No. 18-7233

IN THE SUPREME COURT OF THE UNITED STATES

HOSEA LATRON SWOPES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for unlawful use of a weapon, in violation of Mo. Rev. Stat. § 571.030.1(4) (1986), was a conviction for a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 892 F.3d 961. Prior opinions of the court of appeals are reported at 886 F.3d 668 and 850 F.3d 979.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2018. A petition for rehearing was denied on August 2, 2018. On October 26, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including November 30, 2018. On December 10, 2018, Justice Gorsuch further extended the time to and including December 30, 2018, and the

petition was filed on January 2, 2019 (Wednesday after Court closures). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2, 4. The court of appeals affirmed. Pet. App. 1-3.

1. In July 2014, the St. Louis Metropolitan Police Department received a tip from a confidential informant that petitioner was in possession of two concealed firearms and heroin at a lounge in St. Louis, Missouri. Presentence Investigation Report (PSR) ¶ 10. A records check revealed that petitioner was a convicted felon and was at the time serving a term of supervised release for a prior federal conviction under 18 U.S.C. 922(g)(1). PSR ¶¶ 10, 35. Officers located petitioner outside of the lounge and observed him lift the front of his shirt to reveal part of a handgun. PSR ¶ 11. Petitioner removed the handgun and dropped it to the sidewalk at his feet. Ibid. Police then retrieved the handgun and arrested petitioner. Ibid.

A federal grand jury charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1).

Indictment 1. Petitioner pleaded guilty to that charge pursuant to a written plea agreement. Plea Tr. 4, 19; see D. Ct. Doc. 56 (Mar. 23, 2015).

2. A conviction under Section 922(g) has a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1); see Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" 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.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the "elements clause," and the portion beginning with "otherwise" is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office classified petitioner as an armed career criminal under the ACCA based on three prior convictions: a 1992 conviction for unlawful use of a weapon, in violation of Mo. Rev.

Stat. § 571.030.1(4) (1986); a 1994 conviction for Missouri second-degree robbery; and a 1996 conviction for Missouri first-degree robbery. PSR ¶¶ 26, 32-34; Addendum to PSR 1. Petitioner objected to his ACCA classification on the theory that his conviction for unlawful use of a weapon was not a conviction for a violent felony under the ACCA. See Addendum to PSR 1; Sent. Tr. 4-8. Petitioner acknowledged that in United States v. Pulliam, 566 F.3d 784, cert. denied, 558 U.S. 1035 (2009), the Eighth Circuit had determined that Section 571.030.1(4) categorically satisfies the ACCA's elements clause. See Sent. Tr. 6. Nevertheless, he argued that more recent decisions of this Court -- namely, Descamps v. United States, 570 U.S. 254 (2013), and Johnson v. United States, 559 U.S. 133 (2010) -- had cast doubt on that determination. See Sent. Tr. 6-7.

The district court overruled petitioner's objection and found that petitioner was subject to the ACCA's enhanced statutory-minimum sentence. Sent. Tr. 7-8. The court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2, 4.

3. On appeal, petitioner initially argued only that his conviction for unlawful use of a weapon was not a conviction for a violent felony under the ACCA's elements clause. See Pet. C.A. Br. ix. While the appeal was pending, the Eighth Circuit held in United States v. Bell, 840 F.3d 963 (2016), that Missouri second-degree robbery was not a "crime of violence" for purposes of

Sentencing Guidelines § 4B1.2(a)(1). 840 F.3d at 964-969. In light of that decision, petitioner filed a supplemental brief arguing that his prior conviction for second-degree robbery was not a violent felony for purposes of the ACCA's elements clause. See 850 F.3d at 980. The court of appeals agreed, vacated petitioner's sentence, and remanded for resentencing. Id. at 981.

The government petitioned for rehearing en banc, and the court of appeals granted the petition. See 886 F.3d 668. On rehearing en banc, the court overruled Bell and determined that second-degree robbery under Missouri law qualifies as a violent felony under the ACCA's elements clause. Id. at 671-672. The court accordingly vacated the original panel decision and remanded to the panel to resolve whether petitioner's prior conviction for unlawful use of a weapon under Section 571.030.1(4) qualifies as a violent felony. Id. at 672-673. This Court denied a petition for a writ of certiorari challenging the en banc court's conclusion about petitioner's second-degree robbery conviction. Swopes v. United States, cert. denied, No. 18-5838 (Feb. 25, 2019).

The original court of appeals subsequently rejected petitioner's challenge to the classification of his unlawful-use-of-a-weapon conviction and affirmed petitioner's sentence in a per curiam opinion. Pet. App. 1-3. The court observed that it had already determined in Pulliam that a violation of the Missouri statute at issue categorically qualifies as a violent felony. Id. at 2. The court also noted that, in another recent case, it had

rejected the argument that Pulliam had been superseded by Descamps or Johnson. Id. at 2-3 (citing United States v. Hudson, 851 F.3d 807 (8th Cir. 2017)). The court thus concluded that petitioner was eligible for the ACCA's sentencing enhancement because he had sustained three prior convictions for violent felonies. Ibid.

ARGUMENT

Petitioner contends (Pet. 14-20) that his prior conviction for unlawful use of a weapon under Mo. Rev. Stat. § 571.030.1(4) (1986) does not qualify as a violent felony for purposes of the ACCA because the statute "does not require proof of a victim" and therefore "does not involve the threatened use of physical force against the person of another." Pet. 20 (emphasis omitted). The court of appeals correctly rejected that state-offense-specific contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that petitioner's conviction for unlawful use of a weapon, in violation of Mo. Rev. Stat. § 571.030.1(4), qualifies as a conviction for a violent felony under the ACCA's elements clause.

The court of appeals relied on its prior decisions in United States v. Pulliam, 566 F.3d 784 (8th Cir.), cert. denied, 558 U.S. 1035 (2009), and United States v. Hudson, 851 F.3d 807 (8th Cir. 2017), which found that Section 571.030.1(4) satisfies the identically worded elements clauses of the ACCA and Sentencing

Guidelines § 4B1.2(a)(1), respectively. See Pet. App. 2-3. The relevant Missouri statute makes it a crime to "knowingly * * * [e]xhibit[], in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner." Mo. Rev. Stat. § 571.030.1(4) (1986). In Pulliam, the court reasoned that "[i]t 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." 566 F.3d at 788. And in Hudson, the court determined that Pulliam "remain[ed] sound in light of the statutory elements: Displaying a weapon that is 'readily capable of lethal use' before another in an angry or threatening manner qualifies as threatened use of physical force against another person." 851 F.3d at 810.[1]

Petitioner does not dispute that the angry or threatening display of a weapon readily capable of lethal use qualifies as the threatened use of violent force for purposes of the ACCA's elements clause. Instead, he contends (Pet. 17-20) that Pulliam and Hudson were wrongly decided because, as interpreted by Missouri state courts, Section 571.030.1(4) is a "victimless crime[]." Pet. 18. That contention is mistaken.

The court of appeals rejected a similar proposed interpretation of state law in Hudson. See 851 F.3d at 810

[1] The court in Hudson assumed that Section 571.030.1(4) "defines a single offense" and held that, under Pulliam, "both means of committing the offense (an angry display or a threatening display) involve the requisite threatened use of force." 851 F.3d at 809-810.

("Hudson has not identified any developments in Missouri law after 2009 that undermine the court's conclusion in Pulliam."); see also Appellant's Br. at 14, Hudson, supra (No. 15-3744) (raising state-law arguments similar to petitioner's). Section 571.030.1(4) requires both that a defendant exhibit a weapon "in the presence of one or more persons" and that he do so "in an angry or threatening manner." Mo. Rev. Stat. § 571.030.1(4). The statute thus identifies the relevant victim: the "one or more persons" subject to the defendant's "angry or threatening" exhibition. Ibid. Accordingly, Missouri courts have repeatedly assumed that an offense under Section 571.030.1(4) involves a victim. See, e.g., State v. Barber, 37 S.W.3d 400, 404 (Mo. Ct. App. 2001) ("[Section 571.030.1(4)] is designed to protect victims from the threat of being harmed by a weapon."); State v. Williams, 779 S.W.2d 600, 603 (Mo. Ct. App. 1989) ("[T]he threat does not depend on the victim's subjective perception of the danger involved.").

Petitioner does not cite any state decision establishing that Section 571.030.1(4) may be violated in the absence of a victim. Nor does he identify any prosecutions under Section 571.030.1(4) that did not involve the threatened use of force against another person. See Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (explaining that the categorical approach "is not an invitation to apply legal imagination to [a] state offense," and that "there must be a realistic probability, not a theoretical possibility,

that the State would apply its statute to conduct that falls outside" the federal definition) (citation and internal quotation marks omitted). He instead supports his interpretation of the Missouri law as defining a victimless crime solely by relying on inapposite decisions.

First, petitioner notes (Pet. 18) that a Missouri court has determined that "[t]he pointing of the weapon at a person or persons is not a necessary element of [Section 571.030.1(4)]." State v. Horne, 710 S.W.2d 310, 315 (Mo. Ct. App. 1986). But that is because Section 571.030.1(4) prohibits "brandishing" a weapon, not aiming it. State v. Parkhurst, 845 S.W.2d 31, 36 (Mo. 1993). Horne nowhere suggests that Section 571.030.1(4) may be violated without threatening a victim; to the contrary, as the Missouri Court of Appeals has observed, Horne addressed "the number of victims of the flourishing of the weapon." Barber, 37 S.W.3d at 405 (emphasis added). Similarly, it is immaterial that Section 571.030.1(4) may be violated even if a victim never sees the weapon. See Pet. 18 (citing State v. Johnson, 964 S.W.2d 465, 467-469 (Mo. Ct. App. 1998)). The statute "protect[s] victims from the threat of being harmed by a weapon." Barber, 37 S.W.3d at 404. An offender can threaten the use of physical force against the person of another where he "give[s] evidence of [a deadly weapon] through visible signs and actions" in a threatening or angry manner, whether or not a victim makes "actual visual contact with the weapon." Johnson, 964 S.W.2d at 468-469.

Second, petitioner suggests (Pet. 18-19) that because Section 571.030.1(4) does not require proof of the defendant's "purpose to threaten" a particular victim, the statute's mens rea element does not necessarily contemplate the existence of a victim. Pet. 18 (citing, inter alia, State v. Meyers, 333 S.W.3d 39, 48 (Mo. Ct. App. 2010)). But Section 571.030.1(4) requires that the defendant knowingly exhibited a weapon and "knew that his actions were threatening." Meyers, 333 S.W.3d at 48. As is true of Section 571.030.1(4) generally, the mens rea element thus presupposes an object of the defendant's threatening exhibition.[2]

Third, petitioner asserts (Pet. 19) that Missouri courts have distinguished unlawful use of a weapon from assault because the former does not require as an element "placing another person in apprehension of immediate physical injury." State v. Cavitt, 703

[2] To the extent petitioner suggests that general intent crimes cannot constitute violent felonies under the elements clause, the courts of appeals have repeatedly rejected that argument. See, e.g., United States v. Deiter, 890 F.3d 1203, 1212-1214 (10th Cir.) (rejecting argument that federal bank robbery, in violation of 18 U.S.C. 2113(a), does not quality as a violent felony under the elements clause because it is a "general intent crime," and noting that every circuit to address the issue had reached the same conclusion), cert. denied, 139 S. Ct. 647 (2018); United States v. Campbell, 865 F.3d 853, 857 (7th Cir.) (same for federal bank robbery under Sentencing Guidelines § 4B1.2(a) (2015)), cert. denied, 138 S. Ct. 347 (2017); United States v. White, 723 Fed. Appx. 844, 849 (11th Cir. 2018) (per curiam) (rejecting argument that resisting-an-officer offense requiring general intent does not qualify as a violent felony under the elements clause); United States v. Laurico-Yeno, 590 F.3d 818, 823 n.4 (9th Cir.) ("A general intent crime can satisfy the generic definition of a 'crime of violence'" in Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2009)), cert. denied, 562 U.S. 886 (2010).

S.W.2d 92, 93 (Mo. Ct. App. 1985). Even if a conviction under Section 571.030.1(4) does not require proof of a victim's mental state, that does not imply that the offense may be committed without the "threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). Rather, it suggests only that the relevant mental state is the defendant's.

2. Although petitioner does not identify any conflict among the courts of appeals with respect to the statute at issue or similar statutes prohibiting the exhibition of firearms, petitioner asserts (Pet. 14-18) that the decision below conflicts with decisions of the Fourth and Sixth Circuits about whether the ACCA's definition of "violent felony" includes "explicitly victimless crimes." Pet. 17-18. No such conflict exists.

First, as explained above, see pp. 9-11, supra, the Missouri offense at issue is not a "victimless crime." The decision below therefore did not address whether, let alone hold that, the ACCA's definition of violent felonies necessarily encompasses such crimes. See Pet. App. 2-3. Second, the two decisions that petitioner cites in support of an alleged circuit conflict involve a materially different state statute and are consistent with the decision below. As petitioner notes (Pet. 15-16), the Fourth and Sixth Circuits have concluded that a violation of a North Carolina statute prohibiting the discharge of a firearm into an occupied structure does not necessarily involve the use of force against the person of another. See United States v. Parral-Dominguez,

794 F.3d 440, 445 (4th Cir. 2015); Higdon v. United States, 882 F.3d 605, 606-608 (6th Cir. 2018). But that North Carolina statute did not require "pro[of] that an occupant is targeted or threatened." Parral-Dominguez, 794 F.3d at 445. The Fourth and Sixth Circuits thus determined that the statute criminalizes the "use of force * * * against a structure, not 'against the person of another.'" Higdon, 882 F.3d at 607; see Parral-Dominguez, 794 F.3d at 445 (same). Here, by contrast, the elements of the Missouri statute require the threatened use of force against another person by exhibiting a deadly weapon in a threatening or angry manner in the presence of one or more people. See Mo. Rev. Stat. § 571.030.1(4).

In any event, this case -- like those on which petitioner relies -- depends upon the interpretation of state law. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2019