

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

FREDDIE J. HENNINGTON
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 18-60739

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by dismissing Mr. Hennington's appeal without considering the merits of his arguments.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED FOR REVIEW	ii
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
I. OPINIONS BELOW	1
II. JURISDICTIONAL STATEMENT	2
III. CONSTITUTIONAL PROVISION INVOLVED	3
IV. STATEMENT OF THE CASE	4
A. Basis for federal jurisdiction in the court of first instance	4
B. Statement of material facts	4
1. Facts about Mr. Hennington's history	4
2. Facts about the felon in possession incident	5
3. Facts about the sentencing hearing	5
4. Facts about the Fifth Circuit's rulings	7
V. ARGUMENT	8
A. Introduction	8
B. Argument: Review on certiorari should be granted in this case	8
VI. CONCLUSION	10

CERTIFICATE OF SERVICE	11
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(Appendices 1 and 2)

TABLE OF AUTHORITIES

Page(s)

Cases:

<i>Johnson v. United States</i> , 135 S.Ct. 2551 (2015).....	9
<i>Welch v. United States</i> , 136 S.Ct. 1257 (2016).....	9

Statutes:

Armed Career Criminal Act.....	1, 5, 6, 7, 8, 9
Criminal Justice Act.....	11
18 U.S.C. § 922	1, 4
18 U.S.C. § 924.....	1, 4, 6
18 U.S.C. § 3231	4
28 U.S.C. § 1254.....	2

Rules:

Rule 10, Supreme Court Rules.....	8
Rule 13.1, Supreme Court Rules.....	2
Rule 29.5. Supreme Court Rules.....	11

Provisions of the United States Constitution:

Due Process Clause, United States Constitution, Amendment V.....	3, 9
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I. OPINIONS BELOW

On April 4, 2018, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Hennington with felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Mr. Hennington accepted responsibility for his actions by pleading guilty to the charge on June 21, 2018.

The district court conducted a sentencing hearing on October 3, 2018. It sentenced him to serve 180 months in prison. The court entered a Final Judgment on October 23, 2018. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. Hennington filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on October 23, 2018. The Fifth Circuit case number is 18-60739.

On appeal, Mr. Hennington argued that the district court erred by ruling that two of his prior convictions were "violent felonies" under the Armed Career Criminal Act (hereinafter "ACCA"). The prosecution filed a Motion to Dismiss the Appeal, and the Fifth Circuit granted the Motion on February 20, 2019, without considering the merits of Mr. Hennington's arguments. A copy of the Fifth Circuit's Order is attached hereto as Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its final Order in this case on February 20, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's final Order, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

“No person shall be ... deprived of life, liberty, or property, without due process of law[.]” U.S. Const. amend. V, Due Process Clause.

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Mr. Hennington for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Hennington arose from the laws of the United States of America.

B. Statement of material facts.

1. Facts about Mr. Hennington's history.

Like many people who pass through this country's criminal justice system, Mr. Hennington did not have a privileged upbringing. His parents separated when he was ten years old, and his dad died when Mr. Hennington was 15. His mom developed a drug addiction problem when Mr. Hennington was about 14 years old, so he primarily raised himself. He had to begin work at an early age to help support the family.

Mr. Hennington never graduated from high school, but at least two of his kids made it to college. He has worked over the last several years for a home repair company. Other prior employers include Texaco Express Lube, Publix Grocery Store, McDonalds, Kroger, a concrete plant and a tee-shirt company.

Mr. Hennington suffers from health issues. He has high blood pressure and depression. As to substance abuse, he completed a drug and alcohol recovery program at the Madison County Detention Center while he was on pretrial detention in this case.

2. Facts about the felon in possession incident.

Mr. Hennington was the front seat passenger in a car that was reported stolen. Officers pulled the car over to investigate the stolen vehicle report. During an inventory search of the car, the officers found a .38 revolver. Mr. Hennington immediately claimed ownership of the gun.

The crime had no victims and Mr. Hennington did nothing to obstruct justice. In addition to claiming ownership of the gun at the scene of the arrest, Mr. Hennington continued to accept responsibility for his actions during the course of this case.

3. Facts about the sentencing hearing.

Mr. Hennington's offense level under the United States Sentencing Guidelines (hereinafter "Sentencing Guidelines" or "Guidelines") was 30, and his criminal history category was VI. This combination resulted in a sentencing range of 168 to 210 months in prison. However, because of the 180-month mandatory minimum sentence required by the ACCA, the lower end of the Guidelines range

increased from 168 months to 180 months. So the final Sentencing Guidelines range was 180 months to 210 months in prison.

Throughout this case, Mr. Hennington has adamantly argued that he should not be subject to the ACCA. As the Court is aware, a combined total of three prior convictions for either “a violent felony” or “a serious drug offense” triggers a 15-year mandatory minimum sentence under the ACCA. 18 U.S.C. § 924(e)(1).

Under the current state of the law, defense counsel simply had no valid argument at sentencing that three of the prior drug offenses should not qualify as ACCA predicate offenses. Out of an abundance of caution, however, the district judge allowed Mr. Hennington to speak on his own behalf and make an argument on the issue. The court ruled against the defense on this issue, finding that Mr. Hennington had three prior drug convictions that qualified as ACCA predicate offenses.

Mr. Hennington had two other prior convictions that the defense did contest as qualifying as ACCA predicate offenses. One of the convictions was for aggravated assault under Georgia law and the other was burglary under Georgia law. The court found that both the aggravated assault conviction and the burglary conviction were violent felonies under the ACCA. It sentenced Mr. Hennington to serve 180 months in prison.

4. Facts about the Fifth Circuit's ruling.

On appeal to the United States Court of Appeals for the Fifth Circuit, the undersigned acknowledged that Mr. Hennington's three prior drug sale convictions appear to qualify him as an armed career criminal under the ACCA. Nevertheless, the defense argued that in case a change of law occurs regarding the drug-related priors, the court should analyze the prior assault and burglary convictions and find that they are not violent felonies under the ACCA. The Fifth Circuit rejected this argument, finding that it need not address the assault and burglary convictions because Mr. Hennington qualifies as an armed career criminal even if he prevailed on his argument.

V. ARGUMENT

A. Introduction.

The underlying issue on appeal is whether the district court erred by finding that Mr. Hennington's prior assault and burglary convictions qualify as violent felonies under the ACCA. However, that is not the issue presented in this Petition. That issue is not ripe for consideration before this Court because the Fifth Circuit never reached the merits of the issue. Instead, the Fifth Circuit dismissed the appeal based on its finding that Mr. Hennington is subject to the ACCA because of his three prior drug distribution convictions. In other words, the Fifth Circuit found that it need not address whether the assault and burglary convictions are violent felonies because even if they are not, he is subject to the ACCA anyway. So the issue before this Court is whether the Fifth Circuit erred by failing to address the merits of Mr. Hennington's arguments pertaining to the prior assault and burglary convictions.

B. Argument: Review on certiorari should be granted in this case.

This Petition is filed at Mr. Hennington's unequivocal request. Rule 10 of the Supreme Court Rules states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons."

As the prosecution argued below, even if this Court agrees with Mr. Hennington's arguments on appeal, his sentence will be unchanged at this time. Nevertheless, the Fifth Circuit should have render decisions on whether the aggravated assault and burglary convictions constitute violent felonies under the ACCA, even though Mr. Hennington will receive no immediate benefit from such rulings. This is true because law pertaining to the ACCA has been in a state of flux over the last few years. The prosecution does not contend otherwise. A prime example in the change regarding ACCA law is this Court's decision in *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015). The *Johnson* Court found that the ACCA's residual clause is unconstitutionally vague. In *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016) this Court made the *Johnson* holdings retroactive.

Even though Mr. Hennington's three prior drug distribution convictions appear to qualify as ACCA predicates under the current state of the law, history tells us that the law may change in the future. If a change in law occurs that renders one or more of the prior drug convictions ineligible as ACCA predicates, then Mr. Hennington may no longer qualify as an armed career criminal, and he may be eligible for a sentence reduction. Under the principles of due process, the Court should grant Mr. Hennington's Petition for Writ of Certiorari, and remand the case to the Fifth Circuit for a ruling on the merits of his arguments.

VI. CONCLUSION

Based on the argument presented above, Mr. Hennington asks the Court to grant his Petition for Writ of Certiorari in this case.

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