No. 10-109

SEP 27 2010

IN THE

Supreme Court of the United States

ANTHONY DISMUKE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Petitioner's Reply Brief

In one breath, the Government argues that the circuits are easily reconciled and that Petitioner's thorough description of the utter confusion that the courts have created on the issue of whether nonviolent vehicular fleeing statutes are violent felonies under the Armed Career Criminal Act ("ACCA") is overstated. In the other, the Government cites the numerous other petitions that this Court has denied on this issue and contends that this Petition should meet the same fate. The Government's arguments do not mesh—if the precedent on this issue is so clear why the numerous and continuing petitions to this Court?

Rather, the multiple petitions on whether nonviolent fleeing statutes meet this Court's two-part test as articulated in *Begay v. United States*, 553 U.S. 137, 144-45 (2008), are convincing evidence of the deep and entrenched confusion among the circuits. That confusion and the lack of consistent precedent is only worsening. In fact, circuits continue to reach different outcomes on the very same state's nonviolent fleeing statutes. As a result, individuals like Mr. Dismuke face varied and contradictory results depending entirely on the state in which they are sentenced.

Only this Court can settle this question. Accordingly, certiorari should be granted to rectify the circuit split and instruct the circuits on the correct application of this Court's precedent.

I. THE SPLIT IS ENTRENCHED AND WORSENING.

The Government fails in its attempt to reconcile the circuits and paint the current state of the law as clear. As described in the Petition, the circuits fall into two disparate and entrenched camps. On one end of the spectrum, the Eighth and Eleventh Circuits have analyzed whether state vehicular fleeing statutes are violent felonies based on case-by-case analysis of the statutes' relevant elements—as required by this Court in *Chambers v. United States*, 129 S. Ct. 687, 691-92 (2009). Under that appropriate analysis, these two circuits have held that nonviolent fleeing statutes like the one at issue here do not meet *Begay's* two-part test and thus are not violent felonies. At the same time, both circuits have concluded that fleeing statutes which present a serious potential risk of physical injury and contain aggressive and violent elements similar to the ACCA's enumerated crimes, are violent felonies.

The decisions from the circuits at the other end of the spectrum make no attempt at distinguishing between nonviolent and violent fleeing statutes. The Fifth, Sixth, Seventh, and Tenth Circuits have ruled without regard as to whether state fleeing statutes turn on the presence of dangerous, violent, or aggressive conduct. These circuits have essentially held that vehicular fleeing is a *per se* violent felony.

The Government's attempt to lessen the appearance of a split relies on its argument that the Eleventh Circuit found that a vehicular fleeing statute was a crime of violence. Opp. Br. at 8 (citing

United States v. Layton, 356 Fed. Appx. 286 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3467 (2010)). That ruling, however, does nothing to reconcile the split. In *Layton*, the Eleventh Circuit properly labeled subsection three of Florida's fleeing statute, which includes fleeing at "high speed" and in "a wanton disregard for the safety of persons or property," a crime of violence. *Id.* at 289-90. Indeed, Mr. Dismuke pointed out the same in his brief. *See* Pet. Br. at 14 n.7 (citing *United States v. Harris*, 586 F.3d 1283, 1287-88 (11th Cir. 2009), *petition for cert. filed*, (U.S. May 14, 2010) (No. 09-10868)). Both *Layton* and *Harris* demonstrate that the Eleventh Circuit is following this Court's precedent and distinguishing statutes that contain dangerous, violent, and aggressive elements from those that do not.[1]

Moreover, yet another two circuits have reached opposite conclusions on the same state's fleeing

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[1] The Government also included the First Circuit in its discussion of the split based on that circuit's decision in *Powell v. United States*, 430 F.3d 490 (1st Cir. 2005), *cert. denied*, 547 U.S. 1047 (2006). Opp. Br. at 8. But *Powell* was decided before this Court issued its rulings in *Begay* and *Chambers*. As such, most circuits do not reference the First Circuit as having weighed on this split. *See, e.g.*, Pet. App. at 28a ("Although . . . . the Eighth and the Eleventh Circuits have reached the opposite conclusion . . . . , we think our colleagues in the Fifth, Sixth, and Tenth Circuits have the better of the argument." (internal citations omitted)). Further, the Maine fleeing statute at issue in *Powell* was not a nonviolent fleeing statute. In contained elements such as driving at a "reckless rate of speed" and creating "a high-speed chase" with police officers. *Powell*, 430 F.3d at 492 (citing Me. Rev. Stat. tit. 29, § 2501-A(3)).

statute. In addition to the split between the Eighth Circuit and Ninth Circuit (unpublished decision) on Oregon's fleeing statute cited in the Petition, Pet. Br. at 19-20, the Seventh Circuit has now split with the Eighth Circuit on whether Minnesota's nonviolent fleeing statute meets *Begay's* test.

In *United States v. Askew*, the Seventh Circuit held that Minnesota's fleeing statute, which is violated by attempting to flee a peace officer by increasing speed or extinguishing the vehicle's lights, is a crime of violence. No. 09-2846, 2010 WL 2711276, at *1-2 (7th Cir. July 8, 2010) (citing Minn. Stat. § 609.487(1)-(3)). Relying on this case, the Seventh Circuit held that Minnesota's non-violent statute presents a "serious potential risk of physical injury" and "involves violent conduct in the run-of-the-mill case." *Id.* at *3-4. In *United States v. Tyler*, 580 F.3d 722, 725 (8th Cir. 2009), the Eighth Circuit reached the opposite conclusion, holding that "the elements of the [Minnesota] statute do not require a confrontation, chase, or any other conduct indicating that the crime in question necessarily involves conduct presenting a serious risk of physical injury to another or conduct that is violent and aggressive." *Id.* at 725. The Eighth Circuit reached this same conclusion in two other cases: *United States v. Furqueron*, 605 F.3d 612 (8th Cir. 2010) and *United States v. Johnson*, 601 F.3d 869 (8th Cir. 2010). Indeed, the Seventh Circuit acknowledged this precise split, stating that "in *Furqueron*, *Johnson*, and *Tyler*, the Eighth Circuit reached a different conclusion concerning the very Minnesota statute at issue here." *Askew*, 2010 WL 2711276, at *4 n.5.

Furthering the need for this Court's intervention, circuits also are beginning to question whether their rulings that nonviolent fleeing statutes are violent felonies are consistent with this Court's ACCA precedent. Mr. Dismuke has made this Court aware of Judge Richard Posner's dissent from the Seventh Circuit's decisions on this issue, inviting this Court to resolve the confusion. Pet. Br. at 4. A panel from the Sixth Circuit has also recently expressed reservations about finding that nonviolent fleeing statutes meet *Begay's* test. *United States v. Stephens*, No. 09-1159, 2010 U.S. App. LEXIS 18346 (6th Cir. Aug. 30, 2010). After explaining that the Sixth Circuit has held "that even fleeing and evading in the *fourth* degree under Michigan law . . . constitutes a crime of violence," the *Stephens* panel dropped the following footnote:

> This all said, we do wish to express that we are somewhat concerned with the direction our case law has been taking by expanding, where the Supreme Court in *Chambers* and *Begay* instead appears to be moving toward narrowing, the definition of "crime of violence" or "violent felonies" within the meaning of the Guidelines or the ACCA.

2010 U.S. App. LEXIS 18346, at *12 & n.5.

The spilt on whether nonviolent fleeing statutes are violent felonies or crimes of violence is entrenched and will continue to result in disparate results until this Court settles the issue.

II. THE GOVERNMENT IGNORES AND MISAPPLIES THIS COURT'S ACCA PRECEDENT.

The Government does not dispute the Seventh Circuit's conclusion that the Wisconsin fleeing statute has two parts: one which contains language requiring the endangerment of others and one which does not. Nor does the Government contest the Seventh Circuit's conclusion that Mr. Dismuke violated only the second, non-violent part of the Wisconsin statute. Nevertheless, the Government attempts to conflate the two parts of the Wisconsin statute in an effort to argue that Mr. Dismuke's offense qualifies as a violent felony and the circuits are therefore not conflicted. Opp. Br. at 5-6, 7-8, 12-13. This argument is directly contrary to this Court's teaching in *Taylor v. United States*, 495 U.S. 575, 600 (1990). In *Taylor*, this Court made it clear that under the categorical approach, modified or not, once the proper part of the statute is identified, a court must look to only "the statutory definitions of the prior offenses, and not the particular facts underlying those convictions." The language of the Wisconsin statute is clear that while the first part may qualify as a violent felony since it requires the endangerment of others, the second part, in which no one is endangered, does not. Nonetheless, at footnote 1, the Government does exactly what *Taylor* forbids—it lists the "underlying facts" relating to Mr. Dismuke's fleeing conviction from the presentencing report. Opp. Br. at 3.

The Government also misapplies this Court's decision in *James v. United States*, 550 U.S. 192, 208

(2007). *James* requires a court to analyze "the conduct encompassed by the *elements* of the offense, in the *ordinary* case." *Id.* (emphasis added). The second part of the Wisconsin vehicular fleeing statute is violated if an individual attempts to "elude or flee" a police officer by "increase[ing] speed" or "extinguish[ing] the lights of the vehicle." Wis. Stat. § 346.04(3) (1998). Like the Seventh Circuit, the Government ignores these elements when determining whether the statute satisfies *Begay's* test. Rather, the Government lists the Fifth Circuit's and the Sixth Circuit's description of the dangers that arise when a police officer pursues a fleeing individual and the injuries that can result from that chase to officers and other individuals. Opp. Br. at 7-8 (quoting *United States v. Harrimon*, 568 F.3d 531, 536 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1015 (2009); *United States v. Martin*, 378 F.3d 578, 582-83 (6th Cir. 2004)). Regardless of what the Fifth and Sixth Circuit have asserted on this topic, it does not change the fact that not one line or element in the second part of the Wisconsin vehicular fleeing statute includes (1) pursuit by a police officer, (2) that a police officer be harmed, (3) that other individuals be harmed, or (4) that any property be put at risk. If none of the above-mentioned conduct is referenced in the relevant part of the Wisconsin fleeing statute, then the Government's description cannot be considered the *ordinary* case under the statute.

The Government's insistence on pursuit statistics suffers from this same flaw. The Government argues that data on the likelihood of physical injury resulting from the risk caused by violations under

the second part of Wisconsin's fleeing statute is necessary for this Court to rule on the issue. Opp. Br. at 12-13. But that argument is nonsensical. The elements of the statute specifically exclude from the second, nonviolent part of the statute all offenders who put any one at risk during their attempted flight. *See* Pet. App. at 15a-16a ("The first category is fleeing or attempting to elude an officer 'by willful or wanton disregard of [the officer's] signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians.'" (quoting Wis. Stat. § 346.04(3)) (alterations in original)). Thus, no statistics concerning the risk of physical injury are necessary for this case.

Accordingly, certiorari should be granted to correct further misapplication of this Court's ACCA precedent.

III. MR. DISMUKE DID NOT CONCEDE THAT HIS FLEEING CONVICTION PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY.

The Government conveniently omits the word "apparently" before its quote from this case regarding Mr. Dismuke's purported concession that the second part of Wisconsin's fleeing statute does not present a serious potential risk of physical injury. *Compare* Opp. Br. at 9, *with* Pet. App. at 17a. Mr. Dismuke did not "concede" the issue, and the Government's selective quote and failure to cite to any case law shows the weakness of its argument on this point.

Mr. Dismuke did what he had to do to preserve the issue when facing controlling circuit precedent to the contrary. He brought his argument to the court's attention and then cited the controlling precedent to the contrary. *See* Pet. Br. at 23 n.11 He did the same in his petition for rehearing *en banc*, *see id.*, which was denied. *See* Pet. App. at 52a. And while the Seventh Circuit suggested that Mr. Dismuke "apparently concede[d]" that Wisconsin's fleeing statute presents a risk of serious injury due to controlling precedent, the circuit fully addressed the issue in its opinion and acknowledged that both the Eighth and Eleventh Circuits had reached the opposite conclusion. Pet. App. at 17a n.3. Thus, the only time that Mr. Dismuke could "have reasonably expected that the validity of the earlier . . . [Seventh Circuit] decision would be questioned" would be before this Court. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980).

CONCLUSION

This Court should grant certiorari to resolve the deep and entrenched conflict and confusion that has arisen among the circuits regarding whether a fleeing statute, which criminalizes nonviolent conduct, is a violent felony under the ACCA.

Respectfully submitted,

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