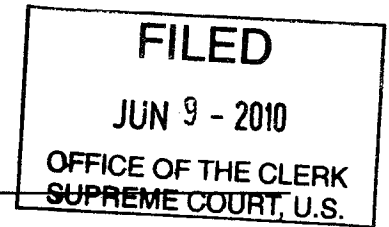


0911311
ORIGINAL



SUPREME COURT OF THE UNITED STATES

MARCUS SYKES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Title 18 United States Code § 3006A(d)(7) and Rule 39 of this Court, Petitioner Marcus Sykes asks leave to file the attached Petition for Writ of Certiorari without prepayment of fees and costs and to proceed *in forma pauperis*.

Undersigned counsel was appointed to represent Petitioner pursuant to Title 18 United States Code § 3006A in the U.S. District Court for the Southern District of Indiana, and in all proceedings before the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. Marsh", written over a horizontal line.

William E. Marsh
Indiana Federal Community Defenders, Inc.
111 Monument Circle, Suite 752
Indianapolis, Indiana 46204
(317) 383-3520
Bill.Marsh@fd.org
Attorney for Petitioner

A handwritten number "10" inside a hand-drawn circle, located in the bottom right corner of the page.

No. _____

SUPREME COURT OF THE UNITED STATES

MARCUS SYKES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

PETITION FOR WRIT OF CERTIORARI

William E. Marsh
Indiana Federal Community Defenders, Inc.
111 Monument Circle, Suite 752
Indianapolis, Indiana 46204
(317) 383-3520
Bill.Marsh@fd.org
Counsel of Record
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a “violent felony” under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

PARTIES

The caption of the case contains the names of all of the parties.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	i
PARTIES	ii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . .	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	15

INDEX TO APPENDIX

<i>United States v. Sykes</i> , 598 F.3d 334 (7 th Cir. 2010)	A-1
--	-----

TABLE OF AUTHORITIES

CASES	PAGE NUMBER
<i>Begay v. United States</i> , 553 U.S. 137 (2008)	7,8,12
<i>James v. United States</i> , 550 U.S. 192 (2007)	7
<i>Swain v. State</i> , 923 N.E. 2d 32 (Ind. App. 2010)(Table): 2010 WL 623720	10,12
<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	8
<i>United States v. Harrimon</i> , 568 F.3d 531, 536 (5 th Cir. 2009)	10,13
<i>United States v. Harrison</i> , 558 F.3d 1280 (11 th Cir. 2009)	5,9,11,12
<i>United States v. Chambers</i> , 555 U.S. —, 129 S.Ct. 687 (2009)	7,12,13
<i>United States v. Jennings</i> , 515 F.3d 980 (9 th Cir. 2008)	5,6
<i>United States v. Partee</i> , — F.3d —, 2010 WL 1141187 (7 th Cir. 2010)	14
<i>United States v. Spells</i> , 537 F.3d 743 (7 th Cir. 2008)	5,13
<i>United States v. Sykes</i> , 598 F.3d 334 (7 th Cir. 2010)	1,5,6,9,10,12,13
<i>United States v. Tyler</i> , 580 F.3d 722 (8 th Cir. 2009)	6
<i>United States v. West</i> , 550 F.3d 952, 971 (10 th Cir. 2008)	13,14
<i>United States v. Young</i> , 580 F.3d 373, 378 (6 th Cir. 2009)	13,14

STATUTES AND RULES

I.C. 35-44-3-3	1,3,4,9-12
18 U.S.C. § 922(g)(1)	4
18 U.S.C. § 924(e)	1,2,4-8,13
28 U.S.C. § 1254	1
28 U.S.C. § 3231	4

OTHER

Oxford English Dictionary	10
U.S.S.G. § 2K2.1(a)	7
U.S.S.G. § 4B1.1	6

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit whose judgment is sought to be reviewed is reported at *United States v. Sykes*, 598 F.3d 334 (7th Cir. 2010) and is reprinted in the appendix to this petition at A-1.

JURISDICTION

The decision of the court of appeals was entered on March 12, 2010; the opinion was amended on March 22, 2010.

This Court has jurisdiction under 28 U.S.C. § 1254.

This case involves the interpretation of 18 U.S.C. § 924(e)(2)(B) and I.C. 35-44-3-3(a)(3) and (b)(1)(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)

“(2) As used in this subsection–

* * *

(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–

(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;”

I.C. 35-44-3-3

“A person who knowingly or intentionally:

* * *

“(a)(3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop;

commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).

* * *

“(b) The offense under subsection (a) is a:

(1) Class D felony if:

(A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense; or

(B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

STATEMENT OF THE CASE

Marcus Sykes pled guilty to an indictment which charged him with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court had jurisdiction of the case pursuant to 28 U.S.C. § 3231.

This offense is punishable by a prison sentence of not more than 10 years in prison, unless the defendant has three previous convictions for a “violent felony” or drug trafficking offense in which case the sentence mandated by Congress in the Armed Career Criminal Act, 18 U.S.C. § 924(e), is 15 years to life in prison.

The district court denied Mr. Sykes’ objection to the enhancement, held that he had three previous convictions for a “violent felony” and sentenced him to 188 months in prison. Mr. Sykes’ objection was that the enhancement did not apply to him because his previous Indiana state conviction for using a vehicle while knowingly or intentionally fleeing from a law enforcement in violation of I.C. 35-44-3-3 was not a “violent felony.”

The United States Court of Appeals for the Seventh Circuit affirmed the application of the enhancement to Mr. Sykes and his sentence of 188 months in prison.

REASONS FOR GRANTING THE PETITION

The holding of the court of appeals that using a vehicle to flee a police officer is a “violent felony” under 18 U.S.C. § 924(e) is in direct conflict with *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009) and *United States v. Jennings*, 515 F.3d 980 (9th Cir. 2008).

The court of appeals opinion in *Sykes* acknowledges the conflict with *Harrison*. Referring to *Harrison*, the seventh circuit said, “[w]e simply reached different conclusions.” The court of appeals decision in *Sykes* followed its holding in *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008), an opinion the eleventh circuit explicitly declined to follow in *Harrison*; the court in *Harrison* said, “it appears that we are at odds with all but one other circuit that has addressed this issue [citing *Spells* and other cases].” 558 F.3d at 1296. It is clear that the opinions of the seventh and eleventh circuits are in direct conflict and both have declined to follow the precedent from the other.

In *Jennings* the ninth circuit held that a Washington fleeing statute which is indistinguishable from the Indiana fleeing statute is not a “violent felony” under § 924(e). The court in *Jennings* held that proof of an actual or potential risk of harm to others is an element of generic felony fleeing and since the Washington statute did not include that element it is not a “violent felony.”

The court of appeals decision in *Sykes* also conflicts with *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009) which held that fleeing a police officer in a motor vehicle is not a “crime of violence” under the United States Sentencing Guidelines, U.S.S.G. § 4B1.1. The court in *Tyler* recognized that the “definitions of ‘violent felony’ [18 U.S.C. § 924(e)] and ‘crime of violence’ [U.S.S.G. § 4B1.1] are virtually identical.” *Id.* at 725 n3.

This petition presents an important issue which has split the circuit courts and which this court should resolve. The circuit split means that some defendants, such as Mr. Sykes, receive sentences of 15 years to life in prison while other persons charged with the same crime and with identical criminal histories receive a maximum

sentence of 10 years in prison. The definition of “violent felony” or “crime of violence” also affects the sentencing guideline calculation in other circumstances.¹

This Courts’ opinions interpreting the 18 U.S.C. § 924(e) term “violent felony” in *James v. United States*, 550 U.S. 192 (2007), *Begay v. United States*, 553 U.S. 137 (2008), and *United States v. Chambers*, 555 U.S. ----, 129 S.Ct. 687 (2009), have resulted in a numerous circuit splits. In his concurring opinion in *Chambers*, Justice Alito said, “the ‘categorical approach’ to predicate offenses has created numerous splits among the lower federal courts.” 129 S.Ct. at 694.

The crime of using a vehicle while knowingly or intentionally fleeing from a law enforcement officer does not have “as an element the use, attempted use, or threatened use of physical force against the person of another” and it is not one of the enumerated felonies in the second clause of the § 924(e), so it is a “violent felony” only if it

¹ See, e.g., firearms offenses U.S.S.G. § 2K2.1(a).

“otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e).

The conclusion that a crime “presents a serious potential risk of physical injury to another” is not enough to bring it within the residual clause of § 924(e). This Court held in *Begay* that driving under the influence of alcohol created a serious potential risk of physical injury to another, but was not a “violent felony.” 553 U.S. 141. In addition the crime must be similar to the enumerated offenses, burglary, arson, extortion and the use of explosives. The Court held that an offense is similar to the enumerated offenses if it involves “purposeful, violent, and aggressive conduct” because this is conduct which “makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim.” 553 U.S. at 144-5.

The eighth, ninth, and eleventh circuits have more faithfully applied these principles in interpreting the residual clause than the seventh circuit. *Begay* follows *Taylor v. United States*, 495 U.S. 575 (1990) in holding that the Court must “consider the offense

generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.” 553 U.S. at 141.

In *Harrison*, the eleventh circuit described the elements of the generic fleeing offense: “[t]he behavior ordinarily underlying the crime in § 316.1935(2) involves only this conduct: (1) a law enforcement vehicle, with its siren and lights activated, signals the motorist to stop and (2) the motorist willfully refuses or fails to stop the vehicle.” 553 F.3d. at 1293.

Viewed this way it seems untenable to label the behavior generically described by the Indiana statute Mr. Sykes was convicted of violating as “purposeful, violent and aggressive.” The seventh circuit did not consider the offense generically, but rather made some assumptions about the kind of conduct which violates the statute and the probable consequences of that conduct. The court envisions the offense as “daring a cop to endanger himself by giving chase” and “something that is inherently likely to lead to violent confrontation,” [598 F.3d at 336].

The Indiana Court of Appeals upheld the felony conviction under I.C. 35-44-3-3(a)(3) and (b)(1)(A) of a woman who drove for 10 to 15 seconds before stopping after a man being chased by police jumped in her car. *Swain v. State*, 923 N.E. 2d 32 (Ind. App. 2010)(Table); 2010 WL 623720.

The seventh circuit opinion in *Sykes* focuses exclusively on the question of whether the conduct was “purposeful” and does not address the questions of whether the conduct was “violent” and “aggressive.” The only consideration the court of appeals gave to the question of whether the conduct was “violent” was resolved by reverting to the requisite “mental culpability,” an aspect of the conduct more properly considered “purposeful,” not “violent.” 598 F.3d at 337.

The Oxford English Dictionary defines “violent actions” as “characterized by the doing of harm or injury; accompanied by the exercise of violence,” and defines “violence” as “the exercise of physical force so as to inflict injury on, or cause damage to, persons or property; action or conduct characterized by this; treatment or

usage tending to cause bodily injury or forcibly interfering with personal freedom.” Using a vehicle while fleeing a law enforcement officer is not “violent” under this definition.

In *Harrison*, the eleventh circuit concluded:

“[h]owever, disobeying a police officer's signal and continuing to drive on, without high speed or reckless conduct, is not sufficiently aggressive and violent enough to be like the enumerated ACCA crimes. Or as the Supreme Court put it in *Begay*, such conduct does not ‘show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. *Begay*, 128 S.Ct. at 1587. It is not “the deliberate kind of behavior associated with violent criminal use of firearms.” *Id.* It is not the type of conduct that one hears about and remarks, “that's the kind of thing an armed career criminal would do.” See *id.* at 1586 (“[S]uch crimes are characteristic of the armed career criminal, the eponym of the statute.” (quotation marks omitted)).” 558 F.3d 1280, 1295 (11th Cir. 2009).

The Indiana fleeing statute has a separate provision for using a vehicle to flee from a police officer in a manner that creates a substantial risk of bodily injury to another person.

I.C. 35-44-3-3(b)(1)(B). Mr. Sykes’ previous conviction was under the subpart (A) of this statute, using a vehicle to flee a police officer, and not subpart (B) fleeing in a vehicle in a manner “creating a substantial

risk of bodily injury to another person.” This distinction in the statute emphasizes that the statute under which Mr. Sykes was convicted does not necessarily define the kind of dangerous behavior contemplated by the seventh circuit because that behavior is covered by a separate statute. Conduct which constitutes “daring a cop to endanger himself by giving chase,” and “something that is inherently likely to lead to violent confrontation,” [598 F.3d at 336] is addressed by I.C. 35-44-3-3 (b)(1)(B), not the statute of Mr. Sykes’ conviction, I.C. 35-44-3-3 (b)(1)(A). The statute under which Mr. Sykes was convicted also applies to more innocuous conduct such as “a fleeing coward-not an armed career criminal bent on inflicting physical injury” [*Harrison*, 558 F.3d at 1295] or a frightened girlfriend as in *Swain v. State*, 923 N.E. 2d 32 (Ind. App. 2010)(Table); 2010 WL 623720.

Begay and *Chambers* relied heavily on objective data in comparing the risk presented by the offense before the Court to the enumerated offenses. The government did not provide the court of appeals any objective data which led the court to make it’s

unsupported assumptions and conclusions about the nature of the crime for which Mr. Sykes was convicted.

The court of appeals in *Sykes* considered the issue as essentially whether to follow or overrule *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008), a decision of the seventh circuit before *Chambers v. United States*, 555 U.S. ----, 129 S.Ct. 687 (2009); in *Chambers* this Court reversed a seventh circuit interpretation of “violent felony” under the residual clause of 18 U.S.C. § 924(e).

The court of appeals in *Sykes* said, “the Fifth, Sixth and Tenth Circuits have all agreed with our reasoning in *Spells*. See *United States v. Harrimon*, 568 F.3d 531, 536 (5th Cir.2009); *United States v. Young*, 580 F.3d 373, 378 (6th Cir. 2009); *United States v. West*, 550 F.3d 952, 971 (10th Cir. 2008).” In *Harrimon*, the fifth circuit considered a state statute virtually identical to the Indiana statute, but the sixth and tenth circuit decisions cited by the court of appeals are distinguishable from *Sykes* because the state statute being considered had an additional element.

The Utah statute considered by the tenth circuit required operating the vehicle “so as to interfere with or endanger the operation of any vehicle or person.” *United States v. West*, 550 F.3d 952, 961 (10th Cir. 2008). The Michigan statute considered by the sixth circuit included as an element “increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police.” *United States v. Young*, 580 F.3d 373, 376 (6th Cir. 2009). Violation of the Michigan statute was a misdemeanor which became a felony only for a second offense within five years of the first.

These statutes are similar to the Wisconsin fleeing statute which has also been held to be a “violent felony” by the seventh circuit. *United States v. Partee*, — F.3d —, 2010 WL 1141187 (7th Cir. 2010). The Wisconsin crime is defined as “willfully and wantonly disregarding the officer's signal so that one endangers the police, pedestrians, or other vehicles; or by speeding away in the vehicle or extinguishing its lights.” *Id.* at 1. The *Partee* opinion applies to three cases which were consolidated by the seventh circuit because they all

raise the same issue. Counsel for these defendants have advised counsel for Mr. Sykes that they intend to petition this Court for certiorari in each of those cases.

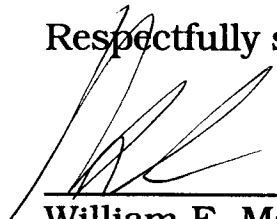
The Indiana statute is narrower than the Wisconsin, Michigan, or Utah statutes because it does not include an element of creating a risk of injury or a dangerous situation and may therefore be a better vehicle for this court to resolve the split in the circuits.

CONCLUSION

The petitioner respectfully requests that a writ of certiorari be granted.

Date: June 9, 2010

Respectfully submitted,



William E. Marsh

THE SUPREME COURT OF THE UNITED STATES

MARCUS SYKES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

APPENDIX
