No. _____

IN THE
Supreme Court of the United States

BRYSHUN GENARD FURLOW,

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

Kimberly Harvey Albro, Esquire
Assistant Federal Public Defender
Federal Public Defender's Office
District of South Carolina
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
Email: Kimberly_Albro@fd.org
Telephone No.: (803) 765-5088
Counsel of Record for Petitioner

QUESTIONS PRESENTED

I. Whether the Fourth Circuit erroneously refused to apply its intervening case law to Furlow's case, incorrectly applying the mandate rule.

II. 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 "serious drug offense" under the Armed Career Criminal Act and a controlled substance offense pursuant to U.S.S.G. §4B1.1.

PARTIES TO THE PROCEEDING

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

RELATED CASES

1. *United States v. Furlow*, No. 3:17-CR-00862-CMC, U.S. District Court for the District of South Carolina. Judgment entered July 12, 2018.

2. *United States v. Furlow*, No. 18-4531, U.S. Court of Appeals for the Fourth Circuit. Judgment entered June 27, 2019 and July 19, 2022.

3. *Furlow v. United States*, No. 19-7007, Supreme Court of the United States. Judgment entered July 6, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Guidelines

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bryshun Genard Furlow, respectfully prays that a writ of certiorari issues to review the unpublished opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 18-4531, entered on July 19, 2022 and the previous opinion, entered on June 27, 2019.

OPINIONS BELOW

The Fourth Circuit panel originally issued its published opinion on June 27, 2019, affirming the judgment of the United States District Court for the District of South Carolina. This opinion is reported as *United States v. Furlow*, 928 F.3d 311 (4th Cir. 2019) and is attached as App. 1A-26A. On December 13, 2019, Furlow filed a petition for writ of certiorari to this Court. On June 1, 2020, this Court granted, vacated and remanded (GVR) Furlow's case for reconsideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019). On July 19, 2022, the Fourth Circuit issued an unpublished opinion and judgment, again affirming the district court, and declining to address intervening law under the mandate rule. App. 27A-30A.

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment on July 19, 2022. App. 27A-30A. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statute 28 U.S.C.A. §2106 is relevant to this appeal:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Also 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 §44-53-375(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

Bryshun Genard Furlow pled guilty to the crime of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. §922(g). He also pled guilty to one count of possession with intent to distribute cocaine and methamphetamine, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(C). JA 118-28.[1] The probation officer classified Furlow as an armed career criminal and a career offender, with his previous conviction under South Carolina Code §44-53-375(B) identified as a predicate. *See* Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e) (providing mandatory minimum term of 15 years and maximum of life in prison for one convicted of violating §922(g) where the defendant has at least three prior convictions for a "violent felony" or a "serious drug offense") and U.S.S.G. §4B1.1 (providing an increased guideline range when a defendant has two or more convictions for a qualifying "controlled substance offense").

The presentence report ("PSR") identified Furlow as both an armed career criminal and career offender. JA 249-51. Furlow lodged objections to these classifications, referencing his previously filed memoranda which submitted §44-53-375(B) is indivisible. His objections were overruled.

Furlow's guideline range was 188-235 months. Based on Furlow's request for a downward variance, the district court sentenced him to 180 months on each count to be served concurrently and a six-year term of supervised release.

---

[1] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. *See Joint Appendix, Vol I & II*, *United States v. Furlow*, 928 F.3d 311 (4th Cir. 2019) (No. 18-4531), ECF Nos. 11-12.

Furlow appealed the decision of the district court that he was an armed career criminal and career offender. His main appellate argument revolved around whether South Carolina Code §44-53-375(B) was an indivisible, and, therefore, an overbroad statute. In particular, in Furlow's case and as is typical in South Carolina indictments, the entire list of alternatives found in §44-53-375(B) are pled in state indictments. JA 74; *Petition for Rehearing and Rehearing En Banc* at Ex. 3, *Furlow*, 928 F.3d 311 (No. 18-4531), ECF No. 50. The alternatives include purchasing, which would not qualify as a predicate for ACCA or the career offender guideline.

The Fourth Circuit issued a published opinion, affirming the district court's sentence and judgment. App. 1A-26A. In doing so, the Fourth Circuit rejected several parameters set forth by this Court for determining divisibility. The Fourth Circuit disregarded the text of the statute, pertinent case law, and the indictment.

Furlow filed a petition with this Court. *Furlow v. United States*, 140 S. Ct. 8248 (2020). On June 1, 2020, this Court granted the petition, vacated the judgment and remanded (GVR) in light of *Rehaif*, 139 S. Ct. 2191.

On remand, Furlow's case was held in abeyance pending a decision from this Court in *Greer v. United States*, 141 S. Ct. 2090 (2021). After the GVR, the Fourth Circuit issued several opinions which impacted Furlow's sentence. Furlow asked the Fourth Circuit if he could submit supplemental briefing on *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020) and *United States v. Singletary*, 984 F.3d 341 (4th Cir. 2021), which held that all discretionary supervised release conditions must be pronounced orally at sentencing. *Motion for Leave to Brief Additional Issue*, *Furlow*, 928 F.3d 311 (No. 18-4531), ECF No. 71. Furlow submitted that his case contains a

Rogers error since the written judgment does not match the oral pronouncement at sentencing. *Id*. The government opposed briefing on *Rogers*/*Singletary*, claiming it violated the mandate rule. *Government's Response in Opposition*, *Furlow*, 928 F.3d 311 (No. 18-4531), ECF No. 73. This Court denied Furlow's motion on March 10, 2022. *Order*, *id*., ECF No. 77.

Furlow also filed a Rule 28(j) letter on April 5, 2022, showing that one of his predicate convictions, distribution of crack, no longer qualified as a controlled substance offense or a serious drug offense based on *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022) and *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022). Recognizing that this Court would not allow supplemental briefing on the *Rogers*/*Singletary* error, Furlow nonetheless filed the Rule 28(j) letter for the record should his case receive further review. The Fourth Circuit refused to consider the applicability of its intervening cases to Furlow's appeal. After Furlow filed his brief on the *Rehaif* issue only, in which he admitted he could not make a showing of error, the Fourth Circuit again affirmed. App. 27A.

Furlow maintains that the intervening cases of *Rogers*, *Singletary*, *Campbell* and *Hope* are outside the mandate rule because these authorities are new intervening law "show[ing] that controlling legal authority has changed dramatically . . . ." *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (cleaned up). Application of *Campbell*, 22 F.4th 438 and *Hope*, 28 F.4th 487 would change Furlow's status as an armed career criminal, which increased his sentence to five years above the otherwise applicable ten-year statutory maximum for an 18 U.S.C. §922(g) conviction, and alter his status

as a career offender. Therefore, leaving the errors uncorrected will "result in a serious injustice." *Bell*, 5 F.3d at 67; *see Agostini v. Felton*, 521 U.S. 203, 236 (1997).

This petition follows, asking for relief from the opinions of the Fourth Circuit.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT ERRONEOUSLY HELD THAT IT COULD NOT ADDRESS ISSUES BASED ON INTERVENING CASE LAW IN FURLOW'S APPEAL AFTER REMAND BECAUSE OF THE MANDATE RULE

This Court should grant the writ to address the parameters of the mandate rule and clarify the scope of this Court's GVR in this case. Alternatively, this Court should GVR so the Fourth Circuit can apply its recent case law to Furlow's case, which would result in relief from both his armed career criminal and career offender status, and from the supervised release conditions in his written judgment that were not imposed in open court.

In recent dissents from denial of certiorari, members of this Court have explained the traditional authority of this Court to GVR and the reasons for which GVRs are typically granted. *Grzegorczyk v. United States*, 142 S. Ct. 2580 (2022); *Coonce v. United States*, 142 S. Ct. 25 (2021). For example, *Coonce*, 142 S. Ct. at 30 recognized the principle first cited decades earlier:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996). Again citing this principle from *Lawrence*, members of the Court noted that it "historically exercised this broad grant of authority to issue GVR orders" even when there is not "an absolute certainty that the judgment would be different on remand."

Grzegorczyk, 142 S. Ct. at 2583. Citing 28 U.S.C. §2106, *Grzegorczyk* recognized the only limitation on the GVR authority is that it "'be just under the circumstances.'" 142 S. Ct. at 2584. This Court has recognized it exercises its GVR power when the government concedes error, in light of new opinions from this Court and state supreme courts, for new federal and state statutes, and when administrative interpretations of federal statutes have issued. *Lawrence*, 516 U.S. at 166-67. "[T]he GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Id*. at 168. In sum, this Court has issued GVR orders when there is "a reasonable probability of a change in the result" even when the government does not confess error. *Id*. at 171.

These principles lead to the question of what happens at the appellate courts once a case is sent back on a GVR order. This Court has recognized that a GVR is not a final decision on the merits. *Henry v. City of Rock Hill*, 376 U.S. 776 (1964). In the context of a GVR based on intervening changes in the law, this Court reiterated that the GVR is not a final decision on the merits. *Tyler v. Cain*, 533 U.S. 656, 666, n.6 (2001) (citations omitted). "[A]n order remanding a case to a lower court does 'not amount to a final determination on the merits,' . . . but only a conclusion that an intervening decision is sufficiently analogous to make re-examination of the case appropriate." *Florida v. Burr*, 496 U.S. 914, 918 (1990) (Stevens, J., dissenting) (quoting *Henry,* 376 U.S. at 777).

"Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals." *Johnson v. Bd. of Educ. of City of Chicago*, 457 U.S. 52, 53-54 (1982). The law of the case doctrine generally means "that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper v. United States*, 562 U.S. 476, 506 (2011). However, this doctrine does not limit a court's power. *Id*. "Accordingly, the doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." *Id.* at 506-07 (internal quotation marks and citation omitted).

This Court's holdings about law of the case are reflected in the appellate court's rulings regarding the mandate rule. "The mandate rule prohibits lower courts, with limited exceptions, from considering questions that the mandate of a higher court has laid to rest." *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007). Although the mandate rule does "not contemplate resurrecting an issue on remand, the trial court may still possess some limited discretion to reopen the issue in very special situations . . . which include a show[ing] that controlling legal authority has changed dramatically . . . ." *Bell*, 5 F.3d at 67 (cleaned up; citations omitted); *see also United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (an intervening change of law by a controlling authority is an exception to the law of the case doctrine); *Grigsby v. Barnhart*, 294 F.3d 1215, 1219 (10th Cir. 2002) (an exception to law of the case and the mandate rule is a "subsequent, contrary decision of

applicable law by a controlling authority"); *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993) (re-opening a matter already decided requires exceptional circumstances such as "controlling legal authority has changed dramatically"); *Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1986) (exception to mandate rule is when controlling authority has changed). On a limited remand, the mandate rule usually forecloses issues waived or previously decide on appeal. *United States v. Valente*, 915 F.3d 916, 924 (2d Cir. 2019). However, "'[a] court's reconsideration of its own earlier decision in a case may ... be justified in compelling circumstances, consisting principally of (1) an intervening change in controlling law, (2) new evidence, or (3) the need to correct a clear error of law or to prevent manifest injustice.'" *Id*. (quoting *United States v. Carr*, 557 F.3d 93, 102 (2d Cir. 2009)). In a case where an intervening decision interpreted a rule of evidence before the defendant's retrial after remand from this Court, the Fourth Circuit held it was not error for the district court to apply the intervening case law and allow hearsay evidence it had previously excluded. *United States v. Lentz*, 524 F.3d 501, 528-29 (4th Cir. 2008). "Although the [law of the case] doctrine applies both to questions actually decided as well as to those decided by necessary implication, it does not reach questions which might have been decided but were not." *Id*. at 528 (citation omitted). Revisiting the issue in light of intervening authority was appropriate. *Id.* Since Furlow is in exactly the same posture, it works a manifest injustice that he would not benefit from intervening law when other similarly-situated defendants in the Fourth Circuit do benefit. *Pepper*, 562 U.S. at 506-07 (internal quotation marks

and citation omitted). Denying Furlow the benefit of case law that issued prior to reconsideration on remand by the Fourth Circuit works to defeat "the fairness and accuracy of judicial outcomes" that GVR orders historically help. *Lawrence*, 516 U.S. at 168.

Although several relevant cases that affected Furlow's sentence issued from the Fourth Circuit after the GVR from this Court, the Fourth Circuit declined to address these authorities. On remand, the Fourth Circuit held that the mandate rule barred the court's consideration of the new authorities. App. at 29A n.*. This holding is contrary to the precedent cited herein.

The Fourth Circuit issued *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020) and *United States v. Singletary*, 984 F.3d 341(4th Cir. 2021), which held that all discretionary supervised release conditions must be pronounced orally at sentencing. Furlow's case contains a *Rogers* error since the written judgment does not match the oral pronouncement at sentencing. More elementally, for the first time, the Fourth Circuit held that failure to orally pronounce the conditions of supervised release at a sentencing hearing that later end up in the written judgment does not simply result in an unreasonable sentence. *Rogers*, 961 F.3d at 295, 300. Instead, the court held that "[d]iscretionary conditions that appear for the first time in a subsequent written judgment . . . are nullities; the defendant has not been sentenced to those conditions, and a remand for resentencing is required." *Singletary*, 984 F.3d at 344 (citing *Rogers*, 961 F.3d at 295). *Rogers* and *Singletary* dramatically changed the law by holding that inclusion of supervised release

conditions that first appear in the written judgment are not actually part of the defendant's sentence. *Rogers*, 961 F.3d at 295; *Singletary*, 984 F.3d at 344. The Fourth Circuit has been willing to copiously correct these errors, even when appellate waivers would otherwise bar the issue or in cases under *Anders* review, because defendants do not have the opportunity to object to conditions which are not announced by the district court in front of the defendant. *Rogers*, 961 F.3d at 295; *United States v. Scotland*, 852 F. App'x 754 (4th Cir 2021); *United States v. Lee*, 845 F. App'x 284 (4th Cir. 2021). Therefore, Furlow submits the standard conditions in the written judgment are not part of his sentence, a newly recognized point of law that the Fourth Circuit should have applied to his case.

The Fourth Circuit also issued opinions in *Campbell*, 22 F.4th 438 and *Hope*, 28 F.4th 487, relevant to Furlow's appeal. Furlow was designated an armed career criminal and career offender. *Campbell* holds that the commentary to U.S.S.G. §4B1.2(b) cannot expand the detailed definition of controlled substance offense to include attempt offenses. 22 F.4th 438. Controlled substance offenses are defined in detail in §4B1.2(b), and do not include attempt crimes in its definition. *Id.* at 445. Furlow's conviction for distribution of crack encompasses an attempt offense and no longer qualifies as a career offender predicate. JA 244-45; S.C. Code §44-53-110(10), §44-53-110(17).

If a statute defines a state controlled substance more broadly than the substances outlawed under federal law, then the state offense cannot be a serious drug offense under the ACCA. *Hope*, 28 F.4th 487. Furlow's prior distribution

offense is arguably overbroad under *Hope*, so it would no longer qualify as an ACCA predicate. *Id.*; S.C. Code §44-53-110(9); 21 U.S.C. §802(17). Furlow submits these cases are new intervening law "show[ing] that controlling legal authority has changed dramatically . . . ." and therefore, not barred by the mandate rule. *Bell*, 5 F.3d at 67 (cleaned up).

Furlow asks that this Court grant his petition because the Fourth Circuit erroneously held that the mandate rule barred him from relief under intervening authorities. The scope of the mandate rule on GVR from this Court is an important issue that this Court should clarify.

Alternatively, Furlow asks this Court to GVR so that the Fourth Circuit can apply these intervening authorities to his case, as the cases are a change in controlling authority that would reduce Furlow's sentence, and affect his supervised release.

II. IN THE 2019 OPINION, THE FOURTH CIRCUIT FAILED TO PROPERLY APPLY THE CATEGORICAL APPROACH TO DETERMINE IF FURLOW'S PRIOR STATE DRUG CONVICTION WAS AN ACCA AND CAREER OFFENDER PREDICATE

In the Fourth Circuit's 2019 opinion,[2] the court departed from the established

[2] When a judgment is vacated, it loses its precedential value, although it can still be cited as persuasive. *Gutierrez v. Saenz*, 565 F. Supp. 3d 892, 904 (S.D. Tex. 2021) (citing *Troy State Univ. v. Dickey*, 402 F.2d 515, 516 (5th Cir. 1968); *NASD Dispute Resolution, Inc. v. Judicial Council*, 488 F.3d 1065, 1069 (9th Cir. 2007); *Johnson*, 457 U.S. at 53)). The Fourth Circuit has continued to cite to *Furlow*, 928 F.3d 311. *See*, *e.g.*, *Hope*, 28 F.4th at 500; *United States v. Lyman*, No. 21-4210, 2022 WL 1184167, at *1 (4th Cir. Apr. 21, 2022). Furthermore, Furlow is still subject to the decision rendered by the Fourth Circuit in *Furlow*, 928 F.3d 311, and this Court did not decide this issue, presented in Furlow's December 13, 2019, petition to this Court in case number 19-7007.

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 under ACCA and for the career offender guideline. The Fourth Circuit rejected, and, in fact, stated that it need not follow, this Court's guidance for determining divisibility and for application of the categorical approach. App. 14A, 17A-20A. Therefore, this Court should grant certiorari.

In holding that South Carolina Code §44-53-375(B) is divisible, the Fourth Circuit disregarded this Court's authority on what indicators are relevant to determine divisibility, and what level of certainty is required. Instead, the Fourth Circuit focused on certain factors to determine divisibility, and ignored other pertinent indicators, contrary to precedent and its own cases. Specifically, the court rejected that an indictment listing all the statutory means is indicative of an indivisible statute, ignored relevant state law, and disregarded the single penalty imposed for all the alternatives in the statute. App. 14A, 17A-20A.

In the context of the ACCA, 18 U.S.C. §924(e), this Court gave guidance on the categorical approach almost 30 years ago in *Taylor*, 495 U.S. 575. "The Courts of Appeals uniformly have held that §924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id*. at 600.

Initially, under the categorical approach, courts are to look "only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. If alternatives are listed, the statute might answer the divisibility question by identifying what

elements must be charged or whether the alternatives carry different punishments. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). In reliance on *Mathis*, analyzing another South Carolina statute, the Fourth Circuit correctly recognized this principle in a published opinion:

> the ABWO 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", was not divisible because it provided a single punishment for violating any one of these alternatives).

As directed by *Taylor*, if the statute itself does not provide clear answers under the categorical approach, then the courts should turn to the indictment and jury instructions to determine divisibility. *Taylor*, 495 U.S. at 602. For 30 years, this Court has emphasized the importance of the charging document to the determination of divisibility and means versus elements. *Id.*; *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 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**. So too if those documents use a single umbrella term like "premises": Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. See *Descamps,* 570 U.S., at ____, 133 S. Ct., at 2290. Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime.

Mathis, 136 S. Ct. at 2257 (emphasis added).

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. "[S]uch [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." *Mathis*, 136 S. Ct. at 2257 (quoting *Shepard,* 544 U.S. at 21). 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*, 544 U.S. at 21-22.

Despite this clear directive, the *Furlow* opinion failed to apply the identified factors to determine if the statute at issue is divisible. 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 . . . .

The statute provides the same punishment for the listed alternatives, depending on whether it is a first, second, or third or subsequent conviction. S.C. Code §44-53-375(B)(1-3).

Although this Court has provided two indicators that can be apparent from the face of a statute to evaluate whether it is divisible, the *Furlow* panel rejected this Court's holding. *Mathis*, 136 S. Ct. at 2256 (whether the text identifies the alternatives as elements or illustrative examples and if the statute offers multiple punishments for discrete offenses). *Furlow* recognized that *Mathis* dictates the divisibility analysis can be solved if the statute itself lists what elements must be charged or if it offers only illustrative examples, and a single punishment is identified in the statute. App. at 14A. The Fourth Circuit rejected both criteria. App. 14A, 18A-19A.

The Fourth Circuit then shifted its analysis to South Carolina case law. The Fourth Circuit focused, not on the drug indictments routinely filed in South Carolina,

but instead relied almost solely on ambiguous South Carolina case law to decide S.C. Code §44-53-375(B) is divisible. The panel concluded: "Our review of South Carolina precedents leads us to conclude that the state courts have treated the alternatives specified in section 44-53-375(B) as distinct offenses with different elements." App. 14A-15A. The Fourth Circuit cited to several appellate state court cases that are more than 20 years old. App. 15A.

The Fourth Circuit relied on three state Court of Appeals cases. App. 15A (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)). The 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 §44-53-375(B) 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 case 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.

Gill is also ambiguous. *Furlow* relied on *Gill* because the case allegedly sets forth the elements of distribution. However, the case recites the indictment, which

alleges several alternatives from §44-53-375(B):

> Gill's indictment for distribution of crack cocaine alleged that he "did **distribute, dispense, or deliver** a quantity of crack cocaine ... or did otherwise **aid, abet, attempt, or conspire to distribute, dispense, or deliver** crack cocaine, all in violation of Section 44-53-375 "

Gill, 584 S.E.2d at 434 (emphasis added). *See Petition for Rehearing and Petition for Rehearing En Banc* at Ex. 1, Ex. 3, *Furlow*, 928 F.3d 311 (No. 18-4531), ECF No. 50. The Fourth Circuit relied greatly on its prior unpublished opinions, such as *United States v. Marshall*, 747 F. App'x 139 (4th Cir. 2018), which similarly relied on ambiguous South Carolina cases, including an unpublished South Carolina opinion, which has no precedential value in South Carolina.[3] App. 16A-17A. (citing *State v. Watson*, No. 2013-UP-312, 2013 WL 8538756, at *2 (S.C. Ct. App. 2013) (unpublished)). Even if *Watson* were reliable authority, the Fourth Circuit failed to reconcile that the *Watson* indictment alleged multiple alternatives from the statute. *Brief for Appellant* at Addendum 2, 4, 6, *Furlow*, 928 F.3d 311 (No. 18-4531), ECF No. 10. Furthermore, Furlow raised the issue, but the Fourth Circuit failed to address, that the jury in *Watson* appeared to find him guilty of two of the alternatives, PWID and possession, yet only a single conviction was imposed. *Id.* at 18-20; Add. 7-8.

[3] South Carolina Appellate Court Rule 268, https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=268.0&subRuleID=&rul eType=APP ("unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved").

Nonetheless, in the face of overwhelming evidence that all the alternatives in §44-53-375(B) and similar South Carolina drug statutes are pled with all the statutory alternatives, the Fourth Circuit determined that "the sloppy drafting of indictments on some occasions [does not] override[] the state courts' clear indications that the alternatives specified in section 44-53-375(B) are distinct offenses". App. 19A-20A. Inclusion of all the listed alternatives in §44-53-375(B) and other similar drug statutes is routine, not merely "sloppy drafting" on an occasional basis. *Petition for Rehearing and Petition for Rehearing En Banc* at Ex. 3, *Furlow*, 928 F.3d 311 (No. 18-4531), ECF No. 50.

The Fourth Circuit's holding is error both because South Carolina case law is ambiguous at best, and because it ignores this Court's holding in *Mathis* that listing all statutory alternatives in indictments "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 (emphasis added). In other words, the court's observation that it need not look at the statute's penalties, or other indications of indivisibility, because a state court decision allegedly answered the question, is contrary to *Mathis* and *Taylor*'s demand for certainty.

Furthermore, the Fourth Circuit failed to address a South Carolina Supreme Court case directly on point, which explicitly interpreted South Carolina Code §44-53-370(e)(2) to list means by which the crime of trafficking can be accomplished. *State v. Raffaldt*, 456 S.E.2d 390, 394 (S.C. 1995); *Brief for Appellant* at 20, *Furlow*,

928 F.3d 311 (No. 18-4531), ECF No. 10. A longstanding principle espoused by 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 (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 in §44-53-375(B), are **means** of accomplishing the trafficking offense, not elements. *Raffaldt*, 456 S.E.2d at 394. *Raffaldt* supports that the statutory alternatives in §44-53-375(B) are means, not elements. The state 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. 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*, 456 S.E.2d at 394. South Carolina's drug

statutes are integrally related to each other, as a conviction under §44-53-375(B) first requires a "violation of the provisions of Section 44-53-370". In turn, South Carolina Code §44-53-370(a) is a lesser included offense of the trafficking statute §44-53-370(e) at issue in *Raffaldt*. *State v. Peay*, 468 S.E.2d 669, 671 (S.C. Ct. App. 1996); *Raffaldt*, 456 S.E.2d at 393-94.

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). Rather, "[t]o the extent that the statutory definition of the prior offense has been interpreted by the state's highest court, that interpretation constrains [a federal court's] analysis of the elements of state law." *United States v. Aparicio-Soria*, 740 F.3d 152, 154 (4th Cir. 2014). *See also United States v. Shell*, 789 F.3d 335, 339 (4th Cir. 2015) (courts look to state statute and "the state precedent construing it."). "Where the state's highest court has not decided an issue of state law, the federal courts defer to state intermediate appellate court decisions, unless . . . convinced that the state supreme court would rule to the contrary." *United States v. Vann*, 660 F.3d 771, 777 (4th Cir. 2011) (King, J., concurring) (*en banc*).

In sum, the Fourth Circuit could not, in conformance with precedential cases of this Court, hold that S.C. Code §44-53-375(B) is divisible. Furlow submits that the Fourth Circuit failed to consider relevant state case law, that South Carolina indictments pled the statutory means, and that the statute identifies a single

punishment for all the listed alternatives. The Fourth Circuit's analysis is contrary to the long-established holdings of this Court.

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,

s/ *Kimberly H. Albro*
Kimberly H. Albro, Esquire
Assistant Federal Public Defender
Federal Public Defender's Office
District of South Carolina
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
Email: Kimberly_Albro@fd.org
Telephone: (803) 765-5088
Counsel of Record for Petitioner

December 13, 2022