CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October 2019 Term

MELVIN PRYOR

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Do criminal statutes that prohibit angry or threatening firearm displays not targeted at a specific victim qualify as a "violent felony" having as an element "the use . . . of physical force against the person of another" within 18 U.S.C. §924(e)(2)(B)(i)?

Parties to the Proceedings

Petitioner Melvin Pryor was represented in the lower court proceedings by his counsel, Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, and Felicia A. Jones, Assistant Federal Public Defender, 1010 Market, Suite 200, Saint Louis, Missouri, 63101. The United States is represented by United Sates Attorney Jeff Jensen and Assistant United States Attorney, Sayler A. Fleming, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri, 63102.

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OPINION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is published at 927 F.3d 1042. It appears in the Appendix ("Appx", at 1).

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on June 26, 2019. Appx. 1-5. Pryor filed a motion for rehearing, which was denied August 28, 2019. Appx. 6. The Circuit Justice for the Eighth Circuit, Justice Neil M. Gorsuch, granted Pryor's requests for addition time to file his Petition for a Writ of Certiorari through January 20, 2020, a legal holiday, and this petition is timely filed by deposit with a third party commercial carrier on the next open court day, January 21, 2020. See Rules 13.5, 30.1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §16, "Crime of Violence defined," provides:

> 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, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §922(g) It shall be unlawful for any person—

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> To ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition…

18 U.S.C. §924(e)(2)(B), provides:

> **(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, or
>
> (2) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

United States Sentencing Guidelines Provisions

U.S.S.G. §4B1.2(a) (2015)

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to 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; or

*****

7. Unlawful use of weapons is a class D felony unless committed pursuant to subdivision (6), (7), or (8) of subsection 1 of this section, in which cases it is a class B misdemeanor, or subdivision (5) or (10) of subsection 1 of this section, in which case it is a class A misdemeanor if the firearm is unloaded and a class D felony if the firearm is loaded, or subdivision (9) of subsection 1 of this section, in which case it is a class B felony, except that if the violation of subdivision (9) of subsection 1 of this section results in injury or death to another person, it is a class A felony.

N.C. Gen. Stat. §14-34.1 (2019) Discharging certain barreled weapons or a firearm into occupied property

(a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

(b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into any occupied vehicle, aircraft, watercraft, or other conveyance that is in operation is guilty of a Class D felony.

(c) If a person violates this section and the violation results in serious bodily injury to any person, the person is guilty of a Class C felony.

Va. Ann. Code § 18.2-279 (2019), Discharging firearms or missiles within or at building or dwelling house; penalty.

> If any person maliciously discharges a firearm within any building when occupied by one or more persons in such a manner as to endanger the life or lives of such person or persons, or maliciously shoots at, or maliciously throws any missile at or against any dwelling house or other building when occupied by one or more persons, whereby the life or lives of any such person or persons may be put in peril, the person so offending is guilty of a Class 4 felony. In the event of the death of any person, resulting from such malicious shooting or throwing, the person so offending is guilty of murder in the second degree. However, if the homicide is willful, deliberate and premeditated, he is guilty of murder in the first degree.
>
> If any such act be done unlawfully, but not maliciously, the person so offending is guilty of a Class 6 felony; and, in the event of the death of any person resulting from such unlawful shooting or throwing, the person so offending is guilty of involuntary manslaughter. If any person willfully discharges a firearm within or shoots at any school building whether occupied or not, he is guilty of a Class 4 felony.

W. Va. Code § 617-7-12 (2019). Wanton endangerment involving a firearm.

> Any person who wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another shall be guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary for a definite term of years of not less than one year nor more than five years, or, in the discretion of the court, confined in the county jail for not more than one year, or fined not less than two hundred fifty dollars nor more than two thousand five hundred dollars, or both.

STATEMENT OF THE CASE

This case presents a recurrent problem of whether state laws prohibiting displays or discharges of firearms not targeted at another person constitute the "use, attempted use, or threatened use of physical force against the person of another under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(2)(B)(i). This term the Supreme Court will decide whether "use" of force "against another person" requires deliberately targeted force or threats against the person of another in *James Walker v. United States*, No. 19-373, a component of the issue of whether "reckless" crimes satisfy ACCA. *See Walker*, No. 19-373, Petitioner's Merits Brief, pp. 21-24 (January 6, 2020). For that reason, Pryor's petition should be held pending the ruling in *Walker*, at minimum. The Eighth Circuit's decision also conflicts with this Court's ACCA jurisprudence directing the federal bench to use a categorical analysis of proposed ACCA predicate crimes to determine the least violent form of conduct encompassed by a statute as established by authoritative state court decisions construing the prior offense.

The Missouri statute at issue in this case makes it a crime to "exhibit[], 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) (2013). Missouri courts interpret the statute to require no intent by an offender to threaten anyone, no actual discharge of a firearm, nor proof that anyone actually saw the exhibition, or even that the firearm be loaded. The presence of another is satisfied by the presence of a child in the offender's care or company at the time of the angry display, as to whom no threat or harm is directed or intended. The Missouri law's purpose is to discourage risky behavior that may unintentionally injure others, similar to the legislative intent behind statues prohibiting reckless conduct with guns.

Petitioner Melvin Pryor pled guilty to illegal possession of a firearm following a prior felony conviction, contrary to 18 U.S.C. §922(g)(1). The offense normally carries a maximum 10 years in prison pursuant to 18 U.S.C. §924(a)(2). However, the ACCA requires an enhanced mandatory

minimum prison term of 15 years when a defendant has three prior convictions satisfying the definition of "violent felony," 18 U.S.C. § 924(e)(1). The definition includes any crime punishable by more than one year in prison that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Section 924(e)(2)(B)(i) (known as "the force clause"). ACCA also defines violent felonies to include any felony that "is burglary, arson, or extortion, [or] involves use of explosives." Section 924(e)(2)(B)(ii). Until 2015, the statute also included a catchall definition, encompassing felonies that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." *Ibid.* The Supreme Court struck down this "residual clause" definition as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The District Court in this case applied the ACCA enhancement and sentenced Pryor to 180 months (15 years), based on three prior convictions for offenses committed at age 16. These teenage offenses consisted of two assaults and a conviction for exhibiting a lethal weapon "in an angry or threatening manner" in the presence of others. Petitioner appealed, arguing that the Eighth Circuit case law the District Court applied rested on a 2009 decision that first declared the Missouri exhibiting law a violent felony on the gut-sense that, "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." *United States v. Pulliam*, 566 F.3d 784, 788 (8th Cir. 2009). Appx. 3. Pryor argued that the *Pulliam* decision conducted no examination of Missouri state case law in 2009 to determine the scope of the statute, and that the parties' briefs in *Pulliam* cited no Missouri state case law. Pryor outlined cases prior to 2009 indicating that the exhibiting statute's requirement that another be present at the time of the angry or threatening exhibition could be satisfied by a family member or loved one at whom no threat or display is directed nor intended. He cited Missouri cases establishing that the exhibiting statute did not constitute a form of assault. Missouri state case law also established that the

statute does not require an offender to intend a threat to another, and that a person who merely intended to kid or joke with another person was criminally liable so long as he knew the other person might objectively view his behavior as angry or threatening. Petitioner pointed to intervening decisions of this Court in the years since the 2009 case compelling consideration of state court case law interpreting the elements of a proposed ACCA predicate.

A three-judge panel of the Eighth Circuit affirmed the district court's ACCA sentence, relying on *Pulliam.* The Eighth Circuit dismissed Pryor's citations to Missouri case law establishing that the person in whose presence the angry or threatening display occurs could be a friend or a child toward whom the offender neither directs the display nor intends any application of force. The Eighth Circuit dismissed these cases on the basis that Pryor had cited no Missouri decision issued *after* 2009 indicating that the Circuit's first judgment was in error. Appx. 2-3. "[E]ven 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*." *Id.*

Pryor filed a petition for rehearing, wherein he indicated that the three-judge panel's decision rested on the mistaken premise that the *Pulliam* decision had considered the Missouri case law he cited—all of which happened to come from Missouri case law prior to 2009. He cited the intervening emphasis this Court had placed on consulting authoritative state cases interpreting state statutes on which the predicate offenses were prosecuted. The Court of Appeals denied rehearing *en banc* on August 28, 2019. Appx. 6. Petitioner requested and received additional time to file this petition up through January 20, 2020. Appx. 7.

GROUNDS FOR GRANTING THE WRIT

I. The Court should grant certiorari to decide whether statutes prohibiting gun displays and discharges not directed at a targeted victim constitute "the use, attempted use, or threatened use of force against the person of another" under ACCA, or hold this case pending the decision in *Walker v. United States*, No. 19-373.

Pryor's ACCA sentence rests on a form of public safety law intended to discourage risky conduct with firearms without requiring as an element that a violator targeted a particular person or even intended another person to feel threatened. Although the statute in this case requires that a defendant "knowingly" engage in conduct another person could objectively deem "angry" or "threatening," the statute does not requires the defendant intend to threaten another, nor any apprehension of a threat or awareness of the display by another person, and no actual discharge of a firearm. The requisite presence of another person at the time of the angry or threatening display is satisfied by a child who happens to be in the exhibitor's care, at whom the exhibitor does not intend or direct any threat nor harm.

The issues this Court will decide in *James Walker v. United States*, No. 19-373, include the question of whether the ACCA "elements clause" requires an offense defined by "targeted use" of force against a specific other person. *Walker v. United States*, Brief for the Petitioner, at I, 17-21 (January 6, 2020). In light of this, Pryor's petition should be held pending the ruling in *Walker*. The specific issue raised in *Walker* is whether crimes that may be committed with a mental state of recklessness constitute "the use of physical force against the person of another[.]" *Ibid* at I. Walker argues that one who uses force recklessly "is indifferent as to whether it falls on another person or on no one at all." *Id.* at 17. The same is true of the Missouri exhibiting statute, and similar statutes in other states.

This Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), construed a definition for "crime of violence" in 18 U.S.C. § 16(a), that is virtually identical to the ACCA "force clause." The Court indicated that the "key phrase" in the definition consisted of "the 'use . . . of physical force against the person or property of another'—[which] most naturally suggests a higher degree of intent than

negligent or merely accidental conduct." *Leocal*, at 9. The Court concluded that this definitional language suggested a category of violent, active crimes that did not include DUI offenses, the category of predicate offense Leocal challenged. *Id.* at 10. Walker's brief cites ordinary definitions of the word "use" as meaning the "act of employ, using, or putting into service." Walker Brief, at 21-22. He further argues that the phrase "against the person of another" restricts the phrase "use, attempted use, or threatened use of physical force" and requires force "that is directed or aimed at another person." *Id.* at 22.

The Missouri statute prohibits knowingly "[e]xhibit[ing], 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) (2006). The crime has three elements: (1) exhibiting a weapon (2) in an angry or threatening manner (3) in the presence of one or more other people. *State v. Gheen*, 41 S.W.3d 598, 605 (Mo. Ct. App. 2001). Authoritative Missouri state court decisions establish that the law does not require that an offender point, aim, or direct the weapon exhibit at, toward, or against anyone. *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 49, 48 (Mo. Ct. App. 1989). 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; *State v. Williams*, 779 S.W.2d 600, 602-03 (Mo. Ct. App. 1989).

Missouri case law construing the exhibiting statute demonstrates that while a defendant must act knowingly in the sense that he realizes his conduct might objectively be viewed as "angry" or "threatening," an actor who is indifferent to the consequences has not *targeted* his behavior "against the

person of another." *Cf Walker*, Brief for the Petitioner, at 19, 25. The *Walker* decision will undoubtedly decide whether that constitutes "use of force against the person of another." The reasoning by which this Court resolves the issue may well determine whether Missouri's exhibiting statute qualifies. Therefore, Pryor's petition for certiorari should be held pending the decision in *Walker*, at the very least.

II. The Eighth Circuit's ruling conflicts with decisions by the Fourth and Fifth Circuit that firearm statutes that do not require a defendant target the prohibited firearm conduct at another person cannot satisfy identical "force element" provisions in the Sentencing Guidelines.

The Eighth Circuit's decision conflicts with federal court decisions in the Fourth and Fifth Circuits declaring that statutes prohibiting discharge of firearms not targeted at another person do not satisfy the "force element" definition in other identically worded sentencing provisions.

The Fourth Circuit held that a North Carolina statute prohibiting intentional discharge of a firearm toward an occupied building did not satisfy the "force clause" in *United States v. Parral-Dominguez*, 794 F.3d 440, 445 (4th Cir. 2015) (construing N.C. Gen. Stat. §14-34.1). Although the statute required that a shooter knew or had reasonable grounds to believe the building might be occupied, as a "force elements" offense because it did not require proof that the defendant targeted or threatened an occupant therein. *Id.* The Fourth Circuit has also ruled that West Virginia's wanton endangerment statute, W. Va. Code § 61-7-12, only qualified as a "crime of violence" under the identical definitions of the career offender Sentencing Guidelines, U.S.S.G. §4B1.2(a)(2) (2014), under the residual clause definition this Court struck from the ACCA sentence as unconstitutional. *See United States v. Burt*, 734 Fed. Appx. 881, 883 (4th Cir. 2018).[1] Like Missouri's exhibiting statute, West

[1] All federal courts construe the identical definitions in the ACCA and the career offender Sentencing Guidelines interchangeably, *see, e.g. Johnson v. United States*, 135 S. Ct. 2251, 2259-60 (2015) (citing four cases construing the Sentencing Guidelines crime of violence definition in deciding a challenge to the identical ACCA violent felony definition). The 2015 *Johnson* did not strike down the residual definition for the advisory Guidelines applied in federal sentencing after January of 2005, *see Beckles v. United States*, 137 S. Ct. 886, 893 (2017).

Virginia's wanton endangerment statute does not require targeted use of a firearm nor the creation of an actual risk to any person, *see State v. Hulbert*, 209 W. Va. 17, 544 S.E.2d. 919, 930 (W. Va. 2001); *United States v. Parsons*, 129 Fed. Appx. 851, 853 (4th Cir. 2005). Similarly, Virginia has a statute that prohibits discharging a firearm within or at a building or dwelling house, Va. Code Ann. Section 18.2-279. It requires no proof that an offender targeted another person, and is satisfied by the possibility a discharged bullet might ricochet in a manner that might endanger lives. *See Strickland v. Commonwealth*, 16 Va. App. 180, 428 S.E.2d 507, 508 (1993).

The Fifth Circuit also rejected Virginia's statute prohibiting malicious firearm discharges that could be violated by shooting a gun at a building that happened to be occupied at the time without a finding that the defendant shot, attempted to shoot, or threatened to shoot another person. *See United States v. Alfaro*, 408 F.3d 204, 209 (5th Cir. 2005) (construing Va. Code Ann. § 18-2-279).

Again, this Court's decision in *Walker* this term may well resolve this conflict. It will determine the issue, squarely raised in *Walker*'s brief of whether "[a] person who sues force but [who] is indifferent as to whether the force falls onto another person[,]" has used force against another." *Walker*, Brief for the Petitioner, at 19. The interests of justice and judicial economy support Mr. Pryor's request that this petition be held in abeyance until the Court decides the issue in *Walker* this Spring.

A. The Eighth Circuit's qualification of exhibiting despite its failure to require any intent to threaten conflicts with the Tenth Circuit rule that "the element of force" definition requires an intent to use force that is communicated toward the other.

The Eighth Circuit's intuitive qualification of Missouri's exhibiting law as a predicate offense in *Pulliam* also stands in conflict with the position of at least one other circuit that interprets the "element of force" definition for crime of violence to require "both an intent to use force and a communication of that intent." In *United States v. King*, 979 F.2d 801, 803 (10th Cir. 1992), the Tenth Circuit held that a conspiracy conviction could not qualify as a violent felony under the ACCA "element of force"

definition. Although a formed intent of conspirators could constitute an "inchoate 'threat' to both the impending target of the contemplated felony and to society as a whole, in the context of ACCA's "element of force" definition, "'threatened use of physical force' means both an intent to use force and a communication of that intent." *Id.*

Missouri case law, as noted above, establishes that exhibiting requires no proof that the defendant harbored an intent to threaten anyone in whose presence his angry or threatening exhibition occurs. *See Meyers*, 333 S.W.3d at 48. In fact, the persons present may be precisely those he would never seek to harm, like the passenger girlfriend and child riding with the defendant in *Gheen*, 41 S.W.3d at 605-06. The Eighth Circuit's intuitive belief that the Missouri law qualifies as a threat perpetrates a circuit conflict with the Tenth Circuit's equally established view that the element of force definition for crimes of violence and ACCA violent felonies requires both an intent to use force and a communication of that intent. This direct circuit conflict warrants resolution without waiting for other circuits to choose sides.

III. In the alternative, certiorari should be granted to vacate the Eighth Circuit's decision and remand for reconsideration in light of the conflict between the Court of Appeals' ruling and this Court's decisions in *Moncrieffe* and *Mathis* stressing review of authoritative state case law to establish the least conduct required to commit the proposed predicate.

Certiorari is also warranted in this case by the conflict between the Eighth Circuit's ruling and this Court's rulings emphasizing the role of authoritative state court decisions construing a predicate statute to establish the least violent conduct encompassed by the law in question. *See Johnson v. United States*, 559 U.S. 133, 137 (2010). This Court's precedents repeatedly command a "categorical" analysis of proposed predicate convictions, focused on "the elements of the statute of conviction," rather than on the bare label a legislature attaches to the crime (such as "burglary" or "aggravated assault), or a focus on "'the particular facts underlying [the prior] convictions' –the means by which the defendant, in real

life, committed his crimes." *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016), quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990). "That rule can seem counterintuitive." *Id.* at 2251.

This Court has "often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than" the "violent felony" definition the government claims it falls within. *See Taylor*, 495 U.S. at 602. Even if the "'underlying brute facts or means' of commission" in a defendant's particular case "fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence." *Mathis*, at 2246, quoting *Richardson v. United States*, 526 U.S. 813, 817 (1999). In both sentencing contexts, "[t]he first task for a sentencing court faced with an alternatively phrased statute is … to determine whether its listed items are elements or means." *Mathis*, 136 S. Ct. at 2256. If they are elements, the court may engage in the limited review of record materials to discover which of the enumerated alternatives played a part in the de3fendant's prior conviction, and then compare that definition of the crime to the definition for the predicate crime of violence. *Id.* "If instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Id.* The language and structure of a statute itself may be decisive or at least circumstantial proof of the answer. If statutory alternatives carry different punishments, then they must be elements. *Id*., citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Missouri exhibiting statute applies the identical punishment to both "angry [and] threatening" firearm exhibitions under Mo. Rev. Stat. §§571.030.1(4), 571.030.7 (2006).

Because the analysis is categorical, rather than particularized to a specific set of circumstances, a court applying this definition to a proposed predicate must presume that the conviction rested on nothing more than the least of the acts criminalized and then determine whether even those acts satisfy the force clause. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), quoting *Johnson*, 559 U.S. at 137. Federal courts "are bound by [a state court's] interpretation of state law, including its determination of the

elements[.]." *Johnson*, 559 U.S. at 138. Rather than examining Missouri state court interpretations of the elements of exhibiting a firearm, the Eighth Circuit perpetuated its 2009 tautology that "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." Appx. 3-4, quoting *Pulliam*, 566 F.3d at 788. The Eighth Circuit's 2009 ruling in *Pulliam* did not discuss, or even cite, any Missouri case interpreting the exhibiting statute. Nor did the parties' briefs in *Pulliam*.

In fact, the Missouri case law reveals that Missouri's exhibiting offense has no element requiring the use, attempted use or threatened use of violent physical force against the person of another. As explained above, Missouri courts consistently interpret the statute to exclude any requirement that an offender point, aim, or direct the weapon exhibited at, toward, or against anyone. *See State v. Horne*, 710 S.W.2d 310, 315 (Mo. Ct. App. 1986). The statute does not require an offender to act with a purpose of threatening another; rather the mental state requires only proof that a defendant knew his actions could be objectively viewed as threatening. *See State v. Meyers*, 333 S.W.3d at 48. The statute does not require that a violator intend to threaten another person by his exhibition of a weapon—indeed, a defendant who merely intends to kid or joke with another person is criminally liable so long as he knows the other person may objectively view his behavior as angry or threatening. *See Meyers*, 333 S.W.3d at 48. Missouri courts hold that the element of exhibiting anger in the presence of others is satisfied by the presence of a defendant's own family to whom his emotion and display are not directed. *See Gheen*, 41 S.W.3d at 605-06 (element of presence of others satisfied by presence of defendant's girlfriend and her son in the car from which he made an angry exhibition, even though those prompting the anger did not see the exhibition). This distinguishes the Missouri offense from "menacing statutes," for example, defined to require that a defendant "intentionally place []or attempt [] to place another in fear of physical injury, serious injury, or death by displaying a deadly weapon or instrument." *See*

United States v. Drummond, 240 F.3d 1333, 1337 (11th Cir. 2001). Missouri courts distinguish exhibiting from assault, and reject it as a lesser-included offense of assault. *See State v. Whitehead*, 675 S.W.2d 939, 943-44 (Mo. Ct. App. 1984); *State v. Cavitt*, 703 S.W.2d 92, 93 (Mo. Ct. App. 1985).

Moreover, Missouri exhibiting may be established by angry and threatening exhibitions directed at property, which does not constitute the use of force "against the person of another." In *State v. Johnson*, 964 S.W.2d 465, 467 (Mo. Ct. App. 1998), the defendant went to his partner's parents' home and, while on the front porch, demanded that his partner, Ms. Porter, come out to speak with him. *Id.* Ms. Porter's stepfather answered the door and spoke to Johnson, but neither he nor his wife nor Ms. Porter ever left the house. Unable to speak to Ms. Porter, Johnson began yelling angrily "through the door to Ms. Porter." He then left the porch, walked across the street, to fire four shots into Ms. Porter's parked car, and drove away. *Id.* Ms. Porter never actually saw a gun. She heard four shots and saw from inside the house what she described as fire coming from Mr. Johnson's hand. *Id.* No one in the house saw a gun while Johnson was on the porch nor when gunshots were heard. His display with the firearm was directed at the parked car, not at Ms. Porter or her family inside the house across the street.

Missouri case law takes the statute at its plain meaning, requiring only that the exhibition occur "in the presence" of others, with no requirement that it be directed at anyone. A defendant may be convicted of exhibiting a weapon without any proof that it was pointed, aimed, or directed at any person and without showing that anyone visually perceived this 'exhibition.'" *See id.; Gheen*, 41 S.W.3d at 606. The Eighth Circuit's failure to address the authoritative state cases defining the least form of the exhibiting offense stands in direct conflict with this Court's direction to employ those expert sources on the categorical scope of the statute in its least violent from. This supports summary reversal by this Court to vacate the judgment, and remand for reconsideration in light of *Mathis* and *Moncrieffe*.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court grant his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals, or, in the alternative, hold it in abeyance pending this Court's decision this Term in *James Walker v. United States*, No. 19-373.

Respectfully submitted,

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