

*In the*  
**Supreme Court of the United States**

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JAVIER BROWN,

*Petitioner,*

– v. –

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Pursuant to Section 4B1.1 of the United States Sentencing Commission Guidelines, following a conviction for a narcotics offense, an offender who has a “prior conviction for a felony drug offense” is subject to enhanced penalties as a Career Offender.

The issues presented for review are:

1. Whether the Fourth Circuit violated the parameters set forth by this Court by using the modified categorical approach instead of the categorical approach in determining whether South Carolina Code Annotated Section 44-53-375 qualifies as a predicate drug offense under Section 4B1.1 of the United States Sentencing Commission Guidelines.
2. Whether the Fourth Circuit also violated the requirements of this Court by relying upon records that fail to be “conclusive” or “certain” records of conviction in a generic crime State and whether the testimony should properly be allowed to illuminate the “conclusive” or “certain” nature of the records.

## **PARTIES TO THE PROCEEDINGS**

All Parties are listed in the caption on the cover page.

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING .....	ii
TABLE OF CONTENTS.....	iii
INDEX OF APPENDICES .....	iv
TABLE OF AUTHORITIES.....	v
OPINION BELOW.....	1
BASIS FOR JURISDICTION IN THE SUPREME COURT.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE.....	3
Overview.....	3
ARGUMENTS.....	6
1.    THE FOURTH CIRCUIT FAILED TO FOLLOW THIS COURT’S PRECEDENT BY FAILING TO UTILIZE THE CATEGORICAL APPROACH TO DETERMINE IF BROWN’S PRIOR STATE DRUG CONVICTION WAS A CAREER OFFENDER PREDICATE .....	6
II.    THE FOURTH CIRCUIT VIOLATED THE PARAMETERS OF THIS COURT BY RELYING UPON INCONCLUSIVE AND UNCERTAIN RECORDS TO SUPPORT CAREER OFFENDER DESIGNATION AND IN REJECTING TESTIMONY THAT WOULD ESTABLISH THEIR LACK OF RELIABILITY .....	9
CONCLUSION.....	14

## **INDEX OF APPENDICES**

APPENDIX A – Opinion of the United States Court of Appeals for the Fourth Circuit, Entered December 11, 2019

APPENDIX B - Judgment of the United States District Court for the District of South Carolina, Entered February 11, 2019

APPENDIX C – Sentencing Transcript, February 7, 2019

APPENDIX D – Indictment and Sentencing Sheets

## TABLE OF AUTHORITIES

### Cases

<i>Descamps v. United States</i> , 133 S.Ct. 2276 (2013) .....	6, 7
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016) .....	5, 7, 8
<i>Morris v. State</i> , 639 S.E.2d 53 (S.C. 2006) .....	11
<i>Shepard v. United States</i> , 544 U.S. 13 (2005) .....	passim
<i>State v. Bennett</i> , 650 S.E.2d 490 (S.C. Ct. App. 2007) .....	11
<i>State v. Nesbitt</i> , 768 S.E.2d 67 (S.C. 2015) .....	11
<i>State v. Raffaldt</i> , 456 S.E.2d 390 (S.C. 1995) .....	9
<i>Taylor v. United States</i> , 495 U.S. 575 (1990) .....	6, 7
<i>United States v. Bethea</i> , 603 F. 3d 254 (4 <sup>th</sup> Circ. 2010) .....	5, 14
<i>United States v. Brown</i> , 787 Fed.Apx 182 (4 <sup>th</sup> Cir. 2019) .....	5
<i>United States v. Brown</i> , No. 19-4113, 787 Fed.Apx 182 (4 <sup>th</sup> Cir. 2019) .....	4
<i>United States v. Furlow</i> , 928 F.3d 311 (4 <sup>th</sup> Circ. 2019) .....	5
<i>United States v. Hemingway</i> , 734 F.3d 323 (4 <sup>th</sup> Cir. 2013) .....	13

<i>United States v. Marshall</i> , 747 Fed.Appx 139 (4 <sup>th</sup> Cir. 2018).....	13
<i>United States v. Montes-Flores</i> , 736 F.3d 357 (4 <sup>th</sup> Cir. 2013).....	13
<i>United States v. Rodriguez-Negrete</i> , 772 F. 3d 221 (5 <sup>th</sup> Circ. 2014).....	5, 14

## **Rules, Statutes, and Other Authorities**

28 U.S.C. § 1254(1) .....	2
Iowa Code § 792.12 (2013).....	7
S.C. Code Ann. § 44-53-370 .....	2
S.C. Code Ann. § 44-53-375 .....	2, 4, 9
S.C. Code Ann. § 44-53-375(B) .....	passim
S.C. Code Ann. § 44-53-445 .....	2
U.S. Const. amend. V.....	2
U.S. Const. amend. VI .....	2
U.S.S.G. § 4B1.1.....	1, 2
U.S.S.G. § 4B1.2(b) .....	2

### **OPINIONS BELOW**

The unpublished opinion of the Fourth Circuit Court of Appeals, which affirmed the district court, was filed on December 11, 2019, and is reprinted in Petitioner's Appendix A. The Judgment of the District Court, which was entered on February 11, 2019, is reprinted in Petitioner's Appendix B.

### **BASIS FOR JURISDICTION IN THE SUPREME COURT**

Mr. Brown respectfully petitions this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in United States v. Brown, No. 19-4113, 787 Fed.Appx 182 (4<sup>th</sup> Cir. 2019), affirming his criminal conviction and sentence dated February 11, 2019. Mr. Brown was sentenced as a Career Offender based on the district court's determination that two prior controlled substance convictions under S.C. Code Ann § 44-53-375(B) (2018) qualify as felony controlled substance offenses under the Career Offender provision in Section 4B1.1 of the United States Sentencing Guidelines. The Fourth Circuit Court of Appeals affirmed. Both the district court, and the Fourth Circuit in affirming, utilized the modified categorical approach, which is in conflict with precedent from this Court, as well as precedent from the state court of last resort reviewing the same statute. Furthermore, in taking this approach, the district court and Fourth Circuit reviewed documents beyond those



permitted by this Court. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY PROVISIONS  
INVOLVED**

U.S.S.G. § 4B1.1  
U.S.S.G. § 4B1.2(b)  
S.C. Code Ann. § 44-53-370  
S.C. Code Ann. § 44-53-375  
S.C. Code Ann. § 44-53-445  
U.S. Const. amend. V  
U.S. Const. amend. VI

**STATEMENT OF THE CASE****Overview**

This petition for a writ of certiorari challenges the Fourth Circuit's opinion as being in violation of precedent from this Court for utilizing the modified categorical approach in reviewing South Carolina law and in relying upon uncertain and unreliable documents to support an enhanced sentence.

On November 29, 2018, pursuant to a written plea agreement, Brown pled guilty to Count 6 of the Indictment, charging him with possession with intent to distribute a controlled substance. Recognizing the potential for classification as a Career Offender and the fact that such a classification would result in a sentence much more severe than necessary, the parties stipulated to a sentence of 120 months in the event Brown was classified as a Career Offender by the District Court. After Brown's plea and a Presentence Investigation was conducted, a Presentence Investigation Report (PSR) was prepared. Brown was classified as a Career Offender based upon two (2) prior felony narcotics convictions. Without this classification, Brown's Adjusted Offense Level was 14, which would have resulted in a sentencing range of imprisonment of 27-33 months incarceration based upon a Total Offense Level of 12 (with the award of Acceptance of Responsibility credit) and a criminal history category of IV. Brown has already served more than 33 months in custody for this offense.

Objection was made to Brown's classification as a Career Offender and argument

ensued on this challenging at Sentencing which occurred on February 7, 2019. During the Sentencing hearing, over Brown's objection, the district court used the modified categorical approach and thereafter relied upon state court sentencing sheets, asserting that the same are appropriate for consideration under *Shepard v. United States*, 544 U.S. 13 (2005). *See* Appendix C and D. In response, Brown proffered the testimony of a former state court prosecutor to explain what is to be understood from sentencing sheets, what can be gleaned from the documents themselves and demonstrate why they aren't reliable. *See id.* While the district court concluded it would be inappropriate to consider anything other than the documents themselves, Brown proffered the expected testimony, outlining that the reference to "PWID" on the sentencing sheet was merely a catchall and not a confirmation that Brown was convicted of possessing with the intent to distribute the referenced narcotic, as opposed to another means of violating the referenced statute, South Carolina Code Annotated Section 44-53-375. *See id.*

The district court, after hearing argument from the parties, disagreed with Brown's position on the documents to be relied upon and the Career Offender designation, and overruled Brown's objection. The district court did, however, accept the parties' stipulation of 120 months incarceration and imposed that sentence. Brown timely appealed.

On December 11, 2019, the Fourth Circuit Court of Appeals affirmed. *United States v. Brown*, No. 19-4113, 787 Fed.Appx 182 (4<sup>th</sup> Cir. 2019); Appendix A. With respect to

the application of S.C. Code Ann. § 44-53-375(B), the Fourth Circuit merely noted the prior rejection of the argument advanced by Brown in *United States v. Furlow*, 928 F.3d 311, 317 (4<sup>th</sup> Circ. 2019). The Fourth Circuit further rejects Brown’s argument that the district court erred by relying upon his South Carolina sentencing sheets, simply stating that “[u]nder the modified categorical approach, the court may consider a “limited class of documents” approved by the Supreme Court to determine the particular crime of which the defendant was convicted.” *See United States v. Brown*, 787 Fed.Appx 182, 183 (4<sup>th</sup> Cir. 2019)(citing *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (citing *see Shepard v. United States*, 544 U.S. 13, 26 (2005))). Neither *Mathis*, nor *Shepard*, approved of the documents at issue. “The court then is required to compare the elements of that crime with the federal definition of a felony controlled substance offense. *Mathis*, 136 S. Ct. at 2249, 2256. Responding to Brown’s challenge to the use of sentencing sheets, the Fourth Circuit responds “[b]ut this court and others have examined sentencing sheets when employing the modified categorical approach to determine which alternative offense formed the basis for a defendant’s conviction.” *See Brown*, at 183 (citing *United States v. Bethea*, 603 F. 3d 254, 259-60 (4<sup>th</sup> Circ. 2010) (consulting South Carolina sentencing sheets under modified categorical approach); *see also United States v. Rodriguez-Negrete*, 772 F. 3d 221, 227 (5<sup>th</sup> Circ. 2014)(same). The Fourth Circuit affirms Brown’s enhanced sentence.

In so doing, the Fourth Circuit disregarded or misapprehended prior precedent from

this Court and as such this Court should grant certiorari to correct the error below.

### **ARGUMENTS**

**1. THE FOURTH CIRCUIT FAILED TO FOLLOW THIS COURT'S PRECEDENT BY FAILING TO UTILIZE THE CATEGORICAL APPROACH TO DETERMINE IF BROWN'S PRIOR STATE DRUG CONVICTION WAS A CAREER OFFENDER PREDICATE.**

Certiorari should be granted in this matter because the Fourth Circuit departed from this Court's mandate of *Taylor v. United States*, 495 U.S. 575 (1990), to utilize the categorical approach to determine whether a prior state conviction constitutes a Career Offender predicate offense under the Sentencing Commission Guidelines. By concluding that South Carolina Code Annotated Section 44-53-375(B) is divisible, the Fourth Circuit ignored indicators this Court has provided for guidance on the issue of divisibility and thereby improperly classified Brown as a Career Offender.

In *Taylor*, this Court outlined that the categorical approach requires courts to review "the fact of the conviction and the statutory definition of the prior offense." *See Taylor*, at 603. Focus is placed solely upon whether the elements of the crime of conviction sufficiently match the elements of the generic crime, while ignoring the particular facts of the case. *See id.* at 600-01. Sometimes the statute is more complicated in structure, making a comparison of elements to the generic crime more difficult. *See Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013). In such cases, we must identify whether the different elements create different crimes, or merely

one crime with alternative means of committing the singular crime.

If the alternatives listed in the statute carry different punishments, then they are elements. *See Mathis v. United States*, 136 S.Ct. 2243, 2256 (2016). Conversely, if the statute reveals the list is merely “illustrative examples,” then they are only different means of committing the same offense. *See id.* If, however, the statute does not provide clear guidance, then courts should look to the indictment and jury instructions to determine divisibility. *See id.* at 2256-57; *see also Taylor*, at 602. These records will show what the prosecutor must prove, and what is not required, to sustain conviction. *See id.* at 2257 (citing *Descamps*, 133 S.Ct. at 2290).

The foregoing inquiry is to determine whether the statute at issue is divisible, not whether the defendant’s conduct falls within the generic form of the offense. If the statute lists different means of committing one offense, some of which are generic and some of which are not, the statute is not divisible and not a predicate offense. Such was the case with the Iowa burglary statute in *Mathis*. There, a defendant could commit the overall offense of burglary by unlawfully entering “any building, structure [or] land, water, or air vehicle.” *See id.* at 2250 (citing Iowa Code § 792.12 (2013))(emphasis in *Mathis*).

With the foregoing parameters set forth, the Fourth Circuit was required to apply them diligently to the statute at issue, South Carolina Code Annotated Section 44-53-375(B). They did not.

South Carolina Code Annotated Section 44-53-375(B) provides in pertinent

part:

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

The plain text of South Carolina Code Annotated Section 44-53-375(B) clearly reveals different means of committing one offense, and only one punishment. South Carolina prohibits an individual from violating its drug law, and the violation can be committed by engaging in a variety of prohibited narcotics activities. Each of these ways of violating the one law carries the same felony status and the same punishment. By proscribing the “purchase” of narcotics, the language of this statute includes conduct which is broader than the generic offense. Despite the requirements of *Mathis*, the Fourth Circuit ignored the structure of the statute and looked outside of the language of the statute to determine Career Offender status.

Even looking to the indictments at issue (See Appendix B), while the heading of the offense references “PWID,” the body of the charging document recites the entirety of the statute and the different ways in which the statute can be violated. The focus is on the elements of the offense, however, and not the heading or title for the offense. *See Mathis*, 136 S.Ct at 2251-52 (addressing “burglary”).

Beyond the foregoing, South Carolina has interpreted its own statute to describe their drug laws as identifying “means” of committing a violation, not

separate elements. *See State v. Raffaldt*, 456 S.E.2d 390, 394 (S.C. 1995). In *Raffaldt*, the South Carolina Supreme Court interpreted a similarly worded South Carolina narcotic law and outlined that the only difference between two (2) subsections which outlined trafficking, conspiracy, possession with intent to distribute, and simple possession, was the amount of drugs involved. *See id.*

Based upon the foregoing, not only has the Fourth Circuit failed to follow this Court's directives on the categorical approach, but it has also decided this question in a way that conflicts with the highest court of South Carolina. Certiorari should properly be granted.

**II. THE FOURTH CIRCUIT VIOLATED THE PARAMETERS OF THIS COURT BY RELYING UPON INCONCLUSIVE AND UNCERTAIN RECORDS TO SUPPORT CAREER OFFENDER DESIGNATION AND IN REJECTING TESTIMONY THAT WOULD ESTABLISH THEIR LACK OF RELIABILITY.**

As discussed in the previous section, the statute at issue, South Carolina Code Annotated Section 44-53-375 is indivisible, and therefore the modified categorical approach should not be utilized. If, however, this approach is used, the sentencing sheets should not be consulted as a *Shepard* document. *Shepard* talked in terms of records with the "conclusive significance of a prior judicial record." *Shepard*, 544 U.S. at 25. Sentencing sheets in South Carolina Courts of General Sessions fail in this regard and the district court erred in considering them. Furthermore, when presented with an offer of explanation regarding the lack of benefit to be gleaned from



the sentencing sheets, the district court erred in failing to receive the testimony.

In *Shepard v. United States*, 544 U.S. 13 (2005), this Court approved of the review of a limited class of documents to determine whether a defendant’s prior conviction qualifies as a predicate offense. The specific documents referenced included “the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” *See Shepard*, 544 U.S. at 26. In limiting the types of documents that may be reviewed, the Court rejected the Government’s attempts to “go[] beyond conclusive records made or used in adjudicating guilt . . .” *See Shepard*, 544 U.S. at 21 (emphasis added). *Shepard* also references the need for the “evidence of generic conviction [to] be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State.” *See id.*, 544 U.S. at 23 (emphasis added). South Carolina sentencing sheets are neither certain, nor conclusive.

A South Carolina sentencing sheet (Appendix D) contains three pieces of information related to an offense: (1) the statute under which a defendant is charged and convicted; (2) a descriptive name of the statute; and (3) a CDR code.<sup>1</sup> South Carolina law is clear that the statute listed on the sentencing sheet, not the other items (including the name of the offense), is the final word on the defendant’s crime

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<sup>1</sup> The CDR code is a relic from days when computers had such limited memory they were unable to store references to specific statutes with multiple digits. *State v. Bennett*, 650 S.E.2d 490, 495 (S.C. Ct. App. 2007).

of conviction. In fact, South Carolina Courts have recognized the inaccuracy of some information contained thereon, without rendering the plea ineffective.

In *State v. Bennett*, a CDR code was incorrectly entered on a South Carolina sentencing sheet. *See State v. Bennett*, 650 S.E.2d 490, 495 (S.C. Ct. App. 2007). Because the sentencing sheet was ambiguous, the question was whether the statute or the CDR Code listed on Bennett's sentencing sheet controlled. The Court of Appeals held that "[b]ecause the South Carolina Code of Laws is the controlling authority for classifications, definitions and penalties for criminal offenses, a statute listed on a sentencing sheet, and not a CDR code, will dictate a criminal's sentence." *Id.*, 650 S.E.2d at 495. Therefore, under South Carolina law, it is the *statute listed* on the sentencing sheet which controls all interpretation of the offense. Accordingly, a South Carolina sentencing sheet such as the ones related to Browns' prior convictions offer no *Shepard* approved material beyond the citation of the statute of conviction. Moreover, the practice in South Carolina courts for defendants to execute sentencing sheets *before* a guilty plea is entered. *See Morris v. State*, 639 S.E.2d 53, 55 (S.C. 2006) (defendant "arrived at court and signed a sentencing sheet in anticipation of entering a guilty plea . . . Petitioner subsequently left the courthouse, and when his case was called, he could not be located."); *see also State v. Nesbitt*, 768 S.E.2d 67, 68-69 (S.C. 2015) (reciting facts of underlying case where there was an additional sentencing sheet for a firearms charge that was not reviewed by the district court prior to defendant's departure from the courtroom, and "[t]hus, although Appellant was never

brought back into the courtroom to enter a plea on the firearms charge, the circuit court nonetheless ‘accepted’ Appellant’s plea in his absence and sentenced him to an additional five years’ imprisonment . . . .”). Based upon the foregoing, the Fourth Circuit further disregarded *Shepard*’s requirement that the documents relied upon be certain and conclusive, as well as the case law from South Carolina revealing the lack of such certainty.

In an effort to illuminate the problems with relying upon sentencing sheets, Brown attempted to call a former state court prosecutor as a witness. The witness was a prosecutor in Richland County, South Carolina, the county of conviction for both of Brown’s relevant convictions. Her testimony would have illuminated what can, and cannot, be discerned from the Sentencing Sheets. She was prohibited from testifying, however. As is outlined from the proffer of her testimony, she was not intended to provide any information outside of how to read the documents and whether with that reading they are reliable. *See* Appendix C.

For cases like Brown’s, courts may only rely on documents with “the conclusive significance of a prior judicial record,” such as charging papers, written plea agreements, plea colloquy transcripts, or “recorded judicial acts of that court limiting convictions to the generic category,” *Shepard*, 544 U.S. at 20, 25, to determine whether a defendant was necessarily convicted of an offense with the same or narrower elements as a “controlled substance offense.” In pleaded cases, these documents would be “the statement of factual basis for the charge, . . . shown by a transcript of plea

colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea . . . .” *Id.* at 20

A defendant’s signature on a sheet which contains a handwritten short-hand characterization of an offense, which may have been executed by a defendant prior to an actual entry of plea, does nothing to narrow an overbroad offense to establish that a defendant was necessarily convicted of an offense with the same or narrower elements of a qualifying predicate offense. This is especially true where, as here, the short-hand characterization is merely a “catchall” phrase. Therefore, a sentencing sheet is not a *Shepard* document upon which this Court should rely. The district court erred in relying on the Sentencing Sheets and further erred in refusing to consider the explanation offered by Brown which would have further illuminated why the documents were of no benefit.

Unfortunately, despite the foregoing problems with placing reliance upon South Carolina sentencing sheets, Circuit Courts are affirming *reliance* thereon. Prior to the instant matter, the Fourth Circuit relied upon sentencing sheets in *United States v. Marshall*, 747 Fed.Appx 139 (4<sup>th</sup> Cir. 2018); *United States v. Montes-Flores*, 736 F.3d 357, 362 n.4 (4<sup>th</sup> Cir. 2013); *United States v. Hemingway*, 734 F.3d 323, 330 (4<sup>th</sup> Cir. 2013) and *United States v. Bethea*, 603 F.3d 254, 259 (4<sup>th</sup> Cir. 2010). Additionally, the Fifth Circuit in *United States v. Rodriguez-Negrete*, 772 F.3d 221, 228-29 (5<sup>th</sup> Cir. 2004), has relied upon South Carolina sentencing sheets. None of

these cases, however, provides any analysis as to how or why these documents are within that class of “certain” or “conclusive” documents authorized by *Shepard*. Instead, blind reliance by one Circuit Court has bred blind reliance by others and in each instance the defendant receives a much higher sentence than otherwise. This important question needs answering and the Circuit Courts need additional guidance on what documents can be relied upon.

### **CONCLUSION**

Based on the foregoing, Brown respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit in this case.

Respectfully submitted,

/s/ Jonathan M. Milling  
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**ATTORNEY FOR PETITIONER**

Columbia, South Carolina  
March 10, 2020

# APPENDIX A

**UNPUBLISHED**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 19-4113**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAVIER BROWN, a/k/a Juv,

Defendant - Appellant.

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Appeal from the United States District Court for the District of South Carolina, at  
Columbia. Mary G. Lewis, District Judge. (3:16-cr-00630-MGL-1)

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Submitted: November 27, 2019

Decided: December 11, 2019

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Before MOTZ and QUATTLEBAUM, Circuit Judges, and HAMILTON, Senior Circuit  
Judge.

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Affirmed by unpublished per curiam opinion.

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Jonathan M. Milling, MILLING LAW FIRM, LLC, Columbia, South Carolina, for  
Appellant. Sherri A. Lydon, United States Attorney, Winston D. Holliday, Jr., Assistant  
United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia,  
South Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

## PER CURIAM:

Javier Brown appeals from his 120-month, below Sentencing Guidelines range, sentence imposed after he pleaded guilty to possession with intent to distribute a mixture or substance containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (2012). Brown challenges the district court's determination that his two prior controlled substance convictions under S.C. Code Ann. § 44-53-375(B) (2018) constitute felony controlled substance offenses under the career offender provision in the U.S. Sentencing Guidelines Manual § 4B1.1 (2018). He first argues that the South Carolina offenses are categorically overbroad. Second, he argues that even using the modified categorical approach to determine whether he had qualifying drug offenses, the South Carolina sentencing sheets that the court relied upon are also overbroad. Brown sought at sentencing to present the testimony of a former South Carolina prosecutor to explain in general terms the information found on sentencing sheets and what may be possible to infer from the documents. The district court denied the proffer of testimony. Finding no error, we affirm.

We review de novo the district court's determination that a state crime qualifies as a predicate offense under the career offender Guideline. *United States v. Furlow*, 928 F.3d 311, 317 (4th Cir. 2019). Brown first contends that S.C. Code Ann. § 44-53-375(B) should be analyzed using a strict categorical approach. We have recently held otherwise. “[S]ection 44-53-375(B) is divisible and subject to the modified categorical approach.” *Furlow*, 928 F.3d at 322.

Under the modified categorical approach, the court may consider a “limited class of documents” approved by the Supreme Court to determine the particular crime of which the



defendant was convicted. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)). The court then is required to compare the elements of that crime with the federal definition of a felony controlled substance offense. *See Mathis*, 136 S. Ct. at 2249, 2256.

Brown argues that the district court erred by consulting his South Carolina sentencing sheets to determine that he was convicted of possession with intent to distribute crack and he should have been permitted to present testimony to interpret the documents. But this court and others have examined sentencing sheets when employing the modified categorical approach to determine which alternative offense formed the basis for a defendant's conviction. *See United States v. Bethea*, 603 F.3d 254, 259-60 (4th Cir. 2010) (consulting South Carolina sentencing sheets under modified categorical approach); *see also United States v. Rodriguez-Negrete*, 772 F.3d 221, 227 (5th Cir. 2014) (same). Accordingly, the district court did not err in doing so here without taking further explanatory testimony.

We affirm the sentence imposed by the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

# APPENDIX B

# UNITED STATES DISTRICT COURT

## District of South Carolina

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

vs.

Case Number: 3:16-630 (001 MGL)

JAVIER BROWN, a/k/a "Juv"

USM Number: 31586-171

Jonathan Milling

Defendant's Attorney

**THE DEFENDANT:**

- ☒ pleaded guilty to count(s) 6 of the Indictment .
- ☐ pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.
- ☐ was found guilty on count(s) \_\_\_ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21:841(a)(1), (b)(1)(C) & (b)(1)(E)(2)	Please see Indictment	4/3/16	6

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)\_\_\_\_\_.
- ☒ Count(s) 1-5, 7, 8 of the Indictment ☐ is ☒ are dismissed on the motion of the United States.
- ☐ Forfeiture provision is hereby dismissed on motion of the United States Attorney.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

February 7, 2019

Date of Imposition of Judgment

s/Mary Geiger Lewis

Signature of Judge

Mary Geiger Lewis, United States District Judge

Name and Title of Judge

February 11, 2019

Date

DEFENDANT: JAVIER BROWN, a/k/a "Juv"  
CASE NUMBER: 3:16-630

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of one hundred twenty (120) months.

☒ The court makes the following recommendations to the Bureau of Prisons: that the defendant be screened for participation in the Intensive Drug Treatment Program and that he be housed at a facility in South Carolina.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:  
☐ at \_\_\_\_\_ ☐ a.m. ☐ p.m. on \_\_\_\_\_.  
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:  
☐ before 2 p.m. on \_\_\_\_\_.  
☐ as notified by the United States Marshal.  
☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this Judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
 at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JAVIER BROWN, a/k/a "Juv"

CASE NUMBER: 3:16-630

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. §20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program of domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with the following special condition:

- 1) The defendant must submit to substance abuse testing to determine if he has used a prohibited substance. He must contribute to the cost of such program not to exceed an amount determined reasonable by the court-approved "U.S. Probation Office's Sliding Scale for Services," and he will cooperate in securing any applicable third-party payment, such as insurance or Medicaid.

DEFENDANT: JAVIER BROWN, a/k/a "Juv"

CASE NUMBER: 3:16-630

**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_ Date \_\_\_\_\_

DEFENDANT: JAVIER BROWN, a/k/a "Juv"  
CASE NUMBER: 3:16-630

### CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	<b><u>\$ 100.00</u></b>		<b><u>\$</u></b>	<b><u>\$</u></b>

☐ The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case*(AO245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
<b>TOTALS</b>	<b>\$ _____</b>	<b>\$ _____</b>	

☐ Restitution amount ordered pursuant to plea agreement **\$ \_\_\_\_\_**

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ fine ☐ restitution.

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

\*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JAVIER BROWN, a/k/a "Juv"  
CASE NUMBER: 3:16-630

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than \_\_\_\_\_, or
- ☐ in accordance with ☐ C, ☐ D, or ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal \_\_\_\_\_ (weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

As directed in the Preliminary Order of Forfeiture, filed \_\_\_\_\_ and the said order is incorporated herein as part of this judgment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.



# APPENDIX C

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

United States of America	)	
	)	
-vs.-	)	3:16-cr-00630-MGL-1
	)	February 7, 2019
Javier Brown,	)	Columbia, SC
	)	
Defendant.	)	
-----	)	

BEFORE THE HONORABLE MARY GEIGER LEWIS  
UNITED STATES DISTRICT JUDGE, PRESIDING  
SENTENCING

A P P E A R A N C E S:

For the Government:	WINSTON D. HOLLIDAY, AUSA United States Attorney's Office 1441 Main Street, Suite 500 Columbia, SC 29201
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For the Defendant:	JONATHAN M. MILLING, ESQ. Milling Law Firm 2910 Devine Street Columbia, SC 29205
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Court Reporter:	Jennifer H. Williams, RPR United States Court Reporter 901 Richland Street Columbia, SC 29201
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STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

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1           THE COURT: All right, Mr. Holliday.

2           MR. HOLLIDAY: Thank you, Your Honor. This is case  
3 number 3:16-630. We are here for Mr. Brown's sentencing. He  
4 is represented by Jonathan Milling. The Government has no  
5 objections but I believe that the defendant has filed  
6 several.

7           THE COURT: All right, Mr. Milling. Is your client  
8 ready to proceed?

9           MR. MILLING: He is, Your Honor.

10          THE COURT: Well, I've looked over what was  
11 presented at his plea hearing, the plea agreement, and then I  
12 got your sentencing memorandum this morning.

13          MR. MILLING: Yes, Your Honor.

14          THE COURT: So I've tried to get through it.  
15 Anything else I need to look at before we begin?

16          MR. MILLING: The sentencing memorandum essentially  
17 encompasses and further argues the objections that we filed  
18 to the pre-sentence report.

19          THE COURT: Right.

20          MR. MILLING: The only issue we have is whether or  
21 not the two prior convictions in Richland County state court  
22 should qualify as predicate offenses.

23          THE COURT: Right.

24          MR. MILLING: And that essentially will resolve the  
25 objections here.

1           THE COURT:   Okay.   All right.   Well, let's see.  
2   Mr. Brown, sir, have you had enough time to look over the  
3   pre-sentence investigation report and talk about it with Mr.  
4   Milling?

5           DEFENDANT:   Yes, Your Honor.

6           THE COURT:   He's answered all your questions about  
7   it?

8           DEFENDANT:   Yes, Your Honor.

9           THE COURT:   Do you think you understand the report?

10          DEFENDANT:   Yes, Your Honor.

11          THE COURT:   Okay.   All right, Mr. Milling.   You've  
12   obviously been over the pre-sentence investigation report and  
13   talked about it with Mr. Brown?

14          MR. MILLING:   Yes, ma'am.

15          THE COURT:   Do you think he understands it?

16          MR. MILLING:   He appears to.

17          THE COURT:   Okay.   All right.   Well, then let's go  
18   ahead and take up the objections to the report.   So I'll be  
19   happy to hear from you, Mr. Milling.

20          MR. MILLING:   Thank you, Your Honor.   May it please  
21   the Court.   Again I apologize for not being able to file the  
22   sentencing memorandum before I did, but it really involves --  
23   this is a very involved situation and a very involved  
24   argument.

25          The Court has heard I'm sure countless times the

1 positions on divisibility versus indivisibility, what you can  
2 look at; and so I'm not going to really belabor the point.  
3 But I do want to at least address how we look at this  
4 particular statute, 44-53-375, and the different means by  
5 which that offense -- or that statute -- can be violated.

6 We've outlined in the sentencing memorandum, obviously  
7 there are several different ways in which a defendant can be  
8 convicted of that offense. At issue here is the possession  
9 with intent to distribute, which is what is identified in the  
10 indictment. It is what is identified in the sentencing sheet  
11 in this case.

12 But before we even get to that, if it's not divisible,  
13 if it's an individual statute, looking at the plain language,  
14 whether or not there are different means by which a defendant  
15 can be convicted of that offense, and the sentencing  
16 memorandum that we filed walks through the different means by  
17 which it can be violated. It talks about the different law.  
18 And I'm not going to belabor the Court with those points  
19 because you've got that in the sentencing memorandum.

20 But if we look at something that's really not been  
21 discussed, at least as far as I've seen by different courts  
22 here, is, you can just possess crack cocaine and violate the  
23 statute. If you are in possession -- if a defendant is in  
24 possession of more than one gram -- and I'm sure Your Honor  
25 has heard testimony from various FBI agents regarding one

1 gram, how much that is, street level, and the prices  
2 associated with that, I would submit to the Court that the  
3 value is relatively between 100 and 150 dollars. But if we  
4 look at possession of one gram, that's prima facia evidence  
5 of violation of the statute.

6 Beyond that -- I've cited this in the sentencing  
7 memorandum -- but beyond that, a defendant can be in  
8 possession of less than that prima facia threshold, less than  
9 one gram; in fact, any amount, if he's got other  
10 circumstances, that is evidence of the intent to distribute.  
11 And South Carolina law has demonstrated that you can possess  
12 any amount and possess drug paraphernalia and the case is  
13 sufficient to go to the jury here in South Carolina.

14 And so what I've done is I've gone back and looked at  
15 what is drug paraphernalia under South Carolina law. And  
16 it's in the definitions section of South Carolina law. And  
17 it doesn't take a whole lot. This is in 44-53-110, paragraph  
18 33, which addressed paraphernalia.

19 It means any instrument, device, article or contrivance  
20 used, designed for use, or intended for use for ingesting,  
21 smoking, administering, manufacturing, or preparing a  
22 controlled substance, and does not include cigarette papers  
23 or tobacco types but does include and is not unlimited to  
24 bowls, water pipes, smoking or carburetor masks, roach clips,  
25 chamber pipes, bongs. And it goes through a list of

1 different items that are considered to be drug paraphernalia.

2 Now, the items that I'm looking at here are all personal  
3 use devices. And so if South Carolina has interpreted  
4 44-53-375 to allow for the violation of that statute if you  
5 possess any quantity and you possess a water bong or you  
6 possess a crack pipe and that's a violation of the statute, I  
7 would submit that it sweeps more broadly than what the  
8 federal law had intended if we look -- if Your Honor  
9 disagrees and finds that this is a divisible statute and we  
10 look outside of just the plain language itself.

11 THE COURT: Right. Because, I mean -- and I  
12 realize that it's not a published opinion. But, you know,  
13 Judge Keenan went through pretty carefully the statute trying  
14 to address really the same arguments that you're making here.  
15 But you are also arguing that I'm not supposed to look at  
16 anything but the indictment. Is that what you're --

17 MR. MILLING: Yes, Your Honor. And that's because  
18 the sentencing sheet itself is simply a document that is  
19 prepared by the prosecutor, filled out by the prosecutor for  
20 the most part, done before sentencing. And --

21 THE COURT: But it's done at the time of the plea.

22 MR. MILLING: Sometimes. Sometimes it is;  
23 sometimes it isn't. The defendant -- or the judge signs it  
24 at the time of the plea when he fills out the portion of it  
25 that deals with the sentence. But many times it's a scenario

1 where it's filled out in advance. The defendant signs it  
2 when it comes to court, and then the judge signs his portion  
3 of it at the time that he is actually filling out the  
4 sentence.

5 Judge, as we're getting into what does the sentencing  
6 sheet mean, what does the indictment mean, what can be  
7 gleaned from that, which is something that I think that our  
8 appellate courts have talked about in general terms, but we  
9 have not seen an actual witness talk about from the state's  
10 perspective what this means as they're filling it out and  
11 whether or not they can glean from the documents itself; I  
12 would like to call Sandra Moser as a witness who is a former  
13 state prosecutor. She just left the Richland County  
14 Solicitor's Office which is the actual office where these  
15 charges arose. I would like to call her as a witness in this  
16 case.

17 I understand Mr. Holliday may have objection to this  
18 because he thinks that this gets outside of the modified  
19 categorical approach. I'm not looking to get into the  
20 underlying facts of the case, what Mr. Brown may or may not  
21 have done, but I think it could help the Court know exactly  
22 how a state court prosecutor is viewing this and what a state  
23 court prosecutor can glean from these documents in  
24 determining how the statute might have been violated.

25 THE COURT: You know, I understand what you want to



1 do. You want to explain what the sentencing sheet that's,  
2 you know, so important in this case, what it means. But I  
3 don't think, at this point anyway, that the courts have  
4 decided that when you've got a divisible statute and you're  
5 employing the modified categorical approach that you can look  
6 at anything other than the Shepard documents. So I don't  
7 think it would be appropriate for me to consider anything  
8 other than the Shepard documents.

9 MR. MILLING: Well, again --

10 THE COURT: And I do understand that we've got an  
11 indictment. But I'd like for you to maybe address the fact  
12 that the indictment in this case was not presented to the  
13 Grand Jury. And so it seems to me that maybe the sentencing  
14 sheet is the best indication. And it does I believe indicate  
15 a violation of, I believe it was 375.

16 MR. MILLING: Yes, Your Honor.

17 THE COURT: So, you know, isn't that what I should  
18 look at to determine --

19 MR. MILLING: Well, in my practice; and, again,  
20 this is something that I think that Ms. Moser will be able to  
21 testify regarding because her office was the office that  
22 actually prepared these documents and prepared the waivers.  
23 But I will proffer her testimony would be that a waiver is  
24 simply a form of an indictment that has not been submitted to  
25 the Grand Jury. There, the defendant waives presentment to

1 the Grand Jury and basically accepts that indictment, that  
2 document, as if it actually had been submitted to the Grand  
3 Jury, waiving the right to have them actually review it. So  
4 it's got the same effects under South Carolina law as an  
5 actual true billed indictment because the defendant is simply  
6 waiving his rights to that.

7 And so if we look at the indictment, or whether we look  
8 at the sentencing sheet, I would submit -- and, again, I  
9 would proffer that Ms. Moser's testimony would be -- that if  
10 you look at what that CDR code is, if you look at the  
11 acronym, PWID, all that means is that it's a catchall for  
12 violation of this statute. It is what is used in the event  
13 that the defendant is not charged with trafficking crack  
14 cocaine, which is also covered by 44-53-375.

15 It does not mean that the defendant was charged with or  
16 pleading guilty to distribution which is also covered by that  
17 statute. It means that the defendant was not charged with  
18 simple possession which is also covered in that statute.

19 It does not, however, mean that he was convicted of  
20 possessing with intent to distribute necessarily. Could have  
21 been. But it's just a catchall. And that's what I would  
22 submit to Your Honor she would testify to based upon my  
23 understanding of what her testimony would be, that it's a  
24 generic phrase that is used just to identify the catchall,  
25 not one of those others specifically enumerated.

1 But even within the PWID, if we look at 375, the  
2 defendant can violate that by simply possessing a crack pipe  
3 and a rock of crack. And that's cited in our brief. A  
4 defendant can violate that by having roughly the equivalent  
5 of four rocks of crack because that's going to exceed the  
6 threshold quantity of one gram of crack cocaine.

7 And so if we look at how possession of any amount -- and  
8 I've also cited in our sentencing memorandum on page 16 how  
9 South Carolina treats constructive possession in these cases.  
10 And so if a defendant doesn't even actually possess the  
11 drugs, he can be convicted of a violation of this statute.

12 And that's why the simple acronym, PWID, doesn't really  
13 give us any guidance as to exactly what he did. Because he  
14 could have been purchasing it. He could have been possessing  
15 a rock of crack and a piece of drug paraphernalia, a pipe.  
16 He could have been possessing simply one gram of crack  
17 cocaine. And so that's why it's broader than what the  
18 controlled substance offense is, as has been defined under  
19 the guidelines.

20 Your Honor, if we look beyond just that and see how the  
21 First Steps Act has started to treat recidivism and how  
22 they've just redefined what qualifies as a predicate offense  
23 under 841 and 851, actually requiring that a defendant would  
24 serve more than a year in jail, I think that shows how  
25 Congress is treating this situation and understanding and

1 recognizing that the state courts, if they sentence somebody  
2 to active time, to more than a year, it's a more serious  
3 offense sufficient to activate this recidivism statute; but  
4 if it's less, it's a less serious offense that should not  
5 qualify.

6 But I don't think we even need to get there because the  
7 statute, 44-53-375, sweeps more broadly than what is  
8 envisioned under controlled substance offense because it does  
9 criminalize the purchasing. It does criminalize possession  
10 of personal use quantities and drug paraphernalia because --

11 THE COURT: But it's divisible.

12 MR. MILLING: I would still submit that it's not --

13 THE COURT: I mean, I agree the language is broad.  
14 But, you know, I think that's where the issue is in this  
15 case, is whether or not the analysis that has been conducted;  
16 albeit, not binding precedent, as to whether or not this is  
17 divisible or not is really what is going to determine --

18 MR. MILLING: Well, I think that if it's not  
19 divisible, it's clear that it is more broad.

20 THE COURT: Yeah.

21 MR. MILLING: Even if it is divisible, I think  
22 looking at the documents in this case, the indictment and if  
23 Your Honor chooses to consider the sentencing sheet, which  
24 again, because it's not a judicially created document, I  
25 don't know that I think that it qualifies as an appropriate

1       Shepard document; but even if you --

2               THE COURT:   Well, I think though that the -- and I  
3       haven't looked at every single case. But, I mean, even in  
4       Judge Keenan's case in the unpublished opinion where she  
5       analyzes the statute, sentencing sheets are clearly  
6       contemplated. So, you know, based on that, it seems like --

7               MR. MILLING:   Yes, Your Honor.

8               THE COURT:   -- other people who have looked at it  
9       have decided that maybe that is an appropriate Shepard  
10      document.

11              MR. MILLING:   Yes, Your Honor. And I understand if  
12      Your Honor is going to consider that. I still would submit  
13      that even if you do, and that's where I think that the  
14      testimony of Ms. Moser would have been helpful, to outline  
15      that in fact she can't read as a former prosecutor, one month  
16      removed from that, she can't read what means by which the  
17      defendant violated 44-53-375 because PWID, the acronym, is a  
18      catchall that does not apply to any of those.

19              But even if it is possession with intent to distribute,  
20      because of the prima facia reference in 375, it's just  
21      possession of a gram. It's possession of any amount along  
22      with drug paraphernalia or any other circumstances. And  
23      South Carolina doesn't even require actual possession because  
24      constructive possession can apply. I would just submit that  
25      even if you do look at the sentencing sheet, it still sweeps

1 more broadly than what is envisioned under federal law and so  
2 should qualify.

3 THE COURT: Okay. All right. I think I understand  
4 your argument.

5 All right, Mr. Holliday. What's wrong with that  
6 argument?

7 MR. HOLLIDAY: Your Honor, all the case law runs  
8 the other way. And I understand that it's not binding  
9 because it's not published, but at least it's indicative at  
10 the point where the Fourth Circuit does decide to publish  
11 something on which way they're going to go.

12 Also, as you know, at the district court level, all but  
13 one judge have decided that the statute is divisible. If you  
14 look at the Shepard-approved document in this case which is  
15 the sentencing sheet, it says PWID crack cocaine.

16 At the point in which this Court would consider -- and I  
17 don't think the Court is about to consider -- but all these  
18 hypotheticals that Mr. Milling is proposing that you  
19 consider, those are all factual hypotheticals where we would  
20 go beyond the modified categorical approach to consider  
21 underlying facts and all that. Clearly, that's not something  
22 we can do.

23 So based on the sentencing sheets, the plain language on  
24 the sentencing sheets, the divisibility of the statute, the  
25 Marshall case, the Cheeseboro case and others, as well as

1 precedent within this district set by Judge Wooten, Judge  
2 Harwell, Judge Gergel, Judge Currie, and Judge Anderson, all  
3 thoughtful judges who I'm sure have taken a long look at what  
4 it means to have this state statute to be divisible and the  
5 prudence of considering these underlying convictions that  
6 they have made the right call, and I agree with their  
7 analysis. And I believe that you should reject or deny the  
8 defendant's objections because they're just not grounded in  
9 any precedent or where precedent is going in this circuit.

10 THE COURT: Okay.

11 MR. MILLING: And, Your Honor, if I may respond  
12 briefly. I don't want to reargue the points that I already  
13 have. But Mr. Holliday made a good point when he says that  
14 these are factual hypotheticals, factual hypothetical means  
15 by which a defendant may have committed a violation of the  
16 statute. And I submit that because he even acknowledges that  
17 there are factual hypothetical ways to commit violation of a  
18 statute which make it more broad than what our federal courts  
19 have interpreted, it sweeps more broadly.

20 And again, how a state court would interpret this as  
21 it's being drafted, that's why I thought it prudent to bring  
22 Ms. Moser here, to be able to testify as to what this PWID  
23 crack cocaine means. Can she tell what the defendant  
24 actually was convicted of from this? And as I submitted  
25 earlier, she would testify that she can't, that she cannot

1 tell how the statute was violated just by the language.

2 So --

3 THE COURT: All right. Well, I'm going to overrule  
4 the objection. I think that the courts that have looked at  
5 this -- I realize that none of it is binding on me, but I  
6 certainly can't ignore the analysis that the Fifth Circuit  
7 has conducted as well as the unpublished opinions of the  
8 Fourth Circuit. I know one of them just sort of assumed.  
9 But I've followed that analysis and I think it's the correct  
10 one. So I'm going to overrule your objection.

11 Now, does that take care of all of your other  
12 objections?

13 MR. MILLING: That resolves the other objections  
14 that we've got. I believe that the only other issue that we  
15 would have is the parties have stipulated based upon the  
16 history of this case that if he was deemed to be a career  
17 offender that a ten-year sentence was the appropriate  
18 sentence in this case.

19 THE COURT: Okay.

20 MR. MILLING: Because it's the stipulation and we  
21 can't argue for below that, they can't argue for above that,  
22 I did not include a detailed analysis of the 3553(a)  
23 factors --

24 THE COURT: Okay.

25 MR. MILLING: -- in my sentencing memorandum. Your



1 Honor is very familiar with Mr. Brown's case.

2 THE COURT: Yes. Painfully.

3 MR. MILLING: Yes, Your Honor. He is somebody --  
4 and he does want to address the Court at the appropriate  
5 time. But he is someone who throughout my dealings with him  
6 -- and mind you, to begin with, it was by telephone and by  
7 email because he had already been sentenced and I was  
8 representing him before the Fourth Circuit.

9 But since he and I have gotten to know each other in  
10 person while he's been at Lexington County, one of the things  
11 that has really made an impression on me is the regret that  
12 he has shown. And it comes forth when he starts talking  
13 about his boys. He has got a boy who is eight. He has got a  
14 boy who is six and a boy who is three. Now, if we work  
15 back --

16 THE COURT: Has he got as many as you?

17 MR. MILLING: Not yet. Well, the right number of  
18 boys; but I've still got him by one more kid.

19 THE COURT: Yes.

20 MR. MILLING: But if we look at working backwards,  
21 he has been in custody for 29 months. And so that youngest  
22 child he really hasn't had a chance to interact with.

23 Javier tells me that he wants to be able to be there for  
24 them so that he can teach them from his mistakes. He tells  
25 me that he has not told his boys that he's in custody because

1 they try to emulate him and he doesn't want to set a tone  
2 where they think this is a good thing for him to be in  
3 custody. He tells them that he's at work. And so that's why  
4 he can't come home.

5 And he told me recently that his older two boys in  
6 talking to him on the phone said, well, daddy, can we come  
7 help you so that you can come home sooner? And when he and I  
8 were talking about that earlier this week, he broke down.  
9 That's not something that he is doing for show. That's not  
10 something that he is doing in court to try and sway the Court  
11 one way or the other. It's just me and him in the holding  
12 cell. And that tells me that it's really making a big impact  
13 upon his life.

14 And he wants to do right now. And he recognizes that he  
15 was young and stupid and he can't do that anymore. And he  
16 needs to be a man and he needs to be a father. And to that  
17 regard, he has already reached out.

18 He was optimistic that today he may be found not to be a  
19 career offender, in which case he would have already exceeded  
20 his time as under the guidelines. But he told me that he's  
21 already reached out to the owner of Subway right there behind  
22 the hospital about trying to get a job. He's already reached  
23 out to an HVAC company about working with them. He is trying  
24 to get legitimate employment upon release so that he can set  
25 a good example for his children. And I think that speaks

1 volumes as to where he's been and to where he is now.

2 He's got a lot of family here; his mother. His brother  
3 was in here. He just stepped out. Did you want to speak to  
4 the Court?

5 MR. RANDOLPH: Yes, sir.

6 THE COURT: I'll call on you to do that in just a  
7 minute. Let me do a couple of other things, like adopt what  
8 is in the pre-sentence report.

9 MR. MILLING: Yes, Your Honor.

10 THE COURT: All right. Since we've taken care of  
11 all the objections, I am going to adopt the findings that are  
12 set forth in the revised pre-sentence investigation report,  
13 including the applicable statutory guidelines for purposes of  
14 determining my sentence.

15 Mr. Brown, is it Javier or Havier [ph]?

16 THE DEFENDANT: It's Javier.

17 THE COURT: Javier. Okay, sir. The statutory  
18 provisions for your offense which is possession with intent  
19 to distribute a mixture or substance containing -- is it  
20 meth, or was it -- what is it?

21 MR. MILLING: It was pills.

22 THE COURT: Yeah. Methamphetamine and alprazolam.  
23 Am I pronouncing that correctly?

24 DEFENDANT: (Nods head affirmatively.)

25 THE COURT: The statute provides for custody of a

1 maximum of 20 years followed by supervised release of at  
2 least 3 years. It is probation eligible under the statute  
3 for a period of one to five years. It carries a fine of a  
4 million dollars and a special assessment fee of \$100.

5 The guidelines assigned to this offense: a base offense  
6 level of 12. That number is increased two levels under the  
7 guidelines because of possession of a firearm. So the  
8 adjusted offense level is 14. Because of these enhancements  
9 that we've been discussing this morning, your level jumps to  
10 32. That number is reduced three levels because of your  
11 acceptance of responsibility. So you have a total offense  
12 level of 29, and your criminal history category is VI. So in  
13 that situation, the guidelines yield an imprisonment range of  
14 151 to 188 months.

15 I am noting though there is a stipulation between the  
16 parties to a sentence that is below that amount, which is 120  
17 months, followed by supervised release of three years. It's  
18 not probation eligible under the guidelines. But again,  
19 there is a \$100 assessment fee. That's how I see, given my  
20 ruling on the objection, the statutory and guideline  
21 provisions that are applicable in this case and in Mr.  
22 Brown's situation.

23 Any comments, corrections?

24 MR. HOLLIDAY: We have no objections to what you've  
25 announced, Judge. Thank you.

1           THE COURT: All right. I've heard a little bit  
2 already from Mr. Milling. Mr. Holliday, let me hear from you  
3 about appropriate resolution of this. 120 months?

4           MR. HOLLIDAY: Your Honor, as you have referred,  
5 paragraph 4 of the plea agreement is where we are  
6 recommending to you that you sentence him to 120 months.

7           As Mr. Milling alluded to, this case has had sort of a  
8 long and winding road to get us here today. I initially  
9 called it as a counterfeiting case; and those are the first  
10 two counts in the indictment. And then we learned through  
11 various sources coming to us that there was a lot of other  
12 stuff out there that was pending against Mr. Brown. We  
13 picked up the gun charge and the drug charge and all that.  
14 So obviously there were many choices actually of what to have  
15 him plead guilty to, which I don't know is the case with all  
16 defendants.

17           He does have a very long criminal history. He would  
18 have been a criminal history category IV but for his  
19 designation. But as I was flipping through, there are a lot  
20 of different offenses, a lot of drug offenses in there. So  
21 as far as this defendant goes, he is not one who has just  
22 been caught on this one occasion doing something bad. He is  
23 someone who has been around for a while, has been breaking  
24 the law for a while.

25           He has pled guilty to a drug offense, which is a serious

1 offense. And I think all of that provides a basis for  
2 sentencing to that 120-month figure. I'm not going to ask  
3 you to go up to 151 or whatever the guidelines indicated. I  
4 think ten years is a fair sentence here and I'm asking you to  
5 do that.

6 THE COURT: All right. Mr. Milling, I've heard  
7 from you some already, but I'm happy to hear from you some  
8 more. Or if the defendant wants to address the Court or  
9 anyone else, I'm happy to hear from them.

10 MR. MILLING: Your Honor, from my standpoint, I  
11 would rest on the arguments I've already made. I do think  
12 that him being classified as a career offender that a  
13 120-month sentence is sufficient but not greater than  
14 necessary.

15 We do have some family members here. I know that at  
16 least one would like to address the Court. And I know Javier  
17 would like to address the Court as well.

18 THE COURT: Why don't we start with the gentleman  
19 in the back. Sir, come forward and try to get close to one  
20 of these mics and state your name for me.

21 MR. RANDOLPH: James Randolph.

22 THE COURT: Excuse me?

23 MR. RANDOLPH: James Randolph.

24 THE COURT: James Randolph. All right. And what  
25 is your relationship with the defendant?

1           MR. RANDOLPH: I'm a friend of his. I'm also a  
2 business owner. The family had reached out to me about some  
3 employment for him.

4           THE COURT: Okay.

5           MR. RANDOLPH: I currently owns [sic] Mano's  
6 Restaurant. We is [sic] currently in Dutch Square Mall. We  
7 made a transition into Columbia Mall and we're just getting  
8 ready to start. So I was going to make sure that he would be  
9 able to have some employment once he is released.

10          THE COURT: Well, that's appreciated because when  
11 he is released, he is going to need employment. So you've  
12 been gracious so far. I hope you will continue to do that.

13          MR. RANDOLPH: Yes, ma'am. Thank you.

14          THE COURT: Anything else?

15          MR. RANDOLPH: I understand -- I've known him for  
16 approximately like five years or so -- he seems to be a great  
17 guy and a family man and things of that nature, like that. I  
18 wasn't aware of his other lifestyle; but from what I've known  
19 of him, he's been always a good guy. That's the only thing I  
20 could say about him because --

21          THE COURT: It sounds like you might be a good role  
22 model for him at some point when he is released.

23          MR. RANDOLPH: Yes, ma'am.

24          THE COURT: Thank you, sir.

25          MR. RANDOLPH: All right. Thank you.

1 MR. MILLING: Next we have his brother.

2 THE COURT: Okay. All right. Good morning. Would  
3 you state your name for me, please, sir.

4 MR. CHRISTOPHER BROWN: Christopher Brown.

5 THE COURT: I'm sorry?

6 MR. CHRISTOPHER BROWN: Christopher Brown.

7 THE COURT: Christopher. Okay. And you're a  
8 brother of the defendant?

9 MR. CHRISTOPHER BROWN: Yes, ma'am. Younger and  
10 only brother.

11 THE COURT: I'll be happy to listen to anything you  
12 want to tell me.

13 MR. CHRISTOPHER BROWN: The only thing I just  
14 wanted to say is I watched my mom raise me and my brother.  
15 Our daddy figure never was there. He is three years older  
16 than me. Like I had -- I look up to my brother, ma'am.  
17 That's all I have. That's all I have.

18 As to his four boys, every day I get them from school.  
19 I take good care of them. I help his baby's mama with the  
20 kids. I try to do all I can, Your Honor. Like, that's all I  
21 have of me.

22 I never met my dad. Like, I have an older brother, role  
23 model. Like, despite all the trouble he got into, I always  
24 talk with my brother every night. I always.

25 The only thing I can say is, Judge, just please don't



1 take my brother's life from him, ma'am. He need [sic] it. I  
2 have a grandma in the hospital; I have an aunty on life  
3 support, and they worry about my brother every day. Well,  
4 they just turned sick. They're sick in the hospital, just  
5 worried about my brother every day. The only thing I can  
6 say, Lord, just -- just please don't take his life from him.

7 THE COURT: Okay.

8 MR. MILLING: Your Honor, we've got two other  
9 family members who are here but they don't wish to address  
10 the Court. Mr. Brown would like to address the Court, Your  
11 Honor.

12 THE COURT: All right. Mr. Brown.

13 DEFENDANT: I want to say I'm sorry for wasting the  
14 taxpayer's money to address the issue. I'm sorry for wasting  
15 your time, too, Your Honor. And I've been through a lot  
16 since I've been incarcerated. And I'm sorry for putting my  
17 family through this. It's hard.

18 And when I hear my kids' voice and, you know, not being  
19 able to be there for them, I feel like I let them down. I  
20 feel like going through this right here is an experience and  
21 I learned my lesson. And like, since I've been incarcerated,  
22 I got into the Bible. And I'm more humble. And I know what  
23 I did was wrong. I know.

24 But right now, I'm just saying that I'm sorry and I'm  
25 not -- I'm not this person that my records are showing,

1     because I had a drug habit. I had a habit. I was addicted.  
2     And that's all I can say.

3             And right now, I've been through so much. Even in  
4     February of last year, I received 262 months, that was an eye  
5     opener for me. That right there alone was enough to let me  
6     know that what I was doing and the road I was going down was  
7     not the road that I needed to be on.

8             So when I was incarcerated, I had got into the Bible.  
9     And I understand that I wasn't living right. So I have  
10    changed my lifestyle. And I am here today to address my  
11    issue, and I'm accepting my responsibility of what had went  
12    on with this case. And like I said again, I'm sorry for  
13    wasting your time to address this case, Your Honor.

14            THE COURT: All right.

15            DEFENDANT: Thank you.

16            THE COURT: Anything else, sir?

17            DEFENDANT: Thank you.

18            THE COURT: You're welcome. All right. Anything  
19    else before --

20            MR. MILLING: No, Your Honor.

21            THE COURT: All right. I think we've correctly  
22    calculated the guideline range. And just taking into account  
23    the fact that the parties have agreed that in the event I  
24    determined he was a career offender, which I have done, that  
25    an appropriate sentence is 120 months; and I think that I

1 agree with that, I think taking into consideration what we've  
2 heard about today about this particular defendant and about  
3 his substantial criminal history. But also, on the good  
4 side, there is obviously some remorse and, hopefully, a  
5 decision to make a change going forward, even so far as to  
6 start planning for employment upon his release, which is  
7 commendable.

8 I think taking all the 3553(a) factors into account that  
9 the sentence that the parties have agreed to in this  
10 situation is appropriate. So I will vary downward from that  
11 and enforce the plea agreement sentence of 120 months.

12 So having calculated and considered the advisory  
13 sentencing guidelines and having also considered the relevant  
14 statutory sentencing factors contained in 18 USC 3553(a), it  
15 is the judgment of the Court that the defendant, Javier  
16 Brown, is hereby committed to the custody of the Bureau of  
17 Prisons to be imprisoned for a term of 120 months.

18 Is there a forfeiture?

19 THE CLERK: No.

20 THE COURT: No? Okay. All right. It appears that  
21 Mr. Brown does not have the ability to pay a fine; and,  
22 therefore, the fine is waived, but he shall pay the \$100  
23 assessment fee.

24 Upon release from imprisonment, the defendant shall be  
25 placed on supervised release for a term of three years.

1     Within 72 hours of release from the custody of the Bureau of  
2     Prisons, the defendant shall report in person to the  
3     Probation Office in the district to which he is released; and  
4     while on supervised release, the defendant shall comply with  
5     the mandatory and standard conditions of supervision that are  
6     outlined in 18 USC 3553(d).

7             He shall also comply with the following special  
8     conditions for the reasons that are set forth in the  
9     pre-sentence investigation report that has previously been  
10    adopted as to the finding of facts for purposes of this  
11    sentencing.

12            The defendant must submit to substance abuse testing to  
13    determine if he has used a prohibited substance, and he must  
14    contribute to the cost of that program not to exceed an  
15    amount determined reasonable by the court-approved U.S.  
16    Probation Office's sliding scale for services; and he shall  
17    cooperate in securing any applicable third-party payment,  
18    such as insurance or Medicaid.

19            So as to Count Six of the indictment, I think this  
20    sentence is reasonable under the facts and circumstances of  
21    this case and that it is sufficient but not greater than  
22    necessary to achieve the purposes of sentencing.

23            Any corrections to my sentence?

24                   MR. HOLLIDAY: No corrections, Your Honor. But I  
25    would move to dismiss all the remaining counts in the

1 indictment.

2 THE COURT: Okay. All right. All right, sir. You  
3 have 14 days from the date of the Judgment Order to file any  
4 notice of appeal. Thank you.

5 MR. MILLING: Thank you, Your Honor. If we could  
6 request a recommendation that he be screened for the  
7 Intensive Drug Treatment Program?

8 THE COURT: Okay.

9 MR. MILLING: Thank you, Your Honor.

10 THE COURT: All right. Thank you.

11 MR. HOLLIDAY: All right. Thank you, Your Honor.

12 MR. MILLING: Your Honor, if we could ask one more  
13 recommendation, that he be -- that the recommendation be made  
14 that he remain in South Carolina, if at all possible.

15 THE COURT: I'll be happy to make that  
16 recommendation.

17 MR. MILLING: Thank you, Your Honor.

18 (WHEREUPON, the proceedings are concluded.)

19 \*\*\*

20 I certify that the foregoing is a correct transcript from the  
21 record of proceedings in the above-entitled matter.

22

23 s/Jennifer H. Williams

24 \_\_\_\_\_

March 18, 2019

25 Jennifer H. Williams, RPR

# APPENDIX D

**WITNESSES**

**ARREST WARRANT NUMBER**

M235960

**ACTION OF GRAND JURY**

Foreperson of Grand Jury  
Date:

**VERDICT**

Foreperson of Petit Jury  
Date:

**2009**  
DOCKET NO. ~~2010~~-GS-40-6572

**The State of South Carolina**  
**County of Richland**

**COURT OF GENERAL SESSIONS**

**NOVEMBER TERM 2010**  
**152**

**THE STATE**  
**vs.**

**JAVIER KEIONTE BROWN**

**Indictment for**

**PWID CRACK COCAINE**  
SC Code: 44-53-375(B)(1)  
CDR Code: 0112  
Class FEL/D

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I  
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

INDICTMENT

At a Court of General Sessions, convened on \_\_\_\_\_, the Grand Jurors of Richland County present upon their oath:

PWID

CRACK COCAINE -1<sup>st</sup> Offense

That JAVIER KIEONTE BROWN did in Richland County on or about July 29, 2009, manufacture, distribute, dispense, deliver, purchase or aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance, to wit: Crack Cocaine in violation of Section 44-53-375 Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Warren B. Giese  
WARREN B. GIESE, SOLICITOR



## STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND  
STATE VS.

AKA:

Race: Black Sex: Male Age: 22DOB: 8-6-88 SS#: 250-85-4114Address: 4644 Webb CtCity, State, Zip: Cola, SC 29204

DL# \_\_\_\_\_ SID# \_\_\_\_\_

\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS  
TO: PWID Crack Cocaine - 1st offenseIn violation of § 44-53-375(B)(1) of the S.C. Code of Laws, bearing CDR Code # 0112☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ \$17-25-45(CSC w/minor 1<sup>st</sup> or Lewd Act)The charge is: ☐ As indicted, ☐ Lesser Included Offense, ☒ Defendant Waives Presentment to Grand Jury. (def.'s initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

Solicitor

SC Bar # 74932Defendant Jan BrownAttorney for Defendant Jan Brown

SC Bar # \_\_\_\_\_

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,  
for a determinate term of 3 days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years  
and/or to pay a fine of \$ 5,000.00; provided that upon the service of \_\_\_\_\_ days/months/years and on payment of \$ \_\_\_\_\_;  
plus costs and assessments as applicable; the balance is suspended with probation for 2 months/years and subject to  
South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State  
Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal  
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_

Payment Terms: \_\_\_\_\_

☐ Set by SCDPPPS \_\_\_\_\_

Recipient: \_\_\_\_\_

*Fine:		\$	
§14-1-206 (Assessments 107.5%)		\$	
§14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$	
§14-1-211 (A)(2)(DUI Surcharge)	\$100	\$	
§56-5-2995 (DUI Assessment)	\$12	\$	
§56-1-286 (DUI Breath Test)	\$25	\$	
Proviso 47.9 (Public Def/Prob)	\$500	\$	
§14-1-212 (Law Enforce. Funding)	\$25	\$	
§14-1-213 (Drug Court Surcharge)	\$150	\$	
§50-21-114 (BUI Breath Test Fee)	\$50	\$	
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$	
Proviso 90.5 (SCCJA Surcharge)	\$5	\$	
§44-53-450(C) (Conditional Discharge)	\$350	\$	
3% to County (if paid in installments)		\$	
TOTAL		\$	

Clerk of Court/Deputy Clerk Janette W. McBrideCourt Reporter: C. Holm

SCCA/217 (06/2010)

## IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009-GS- 40 - 6572AMW#: M235960Date of Offense: 7-29-09S.C. Code §: 44-53-375(B)(1)CDR Code #: 0112

## SENTENCE SHEET

70 days/hours Public Service EmploymentObtain GED ☒

Attend Voc. Rehab. Or Job Corp. \_\_\_\_\_

May serve W/E beginning \_\_\_\_\_

Substance Abuse Counseling ☒Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ \_\_\_\_\_ Beginning \_\_\_\_\_

\$ \_\_\_\_\_ Paid to Public Defender Fund

Other: \_\_\_\_\_

☐ Conditional Discharge, §44-53-450(C) requires  
\$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel,  
\$47.12 requires \$500 be paid to Clerk  
during probationPresiding Judge 2061Judge Code: 2061Sentence Date 11-4-10

**WITNESSES**

DOCKET NO. 2010-GS-40-7629

**The State of South Carolina**  
**County of Richland**

After being fully advised as to my  
legal rights, I hereby waive presentment  
to the Grand Jury.

Defendant

**COURT OF GENERAL SESSIONS**

**NOVEMBER TERM 2010**

**152**

I  
hereby appear in my own proper person and plead  
guilty to the within indictment or to

**ARREST WARRANT NUMBER**

**M239025**

Defendant

Witness:

C.C.C. PLS. AND G.S.

**ACTION OF GRAND JURY**

**THE STATE**  
**vs.**

**JAVIER K. BROWN**

Foreperson of Grand Jury  
Date:

**VERDICT**

**Indictment for**

**PWID CRACK COCAINE**  
SC Code: 44-53-375(B)(1)  
CDR Code: 0112  
Class FEL/D

Foreperson of Petit Jury  
Date:

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

INDICTMENT

At a Court of General Sessions, convened on \_\_\_\_\_, the Grand Jurors of Richland County present upon their oath:

PWID  
CRACK COCAINE

That JAVIER K. BROWN did in Richland County on or about May 18, 2010, manufacture, distribute, dispense, deliver, purchase or aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance, to wit: Crack Cocaine in violation of Section 44-53-375 Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
WARREN B. GIESE, SOLICITOR

## STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND  
STATE VS.

AKA: JAVERK. BROWN  
 Race: Blk Sex: M Age: 22  
 DOB: 8-6-88 SS#:   
 Address: 4044 Webb Ct  
 City, State, Zip: Latta, SC. 29204  
 DL#  SID#   
 \*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS  
 TO: PWID CRACK - 1st

In violation of § 44-53-375 of the S.C. Code of Laws, bearing CDR Code # 0112

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45  
 (CSC w/minor 1<sup>st</sup> or Lewd Act)

The charge is: ☐ As indicted, ☐ Lesser Included Offense, ☒ Defendant Waives Presentment to Grand Jury. (def.'s initials)  
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

5 Solicitor 74932 SC Bar #  Defendant Javerk Brown Attorney for Defendant 929 SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,  
 for a determinate term of 180 days/months/years or ☐ under the Youthful Offender Act not to exceed  years  
 and/or to pay a fine of \$ 10,000.00 provided that upon the service of  days/months/years and or payment of \$ ;  
 plus costs and assessments as applicable; the balance is suspended with probation for  months/years and subject to  
 South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State  
 Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal  
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP 

Total: \$  plus 20% fee:  \$

days/hours Public Service Employment

Payment Terms:

Obtain GED ☐

☐ Set by SCDPPPS

Attend Voc. Rehab. Or Job Corp.

Recipient: 

\*Fine:   
 \$14-1-206 (Assessments 107.5%) \$   
 \$14-1-211 (A)(1)(Conv. Surcharge) \$100 \$   
 \$14-1-211 (A)(2)(DUI Surcharge) \$100 \$   
 \$56-5-2995 (DUI Assessment) \$12 \$   
 \$56-1-286 (DUI Breath Test) \$25 \$   
 Proviso 47.9 (Public Def/Prob) \$500 \$   
 \$14-1-212 (Law Enforce. Funding) \$25 \$   
 \$14-1-213 (Drug Court Surcharge) \$150 \$   
 \$50-21-114 (BUI Breath Test Fee) \$50 \$   
 \$56-5-2942(J) (Vehicle Assessment) \$40/ea \$   
 Proviso 90.5 (SCCJA Surcharge) \$5 \$   
 \$44-53-450(C) (Conditional Discharge) \$350 \$   
 3% to County (if paid in installments) \$   
 TOTAL \$

Clerk of Court/Deputy Clerk Jeanette W. McBride

Court Reporter: C. Holmes

SCCA/217 (06/2010)

## IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010 -GS- 40 - 7629  
 AM#: M239025  
 Date of Offense: 5/19/10  
 S.C. Code §: 44-53-375(B)(1)  
 CDR Code #: 0112

## SENTENCE SHEET

Presiding Judge 

Judge Code: 2061

Sentence Date 11-19-10

May serve W/E beginning   
 Substance Abuse Counseling ☐  
 Random Drug/Alcohol Testing ☐  
 Fine may be pd. in equal consecutive weekly/monthly  
 pmts. of \$  Beginning   
 \$  Paid to Public Defender Fund

Other:

☐ Conditional Discharge, §44-53-450(C) requires  
 \$350 be paid to the Clerk prior to case disposition  
☐ Appointed PD or appointed other counsel,  
 \$47.12 requires \$500 be paid to Clerk  
 during probation.