

No. _____

In The
Supreme Court of the United States

MARCUS TERRELLE MARSH,
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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Dated: December 16, 2019

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QUESTION PRESENTED

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

LIST OF PARTIES

Petitioner Marcus Marsh was the Defendant and Appellant below.

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

CORPORATE DISCLOSURE STATEMENT

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

DIRECTLY RELATED PROCEEDINGS

The following proceedings are directly related to this case:

United States v. Marcus Marsh, United States District Court, District of South Carolina, 3:17-cr-01197, judgment filed September 13, 2018

United States v. Marcus Marsh, United States Court of Appeals for the Fourth Circuit, 18-4697, mandate issued September 25, 2019

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The Fourth Circuit's unpublished opinion in *United States v. Marsh* is at 783 Fed. Appx. 282 (4th Cir. 2019). (App. p.1a).

STATEMENT OF JURISDICTION

The United States Courts of Appeals for the Fourth Circuit issued its final decision on August, 2, 2019. (App. p.8a). The Fourth Circuit denied a petition for rehearing and rehearing *en banc* on September 17, 2019. (App. p.9a). 28 U.S.C. § 1254(1) authorizes jurisdiction in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

In the case of a person who violates section 922(g) of this title [18 U.S.C.S. § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 U.S.C.S. § 922(g)(1)] for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person

with respect to the conviction under section 922(g) [18 U.S.C.S. § 922(g)].

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

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

STATEMENT OF THE CASE

Petitioner Marsh was arrested on June 25, 2017. He was stopped on the street in Columbia, South Carolina and searched by a Benedict College campus police officer. The search discovered a gun.

Marsh was indicted in federal court as a felon in possession of a firearm.

After litigating suppression issues, Marsh entered a plea agreement with the Government on May 21, 2018. He reserved his right to appeal his motion to suppress and sentencing.

At sentencing, the Government argued Marsh was subject to the Armed Career Criminal Act (ACCA) based on prior convictions under the South Carolina Possession with Intent to Distribute (PWID)

and related drug statutes.¹ Marsh objected, arguing his indictments were far broader than the federal definition of a serious drug offense. The PWID statute, and Marsh's indictments, covers "purchasing" which would not fall under the federal definition of a serious drug offense.

The district court recognized Marsh would prevail under the categorical approach, because the statute includes "purchase" which would render the statute categorically overbroad. However, the district court considered the state sentencing sheets for a description of what Marsh pled guilty to in his prior state cases.

The state sentencing sheets are not proper *Shepherd* documents, but that issue is not relevant to this appeal. Even with those documents and the modified categorical approach, Marsh should still prevail. The documents still reflect an overbroad crime, to the extent they reflect anything.

The district court applied the ACCA and sentenced Marsh to 180 months. Marsh appealed to the United States Court of Appeals for the Fourth Circuit. His sentence was affirmed.

REASONS FOR GRANTING THE PETITION

Marsh's sentence was based on a fundamental misunderstanding of both the ACCA and this Court's prior decisions. The difficulty applying *Mathis* to

¹ The statute is referred to as the Possession with Intent to Distribute statute though it covers a broad array of activity. As explained later, there are multiple statutes at issue in this case that are substantively the same.

state drug statutes has resulted in a Circuit disagreement, as well as confusion.

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

The decision below was wrong

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

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

Mathis requires two initial observations. If a state appellate opinion resolves the matter, that

opinion controls. *Id.* at 2256. The face of the statute may also control the decision. *Id.* If neither of those sources clarify the issue, the court can look at the record of the actual conviction. *Id.* If there is still no answer, the court will apply the categorical analysis. This Court prohibits the district courts from applying the modified categorical approach in every case where there is no clear answer. *Id.* at 2253-54.

Under the first two steps, a South Carolina PWID conviction is indivisible. Numerous South Carolina cases hold the drug statute in South Carolina can be violated in a variety of ways. The Supreme Court of South Carolina has approved of a possession with intent to distribute indictment listing all the ways the statute can be violated. *Edwards v. State*, 642 S.E.2d 738, 739 (S.C. 2007).

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

The Fourth Circuit decided Marsh's case consistent with its published opinion in *United States*

² South Carolina pattern jury instructions are no longer listed on the State's judicial website, but can be found here: <https://web.archive.org/web/20160113231514/http://www.sccourt.s.org/juryCharges/GSInstructions.2015.pdf> (last accessed December 12, 2019). The referenced jury instruction is at pp.191-92 of those instructions.

v. Furlow, 928 F.3d 311 (4th Cir. 2019).³ *Furlow* analyzed several South Carolina cases, claiming they supported the position that South Carolina’s drug statute was divisible. None of the cases discussed in *Furlow* support divisibility. In fact, they all seem to state the opposite. For example, *Harden v. State* is used by the Fourth Circuit to support the idea conspiracy and an offense are separate crimes. The statute under discussion, however, clearly states “[t]rafficking may be accomplished by several means...” *Harden v. State*, 602 S.E.2d 48, 50 (S.C. 2004).

Furlow further relied on an unpublished Fourth Circuit opinion in *United States v. Marshall*, touting its “thorough analysis.” *Furlow*, 928 F.3d at 320. *Marshall* was primarily based on an unpublished South Carolina opinion which offers little support for its ultimate position.⁴

³ A petition for writ of certiorari has been docketed in that case but has not been filed as of this filing.

⁴ *Marshall* relied on *State v. Watson*, 2013 WL 8538756 (S.C. Ct. App. 2013) and *United States v. Rodriguez-Negrete*, 772 F.3d 221, 226-27 (5th Cir. 2014) in support of finding the South Carolina drug statutes contain elements, not means. *Rodriguez-Negrete* also cites *Watson* in support of this finding. SCACR, Rule 268(d)(2) states unpublished opinions in South Carolina have no precedential value and should not be cited as authority. *Watson* is not the law in South Carolina.

Even if *Watson* was the law, the opinion in that case draws little distinction between “PWID” and “purchasing.” While it makes a reference to the two being separate crimes, it also finds they are generally the same and allows an amended indictment under the drug statute to go forward without being considered by the grand jury. This is as clear a sign as any that S.C. Code § 44-53-370 is a crime that can be committed a variety of ways. If it listed

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

(a) Except as authorized by this article it shall be unlawful for any person:

(1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or a controlled substance analogue;

S.C. Code Ann. § 44-53-370(a)(1).⁵ The only difference in punishments for violations relates to the type of drug and its weight, not which way the statute was violated. *Mathis*, 136 S. Ct. at 2256 (“If statutory alternatives carry different punishments, then under *Apprendi* they must be elements.”). There are no additional statutes setting out separate definitions for the means listed in the statute.

The first two considerations point to an indivisible statute that describes means, not elements. While that should end the analysis, the third instruction in *Mathis* offers even more support

different crimes, no new crime could be added without additional grand jury consideration.

⁵ There are two other statutes involved in Marsh’s case, but they are identically worded. To avoid confusion, 370 is cited in this petition since it has little substantive difference from the other relevant statutes.

for Marsh's position. Looking at the record documents in this case confirm the statute is indivisible.

Marsh's prior indictments for his predicate drug offenses list all the means in the statute, including "purchase." Contrary to the Fourth Circuit's statements in *Furlow* and *Marshall*, state prosecutors in South Carolina typically list every means in the statute in a state drug indictment. This manner of charging is critically important to determining how to consider this statute.

In *Descamps*, the United States Supreme Court recognized a simple test for determining when a statute is divisible. When dealing with a divisible statute, a charging prosecutor must select the specific crime to allege in the indictment. *Descamps v. United States*, 133 S. Ct. 2276, 2290 (2013).

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

Though drug charges are often indicted with multiple means of committing the offense in the body

of the indictment, no South Carolina court has found drug offense indictments defective for duplicity. Such an indictment would be defective. *State v. Samuels*, 743 S.E.2d 773, 774 (S.C. 2013). This problem would not go unnoticed.

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

All three ways of analyzing the divisibility of a statute under *Mathis* confirm the South Carolina drug statutes are indivisible. Because the statutes prohibit “purchasing” drugs, they are categorically overbroad and Marsh should not have been sentenced under the ACCA.

Why this Court should grant certiorari

The opinion below is more than just a wrong decision. It reflects a fundamental misunderstanding of this Court’s precedent. Many drug statutes are drafted the way South Carolina’s is, providing a wide variety of ways one can be involved with illegal drugs. A growing split and sense of confusion in the Circuits compels this Court to grant certiorari and resolve the conflict among lower courts.

Because of the incredibly long sentences the ACCA imposes, this matter is also of significant importance to defendants and the judicial system. Defendants face a disadvantage in plea negotiations when it is difficult to tell whether the ACCA will

apply. Because it is a statutory mandatory minimum, there is nothing that can be done once it applies.

Significant litigation in the district courts and the Circuits continues to focus on the ACCA (and career offender enhancements, which are often dictated by the same opinions). There is little certainty in how a prior drug conviction will affect a sentence.

The First Circuit considered a similar statute; trafficking cocaine in Massachusetts. *United States v. Bain*, 874 F.3d 1 (1st Cir. 2017). That statute also contains a variety of ways it can be violated, including one which would not categorically match ACCA enhancement. *Id.* at 28-29. Operating under the plain error standard, the First Circuit held state law on the statute was unclear and the record lacked documentation to decide the matter. In denying relief, that Court decided it could not decide.

The Fifth Circuit analyzed a Texas drug statute as instructed by *Mathis*. *United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016).⁶ The opinion reveals a nearly identical situation in state law as the one in this case. *Id.* at 575-76. The Fifth Circuit found the ACCA did not apply. It considered state case law that held various ways of committing a crime could be listed in an indictment, much like the South Carolina cases cited here. *Id.* Though a prosecutor could specify means in a Texas indictment,

⁶ *Hinkle* considered a career offender enhancement under the Guidelines, not an ACCA enhancement. However, the wording of the two enhancements results in courts using the law that applies to one interchangeably with the other.

he or she was not required to. This is consistent with *Mathis*.

The Sixth Circuit has held a similar Michigan statute was divisible, based on how it is charged in Michigan (the specific act was listed in the indictment) and the sentencing provision (different alternatives carried different sentences). *United States v. House*, 872 F.3d 748, 753 (6th Cir. 2017) (citing with approval the unpublished opinion in *United States v. Tibbs*, 685 Fed. Appx. 456, 462-63 (6th Cir. 2017)). The Fourth Circuit's decision in this case and its *Furlow* opinion found divisibility despite the exact opposite conditions; South Carolina charges include every way to violate the statute and the sentence remains the same no matter which means of commission is present in a case.

The Ninth Circuit took an entirely different tack in determining whether a Nevada state drug law was divisible. Faced with an inability to decide the matter, it just asked, by way of a certified question to the Nevada Supreme Court. *United States v. Figueroa-Beltran*, 892 F.3d 997, 1004 (9th Cir. 2018). While that may seem a good way to determine divisibility, *Mathis* suggests the uncertainty inherent in a case where such a request is made should result in a finding of indivisibility. *Mathis*, 136 S. Ct. at 2257. It appears from the Nevada Supreme Court's docket the issue remains undecided.⁷

The Tenth Circuit opinion in *United States v. Madkins* is somewhat confusing, because it applies

⁷<http://caseinfo.nvsupremecourt.us/public/caseView.do;jsessionid=F3570E40FFE7D1B988C1A0B3223C291E?csIID=46276> (last accessed December 12, 2019).

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

The Eleventh Circuit considered an almost identical situation to Marsh's, analyzing a Florida trafficking statute that also prohibited the purchase of drugs. *United States v. Shannon*, 631 F.3d 1187, 1188 (11th Cir. 2011). The statute is similar to the South Carolina statute under which Marsh was convicted. *Id.* at 1189. The Eleventh Circuit found purchasing was not equivalent to a federal distribution crime. Interestingly, this case was decided before the *Mathis* opinion but is in line with that decision.

A later Eleventh Circuit opinion, also considering a Florida drug statute, reaches the conclusion a Florida trafficking statute is indivisible. *Cintron v. United States AG*, 882 F.3d 1380 (11th Cir. 2018).⁸ Using Florida state appellate opinions, the Eleventh Circuit found the statute could be violated in a variety of ways, as it contained means of violation instead of separate crimes. *Id.* at 1385-86.

The Circuits approach these cases differently. In some instances, lack of clarity leads to indivisibility, while in others the same lack of clarity

⁸ This case involves an immigration matter but recognizes the analytical framework in ACCA cases is analogous to the framework in immigration cases. *Cintron*, 882 F.3d at 1384, n.3.

leads to divisibility. Despite multiple signals under the *Mathis* analysis that the South Carolina drug statute is indivisible, the Fourth Circuit has insisted on finding ways to apply the modified categorical approach and ultimately the ACCA.

Mathis recognized that “coherence has a claim on the law.” *Mathis*, 136 S. Ct. at 2257. State drug laws, often drafted in a broad manner, are considered in relation to the ACCA like any other laws. This Court has made it clear facts simply do not matter to the ACCA. *Id.* A statute containing various ways it can be violated is considered categorically. Marsh’s prior conviction was under a statute that is categorically overbroad and should not trigger a sentence under the ACCA.

CONCLUSION

Marsh respectfully requests this Court grant the petition, vacate the decision of the Fourth Circuit, and remand this matter with instructions to sentence Marshall without the career offender or Armed Career Criminal enhancement.

Respectfully submitted,

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