RECORD NUMBER: _____

In the

Supreme Court of the United States

GABRIEL Z. KERSHAW,

Petitioner,

– v. –

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner was found to be a career offender under United States Sentencing Guidelines § 4B1.1 because of a prior conviction of a South Carolina drug statute.[1] The Fourth Circuit has repeatedly held that the South Carolina statute in question is divisible, and that defendants were subject to enhancement, despite the fact that the statute includes "purchasing" as a means to violate the statute, and despite the fact that South Carolina includes the "purchasing" language in its indictments under the statute. In this case, Kershaw's indictment also included the possibility that he violated the statute by "purchasing" the drugs in question. The lower courts relied on the following description of the offense in Kershaw's South Carolina sentencing sheet to determine Kershaw was convicted of possession with intent to distribute: "Drugs/Manuf., poss. of other sub. in Sch. I, II, III or flunitrazepam or analogue, w.i.t.d. – 1st". This description is a generic description of all conduct under the South Carolina statute, including "purchasing".

The questions presented are:

Whether the Fourth Circuit should be required to use the categorical approach, applying the parameters set by this Court, to its determination that a prior conviction is a controlled substance offense pursuant to U.S.S.G. §4B1.1?

When evaluating a predicate offense, if the charging document is overbroad, should a court review clerical documents in an attempt to determine a defendant's actual conduct?

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[1] South Carolina Code Ann. § 44-53-370

PARTIES TO THE PROCEEDINGS

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

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Petitioner Gabriel Z. Kershaw respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is reported at 779 Fed.Appx. 172 (4th Cir. 2019)(Appendix A, page 1(App. A at 1)). The District Court order is not reported.

JURISDICTION

The Fourth Circuit Court of Appeals entered judgment on April 15, 2020 (App. 1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUORY PROVISIONS INVOLVED

United States Sentencing Guidelines §4B1.1

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
>
> (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

South Carolina Code §44-53-370:

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

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

STATEMENT OF THE CASE

Gabriel Kershaw pled guilty to the crime of knowingly and intentionally possessing with intent to distribute cocaine base and cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(c). Mr. Kershaw objected to a 2014 South Carolina drug conviction, under South Carolina Code §44-53-370, being considered a "controlled substance offense" under United States Sentencing Guidelines § 4B1.1. (JA 140)[2]. The Petitioner's specific objection was that the conviction was overbroad, in that the South Carolina statute, and in particular Mr. Kershaw's indictment, included "purchase" as a means that he might have violated §44-53-370. (JA

[2] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. See *United States v. Kershaw*, 18-4929, Joint Appendix, (ECF No. 19) (4th Cir. filed March 20, 2019).

139). It was agreed that "purchase" falls outside the definition of "controlled substance offense" in U.S.S.G. §4B1.2. (JA 141).[3]

The probation office relied on Kershaw's South Carolina sentencing sheet and specifically, "Criminal Data Report" (CDR) code #186 and the specific language, "Drugs/Manuf., poss. of other sub. in Sch. I, II, III or flunitrazepam or analogue, w.i.t.d. – 1st" ("Drugs/Manuf.,"), to conclude the conviction involved possession with intent to distribute. (JA 141).[4] The CDR code supplies the "Drugs/Manuf.," language on the sentencing sheet. The District Court acknowledged that the statute was overbroad, but relied on the probation office's position, specifically repeating the "Drugs/Manuf.," language in determining it was a predicate offense. (JA 65-66). The judge sentenced Kershaw to the minimum 120 months; without the career offender enhancement, Mr. Kershaw's guideline was 24-30 months. (JA 141).

On appeal, Kershaw argued the South Carolina statute should have been reviewed using the categorical method, but regardless, even if the

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[3] Mr. Kershaw has a prior conviction for Armed Robbery which was considered a "crime of violence" for guideline sentencing purposes. (JA 139-140).

[4] The CDR code is a relic from days when computers had such limited memory that 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).

modified categorical method was used, that the "Drugs/Manuf.," language could never satisfy *Shepard*[5] because it was a generic description of all conduct under the statute, including purchasing; that regardless it could not be considered an "explicit factual finding by the South Carolina trial judge to which the defendant assented"; and, that it could not satisfy the Government's burden of proof. Furthermore, at best the "Drugs/Manuf.," language is ambiguous – just as the language does not specify whether Kershaw's conviction involved a Schedule I, II, III drug, or flunitazepam or analogue, it also did not specify whether the Petitioner was convicted of a generic "Drugs" offense, or manufacturing, or possession with intent to distribute.

The panel relied on its recent decision, *United States v. Furlow*, 928 F.3d 311 (4th Cir. 2019)(vacated and remanded on other grounds, 140 S.Ct. 2824 (2020)), to determine the modified categorical approach was appropriate. *Furlow* involved South Carolina Code Ann §44-53-375, but as the court noted, the two statutes are essentially identical; in fact, *Furlow* relied on *United States v. Marshall*, 747 Fed. Appx. 139 (4th Cir. 2018), which involved §44-53-370 (App. A at 3). As in Kershaw, the

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[5] *Shepard v. United States*, 544 U.S. 13, 20 (2005)

Furlow decision did not rely on the fact that South Carolina indicted in the overbroad manner or that the statute punished the alternatives identically, it relied on unpublished lower court state opinions, while not discussing contrary South Carolina Supreme Court opinions, for the proposition the statute was divisible.

The Fourth Circuit dismissed Petitioner's other argument, that the "Drugs/Manuf.," language was ambiguous and could not satisfy *Shepard*, in the following three sentences:

> Kershaw contends that, even under the modified categorical approach, his marijuana conviction does not qualify as a career offender predicate. Specifically, he asserts that, *even though his sentencing sheet describes his conviction as possession with intent to distribute marijuana*, that description is not reliable because, due to the coding system used by the state courts, that description is merely a restatement of the overbroad statutory subsection. We have thoroughly reviewed the record and conclude that the district court did not err by relying on Kershaw's sentencing sheet in qualifying his marijuana conviction as a predicate controlled substance offense [emphasis added].

The Fourth Circuit did not explain where the Petitioner's "sentencing sheet describe[d] his conviction as possession with intent to distribute marijuana". (App. A at 4). Kershaw specifically noted that this sentence was factually incorrect in his Motion for Rehearing and that the only description on the sentencing sheet is the "Drugs/Manuf.," description. (ECF 50, page 4).

REASONS FOR GRANTING THE PETITION

This Court should grant the writ because the Fourth Circuit departed from the established rule of *Taylor v. United States*, 495 U.S. 575 (1990), requiring a categorical approach to determine whether a prior state conviction constitutes a predicate offense. This Court has consistently held the categorical approach was the default standard in evaluating a predicate offense. *Mathis v. United States*, 136 S.Ct. 2243 (2016). Only in a "narrow range of cases" is the modified categorical approach to be used. *Descamps. v. United States*, 570 U.S. 254 (2013). The *Mathis* decision builds on the Court's history of consistent jurisprudence regarding the categorical approach: Courts must look at the elements, not the particular facts of a given case; "That simple point became a mantra in our subsequent ACCA decisions." [Footnote eliminated] *Mathis* at 2251. Despite this clear precedent, courts have continued to default to the modified categorical approach rather than the categorical approach.

Kershaw and *Furlow* disregarded this Court's authority on what indicators are relevant to determine divisibility and what level of certainty is required. Instead, the Fourth Circuit rejected the fact that

an indictment listing all the statutory alternatives is indicative of an indivisible statute, it ignored relevant state precedent, and it disregarded the single penalty imposed for all the alternatives in the statute.

As this Court has noted in similar cases, this analysis should be an easy one, however, courts continue to look past the clear pathway this Court has indicated and instead venture into an investigation of what might have been. This Court should make clear, that when a defendant's indictment includes all the statutory alternatives, or when state court precedent is ambiguous, courts must default to the categorical approach.

ARGUMENT I When state charging documents routinely include all the alternatives of the statute, the punishments for the alternatives are identical, and state court precedent is ambiguous, courts should default to the categorical approach in determining predicate offenses.

The Fourth Circuit opinion departed from this Court's clear precedent; for 30 years, this Court has emphasized the importance of the charging document to the determination of divisibility and means versus elements. *Taylor* at 602. *Shepard v. United States*, 544 U.S. 13, 20 (2005)

(emphasizing the "best way to identify generic convictions in jury cases" is use of indictment and jury instructions, and similar documents when a bench trial or plea is involved); *Descamps v. United States*, 570 U.S. 254, 261 (2013) (reaffirming *Taylor's* directive to look at the charging paper and jury instructions to determine divisibility). In determining whether statutory alternatives are means or elements, this Court recently held:

> Suppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a "building, structure, or vehicle" – thus reiterating all the terms of Iowa's law. That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.

Mathis, 136 S.Ct. at 2257. If, after a review of approved *Shepard* documents, it is not clear whether the statute is divisible, then the issue must be decided in favor of the defendant; "such [state] record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy '*Taylor's* demand for certainty' when determining whether a defendant was convicted of a generic offense." *Id.* (quoting *Shepard* at 21).

The Fourth Circuit dismissed the fact that South Carolina predominantly charges these statutes in the overbroad manner, as "sloppy drafting of indictments". *Furlow* at 321. The indictment in this case, as well as *Furlow*, *Marshall*, and every other case involving this issue before the Fourth Circuit (except one), clearly show that South Carolina charges and convicts §44-53-370 and -375 in the overbroad manner. (See *United States v. Furlow*, 928 F.3d 311 (4th Cir. 2019)(vacated on other grounds 140 S.Ct. 2824 (2020), Fourth Circuit Case No. 18-4531, Motion to Reconsider and Motion to Reconsider *en banc*, (ECF 50), Exhibit 3, containing 21 indictments with the overbroad language - this small sample represents 6 of the 14 Circuits in South Carolina.)(See also *Javier Brown v. United States*, 787 Fed.Appx. 182 (4th Cir. 2019)(cert denied 140 S.Ct. 2749 (2020); Petition for Writ of Certiorari No. 19-7972, Appendix D, pp. 64 and 67) (See also *United States v. Simmons*, 796 Fed.Appx. 163 (4th Cir. 2019) Fourth Circuit Case No. 18-4210, Brief of Appellant, pp. 24-25 (ECF No. 16)(4th Cir. July 26, 2018)). (See also *United States v. Marshall*, 747 Fed.Appx. 139 (4th Cir. 2018)(cert denied139 S.Ct. 1214 (2019) Fourth Circuit Case No. 16-4594, Reply Brief of Appellant, p. 15 (ECF No. 42)(4th Cir. April 3,

2017)(*Marshall* noted it considered how South Carolina prosecutors charged these offenses, without any citations to actual indictments.[6]) (See also *United States v. Rhodes*, 736 Fed.Appx. 375 (4th Cir. 2018) Fourth Circuit Case No. 17-4162, Reply Brief of Appellant, p. 4 (ECF No. 53) (4th Cir. Oct. 23, 2017).

The Fourth Circuit cited two cases not before the panel, *South Carolina v. Gill*, 584 S.E.2d 432 (S.C. Ct. App. 2003) and *Carter v. South Carolina*, 495 S.E.2d 773 (S.C. 1998), for the proposition that "other state court indictments charging violations of those statutes are more specific". (*Furlow* at 321). *Gill* concerned a mens rea argument and *Carter* concerned a waiver of indictment. The indictment in *Gill* also used several alternatives:

> "[that he] did distribute, dispense, or deliver a quantity of crack cocaine … or did otherwise aid, abet, attempt, or

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[6] *Marshall* also relied on *South Carolina v. Watson*, 2013 WL 8538756, an unpublished South Carolina Court of Appeals case. *Marshal* noted that the case upheld an "indictment and jury form listing purchase and possession with intent to distribute separately". As was discussed by the petitioner below, *Watson* is misleading. Actual examination of the three indictments addressed in *Watson* shows that, as is typical in South Carolina, Watson was charged in a single count referencing the various ways of committing the drug offense at issue and sentenced to a single offense. (See Brief of Appellant (ECF 16) at p. 19; See also *United States v. Furlow*, No. 18-4531, Brief of Appellant (ECF No. 10) at p. 18 (4th Cir. October 1, 2018).

> conspire to distribute, dispense, or deliver crack cocaine, all in violation of Section 44-53-375…."

Gill at 434. See *Furlow*, Fourth Circuit Case No. 18-4531, *Petition for Rehearing and Petition for Rehearing En Banc* at Ex. 1 (state indictment from *Gill*). Regardless, these two cases from the past are insignificant compared to the many cases that were currently before the Fourth Circuit and the 21 indictments noted above that were overbroad. It is clear South Carolina charges in the overbroad manner; at best it is ambiguous and *Mathis* makes it clear that if these indicators do not "speak plainly," courts must resolve the inquiry in favor of indivisibility. *Mathis* at 2257: "But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule."

State Precedent Defines the Statute as Means

Arguably, the Fourth Circuit should never have looked at the indictments; "This threshold inquiry – elements or means? – is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question." *Mathis* at 2256.

Despite this, the Fourth Circuit ignored a South Carolina Supreme Court case directly on point, which explicitly interpreted §44-53-370 to list means by which the crime of trafficking can be accomplished. *State v. Raffaldt,* 456 S.E.2d 390, 394 (S.C. 1995); *Raffaldt* held that denial of the defendant's request for jury charges on "conspiracy to distribute, conspiracy to possess with intent to distribute and conspiracy to possess" were not error because the requested charges were merely "various ways to commit distribution and possession", referencing §44-53-370(a) and (d)(3). *Id.* at 393-94. The only difference between trafficking (§44-53-370(e)(2)) and conspiracy, PWID, distribution and simple possession (§44-53-370(a)(1)) is the amount of drugs involved. *Raffaldt* at 394. See also *State v. Harris*, 572 S.E.2d 267 (S.C. 2002) (Conspiracy to traffick and trafficking are the same crime, and reiterating that in *State v. Raffaldt,* the court recognized that trafficking may be accomplished by a variety of acts, including such acts as providing financial assistance or knowingly having actual or constructive possession of cocaine)(See also *Harden v. State*, 602 S.E.2d 48, 50 (S.C. 2004) "Trafficking may be accomplished by several means, including conspiracy.") (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)."

In failing to address *Raffaldt* at all, the Fourth Circuit again rejected the holdings of this Court for determining divisibility and applying the categorical approach. 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. Fankell*, 520 U.S. 911, 916 (1997). Instead of relying on a published opinion from the highest authority in South Carolina, *Furlow* relied on three lower court cases from the South Carolina Court of Appeals. (citing *State v. Brown*, 461 S.E.2d 828, 831 (S.C. Ct. App. 1995); *State v. Gill*, 584 S.E.2d 432, 434 (S.C. Ct. App. 2003); *State v. Watts*, 467 S.E.2d 272, 277 (S.C. Ct. App. 1996)). In so doing, the *Furlow* court placed great weight on the state court's passing comment "In South Carolina, the offenses of distribution of crack cocaine and possession of crack cocaine with the intent to distribute are statutory crimes, found in S.C. Code Ann. Section 44–53–375(B) (Supp.1994)", while ignoring the next sentence which indicates these alternatives "are criminalized in the same subsection, and both

carry a maximum sentence of fifteen years and a fine of at least $25,000 for a first time offender." *Brown*, 461 S.E.2d at 831. Again, the text of §44–53–370 and the case law support that this is one offense found in the same subsection subject to the same punishment. *Mathis* 136 S. Ct. at 2256. At worst, given this Court's guidance, the state case law is ambiguous regarding divisibility, which fails to satisfy this Court's "demand for certainty." *Shepard*, 544 U.S. at 21-22; *Mathis*, 136 S.Ct. at 2257.

Whether There are Different Punishments

The Fourth Circuit also dismissed the fact that the statute contains identical punishments for the listed alternatives. Instead, the Fourth Circuit noted that this Court explained in *Mathis* that different punishments are relevant to the divisibility inquiry when the statutory alternatives are punished differently, and therefore did not consider this indicator in its analysis. (*Furlow* at 321). The Fourth Circuit not only disregarded this Court's repeated indicators to determine divisibility, it repeatedly defaulted to the modified categorical approach.

Finally, the appellant is aware that in a recent case, this Court considered a similar Florida drug statute, but one without the purchasing

language. *Shular v. United States*, 140 S.Ct. 779 (2020). But obviously apparent is the fact that in *Shular* it was agreed the categorical approach was mandated. While *Shular* is different from the petitioner's case, it is clear the categorical approach is also mandated in this case, and the result should be obvious. *See Johnson v. United States*, 559 U.S. 133, 137 (2010) (relying on the least prohibited act in statute when unable to determine which aspect of statute defendant violated). Because this South Carolina statutory section prohibits the purchase of drugs, it is not a qualifying "controlled substance offense." *Salinas v. United States*, 547 U.S. 188 (2006) (prior drug conviction for simple possession did not constitute a "controlled substance offense" because plain language of §4B1.2(b) requires possession with intent to distribute). Based on the clear and oft repeated precedent of this Court, it is clear that the Fourth Circuit should have used the categorical approach in considering the divisibility of the South Carolina statutes.

ARGUMENT II When a charging document is overbroad, generic judgment records cannot be considered as reliable *Shepard* documents unless it is conclusive that the subsequent record is a comparable finding of fact assented to by the defendant.

Even if these South Carolina statutes were divisible, the Fourth Circuit ignored this Court's clear warnings of the danger of fact finding when determining whether a prior offense is a predicate offense. The Fourth Circuit's opinions in *Furlow* and *Marshall* led exactly to the absurd decision that this Court predicted – a lower court reviewing generic court documents to determine the defendant committed an offense, despite the fact the defendant may never have agreed to the conduct to which to which the lower court imagines. This Court recently reiterated that an elements-focus analysis avoids unfairness to defendants with prior convictions, and in particular when those convictions are from a guilty plea, because a defendant may have no incentive to contest what does not matter under the law. When there are mistakes (or even ambiguity) in a clerk's record, the defendant may have good reason not to object; "Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Mathis at* 2253. Kershaw's charging documents

and sentencing sheet make it clear that the defendant was convicted of a crime under Section 44-53-370(b)(2); in 2014 there would be no reason for the defendant to object to the abbreviated "Drugs/Manuf.," language of the statute on the sentencing sheet if he was merely purchasing drugs, because under the South Carolina statute he is just as guilty.

This clear and consistent mandate is not only present in the *Mathis* majority opinion, it is a consistent concern throughout the Court; Justice Breyer's dissent emphasizes looking at the charging document to determine whether or not the prior conviction was narrowed to the generic offense. The 2014 South Carolina indictment does nothing to narrow this crime and there is no conclusive proof that Kershaw pled to anything other than a generic 44-53-370(b)(2) offense. So too did Justice Thomas warn that "permitting sentencing courts to look beyond charging papers, jury instructions, and plea agreements to an assortment of other documents" would give rise to constitutional error. *Shepard* at 28. The ambiguous and confusing language in the "Drugs/Manuf." language clearly shows the dangers of relying on documents contradictory to the charging documents. This Court demands certainty "when identifying a generic 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 generic from nongeneric" offenses. *Shepard* at 21–22.

This Court is considering a similar matter in *Pereida v. Barr* (No. 19-438), *cert granted*, December 18, 2019. As the National Association of Criminal Defense Lawyers point out in their amicus brief in *Pereida*, judgment records in criminal cases can be inaccurate and confusing. As is the case here, the "Drugs/Manuf." language is not an "explicit" finding; just as this language could not help the South Carolina judge make an "explicit" finding as to whether the drug was under Schedule I, II, or III or if the drug was flunitrazepam or analogue. There is no explanation as to why the judge determined the defendant had committed the crime of PWID as opposed to Manufacturing. More problematic, there is no explanation as to why the conviction is not simply one for "Drugs". The "/" symbol or virgule, universally means "or".[7] The logical reading of "Drugs/Manuf." is that the defendant was convicted of some type of

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[7] *Dynalectron Corp v. Equitable Trust Co.*, 704 F.2d 737 (4th Cir. 1983). See also, *Knous v. United States*, 683 Fed. Appx. 859 (11th Cir. 2017); *Heritage Bank v. Redcom Laboratories*, 250 F.3d 319 (5th Cir. 2001); *United States v. Owens*, 904 F.2d 411 (8th Cir., 1990).

generic "Drugs" offense or he was convicted of Manuf or PWID. There is no explanation why the district judge determined the "Drugs/Manuf." language means the appellant was convicted of PWID as opposed to Manuf., or simply to the generic "Drugs", which would obviously include purchasing under the statute.

In addition, the "Drugs/Manuf.," language comes from South Carolina CDR code, 0186. (See Appellant's Fourth Circuit Brief, page 10-12 of 40 (ECF 16)). As was explained in far more detail in circuit court below, this code is the same code that would be used if a defendant "purchased" drugs under the statute. South Carolina repeatedly explains that CDR codes merely refer back to the South Carolina Code Section, which can also be seen on Kershaw's sentencing sheet in the top right-hand corner. (Id. 40 of 40). Furthermore, South Carolina notes that these are merely administrative shortcuts and the statute is the controlling authority. (Id. 35 of 40). All of this clearly shows the danger of relying on documents contradictory to the charging documents. The lower courts clearly departed from this Court's precedent and relied on an ambiguous statement in a clerical document that the appellant most likely never considered during his guilty plea.

CONCLUSION

The Fourth Circuit has clearly departed from this Court's precedent by using the modified categorical approach despite conflicting state case law and by ignoring the fact that the alternatives are punished identically. Regardless, even if the lower court was permitted a "peek" at the record, it should never have relied on clerical documents to override a clearly overbroad indictment. This Court should grant certiorari; in the alternative, depending on the decision in *Pereida*, the Court could grant certiorari, vacating the judgment of the Fourth Circuit, and remanding the case for further proceedings in light of *Pereida*.

Respectfully submitted,

/s/ Derek J. Enderlin

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February 10, 2021

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4929

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GABRIEL Z. KERSHAW,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Cameron McGowan Currie, Senior District Judge. (3:16-cr-00258-CMC-1)

Submitted: September 25, 2019 Decided: October 8, 2019

Before WYNN and HARRIS, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Derek J. Enderlin, ROSS & ENDERLIN, Greenville, South Carolina, for Appellant. Sherri A. Lydon, United States Attorney, William C. Lewis, Assistant United States Attorney, Brook B. Andrews, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gabriel Z. Kershaw appeals his 120-month sentence for distribution of cocaine and crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (2012). He contends that the district court erroneously sentenced him as a career offender under U.S. Sentencing Guidelines Manual § 4B1.1 (2016), because his prior conviction under S.C. Code Ann. § 44-53-370(a)(1), (b)(2) (2018) does not qualify as a predicate controlled substance offense. We affirm.

In order to be classified as a career offender under § 4B1.1, a defendant must have sustained "at least two prior felony convictions of either a crime of violence or a controlled substance offense." USSG § 4B1.1(a). A controlled substance offense is "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense. USSG § 4B1.2(b).

> When addressing whether a prior conviction triggers a Guideline sentencing enhancement, we approach the issue categorically, looking only to the fact of conviction and the statutory definition of the prior offense. The point of the categorical inquiry is not to determine whether the defendant's conduct *could* support a conviction for a [predicate offense], but to determine whether the defendant was *in fact convicted* of a crime that qualifies as a [predicate offense]. Accordingly, [t]he categorical approach focuses on the *elements* of the prior offense rather than the *conduct* underlying the conviction. For a prior conviction to qualify as a Guideline predicate offense, the elements of the prior offense [must] correspond[] in substance to the elements of the enumerated offense.

United States v. Dozier, 848 F.3d 180, 183 (4th Cir. 2017) (internal citations and quotation marks omitted). Where, however, the state statute is divisible, we apply the modified

categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). A statute is divisible if it "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Id.* A statute is not divisible, by contrast, if it "enumerates various factual means of committing a single element." *Id.* Under the modified categorical approach, "a sentencing court looks to a limited class of [*Shepard*[1]-approved] documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.*

Section 44-53-370(a)(1) makes it unlawful "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," and subsection (b)(2) establishes penalties for violations of subsection (a)(1) with respect to marijuana. Kershaw contends that the statute is categorically overbroad because it covers the purchase of controlled substances. The district court concluded that this statute is divisible and, applying the modified categorical approach, that Kershaw's South Carolina sentencing sheet established that his conviction was for manufacturing or distributing marijuana.

We review de novo a district court's determination that a defendant's prior conviction qualifies as a career offender predicate. *United States v. Furlow*, 928 F.3d 311, 317 (4th Cir. 2019). We recently held that an "almost identical South Carolina drug

[1] *Shepard v. United States*, 544 U.S. 13 (2005).

statute" was divisible.[2] *Id.* at 320 (citing *United States v. Marshall*, 747 F. App'x 139, 150 (4th Cir. 2018) (No. 16-4594) (argued but unpublished), *cert. denied*, 139 S. Ct. 1214 (2019)). The only relevant distinction between the statute at issue in *Furlow* and the statute at issue here is that the former "concerns specifically methamphetamine and crack cocaine" while the latter "applies to all controlled substances." *Id.* Under both statutes, South Carolina courts treat the purchase of a controlled substance as a distinct crime, prosecutors charge one of the listed statutory alternatives in state indictments, and juries are typically instructed to find one of the alternative elements beyond a reasonable doubt. *Id.* (citing *Marshall*, 747 F. App'x at 150).

We decline Kershaw's request to revisit our recent decision in *Marshall* and agree with the district court that § 44-53-370(b)(2) is divisible and amenable to the modified categorical approach. Kershaw contends that, even under the modified categorical approach, his marijuana conviction does not qualify as a career offender predicate. Specifically, he asserts that, even though his sentencing sheet describes his conviction as possession with intent to distribute marijuana, that description is not reliable because, due to the coding system used by the state courts, that description is merely a restatement of the overbroad statutory subsection. We have thoroughly reviewed the record and conclude that the district court did not err by relying on Kershaw's sentencing sheet in qualifying his marijuana conviction as a predicate controlled substance offense. We therefore affirm the district court's judgment.

[2] *See* S.C. Code Ann. § 44-53-375 (2018).

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

vs.

GABRIEL Z. KERSHAW

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:16-258 (001 CMC)

USM Number: 31245-171

Nathaniel Roberson
Defendant's Attorney

THE DEFENDANT:

■ pleaded guilty to count(s) 1 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:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1) & (b)(1)(C)	Please see Indictment	3/5/15	1

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) 2-3 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.

December 5, 2018
Date of Imposition of Judgment

S/Cameron McGowan Currie
Signature of Judge

Cameron McGowan Currie, Senior United States District Judge
Name and Title of Judge

December 5, 2018
Date

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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 evaluated for the section 3621e Intensive Drug Treatment Program and that he be housed at the closest available facility to the Columbia, SC area for which he qualifies.

■ 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

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of six (6) 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 conditions:

1) The defendant shall satisfactorily participate in a substance abuse treatment program, to include drug testing, as approved by the U.S. Probation Office. The defendant shall contribute to the costs of such treatment not to exceed an amount determined reasonable by the court-approved "U.S. Probation Office's Sliding Scale for Services," and shall cooperate in securing any applicable third-party payment, such as insurance or Medicaid.
2) The defendant shall submit to a mental health evaluation as approved by the U.S. Probation Office following his release from imprisonment and participate in a mental health counseling program if treatment is determined to be necessary. If able, the defendant shall contribute to the costs of such treatment in an amount determined reasonable by the court at the time of the treatment and, in any event, shall cooperate in securing any applicable third-party payment, such as insurance or Medicaid.
3) Unless able to secure stable and verifiable employment, the defendant shall participate in a vocational training or Work Force Development program as approved by the U.S. Probation Office.

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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.

Defendant's Signature _____ Date _____

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CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	**$ 100.00**		**$**	**$**

☐ 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.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

☐ 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.

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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.