No. 09-11311

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior felony conviction under Indiana law for intentional vehicular flight from a law enforcement officer is a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(ii).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 598 F.3d 334.

JURISDICTION

The judgment of the court of appeals as amended was entered on March 22, 2010. The petition for a writ of certiorari was filed on June 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Indiana, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A9.

1. On March 11, 2008, petitioner brandished a firearm while attempting to rob two people who were sitting in a parked car outside of a liquor store in Indianapolis, Indiana. Petitioner recognized one of the people in the vehicle and aborted his robbery attempt. Police officers subsequently saw petitioner toss a black revolver on the ground, and they arrested him. Pet. App. A4; Presentence Report (PSR) paras. 8-10.

On July 22, 2008, petitioner pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). Pet. App. A4. On that count, petitioner was subject to a mandatory minimum sentence of 15 years under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), if he had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The Act defines a "violent felony" as

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

18 U.S.C. 924(e)(2)(B).

At the sentencing hearing, petitioner did not dispute that two of his prior convictions under Indiana law for robbery qualified as "violent felon[ies]" for ACCA purposes. See Pet. C.A. Br. 3 & n.1; PSR paras. 23, 38. Petitioner did dispute, however, whether a third prior conviction qualified as an ACCA violent felony: his conviction in June 2003 under Indiana Code § 35-44-3-3(b)(1) for intentional vehicular flight from a law enforcement officer. PSR para. 39.[1] The district court concluded that petitioner's prior conviction for intentional vehicular flight was a violent felony, which meant that petitioner's advisory Guidelines range was 188 to 235 months of imprisonment (based on his criminal history category of VI and his total offense level of 31). Id. paras. 27, 43, 74.

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[1] According to the PSR, on May 30, 2002, police attempted to stop petitioner, who fled in a motor vehicle. Petitioner led police on a chase, during which he drove on the wrong side of the road and through the yards of two residences before striking the rear of a third residence with his vehicle. There were people standing in those yards during the chase. PSR para. 39.

The district court sentenced petitioner to a term of 188 months of imprisonment. Pet. App. A4.

2. The court of appeals affirmed. Pet. App. A1-A9. It held, in reliance on its earlier decision in United States v. Spells, 537 F.3d 743, 752 (2008), cert. denied, 129 S. Ct. 2379 (2009), that "resisting law enforcement in a vehicle under Indiana law typically involves conduct that is 'purposeful, violent[,] and aggressive' such that there is an increased likelihood that the 'offender is the kind of person who would deliberately point [a] gun and pull the trigger.'" Pet. App. A5 (quoting Spells, 537 F.3d at 751-752, and Begay v. United States, 553 U.S. 137, 146 (2008)) (second brackets in original); id. at A6 ("[R]esisting law enforcement and the enumerated crimes [in the ACCA] all create a likelihood of violent confrontation and are purposeful, violent and aggressive.") (internal quotations marks omitted).

ARGUMENT

Petitioner contends (Pet. 5-15) that his prior felony conviction under Indiana law for intentional vehicular flight from a law enforcement officer is not a "violent felony" under the ACCA and that the decision below is inconsistent with this Court's decisions in Begay v. United States, 553 U.S. 137 (2008), and Chambers v. United States, 129 S. Ct. 687 (2009), as well as with decisions of the Eighth, Ninth, and Eleventh Circuits. Those contentions are without merit. Petitioner's vehicular flight

conviction is significantly different in kind and degree from the driving-under-the-influence conviction at issue in Begay and the failure-to-report conviction at issue in Chambers. Moreover, there is no conflict in the courts of appeals on the question presented. The Court has declined to review this question several times, and the same disposition is appropriate here.

1. a. In Begay, this Court held that felony driving under the influence (DUI) does not qualify as a violent felony under the ACCA. The Court reasoned that, to qualify as a violent felony under the ACCA's residual clause, an offense must be "roughly similar, in kind as well as in degree of risk posed, to the [statutory] examples" of burglary, arson, extortion, and offenses involving use of explosives, and thus must "typically involve purposeful, violent, and aggressive conduct." Begay, 553 U.S. at 142-145 (internal quotation marks omitted). The Court held that the DUI offense at issue did not satisfy that definition because, even assuming that DUI "presents a serious potential risk of physical injury to another," it is a "strict liability" offense that "typically" does not involve "purposeful" conduct. Id. at 144-146.

The decision below is consistent with Begay. Unlike drunk driving, vehicular flight from a law enforcement officer involves purposeful, violent, and aggressive conduct. As an initial matter, vehicular flight from police is purposeful conduct because the

Indiana statute provides that the flight must be done "knowingly or intentionally." Ind. Code § 35-44-3-3(a); see United States v. Harrimon, 568 F.3d 531, 534 (5th Cir.) ("[U]nlike the DUI statute at issue in Begay, fleeing by vehicle requires intentional conduct."), cert. denied, 130 S. Ct. 1015 (2009). And because vehicular flight "calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit," it is an inherently violent and aggressive crime. United States v. Spells, 537 F.3d 743, 752 (7th Cir. 2008), cert. denied, 129 S. Ct. 2379 (2009). Vehicular flight "'will typically lead to a confrontation with the officer being disobeyed,' a confrontation fraught with risk of violence." Harrimon, 568 F.3d at 535 (quoting United States v. West, 550 F.3d 952, 970 (10th Cir. 2008)).

An offender's "willingness to use a vehicle to flout an officer's lawful order to stop" also demonstrates an increased risk that "the offender would, if armed and faced with capture, 'deliberately point the gun and pull the trigger.'" Harrimon, 568 F.3d at 535 (quoting Begay, 553 U.S. at 146); see Welch v. United States, 604 F.3d 408, 425 (7th Cir. 2010) ("An individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police, [he] would have a greater propensity to use that firearm in an effort to evade arrest.")

(quoting Spells, 537 F.3d at 752, and brackets in original). Vehicular flight by its very nature "creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders." Harrimon, 568 F.3d at 536 (quoting West, 550 F.3d at 964-965).

b. The decision below is also consistent with Chambers, which held that failure to report for penal confinement is not a violent felony under the ACCA. Vehicular flight from police presents risks different in kind and degree from those presented by the failure-to-report offense at issue in Chambers. Unlike the passive conduct of failing to report, vehicular flight from police cannot be characterized as "a form of inaction," Chambers, 129 S. Ct. at 692, because it involves deliberate movement to evade the police. See Pet. App. A6 ("[The Indiana statute's] knowing and intentional requirement means that a typical offender does not simply fail to appear before authorities, but affirmatively eludes police custody by choosing to continue driving rather than pull over."). For that reason, vehicular flight from police is similar not to the crime of failure to report for penal confinement but to the crime of escape from custody. Cf. Chambers, 129 S. Ct. at 691 (contrasting "[t]he behavior that likely underlies a failure to report" with "the less passive, more aggressive behavior underlying an escape from custody").

In addition, flight from an officer's command to stop involves a substantial and inherent risk of physical injury because of the "marked likelihood of pursuit and confrontation." Harrimon, 568 F.3d at 536; see ibid. ("[W]e think that, in the typical case, an offender fleeing from an attempted stop or arrest will not hesitate to endanger others to make good his or her escape."). Vehicular flight, like escape from custody, is a continuing offense that encompasses conduct likely to occur at the end of the pursuit by law enforcement officers. See United States v. Martin, 378 F.3d 578, 582-583 (6th Cir. 2004) ("Both escape and fleeing from a police officer represent continuing offenses, which heighten the emotions and adrenaline levels of the parties involved, and which generally end with a confrontation between the officer and the escapee or fleeing driver.") (internal quotation marks and citations omitted). As with the ACCA's enumerated crimes (like burglary or arson), vehicular flight creates the potential for a dangerous confrontation between the suspect and other individuals.

2. Petitioner contends (Pet. 5-6) that the courts of appeals are in conflict over whether vehicular flight from police is a "violent felony" under the ACCA or a "crime of violence" under Sentencing Guidelines § 4B1.2(a).[2] But there is no disagreement among the courts of appeals with respect to offenses like

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[2] The ACCA's definition of a "violent felony" is identical for present purposes to Sentencing Guidelines § 4B1.2(a)'s definition of a "crime of violence."

petitioner's that typically present a substantial risk of injury to police officers or other individuals.

Five courts of appeals (the First, Fifth, Sixth, Tenth, and Eleventh Circuits) have agreed with the Seventh Circuit that intentional flight from a law enforcement officer is a violent felony under the ACCA or a crime of violence under Section 4B1.2(a) of the Guidelines. See United States v. McConnell, 605 F.3d 822, 827-830 (10th Cir. 2010) (Guidelines); United States v. Layton, 356 Fed. Appx. 286, 290 (11th Cir. 2009) (Guidelines), cert. denied, No. 09-9658 (June 21, 2010); Harrimon, 568 F.3d at 534-537 (ACCA); United States v. LaCasse, 567 F.3d 763, 767 (6th Cir. 2009) (ACCA), cert. denied, 130 S. Ct. 1311 (2010); Powell v. United States, 430 F.3d 490, 491 (1st Cir. 2005) (per curiam) (ACCA), cert. denied, 547 U.S. 1047 (2006). Those courts have reasoned that a driver's intentional act of fleeing from a law enforcement officer is a purposeful, violent, and aggressive act. See, e.g., Harrimon, 568 F.3d at 534-537.[3]

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[3] In United States v. Rivers, 595 F.3d 558 (2010), the Fourth Circuit held that a conviction under South Carolina law for failure to stop for a blue light, S.C. Code Ann. § 56-5-750(A), does not constitute a violent felony under the ACCA. Rivers, 595 F.3d at 565. Unlike the Indiana statute at issue, however, the South Carolina blue light statute does not require that a driver have acted intentionally. Ibid. The Fourth Circuit reasoned that, as "a strict liability crime," the statute does not proscribe purposeful, aggressive, and violent conduct as required by Begay. Ibid. (quoting Begay, 553 U.S. at 148). Rivers therefore does not conflict with the decisions of several other courts of appeals that intentional vehicular flight is a violent felony under the ACCA or a crime of violence under Section 4B1.2(a) of the Guidelines.

a. Petitioner claims (Pet. 6) a conflict with United States v. Tyler, 580 F.3d 722 (8th Cir. 2009), in which a divided panel held that the Minnesota offense of vehicular flight from a law enforcement officer is not a crime of violence under Sentencing Guidelines § 4B1.2(a). But the Minnesota statute at issue in Tyler differs significantly from the Indiana statute at issue here. Specifically, the Minnesota statute expressly defines fleeing an officer to include such nonviolent conduct as extinguishing headlights or taillights. See Tyler, 580 F.3d at 725. The Eighth Circuit reasoned that, because Minnesota has defined fleeing so broadly as to encompass nonviolent conduct, a violation of the Minnesota statute "do[es] not necessarily translate into a serious potential risk of physical injury." Ibid. The Eighth Circuit expressly distinguished, however, state statutes -- like the Indiana statute at issue here -- that do not define fleeing so broadly. Id. at 726.

b. Petitioner also claims (Pet. 5-6) a conflict with United States v. Jennings, 515 F.3d 980 (9th Cir. 2008). In Jennings, the Ninth Circuit held that a previous version of Washington's vehicular flight statute, Wash. Rev. Code § 46.61.024 (2001), did not categorically describe conduct that qualifies as a violent felony for ACCA purposes. According to the court, the Washington statute criminalized conduct that created a serious risk of harm not only to people, but also to property. Jennings, 515 F.3d at

989-990 & n.9. After the decision in Jennings, however, Washington amended its statute and removed the language (covering disregard for others' property) on which the Ninth Circuit had relied. Since that time, the Ninth Circuit has not concluded that any state offense involving flight from law enforcement does not qualify as a violent felony under the ACCA.

c. Petitioner further claims (Pet. 5, 11) a conflict with United States v. Harrison, 558 F.3d 1280 (11th Cir. 2009). The Florida statute at issue in Harrison created separate offenses for simple vehicular flight and aggravated vehicular flight that recklessly disregards the safety of persons or property. See Fla. Stat. § 316.1935(1), (2), and (3). In Harrison, the Eleventh Circuit held that simple vehicular flight is not a violent felony for ACCA purposes, while indicating that Florida's forms of aggravated vehicular flight would be violent felonies. See 558 F.3d at 1291, 1295-1296.

Here, the Indiana statute provides that intentional flight from a law enforcement officer is a Class D felony if the defendant "uses a vehicle to commit the offense," Ind. Code § 35-44-3-3(b)(1)(A), or "operates a vehicle in a manner that creates a substantial risk of bodily injury to another person," Ind. Code § 35-44-3-3(b)(1)(B). Relying on Harrison, petitioner argues (Pet. 11-12) that because he was convicted of simple vehicular flight under subsection (b)(1)(A) -- and not vehicular flight that

"creates a substantial risk of bodily injury" to others under subsection (b)(1)(B) -- his conviction was not for a violent felony. That argument, however, confuses the relevant inquiry under the ACCA and the Guidelines. The question is not whether vehicular flight in a particular case creates an actual risk of death or injury to third parties, but whether vehicular flight in a typical case creates a potential risk of serious harm to others.

As other courts of appeals have recognized, even if vehicular flight does not create an actual risk of death or injury to bystanders or others, it still creates "a serious potential risk" in the typical case. Sentencing Guidelines § 4B1.2(a)(2). For instance, the Sixth Circuit held in considering a similar Tennessee state statute that "[a]s a categorical matter, the decision to flee thus carries with it the requisite potential risk, even if the resulting chase does not escalate so far as to create the actual risk of death or injury that would make it a Class D felony under Tennessee law." United States v. Rogers, 594 F.3d 517, 521 (6th Cir. 2010), petition for cert. pending, No. 09-10276 (filed Apr. 13, 2010); see James v. United States, 550 U.S. 192, 208 (2007) ("[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."). The Fifth Circuit likewise held in Harrimon that "while it is possible * * * to be guilty of fleeing by vehicle despite obeying all traffic laws

and later surrendering quietly, * * * in the typical case, an offender * * * will not hesitate to endanger others to make good his or her escape." 568 F.3d at 536. This case illustrates that point: petitioner's prior conviction for vehicular flight involved driving on the wrong side of the road, as well as driving through residential yards in which people were standing before striking the rear of a house. See p. 3 n.1, supra.

Moreover, the Eleventh Circuit's decision in Harrison is distinguishable because the court's holding rested on the limited evidentiary record in that case. See 558 F.3d at 1295-1296. The court recognized that in similar cases the Supreme Court "has used statistical evidence to aid its risk assessment" and that its own consideration "would benefit from empirical evidence of the likelihood of physical injury in statutory willful fleeing crimes that do not have the elements of high speed or reckless disregard." Id. at 1294-1295. "[B]ased on the limited record," which did not contain any "empirical data," the court concluded that the government had not satisfied its burden of showing that the Florida offense was a violent felony for ACCA purposes. Id. at 1296. Thus, the court left the door open for the government to make such a showing on a more developed factual record in a future case. Ibid.

Other courts have considered the sort of statistical evidence not present in Harrison. For instance, the Fifth Circuit in

Harrimon noted that according to a study "collecting police pursuit data from fifty-six law enforcement agencies in thirty states, 314 injuries (including fatal injuries) to police and bystanders resulted from 7,737 reported pursuits," or "roughly .04 injuries to others per pursuit." 568 F.3d at 537. By comparison, "there are roughly 267,000 fires attributed to arson per year, resulting in over 2,475 injuries * * * or roughly .009 injuries per arson." Ibid. The Fifth Circuit therefore concluded that "the risk of injury to others [from vehicular flight] would appear to be at least 'roughly similar' to that associated with arson." Ibid. (quoting Begay, 553 U.S. at 143). In light of the Fifth Circuit's analysis, this Court's review would be premature, because the Eleventh Circuit should be permitted to revisit the question on a more developed evidentiary record.

3. Further consideration in the courts of appeals -- including examination of pertinent differences among the state statutes in question -- will bear directly on the need for this Court's review. The Court has denied several petitions for writs of certiorari presenting the question of whether prior convictions under state statutes -- including this same Indiana statute -- qualify as violent felonies under the ACCA or crimes of violence under the Guidelines. See Spells v. United States, 129 S. Ct. 2379 (2009) (No. 08-8136) (Indiana statute); see also Layton, 2010 WL 979076 (June 21, 2010) (No. 09-9658) (Florida statute); Collier v.

United States, 130 S. Ct. 1882 (2010) (No. 09-7631) (Texas statute); LaCasse v. United States, 130 S. Ct. 1311 (2010) (No. 09-8204) (Michigan statute); Sneed v. United States, 130 S. Ct. 1285 (2010) (No. 09-7276) (Texas statute); Harrimon v. United States, 130 S. Ct. 1015 (2009) (No. 09-6395) (Texas statute). The same disposition is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2010

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