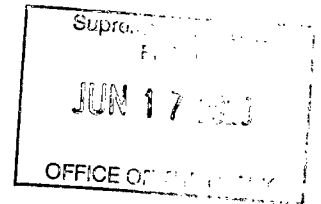


20-5429

No. USCA 7#18-3431

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Derrick Neville — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the seventh circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

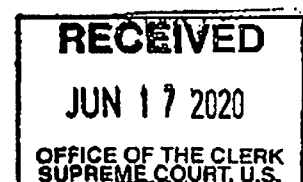
PETITION FOR WRIT OF CERTIORARI

Derrick Neville
(Your Name)

P.O. Box 1000
(Address)

Oxford, WA 53952
(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

I. In *Shular* this court held that the categorical approach does not apply to the term "serious drug offense" pursuant to 924(e)(2)(A)(ii). The term "requires only that the state offense involve the conduct specified in the federal statute." Notwithstanding the forementioned, Can a Sentencing Court Consistent with the Sixth Amendment, and this court's holdings in *Apprendi* and *Allyene* "use a fact, other than the fact of a prior conviction" to subject a defendant to enhanced Statutory Minimums and maximums without submitting the enhancing element to the Jury?

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	8
CONCLUSION.....	16

INDEX TO APPENDICES

APPENDIX A	<i>opinion of Court of Appeals</i>
APPENDIX B	<i>Denial of petition for Rehearing</i>
APPENDIX C	<i>prior convictions from state court</i>
APPENDIX D	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Allene (citation unknown)	10
Almendarez-Torres, 523 U.S. 224 (1998)	9, 10
Anders v. California, 386 U.S. 738 (1967)	4
Apprendi v. New Jersey, 530 U.S. 466 (2000)	8, 9, 10
Mathis v. United States, 579 U.S. ____ (2016)	9
Redden v. U.S., 875 F.3d 374 (2017)	10, 12
Shular, No. 18-6662	8, 10
Taylor, 495 U.S. ____ (1989)	9.

STATUTES AND RULES

431.2;	7
570/401(c)(2)	
420/9LCS § 570/401(c)(1)	6
18: 924(e)(2)(A)(ii)	8, 10, 11, 12, 14, 1.
18: 922(g)(1)	4, 11, 12, 13, 14
21: 802(8)	12
21: 802(11)	12

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A 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 United States district court appears at Appendix B 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 11-19-2019.

☐ 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: 01-07-2020, and a copy of the order denying rehearing appears at Appendix C.

☐ 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

United States Constitution

5th Amendment

6th Amendment

Statement Of The Case

Mr. Derrick Neville, Petitioner pro se was indicted by a grand jury after the Government's Attorney presented an indictment to it charging Mr. Neville with possessing with intent to distribute a controlled substance, and being a felon in possession of a firearm in violation of Section 21 U.S.C. § 841(a) and 18 U.S.C. 922(g)(1).

Mr. Neville subsequently pleaded guilty to the violation under 841(a), and 922(g)(1). At Sentencing after the court concluded that Mr. Neville had 3 previous convictions for "Serious drug offenses" Sentenced Mr. Neville to 186 months. The Armed Career Criminal Act drove the mandatory minimum and maximum Sentencing Scheme, which culminated in the 186 month sentence.

Mr. Neville filed a notice of Appeal, and his trial counsel file an Anders brief pursuant to Anders v. California, 386 U.S. 738, 744 (1967). Counsel for Mr. Neville did not comply with this Court guidance in Anders to find arguable issues instead counsel had simply work to discredit the fact that any issue can be raised in this

case regarding the district court's Judgment. Mr. Neville in concert with Anders holding filed a Supplemental brief sighting issues he sought to appeal. The court of Appeals characterized his Supplemental brief as a Circuit Rule 51(b) motion in opposition.

Relevant to these matters, counsel asserted that Mr. Neville attempting to challenge his Armed Career Offender designation would be frivolous because the issue was waived during the district court proceedings. The appeals court likewise concluded that such an argument would be frivolous because it was waived in the district court. The court specifically reasoned "A party waives an argument when he intentionally (as opposed to negligently) chooses not to raise it... In his sentencing memorandum, Neville stated that he expressly agreed with his classification as an Armed Career Criminal and the Sentencing Guideline calculations set forth in the presentence report." Appendix A, at 2.

Mr. Neville however, in his Rule 51 Supplement disagreed and asserted that his attorney, not him conceded the positions and challenged

the classification and contended that his two convictions under the Illinois Controlled Substances Act, 720 ILCS § 570/401(c), are not "serious drug offenses" under the ACCA.

After applying the categorical approach the court articulated that the provisions in which Mr. Neville was convicted were divisible and that "These two subsections criminalize possession of heroin and cocaine. These provisions are divisible so that the modified categorical approach can apply. There is thus no ambiguity about which substances are implicated by Neville's convictions and whether those substances are also criminalized under federal law. Accordingly, we can determine that his convictions count as "serious drug offense" under federal law without needing to look beyond the statutory text." we add that we have previously rejected a categorical challenge to the use of § 570/401 as a predicate drug offense under the Guidelines... Appendix A, at 4.

Mr. Neville asserts that the appeals court's denial consolidates 2 claims made by him 1) that his armed career criminal status is erroneous; and

his career offender status pursuant to 4B1.2 is also erroneous. Mr. Neville asserts that both designations are erroneous.

After the denial of Mr. Neville's appeal he file a petition for hearing and a suggestion for rehearing en banc which was denied on 01-07-2020.

Reasons For Granting the Writ

I. THE COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Court of Appeals rejected a categorical challenge to the use of § 570/401. This court too has recently rejected a categorical challenge to determining what qualifies as a predicate offense pursuant to Title 18 U.S.C. 924(e)(2)(A)(ii). Up until this Court's holding in *Shular*, courts uniformly held that to determine whether a state conviction qualifies as a predicate "serious drug offense" pursuant to the Armed Career Criminal Act courts apply the "categorical approach" and determine whether the state crime has the same elements as the terms laid out in the federal statute. However, if the state crime's elements are broader than those of the federal relevant equivalent then the crime can't qualify for enhancement purposes.

This Court in *Apprendi v. New Jersey*, 530 U.S. 446, 120 S.Ct. 2348 (2000), this court held that: other than the fact of a prior conviction, any fact

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and decided beyond a reasonable doubt. *Id.* The holding in *Apprendi* manifested from this court's holding in *Almendarez-Torres*, 523 U.S. 224 (1998), in *Almendarez-Torres* this court recognized a narrow exception to the general rule for the fact of a prior conviction.

This court created the categorical approach to be sure that defendants charged with violating the ACCA were protected from having their Sixth Amendment rights violated by a Judge not a jury finding facts other than a fact of a prior conviction to increase the minimum and maximum penalty. Specifically, citing *Apprendi*. In *Mathis v. United States*, 579 U.S. ____ (2016), this court reasoned that "Congress chose another course in ACCA, focusing on only 'the elements of the statute of conviction.'" Citing *Taylor*, 495 U.S., at 601. "A construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns... That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed

the offense... He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea" or "what the jury in a prior trial must have accepted as the theory of the crime." He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* at Slip. Op. 10.

The Seventh Circuit's opinion in *Redden*, 895 F.3d 374, 375 (7th Cir. 2017), that the term delivery is just another term for distribution or dispensing, while consistent with this court's holding in *Shular* and nearly every other circuit's holding on the issue specifically contradict this court's holding in *Almendarez-Torres*, *Apprendi*, *Alleyne*, and the categorical approach. In Mr. Neville's case for example he was charged and convicted of "delivering a controlled substance," an issue because 924(c)(2)(A)(ii) does not enumerate "delivery" or "delivering" a controlled substance.

To be susceptible to an enhanced sentence

pursuant to 924(E)(2)(A)(ii), a state offense must involve "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance. This is an issue because Mr. Neville was not convicted in the state of Illinois for distributing or manufacturing a controlled substance, nor, was he convicted of possessing a controlled substance with intent to distribute or manufacture a controlled substance. Consequently, the fact of Mr. Neville's prior conviction protects him from ACCA's statutory enhancement, unless a fact other than the fact of Mr. Neville's prior convictions can be used to enhance his statutory penalties from 0-10 years pursuant to 922(g)(1), to 15 years pursuant to 924(c).

Mr. Neville asserts that the Seventh Circuit and nearly every other circuit has answered an important federal question that has not been, but should be, settled by this Court, and decided the question in a way that conflicts with relevant decisions of this court. Specifically, "whether a court applying a sentencing enhancement altering the statutory minimum and maximum from

10-10 years under 922(g)(1), to 15 years to life under 924(e)(2)(A)(ii), can use a fact, other than the fact of a prior conviction to change the statutory penalty. A question that has not been, but should be answered by this court.

Nearly every state punishes delivery or delivering a controlled substance, ~~Section~~ Section 802 of the Controlled Substance Act also defines the term "delivery and deliver." Specifically, Section 802, Subsection (8) defines delivery as, "the actual, constructive, or attempted transfer of a controlled substance..." The State of Illinois defines the term in the exact same way. See Redden.

The term "distribution," the same term used in the Armed Career Criminal Act is also defined in Section 802 of the Act at Subsection (11) to mean "to deliver (other than by administering or dispensing) a controlled substance or a listed chemical."

Obviously, the term distribution contained in the Armed Career Criminal Act is narrower than

the term "delivery" which encompasses "any mode of transferring a controlled substance to include "administering and dispensing," consequently, a judicial determination that Mr. Neville's conviction for "delivery of a controlled substance" was for "distribution" rather than "administering and dispensing" means that a sentencing court used a fact, other than the fact of the prior conviction to alter the statutory minimum and maximum sentence pursuant to 922(j)(1) the crime in which Mr. Neville plead guilty. Such a finding would also allow the federal sentencing court to rewrite Mr. Neville's state plea agreement, which was not for distribution.

Mr. Neville has not waived his rights pursuant to the Sixth Amendment to the United States Constitution or the state of Illinois constitution of a determination beyond a reasonable doubt that he "distributed" a controlled substance as that was not an element of the offense in which he was convicted.

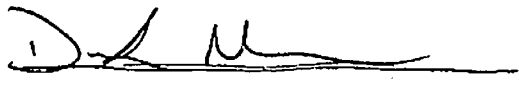
Because the lower courts and the Circuit

Courts holdings sustaining the utilization of facts, other than the fact of a prior conviction to alter a defendant's statutory maximum and minimum sentence pursuant to 924(e)(2)(A)(ii) is contrary to this courts well established precedents on the issue this court should utilize its supervisory powers and grant this petition for writ of Certiorari to protect the 5th Amendment due process right of defendants, and the Sixth Amendment trial right to be found guilty of every element that constitutes the offense.

In most cases a defendant charged with 922(g)(1) is not given notice of the fact that he may be susceptible to an enhanced sentence pursuant to Section 924(e) until after he pleads guilty and a presentence report is prepared depriving a defendant notice. The fact that the indictment may list a prior conviction is of no consequence if the Jury doesn't have to find it is a proper predicate offense beyond a reasonable doubt because the Sentencing court could find by the preponderance of the evidence that the prior

qualities, even if, as in this case the court uses a fact, other than the fact of the prior conviction it self,

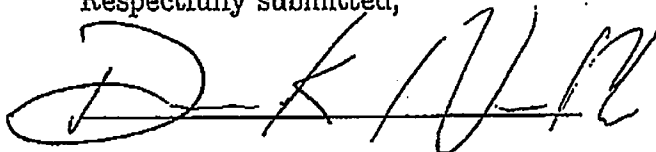
Because this Court has ruled and continuously maintained that a court cannot rely on a fact, other than the fact of a prior conviction to subject a defendant to punishment in excess of the statutory minimum or maximum this Court should provide guidance regarding how a court is suppose to determine whether a State crime can qualify pursuant to 924(e)(2) (AXii), so as to preserve this courts holdings regarding the application of Statutory penalties outside of those which a defendant was indicted.


Derrick Neville

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to be "D. K. / J. R." with a horizontal line drawn through the middle of the letters.

Date: 06/05/2020