that a violation of §44-53-370(a) is proven. Pet. 13-14; S.C. Code §44-53-375(B). The government offers no explanation why "[t]he normal rule of statutory construction . . . that identical words used in different parts of the same act are intended to have the same meaning" would not apply to the South Carolina drug statutes. *See 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 (1932)) (internal quotation marks omitted); BIO at 11.

The government also urges this Court to deny the petition because this Court usually defers questions of state law to the courts of appeals. BIO at 13 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004), *abrogated by Lexmark*

Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014)). *Newdow* dealt with the question of "parental status . . . defined by California's domestic relations law" in the context of a father's challenge to his daughter's exposure to religious views with which he disagreed. *Id.* The issue in this case, however, involves whether state law convictions qualify for federal sentencing enhancements. Contrary to the government's position, this Court does consider cases involving state statutes when, like here, the cases involve a broader issue of law particularly important and relevant to criminal defendants in this country. *See*, *e.g.*, *Mathis*, 136 S. Ct. at 2256 (whether petitioner's prior Iowa burglary convictions qualified him for an ACCA sentencing enhancement); *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (interpreting whether a Georgia marijuana offense was a qualifying aggravated felony under federal immigration laws); *Johnson v. United States,* 559 U.S. 133 (2010) (This Court held it was "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2)" in analyzing whether state battery could be a conviction for federal sentencing enhancements.); *Taylor*, 495 U.S. 575. As in Furlow's case, the cited cases of this Court interpreted whether relevant state cases supported the finding that the state offenses at issue could be used to enhance federal criminal sentences.

In sum, this Court should grant certiorari to correct the Fourth Circuit's misapplication of the categorical analysis in *Furlow*.

II. This Court should revisit *Custis*[1] and *Daniels* in light of the due process violation created by the Fourth Circuit's opinion

The government incorrectly states that the Fourth Circuit rejected Petitioner's position that numerous South Carolina indictments are duplicitous if the drug statutes are considered divisible. BIO at 8. The Fourth Circuit, as quoted by the government, did indicate that the duplicitous issue was better handled by the South Carolina prosecutors and state courts. *Id*. Neither *Furlow* nor the government explain how Furlow can rectify his unconstitutional state drug conviction. Furlow is without remedy because South Carolina drug indictments routinely include the list of alternatives from the drug statutes and no one every challenged the indictment as duplicitous in South Carolina courts because S.C. Code 44-53-375(B) identified a single offense. *United States v. Furlow*, No. 18-4531, *Petition for Rehearing and Rehearing En Banc* at Ex. 3 (ECF No. 50) (4th Cir. filed July 22, 2019).

There is no question that, under the Fourth Circuit's ruling, Furlow was convicted based on a duplicitous indictment. JA 74; *United States v. Burns*, 990 F.2d 1426, 1438 (4th Cir. 1993) (Duplicity means "the joining in a single count of two or more distinct and separate offenses."). This Court has upheld a murder conviction where the indictment charged death both by shooting and by drowning against a challenge of being duplicitous because "it was immaterial whether death was caused by one **means** or the other." *Schad*, 501 U.S. at 631 (emphasis added) (citing *Andersen v. United States,* 170 U.S. 481 (1898)). *Schad*'s outcome could be achieved

[1] *Custis v. United States,* 511 U.S. 485 (1994).

only because "an indictment need not specify which overt act, among several named, was the **means** by which a crime was committed". *Id.* (emphasis added). Application of this Court's principle to this case shows either that Furlow was convicted unconstitutionally under a duplicitous state indictment, or that the *Furlow* opinion wrongly decided that §44-53-375(B) is divisible.

The circumstances created by *Furlow* implicate "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). The only reason defendants like Furlow now need to challenge their state convictions as duplicitous is because the Fourth Circuit's ruling imposes serious collateral consequences on Furlow and numerous other similarly-situated defendants based on a conviction Furlow and countless others never knew was unconstitutional. *See United States v. Furlow*, No. 18-4531, *Petition for Rehearing and Rehearing En Banc* at Ex. 3 (ECF No. 50) (4th Cir. filed July 22, 2019).

The government asserts this case is not an appropriate vehicle for reconsideration of this Court's prior holdings precluding collateral attacks on state convictions. BIO at 14. This is the ideal vehicle, however, because it presents unique circumstances that rendered Petitioner's prior state conviction, obtained by a guilty plea, unconstitutional long after any state remedies expired and unconstitutional only because of the federal appellate court's ruling.

The government's reliance on *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) is misplaced. This Court indicated:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Id. at 267. Unlike the situation in *Tollett*, where the defendant knew the true nature of the offense, at the time Furlow pled guilty, he believed he was pleading guilty to a single offense criminalized by S.C. Code §44-53-375(B), as pled in his indictment. JA 74; JA 244, ¶46. It was not until years later, when the court of appeals imposed collateral consequences on him by enhancing his sentence under the ACCA and career offender provision of the guidelines, that Furlow was on notice that his state conviction was unconstitutional, based on a duplicitous indictment that never clearly informed him about the nature of the offense to which he pled. By the time *Furlow* issued, it was too late to seek a remedy in state court. Rules 203 and 243, SCACR. In other words, at the time Furlow pled guilty, the state of the law did not notify him that he was pleading guilty to an infirm indictment. It was only after the *Furlow* opinion issued that Furlow knew his state drug conviction was unconstitutional.

Therefore, Furlow asks this Court to grant certiorari to review this important constitutional issue.

III. This Court can GVR this case under its broad authority in light of *Rehaif*

Finally, the government urges this Court to reject any claims Furlow has to relief under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), because this Court's "traditional rule" precludes granting certiorari on an issue not pressed or passed upon below. BIO at 15. Furlow submits that granting his petition, vacating the judgment and remanding for further proceedings ("GVR") would be appropriate in this case, especially in light of the intervening case law. BIO at 15-16. "Title 28 U.S.C. § 2106 appears on its face to confer upon this Court a broad power to GVR: 'The Supreme Court or any other court of appellate jurisdiction may ... vacate ... any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and ... require such further proceedings to be had as may be just under the circumstances.'" *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996). This Court recognized it has GVR'd for numerous reasons, including its own decisions, changed factual circumstances, and decisions from the state's highest courts. *Id*. at 166-67 (citations omitted). "[T]he GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Id*. at 168.

On the same day *Lawrence* issued, this Court GVR'd a criminal case, in part because "the only opinion below did not consider the import of a recent Supreme Court precedent that both parties now agree applies" and because the petitioner was

languishing in jail, through no fault of his own, without having had the issue reviewed by the appellate court. *Stutson v. United States*, 516 U.S. 193, 195 (1996).

The government does not deny that *Rehaif* is relevant and applicable to Furlow's case. Furthermore, the government recognizes that a recent Fourth Circuit case, where the opinion issued after Furlow filed this petition, held that a guilty plea accepted by the district court without informing the defendant of the 18 U.S.C. §922(g) element identified in *Rehaif* is structural error. BIO at 16 (citing *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020)). Here, Furlow suggests GVR for the very reasons cited by the Court in *Stutson*, 516 U.S. at 195. *Rehaif* issued on June 21, 2019. The Fourth Circuit released its opinion in *Furlow* less than one week later. App. 1A. Although Furlow considered raising *Rehaif* in his petition for rehearing and rehearing en banc to the Fourth Circuit, he ultimately did not do so because it did not appear to meet the requirement of the Federal Rules of Appellate Procedure 35 and 40 and it was not addressed in the Fourth Circuit's opinion, for which Furlow sought rehearing. Nonetheless, by the time he filed his petition to this Court, Furlow believed that the Fourth Circuit would be issuing guidance on how to apply *Rehaif*, and raised the possibility of GVR to preserve this Court's resources and for uniformity of Fourth Circuit decisions. Therefore, this Court under its broad authority can GVR Furlow's case to address the *Rehaif* issue in light of *Rehaif* and the Fourth Circuit's opinion interpreting *Rehaif*.

CONCLUSION

For the foregoing reasons and those outlined in the petition, this Court should grant certiorari.

Respectfully submitted.

s/Kimberly H. Albro
Kimberly H. Albro, Esquire
Assistant Federal Public Defender
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
Telephone No.: (803) 765-5088
Email: Kimberly_Albro@fd.org
Counsel of Record for Petitioner

April 30, 2020