

CASE NO. 17A-_____

SUPREME COURT OF THE UNITED STATES
October 2017 Term

HOSEA SWOPES,)
)
 Petitioner,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
 Respondent.)

APPLICATION DIRECTED TO JUSTICE GORSUCH FOR ADDITIONAL TIME TO FILE
PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF AP-
PEALS

Submitted on Behalf of Petitioner

Submitted By:

NANCI H. MCCARTHY
Assistant Federal Public Defender
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St. Louis, MO. 63101
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ATTORNEY FOR PETITIONER

To Justice Neil M. Gorsuch:

Petitioner Hosea Swopes, through his attorney of record, Assistant Federal Public Defender Nanci H. McCarthy, requests 60 additional days in which to file a petition in this Court seeking certiorari to the Eighth Circuit Court of Appeals, up through December 31, 2018. He requests this extension under Supreme Court Rule 13.5. In support, he states:

JURISDICTION

Petitioner seeks an extension to file a petition for writ of certiorari. Petitioner is requesting review of the judgment issued by the Eighth Circuit Court of Appeals on June 13, 2018, affirming his conviction and sentence for being a previously convicted felon in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1). Appendix 1. Petitioner filed a motion for rehearing which the Eighth Circuit denied on August 2, 2018. Appendix 1. The petition for writ of certiorari is originally due on Thursday, October 31, 2018. Petitioner files this request for additional time at least 10 days before the date the petition is currently due, in compliance with Supreme Court Rule 13.5.

REASONS FOR APPLICATION FOR EXTENSION

1. Swopes believes that his case raises a recurrent issue of exceptional importance concerning the interpretation of the problematic definitions used to enhance sentences under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i), based on a recidivist provision focused on prior convictions qualifying under the Act's definitions for what constitutes a violent felony. The judgement counsel seeks to challenge raises the issue of whether the Missouri state offense of unlawful use of a weapon qualifies as a violent felony under the ACCA. Specifically it concerns whether this offense has as an element the use, attempted use, or threatened use

of physical force against the person of another within the meaning of 18 U.S.C. § 924(e)(2)(B)(i).

2. Swopes's case presents an unusual procedural situation. On Swopes's direct appeal of his sentence, the Eighth Circuit initially vacated the judgment on grounds that Swopes's prior conviction for Missouri's second-degree robbery failed to qualify as a violent felony under the ACCA. *See United States v. Swopes*, 850 F.3d 979, 981 (8th Cir. 2017) (per curiam). Thereafter, the Eighth Circuit granted the government's petition for rehearing en banc, reversed precedent, and, on March 20, 2018, held that Swopes's prior conviction for Missouri's second-degree robbery qualified as a violent felony. *See United States v. Swopes*, 886 F.3d 668, 672 (8th Cir. 2018). In the same decision, it referred Swopes's case back to the initial panel to determine whether a prior conviction under Missouri's unlawful use of a weapon statute qualified as a violent felony under the ACCA. *See id.* at 672-73. On June 13, 2018, the panel issued its decision affirming Swopes's sentence and holding that the unlawful use of a weapon conviction qualified as a violent felony. *United States v. Swopes*, 892 F.3d 961, 962 (8th Cir. 2018) (per curiam). Swopes moved for rehearing en banc of this decision, which the Eighth Circuit denied in a summary order on August 2, 2018. *See United States v. Swopes*, No. 16-1797 (8th Cir. Aug. 2, 2018).

3. On August 27, 2018, Swopes filed a petition for a writ of certiorari and motion for leave to proceed in forma pauperis from the Eighth Circuit's March 29, 2018 decision concerning Missouri's second-degree robbery statute. He filed this petition out of an abundance of caution to ensure that this issue was preserved for review.

4. Swopes also intends to seek this Court's review of the issue concerning Missouri's unlawful use of a weapon statute which the Eighth Circuit resolved in June 13, 2018 decision and affirmed in its August 2, 2018 denial of rehearing en banc. This application for additional time concerns that issue.

2. Petitioner's counsel requests additional time due to the high number and increased complexity of criminal prosecutions she has been appointed to represent as an assistant federal public defender. Counsel makes this request with no dilatory purpose, but rather seeks to ensure proper presentation of the important federal questions raised in petitioner Swopes's case while also providing the effective representation of her dozens of other appointed clients.

WHEREFORE, petitioner requests leave to file his Petition for Writ of Certiorari, up through and including December 31, 2018.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

892 F.3d 961
United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Hosea Latron **SWOPES**, Defendant-Appellant.

No. 16-1797

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Submitted: March 29, 2018

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Filed: June 13, 2018

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Rehearing and Rehearing En Banc Denied August 2, 2018

Synopsis

Background: Defendant pled guilty in the United States District Court for the Eastern District of Missouri, Ronnie L. White, J., to unlawful possession of firearm as previously convicted felon, and he appealed. The Court of Appeals, 850 F.3d 979, vacated and remanded. On rehearing en banc, the Court of Appeals, 886 F.3d 668, affirmed, and returned case to panel to resolve balance of defendant's appeal.

[Holding:] The Court of Appeals held that defendant's prior Missouri conviction for unlawful use of weapon qualified categorically as predicate "violent felony" under Armed Career Criminal Act (ACCA).

Affirmed.

West Headnotes (1)

[1] Sentencing and Punishment—Particular offenses

Defendant's prior Missouri conviction for unlawful use of weapon qualified categorically as predicate "violent felony" under Armed Career Criminal Act's

(ACCA) elements clause. 18 U.S.C.A. § 924(e)(2)(B)(i); Mo. Ann. Stat. § 571.030.1(4).

Cases that cite this headnote

Appeal from United States District Court for the Eastern District of Missouri—St. Louis

Attorneys and Law Firms

Allison Hart Behrens, John Timothy Bird, Assistant U.S. Attorneys, U.S. ATTORNEY'S OFFICE, Eastern District of Missouri, Saint Louis, MO, John Nicholas Koester, Jr., Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Eastern District of Missouri, for Plaintiff-Appellee.

Nanci McCarthy, Federal Public Defender, FEDERAL PUBLIC DEFENDER'S OFFICE, Saint Louis, MO, Scott Tilsen, Assistant Federal Public Defender, FEDERAL PUBLIC DEFENDER'S OFFICE, Cape Girardeau, MO, for Defendant-Appellant.

Hosea Latron Swopes, Atwater, CA, Pro Se.

Before COLLTON, MELLOY, and SHEPHERD, Circuit Judges.

Opinion

PER CURIAM.

Hosea Swopes pleaded guilty to unlawful possession of a firearm as a previously convicted felon, in violation of ***962** 18 U.S.C. § 922(g)(1). The district court¹ concluded that Swopes was subject to an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The Act requires a minimum 15-year prison sentence for a felon in possession of a firearm who has sustained three previous convictions for a violent felony or a serious drug offense. The district court cited Swopes's prior Missouri convictions for unlawful use of a weapon, second-degree robbery, and first-degree robbery as three violent felonies. Without the sentence enhancement, the statutory maximum punishment would have been ten years' imprisonment. 18 U.S.C. § 924(a)(2).

Swopes appealed his sentence and argued that the convictions for unlawful use of a weapon and second-degree robbery should not have counted as violent felonies.

We vacated the judgment on the ground that second-degree robbery in Missouri was not a violent felony under the reasoning of *United States v. Bell*, 840 F.3d 963, 965–67 (8th Cir. 2016). See *United States v. Swopes*, 850 F.3d 979 (8th Cir. 2017) (per curiam). The court then granted rehearing en banc, overruled *Bell*, and concluded that the district court properly counted Swopes’s Missouri robbery conviction as a violent felony. *United States v. Swopes*, 886 F.3d 668 (8th Cir. 2018) (en banc). The en banc court returned the case to this panel to resolve the balance of Swopes’s appeal.

Swopes argues that unlawful use of a weapon, in violation of Mo. Rev. Stat. § 571.030.1(4), is not a violent felony. In *United States v. Pulliam*, 566 F.3d 784 (8th Cir. 2009), however, this court held that a violation of the statute qualifies categorically, because it “has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i); see *Pulliam*, 566 F.3d at 788. Swopes argues that *Pulliam* was wrongly decided and also has been superseded by the Supreme Court’s decisions in *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), and *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). We considered a similar argument in *United States v. Hudson*, 851 F.3d 807 (8th Cir. 2017), and concluded that *Pulliam* was not superseded by *Descamps* or *Johnson*, or by developments in Missouri law. *Id.* at 809–10. Swopes also contends that *Pulliam* is inconsistent with the decision in *United States v. Jordan*, 812 F.3d 1183 (8th Cir. 2016), concerning a conviction for aggravated assault in Arkansas. But *Jordan*, of course, involved a different state statute; the *Jordan* panel could not overrule *Pulliam*’s conclusion about the Missouri statute and did not purport to do so.

In light of *Pulliam* and *Hudson*, we conclude that Swopes’s conviction for unlawful use of a weapon in Missouri was a conviction for a violent felony under § 924(e). Swopes therefore had sustained three previous convictions for a violent felony at the time of his offense in this case, and the district court properly applied the sentencing enhancement under the Armed Career Criminal Act. The judgment of the district court is affirmed.

All Citations

892 F.3d 961

Footnotes

¹ The Honorable Ronnie L. White, United States District Judge for the Eastern District of Missouri.

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SUPREME COURT OF THE UNITED STATES
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Appendix to Petitioner's Motion for More Time to File Petition for a Writ of Certiorari

Contents

1. *United States v. Hosea Swopes*, No. 16-1797,
Per Curiam opinion (8th Cir., June 13, 2018) 1 – 3

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served October 18, 2018, to Assistant United States Attorney Allison H. Behrens, U.S. Attorney's Office, 111 S. 10th Street, 20th Floor, St. Louis, MO 63102 by hand-delivery to that address, and by depositing a copy with a third-party commercial carrier for delivery within two-days time to the Office of the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave. N.W., Washington, D.C. 20530-0001.

NANCI H. MCCARTHY
Assistant Federal Public Defender