

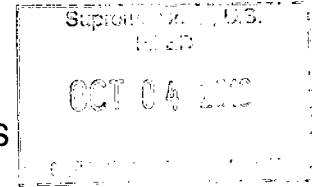
19-6233

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



ALSHAQAH TARIQ POWELL

— PETITIONER

(Your Name)

vs.

United States of America

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Third Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alshaqah Tariq Powell

75239-067

(Your Name)

FCI - Fort Dix, P.O. Box 2000

(Address)

Fort Dix, NJ 08640

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

The questions important to this case are:

- I. Whether Petitioner had the Fourth Amendment rights as a United States Citizen to be advised of his rights to the "expectation of privacy" during a detained traffic stop, before being asked to sign a contract form to search the vehicle? And whether the state trooper's failure to show concern about Petitioner's age, education, or intelligence rendered his consent to search the vehicle involuntarily, and not intelligently given under the Fourth Amendment? And under these circumstances, should this Court decide whether the consent form to search a vehicle is too unconstitutionally vague for a layman person to understand the rights he or she is waiving under the Fourth Amendment?
- II. Whether Petitioner's two New Jersey prior state convictions qualify as a "serious drug or controlled substance offenses" under the "categorical approach," and whether his career offender status is rendered invalid, by New Jersey statute lacking a mens rea? This question should be held in abeyance until this Court makes a decision in Shular v. United States, 18-6662 (2019).

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
CONCLUSION.....	20

INDEX TO APPENDICES

APPENDIX A	- Unpublished opinions affirming the judgment ⁵ of the District Court. (3rd Cir. Appeal Court. May 22, 2019).....	A-1
APPENDIX B	Order denying the Petition for Panel Rehearing. (3rd Cir. App. Court. July 12, 2019).....	A-10
APPENDIX C	Opinion of the U.S. District Court for the Middle District of PA. denying Defendant's Motion to Suppress (Jun. 12, 2017).....	A-11
APPENDIX D	Report of Investigation. (Feb. 7, 2017).....	A-17
APPENDIX E	Copy of Government Exhibits 2: PA State Police waiver of rights and consent to search form. (Nov. 3, 2015).....	A-19
APPENDIX F	Pennsylvania State Police Incident Report (Nov. 3, 2015).....	A-20

TABLE OF AUTHORITIES CITED

CASES

<u>Amos v. United States</u> , 255 U.S. 313, 317 (1921).....	15,16
<u>Bumper v. North Carolina</u> , 391 U.S. 543, 548 (1968).....	10
<u>California v. Hodaridi</u> , 499 U.S. 621, 628 (1991).....	16
<u>Descamps v. United States</u> , 133 S.Ct. 2276, 2281 (2013).....	17
<u>Dunaway v. New York</u> , 442 U.S. 200, 207 (1979).....	9
<u>Florida v. Bostick</u> , 501 U.S. 429, 434 (1991).....	16
<u>Florida v. Royer</u> , 460 U.S. 491, 501 (1983).....	14
<u>Haines v. Kerner</u> , 404 U.S. 519 (1972).....	20
<u>Johnson v. United States</u> , 333 U.S. 10, 13 (1948).....	15
<u>Lambert v. United States</u> , 46 F.3d 1064 (10th Cir. 1995).....	13,14
<u>Lawrence v. Chater</u> , 516 U.S. 163 (1996).....	9
<u>Martinez v. Attorney General</u> , 906 F.3d 281 287 (3rd Cir. 2018).....	18
<u>Maryland v. Dyson</u> , 527 U.S. 465, 466 (1999).....	9
<u>Mathis v. United States</u> , 136 S.Ct. 2243, 2248 (2016).....	18
<u>Mellouli v. Lynch</u> , 135 S.Ct. 1980 (2015).....	18
<u>Rodriguez v. United States</u> , 135 S.Ct. 1609 (2015).....	12
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218, 222 (1973).....	10,14
<u>Shaibun v. United States</u> , 920 F.2d 1428.....	15,16
<u>Shular v. United States</u> , 18-6662 (2019).....	9,17,19,20
<u>Taylor v. United States</u> , 295 U.S. 575, 600 (1990).....	17,18
<u>United States v. Abbott</u> , 748 F.3d 154 (3rd Cir. 2014).....	20
<u>United States v. Baker</u> , 221 F.3d 438 (3rd Cir. 1999).....	10,17,20
<u>United States v. Chan-Jimenez</u> , 125 F.3d 1324 (9th Cir. 1997).....	14
<u>United States v. Clark</u> , 902 F.3d 404 (3rd Cir. 2018).....	11,12
<u>United States v. Elliot</u> , 107 F.3d 810 (10th Cir. 1997).....	15
<u>United States v. Hernandez-Alvarado</u> , 891 F.2d 1414, 1418-19 (1989).....	13
<u>United States v. Julio Aviles, Sr.</u> , No. 18-2967 (3rd Cir. 2019).....	20
<u>United States v. Mesa</u> , 62 F.3d 159 (6th Cir. 1995).....	13
<u>United States v. Morillo</u> , 148 F.Supp. 2d 84 (D-Mass. 2001).....	19
<u>United States v. Page</u> , 302 F.2d 81 (9th Cir. 1962).....	15
<u>United States v. Saperstein</u> , 723 F.2d 1221, 1228 (6th Cir. 1983).....	13
<u>United States v. Shoupe</u> , 35 F.3d 835, 839 (3rd Cir. 1994).....	19
<u>United States v. Warfield</u> , 727 Fed. Appx. 182 (6th Cir. App. 2018).....	13
<u>United States v. White</u> , 890 F.2d 1413, 1418 (8th Cir. 1989).....	13
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963).....	10,17,20
<u>Wren v. United States</u> , 517 U.S. 806, 809-10 (1996).....	12

STATUTES AND RULES

21 C.F.R. § 1308-12 (b)(4).....	18
75 Pa.C.S. § 3314(b).....	11,12
N.J.Stat.Ann. § 2C: 35-5.....	18
N.J.Stat.Ann. § 2C: 35-7.....	17,18,19
N.J.Stat.Ann. § 2C: 43-6.....	19

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 2019 U.S. App. LEXIS 15134; or,
 [] has been designated for publication but is not yet reported; or,
 [X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court
appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 22, 2019.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 12, 2019, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional Provisions are involved in the case:

The U.S. Constitution - Amendment IV: The Fourth Amendment of the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The U.S. Constitution - Amendment V: The Fifth Amendment of the U.S. Constitution states that "No person shall be held . . . Nor be deprived of life, liberty, or property without due process."

The U.S. Constitution - Amendment VIII: The Eighth Amendment of the United States Constitution prohibits . . . cruel and unusual punishments inflicted.

STATUTES

- 21 C.F.R. § 1308.12(b)(4): Federal law currently exempts Ioflupane, a derivative of coca leaves, from the list.
- 75 Pa. Const. Stat. Ann. § 3314(b): The statute includes an exception if the driver is using a headset for hands-free communications, in which case sound from the cellular device must be provided through only one earphone.
- N.J. Stat. Ann. § 2C: 35-5: prohibits possession of a controlled dangerous substance with intent to distribute.
- N.J. Stat. Ann. § 2C: 35-7: prohibits distributing, dispensing or possessing with intent to distribute a controlled dangerous substance . . . on any school property . . . or within 1,000 feet of such school property or a school bus, is "guilty of a crime of the third (3rd) degree."
- N.J. Stat. Ann. § 2C: 43-6: The range of punishment for a crime of the third degree is 3 to 5 years.

STATEMENT OF THE CASE

A. Background History

On November 3, 2015, State Trooper David Long of the Pennsylvania State Police was observing southbound traffic on Interstate 81 from the interstate median. (Tr. at 12:1-2, 27: 5-12, 29: 2-4.) Trooper Long positioned his unmarked SUV perpendicular to the interstate to watch traffic pass from right to left through Dauphin County, Pennsylvania. (Tr. at 5:16-21, 31: 2-10.) During this time, Petitioner Powell drove past Trooper Long in a black Ford Taurus. (Tr. at 27: 13-22; 28: 2-4.) The Ford Taurus had tinted windows, displayed a temporary New Jersey tag, and was not speeding. (Tr. at 7: 16-17; 28: 2-12.)

Petitioner allegedly passed by his patrol car, Trooper Long allegedly observed Petitioner wearing white headphones over his left ear. (Tr. at 9: 11-19; 31: 11-25.) Trooper Long could not tell whether Petitioner wore headphones over his right ear. (Tr. at 9: 13-14; 32: 1-3.) Nonetheless, Trooper Long followed Petitioner before crossing into the interstate and activated his lights. (Tr. at 33: 10-21.) Petitioner pulled over to the side of the interstate. Trooper Long approached the passenger window and allegedly witnessed Petitioner talking on the phone with headphones over both ears. Trooper Long told Petitioner that driving with headphones over both ears violated Pennsylvania's vehicle code. Petitioner responded that he used the headphones' Bluetooth to talk on the phone. Trooper Long explained that he would not give him a citation for driving with headphones. Pet. App. A-11.

Trooper Long then proceeded to ask Petitioner for his license and registration, whether he drove from New Jersey, and who owned the Ford Taurus. Pet. App. A-19. Petitioner allegedly stated that he was driving from the New Jersey state line to visit his girlfriend who worked in York County, P.A. Petitioner made it known to the state trooper that he was not the owner of the Ford Taurus he was driving. Pet. App A-11,12.

Petitioner provided Trooper Long with North Carolina identification, offered a New Jersey temporary registration card, and acknowledged that he was not licensed to drive. Trooper Long returned to his SUV, messaged Trooper Travis Martin of the Pennsylvania State Police for backup, and started his inquiry into the vehicle's registration as well as Petitioner's criminal history. At this time, Trooper Long also allegedly detected a possible odor of marijuana from the vehicle. However, Trooper Long did not initially confront Petitioner with his suspicion and sought Trooper Martin's opinion as to the presence of marijuana because Trooper Long had a cold at the time. (Tr. at 15: 6-17; 35: 22-25.) Trooper Martin allegedly appeared on the scene approximately five minutes later. (Tr. at 52: 20-23.) Trooper Martin spoke with the Petitioner, and inquired into the purpose of his trip, and did not detect an odor of marijuana in the Ford Taurus. Pet. App. A-12.

Approximately twenty-five minutes into the stop, Trooper Long returned to Petitioner and asked him to step out of the Ford Taurus. A pat-down of Petitioner's person revealed only a pack of "Indian cigarettes." Again, Trooper Long asked Petitioner questions about the purpose of his trip, "at no time during the stop was Petitioner free to leave the police

encounter." (Id. at 12.) Pet. App. A-15. Trooper Long then asked Petitioner for permission to search the Ford Taurus, and Petitioner stated, "yeah, I guess." Trooper Long explained to Petitioner that he needed a definitive yes or no response. Petitioner explained that "he didn't understand the purpose of the search or why Trooper Long wanted to search, "however Petitioner did provide both verbal and written consent, after Trooper Long informed "Petitioner that he can obtain a warrant to search the vehicle." Pet. App. A-12, 20-21. The record is unclear whether the State Troopers advised Petitioner of his "right to expectation of privacy" before having him sign the consent form to search, because Petitioner had to complete the consent form on the road and outside of the view of Trooper Long's dashcam video. Pet. App. A-12, 19-21.

Trooper Martin's search of the Ford Taurus' trunk revealed paper-wrapped packages of heroin and bricks of heroin. Trooper Martin discovered the heroin by unzipping a backpack located in the vehicle's trunk. Trooper Martin immediately pointed his taser at Petitioner upon seeing the narcotics and instructed Trooper Long to take Petitioner into custody. A review of the dashcam video doesn't show the troopers questioning Petitioner's knowledge of the drugs, to determine if he was aware that drugs were discovered in the trunk. Trooper Martin then proceeded to take Petitioner into custody and allegedly read him his Miranda rights. Petitioner was already detained for over 25 minutes and before narcotics were found in the trunk because he was not free to leave. Pet. App. A-11-21.

On June 22, 2016, a grand jury returned a one-count indictment charging Petitioner with possession with intent to distribute heroin.

Petitioner entered a plea of not guilty on June 28, 2016, and he filed a motion to suppress physical evidence on January 22, 2017. A suppression hearing was conducted on May 17, 2017, and at the suppression hearing, Trooper Long and Martin testified to the events surrounding Petitioner's arrest on November 3, 2015. Pet. App. A-12. The U.S. District Court of the Middle District of Pennsylvania denied the motion to suppress on June 12, 2017. Pet. App. A-11, 12-16.

Petitioner then entered a guilty plea, preserving his right to appeal the denial of his suppression motion on December 1, 2017. On July 25, 2018, Petitioner was sentenced to a term of imprisonment for 188 months on count 1, with 5 years of supervised release, a \$100 special assessment and \$1,500 fine. A notice of appeal was filed on August 1, 2018, and his appeal was affirmed by United States Court of Appeals for the Third Circuit on May 22, 2019. Petitioner's motion for a 30 day extension to file a petition for panel rehearing was granted, therefore, moving the deadline from June 5, 2019 to July 5, 2019, to file for rehearing. On July 2, 2019, Petitioner filed his motion for panel rehearing which was denied on July 12, 2019, and it was filed in a timely fashion. Pet. App. A-1, 2-16.

B. Relevant Facts Pertinent for Review

The Government in its appellee brief concedes that Trooper Long at the time of the stop could not have determined whether Petitioner was wearing headphones over both ears, and also concedes that even if Petitioner was wearing headphones over both ears, "it may be true that over-the-ear

headphones could still allow adequate noise through to allow a driver to legally wear them while driving." Pet. App. A-4, 5, 11-16, 20-21.

Trooper Long testified that his interest was initially drawn to the vehicle for reasons that had nothing to do with headphones. At the suppression hearing, the trooper testified that "the vehicle -- what first caught my attention, he was traveling in the right lane by himself on Interstate 81 southbound, and he was driving slower than the average motoring public I see on a day-to-day basis." (Suppression Transcr. p. 9:7-19.)

Trooper Martin testified that Petitioner gave Trooper Long consent to search the Ford Taurus, and Trooper Long testified that Petitioner completed a form that provided consent to search the vehicle. However, the trial court acknowledged that a review of the dashcam video reveals no concerns about Petitioner's age, education, or intelligence from which the trial court could infer that Petitioner's consent was not given voluntarily or intelligently. Pet. App. A-16. Nevertheless, the trial court denied his suppression motion, although Petitioner's consent was not intelligently and voluntarily made. Pet. App. A-16, 20-21.

Petitioner appeals the denial of his suppression motion and his sentence arguing two main issues: That the traffic stop and resulting search were unconstitutional, and also his sentencing was procedurally and substantively unreasonable, because Petitioner's New Jersey State prior convictions are not qualifying serious drug offenses under the "categorical approach." And his prior drug convictions were not "controlled substance offenses" under the career offender status, because the New Jersey statute lacks a "mens rea requirement," and for this same reason his petition for a

writ of certiorari should be held in abeyance until this Court makes its decision in Shular v. United States, 18-6662 (2019), because his sentencing issued is closely related to Shular (supra). Pet. App. A-1, 2-21. Petitioner seeks a "G.V.R." in light of previous Supreme Court decisions concerning Fourth Amendment violations during traffic stops.

REASONS FOR GRANTING THE PETITION

- A. The Court of Appeals improperly conducted its analysis without considering the totality of the circumstances under the Constitution's 4th Amendment, and overlooking the unconstitutional vagueness of P.A. State Trooper's consent form to search the vehicle and how it fails to give ordinary citizens a fair and complete notice of their rights they're waiving as required by the Fifth Amendment of the U.S. Constitution.

This court has decided in the past to give "G.V.R.s" or "grant" certiorari, "vacate" the decision below, and "remand" cases back for reconsideration by the lower court - when it believes that the lower court should give further thought to its decision in light of an opinion of this Court. Lawrence v. Chater, 516 U.S. 163 (1996) (a GVR order, when used in accordance with the Supreme Court's flexible approach, 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 the Supreme Court's plenary review.)

Generally, the Fourth Amendment to the Constitution of the United States, applicable to the states through the Fourteenth Amendment, requires probable cause and a warrant before police may make an arrest or conduct a search. Maryland v. Dyson, 527 U.S. 465, 466 (1999) (per curiam); Dunaway v. New York, 442 U.S. 200, 207 (1979).

When there is valid consent, a search is constitutionally

permissible. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). The prosecution bears the burden of proving that consent was freely and voluntarily given. Id. (quoting Bumper v. North Carolina, 319 U.S. 543, 548 (1968)). In Schneckloth, the Supreme Court adopted the test for voluntariness of a confession and applied it to the voluntariness of consent to search a vehicle, concluding that the issue is whether the defendant's will was overborne. 412 U.S. at 225-226. The issue of voluntariness is a question of fact to be determined from the totality of the circumstances. Id. at 227. A court may consider such circumstances as a defendant's age, education, and intelligence, whether the defendant was advised of his constitutional rights, and whether any questioning was repeated or prolonged. Once a consent to search Petitioner's vehicle is determined to be involuntary and not intelligent, then the traffic stop is no longer classified as a legal search, which would make any evidence obtained in the search "fruit of the poisonous tree" under WongSun v. United States, 371 U.S. 1171 (1963).

The Third Circuit analysis of Petitioner's case and appeal are in conflict with this Court's decision in Bumper v. North Carolina (supra) and WongSun v. United States (supra), and in conflict with its decision in United States v. Baker, 221 F.3d 438 (3rd Cir. 1999). In Baker (supra), the Third Circuit held that the defendant had a standing to assert his U.S. Const. Amendment IV, rights because he had substantial control over and, thus, a reasonable expectation of privacy in a borrowed car. Under Pennsylvania law, defendant's signing the consent-to-search form did not operate as a waiver of U.S. Constitutional Fourth Amendment's requirement that warrantless searches be based on reasonable suspicion. After finding that the fruits of the search

of defendant's car trunk had been illegally obtained, the Third Circuit reversed the defendant's conviction.

In the instant case, Trooper Long's incorrect interpretation of the law led him to believe that Petitioner driving with headphones on one ear was a violation of Pennsylvania law to wear headphones while driving, and this was Trooper Long's reason for the traffic stop of Petitioner's car. Pet. App. A-4, 5, 11, 20. The traffic stop was not constitutionally valid, because the P.A. statute provides an exception for, "the use of a headset in conjunction with a cellular telephone that only provides sound through one ear and allows surrounding sounds to be heard with the other ear...." 75 Pa. C.S. § 3314(b). The statute doesn't prohibit Petitioner from wearing headphones on both ears; according to the wording of the statute, one could have headphones that cover both ears provided it is in conjunction with cellular telephone service and the sound is only through one ear, and surrounding sounds can be heard with the other. Trooper Long testified that Petitioner's response to the violation was that he used the headphones' Bluetooth to talk on the phone. Pet. App. A-11. Which is proof that Petitioner was in compliance with the statute requirement, and renders Trooper Long's traffic stop "unreasonable" under the Fourth Amendment, which was overlooked and not addressed by the Third Circuit. See: United States v. Clark, 902 F.3d 404 (3rd Cir. 2018) (A traffic stop's mission is to address the traffic violation that warranted the stop and attend to related safety concerns, after the traffic stop is concluded, to then turn to defendant for questioning that sought suspicion for criminal activity went beyond ordinary inquiries incident to the traffic stop.).

The stop concluded when Trooper Long told Petitioner that he was

not going to issue a citation for violation of 75 Pa.C.S. § 3314 at the beginning of the stop, to then turn to Petitioner for questioning that sought suspicion for criminal activity went beyond ordinary inquiries incident to Trooper Long's traffic stop. Pet. App. A. 1-5, 11, 20.

Like Clark (supra), Petitioner was held for repeated questioning by Trooper Long for over 25 minutes, even when Petitioner's identification and registration document turned out to be legitimate, Trooper Long made it clear that Petitioner was not free to go, and had already called for backup and a K9 dog, after the initial traffic stop was concluded, and none of Trooper Long's questions were related to the initial stop. Pet. App. A. 11-12, 20-21. A traffic stop, even if brief and for a limited purpose, this Court held that it "constitutes a 'seizure' of 'persons' within the meaning of the Fourth Amendment." Whren v. United States, 517 U.S. 806, 809-10 (1996). Within the 25 minutes seizure of Petitioner's person, Trooper Long never returned his "ID and registration" back to him, he asked Petitioner to step outside the vehicle and pat search Petitioner against his Fourth Amendment rights and before Trooper Long's request for Petitioner's consent to search the vehicle, this whole encounter was unreasonable and went beyond the ordinary inquiries incident to the traffic stop. Clark (supra).

In Rodriguez (infra), the Court directs the lower court's attention to the mission of the traffic stop to determine whether it is impermissibly lengthened, and held that a stop becomes unlawful when it lasts "... longer than is necessary" to complete its mission, the rationale being that the "authority for the seizure ... ends when tasks tied to the missions are, or reasonably should have been, completed." Id. at 1614. To prolong a

stop beyond that point, the officer must have acquired reasonable suspicion during the mission to justify further investigation." Rodriguez v. United States, 135 S. Ct. 1609 (2015).

The lower court determined that Trooper Long's reasonable suspicions were born of Powell's apparent nervousness, his shaky hands, and his inconsistent and dubious answers to the trooper's questions, as well as the vehicle's registration, which was only four days old. Pet. App.. A-5 (Footnotes 14). Nervousness is not a ground sufficient in and of itself to establish reasonable suspicion. See United States v. Mesa, 62 F.3d 159 (6th Cir. 1995), the Sixth Circuit and other circuits would disagree with the Third Circuit analysis of "reasonable suspicion," when it rejected an officer's argument that he had reasonable suspicion where the passengers told inconsistent stories regarding whether the relative they had visited had a heart attack or a stroke. Mesa (supra) and see also United States v. Warfield, 727 Fed. Appx. 182 (6th Cir. App. 4/13/18).

The 9th Circuit has held in United States v. Hernandez-Alvarado, 891 F.2d 1414, 1418-19 (1989), that a defendant's alleged nervousness is insufficient to create reasonable suspicion. In United States v. White, 890 F.2d 1413, 1418 (8th Cir. 1989), the Eighth Circuit held that "an airline passenger who was stopped because he fit the drug courier profile and appeared nervous after the stop did not provide officers with reasonable suspicion; nervousness is an inherently unsuspicious behavior trait. See United States v. Saperstein, 723 F.2d 1221, 1228 (6th Cir. 1983). As in Lambert (infra), the Petitioner's nervous condition, appearance and shaky hands were of little significance because none of the state troopers had any prior contact with the

Petitioner with which to compare his behavior. Lambert, 46 F.3d 1064 (10th Cir. 1995), and also Florida v. Royer, 460 U.S. 491, 501 (1983). Here, the Petitioner has shown that there was no reasonable suspicion to prolong the traffic stop to conduct an investigative stop and search, and the heavy burden was on the Government to meet in the Third Circuit Court of Appeals, which it failed to do so. Therefore, Petitioner had the right to expectation of privacy, which the Third Circuit never addressed this issue within its analysis.

Why the lower courts continued to enforce not the Fourth Amendment Right to expectation of privacy of individuals who are seized or detained during a traffic stop? Petitioner was entitled to be advised of his right to expectation of privacy prior to being asked to sign a consent form to search the vehicle by the troopers as a Fourth Amendment right and failure to be concerned about Petitioner's education, age and intelligence renders the consent involuntary.

Once again, the government bears the heavy burden of demonstrating that the consent is freely and voluntarily given. United States v. Chan-Jimenez, 125 F.3d 1329 (9th Cir. 8/8/97). The courts must consider the totality of the circumstances such as Petitioner's age, education, and intelligence. Schneckloth (supra). In the attached opinion of the motion to suppress, the district court in this case, made it known that "a review of the dashcam video reveals no concerns about Defendant's age, education, or intelligence from which the district court judge could infer that his consent was not given voluntarily or intelligently. Pet. App. A-16. ON the district court level, the courts were aware that Petitioner's consent was not voluntary

and erroneously chose to deny his motion to suppress the evidence, and the Third Circuit appeal court overlooked the district court error, by not analyzing "the dashcam video" to determine the totality of the circumstances, when it decided Petitioner's appeal. United States v. Elliot, 107 F.3d 810 (10th Cir. 1997).

If Petitioner was advised of his right to expectation of privacy and of his right to refuse the search under the Fourth Amendment, failure to inform Petitioner of this constitutional right deprived him of options. The record shows where the trooper's main concern was to search Petitioner's vehicle at all costs, Petitioner informed the trooper that he did not own the vehicle, and he did not understand the purpose of the search. Pet. App. A. 17-18, 20-21. Trooper Long thought he smelled the odor of marijuana, however during the search of Petitioner and the vehicle, no marijuana was found. Pet. App. A. 2, 11-12, 21. The troopers failed to inquire knowledge of Petitioner's awareness of contraband in the vehicle, since he didn't own the vehicle, nor consider the fact that Petitioner may have a nervous condition or medical condition that led to his suspicion to search the vehicle. Third Circuit overlooked the totality of all the circumstances before it made its decision. Petitioner was not informed by Trooper Long or Martin of the nature of the search. Pet. App. A. 1-21.

In Shaibu, 920 F.2d at 1428, the Ninth Circuit held that the police would so, without request, create an impression of authority to do so ... "coercion is implicit in situations where consent is obtained under the color of the badge." (quoting United States v. Page, 302 F.2d 81 (9th Cir. 1962)). see also Johnson v. United States, 333 U.S. 10, 13 (1948); Amos v.

United States, 255 U.S. 313, 317 (1921) (such submission is not effective consent. Id.). Petitioner's signature on the form was invalid, and the form to search the vehicle was too broad and unconstitutionally vague for him to understand what he's signing to or the constitutional rights he's waiving. Pet. App. A-19. Petitioner's consent to search was not voluntary, but rather coercion and submission to Trooper Long and Martin, under the color of the badge, because it is clear Petitioner was not free to leave. Shaibu (supra). Pet. App. 1. 1-5, 15, 20-21.

This Court held that, for purposes of the Fourth Amendment, a seizure occurs when a law enforcement officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen. Florida v. Bostick, 501 U.S. 1129, 434 (1991). A police officer has restrained the liberty of the citizen if, "taking into account all of circumstances surrounding the encounter, the police conduct would 'have police presence and go about his business.'" ??? Id. at 437 (quoting California v. Hodaridi, 499 U.S. 621, 628 (1991)). Petitioner has shown this Court that his Fourth Amendment was violated when Trooper Long used his authority to make an invalid traffic stop of Petitioner's vehicle, then unreasonably prolonged the detention to coerce Petitioner to make an unintelligent decision to sign an unconstitutionally vague consent form to search the vehicle, without being concerned of Petitioner's age, education, and intelligence. Pet. App. A. 1-21. The government failed again to meet its burden and cannot prove beyond a shadow of a doubt that Petitioner intelligently and voluntarily consented to the search without coercion being involved.

For all the above reasons, Petitioner in "good faith," asks this

Court to "G.V.R." his case back to the lower court in consideration of the totality of the circumstances and illegal search under the Fourth Amendment, which would make any evidence obtained in the search "fruit of the poisonous tree" under WongSun v. United States, 371 U.S. 471 (1963). And in light of United States v. Baker, 221 F.3d 138 (3rd Cir. 1999), where the Third Circuit held that the expectation of privacy extends to the trunk of the vehicle, and reversed defendant's conviction, because the fruit of the search of the defendant's car trunk had been illegally obtained.

- B. The Third Circuit conducted its analysis of Petitioner's prior New Jersey State drug convictions under the modified categorical approach instead of the categorical approach, and should of held its decision in abeyance until this Court decided Shular v. United States, 18-6662 (2019).

The Third Circuit reasoning set forth in its opinion should be reexamined because it applied the modified categorical approach in its analysis to determine whether Petitioner's New Jersey State prior drug conviction under N.J.STAT.ANN. § 2C:35-7, is a qualifying career offender predicate instead of conducting its analysis under the categorical approach. Pet. App. A. 6-7.

This Court held in Descamps v. United States, 133 S. Ct. 2276, 2281 (2013), that: To determine whether a prior conviction is a Career Offender predicate, the court must employ a "categorical approach" that involves comparing "the elements of the 'generic' crime, i.e. the offense as commonly understood." The categorical approach considers "only the statutory definitions: i.e., the elements - of a defendant's prior offenses, and not "to the particular facts underlying those conviction." Id. at 2283 (quoting Taylor

v. United States, 295 U.S. 575, 600 (1990). A statute is indivisible when it sets forth a single set of elements to define a single crime. Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). Petitioner brought this correction to the Third Circuit's attention in his petition of rehearing en banc, where he explained that if the statute is "indivisible," the analysis is straightforward; the court does not examine underlying documents associated with the prior convictions.

When looking at New Jersey drug statutes under N.J.Stat.Ann. § 2C:35-7, for general controlled substance, is a "crime of the third degree" no matter what the specific drug in possession. The Third Circuit opinion in the instant case is in conflict with its decision in Martinez v. Attorney General, 906 F.3d 281, 287 (2018), where the Third Circuit explained, "To be sure, N.J.State.Ann. § 2C:35-5 statute criminalizes any derivative of coca leaves. And federal law currently exempts Ioflupane, a derivative of coca leaves, from lists. 21 C.F.R. § 1308-12(b)(4). The Third Circuit further states that the categorical approach directs it to compare the schedules at the time of conviction. Mellouli v. Lynch, 135 S. Ct. 1980 (2015). However, it did not apply the categorical approach to Petitioner's prior New Jersey drug conviction under N.J.Stat.Ann. § 2C:35-7, which do not qualify this statute as a controlled substance compared to a "federal controlled substance" because the New Jersey list of controlled substances is currently broader than the federal list. Petitioner entered a guilty plea to the indictment on November 20, 2017, the new federal list of controlled substances was in effect at the time of his conviction, which is not as broad as New Jersey statute for controlled substances, and does not categorically match the federal controlled

substances under the categorical approach. Therefore, rendering Petitioner's current sentence under the career offender status is cruel and unusual punishment in violation of his Eighth Amendment because his career offender status over-represents his criminal history category. United States v. Shoupe, 35 F.3d 835, 839 (3rd Cir. 1994).

Petitioner's prior drug convictions cannot stand under the categorical approach nor as a federal enhancement under Amendment 591. United States v. Morillo, 148 F. Supp. 2d 84 (D. Mass. 2001), Amendment 591 clarified that the enhancement of U.S.S.G. § 2D1.2 applies only when the defendant was convicted of or stipulated to an offense referenced in section 2D1.2. And even in light of the pending Shular v. United States, 18-6662 (2019), before this Court, Petitioner's issues are similar and should be held in abeyance until this Court decides Shular (supra), because his prior New Jersey State drug conviction under N.J.Stat.Ann. § 2C:35-7, are not a controlled substance or a serious drug offense under 4B1.1(a) for career offender status. The New Jersey statute lacks a mens rea requirement and does not qualify Petitioner's sentence for a career offender enhancement.

A serious drug offense "is an offense under state law, punishable by at least ten years of imprisonment, involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance. U.S. Sentencing Guidelines Manual § 4B1.2(b)(2013). The range of punishment for a "crime of the third degree" in New Jersey is 3 to 5 years. N.J.Stat.Ann § 2C:43-6, therefore, cannot be classified as a serious drug offense. Petitioner's sentencing guidelines would be a total offense level of 21 and criminal history category would have been III, and sentence range 46-57 months

without the career offender enhancement, the lower courts overlooking this miscarriage of justice, and deprived Petitioner of a fair sentence. The modified categorical approach may apply to P.A. Statute as mentioned in United States v. Abbott, 748 F.3d 154 (3rd Cir. 2014), however it has nothing to do with New Jersey statute, nor Petitioner's sentences, and the Third Circuit opinion concerning his sentence is in error, and should of used all the above mentioned options in its analysis, or held Petitioner's case in abeyance until the Third Circuit decided United States v. Julio-Aviles, Sr., No. 18-2967 or for this Court to decide Shular v. United States, 18-6662 (2019).

For all the above reasons, Petitioner prays that this Court in "good faith" grant this petition, vacate the lower court judgement, and remand back to the lower courts for consideration in light of WongSun (supra) and Baker (supra) under the Fourth Amendment.

In summary, Petitioner prepared his Petition for a Writ of Certiorari to the best of his knowledge and ability, without the aid of counsel, and not on the level as a professional lawyer, and further asks this Court to review his Petition for Certiorari in accordance with the remand provision. Haines v. Kerner, 404 U.S. 519 (1972).

CONCLUSION

Petitioner Alshaqah Tariq Powell, respectfully requests that this Court grant this petitioner for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



ALSHAQAH TARIQ POWELL

Date: October 2, 2019

INDEX TO APPENDIX

Third Circuit Court of Appeals Documents

- A. Unpublished Opinion affirming the judgment of the District Court. (3rd Cir. Appeal Court, May 22, 2019)..... A-1
- B. Order denying Petition for Panel Rehearing. (3rd. Cir. App. Court. July 12, 2019)..... A-10

District Court Documents

- C. Opinion of the U.S. District Court for the Middle District of Pennsylvania denying defendant's Motion to Suppress. (Jun. 12, 2017)..... A-11

Other Appendices

- D. Report of Investigation. (Feb. 7, 2017)..... A-17
- E. Copy of Government Exhibit 2: P.A. State Police waiver of rights and consent to search form. (Nov. 3, 2015)..... A-19
- F. Pennsylvania State Police Incident Report. (Nov. 3, 2015)..... A-20