No. _____

IN THE
Supreme Court of the United States

SEAB NOLEN,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a prior conviction that includes as an element the possession of a weapon categorically a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924 (e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force again the person of another"), if the crime may be proven without regard to placing another person in apprehension of immediate physical injury?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Seab Nolen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A) is unpublished at 769 Fed. Appx. 398, No. 17-1988, 2019 WL 1952754, at *1 (8th Cir. Apr. 30, 2019). The order of the United States District Court for the Western District of Missouri (Pet. App. B) is also unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 30, 2019. This Court has jurisdiction under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOKED

18 U.S.C. § 924. Penalties

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

> (B) the term 'violent felony' means 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.

Mo. Rev. Stat. § 571.030.1(4)

1. A person commits the crime of unlawful use of weapons if he or she knowingly:

   (4) Exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner.

INTRODUCTION

The courts of appeals are conflicted over whether a prior conviction that includes as an element the possession of a weapon is a "violent felony" under the ACCA, if the crime may be proven without regard to placing another person in apprehension of immediate physical injury.

The question presented was not an important question for this Court when the ACCA's residual clause existed as a catchall provision, because many circuits had concluded that such crimes involving a weapon satisfied the residual clause due to the mere risk of physical injury. However, now with the residual clause gone as the most expedient route to an ACCA enhanced sentenced after *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015), lower courts must reconsider whether such gun crimes – long counted as a "violent felony" within the residual clause – still qualify as predicate convictions within the elements clause of § 924(e)(2)(B)(i).

Some circuit courts have risen to that task. Unlike the Eighth Circuit, they have carefully re-examined whether a threatened use of physical force is required based on the minimum conduct necessary for a conviction, as mandated by this Court's precedents. *See Stokeling v. United States*, 913 F.3d 1252 (2019); *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); and *Mathis v. United States*, 136 S.Ct. 2243 (2016). When one applies this Court's case law faithfully to these crimes that merely involve possession of a weapon, and do

not require placing another person in apprehension of immediate physical injury, it is readily apparent that they are not a "violent felony" because they do not satisfy the elements clause.

For example, Mr. Nolen's conviction under Missouri law, "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*." *State v. Cavitt*, 703 S.W.2d 92, 93 (Mo. Ct. App. 1985), emphasis added. This crime, and other crimes like it, do not require "the use, attempted use, or threated use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

This issue has fully percolated below, and the courts of appeals are deeply and intractably divided. The stakes are also high. Numerous individuals will be sentenced to enhanced ACCA sentences based on the elements clause of 18 U.S.C. § 924(e)(2)(B)(i) just this year – sentences that are at least five years and sometimes decades longer than could otherwise have been imposed – merely based on the happenstance of geography. Simply put, the time for the Court to resolve this circuit split is now.

STATEMENT OF THE CASE

1. In 2012, Petitioner Seab Nolen pleaded guilty to felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).

After he pled guilty, the Probation Office's presentence investigation report ("PSR") concluded that Mr. Nolen was an Armed Career Criminal because he had three—and only three—prior "violent felony" convictions. Specifically, the PSR concluded that Mr. Nolen's convictions for Kansas aggravated battery, Missouri second degree assault, and Missouri unlawful use of a weapon made him an ACCA offender.

At the sentencing hearing in 2013, the district court concluded that Mr. Nolen was an ACCA offender based on his prior convictions. He was ultimately sentenced to 192 months' imprisonment.

2. Mr. Nolen filed a direct appeal to the Eighth Circuit challenging, among other things, whether he was properly sentenced under the ACCA. The Eighth Circuit denied his appeal. *See United States v. Nolen*, 533 Fed.Appx. 699 (8th Cir. 2013).

3. In June 2016, Mr. Nolen filed an application for leave to file a second or successive motion to vacate, set aside or correct his sentence with the Eighth Circuit. On December 7, 2016, the Eighth Circuit granted Mr.

Nolen permission to file a second or successive motion to vacate his sentence, pursuant to 28 U.S.C. § 2255.

4. In January 2017, Mr. Nolen filed his successive motion pursuant to 28 U.S.C. § 2255 with the district court, maintaining that after this Court's decision in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2016), he was improperly sentenced as an ACCA offender because his sentence was predicated on that statute's void residual clause.

The district court denied Mr. Nolen's § 2255 motion, concluding that all three of his prior convictions were still "violent felony" convictions after this Court's holding in *Samuel Johnson*. In reaching that conclusion, the district court noted that at the original sentencing hearing "there was no specific determination as to why any of Movant's prior convictions constituted violent felonies, largely because it was generally accepted at the time that these crimes qualified as crimes of violence under the residual clause." App. B, pg. 2.

The district court, however, went on to conclude that Mr. Nolen's three predicate convictions in question all satisfied the elements clause of 18 U.S.C. § 924 (e)(2)(B)(i). *Id*. The district court focused on Mr. Nolen's Missouri unlawful use of a weapon conviction under Mo. Rev. Stat. § 571.030.1(4), and concluded that he was entitled to a certificate of appealability solely as to

whether that conviction is a "violent felony" because the issue was subject to debate among reasonable jurists. App. B, pg. 4.

5. Mr. Nolen timely appealed the denial of his § 2255 motion to the Eighth Circuit in May 2017, challenging whether he was properly sentenced as an ACCA offender because Mo. Rev. Stat. § 571.030.1(4) is not a violent felony.

However, Mr. Nolen filed a motion to stay the appeal in the Eighth Circuit, because the Eighth Circuit was re-considering *en banc* the identical issue in *Swopes v. United States*, 16-1796—whether Mo. Rev. Stat. § 571.030.1(4) is a "violent felony." The Eighth Circuit granted Mr. Nolen's motion to stay the appeal on November 16, 2017, based on the *en banc* proceedings in *Swopes*.

During the Fall of 2017, the *en banc* Eighth Circuit permitted supplemental briefing to be filed in *Swopes* on the issue of whether unlawful use of a weapon, Mo. Rev. Stat. § 571.030.1(4), was a "violent felony", and also heard *en banc* oral argument on this issue as well. Ultimately, the Eighth Circuit's *en banc* opinion declined to reach the merits of this issue because the "three-judge panel did not pass on this question," and therefore the court decided "to return the case to the panel for resolution" of that issue. *United States v. Swopes*, 886 F.3d 668, 672 (8th Cir. 2018) (en banc). Less

than three months later, the panel of the Eighth Circuit issued its opinion in *Swopes*, refusing to reach the merits of the issue, because prior panel decisions of the Eighth Circuit had concluded Mo. Rev. Stat. § 571.030.1(4) was a "violent felony". *United States v. Swopes*, 892 F.3d 961, 962 (8th Cir. 2018), citing *United States v. Pulliam*, 566 F.3d 784 (8th Cir. 2009).[1]

After *Swopes* was decided, the Eighth Circuit vacated its prior stay in Mr. Nolen's appeal, and subsequently denied his appeal in April 2019. *See United States v. Nolen*, 769 Fed.Appx. 398 (8th Cir. 2019). In denying Mr. Nolen's appeal, the Eighth Circuit issued a three paragraph per curiam opinion, which relied, again, on its prior case law as to why Mr. Nolen's conviction under Mo. Rev. Stat. § 571.030.1(4) was a violent felony. *Id.*, citing *Swopes.* 892 F.3d at 962.

[1] In his petition for certiorari to this Court, Mr. Swopes did not raise any issue regarding his unlawful use of a weapon conviction under § 571.030.1(4), but instead solely challenged his Missouri robbery predicate conviction. *See* petition for certiorari, No. 18-5838.

REASONS FOR GRANTING CERTIORARI

I. The lower courts are in conflict over the question presented.

1. There is a direct conflict in the circuits as to whether an unlawful use of a weapon conviction satisfies the ACCA's elements clause. The Ninth Circuit has repeatedly held that such crimes do not satisfy the elements clause, even before the residual clause was struck down as unconstitutional by this Court. *See United States v. Long,* 62 F.3d 1426 (9th Cir. 1995) (exhibiting a deadly weapon, Ariz. Rev. Stat Ann. § 13-916, does not satisfy ACCA's elements clause); *see also United States v. Willis*, 795 F.3d 986 (9th Cir. 2015) (unlawful use of a weapon, Or. Rev. Stat § 166.220(1)(a), does not satisfy Guidelines' elements clause).

While the Eighth Circuit originally relied on the residual clause to conclude that unlawful use of a weapon, Mo. Rev. Stat. § 571.030.1(4), was a "violent felony", *see for example United States v. Jackson*, 462 F.3d 899 (8th Cir. 2006), it later concluded that this conviction satisfied the ACCA's elements clause in *United States v. Pulliam*, 566 F.3d 784 (8th Cir. 2009). Thus, whether a defendant's unlawful use of a weapon conviction satisfies the elements clause is dependent on the geography of where the defendant is sentenced.

Furthermore, the Eighth Circuit has acknowledged this circuit split. In *United States v. Boaz*, 884 F.3d 808, 810 (8th Cir. 2018), the Eighth Circuit held that Arizona unlawful use of a weapon, Ariz. Rev. Stat Ann. § 13-916, satisfies the elements clause. In doing so, the court concluded that the Arizona and Missouri unlawful use of a weapon crimes – Ariz. Rev. Stat Ann. § 13-916 and Mo. Rev. Stat. § 571.030.1(4) – are "materially indistinguishable." *Boaz*, 884 F.3d at 810. In reaching that conclusion in *Boaz*, the Eighth Circuit acknowledged the Ninth Circuit's opinion in *Long*, but concluded that it was "not bound by it." *Id*. at 811. Thus, the circuit split is pronounced and should be resolved by this Court.

2. The question presented, and the circuit split, are not limited to unlawful use of a weapon offenses. It extends to any other crime that includes as an element the possession of a weapon, and that possession is used by the government to satisfy the elements clause because it purportedly involves a threatened use of physical force.

Aggravated robbery is one example. The Tenth Circuit recently concluded that Kansas aggravated robbery, Kan. Stat. Ann. § 21-3427, is not a "violent felony" under the ACCA, because being armed with a dangerous weapon during the course of a robbery does not satisfy the elements clause. *United States v. Bong*, 913 F.3d 1252, 1266 (10th 2019). The Tenth Circuit

first held that the unarmed Kansas robbery crime did not satisfy the elements clause after this Court's holding in *Stokeling v. United States*, 139 S.Ct. 544 (2019), because Kansas robbery criminalized mere snatchings of property. *Bong*, 913 F.3d at 1261-2.

Next, the Tenth Circuit concluded that "simple possession of a weapon, rather than actual use of a weapon, is a sufficient means of being 'armed' for the purposes of the Kansas aggravated robbery statute, because the statute does not require the robber to use the weapon or that the victim be aware of its presence." *Bong*, 913 F.3d at 1266. In concluding that "merely being 'armed with a weapon during the course of a robbery is not sufficient to render the crime a "violent felony", the Tenth Circuit held that "there is a material difference between the presence of a weapon, which produces a *risk* of violent force, and the actual or threatened use of such force." *Id*., quoting *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) (concluding that Massachusetts armed robbery is not a violent felony under the force clause); *see also United States v. Starks*, 861 F.3d 306, 321 (1st Cir. 2017) (same).

The Eighth Circuit has analyzed the existence of the weapon drastically differently than the First, Ninth and Tenth Circuits. Specifically, the Eighth Circuit concluded that because the weapon involved in the Missouri unlawful use of a weapon crime "is readily capable of *lethal* use",

that furthers the elements clause analysis because it is indicative of the ability to use force. *United States v. Hudson*, 851 F.3d 807, 809 (8th Cir. 2017) (emphasis original). Furthermore, in concluding that Missouri unlawful use of a weapon, Mo. Rev. Stat. § 571.030.1(4), satisfies the elements clause, the Eighth Circuit in *Hudson* focused on the fact that "lethal" means "capable of causing death." *Id*. However, this does not add to the elements clause analysis, because as the Ninth and Tenth Circuits have concluded "there is a material difference between the presence of a weapon, which produces a *risk* of violent force, and the actual or threatened use of such force." *Bong*, 913 F.3d at 1266, quoting *Parnell*, 818 F.3d at 980.

Furthermore, in *Hudson*, the Eighth Circuit assumed that the Missouri unlawful use of a weapon crime necessarily required the State to prove "threatening use of such weapon" to a victim. *Hudson*, 851 F.3d at 809. Indeed, the Eighth Circuit's analysis merely parrots the language of the statute in concluding that "[d]isplaying 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." *Id*. at 810. However, this fails to engage the requisite analysis to "identify the minimum 'force' required by the applicable state law from state law cases, and then determine

if that minimum force satisfies the elements clause." *Bong*, 913 F.3d at 1261, citing *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

Indeed, the Eighth Circuit cited *no* Missouri state case law to determine what the minimum force is required to be convicted of Mo. Rev. Stat. § 571.030.1(4). *Id. Hudson* instead cited to other Eighth Circuit case law, which also in turn also failed to engage the requisite analysis of Missouri state case law. *Id*. This "groupthink" infects the entire Eighth Circuit line of case law as it pertains to Mo. Rev. Stat. § 571.030.1(4), and has prevented meaningful analysis of whether this weapon crime (and other weapon crimes like it) satisfy the elements clause after this Court struck down the ACCA's residual clause in *Samuel Johnson*. *Hudson*, 851 F.3d at 809 (citing to Eighth Circuit case from 2009, *Pulliam*); *Swopes*, 892 F.3d at 962 (same); *Boaz*, 884 F.3d at 810 (same).

This conflict in the law is fully entrenched. The Eighth Circuit heard *en banc* oral argument as to whether Mo. Rev. Stat. § 571.030.1(4) remains a "violent felony" after *Samuel Johnson*, and still refused to reach the merits of the issue as an *en banc* court. *See United States v. Swopes*, 886 F.3d 668, 672 (8th Cir. 2018) (en banc); *see also United States v. Swopes*, 892 F.3d 961, 962 (8th Cir. 2018). Because the Eighth Circuit will not reconsider the merits of this issue, only this Court can resolve the circuit split.

II. The Eighth Circuit's ruling is incorrect.

The Eighth Circuit's conclusion that Missouri unlawful use of a weapon is a "violent felony" fails to apply the elements clause test as required by this Court to determine whether Missouri state courts have interpreted Mo. Rev. Stat. § 571.030.1(4) to "have 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). Once that analysis of Missouri state law is conducted – without reliance on the void residual clause of the ACCA – it becomes readily apparent that Mo. Rev. Stat. § 571.030.1(4) does not satisfy the elements clause.

1. Earlier this year, this Court held that "[b]ecause the term 'physical force' in ACCA encompasses the degree of force necessary to commit common-law robbery, and because Florida robbery requires that same degree of 'force,' Florida robbery qualifies as an ACCA-predicate offense under the elements clause." *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019). To reach that conclusion, this Court employed two steps.

First, *Stokeling* examined what conduct satisfies 18 U.S.C. § 924 (e)(2)(B)(i), and said that "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson,* and 'suggest[s] a degree of power that would not be satisfied by the merest

touching." 139 S.Ct. at 553, quoting *Curtis Johnson v. United States*, 559 U.S. 133, 139 (2010). "The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself 'capable of causing physical pain or injury.'" *Id.,* quoting *Curtis Johnson,* 559 U.S. at 140.

Second, this Court applied "these principles to Florida's robbery statute to determine whether it 'has as an element the use, attempted use, or threatened use of physical force against the person of another.'" *Stokeling,* 139 S.Ct. at 554, quoting 18 U.S.C. § 924(e)(2)(B)(i). This Court's ultimate conclusion turned on how Florida state courts had interpreted the Florida robbery statute in question, and that "the Florida Supreme Court has made clear that this statute requires resistance by the victim that is overcome by the physical force of the offender", and "[m]ere snatching of property from another will not suffice." 139 S.Ct. at 554-55 (citations and quotations to Florida state case law omitted).

2. Applying this Court's elements clause test in *Curtis Johnson* and *Stokeling* to Missouri's unlawful use of a weapon crime, Mo. Rev. Stat. § 571.030.1(4), reveals why the Eighth Circuit's ruling is incorrect. As highlighted above, the Eighth Circuit has failed to "identify the minimum 'force' required by the applicable state law" from Missouri state law cases

interpreting Mo. Rev. Stat. § 571.030.1(4), and then determine if that minimum force satisfies the elements clause." *Bong*, 913 F.3d at 1261, citing *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

While exhibiting a weapon sounds menacing, the label of the conviction alone fails to reveal that "[t]he pointing of the weapon at a person or persons is not a necessary element of the offense." *State v. Horne*, 710 S.W.2d 310, 315 (Mo. Ct. App. 1986). Furthermore, "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*." *State v. Cavitt*, 703 S.W.2d 92, 93 (Mo. Ct. App. 1985), emphasis added.

Thus, while the Eighth Circuit concluded in 2009 that "it goes without saying" that unlawful use of a weapon (exhibiting) Mo. Rev. Stat. § 571.030.1(4), "qualifies as threatened use of physical force against another person", it reached this holding without analyzing any of the definitive sources of Missouri law. In actuality, Mo. Rev. Stat. § 571.030.1(4) criminalizes the creation of a risk of harm to others, but, as construed by Missouri courts, does not categorically require proof of threatened use of physical force against the person of another. Thus, it does not satisfy the elements 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. *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").

The statute's verb, "exhibited," has the ordinary, common sense meaning of display or show publicly. "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.

Accordingly, to prove a weapon was "exhibited," the state need not show that the defendant pointed, aimed, or directed the weapon at, toward, or against anyone. *State v. Horne*, 710 S.W.2d 310, 315 (Mo. Ct. App. 1986). Mo. Rev. Stat. § 571.030.1(4) stands in stark contrast to other state weapon crimes, which require "pointing" the gun at a victim as an element of the offense. *See United States v. King*, 673 F.3d 274, 278 (4th Cir. 2012), (concluding that pointing and presenting a firearm, South Carolina Code § 16–23–410, is a "crime of violence").

Missouri courts accept that the statute means what it says: the exhibiting need only occur "in the presence" of others. *Id.* In fact, the "other" person need not even see the weapon, which is remarkable because it is difficult to discern how the crime therefore involves the use, attempted use, or threatened use of physical force against the person of another. § 924(e)(2)(B)(i).

In *State v. Johnson*, 964 S.W.2d 465, 467 (Mo. Ct. App. 1998), the defendant went to his girlfriend's parents' home and, while on the front porch, demanded that his girlfriend come out and speak with him. When she refused, he left the porch, walked across the street to his girlfriend's parked car, fired four shots, and drove away in his own car. *Id*. No one in the house ever saw a gun while he was on the front porch, or later when they heard gunshots. *Id.* The defendant's conduct was directed at property - - the parked car - - rather than people. *Id*. Nevertheless, his conviction for exhibiting a weapon in the presence of one or more persons in an angry or threatening manner was sustained because his girlfriend saw "fire" in his hands when he was across the street at her car, and heard the sound of gunshots. *Id*.

"[T]his court determines that Mr. Johnson exhibited the gun by giving evidence of it through visible signs and actions according to the plain and ordinary meaning of the term 'exhibit.'" *Johnson* 964 S.W.2d at 468.

Therefore, the state can prove a defendant "exhibited" a weapon without needing to prove that it was pointed or aimed at any person, and without showing that anyone visually perceived this "exhibition" of the *weapon*.

The absence of any need to prove conduct directed against a specific person is consistent with the *mens rea* of Mo.Rev.Stat. § 571.030.1(4). The State need only prove that the defendant was aware of the nature of his conduct, not that he had a purpose to threaten. *See State v. Meyers*, 333 S.W.3d 39, 48 (Mo. Ct. App. 2010). *See also Missouri Approved Instructions* 331.22 (3rd ed.) ("that the defendant acted knowingly with respect to the facts and conduct …"). Finally, the state does not need to prove that the defendant intended to threaten any victim. *State v. Williams*, 779 S.W.2d 600, 602-03 (Mo. Ct. App. 1989); *State v. Owen*, 457 S.W.2d 799, 804-05 (Mo. 1970).

These two aspects of the statute - (1) exhibiting a weapon that no one need see, and (2) exhibiting a weapon that need not be directed at a specific individual, i.e. exhibiting merely in the presence of others who may be inside a building while the defendant is outside and across the street – demonstrate a "realistic probability" that Mo.Rev.Stat. § 571.030.1(4) encompasses conduct that does not involve use or threatened use of violent force. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

The lack of immediacy here is problematic, because a remote and distant threat cannot satisfy the force clause because "'physical' plainly refers to force exerted by and through concrete bodies—distinguishing physical force, from, for example, intellectual force or emotional force.'" *Stokeling*, 139 S.Ct. at 552, quoting *Curtis Johnson*, 559 U.S. at 138. Nor does Mo.Rev.Stat. § 571.030.1(4) require actual use of the weapon to threaten the victim, as interpreted by the above Missouri courts. This highlights why it does not satisfy the elements clause. *See United States v. Bong*, 913 F.3d 1252, 1266 (10th 2019) ("[S]imple possession of a weapon, rather than actual use of a weapon, is a sufficient means of being 'armed' for the purposes of the Kansas aggravated robbery statute", because the statute does not require the robber to use the weapon or that the victim be aware of its presence.")

To be sure, Mo.Rev.Stat. § 571.030.1(4) criminalizes the creation of a risk of harm to others, but this only satisfies the now void residual clause of the ACCA. Exhibiting a weapon in the presence of others creates a risk of harm to those individuals but is not an act, like an assault, directed at a specific individual. If a statute only requires the government to prove that a defendant created a risk of harm to another, it does not qualify as a violent felony under the elements clause because the government need not prove violent physical force. *Samuel Johnson*, 135 S.Ct. at 2579; *Stokeling*, 139

S.Ct. at 552. The Eighth Circuit has erred in repeatedly concluding to the contrary, and in refusing to meaningfully re-consider its holding that is predicated on the ACCA's residual clause.

III. The case is an excellent vehicle to resolve this split regarding a question presented that is extremely important.

1. This case is an ideal vehicle for resolving this circuit split, in order to provide lower courts with guidance in this important area of the law regarding the elements clause of 18 U.S.C. § 924(e)(2)(B)(i). The only basis to affirm Mr. Nolen's sentence is to conclude that his conviction under Mo.Rev.Stat. § 571.030.1(4) satisfies the elements clause. Because unlawful use of a weapon is not an enumerated offense under the ACCA, and because the residual clause of the ACCA is void for vagueness, the sole question presented on appeal focuses on the elements clause alone.

Additionally, the question ruled upon by the district court, and on appeal by the Eighth Circuit, is whether Missouri unlawful use of a weapon, Mo.Rev.Stat. § 571.030.1(4), remains a "violent felony" based on the elements clause. Specifically, there are no procedural issues, which would prevent this Court from reaching the ultimate merits of the issue presented. Thus, it is an ideal vehicle to resolve this circuit split.

2. Furthermore, the question presented is one of exceptional importance, because hundreds of individuals are sentenced to an ACCA enhanced sentence every year. While the enumerated clause of the ACCA has been repeatedly interpreted by this Court in determining such issues as what constitutes "burglary" in the ACCA's enumerated clause, this Court has had fewer occasions to give meaning to the elements clause. To be sure, *Stokeling* further refined what the term "physical" means as it pertains to the "physical force" in the ACCA, but it did not have occasion to interpret what a "*threated* use of physical force" means in 18 U.S.C. § 924(e)(2)(B)(i). 139 S.Ct. at 554-55.

What is more, many of the alternative bases for invoking the ACCA have been shown in recent years to be much narrower than courts thought in the past. See, e.g., *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015), *Descamps v. United States*, 570 U.S. 254 (2013). The question presented therefore determines whether a large number of federal prisoners may be sentenced to ACCA sentences, based on the elements clause.

The question presented is also important after this Court's recent holding in *United States v. Davis*, 139 S.Ct. 2319 (2019), which voided the residual clause of 18 U.S.C. § 924(c)(3)(B). In the wake of *Davis*, there will be

substantial litigation in the lower courts as to which defendants' § 924(c) convictions may be sustained under a virtually identically worded elements clause in 18 U.S.C. § 924(c)(3)(B). Specifically, 18 U.S.C. § 924(c) punishes using a firearm "in connection with certain other federal crimes", but this Court just highlighted that it remains uncertain under the statute *"which* other federal crimes?" *Davis*, 139 S.Ct. at 2323. Therefore, granting certiorari in this case will help provide answers to whether such crimes, like federal kidnapping under 18 U.S.C. § 1201(a), satisfies the elements clause because "a perpetrator could lure his victim into a room and lock the victim inside against his or her will" in a way that is unrelated to the gun possession. *United States v. Jenkins*, 849 F.3d 390, 392 (7th Cir. 2017).

Therefore, how much weight the elements clause can bear will impact a broad swath of cases, and will determine which defendants may have their sentences enhanced under a variety of federal statutes. This issue will also likely impact the Career Offender provision of the Guideline's force clause of U.S.S.G. § 4B1.2, as well as the reentry guideline of U.S.S.G. § 2L1.2.

Accordingly, the sooner this Court brings order to the scope of the elements clause in this context of weapons offenses, the better. The lower courts should not have to expend resources in case after case sorting through competing arguments regarding such claims, and the related state and

federal statutes involved. Ultimately, the many defendants in these cases should not be subjected to years of additional prison time based solely on the happenstance of geography.

CONCLUSION

For the forgoing reason, the petition for a writ of certiorari should be granted.[2]

Respectfully submitted,

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[2] Natalie Hewitt, a third year law student at the University of Missouri-Kansas City (Class of 2020), assisted in the research and writing of this petition for certiorari.

APPENDIX

Appendix A - Judgment of the Eighth Circuit Court of Appeals

Appendix B - Order of the District Court