CASE NO.

SUPREME COURT OF THE UNITED STATES

October 2018 Term

HOSEA 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

The Eighth Circuit held in Petitioner's case that a law that criminalizes exhibiting a firearm in an angry or threatening manner in the presence of others without requiring that one aim at or intend such conduct at or toward any specific victim qualifies as a violent felony under the Armed Career Criminal Act (ACCA). The court of appeals asserted that "it goes without saying" that the offense qualified as one having as an element "the use, attempted use, or threatened use of physical force against the person of another" thus qualifying as a violent felony under 18 U.S.C. § 924(e)(2)(B)(i). In neither the federal precedent it cited nor in Petitioner's case did the Eighth Circuit consider any state-court caselaw, but that caselaw expressly holds that this offense requires no intent to threaten another, does not constitute an assault, and requires no proof of conduct directed at or toward anyone. The Eighth Circuit's holding conflicts with decisions of the Sixth and Fourth Circuits holding the ACCA's definition of violent felony does not include an offense involving risky behavior that does not require proof of any force or threat directed at or toward any specific individual.

Accordingly, the question presented in this petition is:

1. Whether a statute prohibiting an angry exhibition of a weapon in the presence of another without requiring that the perpetrator direct or intend to direct this conduct at the person of another constitutes "the use, attempted use, or threatened use of physical force against the person of another" under 18 U.S.C. § 924(e)(2)(B)(i).

Parties to the Proceedings

Federal Public Defender Lee T. Lawless, through Assistant Federal Public Defender Nanci H. McCarthy, 1010 Market Street, Suite 200, St. Louis, Missouri, 63101, represented petitioner Hosea Swopes in lower courts. The United States is represented by United States Attorney Jeffrey Jensen and Assistant United States Attorney Tiffany Becker, 111 South 10th Street, St. 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 892 F.3d 961. It appears in the Appendix ("Appx.") 1.

JURISDICTION

Swopes invokes this Court's jurisdiction 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 entered its judgment on June 13, 2018, rejecting the issues raised in this petition. Petitioner sought rehearing en banc, but the court of appeals denied his request on August 2, 2018. Eighth Circuit Justice Neal Gorsuch granted petitioner's requests for 60 days additional time to file this petition pursuant to Rule 13.5. The 60th day fell on Sunday, December 30, 2018. Pursuant to Rule 30.1, that day is not counted, and the period extends to the next day that is not a Saturday, Sunday, or a day on which the Court building is closed. Consequently, this petition is due on January 2, 2019.

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.

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(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. § 571.030.1(4) (1991)

A person commits the crime of unlawful use of weapons if he knowingly: . . . .(4) Exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner; . . . .

STATEMENT OF THE CASE

On July 10, 2014, Hosea Swopes pled guilty to a one-count indictment 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]

Swopes appealed his enhanced ACCA sentence to the United States Court of Appeals for the Eighth Circuit. He challenged the district court's conclusion that his prior conviction for angry exhibition of a firearm at age 15 under Mo. Rev. Stat. § 571.030.1(4) qualified as a violent felony for the ACCA. While his case was under submission, the Eighth Circuit issued its decision in *United States v. Bell,* 840 F.3d 963 (8th Cir. 2016), holding that Missouri's second-degree robbery statute categorically failed to qualify as a violent felony. Swopes received permission to file a supplemental brief to the Eighth Circuit challenging the use of his second-degree robbery conviction as a predicate offense for an enhanced sentence under the ACCA. The Eighth Circuit summarily reversed his ACCA sentence on this ground.

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[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).

The government successfully moved for rehearing, arguing that *Bell* was wrongly decided and that Swopes's second-degree robbery conviction should qualify as a violent felony. In his briefs to the Eighth Circuit en banc, Swopes not only defended the panel's reliance on *Bell,* he also again challenged the use of his conviction under Missouri's angry exhibition of a weapon statute as a predicate violent felony for an enhanced sentence. The Eighth Circuit en banc reversed *Bell* and held that Swopes's second-degree robbery conviction qualified as a violent felony.[2] As to the issue concerning Swopes's conviction for angry exhibition, the en banc court referred it to the original three-judge panel. The panel latter issued its decision rejecting Swopes's challenge. He sought rehearing on this question but the Eighth Circuit denied this petition.

Eighth Circuit Justice Neil M. Gorsuch granted Swopes's requests for additional time to seek certiorari on this issue, directing that the petition be filed on or before December 30, 2018.[3]

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[2] Swopes has separately petitioned for a writ of certiorari from the Eighth Circuit's separate opinion regarding Missouri's unarmed robbery statute, which is docketed at No. 18-5838.

[3] The docket sheet for this case, which lists Justice Gorsuch's orders, is included in the Appendix to this petition.

GROUNDS FOR GRANTING THE WRIT

II. This Court must resolve the conflict among federal circuits on the question whether criminal laws prohibiting conduct involving aimless exhibition or discharge of a firearm that is neither directed at nor intended to be directed at the person of another qualify as violent felonies under the ACCA's elements or force clause.

A. Introduction

The ACCA dramatically enhances the statutory penalties for crimes such as being a felon in possession of a firearm from a maximum of 10 years[4] to a mandatory minimum of 15 years to life imprisonment.[5] These penalties are triggered if a defendant has three prior convictions for serious drug offenses or violent felonies.[6] As to prior violent felonies, this Court has held that Congress designed this penalty enhancement for offenders whose prior crimes not only "reveal a degree of callousness toward risk," but also reveal a person "who might **deliberately** point the gun and pull the trigger."[7] Prior convictions that do not reveal the "deliberate kind of behavior associated with violent criminal use of firearms" are not what Congress intended to bring within the ACCA's scope.[8] The Court based its conclusion on section 924(e)(2)(B)(i)'s text defining violent felonies to mean offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another. . . ."[9] In *Leocal v. Ashcroft,* 543 U.S. 1, 9 (2004), this Court held that virtually identical text in 18 U.S.C. § 16(a) "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Following *Leocal,* lower courts uniformly understood section 924(e)(2)(B)(i)'s statutory text, "physical force against the person of another," to require that the predicate prior convictions offered to enhance sentences

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4 *See* 18 U.S.C. § 924(a)(2).
5 *See* 18 U.S.C. § 924(e)(1).
6 *See id.*
7 *Begay v. United States,* 553 U.S. 137, 146 (2008) (emphasis added).
8 *Id.* at 147.
9 18 U.S.C. § 924(e)(2)(B)(i).

must involve deliberate or intentional conduct rather than only reckless conduct.[10]

Two recent developments, however, have confused lower courts' understanding of *Leocal's* limitation of violent felonies to those prior convictions involving deliberate or intentional conduct.[11] The first development was this Court's conclusion that a second aspect of the ACCA's definition of "violent felony," was unconstitutionally vague. This portion of the "violent felony" definition, unlike the elements or force clause, focused on risky behavior; that is conduct, "that presents a serious potential risk of physical injury to another. . . ."[12] With a significant portion of the definition of violent felony erased as unconstitutionally vague, lower courts were required to determine whether predicate prior convictions involving risky conduct nevertheless qualified under the force or elements clause in section 924(e)(2)(B)(i). This requirement led to the second development that has confused lower courts. The confusion arose from lower court decisions applying this Court's decision in *Voisine v. United States,* 136 S. Ct. 2272 (2016), to questions concerning the definition of "violent felony" under the ACCA's elements clause. *Voisine* is not an ACCA case. Rather, it concerns the definition of misdemeanor crimes of domestic violence in section 921(a)(33)(A).[13] *Voisine* construed the verb "use" to cover volitional conduct, and "a volitional application of physical force counts as a 'use' even if the actor merely disregards a substantial risk of harm rather than intends the harm."[14] Lower courts such as the Eighth Circuit have taken *Voisine's* holding out of the misdemeanor crime of domestic violence context and applied it to the definition of violent felonies under the ACCA's force or

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10 *See United States v. Harper,* 875 F.3d 329, 332 (6th Cir. 2017) (circuits previously held that reckless conduct did not constitute the use of force against the person of another).

11 18 U.S.C. 924(e)(2)(B)(i).

12 *See Johnson v. United States,* 135 S. Ct. 2551 (2015). *Johnson* held that the portion of the violent felony definition found in section 924(e)(2)(B)(ii), known as the residual clause, is unconstitutionally vague, producing more unpredictability than the due process clause tolerates. *Id.* at 2558.

13 *See Voisine,* 136 S. Ct. at 2276.

14 *See id.* at 2278-79; *United States v. Harper,* 875 F.3d 329, 331 (6th Cir. 2017).

elements clause.[15] Four circuits have now held that risky, reckless conduct can satisfy the ACCA's definition of "violent felony" under the elements clause.[16] These decisions are inconsistent with the circuits that followed *Leocal* in limiting violent felonies for ACCA purposes to those involving intentional conduct.[17] This circuit conflict remains pending before this Court in *Haight v. United States,* No. 18-370.

What is significant for petitioner's case about these developments, however, is that the decisions applying *Voisine* to the ACCA nevertheless hold that a violent felony must involve a victim. The government concedes this point. In its response in opposition to certiorari in *Haight,* the government stated that "the phrase 'against the person of another' in the ACCA merely identifies the object of the use of force."[18] Thus, the government acknowledges, that regardless how one construes the verb "use," *Voisine's* analysis "incorporates the premise that the 'use' of force is against another person."[19]

B. The Eighth Circuit's decision creates a circuit conflict on whether an offense prohibiting risky, aimless behavior that is neither directed against nor intended to threaten any specific person qualifies as a violent felony under the ACCA's "element of force" clause.

1. The Fourth and Sixth Circuits hold that the ACCA's definition of "violent felony" does not include crimes prohibiting gunfire neither aimed at nor intended to be directed at the person of another.

Because the ACCA's force clause requires use, attempted use, or threatened use of physical force *against the person of another,* it does not encompass offenses that "punish 'use of

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15 *See United States v. Ramey,* 880 F.3d 447, 448-49 (8th Cir. 2018).
16 *See* Supplemental Brief of Petitioner at 1-3, *Ramey v. United States,* No. 17-8846 (2018)
17 *See United States v. Harper,* 875 F.3d at 331.
18 Brief for the United States in Opposition at 9, *Haight v. United States,* No. 18-370 (2018).
19 *Id.*

force' in the abstract."[20] Rather, it encompasses only offenses that require proof of a victim.[21] The restrictive phrase "against the person of another" requires that any threat involved in the defendant's risky conduct be communicated to the victim. Absent such communication, the offender's conduct is a threat only in the sense "in which one speaks of 'threats' that are not communications at all, such as the threat of rain posed by storm clouds on the horizon."[22] As the court in *Austin* noted, however, Congress covered such abstract threats with the now-abrogated residual clause which covered "a serious potential risk of physical injury to another."[23] In contrast, the ACCA's force clause more specifically refers to "threatened use of physical force against the person of another,"[24] which "carries the distinct meaning of a communicated intent to do harm."[25]

This understanding of the ACCA's elements clause to cover only offenses that require proof of a victim against whom the use, attempted use, or threatened use of force is directed, led the Sixth Circuit to join the Fourth Circuit in holding that the North Carolina offense of discharging a firearm into an occupied structure is **not** a violent felony.[26] Writing for the Sixth Circuit panel, Judge Kethledge held that for an offense to qualify as a violent felony under the force clause, it must meet four requirements: (1) conduct giving rise to force such as pulling the trigger on a gun; (2) consequences from this conduct such as the application of physical force against the person of another; (3) a volitional, non-accidental mental state; and (4) that the

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20 *United States v. Verwiebe,* 874 F.3d 258, 263 (6th Cir. 2017). *Verwiebe* dealt with the United States Sentencing Guidelines' force clause in section 4B1.2. The Sixth Circuit, like this Court, treats the guidelines' force clause identically to the ACCA's. *See, e.g., United States v. Anderson,* 695 F.3d 390, 399 (6th Cir. 2012); *United States v. Hennecke,* 590 F.3d 619, 620 (8th Cir. 2010).

21 *See id.* at 263

22 *Austin v. United States,* 280 F. Supp. 3d 567, 576 (S.D.N.Y. 2017) (Rakoff, J.).

23 *See id.* (referring to 18 U.S.C. § 924(e)(2)(B)(ii)).

24 18 U.S.C. § 924(e)(2)(B)(i).

25 *Austin,* 280 F. Supp. 3d at 576.

26 *See Higdon v. United States,* 882 F.3d 605, 607 (6th Cir. 2018) (explicitly agreeing with the Fourth Circuit's decision in *United States v. Parral-Dominguez,* 7984 F.3d 440, 445 (4th Cir. 2015).

defendant is at least reckless about the consequences of his conduct.[27] The court found that the government confused proof of an offender's recklessness about the consequences of his or her conduct with proof of the application of force against the person of another.[28] *Higdon* holds that however certain the proof of a defendant's recklessness, this element is entirely separate from the force clause's requirement that the force be used against the person of another.[29] As Judge Keth-ledge explains:

> The government also seems implicitly to adopt a meaning of "against" that is implausible in the context of § 924(e)(2)(B)(i). By way of background, the government repeatedly asserts that a defendant uses force against the person of another if the defendant merely shoots in the person's "direction"—even without hitting him. In so asserting, the government seems to use "against" in the sense of "[i]n hostile opposition or resistance to[,]" which is indeed one of the word's definitions. *American Heritage Dictionary* 32 (3d ed. 1992). Yet the usage example for that definition is "struggle against fate," *id.*, which illustrates that this meaning is too abstract for a phrase as concrete as "physical force against the person of another." Instead, a better fit comes with an alternative definition: "[s]o as to come into forcible contact with[,]" for which the example is "dashing waves against the shore." *Id.* That definition involves physical contact with the (physical) object of the preposition, which makes the definition the more natural one for "against" as used in "physical force against the person of another." Indeed the very point of including the words "the person of" in the statutory text—as opposed to saying simply, "force against another"—is to emphasize that the force must be applied to the victim's "person." The offense here lacked that requirement, and thus Higdon lacked the predicate convictions to be sentenced as an armed career criminal.[30]

Like the overbroad notion of "threat" that Judge Rakoff rejected in *Austin,* the government's erroneous argument in *Higdon* ignored the force clause's command that force be used or threatened *against the person of another.* This restriction, "understood the way the English

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27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.* at 608.

language is ordinarily understood,"[31] requires more than just recklessness. It requires a victim, the person of another against whom a defendant uses, attempts to use, or threatens to use force.

1. The Eighth Circuit ruled that "it goes without saying" that any angry or threatening exhibition of a firearm in the presence of any third party satisfies the ACCA's "element of force" clause without addressing state law establishing that the Missouri offense does not constitute assault and requires no intent to threaten or injure a third party and no perception of the exhibition by the third party.

Confronted with the question whether North Carolina's shooting into an occupied structure statute qualified as a violent felony, the Fourth and Sixth Circuits were careful to analyze state law, both statutory text and state-court caselaw.[32] In sharp contrast, the Eighth Circuit in petitioner's case neither cited nor analyzed any state-court case law.[33] Instead, the court of appeals simply asserted its ability to know that an offense qualifies as an ACCA predicate when it sees it by affirming its prior decision in *United States v. Pulliam,*[34] which claimed, again without any citation to nor analysis of state-court caselaw: "it goes without saying that displaying an operational weapon before another in an angry or threatening manner qualifies as threatened use of physical force against another person."[35] This aspect of petitioner's case, like the sharp circuit

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31 *See United States v. Harper,* 875 F.3d 329, 332 (6th Cir. 2017). In *Harper,* Judge Kethledge observed the restrictive language "against the person of another" "narrows the scope of the phrase "use of force" to require not merely recklessness as to the consequences of one's force, but knowledge or intent that the force apply to another person." *Id.* In the context of threatened violence, the threat must be communicated to the putative victim, a proof requirement absent in section 571.030.1(4).

32 *See Higdon,* 882 F.3d at 607; *Parral-Dominguez,* 794 F.3d at 445.

33 *See Swopes,* 892 F.3d at 962.

34 566 F.3d 784 (8th Cir. 2009).

35 *Pulliam,* 566 F.3d at 788. The Eighth Circuit was so heedless of Missouri law, that it paraphrased the statute erroneously. Pulliam adds the word "operational." But, in a prior review of this statute, the Eighth Circuit held that there is "'no requirement for a firearm to be loaded or operational for a defendant to be convicted under § 571.030.1.'" *United States v. Dixon,* 822 F.3d 464, 466 (8th Cir. 2016). Further, the statute requires that the exhibition of the firearm be "in the presence" of others not "before another" as Pulliam says. Although there may be only a slight difference between "in the presence of" and "before," the latter adds a confrontational connotation that the statute's language utterly lacks.

conflict on the question whether explicitly victimless crimes can qualify as violent felonies, renders petitioner's case particularly suitable for this Court's review. Examination of the state law that the Eighth Circuit simply ignored vividly illuminates the circuit split on the meaning of the ACCA's elements or force clause.

Section 571.030.1(4) has three elements. The state must prove that the defendant (1) knowingly exhibited a weapon (2) in the presence of one or more persons (3) in an angry or threatening manner.[36] The statute's verb, "exhibited," has the ordinary, commonsense meaning of display or show publicly.[37] To prove exhibition, the prosecution need not prove aiming, pointing, or directing the firearm at anyone, much less prove that the firearm was ever discharged.[38] Rather, the exhibition need only be "in the presence" of others. Further, those in the presence of the exhibition need not actually see a firearm.[39] Evidence of the defendant's possession of a firearm suffices to prove exhibition.[40]

Section 571.030.1(4)'s mens rea element is consistent with the obligation to prove mere exhibition, rather than conduct directed against a specific person. The state need only prove that the defendant was aware of the nature of his conduct, not that he had a purpose to threaten.[41] A defendant's subjective intent is irrelevant.[42] The test for whether the defendant exhibited in an

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36 *See State v. Gheen,* 41 S.W.3d 598, 605 (Mo. Ct. App. 2001); *see also* Missouri Approved Instructions 31.22 (3rd ed.) ("the defendant knowingly exhibited, in the presence of one or more persons . . . , a weapon readily capable of lethal use, in an angry or threatening manner").

37 "Exhibit" means "to present to view . . . to show or display outwardly . . . to show publicly . . . ." Merriam-Webster Online Dictionary available at www.merriam-webster.com/dictionary/exhibit.

38 *See State v. Horne,* 710 S.W.2d 310, 315 (Mo. Ct. App. 1986).

39 *See State v. Johnson,* 964 S.W.2d 456, 466-67 (Mo. Ct. App. 1998).

40 *See id.*

41 *See State v. Meyers,* 333 S.W.3d 39, 48 (Mo. Ct. App. 2010); *Williams,* 779 S.W.2d 600, 602-03 (Mo. Ct. App. 1989); *State v. Owen*, 457 S.W.2d 799, 804-05 (Mo. 1970); *State v. Morris*, 172 S.W. 603, 606 (Mo. 1915). *See also Missouri Approved Instructions* 331.22 (3rd ed.) ("that the defendant acted knowingly with respect to the facts and conduct . . . .")

42 *See Williams,* 779 S.W.2d at 603; *United States v. Bell*, 411 F.3d 963, 965 (8th Cir 2016).

angry or threatening manner is objective, from the point of view of a reasonable person in the defendant's presence.[43] Thus for a conviction under section 571.030.1(4), neither the act nor mental state requires proof of conduct, intent, or purpose directed, aimed, or pointed against or toward another.

Accordingly, Missouri caselaw unambiguously establishes that the conduct criminalized under section 571.030.1(4) does not require a victim; that is, a person who is on the receiving end of an offender's conduct such as the victim of an assault. Missouri courts have specifically differentiated unlawful use of a weapon from assault.[44] Even assault third degree is not a lesser included offense of unlawful use of a weapon: [45] "The obvious element under the 'lesser' offense which is not included in the 'greater' offense is the element of assault: placing another person in apprehension of immediate physical injury. **Stated affirmatively, exhibiting a weapon in an angry or threatening manner is a crime that may be proven without regard to placing another person in apprehension of immediate physical injury.**"[46] Further, the state need **not** prove anyone in the defendant's presence subjectively felt threatened.[47] "Whether the manner of exhibition is 'threatening' is to be determined "objectively and not based on the victim's subjective perception of danger."[48] The state may prove a threat merely "on the objective activity of the defendant by which a jury can judge whether the act was threatening."[49] In short, however reprehensible the conduct criminalized under section 575.030.1(4), it does not require a victim.

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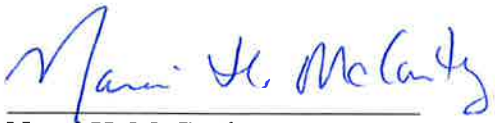
43 *See id.*
44 *See State v. Whitehead,* 675 S.W.2d at 943-44.
45 *See State v. Cavitt,* 703 S.W.2d 92, 93 (Mo. Ct. App. 1985)
46 *Id.* (emphasis added).
47 *See United States v. Betts,* 509 F.3d 441, 445 (8th Cir. 2007)
48 *United States v. Bell,* 411 F.3d at 965.
49 *State v. Murry,* 580 S.W.2d 555, 557 (Mo. Ct. App. 1979); *Bell,* 411 F.3d at 965.

Thus, Eighth Circuit's failure to consider Missouri caselaw left it blind to the qualities of section 571.030.1(4) that distinguishes it from assault. It does not require proof of a victim. The conduct criminalized under the Missouri statute does not involve the threatened use of physical force *against the person of another*. The panel's failure to consider this aspect of the statute and Missouri caselaw creates a circuit conflict. The Eighth Circuit's decision in *Swopes* cannot be squared with the Sixth Circuit's decision in *Higdon* nor the Fourth Circuit's decision in *Parral-Dominguez*. It is equally inconsistent with Judge Rakoff's reasoning and holding in *Austin*. Only this Court can resolve this conflict, and it should do so in petitioner's case.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court grant his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,



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