CASE NO. 18-7233

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

REPLY BRIEF FOR PETITIONER

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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, "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 case law, 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).

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STATUTORY PROVISIONS INVOLVED

Mo. Rev. Stat. § 565.050. Assault, first degree . . . (1991)

A person commits the crime of assault in the first degree if he or she attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

Mo. Rev. Stat. § 565.020.1(2) Assault in the second degree (1991)

A person commits the crime of assault in the second degree if he or she: . . . . (2) Attempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument; . . . .

Mo. Rev. Stat. § 571.030.1(3) Unlawful use of a weapon (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; . . . .

Mo. Rev. Stat. § 571.030.1(4) Unlawful use of a weapon (1991)

A person commits the crime of unlawful use of weapons if he knowingly: . . . .(3) Discharges or shoots a firearm into a dwelling house, a railroad train, boat, aircraft, or motor vehicle as defined in section 302.0010, R.S.Mo., or any building or structure used for the assembling of people; . . .

I. This Court must resolve the circuit conflict on whether weapons offenses that do not require as an element a targeted victim qualify as violent felonies requiring "the use, attempted use, or threatened use of force *against* the person of another" under 18 U.S.C. § 924(e)(2)(B)(i).

The Government does not deny that the "element of force" definition in 18 U.S.C. §924(e) (2) (B) (i) requires a *targeted* "use, attempted use, or threatened use of force against the person of another." Missouri case law plainly provides that "[t]he pointing of the weapon at a person or persons is not a necessary element of the offense." *See State v. Horne*, 710 S.W.2d 310, 314 (Mo. Ct. App. 1986). The Government attempts to camouflage the circuit conflict on the matter by citing Missouri state court cases referring to "victims" of Mo. Rev. Stat. §530.071.1(4). BIO 7-8. These state opinions refer to "victims" in the sense of bystanders placed at risk by "brandishing" of a firearm, not persons targeted for its discharge. Missouri criminalizes targeted gunfire intended for particular victims in its assault statutes.

The Missouri case law cited by the Government also refute its claim that no circuit conflict exists because the North Carolina law against shooting at an occupied structure materially differs from Missouri's exhibiting statute. *See State v. Barber*, 37 S.W.3d 400, 404 (Mo. Ct. App. 2001) (likening the danger the legislature sought to prevent by the exhibiting statute with the adjacent subsection prohibiting firing a gun at a building or other structure where people assemble). The nature of the Missouri exhibiting law the Eighth Circuit fit within the "elements" clause shares the very quality of prohibiting untargeted gunplay that led the Fourth and Sixth Circuits to disqualify the North Carolina law in *United States v. Parral-Dominguez*, 794 F.3d 440 (4th Cir. 2015), and *Higdon v. United States*, 882 F.3d 605, 607 (6th Cir. 2018).

Respondent cites Missouri cases that confirm the exhibiting law does not require targeted victims and that equate the danger the law addresses with that of shooting at houses

The government mistakenly dismisses the Circuit conflict on whether laws proscribing "untargeted" gunplay qualify as the use or threatened use of force against another by claiming that state cases imply targeting by referring to the bystanders in the presence of the exhibitor as "victims." BIO 7-8, citing *Barber*, 37 S.W.3d at 404; *State v. Williams*, 779 S.W.2d 600, 603 (Mo. Ct. App. 1989). In none of these cases does the Missouri appellate court use the term "victim" in the sense of a "targeted" person whom the defendant intends to threaten. Quite to the contrary, the *Barber* decision equated Missouri's gun exhibition prohibition with the adjacent subsection prohibiting discharging a gun into a dwelling house or any building or structured used for the assembling of people. *Barber*, 37 S.W.3d at 404, citing *State v. Morrow*, 888 S.W.2d 387, 393 (Mo. Ct. App. 1994).

Angry or threatening gun exhibitions—"brandishing," to borrow the government's non-statutory description of the offense (BIO 9)—puts the lives of others "in jeopardy," but does not require targeting "victim" bystanders for the use , attempted use or threatened use against their persons. *Horne*, 710 S.W.2d at 314. Missouri criminalizes targeted gunfire in assault laws that require as an element that one knowingly "attempts to kill or knowingly causes or attempts to cause serious physical injury *to another person*," Mo. Rev. Stat. §565.050.1 (1991) (assault in the first degree), or "[a]ttempts to cause or knowingly causes physical injury *to another person* by means of a deadly weapon or dangerous instrument," Mo. Rev. Stat. § 565.060.1(2). (1991) Missouri cases treat assault and angry or threatening exhibitions as distinct offenses. *See State v. Whitehead*, 675 S.W.2d 939, 943 (Mo. Ct. App. 1984) (conviction of both first-degree assault and angry or threatening weapon exhibitions were proper, despite some overlap in proof).

In short, Missouri's gun exhibition law does not require a threat or attempted use of force

against a targeted other person. The government overstates Missouri case law to suggest that the statute's mental state of knowing conduct "presupposes an object of the defendant's threatening exhibition." BIO 10, citing *State v. Meyers*, 333 S.W.3d 39, 48 (Mo. Ct. App. 2010). Although the facts in *Meyers* showed the defendant *did* threaten a teenage girl while pulling her hair and holding a knife three inches from her head, *id.* at 45, the statute does not categorically require an offender to direct or intend a threat to a targeted victim. *Horne*, 710 S.W.2d at 314. *Compare Descamps v. United States*, 570 U.S. 254, 276-66 (2013) (modified categorical approach does not apply to prove defendant actually broke into and entered a burgled location under a law that did not categorically require such entry as an element).

The government's claim that Mo. Rev. Stat. §571.31.1(4) has no element of "aiming" a firearm at anyone, Gov. BIO 9, confirms that the law does not require a targeted victim "against" whose person the defendant seeks to use, attempted to use, or threaten violent force. The "threat of being harmed by a weapon" to which the legislature directed the statute refers to the generalized danger posed by angry or threatening conduct in the presence of others whom the defendant need not have any intent to threaten or hurt. In one case, the Court of Appeals noted that the bystanders satisfying the "presence of others" requirement consisted of a defendant's girlfriend and her son who were in a car with him, out of which he stuck his arm to fire a gun in a sweeping fashion to scare away a tailgating motorist in another car. *See State v. Gheen*, 41 S.W.3d 598, 600-601, 605 (Mo. Ct. App. 2001) ("the state elicited testimony from Gheen himself that he exhibited the weapon in the presence of at least two people…. His girlfriend, Louderback, and her son were in the car with him at the time of the incident."). Gheen's angry exhibition was not intended for, directed at, or prompted by the driver or her son in the car he rode in, yet the risk his display posed to them satisfied the "presence of others" element the statute requires.

The *Barber* case cited by the Government negates its claim that Swopes's challenge to Missouri's exhibiting statute causes no circuit conflict on the basis that *Higdon* and *Parral-Dominguez* evaluated a "materially different state statute" because the North Carolina statute prohibiting discharge of a firearm into an occupied structure does not necessarily involve use of force against the person of another." BIO 11. In *Barber*, the Missouri Court of Appeals equated the danger the legislature sought to prevent by prohibiting angry or threatening weapons exhibitions in in §571.031.1(4) with the preceding statutory subsection directed at one who knowingly "[d]ischarges or shoots a firearm into a dwelling house, a railroad train, boat, aircraft, or motor vehicle… or any building or structure used for the assembling of people[.]" 37 S.W.3d at 403-404, quoting Mo. Rev. Stat. §571.030.1(3). The state court noted that §571.030.1(3) was "designed to protect occupants of a dwelling house and to punish one who would fire a gun into a dwelling, placing the occupant's life in jeopardy." *Id*. at 404. The adjacent subsection prohibiting angry exhibitions of firearms likewise "is designed to protect victims from the threat of being harmed by a weapon." *Id.* Both statutes focus on the jeopardy, or "risk" that untargeted gunplay poses to bystanders. The North Carolina statute proscribing the discharge of a firearm into an occupied structure likewise prohibited "acts that merely pose a risk of harm to another person." *Parral-Dominguez*, 794 F.3d at 444-445. Therefore, Missouri's exhibiting statute and both the North Carolina and Missouri statutes prohibiting firing into a dwelling house prevent conduct that imperils bystanders who need not be targeted by the offender.

The Eighth Circuit's determination that the Missouri exhibiting statute qualifies as the "use, attempted use, or threatened use of force against the person of another" cannot be reconciled with the Fourth and Sixth Circuits' determinations that untargeted gunplay fails to establish the "threatened use of force *against* the person of another." *Higdon*, 882 F.3d at 607; *Parral-*

Dominguez, 794 F.3d at 445. Defendants in the Eighth Circuit continue to receive sharply enhanced sentences under the enhanced mandatory minimum in 18 U.S.C. § 924(e)(2) that would not apply if they were prosecuted in the Fourth or Sixth Circuits, resulting in arbitrary disparities based solely on geography that only this Court can resolve. *See, e.g., Tapia v. United States*, 564 U.S. 319, 323 & n.1 (2011) (certiorari granted to solve conflict between circuits concerning sentencing judges authority to lengthen prison terms to serve rehabilitative needs).

The Government's last-ditch effort to preserve the circuit conflict in order to show deference to regional courts of appeals when construing state laws, BIO 12, misstates the issue at hand. The circuit conflict here relates not to conflicting interpretations of state law, but conflict in the interpretation of the federal statute defining predicate "violent felonies" in § 924(e) (2) (B) (i). *Compare Johnson v. United States*, 559 U.S. 133 (2010) (certiorari granted to decide whether "force" referred to in §924(e)(2)(B)(i) definition requires violent force or merely slight, offensive touching as held by the Eleventh Circuit).

CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Court grant his petition for a Writ of Certiorari to the Eighth Circuit Court of appeals.

Dated April 4, 2019.

Respectfully submitted,

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