CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October 2018 Term

HOSEA LATRON SWOPES

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state robbery offense that includes "as an element" the taking of property by another by force, interpreted by state law to be satisfied by the force used to overcome resistance to the taking, categorically a "violent felony" under the "element of force" definition of that term in the Armed Career Criminal Act, 18, U.S.C. §924(c)(2)(B)(i)?

   A. This Court will decide this issue and resolve the Circuit conflict that encompasses the Eighth Circuit's decision in this case in *Denard Stokeling v. United States,* No. 17-5554.

Parties to the Proceedings

Petitioner Hosea Swopes was represented in the lower court proceedings by his counsel, Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, with Nanci H. McCarthy, Assistant Federal Public Defender, 1010 Market, Suite 200, Saint Louis, Missouri, 63101. The United States is represented by United Sates Attorney Jeff Jensen and Assistant United States Attorney Tiffany Becker, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri, 63102.

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OPINION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is published at 886 F.3d 668. It appears in the Appendix ("Appx.") 1.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Eighth Circuit Court of Appeals, sitting *en banc*, entered its judgment on March 29, 2018, which rejected the issue presented in this petition, while remanding the case to a three-judge panel to decide the distinct issue of whether a conviction for unlawfully exhibiting a weapon qualifies as a violent felony. Appendix 1. Petitioner did not seek rehearing on the single issue decided in the March 29, 2018 judgment. Eighth Circuit Justice Neal Gorsuch granted an order extending the time to file a petition for a writ of certiorari up through Sunday, August 2, 2018. Petitioner files this petition on Monday August 27, 2018, pursuant to Supreme Court Rule 30.1

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

> **(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.
>
> ******
>
> **(e) (2)** As used in this subsection-- . . .
>
> **(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.

Mo. Rev. Stat. § 211.021. Definitions (1993)

(1) "Adult" means a person seventeen years of age or older[.]

Mo. Rev. Stat. § 569.010 (1993)

As used in this chapter the following terms mean:

(1) "Forcibly steals", a person "forcibly steals", and thereby commits robbery, when, in the course of stealing, as defined in section 570.030, R.S.Mo., he uses or threatens the immediate use of physical force against another person for the purpose of:

(a) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft[.]

Mo. Rev. Stat. § 569.030.1 (1993)

1. A person commits the crime of robbery in the second degree when he forcibly steals property.

STATEMENT OF THE CASE

On July 10, 2014, Hosea Swopes pled guilty to the one-count indictment in this case charging him with being a felon in possession of a firearm, a violation of 18 U.S.C. § 922(g). The offense normally carries a punishment of no more than 10 years in prison, 18 U.S.C. § 924(a)(2). The Probation Office prepared a Presentence Investigation Report (PSR) asserting that Swopes faced a mandatory minimum prison term of 15 years under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e), based on three prior Missouri convictions constituting "violent felonies." PSR, ¶26. The PSR asserted that Swopes (age 39 at sentencing) had exactly three qualifying predicate convictions: a 1992 offense committed at age 15 for display of a firearm in an angry or threatening manner, a 1993 offense committed at age 16 of unarmed second-degree robbery, and a 1993 conviction of first degree armed robbery committed when he was 17. *Id.*[1]

The PSR's designation of these offenses as violent felonies increased the offense level used to calculate Swopes's Guidelines range from 24 to 33. In his criminal history category, the Guidelines range became 151 to 188 months. But for the designation of each of these three offenses, the maximum statutory penalty would have been ten years (120 months). The District Court accepted the PSR and imposed the mandatory minimum sentence of 180 months on March 28, 2016.

Swopes filed a timely direct appeal to challenge his enhanced ACCA sentence in the United States Court of Appeals for the Eighth Circuit. His opening brief raised a single challenge directed to the predicate offense consisting of angry exhibition of a firearm. The case was argued to a three-judge panel on September 23, 2016. It remained under submission for over six months, during which time another three-judge panel issued a decision that declared Missouri second-degree robbery did not qualify

[1] Though Swopes committed these offenses at ages 15, 16, and 17 respectively, his juvenile age posed no obstacle to their consideration because (1) juvenile adjudications qualify under the ACCA so long as they involve "the use or carrying of a firearm," 18 U.S.C. § 924(e)(2)(B); (2) he was prosecuted as an adult for the unarmed second-degree robbery; and (3) Missouri prosecuted 17-year-olds as adults at that time, Mo. Rev. Stat. § 211.021(1) (1993).

because Missouri case law construed the degree of force required to be satisfied by less than the violent level of strong force required by ACCA's definition of "violent force." Swopes sought and received permission to file a supplemental brief challenging his unarmed second-degree robbery conviction based on the intervening decision. The three-judge panel issued a decision summarily reversing his ACCA sentence conviction based on the intervening circuit decision disqualifying second-degree robbery, without reaching the issue of the Missouri exhibiting statute. Appx. 9.

The Government filed a motion for rehearing that was granted. The Government argued that the panel decision rejecting Missouri second-degree robbery as a violent felony relied on dicta in a single Missouri state court opinion. Swopes argued to the contrary, that the earlier panel decision evaluated seven Missouri court cases before concluding that minimal force amounting to "physical contact" satisfied the element of "forcibly stealing." These state court opinions included a case in which the Missouri Court of Appeals held that the defendant's conduct in yanking a purse from the victim's hand accompanied by a nudge or bump to the victim's shoulder sufficed to prove the defendant "forcibly" stole. *State v. Lewis*, 466 S.W.3d 629, 631-33 (Mo. Ct. App. 2016).

Sitting *en banc*, the Eighth Circuit adopted the Government's position that the earlier panel decision erroneously relied on dicta in a Missouri Supreme Court decision:

> We now conclude that the Missouri second-degree robbery statute under which Swopes was convicted requires the use or threatened use of violent force. The court in [*United States v.*] *Bell*[, 840 F.3d 963 (8th Cir. 2016)] relied on "dicta from a single case to conclude that Missouri second-degree robbery does not necessarily require force capable of causing physical pain or injury to another person." *Bell*, 840 F.3d at 969 (Gruender, J., dissenting). The offense in *Lewis* itself, however, did involve the use of violent force: The court "upheld Lewis's second-degree robbery conviction when he bumped the victim from behind, momentarily struggled with her, and then yanked the purse out of her hands." *Id*. (citing *Lewis*, 466 S.W.3d at 633). A blind-side bump, brief struggle, and yank—like the "slap in the face" posited by *Johnson* [*v. United States*], 559 U.S. [133,] 143 [(2010)]—involves a use of force that is capable of inflicting pain. The holding of Lewis thus supports the view that Missouri second-degree robbery requires the use or threatened use of violent force.

> *Lewis* is consistent with Missouri precedent holding that second-degree robbery requires the use of "force capable of preventing or overcoming resistance." *Bell*, 840 F.3d at 969-70 (Gruender, J., dissenting). In *State v. Childs*, 257 S.W.3d 655 (Mo. Ct. App. 2008), for example, the court upheld a second-degree robbery conviction when there was a "[t]ussle" between the defendant and the victim. *Id*. at 660. The court emphasized that to "tussle" means to fight, struggle, contend, wrestle, or scuffle, and distinguished "tussling" from "[t]he sudden taking or snatching of property." *Id*.; *see also State v. Jolly*, 820 S.W.2d 734, 736 (Mo. Ct. App. 1991) (upholding second-degree robbery conviction after noting that the offense was no "mere purse snatching" because it involved a struggle and victim's fingernail was ripped off); *State v. Applewhite*, 771 S.W.2d 865, 868 (Mo. Ct. App. 1989) (upholding second-degree robbery conviction where defendant intentionally pushed a store manager out of his way and knocked him against a door); *State v. Butler*, 719 S.W.2d 35, 37 (Mo. Ct. App. 1986) (upholding second-degree robbery conviction where defendant grabbed a woman's purse and injured her finger). By contrast, the court in *State v. Tivis*, 884 S.W.2d 28 (Mo. Ct. App. 1994), reversed a conviction for second-degree robbery where the defendant merely "grabbed the [victim's] purse by its strap, took it from her shoulder and ran off," *id.* at 29, because there was no use or threatened use of physical force. Id. at 29-30; *see also State v. Henderson*, 310 S.W.3d 307, 309 (Mo. Ct. App. 2010) (reversing a second-degree robbery conviction where defendant merely "brushed" a clerk's arm during the course of a theft).
>
> The text of the Missouri second-degree robbery statute at issue here requires proof that a defendant used physical force or threatened the immediate use of physical force. *See* Mo. Rev. Stat. §§ 569.030.1, 569.010(1) (1979). Missouri decisions applying the statute show that physical force under the Missouri statute is the equivalent of physical force within the meaning of the ACCA. Based on the data available, we see no realistic probability that Missouri courts would apply the Missouri statute to conduct that does not involve force that is capable of causing physical pain or injury. We therefore conclude that the district court properly counted Swopes's conviction for Missouri second-degree robbery as a "violent felony" under the ACCA.

Appx. 5-6. The *en banc* Court sent the case back to the three-judge-panel to decide Swopes's challenge to the District Court's qualification of Missouri unlawful use of a weapon by angry or threatening exhibition, reasoning that it had not been the subject of the rehearing motion. [2]

Judge Kelly dissented from the *en banc* court's ruling that Missouri's unarmed robbery statute qualified as an ACCA violent felony. Appx. 7-8. Judge Kelly's "disagreement rests on a different understanding of what constitutes a 'realistic probability'—as opposed to a merely theoretical one—'that the State would apply its statute to conduct' that constitutes something less than violent force."

[2] The three-judge panel issued its ruling rejecting this challenge on June 13, 2018. Petitioner's motion for rehearing on that decision was just denied August 2, 2018. Petitioner plans to separately file a petition for rehearing to challenge that decision.

Appx. 8. Judge Kelly read the "dicta" in the *Lewis* case to "mean what it say"—that "in Missouri a defendant can be convicted of second-degree robbery when he has physical contact with a victim but does not necessarily cause physical pain or injury." While this was not the same as concluding the force used by a defendant is not capable of causing physical pain or injury, it was sufficient to show a reasonable probability that Missouri would apply the statute to conduct that does not amount to violent force." Appx. 8. Judge Kelly further observed that Missouri prosecutors, judge, and defendants understandably rely on dicta when making charging decisions, assessing the sufficiency of evidence, and when deciding whether to plead guilty or to go trial. *Id*.

The Eighth Circuit's *en banc* decision qualifying Missouri second-degree robbery issued on March 29, 2018, and petitioner did not seek rehearing on that issue. Eighth Circuit Justice Neil M. Gorsuch granted petitioner's request for additional time to file this petition up through Sunday, August 26, 2018. Appx. 9. It is timely filed on Monday, August 27, 2018 pursuant to Supreme Court Rule 30.1.

GROUNDS FOR GRANTING THE WRIT

I. This Court's decision in the *Stokeling* case will resolve the Circuit conflict encompassing the Eighth Circuit's decision on whether robbery laws satisfied by minimal force used to overcome resistance to the taking of property satisfy § 924(e)(2)(B)(i). This Court should hold this petition pending the ruling in *Stokeling*.

Conflict exists among and within the circuits as to whether robbery statutes having as an element the use of slight force to overcome resistance to a taking of property constitute violent felonies under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i). That circuit conflict moved this Court to grant review of the question presented in this petition in *United States v. Stokeling*, 684 Fed. Appx. 870 (11th Cir. 2017), cert. granted, 86 U.S.L.W. 3495 (U.S. April 2, 2018) (No. 17-5554). The center of the conflict rests in the proper interpretation of this Court's 2010 ruling that the ACCA definition can be satisfied only by statues requiring the use of strong, "violent force," "capable of causing physical pain or injury to another person[.]" *Johnson v. United States*, 559 U.S. 133, 140 (2010). The solution to that conflict and the question Swopes raises in this petition must come from this Court, and will come with its decision in *Stokeling*.

In fact, Stokeling's petition for certiorari noted that the position taken by the Tenth and Eleventh Circuit qualifying such laws conflicted with the Eighth Circuit's original three-judge panel decision in Swopes's case until the Eighth Circuit granted rehearing *en banc* and vacated that decision. Petition for Writ of Certiorari, *Stokeling*, *id.*, Pet. at 13 & n.3. By granting certiorari to decide *Stokeling*, this Court confirmed that the issue of whether the ACCA "element of force" definition encompasses robbery statutes requiring no more force than that used to "overcome resistance" to a thief's asportation of property warrants this Court's review and clarification.

The arguments already before this Court in the *Stokeling* briefing resonate with the arguments presented in the Eighth Circuit *en banc*. Swopes argued in the Eighth Circuit that the 2010 *Johnson* decision required a determination of whether the "*amount* of physical force required for a person to be

convicted of second-degree robbery in Missouri" rose to the "demanding" requirement of necessarily involving "violent force—that is, force capable of causing physical pain or injury to another person." He maintained that this Court had already established that the determination must rest on an assessment of "the lowest level of conduct" that would support a conviction under the Missouri second-degree robbery statute. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (quoting *Johnson*, 559 U.S. at 137). Swopes pointed to Missouri case law upholding a second-degree robbery conviction where the victim testified that a subject walked up behind her, bumped her in the shoulder "a little bit," and reached around, grabbed her purse, and took off running. *State v. Lewis*, 466 S.W.3d 629, 632 (Mo. Ct. App. 2015). The Missouri appellate court indicated that where physical contact, struggle, or injury was present, "a jury reasonably could find a use of force" satisfying the statute. *Id.* In Swopes' case, the Government argued, and the Eighth Circuit *en banc* held, that "[a] blind-side bump, brief struggle, and yank—like the 'slap in the face' posited by *Johnson*, 559 U.S. at 143—involves a use of force that is capable of inflicting pain." Appx. 5.

The parties' briefing in *Stokeling* mirrors the debate in the Eighth Circuit. *See, e.g.*, Brief for the Petitioner, *Stokeling*, *supra*, at 5 ("This case calls for a straightforward application of *Curtis Johnson*"); *id.* at 12 ("the government has suggested that "*violent* force" is any force potentially "capable" of causing pain or injury even in an outlier case….[but] [t]he government's limitless view ignores the Court's repeated focus on 'a substantial degree of force,' and eliminates the distinction *Curtis Johnson* sought to draw between violent and non-violent force."); *id.* at 19-37 (discussing whether the Florida robbery statute underlying Stokeling's ACCA sentence satisfies the Curtis *Johnson* threshold of "substantial" "violent" force); Brief For The United States, *Stokeling*, *supra*, at 8 (Summary of Argument asserts that Petitioner's argument "is premised on a misunderstanding of the definition [of force] set forth in *Johnson*."); *id.* at 6-7 (Summary of argument refers to *Curtis Johnson* in all but last

paragraph); *id.* at 9-15, 17-19 & n.1, 20-28 (argument in support of Respondent's contention that "Petitioner's Narrowing Construction of 'Physical Force' Cannot be Squared with *Johnson*"). The *Stokeling* briefing similarly focuses on the same type of "purse-tugging" and victim "bumping" on which the Eighth Circuit focused in deciding Swopes's claims. Brief for the Petitioner, *Stokeling, supra* at 34-36, 39-40; Brief of Respondent, *Stokeling*, *supra*, at 12-13, 30, 32.

Petitioner notes that his appeal presents a fully developed and perfect vehicle for this Court's analysis, notwithstanding his reliance on plain error review in the Court of Appeals. A determination that his Missouri unarmed robbery conviction did not qualify as an ACCA predicate will establish that his conviction was subject to a maximum of ten years in prison, and that the 15-year prison term he is currently serving is illegal and five years longer than the maximum authorized by Congress. No controversy exists that a judgment wrongly subjecting a defendant to an unauthorized ACCA enhancement affects substantial rights and seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See, e.g., United States v. Heikes*, 525 F.3d 662, 664 (8th Cir. 2008); *United States v. Brandon*, 521 F.3d 1019, 1028 (8th Cir. 2008). The original Eighth Circuit three-judge panel decision granting Swopes relief on this point confirms that he will be entitled to a sentence at least five years shorter than the one he is serving if his claim prevails in this Court.

That said, the *Stokeling* case presents a suitable vehicle for this Court to resolve the question of whether state robbery statutes satisfied by noninjurious force merely sufficient to overcome resistance to the taking of property qualifies as an ACCA "violent felony" encompassed by Section 924(e)(2)(B)(i). As such, the petition for a writ of certiorari in this case should be held pending the Court's decision in *Stokeling* and then disposed of in light of that decision. However, should the Court determine that plenary review is appropriate in this case as well as in *Stokeling*, the matters should be consolidated for oral argument.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court hold this petition for a writ of certiorari pending this Court's resolution of *Stokeling* and then dispose of it in light thereof, or, in the alternative, grant his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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