

NO. : \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2019

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TOMMY ADAMS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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## **QUESTION PRESENTED**

1. DID THE FOURTH CIRCUIT COURT OF APPEALS INCORRECTLY APPLY THE LINE OF AUTHORITY FROM THIS COURT BEGINNING WITH *TAYLOR V. UNITED STATES*, 495 U.S. 575 (1995) AND CONTINUING THROUGH *DESCAMPS V. UNITED STATES*, 570 U.S. 254 (2013) AND *MATHIS V. UNITED STATES*, 136 S. CT. 2243(2016) BY USING THE MODIFIED CATEGORICAL APPROACH TO FIND THAT PETITIONER'S SOUTH CAROLINA DRUG CONVICTIONS FOR VIOLATING S.C. CODE ANN §§ 44-53-370 AND 44-53-375 QUALIFIED AS CONTROLLED SUBSTANCE OFFENSES AS DEFINED IN U.S.S.G. § 4B1.2 FOR PURPOSES OF THE CAREER OFFENDER GUIDELINE FOUND AT U.S.S.G. § 4B1.1.

## **PARTIES TO THE PROCEEDING**

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

## TABLE OF CONTENTS

	<u>PAGES</u>
QUESTION PRESENTED FOR REVIEW. . . . .	i
PARTIES TO THE PROCEEDING. . . . .	ii
TABLE OF CONTENTS. . . . .	iii
TABLE OF AUTHORITIES. . . . .	iv
PETITION FOR A WRIT CERTIORARI . . . . .	1
OPINION BELOW. . . . .	1
JURISDICTION. . . . .	1
GUIDELINE AND STATUTORY PROVISIONS INVOLVED . . . . .	2
STATEMENT OF THE CASE . . . . .	4
REASONS FOR GRANTING THE PETITION . . . . .	7
THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH CIRCUIT FAILS TO PROPERLY APPLY SUPREME COURT AUTHORITY; AND ERRONEOUSLY CONCLUDES THAT S.C. CODE § 44-53-370(a)(1) AND § 44-53-375(B) ARE DIVISIBLE FOR PURPOSES OF APPLYING THE MODIFIED CATEGORICAL APPROACH.	
CONCLUSION. . . . .	18
APPENDIX. . . . .	A1-A4

## TABLE OF AUTHORITIES

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).	.15
<i>Carter v. State</i> , 495 S.E.2d 773 (S.C. 1998).	13
<i>Descamps v. United States</i> , 570 U.S. 254 (2013).	.7, 8, 9
<i>Harden v. State</i> , 602 S.E.2d 48 (S.C. 2004).	12, 16
<i>Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.</i> , 670 S.E.2d 371 (S.C. 2008).	.11
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016).	.9, 10, 13, 14, 15, 16, 17, 18
<i>State v. Fowler</i> , 289 S.E.2d 412 (S.C. 1982).	.13
<i>State v. Johnson</i> , 20 S.C. 387, 391 (1884).	.16-17
<i>State v. Raffaldt</i> , 456 S.E.2d 390 (S.C. 1995).	14, 16, 17
<i>State v. Samuels</i> , 743 S.E.2d 773 (S.C. 2013).	17
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).	7, 9, 17
<i>The Confiscation Cases</i> , 87 U.S. 92 (1874).	16
<i>United States v. Adams</i> , 788 F. App'x 198 (4th Cir. 2019)	.1
<i>United States v. Edwards</i> , 836 F.3d 831 (7th Cir. 2016).	.14
<i>United States v. Furlow</i> , 928 F. 3d 311 (4th Cir. 2019)	.6, 10, 14, 17

<i>United States v. Gomez</i> , 690 F.3d at 199. . . . .	8, 9
<i>United States v. Goodwin</i> , 2018 WL 6582999 (D. S.C. Dec. 14, 2018). . . . .	12
<i>United States v. Jones</i> , 914 F.3d 893 (4th Cir. 2019). . . . .	14, 15
<i>United States v. Mapuatuli</i> , 762 F. App'x 419 (9th Cir. 2019). . . . .	14
<i>United States v. Marshall</i> , 747 Fed. Appx. 139 (4 <sup>th</sup> Cir. 2018). . . . .	6, 17

## **STATUTES**

18 U.S.C. § 3742. . . . .	5
21 U.S.C. § 841(a)(1) . . . . .	4
21 U.S.C. § 841(b)(1)(C). . . . .	4
21 U.S.C. § 851 . . . . .	5
28 U.S.C. § 1254(1). . . . .	1
28 U.S.C. § 1291. . . . .	5
Cal. Health & Safety Code § 11366.5 (West). . . . .	14
S.C. Code Ann. § 44-53-370. . . . .	2, 3, 13, 14, 15
S.C. Code Ann. § 44-53-370(a). . . . .	2, 4, 16
S.C. Code Ann. § 44-53-370(a)(1). . . . .	<i>passim</i>
S.C. Code Ann. § 44-53-370(b)(1). . . . .	2-3, 13
S.C. Code Ann. § 44-53-370(b)(2). . . . .	13
S.C. Code Ann. § 44-53-370(b)(3). . . . .	13
S.C. Code Ann. § 44-53-370(b)(4). . . . .	13
S.C. Code Ann. § 44-53-370(d)(3). . . . .	16

S.C. Code Ann. § 44-53-375. . . . .	13
S.C. Code Ann. § 44-53-375(B). . . . .	3, 4, 5, 7, 8, 9, 10, 14
S.C. Code Ann. § 44-53-420. . . . .	12, 13

## **RULES**

UNITED STATES SUPREME COURT RULE 10(c). . . . .	1
---	---

## **OTHER SOURCES**

U.S.S.G. § 4B1.1. . . . .	4, 5
U.S.S.G. § 4B1.2. . . . .	2, 4
U.S.S.G. § 4B1.2(b). . . . .	2, 5

**PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Tommy Adams, Jr., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No.: 19-4064, entered on December 19, 2019. (App. A1-A4).

**OPINION BELOW**

The Fourth Circuit panel issued its unpublished opinion on December 19, 2019, affirming the judgement of the United States District Court for the District of South Carolina, Florence Division. (App. A1-A4) This opinion is reported as *United States v. Adams*, 788 F. App'x 198 (4th Cir. 2019).

**JURISDICTION**

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment on December 19, 2019. (App. A1-A3). This Court has jurisdiction under 28 U.S.C. § 1254(1) and UNITED STATES SUPREME COURT RULE 10(c).



**GUIDELINE AND STATUTORY PROVISIONS INVOLVED**

United States Sentencing Guidelines § 4B1.2:

U.S.S.G. § 4B1.2(b)

- (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

S.C. Code Ann. § 44-53-370:

S.C. Code Ann. § 44-53-370(a)

- (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;
  - (2) to create, distribute, dispense, deliver, or purchase, or aid, abet, attempt, or conspire to create, distribute, dispense, deliver, or purchase, or possess with intent to distribute, dispense, deliver, or purchase a counterfeit substance.

S.C. Code Ann. § 44-53-370(b)(1)

(b) A person who violates subsection (a) with respect to:

- (1) a controlled substance classified in Schedule I (B) and (C) which is a narcotic drug or lysergic acid diethylamide (LSD) and in

Schedule II which is a narcotic drug is guilty of a felony and, upon conviction, for a first offense must be imprisoned not more than fifteen years or fined not more than twenty-five thousand dollars, or both. For a second offense, the offender must be imprisoned not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both. For a third or subsequent offense, the offender must be imprisoned not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a first offense or second offense may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted . . .

S.C. Code Ann. § 44-53-375(B) reads:

A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, 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

Petitioner is the sole defendant in a multi-count indictment filed on May 22, 2018. Count One charged Petitioner with possession with intent to distribute and distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).

On October 11, 2018, Petitioner pled guilty to Count One. Thereafter, the United States Probation Office prepared a Pre-Sentence Investigation Report (hereinafter "PSR"). Based on Petitioner's convictions for South Carolina drug offenses listed in paragraphs 28 and 29 of the PSR, Petitioner was classified as a career offender pursuant to U.S.S.G. § 4B1.1.

Petitioner objected to his South Carolina drug offenses qualifying as controlled substances offenses pursuant to U.S.S.G. § 4B1.2. Petitioner argued that that the relevant state statutes, S. C. Code Ann. 44-53-370(a) and 44-53-375(B), are not divisible, and that under a proper application of the categorical approach, convictions under these statutes are categorically not controlled substance offenses. Probation made no changes based on this objection by Petitioner.

Petitioner was sentenced on January 24, 2019. Petitioner again objected to the South Carolina drug convictions counting as controlled substance offenses for purposes of U.S.S.G. 4B1.2 and the career offender guideline. The District Court ruled that South

Carolina drug statutes at issue are divisible and subject to the modified categorical approach, and held that Petitioners South Carolina drug offense convictions and career offender predicate offenses.

Petitioner's guideline range was 188-235 based on the career offender guideline and the thirty-year maximum penalty Petitioner faced by virtue of the government's notice filed pursuant to 21 U.S.C. § 851. The district court sentenced Petitioner to a 156 month term of imprisonment to be followed by a six-year term of supervised release. The judgment was entered on January 29, 2019. Petitioner filed a timely notice of appeal on January 30, 2019.

Petitioner appealed pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Petitioner argued that his prior South Carolina drug convictions under S.C. Code § 44-53-370(a)(1) and S.C. Code § 44-53-375(B) are not controlled substance offenses as defined in U.S.S.G. § 4B1.2(b) for purposes of the career offender guideline, U.S.S.G. § 4B1.1. Specifically, Petitioner argued these offenses encompass purchasing and are completely indivisible; or, in the alternative, are divisible into no more than three separate offenses, none of which, by its elements, constitute a controlled substance offense, thereby rendering the modified categorical approach inapplicable. The Fourth Circuit affirmed the district court. In making this decision, the Fourth Circuit indicated that

it was relying on its decisions in *United States v. Furlow*, 928 F.3d 311 (4<sup>th</sup> Cir. 2019) and *United States v. Marshall*, 747 F. App'x 139 (4th Cir. 2018).

This Petition follows.

### REASONS FOR GRANTING THE PETITION

This Court should grant Certiorari because the Fourth Circuit fails to properly apply Supreme Court authority; and erroneously concludes that S.C. Code §44-53-370(a)(1) and S.C. Code §44-53-375(B) are divisible for purposes of applying the modified categorical approach.

When determining whether prior convictions qualify as controlled substance offenses for career offender purposes, this Court has directed that the issue must be approached categorically, looking "only to the fact of conviction and the statutory definition of the prior offense." *Taylor v. United States*, 495 U.S. 575, 602 (1990). The categorical approach focuses on the *elements* of the prior offense rather than the *conduct* underlying the conviction; a prior conviction constitutes a conviction for the enumerated offense if the elements of the prior offense "correspond[ ] in substance" to the elements of the enumerated offense. *Id.* at 599. The point of the categorical inquiry is not to determine whether the defendant's conduct *could* support a conviction for a controlled substance offense, but to determine whether the defendant was *in fact convicted* of a crime that qualifies as a controlled substance offense. See generally, *Descamps v. United States*, 570 U.S. 254, 268 (2013).

The inquiry is a bit different, however, in cases involving "divisible" statutes of conviction which are statutes that set out elements in the alternative and thus create multiple versions of the crime. See *Descamps*, 570 U.S. 261; *United States v. Gomez*, 690 F.3d 194, 199 (4<sup>th</sup> Cir. 2012). If a defendant was convicted of violating a divisible statute, reference to the statute alone "does not disclose" whether the conviction was for a qualifying crime. *Descamps*, 570 U.S. at 261. In such a case, the sentencing court may apply the modified categorical approach and consult certain approved "extra-statutory materials ... to determine which statutory phrase was the basis for the conviction." *Id.* at 263 (internal quotation marks omitted).

As this Court has emphasized, however, the modified categorical approach, "serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Descamps*, 570 U.S. 260. Where the statute defines the offense broadly rather than alternatively, the statute is not divisible, and the modified categorical approach simply "has no role to play." *Id.* at 264.

Petitioner argued below that based on the statutory text and the relevant state case law, S. C. Code that § 44-53-370(a)(1) and 44-53-375(B) are either indivisible, or, at most, only *generally*

divisible. General divisibility, however, is not enough; a statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the statute may be divided constitutes, by its elements, a controlled substance offense. See *Descamps*, 570 U.S. at 263-264 (explaining that the modified categorical approach provides a "mechanism" for comparing the prior conviction to the generic offense "when a statute lists multiple, alternative elements, and so effectively creates several different crimes.... [and] at least one, but not all of those crimes matches the generic version " (emphasis added)); *United States v. Gomez*, 690 F.3d 194, 199 ("[C]ourts may apply the modified categorical approach to a statute only if it contains divisible categories of proscribed conduct, at least one of which constitutes-by its elements-a [qualifying conviction]."). In this case, the categories of conduct set forth in both §44-53-370(a)(1) and 44-53-375(B) do not line up with the elements of a controlled substance offense as defined by the Guidelines as each of the three offenses includes purchasing as a means of commission.

Under the categorical approach as outlined in *Taylor*, courts initially look "only to the fact of conviction and the statutory definition of the prior offense." *Taylor*, 495 U.S. at 602. 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)). If alternatives



are listed, *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, by identifying what elements must be charged or whether the alternatives carry different punishments. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016).

While the Fourth Circuit in *Furlow* indicated that it found nothing in the text of S. C. Code § 44-53-375(B) to clearly suggest that the various specified actions are means rather than elements, Petitioner Adams identified two separate textual indicators consistent with the directives of *Mathis* that establish that S.C. Code § 44-53-370(a)(1) and similarly 44-53-375(B)<sup>1</sup> are, at most, generally divisible into no more than three offenses. This general divisibility into no more than three offenses is supported first by the text of the statute itself, with its repetition of the terms "manufacture, distribute, dispense, deliver [and] purchase" which are then modified with different phrases. See S.C. Code §44-53-370(a)(1). The second repetition of these terms is modified by the words "aid, abet, attempt, or conspire to." See *id.* The third

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<sup>1</sup> To the extent it may be argued that S.C. Code Ann. § 44-53-375(B) is not identical to S.C. Code Ann. § 44-53-370(a)(1) with regard to the purchase of drugs, any such argument is irrelevant to Petitioner's case because all of his other offenses are violations of S.C. Code Ann. § 44-53-370(a)(1). If Petitioner prevails as to S.C. Code Ann. § 44-53-370(a)(1), Petitioner would only have one predicate offense and would not be classified as a career offender.

repetition of the terms is modified by the phrase "possess with intent to." *Id.* "[A]id, abet, attempt, or conspire to" and "possess with intent to" clearly are modifications because if they are not read in conjunction with the terms "manufacture, distribute, dispense, deliver, [and] purchase," parts of the statute would be nonsensical. For example, if "aid" stood alone, the statute would make it unlawful to "aid ... a controlled substance or a controlled substance analog." *Id.* The same would be true if "aid, abet, attempt, or conspire to" are read together, but not as modifiers; in that case, the statute would make it unlawful to "aid, abet, attempt, or conspire to ... a controlled substance or a controlled substance analog." *Id.* As these readings of the statute make no sense, "aid, abet, attempt, or conspire to" and "possess with intent to" must modify the terms "manufacture, distribute, dispense, deliver, [and] purchase." *See Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 670 S.E.2d 371, 373 (S.C. 2008) ("In construing a statute, this [c]ourt will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."). These structural features strongly suggest that manufacturing, distributing, dispensing, delivering, or purchasing a controlled substance is distinct from aiding, abetting, attempting or conspiring to manufacture, distribute, dispense, deliver, or purchase a controlled substance, which is distinct again from

possession with intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance. See *United States v. Goodwin*, No. 3:17-CR-01143-JMC-1, 2018 WL 6582999, at \*5 (D.S.C. Dec. 14, 2018).

The second textual indicator recognized in *Mathis* and not considered by the Fourth Circuit Court of Appeals panel is related to the potential punishments for the maximum three different alternatives. As to conspiracy under section 44-53-370(a)(1), in *Harden v. State*, the South Carolina Supreme Court explained, "Conspiracy is a separate offense from the substantive offense, which is the object of the conspiracy. A defendant may be separately indicted and convicted of both the conspiracy, and the substantive offenses committed in the course of the conspiracy." 602 S.E.2d 48, 50 (S.C. 2004). Conspiracy under section 44-53-370(a)(1) also carries a different punishment than the other two crimes. At the time of Defendant's conviction, section 44-53-420 of the South Carolina Code Ann. (2002) provided that:

- (A) Except as provided in subsection (B), a person who attempts or conspires to commit an offense made unlawful by the provisions of this article, upon conviction, be fined or imprisoned in the same manner as for the offense planned or attempted; but the fine or imprisonment shall not exceed one half of the punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
- (B) A person who attempts to possess a substance made unlawful by the provisions of this article is guilty of a misdemeanor and, upon conviction, must

be fined not more than five hundred dollars or imprisoned not more than thirty days, or both.

S.C. Code Ann. § 44-53-420; *See also State v. Fowler*, 289 S.E.2d 412, 413 (S.C. 1982)("[Under S.C. Code Ann. § 44-53-420,] [t]he maximum sentence for conspiracy to commit a drug offense is one-half of the maximum punishment for the offense which was the object of the conspiracy.").

In contrast, within each of the three statutory alternatives, the statutory means listed in section 44-53-370(a)(1) do not carry different punishments. The statute does not provide a variance in sentence based upon whether a person manufactures, distributes, dispenses, delivers, or purchases a controlled substance. *See* S.C. Code Ann. § 44-53-370(a)(1) (2002). What affects a person's sentence under section 44-53-370(a)(1) is the *type* of drugs. *See Carter v. State*, 495 S.E.2d 773, 777 (S.C. 1998)("Section 44-53-375 provides a violation of § 44-53-370 that involves methamphetamine (crank) carries a greater sentence than the sentence provided for in § 44-53-370 for other Schedule II drugs. Therefore, § 44-53-375 does not define a separate crime but only an enhanced punishment."); *See also*, S. C. Code Ann. § 44-53-370(b)(1), (b)(2), (b)(3) and (b)(4).

In applying *Mathis* to another South Carolina statute, the Fourth Circuit Court of Appeals held: "the ABWO statute does not provide for any alternative punishments that depend on whether the defendant had either assaulted, beaten, or wounded the officer. 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) (citing *Mathis* 136 S. Ct. at 2256); see *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 F. App'x 419, 422 (9th Cir. 2019) (holding Cal. Health & Safety Code § 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).

Yet, despite guidance from *Mathis*, which was properly applied by the Fourth Circuit in *Jones*, and without consideration of *Raffaldt*, as discussed, *infra*, the Fourth Circuit in *Furlow* failed to follow Supreme Court authority in concluding that:

Insofar as section 44-53-375(B) prescribes the same penalty for each alternative action, that attribute does not outweigh the state court decisions treating those actions as separate offenses with different elements. See *Mathis*, 136 S. Ct. at 2256 (explaining that sentencing court need not look beyond state court decision "definitively answer[ing]" question of divisibility).

*Furlow*, 928 F. 3d 311, 321 (4<sup>th</sup> Cir. 2019).

In Petitioner's case, the Fourth Circuit, did not follow the dictates of *Mathis*, as it failed to consider that section 44-53-370 defines no more than three different crimes: (1) the

"manufacture, distribute, dispense, deliver, [and] purchase ... [of a] controlled substance or a controlled substance analogue"; (2) "aid[ing], abet[ting], attempt[ing], or conspire[ing] to manufacture, distribute, dispense, deliver, or purchase ... a controlled substance or a controlled substance analogue"; and (3) "possess[ion] with the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or a controlled substance analogue;" which carry different punishments. This is in contrast to the fact that regardless of the means employed to commit any one of these three drugs offenses, an offender is subject to the same punishment regardless of whether he manufacture[s], distribute[s], dispense[s], deliver[s], or purchase[s] a controlled substance. See *Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements."); see also, *Jones*, 914 F.3d at 900-01 (4th Cir. 2019) (quoting *Mathis* 136 S. Ct. at 2256) (since South Carolina statute did not provide for any alternative punishments, it supported the Court's conclusion the statute was not divisible).

As well, it is critical that the Fourth Circuit did not address the most direct evidence from the South Carolina courts that under S.C. Code § 44-53-370 manufacture, distribute, dispense, deliver, and purchase are means and not elements in contradiction to the dictates of *Mathis*. The South Carolina Supreme

Court in *State v. Raffaldt*, 456 S.E.2d 390, 394 (S.C. 1995) provided clear and conclusive guidance on this issue. In describing the jury instructions requested by Petitioner Raffaldt at trial, the South Carolina Supreme Court observed that, "[t]he charges requested by Raffaldt relate to the various ways to commit distribution and possession." *Raffaldt*, 456 S.E.2d at 394 (emphasis added) (citing S.C. Code Ann. § 44-53-370(a) and (d)(3) (1985 and Supp. 1993) ). This is reiterated by the South Carolina Supreme Court in *Harden*, where it is noted that "[t]rafficking may be accomplished by several means, including conspiracy." *Harden v. State*, 602 S.E.2d 48, 50 (S.C. 2004). Thus, pursuant to *Raffaldt* and *Harden*, section 44-53-370(a)(1) necessarily defines different ways or means, as opposed to elements. *Id.* The failure to address *Raffaldt* is a material legal matter overlooked by the Fourth Circuit and inconsistent with the guidance from *Mathis*.<sup>2</sup>

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<sup>2</sup>Petitioner also notes that 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

Finally, the Fourth Circuit continued to rely on its unpublished decision in *United States v. Marshall*, No. 16-4594, 2018 WL 4150855 (4th Cir. Aug. 29, 2018) in concluding that S.C. Code Ann. § 44-53-370(a)(1) is completely divisible. The Fourth Circuit in *Marshall* "consider[ed] how South Carolina prosecutors charge the offenses, the elements on which South Carolina juries are instructed, and the manner in which South Carolina courts treat convictions under these statutes." *Id.* However, this is a departure from *Mathis* as discussed, *supra*. Additionally, the *Marshall* Court does not address *Raffaldt*.

This Court has provided much direction on what indicators are relevant to determine divisibility, and what level of certainty is required. The Fourth Circuit Court of Appeals reaches a conclusion contrary to that authority based on its reliance on *Furlow*, which failed to properly apply the United States Supreme Court authority in the line of cases from *Taylor* through *Mathis*. As well, the Fourth Circuit failed to consider the relevant state court decisions including *State v. Raffaldt*, 456 S.E.2d 390 (S.C. 1995),

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duplicitous. 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.



which is also inconsistent with the guidance provided by *Mathis*. As the Fourth Circuit Court of Appeals decision decided an important federal question in a way that conflicts with relevant decisions of this Court, Petitioner Adams requests that this Court grant certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

### **CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

Respectfully submitted,

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