No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY S. HALL, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is the Texas crime of Robbery Second Degree a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA")?

II. Is the Texas crime of Robbery Second Degree a "crime of violence" for purposes of the U.S. Sentencing Guidelines?

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CITATION TO OPINION BELOW

A copy of the Opinion of the Eighth Circuit Court of Appeals, dated December 14, 2017, is attached as Appendix "A." The case is reported at United States v. Anthony Hall, Jr., 877 F.3d 800 (8th Cir. 2017).

JURISDICTIONAL STATEMENT

The date of the Opinion sought to be reviewed is December 14, 2017. The date of Order denying the Petition for Rehearing is January 24, 2018, and is attached as Appendix "B."

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

CONSTITUTIONAL PROVISIONS, STATUTES AND UNITED STATES SENTENCING GUIDELINES INVOLVED

18 U.S.C. § 924(a)(2)

(a)(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e)(2)(B)(i) and (ii)

(e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

U.S.S.G. § 4B1.2(a)

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 2K2.1(a)

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

*(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;*

*(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;*

*(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that*

is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) ***20****, if—*

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) ***18****, if the offense involved a firearm described in 26 U.S.C. § 5845(a);*

(6) ***14****, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;*

(7) ***12****, except as provided below; or*

(8) ***6****, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.*

Texas Penal Code § 29.02

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

STATEMENT OF THE CASE

A. Course of Proceedings

Defendant-Appellant Anthony Hall, Jr. has appealed from his conviction and sentence entered by the United States District Court for the Northern District of Iowa on December 7, 2016. Hall's sentence of 360 months imprisonment included enhancements for Armed Career Criminal and Career Offender.

Hall's status as ACC and career offender arise in part from his conviction for Robbery Second Degree in Texas in 2002, under Section 29.02 of the Texas Penal Code. Hall does not dispute the conviction, but instead suggests that it does not qualify as a "violent felony" for purposes of the ACCA, nor as a "crime of violence" for purposes of the Sentencing Guidelines, U.S.S.G. § 4B1.2(a) and U.S.S.G. § 2K2.1(a).

A panel of the Eighth Circuit Court of Appeals affirmed Hall's conviction and sentence. Hall's petition for rehearing was denied.

B. Statement of Facts

In 2015, Anthony Hall, Jr. was charged in the U.S. District Court for the Northern District of Iowa with being an Unlawful Drug User and Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1), (g)(3), and 18 U.S.C. § 924(a)(2). Hall was a felon as a result of a conviction for Second Degree

Robbery in Travis County, Texas, committed when he was seventeen years old. Hall also was convicted of two counts of felony Delivery of Crack Cocaine in Iowa state court in 2009.

The U.S. Probation Office used these prior convictions to increase Hall's Base Offense Level under U.S.S.G. § 2K2.1(a)(2). It also scored Hall as an Armed Career Criminal and a Career Offender under the Sentencing Guidelines. Over Hall's objections, the District Court agreed with the USPO's computation, and sentenced Hall to 360 months in prison on December 7, 2016.

Hall's conviction was affirmed by the Eighth Circuit Court of Appeals on December 14, 2017. The decision is reported at United States v. Anthony Hall, Jr., 877 F.3d 800 (8th Cir. 2017).

C. Basis for Federal Jurisdiction

Federal jurisdiction was premised upon 18 U.S.C. § 3231, as Petitioner was charged with an offense against the laws of the United States.

REASONS FOR GRANTING THE PETITION

I. The crime of Robbery Second Degree under Texas Penal Code § 29.02 is not a "crime of violence" for purposes of the Armed Career Criminal Act.

After the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2251 (2015), the federal courts no longer can rely on the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) to determine whether a defendant's prior felony

convictions qualify as "violent" felonies. Further, the crime of simple robbery is not included in § 924(c)'s list of enumerated offenses. Thus, the armed career criminal enhancement under section U.S.S.G. § 4B1.4 only applies if all three of the defendant's prior convictions qualify as violent felonies by satisfying the alternative requirement that they include as an element the "use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

Before Johnson, the Texas offense of Robbery Second Degree under Texas Penal Code § 29.02 qualified as a violent felony under the "residual clause" of the ACCA. United States v. Davis, 487 F.3d 282, 285-87 (5th Cir. 2007). Clearly, that holding now has been overruled by Johnson.

Neither the Supreme Court nor the Fifth Circuit Court of Appeals have addressed whether Robbery Second Degree in Texas qualifies under the "elements clause" of the ACCA[1]; therefore it remains an open question whether that crime has "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). The district courts of the Fifth Circuit are split on the issue. See e.g. United States v. Joiner,

[1] The Fifth Circuit has determined, however, that *aggravated* robbery, entitled Robbery First Degree under Texas Penal Code § 29.03, is a "violent felony" under the force clause of the ACCA. United States v. Lerma, 877 F.3d 628, 631 (5th Cir. 2017).

2018 WL 814021 (W.D. Texas, February 9, 2018) (both simple robbery and aggravated robbery qualify as violent felonies for ACCA); Campbell v. United States, 2017 WL 1401337 (W.D. Texas, April 19, 2017) (robbery by assault constituted violent felony for purposes of ACCA); but see United States v. Fennell, 2016 WL 4491728 (N.D. Texas, August 25, 2016) ("Because the Texas offense of robbery is broad enough to entail even the slightest use of force that results in relatively minor physical contacts and injuries, and the degree or character of the physical force exerted is irrelevant, the court concludes that it covers conduct that does not involve the type of 'violent force' contemplated by the ACCA and 18 U.S.C. § 924(e)(2)(B)(i)").

Nor has the Fifth Circuit yet determined whether § 29.02 is an indivisible or divisible statute. Joiner at *3. "If the statute is indivisible, the sentencing court must apply the "categorical approach" to focus solely on whether the elements of the crime of conviction include the use, attempted use, or threatened use of physical force against the person of another." Lerma, 877 F.3d at 631. "When a statute is divisible, however, the sentencing court may use the 'modified categorical approach' to determine which elements played a part in the defendant's conviction." Id.

Petitioner Anthony Hall suggests the reasoning of Fennell is the better analysis:

> [T]he Supreme Court in [Johnson v. United States, 559 U.S. 133, 140 (2010) ("Johnson I")] explained that under the ACCA, "the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." Johnson I, 559 U.S. at 140. Thus, a robbery offense under section 29.02 of the Texas Penal Code satisfies § 924(e)'s definition of a violent felony only if a conviction for that offense could not be sustained without proof of the use, attempted use, or threatened use of "violent force—that is, force capable of causing physical pain or injury to another person." Id. Under section 29.02, a person commits the offense of robbery "if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he" either: "(1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Tex. Pen. Code Ann. § 29.02(a)(1)-(2). The parties dispute whether intentionally or knowingly threatening or placing another in fear of imminent bodily injury satisfies § 924(e)'s force requirement. The parties also appear to dispute whether the Texas robbery statute is divisible; however, even applying the categorical approach to the statutory language in § 29.02(a)(1), which requires more than threats, the court determines that it does not satisfy Johnson I's "violent force" requirement for the same or similar reasons that the Fifth Circuit determined in United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006), that the Texas offense of assault under § 22.01(a)(1) of the Texas Penal Code does not constitute a "destructive or violent felony." Id. at 879.
>
> Fennell at *5.

Petitioner respectfully requests the Court grant his request for Certiorari, to determine the proper application of the armed career criminal act enhancements to a prior conviction of Robbery Second Degree in Texas.

II. The crime of Robbery Second Degree under Texas Penal Code §29.02 is not a "crime of violence" for purposes of the U.S. Sentencing Guidelines.

Petitioner Hall's sentencing guidelines score was increased due to his prior robbery conviction. In particular, the district court increased Hall's base offense level to Level 24 under U.S.S.G. § 2K2.1(a)(2), when it determined Hall has been convicted of at least two felonies that are either a "crime of violence" or a drug offense. The Eighth Circuit agreed.

Recently, the Supreme Court held that the Immigration and Nationality Act's definition of "aggravated felony," which incorporated the now-invalidated "residual clause" of the federal criminal code's definition of "crime of violence," likewise was impermissibly vague in violation of due process. Sessions v. Dimaya, --- S.Ct. ---, 2018 WL 1800371 (April 17, 2018). The issues respecting § 16(b)'s application to specific crimes "divide the federal appellate courts." Dimaya at *15. The residual clause in § 16(b), linguistically similar to the residual clause of the ACCA, "'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" Dimaya at *16, quoting Johnson v. United States, 576 U.S. --- (2017) (slip op., at 6).

Petitioner suggests that the Sentencing Guidelines' definition of "crime of violence" in U.S.S.G. § 4B1.2 and Application Note 1 to U.S.S.G. § 4B1.4, while not identical to the statutory definition in 18 U.S.C. § 924(e)(2),

suffers from the same vagueness malady as Section 16(b) of the Immigration and Naturalization Act. The difficulty in determining whether a particular state criminal statute satisfies the vague definition in the Guidelines likewise results in impermissibly unpredictable and arbitrary rulings by sentencing judges.

Petitioner respectfully requests the Court grant his Petition and invalidate the unconstitutional language in the Sentencing Guidelines that attempts to define "crime of violence."

Respectfully submitted,

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