No. 09-11311

In the Supreme Court of the United States

MARCUS SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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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 of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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OPINION BELOW

The opinion of the court of appeals (I J.A. 27-38) 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).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-6a.

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. I J.A. 27-38.

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. During his robbery attempt, petitioner recognized one of the people in the vehicle and aborted his attempt. A short time later, as the victims were speaking to police officers, they saw petitioner walking across a nearby street. Officers approached petitioner, who withdrew a black revolver from his pocket and tossed it on the ground. Officers then arrested petitioner. I J.A. 28; II J.A. 3-4.

2. 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). I J.A. 27-28. On that count, petitioner was subject to a mandatory minimum sentence of 15 years under the Armed Career Criminal Act of 1984 (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 pres-

ents 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 felonies for ACCA purposes. See I J.A. 8-9 ("We acknowledge that those [prior robbery convictions] serve as predicates for the ACCA."); II J.A. 5, 9-10; Pet. C.A. Br. 3 & n.1. 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) (Supp. 2001) for intentional vehicular flight from a law enforcement officer. See I J.A. 9; II J.A. 11.[1] At the time of petitioner's vehicular flight offense, Section 35-44-3-3(a)(3) of the Indiana Code made it a crime to "knowingly or intentionally * * * flee[] from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop," and Section 35-44-3-3(b)(1)(A) elevated that crime to a felony if "the person uses a vehicle to commit the offense."[2]

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[1] According to petitioner's Presentence Investigation Report, on May 30, 2002, police officers saw petitioner operating a vehicle at night in Lawrence, Indiana, with no headlights and heavy front end damage. Police activated their emergency equipment and attempted a traffic stop, but petitioner fled in his vehicle. Petitioner then led police on a chase, during which he drove on the wrong side of the road, wove through traffic, and drove through the yards of two residences before striking the rear of a third residence with his vehicle. There were people standing in those yards at the time. Petitioner fled on foot and was subsequently arrested. See II J.A. 11.

[2] The current version of the Indiana statute that appears in the appendix to petitioner's brief differs slightly from the version in effect in May 2002 when petitioner committed his vehicular flight offense. Those differences are not material to the question presented in this

Petitioner acknowledged before the district court that, under binding circuit precedent, his prior Indiana conviction for intentional vehicular flight was a violent felony. I J.A. 9. The district court therefore sentenced petitioner as an armed career criminal. Based on petitioner's total offense level of 31 and his criminal history category of VI, petitioner's advisory Guidelines range was 188 to 235 months of imprisonment. *Id.* at 14. After consideration of the factors in 18 U.S.C. 3553(a), the district court sentenced petitioner to a term of 188 months of imprisonment, to be followed by five years of supervised release. I J.A. 22-24.

3. The court of appeals affirmed. I J.A. 27-38. Relying on its earlier decision in *United States* v. *Dismuke*, 593 F.3d 582 (2010), petition for cert. pending, No. 10-109 (filed July 19, 2010), it held that "the act of fleeing an officer in a vehicle involves a 'serious potential risk of physical injury' to others." I J.A. 31 (quoting 18 U.S.C. 924(e)(2)(B)(ii)). The court further held, in reliance on its previous decision in *United States* v. *Spells*, 537 F.3d 743 (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.'" *Ibid.* (quoting *Spells*, 537 F.3d at 751-752) (second set of brackets in original).

The court of appeals reasoned that "Indiana's resisting statute criminalizes flight that is done 'knowingly

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case. Except as otherwise noted, all references in this brief to Indiana Code § 35-44-3-3 are to the 2001 Supplement, which was the version in effect at the time of petitioner's offense. Both versions of the Indiana statute appear in an appendix to this brief. See App., *infra*, 2a-6a.

[or] intentionally,' which satisfies the requirement that the conduct be purposeful." I J.A. 31. "In addition," the court observed, "besides daring a cop to endanger himself by giving chase, the act of fleeing police in a vehicle typically creates a risk of harm to other drivers and pedestrians, reflecting a degree of callousness that might lead a person to later pull the trigger on a gun." *Ibid.* The court noted that vehicular flight from law enforcement is violent and aggressive conduct "despite the fact that a predicate offense may not require that an offender actually endanger others through his flight," because the ACCA's enumerated crimes "also do not require that the offender put others in danger for conviction." *Id.* at 31-32 (emphasis omitted).

Moreover, the court of appeals held that *Spells* was consistent with this Court's intervening decision in *Chambers* v. *United States*, 129 S. Ct. 687 (2009). According to the court of appeals, this Court held in *Chambers* "that escape from custody is a violent felony under the ACCA, whereas a 'crime of inaction,' like failure to report to custody[,] is not similarly purposeful, violent and aggressive." I J.A. 33. The court of appeals reasoned that the Indiana offense of vehicular flight is "a crime of action: * * * [i]ts 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." *Ibid.* The court noted that although there is conflict among the circuits, the majority of circuits likewise has concluded that vehicular flight from law enforcement is a violent felony under the ACCA. *Id.* at 35-36.

SUMMARY OF ARGUMENT

To qualify as a "violent felony" under the ACCA's residual clause, an offense must satisfy a two-part test: first, the offense must create a potential risk of physical injury to others that is comparable in degree to the risk created by the ACCA's enumerated crimes. See *James* v. *United States*, 550 U.S. 192, 206-209 (2007). Second, the offense must be similar in kind to the enumerated crimes, in that it must involve purposeful, violent, and aggressive conduct. See *Begay* v. *United States*, 553 U.S. 137, 142-148 (2008); *Chambers* v. *United States*, 129 S. Ct. 687, 692 (2009). Vehicular flight from police satisfies both parts of that test.

A. Vehicular flight from police creates a risk of injury to others that is comparable in degree to the risk created by the ACCA's enumerated crimes. Like the enumerated crime of burglary, vehicular flight creates a serious potential risk of a violent confrontation, except that the risk is even greater because the flight necessarily occurs in the presence of a law enforcement officer who is likely to be armed and to take quick action to pursue and detain the offender. Case law, media reports, and statistical data all confirm that, faced with the prospect of pursuit, a fleeing offender typically uses violent force to elude police. In addition, when police pursue a fleeing offender, the ensuing chase only increases the risk of physical injury to others. Vehicular flight thus places the lives and safety of law enforcement officers, innocent passengers, other motorists, and pedestrians in serious danger.

B. Vehicular flight also is similar in kind to the ACCA's enumerated crimes, because it involves purposeful, aggressive, and violent conduct. Unlike the New Mexico offense of driving under the influence that

was at issue in *Begay*, the Indiana offense of vehicular flight requires knowing or intentional conduct. And unlike the Illinois offense of failure to report for penal confinement that was at issue in *Chambers*, vehicular flight is not a passive crime, because it involves deliberate action to evade the police. Evasion of police is violent both in nature (because it inherently involves a confrontation with police) and in practice (because offenders typically endanger others as they flee). Statistical data and common sense confirm that an offender who not only has disregarded an officer's order to stop but also has actively chosen to flee in a motor vehicle is the type of career criminal who would have a greater propensity to use a firearm to harm others.

C. Contrary to petitioner's arguments, the court of appeals employed this Court's categorical approach to the ACCA's residual clause. The court of appeals correctly determined that the conduct encompassed by the Indiana offense of vehicular flight, in the ordinary case, creates a serious potential risk of injury to others. As part of that determination, the court properly considered potential violence that occurs during pursuit or capture, because vehicular flight is a continuing offense that is ongoing so long as the offender is in flight from police. Nor does it matter if a State elects to create greater or additional offenses for different types of vehicular flight. The necessary inquiry is into the potential risks typically created by conduct that constitutes vehicular flight, regardless of whether that conduct in some circumstances could be prosecuted as a greater or different offense.

ARGUMENT

PETITIONER'S CONVICTION FOR VEHICULAR FLIGHT FROM A LAW ENFORCEMENT OFFICER IS A "VIOLENT FELONY" UNDER THE ARMED CAREER CRIMINAL ACT

The ACCA defines a "violent felony" to include "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). Petitioner's conviction for vehicular flight from a law enforcement officer, in violation of Indiana Code § 35-44-3-3(b)(1), qualifies as a "violent felony" under that definition because it "otherwise involves conduct that presents a serious potential risk of physical injury to another."

To qualify under that residual clause, an offense must satisfy a two-part test: first, the offense must create a potential risk of physical injury to others that is "serious." That requirement means that the offense must create a risk comparable in degree to the risk created by the enumerated crimes. See *James* v. *United States*, 550 U.S. 192, 206-209 (2007). Second, the offense must be similar in kind to the specifically enumerated crimes—burglary, arson, extortion, or crimes involving the use of explosives. That requirement means that the offense must be "purposeful, violent, and aggressive" in the way that the enumerated crimes share those characteristics. *Begay* v. *United States*, 553 U.S. 137, 142-148 (2008). Vehicular flight from police satisfies both parts of that test.

A. Vehicular Flight From Law Enforcement Presents A Serious Potential Risk Of Physical Injury To Others That Is Comparable To The Risk Posed By The Enumerated Crimes

In *James*, this Court held that an offense presents a "serious" potential risk of physical injury to another if the risk of injury that it creates is comparable in degree to the risk posed by one of the enumerated offenses. See 550 U.S. at 203, 208 (stating that the enumerated offenses provide "a baseline against which to measure the degree of risk that a nonenumerated offense must 'otherwise' present in order to qualify"). In determining whether the risk posed by a crime is comparable in degree to the risk created by an enumerated offense, the Court follows a "categorical approach." *Id.* at 202 (quoting *Shepard* v. *United States*, 544 U.S. 13, 17 (2005)). The Court considers the crime generically, measured by the legal definition of the offense rather than how it was committed on a particular occasion. *Ibid.* The categorical approach does not require that every factual scenario encompassed by the offense present the requisite risk of injury. *Id.* at 208. Instead, the Court examines "the conduct encompassed by the elements of the offense, in the ordinary case." *Ibid.*

The Court in *James* concluded that the potential risk of physical injury presented by attempted burglary is comparable in degree to the risk posed by the enumerated offense of burglary. It noted that "[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." 550 U.S. at 203. Attempted burglary, the

Court held, creates a similar "risk of violent confrontation." *Id.* at 203-204. Considering both the likelihood of confrontation and the likelihood that any confrontation will result in injury, the Court concluded that the risk posed by attempted burglary is similar in degree to the risk posed by burglary. *Id.* at 211.

Vehicular flight from law enforcement presents a serious potential risk of physical injury to others that is comparable in degree to the risk posed by burglary and the other enumerated crimes. Like burglary, vehicular flight creates a serious potential risk of a violent confrontation, except that the risk is even greater because the flight necessarily occurs in the presence of a law enforcement officer who is likely to be armed and to take immediate steps to pursue and detain the offender. Case law, media reports, and statistical data all confirm that, faced with the prospect of pursuit, an offender who flees typically will not hesitate to endanger others to make good on his escape. Moreover, when an offender's flight gives rise to pursuit by law enforcement, the ensuing chase only heightens the risk of physical injury to others. Vehicular flight thus places the lives and safety of law enforcement officers, other motorists, and pedestrians in serious danger.

1. An offender's flight in a vehicle creates a serious potential risk of a confrontation with law enforcement officers attempting to capture him

Under Indiana law, it is a crime to "knowingly or intentionally * * * flee[] from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop," Ind. Code § 35-44-3-3(a)(3), and that crime is elevated to a felony if "the person uses a vehicle to commit the offense," *id.* § 35-44-3-3(b)(1)(A). That type of vehicular

flight creates a serious risk of a confrontation between the offender and others, because the offender's flight from law enforcement officers is likely to trigger an immediate effort by those officers to pursue and capture him. See, *e.g.*, *United States* v. *Harrimon*, 568 F.3d 531, 535 (5th Cir.) ("Fleeing by vehicle requires disregarding an officer's lawful order, which is a clear challenge to the officer's authority and typically initiates pursuit."), cert. denied, 130 S. Ct. 1015 (2009).

Indeed, that risk of confrontation is significantly greater than the risk of confrontation between a burglar and either the police or the occupants of the premises being burglarized. A burglar generally goes out of his way to ensure that his offense goes undetected. See, *e.g.*, *United States* v. *Constantine*, 263 F.3d 1122, 1126 (10th Cir. 2001) ("Avoiding detection also facilitates commission of a burglary."). By contrast, vehicular flight cannot possibly go undetected under Indiana law: the offender must flee "from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop." Ind. Code § 35-44-3-3(a)(3). Such flight thus "will always involve an overt * * * disobedience of an officer's command and will occur directly in the officer's presence." *United States* v. *West*, 550 F.3d 952, 964 n.9 (10th Cir. 2008); *id.* at 965 ("[A] driver's refusal to stop a vehicle when commanded to do so will always be directly confrontational.").

Because vehicular flight involves disobedience that occurs directly in the presence of a law enforcement officer, that officer generally will take immediate steps to pursue and detain the offender. A recent study of state, county, and municipal police agencies found that virtually all of them permit officers to pursue fleeing vehicles

in certain circumstances. See Cynthia Lum & George Fachner, *Police Pursuits in an Age of Innovation and Reform: The IACP Police Pursuit Database* 37 (2008) (*Police Pursuits*) (finding that 73 of 77 police agencies, or 94.8%, permit pursuit); see also Kenneth L. Bayless & Robert Osborne, *A Report by the Pursuit Management Task Force* 8 (1998) ("Virtually every police agency allows for pursuit under some circumstances. Of the responding agencies, 99% allow their officers to engage in pursuits."). Although many agencies' policies limit the circumstances in which pursuit is permitted, 98.6% of policies do not require authorization by a supervisor before initiating pursuit; 95.9% do not limit the speed of the pursuing officer; and 74% permit pursuit even when no felony is involved. See *Police Pursuits* 37-38.

Law enforcement officials have good reasons for their efforts to capture offenders who flee in their vehicles. Although many pursuits are initiated for relatively minor infractions, many of those apprehended are charged with serious felony offenses that are unrelated to the pursuit. For instance, a study of more than 5,000 police pursuits in California found that 52% of those pursuits began with an attempted stop for a minor violation, but 73% of those apprehended were charged with felony violations and approximately 66% of felony arrests were for charges other than evading law enforcement officers. Maurice J. Hannigan & Kerri A. Hawkins, *Evaluation of Risk: Initial Cause vs. Final Outcome in Police Pursuits* 1 (1995); see Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. Crim. L. & Criminology 521, 535 (1989) (finding that "nearly 50%" of those apprehended "were charged with serious felony offenses unrelated to the

pursuit"). Simply put, "many offenders flee from the officer because of concern over more than the traffic offense that initiated the pursuit." *Ibid.*

2. A confrontation between a fleeing offender and law enforcement officers attempting to capture him has a serious potential to become violent

When an offender flees in a vehicle and dares officers to give chase, there is a serious potential risk of physical injury to pursuing officers, other motorists, and pedestrians. That is because "the use of a vehicle, usually a car, to evade arrest or detention typically involves violent force which the arresting officer must in some way overcome." *Harrimon*, 568 F.3d at 535. "[N]ot only the arresting officer or officers, but also pedestrians and other motorists are subject to this [violent] force." *Ibid.* Although it is possible to drive a vehicle at low speeds or in a manner that does not endanger officers or bystanders, an offender typically "will not hesitate to endanger others to make good his or her escape." *Id.* 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 note 1, *supra*.

Indeed, cases from this Court and other courts are replete with descriptions of the violence and mayhem that can erupt when an offender flees from police in a vehicle. See, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372, 374-375, 380 (2007) (describing "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury"); *County of Sacramento* v. *Lewis*, 523 U.S. 833, 837 (1998) (describing how a passenger aboard a motorcycle was fatally injured during a high-speed chase with

police); *Ellis* v. *Ogden City*, 589 F.3d 1099, 1100-1101 (10th Cir. 2009) (suspect fleeing from police collided with and killed another motorist); *Jones* v. *Byrnes*, 585 F.3d 971, 973-974 (6th Cir. 2009) (per curiam) (same); *United States* v. *Bear Robe*, 521 F.3d 909, 910 (8th Cir. 2008) (suspect fled from police, during which a passenger was ejected from the vehicle and killed); *Sanders* v. *City of Union Springs*, 207 Fed. Appx. 960, 962 (11th Cir. 2006) (per curiam) (suspect fleeing from police caused a collision, killing the suspect and his two-year-old passenger and severely injuring other motorists).

Newspaper reports confirm that vehicular flight places the lives and safety of law enforcement officers, motorists, and pedestrians in serious danger. See, *e.g.*, Freeman Klopott, *Crash During Police Chase Kills Father of Four*, Washington Examiner, Nov. 22, 2010, at 4 ("A father of four taking his son and daughter out for a late lunch in Silver Spring was killed when a driver fleeing police crossed a double-yellow line, slammed into a sport utility vehicle * * * and sent it into a utility pole."); Justin Fenton, *Woman Killed During Pursuit Identified*, Baltimore Sun, July 27, 2010, at 4A (reporting that a suspect fled police "at a high rate of speed," "struck two officers' vehicles," and "crashed into a woman's vehicle" and killed her); Lisa Rein & James Hohmann, *Crashes, Injuries Left in Wake of Pr. George's-Baltimore Chase*, Washington Post, Nov. 22, 2009, at C3 (reporting that a suspect "led police Saturday on a high-speed chase through Prince George's County and into Baltimore, injuring two Maryland state troopers and a motorist"); Brigid Schulte, *Car-Theft Suspect Hits 4 Vehicles, Including Cruisers*, Washington Post, Sept. 24, 2007, at B4 (reporting that a suspect

"led three police cruisers on a roundabout chase * * * and rammed four vehicles, sending one passenger to the hospital").

Case law and media reports thus strongly support the common sense notion that vehicular flight typically presents a serious potential risk of physical injury to others. An offender who has ignored a law enforcement officer's command to stop and is actively fleeing from police in a motor vehicle will often feel threatened by those who confront him and therefore will resort to violence. See, *e.g.*, *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) ("[E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so."). If anything, an offender's deliberate disobedience only underscores that the offender is not willing to peaceably submit to officers' efforts at capture. Likewise, that active defiance places law enforcement officers on notice that the offender has a demonstrated hostility to custody and that they must be prepared to protect themselves in the event of a confrontation. In numerous respects, an offender's flight in a vehicle creates a serious potential risk of physical injury to pursuing officers, other motorists, and pedestrians.

3. Statistical data confirms the existence of a serious potential risk of physical injury to others

a. Petitioner does not actually argue that vehicular flight fails to create a serious potential risk of physical injury to others. Rather, petitioner argues that the government failed to "present the district court or the court of appeals with any empirical data regarding the risk of injury" created by vehicular flight. Br. 17. Petitioner cites no evidence that Congress intended the decision

whether an offense presents a serious risk to depend on statistical analysis rather than judicial judgment based on experience and common sense. Indeed, petitioner's empirical evidence requirement would mean that many dangerous crimes might fail to qualify as violent felonies under the ACCA's residual clause, because statistical evidence on the riskiness of a particular offense often will not be available. It is difficult to imagine that Congress intended that result when it included the ACCA's "broad residual provision." *James*, 550 U.S. at 200.

To the extent that this Court has examined whether statistical evidence is required, it has rejected the notion. In *James*, this Court held that attempted burglary presents the necessary risk despite the absence of "hard statistics." 550 U.S. at 210. As the Court recognized, the "ACCA requires judges to make sometimes difficult evaluations of the risks posed by different offenses." *Id.* at 210 n.6; see *id.* at 210 (recognizing the difficulty of comparing the risks posed by dissimilar offenses in the absence of statistical data). Even the dissent in *James*, which disagreed with the Court's evaluation of the risk presented by attempted burglary, acknowledged that courts may have to decide, "without hard statistics to guide them, * * * the degree of risk of physical injury posed by various crimes." *Id.* at 227 (Scalia, J., dissenting) (internal quotation marks and citation omitted). It simply is not true, as petitioner appears to assume, that the government must introduce statistical data whenever a defendant disputes whether a prior conviction falls within the ACCA's residual clause.

Petitioner is correct that, in *Chambers* v. *United States*, 129 S. Ct. 687 (2009), this Court looked to a report prepared by the United States Sentencing Commission and concluded that "the study strongly supports the

intuitive belief that failure to report does not involve a serious potential risk of physical injury." *Id.* at 692. But there is a vast difference between saying that statistical data, when it is available, can be helpful in determining the risk posed by a particular offense, and saying that such data is invariably necessary to establish the riskiness of a given offense. See *United States* v. *Harrison*, 558 F.3d 1280, 1295 n.26 (11th Cir. 2009) ("[W]e caution that *Chambers* does not say empirical evidence is always required."). This Court may rely, as the court of appeals did, on its own experience and judicial judgment in holding that vehicular flight creates a serious potential risk of physical injury to pursuing officers, other motorists, and pedestrians.

b. In any event, statistical data strongly supports the common sense proposition that vehicular flight creates a serious potential risk of physical injury to others.[3] According to data collected by the National Highway Traffic Safety Administration (NHTSA), from 2000 to 2009, a total of 3,625—or an average of 363 people each year—were killed in crashes involving the pursuit of fleeing suspects. National Ctr. for Statistics & Analysis, *Fatalities in Motor Vehicle Crashes Involving Police in Pursuit* 37-56 (2010). Of those fatalities, approximately

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[3] Petitioner is correct that the government did not introduce any statistical data before the lower courts, but petitioner never claimed before those courts that he could not be sentenced as an armed career criminal absent such data. In the court of appeals, petitioner filed his opening brief more than two months after this Court's decision in *Chambers*. See I J.A. 3. Yet petitioner did not claim in that brief (or in any of his subsequent filings) that the court of appeals could not find the requisite degree of risk in the absence of empirical data. Petitioner advances that claim for the first time before this Court, see Br. 16-18, and the government accordingly responds to that claim here for the first time.

65% were occupants of the pursued vehicle (2,356 total, or 236 per year); 33% were occupants of another vehicle or pedestrians (1,214 total, or 121 per year); and 2% were police (55 total, or 6 per year). *Ibid.*

Other studies based on NHTSA data have found similar results over different periods of time. See H. Range Hutson et al., *A Review of Police Pursuit Fatalities in the United States from 1982-2004*, 11 Prehospital Emergency Care 278, 280 (2007) (finding that, between 1982 and 2004, the average number of annual fatalities was 323, more than one-fourth of whom were other motorists, pedestrians, or police) (*A Review of Police Pursuit Fatalities*); Fred P. Rivara & C.D. Mack, *Motor Vehicle Crash Deaths Related to Police Pursuits in the United States*, 10 Injury Prevention 93, 94 (2004) (finding that, between 1994 and 2002, "approximately 300 lives [were] lost each year in the United States from police pursuit related crashes and one third of these [were] among innocent people, not being pursued by the police").

Those statistics, although revealing, understate the relevant number of fatalities in at least two respects. First, although the majority of fatalities are occupants of the pursued vehicle, many of those individuals are not culpable in the flight. Indeed, children and adolescents account for nearly half of all passenger deaths from vehicular flight. See *A Review of Police Pursuit Fatalities* 281 (finding that, between 1982 and 2004, "children and adolescents accounted for 48% of all passenger deaths in the chased vehicle").[4] Harms to nonculpable passengers should be considered in assessing whether a culpable driver's flight "presents a serious potential risk

[4] There is no indication what percentage of adolescent passengers are culpable in the vehicular flight that results in their deaths. See *A Review of Police Pursuit Fatalities* 281.

of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Second, NHTSA depends on voluntary reporting from police departments to compile its data, but "many law enforcement officers are not trained to check the 'pursuit-related' box when a fatality occurs." Geoffrey P. Alpert et al., *Policing: Continuity and Change* 194 (2006). Some experts estimate that the death toll "could double if the [fatality] forms were completed correctly." *Ibid.*

In addition to underreporting the number of fatalities caused by vehicular flight, NHTSA's data does not reflect nonfatal injuries caused by vehicular flight. For example, a recent study funded by the Department of Justice examined 7,737 vehicular pursuits conducted by 56 law enforcement agencies in 30 states over a seven-year period. See *Police Pursuits* 54. That study found that 1,817 pursuits (23.5%) resulted in accidents and 694 (9%) resulted in some form of injury. *Id.* at 57. Of the 900 total injuries reported in the study, 313 injuries were suffered by innocent bystanders or police officers. *Ibid.* And of those 313 injuries, only seven (2%) were fatal. *Ibid.* Those figures indicate that while far more than a hundred innocent individuals or law enforcement officers are killed each year as a result of police pursuits, thousands more are physically injured. See L. Edward Wells & David N. Falcone, *Research on Police Pursuits: Advantages of Multiple Data Collection Strategies*, 20 Policing Int'l J. Police Strategy & Mgmt. 729, 739 (1997) (finding that most studies indicate that 23% to 41% of pursuits end in accidents and 9% to 17% result in injuries).

Of course, not every incident of vehicular flight results in pursuit by police. It is therefore possible that data focused specifically on incidents of vehicular flight

that trigger police pursuit may overstate to some degree the risk of injury from vehicular flight. But the degree of overstatement is likely to be slight for two reasons. First, as explained above, most police departments permit their officers to pursue fleeing suspects in a wide range of situations. See p. 20, *supra*. Second, the fact that officers sometimes choose not to pursue fleeing offenders does not eliminate the risk that those offenders pose to the public. As this Court recognized in *Scott*, when police "deactivate their flashing lights and turn around," a fleeing suspect cannot be sure whether "the chase [is] off" or whether instead officers are "simply devising a new strategy for capture." 550 U.S. at 385. Faced with that uncertainty, the suspect may be "just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow." *Ibid.*

Indeed, it is not at all unusual for fleeing offenders to crash their vehicles after the police abandon pursuit or even when the police never give chase at all. See, *e.g.*, Peter Hermann, *Attempt to Elude Police Ends in Fiery Four-Car Crash*, Baltimore Sun, Oct. 12, 2010, at 3A (reporting that a fleeing suspect "crashed into three parked cars, causing all four vehicles to burst into flames," even though the police did not give chase and simply "caught up to the vehicle by following the path of destruction"); Phillip Rucker, *Girl, 2, Dies After Man Hits Car, Runs*, Washington Post, Oct. 22, 2007, at B1 (reporting that three adults were critically injured and a toddler was killed when an unpursued suspect crashed into their car at a Northwest Washington intersection); Ernesto Londono & Debbi Wilgoren, *Md. Crash Came After High-Speed D.C. Chase*, Washington Post, Dec. 5, 2006, at B6 (reporting that a suspect fleeing from District of Columbia police killed two individuals in Silver

Spring, Maryland, even though police "turned around" when they reached the Maryland border). Whether or not authorities give chase, vehicular flight poses a major threat to the safety of innocent passengers, other motorists, pedestrians, and police officers.

c. Available data further suggests that the risk of physical injury to others posed by vehicular flight is comparable to the risk posed by the ACCA's enumerated crimes. In the broad-based study of vehicular pursuits discussed above, there were 313 injuries (including fatal injuries) to bystanders and police from 7,737 reported pursuits, or "roughly .04 injuries to others per pursuit." *Harrimon*, 568 F.3d at 537. By comparison to the enumerated crime of arson, "there are roughly 267,000 fires attributed to arson per year, resulting in over 2,475 injuries * * * or roughly .009 injuries per arson." *Ibid.* (citing U.S. Fire Admin., *Arson in the United States*, 1 Topical Fire Research Series (Jan. 2001), http://www.usfa.dhs.gov/downloads/pdf/tfrs/v1i8-508.pdf). In fact, that rate of arson injury may be too high, because it may include injuries to perpetrators who set arson fires. *Ibid.* In any event, the risk of injury to others from vehicular flight (which is .04 injuries per pursuit) is at least "roughly similar"—indeed, it is significantly greater than—the risk associated with arson (which is less than .01 injuries per arson). *Begay*, 553 U.S. at 143.

That rough similarity likely remains true with respect to two other enumerated crimes: burglary and offenses involving the use of explosives. The Bureau of Justice Statistics estimates that there were approximately 3.7 million household burglaries per year from 2003 to 2007. Shannon Catalano, *Victimization During Household Burglary* 1 (Sept. 2010), http://bjs.ojp.usdoj.

gov/content/pub/pdf/vdhb.pdf. Of those total burglaries, approximately 266,650 burglaries involved violence in some form, but only about 118,000 burglaries resulted in physical injury to a member of the household. *Id.* at 9-10. Those figures amount to .032 injuries per household burglary. As for offenses involving the use of explosives, statistics compiled by the United States Bomb Data Center show that, on average from 2004 to 2008, there were approximately 523 intentional bombings and 29 resulting injuries each year. Office of Strategic Intelligence & Info., Bureau of Alcohol, Tobacco, Firearms & Explosives, *Explosive Incident Data: Years: 2004, 2005, 2007, 2008* 3-7 (2010). As with arson, that rate of injury (.055 injuries per intentional bombing) may be too high, because it may include injuries to perpetrators. But at the least, the rate of physical injury to others from intentional bombing—which is surely one of the more dangerous crimes involving the use of explosives—is roughly similar to the rate of injury from vehicular flight.[5]

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[5] In this case, it does not matter whether the risk of physical injury to others is measured by comparing the number of annual injuries to the number of annual incidents of vehicular flight, see *Begay*, 553 U.S. at 154 (Scalia, J., concurring), or by examining the total annual number of actual and potential victims of vehicular flight, *id.* at 162-163 (Alito, J., dissenting). Likewise, it does not matter if the severity of a given level of risk is judged in relation to the risk posed by the most analogous enumerated crime, see *James*, 550 U.S. at 203, or in relation to the risk posed by the least dangerous enumerated crime, see *id.* at 219 (Scalia, J., dissenting). Using any methodology or substantive standard, vehicular flight poses a serious potential risk of physical injury to others within the meaning of the ACCA's residual clause.

B. Vehicular Flight From Law Enforcement Is Purposeful, Violent, And Aggressive In The Same Way As The Enumerated Crimes

In both *Begay* and *Chambers*, this Court addressed what characteristics serve to qualify an offense as a "violent felony" under the ACCA's residual clause. In *Begay*, the Court concluded that the presence of the four enumerated offenses, coupled with the use of the word "otherwise," indicates that the residual clause extends only to "crimes that are roughly similar, in kind as well as in degree of risk posed," to the listed offenses. 553 U.S. at 143-144. To qualify as similar in kind, a crime must, like the enumerated offenses, involve "purposeful, violent, and aggressive" conduct. *Id.* at 145. That similarity among the listed offenses is "pertinent," the Court reasoned, because it relates to the ACCA's "basic purpose[]": identifying prior crimes the commission of which makes it more likely that the offender, later possessing a gun, would use the gun to harm others. *Id.* at 144, 146.

The Court held in *Begay* that the New Mexico offense of repeatedly driving under the influence of alcohol does not satisfy that test because, even assuming that the offense presents a serious potential risk of physical injury to others, it is a "strict liability" offense that "typically" does not involve "purposeful, violent, and aggressive conduct." 553 U.S. at 141, 145. The Court observed that "statutes that forbid driving under the influence" generally criminalize "conduct in respect to which the offender need not have had any criminal intent at all." *Id.* at 145. For that reason, the Court concluded that, unlike the enumerated offenses of burglary and arson, which involve "intentional or purposeful conduct," a conviction for driving under the influence

does not show an increased likelihood that the offender is the kind of person who might deliberately harm others. *Id.* at 146.

The next Term, in *Chambers*, this Court held that failure to report for penal confinement is not a violent felony under the ACCA. 129 S. Ct. at 693. Because the Illinois statute at issue criminalized "several different kinds of behavior," the Court distinguished the types of behavior involving failure to report from "the less passive, more aggressive behavior underlying an escape from custody." *Id.* at 691. The Court then reasoned that failure to report "amounts to a form of inaction," which is unlike the more active offenses listed in Section 924(e)(2)(B)(ii). *Id.* at 692. The Court noted that among recent federal cases involving a defendant's failure to report, none had involved violence during the commission of the offense itself or during the defendant's later apprehension by authorities. *Ibid.* The Court therefore concluded that a defendant who fails to report is not "significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical injury.'" *Ibid.* (quoting 18 U.S.C. 924(e)(2)(B)(ii)).

The decision below is fully consistent with *Begay* and *Chambers*. Vehicular flight from police presents risks different in kind from those presented by the offenses at issue in those cases. Unlike the New Mexico offense of driving under the influence at issue in *Begay*, the Indiana offense of vehicular flight at issue in this case requires knowing or intentional conduct. And unlike the Illinois offense of failure to report for penal confinement at issue in *Chambers*, vehicular flight is not a passive crime, because it involves deliberate action to evade the police. Rather, like the analogous offense of escape from

custody, vehicular flight from police is characterized by active behavior akin to the conduct underlying the ACCA's enumerated crimes. In addition, evasion of police is both aggressive and violent, because it typically involves conduct that endangers the lives and safety of passengers, other motorists, pedestrians, and police officers. Moreover, vehicular flight creates the risk of pursuit by and confrontation with officers—and that pursuit and confrontation are fraught with danger for not only the officers but also other individuals.

1. Vehicular flight involves purposeful conduct

The court of appeals correctly held that the Indiana offense of vehicular flight from law enforcement officers involves purposeful conduct. See I J.A. 31. The Indiana statute at issue criminalizes various ways of resisting law enforcement, and it requires in relevant part that the offender "*knowingly or intentionally* * * * flee[] from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop." Ind. Code § 35-44-3-3(a)(3) (emphasis added).[6] The Indiana offense of vehicular flight thus involves purposeful conduct because it requires a mental state of knowledge or intent. Cf. *United States* v. *Bailey*, 444 U.S. 394, 404 (1980) ("[T]here is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.") (citation omitted). Indeed, petitioner himself concedes that the Indiana offense of vehicular flight "may be con-

[6] Intent and knowledge are the two highest mental states under Indiana criminal law. See Ind. Code § 35-41-2-2(a) (2004) ("A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so."); *id.* § 35-41-2-2(b) ("A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of the high probability that he is doing so.").

sidered 'purposeful' to the extent that it requires proof of knowledge or intent." Br. 11.[7]

The Indiana statute's requirement that flight be knowing or intentional readily distinguishes this case from *Begay*. Unlike the failure-to-report offense in *Begay*, the Indiana offense is not a "strict-liability crime" aimed at conduct "in respect to which the offender need not have had any criminal intent at all." 553 U.S. at 145-146; see I J.A. 31 ("Indiana's resisting statute criminalizes flight that is done 'knowingly [or]

[7] Petitioner suggests in a footnote that for an offense to be "purposeful" in a way that satisfies the ACCA's residual clause, the offense must intrinsically involve "trying to harm a person's person or property." Br. 11 n.2 (quoting *Welch* v. *United States*, 604 F.3d 408, 434 (7th Cir. 2010) (Posner, J., dissenting), petition for cert. pending, No. 10-314 (filed Sept. 1, 2010)). That suggestion, which petitioner makes for the first time in this Court, is at odds with the statutory text and this Court's decision in *Begay*. The ACCA's residual clause extends to any offense that "involves conduct that presents a *serious potential risk* of physical injury to another," regardless of whether the offense has as an element that the perpetrator intended to injure people or property. For instance, the enumerated crime of burglary does not require proof of intent to harm people or property. Rather, in its generic modern form, burglary requires only proof of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor* v. *United States*, 495 U.S. 575, 598 (1990). Moreover, under petitioner's test, a number of dangerous crimes would not qualify as ACCA violent felonies, including escape from custody pursuant to 18 U.S.C. 751(a), see *Chambers*, 129 S. Ct. at 691; carrying a firearm during and in relation to a drug trafficking offense pursuant to 18 U.S.C. 924(c), see *United States* v. *Stephens*, 237 F.3d 1031, 1033 (9th Cir.), cert. denied, 534 U.S. 956 (2001); and even placing a dangerous chemical device aboard an aircraft pursuant to 18 U.S.C. 31(a)(3), 32(a)(2). Finally, this Court in *Begay* did not require that an offense involve intentional conduct specifically targeted at harming persons or property. See 553 U.S. at 145-146 (contrasting "crimes involving intentional or purposeful conduct" with "crime[s] of negligence or recklessness") (citation omitted).

intentionally,' which satisfies the requirement that the conduct be purposeful, in contrast to DUI, which is more like a strict liability offense."); *United States* v. *Spells*, 537 F.3d 743, 752 (7th Cir. 2008) ("The Indiana law specifically provides that the flight must be done 'knowingly or intentionally,' thus ensuring that the law is only violated when an individual makes a 'purposeful' decision to flee from an officer."), cert. denied, 129 S. Ct. 2379 (2009); *Harrimon*, 568 F.3d at 534 ("[U]nlike the DUI statute at issue in *Begay*, fleeing by vehicle requires intentional conduct.").

2. Vehicular flight involves aggressive and violent conduct

a. The court of appeals also correctly held that vehicular flight from law enforcement officers involves aggressive conduct. See I J.A. 33. In *Chambers*, this Court considered a single Massachusetts statutory provision that criminalized "several different kinds of behavior," including various ways in which offenders could fail to report to penal authorities or escape from the custody of those authorities. 129 S. Ct. at 691. Although the lower courts in *Chambers* had treated those behaviors as different ways of committing a single offense, the Court disagreed, holding that "a failure to report * * * is a separate crime, different from escape." *Ibid.* In the Court's view, those offenses merited distinct treatment in part because "[t]he behavior that underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Ibid.*

Looking only at the offense of failure to report, the Court held that it is not a violent felony under the ACCA. See *Chambers*, 129 S. Ct. at 693. The Court reasoned that failure to report "amounts to a form of inac-

tion, a far cry from the 'purposeful, violent, and aggressive conduct' potentially at issue when an offender" commits any of the ACCA's enumerated crimes. *Id.* at 692 (some internal quotation marks omitted). Failure to report is essentially a passive and nonviolent crime, the Court explained, because although "an offender who fails to report must of course be doing something at the relevant time, there is no reason to believe that the something poses a serious risk of physical injury." *Ibid.* (emphasis omitted). If anything, the Court observed, "an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." *Ibid.*

As the court of appeals recognized, vehicular flight is aggressive conduct within the meaning of *Begay* and *Chambers*. The court reasoned that the Indiana statute's "knowing [or] 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." I J.A. 33; see *Welch* v. *United States*, 604 F.3d 408, 424 (7th Cir. 2010) ("While failure to report is a passive crime characterized by inaction, vehicular fleeing necessarily involves affirmative action on the part of the perpetrator.") (internal citation omitted), petition for cert. pending, No. 10-314 (filed Sept. 1, 2010). For that reason, "[a] felony conviction for resisting law enforcement in Indiana is a crime of action more like escape than 'failure to report,' a crime of inaction." I J.A. 33; see *United States* v. *LaCasse*, 567 F.3d 763, 767 (6th Cir. 2009) ("What is fleeing and eluding but an attempt to escape? It is certainly not a form of inaction."), cert. denied, 130 S. Ct. 1311 (2010).

Petitioner does not argue that "[t]he behavior that likely underlies" vehicular flight is any "less likely to involve risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Chambers*, 129 S. Ct. at 691; see *Harrimon*, 568 F.3d at 535 ("[A]ctive defiance of an attempted stop or arrest is similar to the behavior underlying an escape from custody."); *United States* v. *Howze*, 343 F.3d 919, 922 (7th Cir. 2003) ("Indeed, flight may be even more dangerous than escape, because many escapes do not entail flight to avoid capture—but *all* flights involve that risk-creating conduct."). Whether an offender is fleeing from attempted apprehension or escaping from actual custody, his behavior is an active, aggressive attempt to avoid capture and detention by law enforcement authorities.[8]

b. The court of appeals likewise correctly held that vehicular flight from law enforcement officers involves violent conduct. See I J.A. 31-32. As an initial matter, vehicular flight involves a "deliberate choice by the driver to disobey the police officer's signal." *James*, 337 F.3d at 391. That disobedience "is a clear challenge to the officer's authority," *Harrimon*, 568 F.3d at 535, and it therefore "poses the threat of a direct confrontation between the police officer and the occupants of the vehicle," *James*, 337 F.3d at 391. See *Harrimon*, 568 F.3d at 535 ("[F]leeing by vehicle 'will typically lead

[8] Several courts of appeals to consider the question since *Chambers* have concluded that escape from custody is either a violent felony under the ACCA or a crime of violence under the Sentencing Guidelines. See *United States* v. *Hughes*, 602 F.3d 669, 677 (5th Cir. 2010), petition for cert. pending, No. 10-5289 (filed July 6, 2010); *United States* v. *Willings*, 588 F.3d 56, 60 (1st Cir. 2009); *United States* v. *Pearson*, 553 F.3d 1183, 1186 (8th Cir. 2009); but see *United States* v. *Hart*, 578 F.3d 674, 681 (7th Cir. 2009).

to a confrontation with the officer being disobeyed,' a confrontation fraught with risk of violence.") (quoting *West*, 550 F.3d at 970). Because vehicular flight "calls the officer to give chase," such flight "dares the officer to needlessly endanger himself in pursuit." *Spells*, 537 F.3d at 752.

In *James*, this Court held that attempted burglary is a violent felony under the ACCA primarily because of "the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." 550 U.S. at 203. Intentional vehicular flight escalates that possibility of confrontation into a certainty: under Indiana law, the offender must flee following an officer's order to stop. See Ind. Code § 35-44-3-3(a)(3). In addition, this Court in *Chambers* held that an offender who fails to report for confinement is not "significantly more likely than others to attack, or physically to resist, an apprehender." 129 S. Ct. at 692. But an offender who flees from police has already demonstrated his willingness "physically to resist" apprehension. Vehicular flight thus inherently involves direct confrontation with police. See *West*, 550 F.3d at 965 ("While there may be escapes that do not involve a direct confrontation, a driver's refusal to stop a vehicle when commanded to do so will always be directly confrontational.").

That confrontation between offender and officer carries the potential for violence, because "the use of a vehicle, usually a car, to evade arrest or detention typically involves violent force which the arresting officer must in some way overcome." *Harrimon*, 568 F.3d at 535. The very purpose of flight "is to avoid detention or arrest by a police officer." *United States* v. *Young*, 580 F.3d 373,

378 (6th Cir. 2009), cert. denied, 130 S. Ct. 1723 (2010). As a result, "offenders typically attempt to flee by any means necessary, including speeding, extinguishing lights at nighttime, driving the wrong way, weaving," and other similar means. *Ibid.*; see *West*, 550 F.3d at 964 ("[U]nder the stress and urgency which will naturally attend his situation, a person fleeing from law enforcement will likely drive recklessly and turn any pursuit into a high-speed chase with potential for serious harm to police or innocent bystanders.") (citation omitted).

Those actions frequently present a substantial danger to innocent passengers, other motorists, pedestrians, and police officers. See, *e.g.*, *Harrimon*, 568 F.3d at 535 ("[N]ot only the arresting officer or officers, but also pedestrians and other motorists are subject to this [violent] force."); *West*, 550 F.3d at 964 n.9 ("[Vehicular flight] will likely occur in the presence of innocent and unsuspecting bystanders."); *Howze*, 343 F.3d at 922 ("Bystanders are in particular jeopardy. Collisions between fleeing vehicles and pedestrians or others who get in the way are common."). In the usual case, fleeing from a police officer in a motor vehicle involves the type of violent conduct that "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); see *United States* v. *Rogers*, 594 F.3d 517, 521 (6th Cir. 2010) ("As 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 [an] actual risk of death or injury."), petition for cert. pending, No. 09-10276 (filed Apr. 13, 2010).

Classifying vehicular flight as a violent felony under the ACCA accords with Congress's desire to punish more harshly a particular subset of career criminals, *i.e.*, those career criminals who not only possess firearms but are likely to use them. See *Begay*, 553 U.S. at 146. Consistent with that purpose, an offender's "willingness to use a vehicle to flout an officer's lawful order to stop" 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). As the Seventh Circuit has explained, "[a]n 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." *Welch*, 604 F.3d at 425 (second set of brackets in original) (quoting *Spells*, 537 F.3d at 752).

Statistical data confirms that common sense point. According to statistics published by the Department of Justice, approximately one out of every four state and federal inmates convicted for brandishing or displaying a firearm used the gun in that manner in an effort to "get away." See Caroline Wolf Harlow, Bureau of Justice Statistics, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders* 11 (Nov. 2001), http://www.ojp.usdoj.gov/content/pub/pdf/fuo.pdf; *Spells*, 537 F.3d at 752. In the same way that a firearm can facilitate escape, so too can a motor vehicle: "[a]s a person is in flight from custody, his vehicle has the potential to become a deadly or dangerous weapon." *United States* v. *Kendrick*, 423 F.3d 803, 809 (8th Cir. 2005). An offender's willingness to use his motor vehicle

to escape arrest or detention thus demonstrates an increased likelihood that, if the offender were in possession of a firearm, he would use that firearm in an effort to evade arrest. For those reasons, vehicular flight involves the type of violent and aggressive conduct that merits a higher mandatory minimum sentence under the ACCA.

C. Petitioner's Arguments That Vehicular Flight Is Not A Violent Felony Under The ACCA Lack Merit

Petitioner contends that vehicular flight is not a violent felony under the ACCA for four reasons. First, petitioner argues that the Indiana offense of vehicular flight does not have as an element the use of violence, and thus the court of appeals' focus on "the possible future consequences of the offense improperly expanded upon the elements of the offense." Br. 12. Second, petitioner argues that, by considering the injuries that occur as an offender flees, the court of appeals "also improperly expanded the time frame of the offense." Br. 13. Third, petitioner argues (Br. 15) that vehicular flight cannot be a violent felony, because the Indiana statute separately criminalizes flight that actually creates a substantial risk of bodily injury to others. Fourth, petitioner argues that "the rule of lenity requires that the statute be interpreted in his favor." Br. 18 n.6. None of those arguments is persuasive.

1. Determining whether an offense presents a serious potential risk of physical injury to others does not require impermissible factfinding

The court of appeals held that vehicular flight involves purposeful, aggressive, and violent conduct within the meaning of *Begay*, in part because "[t]he offender's purposeful decision to do something that is inherently

likely to lead to violent confrontation is an aggressive, violent act." I J.A. 31. According to the court, "this combination of mental state and likelihood of confrontation with authorities is aggressive and violent because it is an invitation to, or acceptance of[,] the potential violent outcome by the offender." *Ibid.* The court of appeals recognized "that a predicate offense may not *require* that an offender actually endanger others through his flight." *Id.* at 31-32. The court explained that the ACCA's enumerated crimes "also do not *require* that the offender put others in danger." *Id.* at 32. What vehicular flight and the enumerated crimes share, the court reasoned, is that all of those offenses are purposeful, aggressive, and violent. *Ibid.*

Petitioner observes (Br. 12) that the Indiana offense of vehicular flight does not have as an element the use of violence. From that fact, petitioner argues that the court of appeals erred in assessing the risk posed by "the typical commission of the offense" of vehicular flight, because that method "allow[s] a federal sentencing court to find conduct relating to the state offense that is outside the definition of the offense." *Ibid.* (internal quotation marks and citation omitted). According to petitioner, this Court in *James* made clear that, in assessing whether an offense qualifies under the ACCA's residual clause, sentencing courts may "consider only the conduct encompassed by the elements of the offense." *Ibid.* That rule is necessary, petitioner asserts, to safeguard defendants' Sixth Amendment rights. Br. 12-13.

Petitioner misunderstands the inquiry required by the ACCA's text and this Court's decision in *James*. Section 924(e)(2)(B)(ii) of the ACCA defines a "violent felony" as "any crime" that "is burglary, arson, or extor-

tion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The ACCA's residual clause thus focuses on the "conduct" involved in the commission of an offense and whether that conduct presents a "serious potential risk" of injury to others. For that reason, this Court in *James* held that to determine whether the risk posed by a crime is comparable in degree to the risk created by an enumerated offense, sentencing courts must follow a "categorical approach." 550 U.S. at 202. The categorical approach does not require that every factual scenario encompassed by the offense present the requisite risk of injury. *Id.* at 208. Rather, the focus is on the risk created by "the conduct encompassed by the elements of the offense, in the ordinary case." *Ibid.*

Employing that approach, the court of appeals correctly considered whether the Indiana offense of vehicular flight, in the ordinary case, creates a serious potential risk of physical injury to innocent passengers, other motorists, pedestrians, and police. See I J.A. 30-33. Petitioner disagrees with the court's conclusion that the typical incident of vehicular flight is quite risky, but that disagreement provides no basis for questioning the court's methodology. The court was explicit that it was not considering the particular facts underlying petitioner's conviction. *Id.* at 37. Rather, the court made clear that it was following "[this] Court's categorical approach for ascertaining whether an offense is a violent felony under the ACCA." *Id.* at 30; see *id.* at 31-32 (noting that the elements of the Indiana offense do not require "that an offender actually endanger others through his flight").

Petitioner contends (Br. 12) that in finding a serious potential risk to others from vehicular flight, the court

of appeals engaged in improper factfinding. But in *James* itself, this Court concluded that attempted burglary is an ACCA violent felony primarily because of "the *possibility* of a face-to-face confrontation between the burglar and a third party * * * who comes to investigate." 550 U.S. at 203 (emphasis added). Of course, that possibility of confrontation is not itself an element of attempted burglary. A would-be burglar is guilty even if there is no one at home or otherwise in the vicinity. *Id.* at 207. The relevant inquiry under *James* is whether, in a typical case, the conduct involved in the commission of an offense presents a serious risk of harm to others. The court of appeals correctly concluded that vehicular flight presents such a risk for several reasons, including that flight, like burglary or attempted burglary, creates a serious risk of a violent confrontation.

Petitioner further contends (Br. 12-13) that the court of appeals made factual findings in a manner that implicates Sixth Amendment concerns. Again, that contention is foreclosed by *James*, in which this Court rejected precisely that argument: "In determining whether attempted burglary under Florida law qualifies as a violent felony under [the ACCA's residual clause], the Court is engaging in statutory interpretation, not judicial factfinding." 550 U.S. at 214. The Court explained that the categorical approach "avoid[s] any inquiry into the underlying facts of James' particular offense," and instead "look[s] solely to the elements of attempted burglary as defined by Florida law." *Ibid.* "Such analysis," the Court concluded, "raises no Sixth Amendment issue." *Ibid.* For those same reasons, the court of appeals' application of the categorical approach in this case does not raise any Sixth Amendment issue.

2. In determining whether vehicular flight presents a serious potential risk of physical injury to others, courts properly consider risks created during pursuit or capture

Petitioner argues (Br. 13-14) that courts may not consider potential violence during pursuit or capture in deciding whether vehicular flight qualifies as an ACCA violent felony. That argument is unsound.

a. Petitioner asserts that "[t]he Indiana vehicular fleeing offense is complete when the person fails to stop after a police officer has identified himself and ordered the person to stop." Br. 13. Even if that assertion were correct, the ACCA's text demonstrates that Congress cared about more than just the third-party risk that flows from the initiation of an offense. The injury risked by the enumerated crimes often occurs after they are complete. In many crimes involving use of explosives, for example, any injury to others would occur only once the crimes have already been committed. See, *e.g.*, 18 U.S.C. 2275 ("plac[ing]" bombs or explosives in or upon a vessel with intent to injure the vessel or persons on board); 18 U.S.C. 2332f(a) ("plac[ing]" or "attempt-[ing]" to "place[], discharge[], or detonate[]" an explosive device in a public place). Similarly, arson is complete when a building has been set on fire or burned, see, *e.g.*, 18 U.S.C. 81, but any injury to persons often occurs when the fire subsequently spreads or creates a smoke hazard.

The same is true of the enumerated crimes that are violent and aggressive because the offender consciously commits them despite the risk of a closely related confrontation. In most States, a defendant commits the crime of extortion by making a *threat* with the intent to acquire something of value. See *James*, 550 U.S. at 220

(Scalia, J., dissenting) (citing 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.4(a), at 198-199 (2d ed. 2003)); James Lindgren, *Blackmail and Extortion in* 1 *Encyclopedia of Crime and Justice* 102, 104 (Joshua Dressler ed., 2d ed. 2002). That common, contemporary understanding of extortion presumably provides the definition of generic "extortion" under the ACCA. See *Taylor* v. *United States*, 495 U.S. 575, 592-598 (1990). And under that definition, any injury to others would occur after the offense is complete, when the offender decides to carry out the threat that he earlier made.

The potential violent confrontation in burglary also may occur after the offense is complete. The conduct necessary to commit generic burglary is entering or remaining without permission in a building with intent to commit a crime. *Taylor*, 495 U.S. at 598. A violent confrontation between the burglar and an occupant or police officer may often occur only after the defendant is no longer in the building. See, *e.g.*, *United States* v. *Graves*, 60 F.3d 1183, 1184-1185 (6th Cir. 1995) (burglar fled the scene and fired shots at a pursuing officer); Mike Gangloff, *Man Gets Life Sentence In Deadly New Year's Burglary*, Roanoke Times, May 28, 2010, at A9 (burglar fled the scene, shooting and killing the homeowner's friend). Indeed, when the Court assessed the risk posed by attempted burglary in *James*, it expressly considered the risk of violence in a confrontation occurring after the crime is completed. See 550 U.S. at 211 (considering the risk of violence when an officer or homeowner pursues a would-be burglar following an attempted burglary).

A prohibition on considering injuries that occur after commission of the offense also would have no support in the remaining text of the statute. The ACCA's residual

clause refers to the "conduct" "involve[d]" in the offense. 18 U.S.C. 924(e)(2)(B)(ii). But that clause does not require the offense conduct to involve "potential physical injury." Instead, it requires the conduct to involve a "potential risk of physical injury." *Ibid.* Thus, the offense conduct need not itself entail potential injury but need only create a potential *risk* that injury will follow. That conclusion is reinforced by the absence of any language requiring that the injury occur "in the course of committing the offense." Congress included that precise language when defining a "crime of violence" under 18 U.S.C. 16(b). Its decision not to include similar language in the ACCA is fatal to petitioner's position.

A prohibition on considering injuries occurring after commission of the offense likewise would not advance the ACCA's purpose. That purpose is to sentence more harshly career criminals who not only possess firearms but are likely to use them. See *Begay*, 553 U.S. at 146. In assessing whether a defendant's prior offense establishes such a likelihood, it makes sense to consider all harm that may result from the prior offense, so long as the conduct constituting the offense creates a clear risk that the harm will occur. Whether the harm will occur during commission of the prior offense itself or in its immediate aftermath reveals nothing about the offender's willingness to injure others. Indeed, petitioner's proposed limitation would frustrate the ACCA's purpose. It would exclude from the ACCA an obviously violent crime like placing a biological toxin in a mass transportation vehicle with the intent to endanger the safety of another person, 18 U.S.C. 1992(a)(2), because any injury to others would occur only after the toxin had been placed on the vehicle. That cannot be what Congress intended.

b. Even if there were a requirement that the violence risked by a prior offense must occur while the offense is ongoing, potential violence during vehicular flight would satisfy that test. By definition, the offense of vehicular flight is ongoing so long as the offender is fleeing from police. See *Mays* v. *City of E. St. Louis*, 123 F.3d 999, 1004 (7th Cir. 1997) ("[F]light from the police [is] an ongoing crime."). The offender is therefore responsible for the harm that results from his flight. See *United States* v. *McDougal*, 368 Fed. Appx. 648, 655 (6th Cir. 2010) (finding the defendant liable for restitution because "the act of fleeing was ongoing" and "the damage to the police cars was therefore an immediate consequence of such flight").

In that way, vehicular flight is like escape from custody. Both are continuing offenses that encompass conduct likely to occur during the efforts to evade police. See *United States* v. *Martin*, 378 F.3d 578, 582-583 (6th Cir. 2004) ("Both escape and fleeing from a police officer represent continuing offense[s], 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); see also *Bailey*, 444 U.S. at 413 (escape from custody under 18 U.S.C. 751(a) is a continuing offense); *United States* v. *Merino*, 44 F.3d 749, 754 (9th Cir. 1994) (unauthorized flight to avoid prosecution under 18 U.S.C. 1073 is a continuing offense), cert. denied, 514 U.S. 1086 (1995).

In addition to following logically from the nature of the offense, treating vehicular flight as a continuing offense makes sense because the offender poses a continuing threat to society during the entire period that he remains in flight from police. Cf. *Bailey*, 444 U.S. at 413

("Given the continuing threat to society posed by an escaped prisoner, 'the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.'") (quoting *Toussie* v. *United States*, 397 U.S. 112, 115 (1970)). In deciding whether vehicular flight qualifies as a violent felony under the ACCA, it is therefore entirely appropriate to consider all of the risk created by an offender's ongoing effort to elude law enforcement.

Petitioner claims that courts should not consider any violence that occurs after an offender disregards an officer's order to stop, because such violence is not "an intrinsic component of the offense." Br. 14. That claim is essentially a repetition of petitioner's erroneous argument that the only risks to be considered are those that arise from conduct that is an element of the offense. See pp. 34-36, *supra*. For example, violent confrontation is one of the risks posed by burglary, even though violent confrontation is not an "intrinsic component" of the offense of burglary. In this case, the court of appeals correctly recognized that just as it is possible to commit burglary without confronting anyone, it is possible to flee from police by calmly operating the vehicle within speed limits and scrupulously observing all traffic laws. I J.A. 31-32. But that is not the "conduct" "involve[d]" in vehicular flight, 18 U.S.C. 924(e)(2)(B)(ii), "in the ordinary case," *James*, 550 U.S. at 208.

3. Vehicular flight is a violent felony, even if a State elects to create greater or additional offenses that might also be applicable in a given case of vehicular flight

Four courts of appeals (the First, Fifth, Sixth, and Tenth 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 Sentencing Guidelines. See *United States* v. *McConnell*, 605 F.3d 822, 827-830 (10th Cir. 2010) (Guidelines), petition for cert. pending, No. 10-6991 (filed Oct. 13, 2010); *Harrimon*, 568 F.3d at 534-537 (ACCA); *LaCasse*, 567 F.3d at 767 (ACCA); *Powell* v. *United States*, 430 F.3d 490, 491 (1st Cir. 2005) (per curiam) (ACCA), cert. denied, 547 U.S. 1047 (2006). Two courts of appeals (the Eighth and Eleventh), however, have reached a contrary conclusion, each for different reasons. See *United States* v. *Tyler*, 580 F.3d 722, 725 (8th Cir. 2009); *Harrison*, 558 F.3d at 1291. Petitioner discusses (Br. 15) only *Harrison*, but neither decision is consistent with the ACCA and this Court's precedents.

a. In *Tyler*, a divided panel of the Eighth Circuit 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). See 580 F.3d at 725. The Minnesota statute at issue defined fleeing an officer to include various means of evasion, among them increasing speed, extinguishing headlights or taillights, and refusing to stop the vehicle. *Id.* at 724. The Eighth Circuit reasoned that, because Minnesota has defined fleeing as to include some types of conduct (like extinguishing lights) that are not necessarily violent or aggressive, a violation of the Minnesota statute "do[es] not necessarily translate into a serious potential risk of physical injury." *Id.* at 725. The Eighth Circuit distinguished state statutes—like the Indiana statute at issue here—that do not expressly define fleeing to include nonviolent means of evading law enforcement officers. *Id.* at 726.

The Eighth Circuit's reasoning is flawed. Whether or not a state statute specifies on its face the different ways in which an offender may flee from police, it is possible under generic state flight statutes to flee in a violent manner (*i.e.*, at a high speed or without regard to traffic laws) or in a nonviolent manner (*i.e.*, at a low speed while observing all traffic laws). The question for ACCA purposes is therefore not whether vehicular flight "necessarily translate[s] into a serious potential risk of physical injury" *in every case*. Rather, the question is whether vehicular flight translates into a serious risk of injury *in the typical case*. As the Court explained in *James*, "[o]ne could, of course, imagine a situation in which attempted burglary might not pose a realistic risk of confrontation or injury to anyone." 550 U.S. at 207. But as the Court noted, the ACCA's residual clause "speaks in terms of a 'potential risk,'" which is an "inherently probabilistic concept[]." *Ibid.* What matters is that in the ordinary case, as in *Tyler* itself and as in this case, the offender potentially endangers others by fleeing at high speeds or disregarding traffic laws.

b. In *Harrison*, the Eleventh Circuit held that the Florida offense of vehicular flight from a law enforcement officer is not a violent felony under the ACCA. 558 F.3d at 1296. As relevant here, the Florida statute at issue creates three separate offenses. The basic offense is the third-degree felony of vehicular flight, *i.e.*, willfully fleeing or attempting to elude an identified officer. See Fla. Stat. Ann. § 316.1935(1) and (2) (West 2006). That offense is elevated to a second-degree felony if, during the course of flight, the offender "[d]rives at high speed, or in any manner which demonstrates a wanton disregard for the safety of persons or property," *id.* § 316.1935(3)(a); and it is elevated to a first-degree

felony if, in addition to either of those things, the offender "causes serious bodily injury or death to another person, including any law enforcement officer involved in pursuing or otherwise attempting to effect a stop," *id.* § 316.1935(3)(b). In *Harrison*, the Eleventh Circuit held that vehicular flight is not a violent felony for ACCA purposes, while indicating that Florida's forms of aggravated vehicular flight would be violent felonies. 558 F.3d at 1291, 1295-1296.[9]

i. Petitioner argues (Br. 14-15) that the Indiana statute at issue, Ind. Code § 35-44-3-3, has a similar structure. To understand why petitioner's argument is incorrect, it is important to understand the structure of the Indiana statute. Section 35-44-3-3(a) criminalizes three types of knowing or intentional resistance to police: Subsection (a)(1) prohibits interfering with an officer in the execution of his duties; Subsection (a)(2) prohibits obstructing the service of process or execution of a court order; and Subsection (a)(3) prohibits fleeing from an identified law enforcement officer. Subsection (a)(3) does not specify that the flight must be undertaken through any particular means, and thus it covers both flight on foot and flight in a motor vehicle. All three types of resistance identified in Subsection (a) are Class A misdemeanors under state law, except as provided in Subsection (b) of the statute.

Subsection (b)(1) provides that resisting law enforcement can be elevated to a Class D felony in either of two

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[9] Since *Harrison*, the Eleventh Circuit has held that Florida's lesser form of aggravated vehicular flight—which requires driving at high speed or wantonly disregarding the safety of persons or property—is a crime of violence under Section 4B1.2 of the Sentencing Guidelines. *United States* v. *Harris*, 586 F.3d 1283, 1289 (2009), petition for cert. pending, No. 09-10868 (filed May 14, 2010).

ways. First, resisting police is elevated to a Class D felony if "*the offense is described in subsection (a)(3)* and the person uses a vehicle to commit the offense." Ind. Code § 35-44-3-3(b)(1)(A) (emphasis added). In other words, if an offender flees from an identified law enforcement officer and uses a vehicle to commit that flight, the offense is a felony rather than a misdemeanor. Second, resisting police is elevated to a Class D felony if "*while committing any offense in subsection (a)*, the person * * * operates a vehicle in a manner that creates a substantial risk of bodily injury to another person." *Id.* § 35-44-3-3(b)(1)(B) (emphasis added). In other words, if an offender resists police in any of the three statutorily prohibited ways—by interfering with the execution of official duties, obstructing process service or court orders, or fleeing from an identified officer—and in the process endangers another with a vehicle, the offense is a felony.[10]

Relying on *Harrison*, petitioner argues (Br. 14-15) that his vehicular flight conviction is not an ACCA pred-

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[10] Subsections (b)(2) and (b)(3) provide that resisting law enforcement can be further elevated to a Class C or a Class B felony if a vehicle is involved and certain harms result. "[I]f, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes serious bodily injury to another person," the offense is a Class C felony. Ind. Code § 35-44-3-3(b)(2). And "if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person," the offense is a Class B felony. *Id.* § 35-44-3-3(b)(3). At the time of petitioner's offense, the Indiana statute did not provide that the offense of resisting law enforcement could be elevated to a Class A felony. Resisting law enforcement is currently elevated to a Class A felony "if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of a law enforcement officer while the law enforcement officer is engaged in the officer's official duties." *Id.* § 35-44-3-3(b)(4) (2010).

icate because he was convicted of the first type of Class D felony (*i.e.*, fleeing in a vehicle from an officer) rather than the second type of Class D felony (*i.e.*, resisting law enforcement in a prohibited way and thereby endangering someone with a vehicle). It is simply irrelevant, however, which type of Class D felony the State elected to charge in this particular case. When a defendant flees from police, there are two ways to prove that the offense is a Class D felony under Indiana law: by proving that the defendant fled in a vehicle *or* by proving that the defendant, whatever his means of flight, created a substantial risk of injury to others. It may be the case —indeed, it often is the case—that a defendant who uses a vehicle to flee does both: he flees in a vehicle *and* endangers others along the way using that vehicle. But the State of Indiana need only prove one element or the other to elevate the crime to a felony, and nothing can be inferred from its decision in a given case to prove the means of flight instead of the manner of flight.

For instance, in a case in which both types of Class D felonies could be prosecuted, the State might well elect to prosecute the defendant for vehicular flight, because the two offenses are equally serious and vehicular flight does not require proof to the jury beyond a reasonable doubt that the defendant's conduct in fact endangered others. In addition, prosecutors often negotiate, and courts often accept, pleas to lesser or different charges. See, *e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 361-362, 363 (1978); *Brady* v. *United States*, 397 U.S. 742, 753 (1970). Thus, neither in this case nor generally is it reasonable to infer that a defendant convicted of vehicular flight probably did not create endanger others. This case is a good example: 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. Accordingly, petitioner's conduct doubtless created "a substantial risk of bodily injury" to others, Ind. Code § 35-44-3-3(b)(1)(B), even though petitioner pleaded guilty instead to the offense of vehicular flight.

ii. More generally, petitioner seems to argue (Br. 15) that his flight conviction is not an ACCA predicate because he was not convicted of any offense that has as an element threatened injury, actual injury, or death. That argument confuses the relevant inquiry under the ACCA. The correct inquiry is not whether vehicular flight in a *particular* case creates an *actual risk* of death or injury to third parties (let alone actual death or injury), but whether vehicular flight in a *typical* case creates a *potential risk* of serious harm to others. It is therefore irrelevant that petitioner was not convicted of "creat[ing] a substantial risk of bodily injury to another person," Ind. Code § 35-44-3-3(b)(1)(B), let alone of causing such injury or even death, *id.* § 35-44-3-3(b)(2) and (3). The question under the ACCA's residual clause is not whether petitioner's particular flight presented an actual and substantial risk to the safety of others. Rather, the question is whether a typical offender's flight presents a "serious potential risk" to others' safety. 18 U.S.C. 924(e)(2)(B)(ii). It would be no defense for petitioner to say that, on the facts of his particular case, that potential risk to third parties never materialized into an actual risk.

Other courts of appeals have recognized that 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. 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." *Rogers*, 594 F.3d at 521. The Fifth Circuit likewise noted 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.

Petitioner speculates (Br. 18 n.5) that a fleeing offender in Indiana who risks or causes harm to others will be convicted of one of the Indiana offenses that requires proof of such risk or harm. But as explained earlier, there are two ways that flight of any kind—whether on foot or in a vehicle—can qualify as a felony under Indiana law: the offender uses a vehicle to flee, Ind. Code § 35-44-3-3(b)(1)(A); or the offender flees and, in the process of flight, operates a vehicle in a way that endangers others, *id.* § 35-44-3-3(b)(1)(B). Both of those offenses are Class D felonies, and neither is more aggravated than the other under state law. Nor is either crime a lesser included offense of the other, so that a defendant's conviction for the lesser offense could even possibly be taken to indicate that he had not committed the greater offense.[11] It is true that Indiana has created

[11] For one offense to be a lesser included offense of another, the lesser offense must be necessarily included in the greater offense, such that it is impossible to commit the greater offense without committing the lesser offense. *Schmuck* v. *United States*, 489 U.S. 705, 716-717 (1989); see *Zachary* v. *State*, 469 N.E. 2d 744, 749 (Ind. 1984) ("A lesser included offense is necessarily included within the greater offense so

Class C and Class B felonies for vehicular flight that actually injures or kills someone. See p. 45 note 10, *supra*. Those harms, however, far outstrip the level of potential risk that must be shown under the ACCA's residual clause, and petitioner does not argue otherwise.

Regardless, in deciding whether an offense qualifies as a violent felony under the ACCA's residual clause, the proper inquiry is into the potential risks typically created by conduct constituting that offense. It is not relevant to that inquiry whether greater or different charges may in some circumstances also be available under state law to punish that conduct. Nor is it relevant that a given defendant may not have been prosecuted on whatever greater or different charges may be available.

This Court's decision in *James* illustrates these principles. In *James*, this Court noted the possibility that either burglary or attempted burglary could result in a "confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." 550 U.S. at 203. Of course, such confrontations could become not only violent but

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that it is impossible to commit the greater offense without first having committed the lesser."). That is not true of vehicular flight under Section 35-44-3-3(b)(1)(A) and resistance to law enforcement involving a vehicle and creating a substantial risk of bodily injury under Section 35-44-3-3(b)(1)(B). A defendant can commit the former offense without committing the latter, by fleeing in a way that poses no actual risk to anyone. Conversely, a defendant can commit the latter offense without committing the former, by dangerously using a car not to flee but rather to interfere with an officer's performance of his duties or with the service of process or execution of a court order. Thus, rather than being greater and lesser included offenses, the two types of Class D felonies are simply alternative forms of aggravated resistance to law enforcement.

fatal, in which case the perpetrator's offense could be prosecuted as the much more serious greater offense of felony murder. See generally *Whalen* v. *United States*, 445 U.S. 684 (1980). But that does not mean that the risk of a fatal confrontation must be ignored when considering whether offenses like burglary or attempted burglary present a serious potential risk to others.

Similarly here, in considering the risks presented by the offense of vehicular flight from law enforcement, courts must take into account all instances of vehicular flight from law enforcement, including those that involve circumstances which could lead to prosecution for greater or different offenses. Put another way, a defendant who commits vehicular flight that results in someone else's death is guilty under Indiana law of a greater offense. See Ind. Code § 35-44-3-3(b)(3) (making it a Class B felony, in the course of resisting law enforcement, to "operate[] a vehicle in a manner that causes the death of another person"). But such a defendant also is guilty of the less serious offense of vehicular flight, and the risk that offenders who commit vehicular flight might cause someone else's death must be considered in determining whether vehicular flight from law enforcement is a violent felony under the ACCA.

In any event, even if the risks presented by conduct that could be prosecuted as greater or different offenses were properly disregarded, vehicular flight would remain sufficiently dangerous to qualify as a violent felony. The risk created by vehicular flight includes the risk of physical confrontation when the pursuing officer brings the flight offense to an end. That risk does not arise from the manner in which the perpetrator operates the vehicle, but rather from the circumstance that, in the typical case, the vehicular flight offense ends in a

physical confrontation with the arresting officer. In *James*, the Court indicated that the risk of injury associated with the interruption of an attempted burglary by a police officer or other person would be sufficient to satisfy the ACCA's residual clause. See 550 U.S. at 211-212. Likewise, the risk of injury associated with the termination of the flight offense by the pursuing police officer satisfies the residual clause's risk requirement, without regard to the particular risk presented by the offender's operation of his vehicle.

4. The rule of lenity does not apply

Finally, petitioner is incorrect to suggest (Br. 18 n.6) that the rule of lenity applies here. That rule is reserved for cases that, unlike this one, involve a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). Petitioner does not identify any language in the ACCA that is ambiguous. Instead, he simply disagrees (Br. 18) with the court of appeals' conclusion that an offender's deliberate flight from police creates a "serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The serious-risk standard, although it sometimes requires careful examination of the nature of particular crimes, is not ambiguous. And, for the reasons discussed above, vehicular flight from police clearly satisfies that standard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 924(e) of Title 18, United States Code, provides:

Penalties

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

2. Indiana Code § 35-44-3-3 (Supp. 2001) provides:

Resisting law enforcement

(a) A person who knowingly or intentionally:

(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an officer;

(2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or

(3) flees from a law enforcement officer after the officer has, by visible or audible means, identified himself 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 another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

(2) Class C felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes serious bodily injury to another person; and

(3) Class B felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person.

(c) For purposes of this section, a law enforcement officer includes an alcoholic beverage enforcement officer and a conservation officer of the department of natural resources.

3. Indiana Code § 35-44-3-3 (Supp. 2010) provides:

Resisting law enforcement

(a) A person who knowingly or intentionally:

(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties;

(2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or

(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;

(2) Class C felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes serious bodily injury to another person;

(3) Class B felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person; and

(4) Class A felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of a law enforcement officer while the law enforcement officer is engaged in the officer's official duties.

(c) For purposes of this section, a law enforcement officer includes an enforcement officer of the alcohol and tobacco commission and a conservation officer of the department of natural resources.

(d) If a person uses a vehicle to commit a felony offense under subsection (b)(1)(B), (b)(2), (b)(3), or (b)(4), as part of the criminal penalty imposed for the offense, the court shall impose a minimum executed sentence of at least:

(1) thirty (30) days, if the person does not have a prior unrelated conviction under this section;

(2) one hundred eighty (180) days, if the person has one (1) prior unrelated conviction under this section; or

(3) one (1) year, if the person has two (2) or more prior unrelated convictions under this section.

(e) Notwithstanding IC 35-50-2-2 and IC 35-50-3-1, the mandatory minimum sentence imposed under subsection (d) may not be suspended.

(f) If a person is convicted of an offense involving the use of a motor vehicle under:

(1) subsection (b)(1)(A), if the person exceeded the speed limit by at least twenty (20) miles per hour while committing the offense;

(2) subsection (b)(2); or

(3) subsection (b)(3);

the court may notify the bureau of motor vehicles to suspend or revoke the person's driver's license and all certificates of registration and license plates issued or registered in the person's name in accordance with IC 9-30-4-6(b)(3) for the period described in IC 9-30-4-6(d)(4) or IC 9-30-4-6(d)(5). The court shall inform the bureau whether the person has been sentenced to a term of incarceration. At the time of conviction, the court may obtain the person's current driver's license and return the license to the bureau of motor vehicles.