

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER LEE SCOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether this case should be remanded for the Fourth Circuit to decide the issue presented below, which is whether S.C. Code §§ 44-53-370 and 44-53-375(B) are divisible into three offenses.
- II. Whether the standard applied was contrary to this Court's jurisprudence on the categorical and modified categorical approaches, resulting in S.C. Code §§ 44-53-370 and 44-53-375(B) being wrongly deemed controlled substance offenses.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

United States District Court (D.S.C.):

United States v. Scott, No. 4:18-cr-00519-RBH (May 22, 2018)

United States Court of Appeals (4th Cir.):

United States v. Scott, No. 19-4469 (docketed June 27, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Christopher Scott, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 19-4469, entered on April 30, 2021.

OPINION BELOW

The Fourth Circuit panel issued its unpublished opinion on April 30, 2021, affirming the judgment of the United States District Court for the District of South Carolina. This opinion is reported as *United States v. Scott*, 845 F. App'x 282 (4th Cir. 2021) and is attached as App. 1A-3A. On May 13, 2021, Scott filed a petition for rehearing and rehearing *en banc*, which was denied on June 22, 2021. App. 5A.

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment on April 30, 2021. App. 1A-4A. Scott filed a petition for rehearing and rehearing *en banc* with the circuit court, which was denied on June 22, 2021. App. 5A. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY/CONSTITUTIONAL PROVISIONS INVOLVED

South Carolina Code §44-53-370(a)(1) states:

- (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;

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

Scott was originally charged in an indictment of violations of 18 U.S.C. §§922(g)(1), 924(a)(2) and 924(e). After starting a jury trial, on March 20, 2019, Scott waived indictment and pled guilty to Count 1 of an Information filed that same day, which charged a violation of 18 U.S.C. §§922(d)(1) and 924(a)(2). JA 8, 20.¹

The Presentence Report (PSR) assessed Scott's base offense level as 24, pursuant to U.S.S.G. §2K2.1(a)(2), based on four previous South Carolina drug convictions. JA 90. Scott's prior convictions were pursuant to S.C. Code §44-53-370(a) and §44-53-375(B). Scott has three convictions for violating S.C. Code Ann. §44-53-370 (one involving cocaine, and two involving marijuana) and one prior conviction for violating S.C. Code Ann. §44-53-375 (involving crack cocaine). Appellant objected to his South Carolina drug offenses qualifying as controlled substance offenses.

The district court overruled Appellant's objections and determined that Scott's South Carolina drug offenses were controlled substance offenses, and that his base offense level was properly determined to be a Level 24. Scott was sentenced to a seventy-two-month term of imprisonment, within the calculated guideline range of 70 to 87 months, to be followed by a three-year term of supervised release. JA 70-71; JA 93, ¶77.

¹ Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. *Joint Appendix, Vol I & II* (ECF Nos. 11, 12), *Scott*, 845 F. App'x 282 (No. 19-4469) (4th Cir. filed Sept. 6, 2019).

The judgment was entered on June 25, 2019. JA 69-74. Appellant filed a timely notice of appeal on June 27, 2019. JA 75.

On appeal, Scott raised one issue as stated in his summary of the argument: “The South Carolina drug offense statutes set forth at S.C. Code Ann. §§44-53-370 and 44-53-375 are divisible into no more than three offenses.” *Brief for Appellant* at 5, *Scott*, 845 F. App’x 282 (No. 19-4469). Scott also argued that the analysis of *United States v. Furlow*, 928 F.3d 311, 314 (4th Cir. 2019), *cert. granted, judgment vacated*, 140 S. Ct. 2824, 207 L. Ed. 2d 157 (2020), whose judgment had not yet been vacated by this Court at the time Scott prepared his brief to the Fourth Circuit, was distinguishable because, although the Fourth Circuit held S.C. Code §44-53-375(B) was divisible, it did not identify the number of offenses contained in the statute. *Brief for Appellant* at 14-22, *Scott*, 845 F. App’x 282 (No. 19-4469). Scott argued that the logical divisibility of §44-53-370(a) and §44-53-375(B) was into three offenses, as outlined by the district court in *United States v. Goodwin*, No. 3:17-CR-01143-JMC-1, 2018 WL 6582999, at *2 (D.S.C. Dec. 14, 2018), *vacated and remanded*, 811 F. App’x 870 (4th Cir. 2020).²

In its opinion, the Fourth Circuit presented the issue as: “Scott contends that S.C. Code Ann. §§44-53-370(a)(1), 44-53-375(B) are indivisible and subject to the categorical approach, under which the statutes are overbroad.” App. 2A. The panel went on to rely on *United States v. Furlow*, 928 F.3d 311, 314 (4th Cir. 2019), *cert.*

² *Goodwin* was later vacated by the Fourth Circuit, again in reliance on *Furlow*, after this Court had vacated the judgment in *Furlow*. *United States v. Goodwin*, 811 F. App’x 870, 871 (4th Cir. 2020).

granted, judgment vacated, 140 S. Ct. 2824, 207 L. Ed. 2d 157 (2020) to reach its conclusion that the modified categorical approach applied in Scott's case. The opinion then wrongly stated that Scott did not dispute that his prior South Carolina drug convictions would qualify as controlled substance offenses under that analysis. App. 3A; *Brief for Appellant* at 5, *Scott*, 845 F. App'x 282 (No. 19-4469). As indicated, Scott's entire argument was based on the divisibility of §44-53-370(a) and §44-53-375(B) into three separate offenses. *Brief for Appellant* at 14-22, *Scott*, 845 F. App'x 282 (No. 19-4469).

Scott filed a petition for panel rehearing and rehearing en banc, pointing out that the panel had failed to address the issue he raised on appeal and had, in fact, stated that his issue was directly contrary to the issue he raised. *Petition for Rehearing and Rehearing En Banc* at 10-13 of 24, *Scott*, 845 F. App'x 282 (No. 19-4469). Scott also asked the Court to rehear his case based on supplemental authorities previously submitted to the panel, but not addressed. The Court denied Scott's petition. App. 5A.

REASONS FOR GRANTING THE PETITION

- I. Scott asks that this Court vacate the judgment of the Fourth Circuit and remand to the appellate court to rule on the issue presented. Based on this Court’s precedent, the appellate court should decide the issue raised by Scott before this Court addresses the issue raised on the merits.**

This Court’s “traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below.” *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted). Even if the issue is not presented, this Court will entertain the issue raised if the appellate court has passed upon the issue presented. *Id.* However, after granting certiorari and hearing argument, this Court has remanded when the issue presented involved a constitutional question that might not have otherwise been reached had the appellate court addressed a non-constitutional issue that was raised in the first instance. *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129 (1946). Although the non-constitutional question was before the appellate court, the issue “was neither considered nor decided by the court below”. *Id.* at 132. This Court determined it was proper to vacate the lower court judgment and remand for the lower court to decide “the non-constitutional issues material to the appeal.” *Id.*

Here, not only did the panel not pass upon the issue presented by Scott, it also ruled on an issue that is diametrically opposed to the one Scott actually presented in briefing. *Compare Brief for Appellant* at 5, *Scott*, 845 F. App’x 282 (No. 19-4469) to App. 2A. Because Scott was bound by *Furlow* at the time he prepared his brief, his question centered on how many offenses were encompassed within South Carolina’s relevant drug statutes. Scott argued: “The South Carolina drug offense statutes set

forth at S.C. Code §§44-53-370 and 44-53-375 are divisible into no more than three offenses.” *Brief for Appellant* at 5, *Scott*, 845 F. App’x 282 (No. 19-4469). Yet, the panel summarized Scott’s argument as: “Scott contends that S.C. Code Ann. §§44-53-370(a)(1), 44-53-375(B) are indivisible and subject to the categorical approach, under which the statutes are overbroad.” App. 2A.

Because the issue decided was not the issue raised by Scott, he asked the panel to rehear his appeal, or, alternatively, for an en banc hearing. In his petition, Scott asserted that a legal matter was overlooked in the opinion, and the Fourth Circuit should decide the number of offenses criminalized within S.C. Code §§44-53- 370 and 44-53-375. *Appellant’s Petition for Rehearing and Petition for Rehearing En Banc* at 4-7, *Scott*, 845 F. App’x 282 (No. 19-4469). Scott’s request was denied. App. 5A.

Therefore, Scott asks this Court to grant his petition, vacate the judgment and remand to the Fourth Circuit to decide the question he presented on appeal.

II. Should this Court determine that the Fourth Circuit appropriately passed on the issue of how many offenses are criminalized by South Carolina's drug statutes, Scott submits the panel's opinion incorrectly held that §44-53-370(a) and §44-53-375(B) are controlled substance offenses.

The parties fully recognized the binding authority of *Furlow*, 928 F.3d 311 at the time briefing occurred. However, by the time the Fourth Circuit issued its opinion, this Court had vacated the judgment and remanded *Furlow*. Furthermore, even if the opinion in *Furlow* was good law at the time of *Scott*, *Furlow* left open the question of how many offenses are criminalized under §44-53-370(a) and §44-53-375(B), an important question for defendants trying to determine what prior conduct could result in a greater loss of liberty for them. If the divisibility of these statutes comports with Scott's argument, then the Fourth Circuit has misapplied this Court's precedent on the categorical approach and wrongly counted Scott's predicates as controlled substance offenses.

Scott argued that §44-53-370(a) and §44-53-375(B) were divisible into three offenses, thereby subject to the modified categorical approach as held in *Furlow*, 928 F.3d at 318-322. As indicated, the panel incorrectly noted that Scott's argument was that the statutes were indivisible and subject to the categorical approach. App. 2A. The South Carolina drug statutes list numerous alternatives by which the crimes of distribution and possession with intent to distribute can be committed. In a case cited in *Furlow*, 928 F.3d at 319-20, a South Carolina court cited with approval the *United States v. Atkinson*, 512 F.2d 1235 (4th Cir. 1975) and *United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975) opinions, drawing analogies between §44-53-375(B) and 21 U.S.C. §841(a)(1). *State v. Brown*, 461 S.E.2d 828, 831 (S.C. Ct. App. 1995). The state court

held that §44-53-375(B) defined both distribution and possession with intent to distribute offenses similarly to the offenses in 21 U.S.C. §841. *Id.* at 831. As held by this Court, the panel “is bound by [a state court’s] . . . interpretation of state law, including its determination of the elements” of the offense at issue. *Johnson v. United States*, 559 U.S. 133, 138 (2010).

In a Fed. R. App. P. 28(j) letter filed after briefing, Scott supported his argument with *United States v. Davis*, No. 19-cr-40006-JPG, 2020 WL 998877 (S.D. Ill. 2020). *Davis* analyzed the structure of the federal drug statute 21 U.S.C. §841, which lists alternatives similar to those in §44-53-370(a) and §44-53-375(B), and states:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C.A. §841 (West).

Davis held that the federal statute 21 U.S.C. §841(a) outlines two offenses: distribution and possession with intent to distribute. *Davis* explained that the first element of crime of distribution is “distribution of a controlled substance – with all of the various prohibited activities and types of controlled substances as alternative means”. *Davis*, No. 19-cr-40006-JPG, 2020 WL 998877 at *6. In other words, “manufacture, distribute or dispense” are means that can satisfy the distribution element.

The federal definitions show that the listed means are used interchangeably. “The term ‘dispense’ means to deliver a controlled substance” 21 U.S.C.A. §802(10) (West). “The term ‘distribute’ means to deliver (other than by administering or dispensing) a controlled substance” 21 U.S.C.A. §802(11) (West). “The terms ‘deliver’ or ‘delivery’ mean the actual, constructive, or attempted transfer of a controlled substance” 21 U.S.C.A. §802(8) (West). “The term ‘manufacture’ means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly” 21 U.S.C.A. §802(15) (West). Manufacturing includes packaging, repackaging, labeling or relabeling. *Id.*

The pattern jury instructions of the United States Court of Appeals for the Seventh Circuit are cited with approval in *Davis* and are in accord with this analysis of §841. *Davis*, No. 19-cr-40006-JPG, 2020 WL 998877 at *6 (relying on *The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit* at pp. 880-83 (ed. 2020) (online at http://www.ca7.uscourts.gov/pattern-jury-instructions/pattern_criminal_jury_instructions_2020edition.pdf, last viewed May 11, 2021)) (hereinafter “*Seventh Circuit Jury Instructions*”). The Seventh Circuit identifies the elements of only two offenses criminalized by §841, distribution and possession with intent to distribute. *Seventh Circuit Jury Instructions* at pp. 880-83. The terms “manufacture, distribute or dispense” are the means of committing distribution and also are means of committing possession with intent to distribute. *Id.*

Although the term manufacture has a slightly different meaning, it is not identified as a separate §841(a) offense. *Seventh Circuit Jury Instructions* at 880-83. Manufacture is addressed separately only under 21 U.S.C. §841(c). *Id.* at 884.

The Fourth Circuit likewise held that 21 U.S.C. §841(a)(1) criminalizes two offenses, distribution and possession with intent to distribute. *United States v. Randall*, 171 F.3d 195 (4th Cir. 1999) (“Thus, we conclude that possession with intent to distribute and distribution are necessarily two different offenses.”); *see also Curry*, 512 F.2d at 1305-06 (cited with approval by the South Carolina Court of Appeals in *Brown*, 461 S.E.2d at 831). The pattern jury instructions for the District of South Carolina correspond with this understanding. Eric Wm. Ruschky, *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina* at pp. 510-11 (ed. 2020) (online at extension://oemmndcbldboiebfnladdacbdmadadm/file:///C:/Users/albro/Downloads/PatternJuryInstructions%20(11).pdf, last viewed May 11, 2021). “Title 21, United States Code, Section 841 makes it a crime to distribute a controlled substance or to possess a controlled substance with intent to distribute it.” *Id.* at 510.

The South Carolina drug statutes at issue here likewise list numerous means by which the crimes of distribution and possession with intent to distribute can be committed. The structure of the statutes at issue in this case, §44-53-370(a) and §44-53-375(B), mirror 21 U.S.C. §841:

S.C. Code Ann. §44-53-370 says:

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

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

S.C. Code Ann. §44-53-370(a) (West).

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 the provisions of Section 44-53-370, is guilty of a felony

S.C. Code Ann. §44-53-375(B) (West).

The first clauses of both §44-53-370(a) and §44-53-375(B) outline the distribution offense which can be accomplished when a person manufactures, distributes, dispenses, delivers, or purchases controlled substances. The means to accomplish the element of distribution or possession with intent to distribute in §44-53-370(a) are manufacture, distribute, dispense, deliver, or purchase.

The definitions of the means in the state statutes correspond almost exactly to the federal definitions. “Dispense’ means to deliver a controlled substance to an ultimate user” S.C. Code §44-53-110(15). “Distribute’ means to deliver (other than by administering or dispensing) a controlled substance.” S.C. Code §44-53-110(17). “Deliver’ or ‘delivery’ means the actual, constructive, or attempted transfer

of a controlled drug” S.C. Code §44-53-110(10). “Manufacture’ means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly” S.C. Code §44-53-110(25). Manufacturing includes packaging, repackaging, labeling or relabeling. *Id.* The only listed means to accomplish distribution and possession with intent to distribute that is not defined is purchase. The ordinary meaning of purchase is “to obtain by paying money or its equivalent.” <https://www.merriam-webster.com/dictionary/purchase> (last viewed on May 11, 2021).

Although Congress did not choose to expand the means by which the federal crimes of distribution and possession with intent to distribute could be accomplished, the state is certainly at liberty to define its drug statutes as it wants. South Carolina is keenly aware that it could exclude “purchase” from its list of alternatives, as it did so in a similar statute, S.C. Code §44-53-445. Purchase within a certain proximity to a school is carved out to receive a lesser penalty and is classified as a misdemeanor, which the state lawmakers could have also done with regard to distribution and possession with intent to distribute offenses. S.C. Code §44-53-445(D)(2). However, South Carolina lawmakers chose to repeatedly include “purchase” in its list of means to define both distribution, possession with intent to distribute and conspiracy. S.C. Code §44-53-370(a) and §44-53-375(B). The Fourth Circuit has already recognized that “purchase” is outside the definitions of serious drug and controlled substance offenses. *Furlow*, 928 F.3d at 319 (Because §44-53-375 includes purchase, it “is not a

categorical match with the federal definitions of ‘serious drug offense’ and ‘controlled substance offense.”).

Furthermore, although brought to the attention of both panels, *State v. Raffaldt*, 456 S.E.2d 390 (S.C. 1995), which supports Scott’s position, was omitted from both the *Furlow* and *Scott* opinions. *Appellant’s Petition for Rehearing and Petition for Rehearing En Banc* at 13-15, *Scott*, 845 F. App’x 282 (No. 19-4469); *Appellant’s Petition for Rehearing and Petition for Rehearing En Banc* at 11-13, *Furlow*, 928 F.3d (No. 18-4531). *Raffaldt* explicitly interpreted S.C. Code §44-53-370(e)(2) to list means by which the crime of trafficking can be accomplished. *Raffaldt*, 456 S.E.2d at 394. A long-standing principle of this Court is that “[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), which is in turn quoting *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433, 52 S. Ct. 607, 609, 76 L.Ed. 1204 (1932)) (internal quotation marks omitted). “When administrative and 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 administrative and judicial interpretations as well.” *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

The South Carolina Supreme Court has definitively held that the alternatives listed in S.C. Code §44-53-370(e)(2), which closely match those means in §44-53-

370(a), in the same code section, and in §44-53-375(B), in the same code chapter, as the statute at issue in *Raffaldt*, are means of accomplishing the trafficking offense. *Raffaldt*, 456 S.E.2d at 394. The only difference between trafficking (§44-53-370(e)(2)) and distribution and simple possession (§44-53-370(a) and (d)(3)) is the amount of drugs involved. *Id.* This Court’s law, and the plain language of §44-53-370(a) and §44-53-375(B), show that these statutes should be similarly interpreted. *Raffaldt* itself supports this position, as the court 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.

Regardless of whether the state scheme makes sense, or whether federal courts understand how the states administer their laws, federal courts are not allowed to place their own judgment on how state courts interpret their own laws. *Johnson*, 559 U.S. at 138 (The Supreme Court recognizes federal courts, in interpreting the ACCA, are bound by state courts’ “interpretation of state law, including its determination of the elements”).

This Court should grant the petition so that the categorical and modified categorical framework is uniformly applied to all defendants, and so defendants convicted of South Carolina drug offenses are on notice as to which crimes encompassed in §44-53-370(a) and §44-53-375(B) can potentially subject them to enhanced punishment.

CONCLUSION

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

Respectfully submitted.

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