No. 13-7909

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2013

DANIEL RAUL ESPINOZA, PETITIONER

V.

UNITED STATES OF AMERICA

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTION

Daniel Espinoza asks the Court to take his case to decide whether crimes with a mens rea of recklessness can ever trigger the sentence enhancement set out in the Armed Career Criminal Act, 18 U.S.C. § 924(e). The question has divided the circuit courts. The government acknowledges the division over the issue, but attempts to downplay its importance. The government also tries to suggest that Espinoza's case might not be the right one in which to resolve the split. Both efforts fail. The division has important consequences for individual defendants and for the federal criminal justice system, and this case squarely presents the question in need of resolution. The Court should grant review.

I. Resolving Whether Offenses With a Mens Rea of Recklessness Can Trigger the ACCA Enhancement Is Important to Individual Defendants and to the Federal Criminal Justice System.

The government cannot deny that the circuits are divided over whether offenses with a mens rea of recklessness can invoke the enhanced punishments of the ACCA. It instead falls back to the obscuring claim that "[a]lthough the circuits have not taken a consistent analytical approach to classifying crimes with a mens rea of recklessness under this Court's recent decisions in *Sykes v. United States*, 131 S. Ct. 2267 (2011) and *Begay v. United States*, 553 U.S. 137 (2008), the ultimate practical significance of that conflict is not yet clear." BIO 10. Unless the government is using the

word "ultimate" literally, in which case certiorari could never be granted, the split and its significance are sufficiently well established to warrant review.

A. The Circuit Split Is Clear and Well Developed.

Some courts, such as the Fifth Circuit in this case, hold that *Sykes* and *Begay* mean that offenses with a mens rea of recklessness can trigger the ACCA enhancement. Pet. App. A at 1-9. Some courts hold that *Sykes* and *Begay* mean that such offenses cannot trigger the ACCA enhancement because the statute covers only purposeful, deliberate crimes. *See, e.g., Brown v Caraway,* 719 F.3d 583, 591 (7th Cir. 2013); *Jones v. United States,* 689 F.3d 621 (6th Cir. 2012).

The government purports to separate the split between the circuits into two questions, a "larger `tension'' and a "narrower issue." BIO 19-20. That attempt fails. The purported "larger tension" is no question at all. After *Sykes,* the courts of appeal agree that the *Begay* "purposeful, violent, and aggressive" inquiry is relevant only to offenses that have a mens rea that is less than knowingly. *See Sykes,* 131 S. Ct. at 2275-76; *see also United States v. Spencer,* 724 F.3d 1133 (9th Cir. 2013) (collecting cases that agree on that proposition); see also BIO 19-20. The real question, as the government essentially concedes, is whether the "purposeful" component of the *Begay* test means that all offenses with a recklessness mens rea "lie outside the ACCA's residual clause[.]" BIO 21-22

(acknowledging conflict between Espinoza's case and cases from the Sixth, Seventh, and Tenth Circuits). The best the government can manage in light of these cases that conflict with *Espinoza* is to venture that there might be "intra-circuit tension" in the Sixth Circuit. BIO 22 (citing *United States v. Meeks*, 664 F.3d 1067 (6th Cir. 2012)). But that "intra-circuit tension, if it exists, provides additional reason for this Court to provide guidance, not a reason to let confusion continue. The issue Espinoza's case presents is important. It has been percolating for some time. It has divided the courts, and it has led the Department of Justice to revolving positions about how the ACCA operates in the context of recklessness offenses. *See, e.g., United States v. Johnson*, 587 F.3d 203, 209-10 (3d Cir. 2009) (DOJ reversed litigation position and advised court, in light of *Begay*, that reckless offenses did not qualify as violent crimes under guidelines §4B1.2)). The issue merits review.

The government also suggests that review is not appropriate because the modified categorical approach may be applied to determine whether a conviction under a statute containing disjunctive mens rea was actually obtained on a theory of intentionality or one of recklessness. BIO 23-24; *see Descamps v. United States*, 133 S. Ct. 2276 (2013) (explaining approach); *Shepard v. United States*, 544 U.S. 13 (2005) (setting out what documents may be examined under modified categorical approach). This suggestion is specious. The modified categorical approach can certainly

answer whether an offense was committed recklessly, but that is not the question that divides the circuits. The question that divides the circuits is whether, when an offense is committed recklessly, that offense can trigger the ACCA enhancement. *Compare Espinoza,* Pet. App. A 1-9 *with Brown,* 719 F.3d at 591-93.

B. The Practical Effects of the Split Reach Individuals, the Courts, and the Criminal Justice System.

What the government retreats from is the obvious. The split that Espinoza asks the Court to resolve has significant practical effects. In some parts of the country, persons with prior convictions for reckless crimes face a maximum imprisonment of 10 years for a federal felon-in-possession offense, while in other parts of the country, persons with prior convictions for reckless crimes face a minimum of 15 years imprisonment and a maximum of life imprisonment for the same felon-in-possession offense.[1] It would be difficult to imagine a more practical problem. Either violent felons are going to prison for terms shorter than Congress intended or defendants whom Congress never intended to punish so severely are going to prison for far longer than they should. Whichever is the case, the division among the circuits has the practical effect of creating disparate sentences and undermining the equal application of the law.

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[1] Indeed, over the very offense involved in this case—Texas reckless assault—the courts are divided as to whether it is a violent felony or, under the sentencing guidelines, a crime of violence. Compare *Espinoza,* Pet. App. A 1-9 *with United States v. Zuniga-Soto,* 527 F.3d 1110, 1117 (10th Cir. 2008).

The division has another practical effect. It opens up the Armed Career Criminal Act in a manner that seems contrary to the purpose and structure of the statute. In explaining the "purposeful" requirement, the *Begay* Court observed, that purposeful, violent crimes are "characteristic of the armed career criminal, the eponym of the statute." 553 U.S. at 145 (quoting *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part). The court emphasized the relationship of deliberate conduct to the presumed danger justifying the enhanced sentence. *Begay*, 553 U.S. at 146-48. The inclusion of reckless offenses transforms the ACCA from an enhancement targeting deliberate, criminal-livelihood offenders into a near catch-all sentence increase.[2]The Texas Penal Code uses the word reckless 98 times, almost all of them in defining offenses. Other states define many crimes with a mental state of recklessness. The significance of including such offenses under the ACCA is obvious; its appropriateness is not.

An interpretation of the ACCA and *Begay* that permits reckless offenses to trigger the enhancement will foster near-endless litigation over which of potentially thousands of reckless offenses can be enhancing convictions. By contrast, an interpretation that finds reckless offenses lie

[2] That interpretation appears at odds with title and purpose of the act, as well as with the focus in both the stature's elements prong, 18 U.S.C. § 924(e)(2)(B)(i), and its enumerated-offenses prong, 18 U.S.C. § 924(e)(2)(B)(ii) on deliberate offenses.

outside the statute's purview will keep the focus on the targeted career criminals and will enable this Court to clarify the application of the ACCA to a large number of cases with a single decision. That clarification will relieve the Court of the obligation to address the scope of the ACCA's residual clause on a state-by-state, reckless crime-by-reckless crime basis—a project that would, beyond doubt, last for years. *Cf. Sykes*, 131 S. Ct. at 2283 (Scalia, J., dissenting) ("ad hoc" judgments about ACCA's residual clause sow confusion and result in frequent intervention by this Court). In short, the practical effects of the circuit split over whether reckless offenses trigger the ACCA reach both individual defendants and the courts, and warrant review of this case.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

The government suggests that Espinoza's case is not the best vehicle to review the question presented because the government might, on a possible remand, be able to show that Espinoza has another conviction that triggers the ACCA enhancement. BIO 28-31. This suggestion is not well founded. The government has to prove to the sentencing judge the convictions that it alleges invoke the ACCA enhancement. The government did not even attempt to do so with the Oklahoma eluding conviction that it now advances. Because the government was aware of that conviction, BIO 3, 29, it should be considered to have waived its opportunity to rely on it.

In any case, the government never provided the district court with an opportunity to pass on whether the fact of the Oklahoma conviction was proved or whether the government had *Shepard* documents that would satisfy its burdens. Instead, at sentencing, the government chose to rely on the Texas reckless assault conviction, though it knew, under *Begay* and *Sykes*, that the assault conviction might not fall within the ACCA definition. See Pet. App. C at 278-79 (prosecutor advises court that reckless convictions may not count). That the government now wishes that it had relied on and attempted to prove another conviction to achieve an ACCA sentence is not reason to postpone resolution of the important question this case presents.

The government also claims this case is a poor vehicle because the Fifth Circuit might have mistakenly concluded that Espinoza's offense was a reckless one and not an intentional or knowing one. BIO 25-28. The government thinks that its claim means that the case contains a "substantial threshold issue that is not evidently certworthy in its own right[.]" BIO 28. The government is mistaken. It ignores this Court's teachings, and it relies on overruled and inapposite circuit court precedent.

The Fifth Circuit squarely concluded that the record failed to show that the offense Espinoza pleaded to involved a mental state higher than recklessness. Pet App. A at 3-6 ; *cf. Johnson v. United States,* 559 U.S. 133 (2010) (least act under statute will be considered on record before court).

The government asserts that the Fifth Circuit's conclusion might be wrong and thus might be grounds for affirmance before the recklessness issue is reached. BIO 25-27. That assertion is weak and doubtful, but even if it were not, the Court may "decline to entertain," alternative grounds for affirmance. *United States v. Tinklenberg,* 131 S. Ct. 2007, 2017 (2011); *see also United States v. Nobles,* 422 U.S. 225, 242 n.16 (1975). It should so decline in this case because of the importance and clarity of the issue presented for resolution.

In any event, the government is wrong about the record and about the precedent. While the state charged Espinoza in the conjunctive as having acted intentionally, knowingly and recklessly, those mens rea cannot coexist; intentionality rules out recklessness. The Texas statute acknowledges this reality—it is written in the disjunctive. *See* TEX. PENAL CODE § 22.01 (2004).[3] The Fifth Circuit acknowledged it also. It concluded that the record did not show which of the mens rea Espinoza's conviction rested on. Pet. App. A at 4-6. It then applied the well-established rule that, when the record does not make clear what basis a conviction rests upon, a court will not presume it rests on "anything more than the least of these acts." *Johnson,* 559 U.S. at 137; *see also United States v. Houston,* 364

[3] Obviously, that a prosecutor, knowingly or negligently, drafts a charge in the conjunctive cannot change the wording of a statute. The legislature, not the executive, defines the crime.

F.3d 243, 246 (5th Cir. 2004); *United States v. Thomas*, 159 F.3d 296, 298-99 (7th Cir. 1998).

The government claims that a Ninth Circuit case, a Fifth Circuit case, and an unpublished Tenth Circuit case override this well-established rule and permit a court to presume the most serious mens rea from multiple mens rea. BIO 27-28. This claim is contrary to *Johnson.* 559 U.S. at 137. It is also untrue on its own terms. The Ninth Circuit rule the government cites involved facts, not mental states, and that rule has been repudiated. *United States v. Williams*, 47 F.3d 993 (9th Cir. 1995), *overruled Young v. Holder*, 697 F.3d 976, 986 & n.8 (9th Cir. 2012) (en banc). The Fifth Circuit case the government cites also involved the facts alleged, not the mens rea required. *United States v. Garcia-Arrellano,* 522 F.3d 477, 481 (5th Cir. 2008). A record can, of course, establish multiple, non-contradictory facts as was the case in *Garcia-Arrellano.* The other case the government cites is not precedent at all, but merely an unpublished disposition. *United States v. Rodriguez,* 528 Fed. App'x 921, 926-27 & n.* (10th Cir. 2013). An unpublished disposition ruling that a district court did not clearly err by imposing a guidelines enhancement when it accepted a state court finding of multiple, contradictory mental states cannot override *Johnson,* displace the Fifth Circuit's evaluation of the particular record in this case, or defeat the recognition that Espinoza's case is an excellent vehicle for resolving the question presented.

The court of appeals squarely held that offenses with a mens rea of recklessness can trigger the ACCA enhancement. That ruling conflicts with the rulings of other circuits, and presents practical problems for the fair administration and application of the ACCA. This case provides the Court with a good vehicle for addressing the conflict and the problems it poses. The Court should resolve the conflict through a grant of certiorari in this case.

CONCLUSION

FOR THESE REASONS, as well as those in his petition, Espinoza asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

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March 24, 2014.