

19-7178

IN THE SUPREME COURT OF THE UNITED STATES

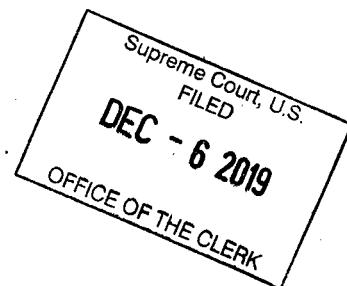
ORIGINAL

TRACY JARVIS ALLEN,
Petitioner

vs.

Criminal Number: 405-340(TLW)

UNITED STATES OF AMERICA,
Respondant



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

TITLE 18 U.S.C. 922(g)(1) And 924(e) ACCA

PRO SE PETITIONER

TRACY JARVIS ALLEN 12714-171
Federal Correctional Institution Berlin
P.O.BOX 9000
Berlin, New Hampshire 03570-9000

QUESTIONS PRESENTED FOR REVIEW

Whether or not the District Court erred in determining that Petitioner Allen's South Carolina Armed Robbery convictions are valid predicates under the Armed Career Criminal Act.

Whether or not Fourth Circuit precedent in United States v. Doctor 842 F.3d 306(4th Cir.2016) applies to Petitioner Allen's JOHNSON claim for relief pursuant to Supreme Court precedent. Johnson v. United States 135 S.Ct. 2551 (2015).

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STANDARD OF REVIEW	
THE DISTRICT COURT SENTENCED APPELLANT IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN IT SENTENCED APPELLANT UNDER THE SENTENCE ENHANCEMENT PROVISIONS OF 18 U.S.C. §924(e) WHEN THE SUPREME COURT DEEMED THE RESIDUAL CLAUSE UNCONSTITUTIONAL AND PETITIONER NO LONGER HAS THE REQUISITE NUMBER OF PREDICATES FOR ACCA ENHANCEMENT.	
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CONSTITUTION:

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Attached is Certificate of Appealability
From Fourth Circuit Court of Appeals
And Judgement From District Court

Appendix A, B

Also Attached South Carolina Code of Laws Statute
for Armed Robbery 16-11-330, & threatening
life of public official 16-3-1040

STATUTES AND RULES:

18 U.S.C. 922(g)(1)	2,10
18 U.S.C. 924(e)	2,3,

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal arises as a result of a criminal prosecution for a violation of the federal firearms law, pursuant to Title 18, U.S.C. 922(g)(1) and 924(e). Petitioner Allen was originally charged in a one-count indictment with the knowing possession of a firearm on or about December 7, 2004, after having been convicted of a felony in violation of 18 U.S.C. 922(g)(1). On June 2, 2005, Mr. Allen was convicted by a jury of the above offense which is set forth in a single count indictment filed March 23, 2005. On July 21, 2005, the honorable Terry L. Wooten, United States District Judge, sentenced Mr. Allen to a term of (288) months imprisonment under the Armed Career Criminal Act to be followed by a supervised release term of five (5) years.

In light of Johnson V. United States, 135 S.Ct. 2551 (2015), on March 14, 2016 Petitioner filed in the Fourth Circuit a motion pursuant to 28 U.S.C. 2244 requesting permission to file a successive 2255 petition. No.16-245 (4th Cir). The Fourth Circuit granted that motion on May 10, 2016, No.16-245 and it was filed in the District Court to consider the motion in the first instance.

On June 17, 2019 the District Court denied Petitioner Allen's JOHNSON claim on the basis that it is foreclosed by Fourth Circuit precedent in United States V. Doctor, the Fourth Circuit concluded that a South Carolina conviction for Strong Armed Robbery is a violent felony for ACCA purposes. 842 F.3d 306, 312 (4th Cir.2016). Three months later, the Fourth Circuit concluded that because strong armed robbery is a lesser included offense of armed robbery, armed robbery is also an ACCA Violent Felony. Petitioner then filed a Certificate of Appealability No.19-7128 which was denied by the Fourth Circuit Court of Appeals on October 22, 2019.

II. ISSUE PRESENTED FOR REVIEW

Whether the District Court sentenced Petitioner in violation of his rights under the Sixth Amendment of the United States Constitution when it sentenced Petitioner under the sentence enhancement provisions of 18 U.S.C. 924(e) Armed Career Criminal Act after the residual clause was struck down and deemed Un-Constitutional by the Supreme Court of the United States when the Petitioner does not have the requisite number of qualifying predicate offenses to be found an armed career criminal.

And; Whether or not Fourth Circuit precedent in United States V. Doctor 842 F.3d 306 (4th Cir.2016) applies to Petitioner Allen's claims?

III. STATEMENT OF THE CASE

Petitioner was charged and convicted at trial of being a felon in possession of a firearm, and the Court sentenced him to (288) months incarceration. At sentencing, Petitioner was classified as an Armed Career Criminal under the Armed Career Criminal Act (ACCA), which imposes a mandatory minimum fifteen year sentence on a felon who possess a firearm and who has three or more prior convictions for committing certain drug crimes or "violent felonies". 18 U.S.C. 924(e)(1). Petitioner Allen's Presentence Investigation Report (PSR), classified the following convictions as ACCA predicate convictions:

- (1) Armed Robbery (PSR) paragraph 28 -Docket No. 96-JU-16-163
- (2) Armed Robbery (PSR) paragraph 28 -Docket No. 96-JU-16-164
- (3) Criminal Domestic Violence Of A High and Aggrevated Nature (CDVHAN) (PSR) paragraph 30
- (4) Threatening the Life, Person, or Family of Public Employee (PSR) paragraph 31
- (5) Failure to Stop for a Blue Light (FSBL) (PSR) paragraph 32

The issue raised is that Petitioner Allen is no longer an Armed Career Criminal after the ruling in JOHNSON and that Fourth Circuit precedent in DOCTOR is inapplicable to Petitioner Allen's claims.

IV. SUMMARY OF THE ARUGUMENT

In light of Johnson V. United States 135 S.Ct. 2551(2015), Petitioner Allen no longer has the requisite number of predicates to be deemed an Armed Career Criminal, and Fourth Circuit precedent in Doctor, United States v. Doctor 842 F.3d 306 (4th Cir. 2016) is inapplicable to Petitioner Allen and has nothing to do with Petitioner Allen's JOHNSON claim.

V. ARGUMENT STANDARD OF REVIEW

A constitutional challenge, as a question of law, is reviewed *De Novo*. United States v. Means, 133 F.3d 444, 447 (4th Cir. 1998).

The District Court sentenced Petitioner in violation of his Sixth Amendment rights after the Supreme Court deemed the residual clause unconstitutional under the Armed Career Criminal Act.

ISSUE 1:

District Court erred in determining that Petitioner Allen's South Carolina Armed Robbery convictions are valid ACCA predicates under the Armed Career Criminal Act.

ISSUE 2 :

Fourth Circuit precedent in Doctor, United States v. Doctor, 842 F.3d 306 (4th Cir. 2016) is misplaced and inapplicable to Petitioner Allen, first Petitioner Allen and DOCTOR are sentenced under distinct and separate statutes with separate elements and penalties and when employing the categorical approach you must look only to the elements of the State statute of a conviction,

in Petitioner Allen's case which will be 16-11-330 (A)
Robbery 16-11-330(B) Attempted Armed Robbery

Armed

ISSUE 3

Fourth Circuit Appeals Court reliance on South Carolina Supreme Court interpretation of what constitutes Robbery in South Carolina in ROSEMOND 356 S.C. 426, 589 S.E.2d 757 (2003) is misplaced and inapplicable to Petitioner Allen. Petitioner Allen's Robbery convictions stem from two 1996 family court juvenile adjudications. You must look to the law at the time of Petitioner Allen's convictions which predates ROSEMOND South Carolina Supreme Court interpretation.

VI. CASE LAW AND FACTS FOR RELIEF UNDER SUPREME COURT PRECEDENT IN UNITED STATES V. JOHNSON, 135 S.Ct. 2551

In United States V. Doctor, 842 F.3d 306 (4th Cir. 2016). However, DOCTOR was a strong Armed Robbery case under a distinct and separate statute that has nothing to do with the elements of Armed Robbery under 16-11-330. 16-11-330 is an indivisible statute, that is over broad, not generic, nor does it have as an element the attempted use or threatened use of physical force. The Court must employ the categorical approach and focus only on the elements of the State statute 16-11-330.

In the United States Supreme Court ruling in Mathis, 136 S.Ct 2257 for more than 25 years we have repeatedly made clear that the application of ACCA involves, and involves only, comparing elements: Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense.

They may not ask whether the defendant's conduct, his particular means of committing the crime falls within the generic definition. And that rule doesn't

does not change when a statute happens to list possible alternative mens of commission, whether or not made explicit, they remain what they ever were, just facts, which ACCA (so we have held over and over does not care about) emphasis added Mathis, 136 S.Ct. 2257 see also id at 2251) .

(" Under our precedent that undisputed disparity resolves this case. We have often held, and in no uncertain terms, that a State crime cannot qualify as an ACCA predicate if it's elements are broader than those of a listed generic offense, see Taylor V. United States ,495 U.S. 575 at 602,110 S.Ct. 2143 109 L.Ed.2d 607 (1990). Instead of announcing a new rule in MATHIS, the Supreme Court "reiterated" it's prior holding that the modified categorical approach may not be used if the crime the defendant was convicted under has a single, indivisible set of elements , and discussed the difference between "elements" of an offense" and the means by which a defendant can satisfy an element Taylor V. United States, 2016 D.St Lexis 117119. It is clear that South Carolina Armed Robbery and Attempted Armed Robbery are not generic crimes and the statute is indivisible: an over broad.

16-11-330 (A) South Carolina Armed Robbery Statute and Attempted Armed Robbery

(A) A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or deadly weapon, or while allegenig, either by action or words, he was armed while using representation of a deadly weapon or any object which a person present during the commission of a robbery reasonably believed to be a deadly weapon is guilty of a felony and, upon conviction must be ~~imprisoned~~ for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. A person convicted under

this subsection is not eligible for parole until the person has served at least seven years of the sentence.

(B) A person who commits attempted robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.

IX. ARGUMENT

It is clear that Strong Armed Robbery has nothing to do with the elements of South Carolina Armed Robbery and Attempted Armed Robbery 16-11-330 (B). DOCTOR is misplaced because we are convicted under two separate and distinct statutes with different elements and subject to separate penalties. However, the Fourth Circuit failed to look at the elements of the State statute which is directed by the Supreme Court of the U.S. precedent, but has relied on a South Carolina Supreme Court case that was decided in ROSEMOND 356 S.C. 426.589 S.E. 2d 757(2003). Note the Government must look to the law at the time of conviction. Petitioner Allen's robbery convictions stem from 1996 which predates ROSEMOND and South Carolina Supreme Court interpretation of what constitutes robbery. Drayton V. Evatt, 1998 U.S. Dist. Lexis 22174. Under South Carolina law robbery is defined as the felonious or unlawful taking of money, goods, or other personal property or value from person of another against his will or without his consent, accomplished by force. State V. Keith 283 S.C. 597.325 S.E. 325 (S.C. 1981).

In McNeil V. U.S. 563 U.S. 816, 131 S.Ct. 2218, 18 L.Ed 2d 35 (2011),

a unanimous Supreme Court instructed the lower courts to the law at the time of the State conviction. So that would make DOCTOR, and the South Carolina Supreme Court interpretation of robbery in ROSEMOND void and invalid and not applicable to Petitioner Allen, nor 16-11-330 South Carolina Armed Robbery.

Also, South Carolina of "Threatening life, person or family of public employee" 16-3-1040(A) is not a valid ACCA predicate, the statute is overbroad, indivisible, and it does not have an element of attempted use, or threatened use physical force.

(A) It is unlawful for a person knowing and willfully to deliver or convey to a public official or to a teacher or principal of an elementary or secondary school any letter or paper ,writing, print ,missive ,document or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public official ,teacher, or principle, or members of his immediate family if the threat is directly related the public official's/teacher's ,or principal's professional responsibilities.

The Government ~~concedes~~ that failure to stop for a Blue Light is not a valid predicate for ACCA purposes S.C. code 56-5-750(B)(1).

Petitioner feels there is no need to challenge South Carolina Criminal Domestic Violence of a High and Aggravated Nature 16-25-20(A) CDVHAN because without the robbery convictions and failure to stop for Blue Light he will no longer have the requisite number of predicate convictions for ACCA purposes.

CONCLUSION

Petitioner Allen feels that at least three of his prior convictions are invalidated without question. It is clear that Petitioner Allen is entitled to immediate release. Petitioner Allen has already served over the statutory maximum of (10) years authorized by law under Title 18 U.S.C. 922(g)(1) felon in possession of a firearm. Petitioner Allen prays that this motion is considered in the best interest of justice and Petitioner's illegal sentence under the ACCA's invalid residual clause is vacated.

Date: Dec 6th, 2019 /s/ Tracy J Allen

Tracy Jarvis Allen
12714-171

Federal Correctional Institution
Berlin
P.O.BOX 9000
Berlin, New Hampshire
03570-9000

COUNTY OF Darlington

IN THE INTEREST OF

Tracy Jarvis AllenHEARING DATE 9-23-96JUDGE: Roger E. HendersonCOURT REPORTER: Linda KinsaulCOMMITMENT ORDER
(DJJ)

96-JU-16-163 + 164

ATTORNEY FOR SOLICITOR: Daniel BlakeATTORNEY FOR JUVENILE: Karl Smith

GUARDIAN AD LITEM:

On the 6 day of June, 19 96, a verified Petition was filed in this Court by State of S.C. alleging that Tracy Jarvis Allen was a delinquent child in that (he)/(she) in Darlington County on 2-24 & 2-25, 19 96 did: Commit the offenses of Armed Robbery (2 counts).

TRUE CERTIFIED COPY,

Shirley B. Dugay

CLERK OF COURT/REMO

DARLINGTON COUNTY, S.C.

in violation of Section(s) 16-11-330

Code of Laws of South Carolina (1976).

AN ADJUDICATORY HEARING was held on the 6 day of August, 19 96 and pursuant to (a plea of guilty)/(a hearing on the merits), the above-named child was found upon proof beyond a reasonable doubt to be delinquent, for having: Committed the offenses of Armed Robbery (2 counts)

in violation of Section(s) 16-11-330

Code of Laws of South Carolina (1976).

A DISPOSITIONAL HEARING was held on the 23 day of September, 19 96 and as a result thereof, I find Tracy Jarvis Allen is a suitable person to be committed to the South Carolina Department of Juvenile Justice.

Therefore, it is,

ORDERED, ADJUDGED AND DECREED, in the best interest of Tracy Jarvis Allen that (he)/(she) is hereby committed to the South Carolina Department of Juvenile Justice, which shall arrange for placement of this child in a suitable corrective environment, with said commitment being for an indeterminate period not to exceed the twenty-first birthday of said child, unless sooner released by proper authority.

September 23, 19 96

FAMILY COURT JUDGE

S. C.

STATE OF SOUTH CAROLINA

COUNTY OF Darlington

IN THE INTEREST OF

Tracy Jarvis Allen

HEARING DATE 9-23-96

JUDGE: Roger L. Henderson

COURT REPORTER: Linda Kinsaul

IN THE FAMILY COURT

96-JU-16-163 + 164

COMMITMENT ORDER
(DJJ)

ATTORNEY FOR SOLICITOR: Daniel Blake

ATTORNEY FOR JUVENILE: Karl Smith

GUARDIAN AD LITEM: _____

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TRUE CERTIFIED COPY,

Scott L. Savage

CLERK OF COURT/HMC
DARLINGTON COUNTY, S.C.

in violation of Section(s) 16-11-330

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September 23, 19 96

W.L. Hause
FAMILY COURT JUDGE

Darlington, S. C.

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2012 South Carolina Code of Laws > Title 16 - Crimes and Offenses >
Chapter 11 - OFFENSES AGAINST PROPERTY > Section 16-11-330 - Robbery and attempted robbery
while armed with deadly weapon.

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2012 South Carolina Code of Laws

Title 16 - Crimes and Offenses

Chapter 11 - OFFENSES AGAINST PROPERTY

Section 16-11-330 - Robbery and attempted robbery while armed with deadly weapon.

Universal Citation: SC Code § 16-11-330 (2012)

(A) A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence.

(B) A person who commits attempted robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably

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2012 South Carolina Code of Laws

Title 16 - Crimes and Offenses

Chapter 3 - OFFENSES AGAINST THE PERSON

Section 16-3-1040 - Threatening life, person or family of public official or public employee; punishment.

Universal Citation: SC Code § 16-3-1040 (2012)

(A) It is unlawful for a person knowingly and wilfully to deliver or convey to a public official or to a teacher or principal of an elementary or secondary school any letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public official, teacher, or principal, or members of his immediate family if the threat is directly related to the public official's, teacher's, or principal's professional responsibilities.

(B) It is unlawful for a person knowingly and wilfully to deliver or convey to a public employee a letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public employee or members of his