

CASE NO. 19-7409

IN THE SUPREME COURT OF THE UNITED STATES

October 2019 Term

MELVYN PRYOR

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR REHEARING

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §16(a) (2018.). Crime of violence defined The term “crime of violence” means—

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

18 U.S.C. 921(a)(33)(A) (2018) “[T]he term ‘misdemeanor crime of domestic violence’ means an offense that –

- (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

18 U.S.C. §924(e)(2)(B) (2018 ed.), “Penalties,”

(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—

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

State Statutes

Mo. Rev. Stat. § 571.030 (2009). Unlawful use of weapons -- exceptions – penalties

- 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[.]

Tenn. Code Ann. § 39-13-102 (2005):

(A) A person commits aggravated assault who:

- (2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and:

(A) Causes serious bodily injury to another; or (B) Uses or displays a deadly weapon.

Tenn. Code Ann. § 39-13-101 (2005)

(a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another[.]

ARGUMENT FOR REHEARING

Petitioner sought a writ of certiorari to the Eighth Circuit Court of Appeals ruling that the Missouri offense making it a crime to “exhibit[] a firearm in an angry or threatening manner,” in the presence of another person, such as a child in the defendant’s care against whom no threat or harm is intended. Mo. Rev. Stat §571.030.1(4) (2005). On March 2, 2020. Petitioner maintained that the Missouri offense could not satisfy the definition of a predicate “violent felony” having “as an element, the use, attempted use, or threatened use of force *against the person of another*,” in the Armed Career Criminal Act (“ACCA”), 18 U.S.C. §924(e)(2)(B)(i) (emphasis added). State courts interpret Missouri’s “exhibiting” offense to require no intent by the offender to threaten another, nor any perception of a threat—or even the exhibition itself—by another person. *State v. Gheen*, 41 S.W.3d 598, 605 (Mo. Ct. App. 2001). The exhibiting law does not require that an offender point, aim, or direct the weapon exhibit at, toward, or against anyone. *See State v. Horne*, 710 S.W.2d 310, 315 (Mo. Ct. App. 1986). Missouri law does not require that a violator intend to threaten another person by his exhibition of a weapon. *State v. Meyers*, 333 S.W.3d 39, 48 (Mo. Ct. App. 2010). Nor does it require that anyone in the defendant’s presence felt threatened. *See United States v. Betts*, 509 F.3d 441, 445 (8th Cir. 2007). The statute does not even require the gun exhibited be loaded, *See State v. Wright*, 382 S.W.3d 902, 905 (Mo. 2012). The statute requires only that the defendant knew his actions could be objectively viewed as threatening or angry. *Meyers*, 333 S.W.3d at 48. The legislation constitutes a public safety measure intended to discourage risky behavior. As such, petitioner argued that the offense did not require as an element the use or threatened use of force “against the person of another.”

At the time Petitioner Pryor requested certiorari, this Court was set to decide if crimes committed with a mental state of “recklessness” fall outside the “element of force” definition for lacking an element of “targeted” at the person of another in *Walker v. United States*, No. 19-593, Petitioner’s Merits Brief,

pp. 21-24 (January 6, 2020). Petitioner urged the Court to hold his case pending this Court's ruling in *Walker*, but Walker suddenly died, eliminating the live controversy.

On March 2, 2020, this Court granted certiorari to reach the issue of whether reckless offenses satisfy the ACCA "element of force" definition in *Christopher Borden Jr. v. United States*, No. 19-5410. Borden's case involves a Tennessee's reckless aggravated assault law prohibiting the felony of reckless aggravated assault, defined as "recklessly causing bodily injury to another" by one who "uses or displays a deadly weapon." Tenn. Code Ann. § 39-13-102(a)(2)(A)-(B) (2005), incorporating Tenn. Code Ann. § 39-13-101(a)(1) (2005)). *See Borden*, Petition for Certiorari, pp. 3, 5, 8, 11-12 (filed July 24, 2019). Like Missouri's firearm "exhibiting" offense, Tennessee's reckless aggravated assault does not require that an offender intend to injure anyone, but only "requires the [defendant's] act to either cause serious bodily injury or be committed with the use or display of a deadly weapon[.]" *See State v. Bonds*, No. W2005-02267-CCA-R3-CD, 2006 WL 2663753, at *9 (Tenn. Crim. App. Sep. 15, 2006).

In *Borden*, this Court will necessarily decide whether the ACCA definition for "violent felonies" having as an element the use or threatened use of force "against the person of another" encompasses only those crimes categorically defined by a perpetrator's use of force *targeted* at another person. Although the merits briefs in *Borden* have not yet been filed, the merits brief in *Walker* made the issue of whether the ACCA "element of force" definition requires a "targeted" use of force against another central to the issue. This issue lies at the heart of the tension between the ruling in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), that a nearly identical "use of force" definition in 18 U.S.C. § 16(a), "suggest[ed] a higher degree of intent than negligent or merely accidental conduct," and *Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016). The *Voisine* decision construed a statute defining predicate crimes having as an element any "use or attempted use of physical force" by a person who has a specified relationship with a specific class of victim (such as a domestic partner), without limiting the conduct to a use of force

“against the person of another.” *Id.*, citing 18 U.S.C. §921(a)(33)(A)(ii). Hence, the targeted use of force stands squarely before this Court in *Borden*. This Court’s resolution of that case will inevitably bear on the validity of the Eighth Circuit’s ruling that Missouri’s firearm exhibition law.

This Court’s resolution of the issue in *Borden* will inevitably confirm or repudiate the Eighth Circuit’s position that the Missouri “exhibiting” offense—requiring no proof of an intended or perceived threat targeted at anyone present—constitutes a use of force “against the person of another.” The Missouri courts interpret the statute to be satisfied by the presence of an offender’s infant child at whom no exhibition is intended nor threat made. *See Gheen*, 41 S.W.3d at 605-06. If this Court holds that the ACCA “element of force” definition encompasses only offenses that require a “targeted” use of force directed at the person of another, the Eighth Circuit’s ruling in Mr. Pryor’s case will be invalid. Therefore, it serves the interests of judicial economy to hold Mr. Pryor’s petition for certiorari and this petition for rehearing on its denial, pending the ruling in *Borden*. This would spare petitioner the need to file a petition for collateral relief under 28 U.S.C. §2255 based on a favorable ruling in *Borden* later this year.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court reconsider his Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals, and, hold its ruling on this rehearing request until this Court issues its decision in *Borden v United States*, No. 19-5410.

Respectfully submitted,

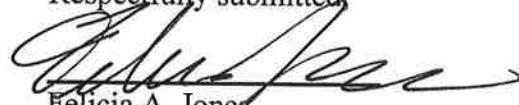


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Certificate of Counsel of Record

Undersigned counsel of record hereby certifies that this petition is submitted in good faith to raise intervening substantial circumstances of the type specified in Supreme Court Rule 44.2, and is not presented for delay.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Felicia A. Jones', is written over a horizontal line.

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