

CASE NO. 19A-_____

SUPREME COURT OF THE UNITED STATES
October 2019 Term

MELVIN PRYOR,
)
Petitioner,
)
v.
)
UNITED STATES OF AMERICA,
)
Respondent.
)

APPLICATION DIRECTED TO JUSTICE GORSUCH FOR ADDITIONAL TIME TO FILE
PETITION FOR A WRIT OF CERTIORARI TO EIGHTH CIRCUIT COURT OF APPEALS

Submitted on Behalf of Petitioner

Submitted By:

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ATTORNEY FOR PETITIONER

To Justice Neil M. Gorsuch:

Petitioner Melvin Pryor, through his attorney of record, Assistant Federal Public Defender Felicia A. Jones, requests 60 additional days in which to file a petition in this Court seeking certiorari to the Eighth Circuit Court of Appeals, up through January 25, 2020. 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 26, 2019, 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 28, 2019. Appendix 1. The petition for writ of certiorari is originally due on November 26, 2019. 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. Pryor 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

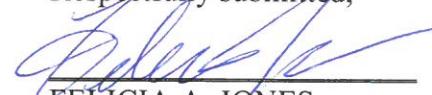
of physical force against the person of another within the meaning of 18 U.S.C. § 924(e)(2)(B)(i).

2. Pryor was convicted of being a felon-in-possession of a firearm, and sentenced to an enhanced mandatory minimum prison term of 15 years based on a finding that his previous Missouri conviction for displaying a firearm in an angry manner qualified as a predicate “violent felony” as defined in the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(i). On June 26, 2019, a panel of the Eighth Circuit issued its decision affirming Pryor’s sentence and holding that the unlawful use of a weapon conviction qualified as a violent felony. *United States v. Pryor*, 927 F.3d 1042 (8th Cir. 2019) (per curiam). Pryor was granted leave to file a motion for rehearing through August 5, 2019 and he timely filed his motion on that date. The Eighth Circuit denied the motion for rehearing by a summary order on August 28, 2018. See *United States v. Pryor*, No. 18-2627, Order (8th Cir. Aug. 28, 2019).

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 Pryor’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 January 25, 2020.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

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Appendix to Petitioner's Motion for More Time to File Petition for a Writ of Certiorari

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United States Court of Appeals
For the Eighth Circuit

No. 18-2627

United States of America

Plaintiff - Appellee

v.

Melvin Pryor

Defendant - Appellant

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

Submitted: May 13, 2019
Filed: June 26, 2019

Before COLLTON, BEAM, and SHEPHERD, Circuit Judges.

BEAM, Circuit Judge.

In October 2014, Melvin Pryor pleaded guilty to a single-count indictment of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). In the presentence investigation report, the probation officer concluded that Pryor was an Armed Career Criminal (ACC) based on the existence of at least three prior convictions for a violent felony or serious drug offense, or both, and thus suggested

that the district court¹ enhance Pryor's Guidelines sentence accordingly. Pryor argued that although our circuit law dictates otherwise, certain of his prior convictions should not qualify as "violent felonies" under the Armed Career Criminal Act (ACCA), and the legal matter should be revisited by the en banc court. The district court, applying circuit precedent, sentenced Pryor as an ACC (18 U.S.C. § 924(e)(1)) to the statutory minimum term of 180 months imprisonment, followed by three years of supervised release.

When a defendant has three prior convictions "for a violent felony or a serious drug offense," 18 U.S.C. § 924(e)(1) imposes a mandatory minimum sentence of fifteen years. Relevant here, a violent felony is a crime punishable by imprisonment for at least one year and "has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 924(e)(2)(B)(i). When determining whether a crime qualifies as a violent felony, we are generally limited to examining only the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented, rather than the underlying facts of the crime committed. Shepard v. United States, 544 U.S. 13, 26 (2005); United States v. Pulliam, 566 F.3d 784, 788 (8th Cir. 2009). "This court reviews de novo whether a prior conviction is a crime of violence." United States v. Minnis, 872 F.3d 889, 891 (8th Cir. 2017), cert. denied, 138 S. Ct. 1581 (2018).

On appeal Pryor challenges the application of the ACCA at his sentencing, particularly challenging the inclusion of two of his Missouri convictions as violent felonies for purposes of the enhancement—his Missouri conviction for the offense of

¹The Honorable Rodney W. Sippel, Chief Judge, United States District Court for the Eastern District of Missouri.

unlawful use of a weapon, Mo. Rev. Stat. § 571.030.1(4);² and his Missouri conviction for first-degree assault, Mo. Rev. Stat. § 565.050.1.³ This panel's response to each of Pryor's arguments is dictated by circuit precedent but Pryor advances his claims in hopes of en banc review of these settled analyses.

As to the unlawful use of a weapon offense, this court has plainly held that "Missouri's crime of unlawful use of a weapon meets the statutory definition of violent felony in § 924(e)(2)(B)(i), because it involves the use, attempted use, or threatened use of physical force against the person of another." Pulliam, 566 F.3d at 788 (quotation omitted). "It 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." Id. Pryor argues that although Pulliam is binding precedent, and has been reaffirmed recently in United States v. Hudson, 851 F.3d 807, 809-10 (8th Cir. 2017), and United States v. Swopes, 892 F.3d 961, 962 (8th Cir. 2018), cert. denied, 139 S. Ct. 1546 (2019), en banc review is necessary because this court has not adequately considered Missouri's own interpretation of this statute.

²Under Missouri law a person commits the crime of unlawful use of a weapon if he knowingly "[e]xhibits, 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).

³Under Missouri law relevant at the time of Pryor's offense:

1. A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.
2. Assault in the first degree is a class B felony unless in the course thereof the actor inflicts serious physical injury on the victim in which case it is a class A felony.

Mo. Rev. Stat. § 565.050 (2000).

Essentially he claims that as interpreted by the state courts, the Missouri statute falls short of the requirement that 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). However, even with the factual scenarios he posits (including, for example, the mental state required, and to whom or at what the exhibiting must be directed), Pryor has not identified any pertinent developments in Missouri law after 2009 that undermine this court's conclusion in Pulliam. Although Pryor believes our court's cases on the matter were wrongly decided, we are bound by them absent en banc review. United States v. Eason, 829 F.3d 633, 641 (8th Cir. 2016) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." (quoting United States v. Anderson, 771 F.3d 1064, 1066-67 (8th Cir. 2014))).

Pryor additionally argues that his Missouri conviction for first-degree assault does not qualify as a predicate offense under the ACCA. Again, while acknowledging contrary, binding circuit precedent in United States v. Winston, 845 F.3d 876, 878 (8th Cir. 2017), Pryor claims that because the Missouri statute can be satisfied by mere causation of serious injury, which may be accomplished by use of non-violent force such as poisoning, it does not necessarily require the use of "violent" force against another person as contemplated by the ACCA (i.e., that the Missouri statute criminalizes conduct that is broader than the necessary violent force contemplated by the ACCA). He argues this particular matter was not adequately addressed in Winston and remains ripe for review en banc. However, this court recently reviewed the matter in Minnis. In Minnis, we affirmed the analysis in Winston, which likewise cited guidance from United States v. Castleman, 134 S. Ct. 1405, 1414-15 (2014), and held that "[p]hysical force . . . need not be applied directly to the body of the victim. Hypothetical scenarios involving no physical contact by the perpetrator (luring a victim to drink poison or infecting a victim with a disease) do not avoid coverage under § 924(e)(2)(B)(i)." Minnis, 872 F.3d at 892 (quoting Winston, 845 F.3d at 878)

(second alteration in original). Absent en banc review, this court is bound by Winston and Minnis. Eason, 829 F.3d at 641.

The judgment of the district court is affirmed.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-2627

United States of America

Appellee

v.

Melvin Pryor

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:13-cr-00367-RWS-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 28, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans