No. _____

IN THE
Supreme Court of the United States

ASHFORD JAMES SIMMONS,

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

Parks Nolan Small
Federal Public Defender
for the District of South Carolina

Emily Deck Harrill, Esquire
Assistant Federal Public Defender
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
Telephone No.: 803.765.5089
Email: Emily_Harrill@fd.org
Counsel of Record for Petitioner

QUESTION PRESENTED

Since 1990, this Court has required the lower courts to use the "categorical approach" in courts' evaluation of a criminal defendant's prior convictions when determining whether a defendant should be exposed to a lengthy sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). This Court has issued several cases containing clear directives regarding the proper application of this statutory analysis.

The question presented here is whether the Fourth Circuit should be required to properly apply the categorical approach, using the parameters set by this Court, to its determination of whether a prior conviction is a "serious drug offense" under the ACCA, 18 U.S.C. § 924(e), and/or a "controlled substance offense" as that term is defined under the Sentencing Guidelines at U.S.S.G. § 4B1.1.

PARTIES TO THE PROCEEDING

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

DIRECTLY RELATED PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS

United States v. Simmons, No. 6:15-695-TMC-01 (D.S.C. 2015).

United States v. Simmons, No. 18-4210, consent motion to remand granted, (4th Cir. Aug. 10, 2018).

United States v. Simmons, No. 19-4054, 796 F. App'x 163 (4th Cir. 2019).

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TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ashford James Simmons, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in *United States v Simmons*, Case No. 19-4054, entered December 9, 2019.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra* 1a through 6a) is unreported at 796 F. App'x 163 (4th Cir. 2019).

The opinion of the court of appeals in *United States v. Furlow* (App., *infra* 7a through 32a) is reported at 928 F.3d 311 (4th Cir. 2019).

The opinion of the court of appeals in *United States v. Marshall* (App., *infra*, 33a through 63a), is unreported at 747 F. App'x 139 (4th Cir. 2018).

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and judgment in this matter on December 9, 2019. On February 19, 2020, Chief Justice Roberts extended the time for Simmons to file this petition for writ of certiorari to and including May 6, 2020.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

At issue is 18 U.S.C. §924(e), which reads:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title 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).
>
> (2) As used in this subsection - -
>
> (A) the term "serious drug offense" means -
>
> * * *
>
> (ii) 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 . . . .

South Carolina Code § 44-53-370(a)(1) provides that it is illegal :

> 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 . . . .

South Carolina Code §44-53-375(B) reads:

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of section 44-53-370, is guilty of a felony. . . .

STATEMENT OF THE CASE

Ashford James Simmons (Simmons) pled guilty to the crime of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. §922(g)(1).[1] He also pled guilty to one count of conspiracy to traffic a minor in prostitution, a violation of 18 U.S.C. § 1594(c). JA 59-117. In preparation for sentencing, a United States Probation Officer prepared a Presentence Report (PSR). In this PSR, Simmons was classified as an armed career criminal as well as being eligible for an enhancement of his base offense level under the Sentencing Guidelines pursuant to U.S.S.G. § 2K2.1(a)(2), based upon, *inter alia*, his previous convictions under South Carolina Code § 44-53-370 and South Carolina Code § 44-53-375(B). JA 477-509; 514-573. See 18 U.S.C. § 924(e) (providing mandatory minimum term of 15 years and maximum of life in prison for conviction under 18 U.S.C. § 922(g)(1) where defendant has at least three prior convictions for, *inter alia*, a "serious drug offense"); U.S.S.G. § 4B1.2(b) (defining "controlled substance offense" which is the definition applied in U.S.S.G. § 2K2.1(a)(2)).

As is relevant to the appeal taken from Simmons' resentencing,[2] Simmons lodged objections to the PSR based upon these enhancements and filed a sentencing memorandum objecting to the same. JA 348-377. On January 9, 2019, the district

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[1] Citations to "JA" refer to the appellate record compiled in the Joint Appendix on file with the Fourth Circuit Court of Appeals. See *United States v. Simmons*, No. 19-4054, Joint Appendix, Vols. I & II (ECF Nos. 13 & 14) (4th Cir. Apr. 18, 2019).

[2] The appeal which is the subject of this petition was taken after a consent remand for resentencing.

court held a resentencing hearing. JA 399-463. Simmons' objections were overruled, and Simmons was sentenced to 210 months' imprisonment. Simmons filed a timely Notice of Appeal to the Fourth Circuit Court of Appeals. The court of appeals had jurisdiction under 18 U.S.C. 3742(a) and 28 U.S.C. § 1291.

Simmons' main appellate argument was that his drug convictions under South Carolina Code §§ 44-53-370 and 44-53-375(B) were for violations of state statutes which are indivisible and overbroad. The government opposed Simmons' arguments, arguing the statutes in question are divisible and that a review of these statutes via the "modified categorical approach"[3] establishes that Simmons had been convicted of "serious drug offenses" and "controlled substance offenses."

On December 9, 2019, the Fourth Circuit issued an unpublished opinion in Simmons' case, affirming the district court's sentence and judgment, relying in large part on its published decision in *United States v. Furlow*, 928 F.3d 311 (4th Cir. 2019), and its unpublished decision in *United States v. Marshall*, 747 F. App'x 139 (4th Cir. 2018) (No. 16-4594) (argued but unpublished), *cert. denied*, 139 S. Ct. 1214 (2019).

A petition for certiorari in the *Furlow* case is currently before this Court. See *United States v. Furlow*, No. 19-7007.

In rejecting Simmons' appeal and relying on these decisions, the court of

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[3] Citations to "JA" refer to the appellate record compiled in the Joint Appendix on file with the Fourth Circuit Court of Appeals. See *United States v. Simmons*, No. 19-4054, Joint Appendix, Vols. I & II (ECF Nos. 13 & 14) (4th Cir. Apr. 18, 2019).

appeals ignored several specific parameters set by this Court for lower courts' use when evaluating the divisibility of state statutes. First, the Fourth Circuit disregarded the text of the statutes in question, both of which provide an extended list of means by which individuals may violate the statute. This list of possible ways in which an individual may violate the statute, all contained in the same subsection, is a specific indicator that the statute contains means, not elements, and is indivisible. Importantly, this conclusion is supported by the fact that the penalty for violating the statute in question (here, either S.C. Code § 44-53-370 or S.C. Code § 44-53-375(B)) applies to all the means listed. *See* S.C. Code § 44-53-370(b)(1)-(3); S.C. Code § 44-53-375(B)(1)-(3). According to this Court's guidance, this relationship between the substantive statutory language and applicable penalty establishes that the statutes are indivisible.

In Simmons' case, relying on its *Furlow* and *Marshall* decisions, the Fourth Circuit found the state statutes in question did not definitively answer the divisibility question. Therefore, the court of appeals moved to an evaluation of state decisional law. In so doing, the Fourth Circuit failed to acknowledge a state supreme court decision which specifically found that the ways to violate a subsection of S.C. Code § 44-53-370 are means, not elements. Because statutes dealing with the same subject matter should be construed to reach a harmonious result, the Fourth Circuit erred in completely ignoring this state supreme court precedent as to S.C. Code § 44-53-370 and its application to the language in § 44-53-375(B). The Fourth Circuit's failure to acknowledge this precedent violates the

well-established principle that federal courts "have no authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Frankell*, 520 U.S. 911, 916 (1997).

In relying on *Furlow* and *Marshall* to find the statutes in question divisible, the Fourth Circuit not only erroneously applied this Court's directives regarding the proper application of the categorical approach, but also violated Simmons' rights under the Constitution.

REASON FOR GRANTING THE PETITION

The Fourth Circuit significantly and improperly departed from this Court's direction regarding the proper application of the categorical approach.

This Court should grant the writ because the correct application of this statutory analysis is paramount to protecting a defendant's rights when determining what penalty that person is exposed to once convicted for a violation of 18 U.S.C. § 922(g)(1). The Fourth Circuit Court of Appeals significantly and improperly departed from this Court's established rule of *Taylor v. United States*, 495 U.S. 575 (1990), in applying the "categorical approach" to the analysis of these two South Carolina drug statutes.

There is little doubt that the categorical approach, established in *Taylor* and its progeny, operates to preserve a defendant's Sixth Amendment rights when courts evaluate whether a defendant should be classified as an "armed career criminal" under 18 U.S.C. § 924(e). *See Shepard v. United States*, 544 U.S. 13, 24 (2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) ("The *Taylor* Court

. . . anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant"); *see id.*, at 28 (Thomas, J., concurring in part and concurring in judgment) (a failure to preserve this Sixth Amendment right would "giv[e] rise to constitutional error, not doubt"). Accordingly, even though *Taylor* and *Shepard* and their progeny analyze the statutory sentencing provision contained in the ACCA, 18 U.S.C. § 924(e), the underpinning of these decisions lies in the Sixth Amendment.

The categorical approach also requires that the materials in a defendant's record "speak plainly," otherwise a sentencing court will not be able to satisfy *Taylor*'s demand for certainty when determining whether a defendant has been convicted of a qualifying predicate offense. *See Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243, 2257 (2016) (quoting *Shepard,* 544 U.S. at 21). The Constitution demands certainty "when identifying a [predicate] offense by emphasizing that the records of the prior convictions used" must be "free from any inconsistent, competing evidence on the pivotal issue of fact separating" qualifying from non-qualifying offenses which expose a defendant to a sentence beyond that ordinarily permitted under 18 U.S.C. § 922(g)(1). *Shepard*, 544 U.S. at 21-22. A failure to properly apply the categorical approach, therefore, seriously undercuts a defendant's constitutional rights.

In Simmons' case, and in *Furlow* and *Marshall*, the Fourth Circuit rejected

this Court's direction regarding the proper application of the categorical approach in contravention of Simmons' rights. In relying on its *Furlow* and *Marshall* decisions in this case and holding that the relevant South Carolina statutes are divisible, the Fourth Circuit disregarded the indicators that courts are to view as particularly relevant to the determination of the divisibility of statutes. Specifically, the Fourth Circuit rejected this Court's direction that a statute which contains a list of illustrative examples by which the statute may be violated is indicative of an indivisible statute; disregarded this Court's recognition that a statute which contains a single statutory penalty applicable to the substantive offense is also highly indicative of an indivisible statute; and ignored this Court's direction that federal courts have no "authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson*, 520 U.S. at 916.

First, the Fourth Circuit significantly departed from a proper application of the categorical approach, as that term was first elucidated in *Taylor*, 495 U.S. 575.[4] The court of appeals did so by ignoring that the state statutes in question here contain an extended list of means by which a statute may be violated, not separate elements. Importantly, there is only one penalty associated with a violation of the substantive statute, and this penalty is *not* dependent upon the defendant committing a particular act within the substantive statute, but rather depends upon the number of convictions an individual has under the statute. This Court has

[4] Simmons does not include a full exposition of the differences between the statutory analysis conducted under "categorical approach" and the "modified categorical approach" in this petition.

specifically indicated that this statutory structure likely identifies an indivisible statute. This is unlike a divisible statute, which clearly identifies what elements must be charged and the corresponding punishments. *Mathis*, 136 S. Ct. at 2256. For example, in a separate published opinion regarding a different South Carolina statute, the Fourth Circuit properly applied this principle:

> the [Assault, beat, or wound a law enforcement officer while resisting arrest [ABWO], S.C. Code § 16-9-320(B)] statute does not provide for any alternative punishments that depend on whether the defendant had either assaulted, beaten, or wounded the officer. *See Mathis*, 136 S. Ct. at 2256 (explaining that court can look to whether "statutory alternatives carry different punishments"). We are therefore satisfied to apply the categorical approach to the ABWO offense.

United States v. Jones, 914 F.3d 893, 900-01 (4th Cir. 2019) (quoting *Mathis*, 136 S. Ct. at 2256). *See also United States v. Edwards*, 836 F.3d 831, 837 (7th Cir. 2016) ("Reinforcing that conclusion [that the statute is not divisible] is the fact that those alternatives carry the same punishment."); *United States v. Mapuatuli*, 762 F. App'x 419, 422 (9th Cir. 2019) (holding CA Hlth. & S. § 11366.5(a), which prohibits maintaining property "for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance for sale or distribution," not divisible because provided a single punishment for violating any one of these alternatives).

Despite this Court's clear directives in both *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis*, the Fourth Circuit, relying on its *Furlow* and *Marshall* decisions, reached the conclusion that S.C. Code §§ 44-53-370 and 44-53-375(B) did not have sufficient indicators to establish the statutes contain means of violations, instead of separate elements of separate offenses.

However, just the opposite is true. South Carolina Code § 44-53-370(a)(1) provides that it is illegal for an individual 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 . . . .".

The punishments for violation of this statutory subsection are contained in South Carolina Code § 44-53-370(b)(1)-(3). These penalties are based not upon a particular *actus reus* contained in S.C. Code § 44-53-370(a)(1), but rather upon whether the conviction is a defendant's first, second, or third conviction.

South Carolina Code § 44-53-375(B) provides that it is unlawful to:

> manufacture[ ], distribute[ ], dispense[ ], deliver[ ], purchase[ ], or otherwise aid[ ], abet[ ], attempt[ ], or conspire[ ] to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base. . . .

This statute also provides a unified punishment for the listed alternatives, depending not on a particular *actus reus* listed in the substantive statute, but rather on whether it is a defendant's first, second, or third conviction. S.C. Code § 44-53-375(B)(1)-(3).

As noted above, specifically relying on its decisions in *Furlow* and *Marshall*, the Fourth Circuit determined the statutes in question are divisible because they have no "indicators" establishing that the list of prohibited actions are "illustrative examples." *Furlow*, 928 F.3d at 319; *id.* at 320 (citing *Marshall*, 747 F. App'x at 150). This, the appeals court felt, establishes that "nothing therein clearly suggests that the various specified actions are means rather than elements." *Id.* at 319.

However, as established above, just the opposite is true, particularly as there is a single penalty applicable for a violation of the statute in question, the increase in which is due to the number of times one violates the statute, *not* upon a particular act listed in the statute. This is as strong an indication as any that the statutes list means, versus elements. Moreover, in Simmons' case, in an incorrect and overbroad statement, the Fourth Circuit stated that simply because the state statute includes the "purchase" of drugs as a means by which the state statute can be violated, "the statute is divisible and therefore, the modified categorical approach applies." *Simmons*, 796 F. App'x at 165 (citing *Furlow*, 928 F.3d at 319-320).[5] This is a stunningly incorrect statement of this Court's clear direction regarding how courts are to determine a statute's divisibility, and significant error which warrants correction by this Court.

Only if the language of the statute does not resolve the question of divisibility should courts then consult state court decisional law. *See Mathis*, 136 S. Ct. at 2256. If a state court decision definitively answers the divisibility question, "a sentencing judge need only follow what it says." *Id.*

Here, the court of appeals relied on *Furlow* (which evaluated S.C. Code § 44-53-375(B)), and *Marshall* (which evaluated S.C. Code § 44-53-370(a)(1)), to reject Simmons' argument regarding the proper application of the categorical approach to his state court convictions. The Fourth Circuit relied on both these decisions' faulty

[5] Neither the definition of "serious drug offense" nor "controlled substance offence" contains the "purchase" of a drug in its definition.

evaluation of state decisional authority to support an improper application of the modified categorical approach to both of the South Carolina statutes under consideration in Simmons' case. However, particularly as to S.C. Code § 44-53-370, the Fourth Circuit failed to acknowledge specific precedent of the South Carolina Supreme Court which answers the question at hand. In so doing, the Fourth Circuit substituted its own judgment for that of the South Carolina Supreme Court. This was error under thisCourt's precedent and the structural integrity of the Constitution regarding the relationship between federal and state courts.

The South Carolina Supreme Court, in evaluating the drug trafficking subsection of S.C. Code § 44-53-370, statute located at S.C. Code § 44-53-370(e)(2), found that listed alternatives in the statute are means, not elements. In *State v. Raffaldt*, 456 S.E.2d 390, 394 (S.C. 1995), the South Carolina Supreme Court held that

> trafficking may be accomplished by *a variety of criminal acts*, to wit:
>
> -knowingly selling, manufacturing, cultivating, delivering, purchasing, or bringing ten grams or more of cocaine (or any mixtures containing cocaine) into this State; or
>
> -providing financial assistance or otherwise aiding, abetting, attempting; or
>
> -conspiring to sell, manufacture, cultivate, deliver, purchase, or bring ten grams or more of cocaine (or any mixtures containing cocaine) into this State; or
>
> -knowingly having actual or constructive possession or knowingly attempting to become in actual or constructive possession of ten grams or more of cocaine (or any mixtures containing cocaine).

> It is the *amount of cocaine, rather than the criminal act*, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession.

456 S.E.2d at 394 (emphases added). In other words, South Carolina's highest state court has explicitly interpreted the trafficking statute, and similarly-worded drug statutes, to list alternative means by which a drug crime can be committed in South Carolina, not separate elements. *See State v. Harden*, 602 S.E.2d 48, 50 (S.C. 2004) (noting that drug trafficking "may be accomplished by several *means*, including conspiracy.") (emphasis added).

Raffaldt strongly supports the conclusion that the statutory alternatives in both S.C. Code § 44-53-370 and § 44-53-375(B) are means, not elements. *See also State v. Ezell*, 468 S.E.2d 679, 681 (S.C. Ct. App. 1996) ("[T]rafficking in crack cocaine may be accomplished by a *variety of criminal acts*, including the knowing *possession* of a certain quantity of the drug, under § 44-53-375(C).") (emphasis added). The only difference between the trafficking offense contained in S.C. Code § 44-53-370(e)(2) and the offense contained in S.C. Code § 44-53-370(a)(1) is the amount of drugs involved in the offense. *Raffaldt*, 456 S.E.2d at 394.

Importantly, "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986) (citing *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). "When . . . judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the

intent to incorporate its . . . judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). This is no different in South Carolina precedent. *See Fullbright v. Spinnaker Resorts, Inc.*, 802 S.E.2d 794, 798 (S.C. 2017) (holding that "it is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single harmonious result.").

Even as acknowledged by the Fourth Circuit, these two drug statutes are integrally related. *Simmons*, 796 F. App'x at 165 (the statutes "criminalize[ ] similar conduct . . . ."); *id.* (statutes "almost identical") (citation omitted). And a simple examination of the statutory language reveals that to sustain a conviction under S.C. Code § 44-53-375(B) first requires a "violation of the provisions of Section 44-53-370."

In failing to address *Raffaldt* at all, the Fourth Circuit studiously avoided the directive from this Court that federal courts have no "authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson*, 520 U.S. at 916. *See also Schad v. Arizona*, 501 U.S. 624, 636 (1991) (noting a "fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a State's courts.").

Instead of addressing this specific South Carolina Supreme Court precedent, the Fourth Circuit, in *Furlow* and *Marshall*, relied on other state court cases, several of which do not stand for the proposition for which the Fourth Circuit cited them. For example, *Furlow* relies upon *Carter v. State*, 495 S.E. 2d 773 (S.C. 1998), for the

proposition that S.C. Code § 44-53-375(B) is divisible, finding that the *Carter* court treated manufacturing as a separate offense under S.C. Code § 44-53-375(B). However, the issue in *Carter* was sufficiency of the indictment and whether Carter's plea was voluntarily and knowingly entered. The South Carolina Supreme Court held that counsel had properly advised Carter that his conviction under S.C. Code § 44-53-370 would require him to be sentenced more severely under the penalties in S.C. Code § 44-53-375(B), as S.C. Code § 44-53-375(B) does not define a separate crime as to methamphetamine, but only is an enhanced punishment for a violation of section 44-35-370 for offenses involving methamphetamine. *Carter*, 495 S.E. 2d at 776.

Also in *Furlow*, the Fourth Circuit relied on *State v. Gill*, 584 S.E.2d 432 (S.C. Ct. App. 2003), because that case allegedly sets forth the elements of distribution in S.C. Code § 44-53-375(B). But the issue in *Gill* was not the divisibility of the statute but rather whether an indictment for distribution of "crack" cocaine must allege the defendant "knowingly" accomplished the crime to confer subject matter jurisdiction. *Gill*, 584 S.E.2d 434. Whether or not an indictment is sufficient to confer subject matter jurisdiction is a wholly separate question from a statute's divisibility for purposes of the application of the ACCA.

Regarding Simmons' conviction under S.C. Code § 44-53-370(a)(1), the Fourth Circuit relied on its prior unpublished *Marshall* opinion. *Marshall* also relied on ambiguous South Carolina cases, including an unpublished South Carolina opinion, which has no precedential value in South Carolina. *See Marshall*, 747 F. App'x at

150 (citing *State v. Watson*, No. 2013-UP-312, 2013 WL 8538756, at *2 (S.C. Ct. App. 2013) (unpublished)). See South Carolina Appellate Rule 268 ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved").

The Fourth Circuit's failure to even discuss relevant state supreme court authority and to substitute its own outcome-driven interpretation of state law was a significant derivation from the premise that a federal court cannot substitute its own evaluation of state law when the state's highest court has spoken on the subject. This is exactly what happened here and warrants this Court's exercise of its oversight authority to correct.

Finally, if the text of the statute and state decisional law is unclear, courts are directed to look to other evidence present in state law, including indictments or jury instructions. *Mathis*, 136 S. Ct. at 2256-57. For example, if one of these documents includes all the statutory alternatives or uses a "single umbrella term," then this indicates that the statute is indivisible. *Id.* at 2257. This is confirmed in *Descamps*: "'[A]n indictment or criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences, would be destitute of the necessary certainty, and would be wholly insufficient.'" *Id.* at 272 (quoting *The Confiscation Cases*, 20 Wall. 92, 104, 22 L. Ed. 320 (1874)). When a defendant has been convicted of an indivisible statute which "extends further than" a serious drug offense, *id.* at 271, "[w]hatever the underlying facts or the evidence presented, the defendant still would not have been convicted, in the

deliberate and considered way the Constitution guarantees, of an offense with the same (or narrower) elements as the" serious drug offense. *Id.* at 273.

In *Furlow*, the Fourth Circuit found that State of South Carolina indictments, which routinely list "all the statutory alternatives," *Furlow*, 928 F.3d at 321, are not indivisible, but rather can be attributed to "sloppy drafting of indictments on some occasions," *id.* at 322, and do not "override[ ] the state courts' clear indications that the alternatives specified in section 44-53-375(B) are distinct offense." *Id.*

However, inclusion of all the listed alternatives in S.C. Code § 44-53-370 and S.C. Code § 44-53-375(B) and other similar drug statutes is the norm in South Carolina courts, not merely "sloppy drafting" on an occasional basis. This is evidenced by the indictments in Simmons' own case, as well as the materials attached to Simmons' sentencing memorandum filed in the district court. *See* JA 367, 370,373 (other defendant's indictments); 545, 548, 551, 554, 557 (Simmons' own indictments). If these statutes are divisible and their listings are of elements versus means, defendants have been unconstitutionally convicted of these offenses in South Carolina courts for years. The Fourth Circuit indicated that this "potential issue [is] best raised with — and resolved by — state prosecutors and the South Carolina courts." *Furlow*, 928 F.3d at 322 n.15. However, this is the very sort of indeterminacy that turns the certainty required by *Taylor* and its progeny on its head. *See Mathis*, 136 S. Ct. at 2257 (quoting *Shepard,* 544 U.S. at 21). The Constitution demands certainty in these cases by "emphasizing that the records of

the prior convictions used" must be "free from any inconsistent, competing evidence on the pivotal issue of fact separating" qualifying from non-qualifying offenses which expose a defendant to a sentence beyond that ordinarily permitted under 18 U.S.C. § 922(g)(1). *Shepard*, 544 U.S. at 21-22.

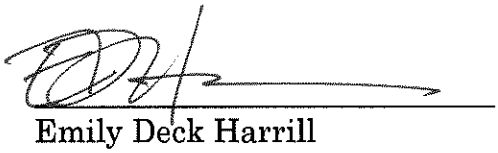
CONCLUSION

In sum, the Fourth Circuit significantly erred in its application of this Court's precedential cases regarding the "categorical approach." The Fourth Circuit's analysis undermines the long-established holdings of this Court, and operates to violate Simmons' constitutional rights. Simmons' petition should be granted, and the decision of the Fourth Circuit should be vacated and reversed with direction by this Court to properly apply *Taylor* and its progeny.

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Parks Nolan Small
Federal Public Defender
for the District of South Carolina



Emily Deck Harrill
Counsel of Record
Assistant Federal Public Defender
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
803.765.5079
Emily_Harrill@fd.org

Counsel for Petitioner

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