No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2013

DANIEL RAUL ESPINOZA, PETITIONER

V.

UNITED STATES OF AMERICA

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

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should resolve the division between the circuits as to whether an offense with a mens rea of recklessness can trigger the sentence enhancement set out in 18 U.S.C. § 924(e)(2)(B)(ii), the residual clause of the Armed Career Criminal Act.

2. Whether an offense that requires only a mens rea of recklessness toward the act causing or risking injury can ever be "purposeful" as that term was used by this Court when interpreting § 924(e)(2)(B)(ii) in *Begay v. United States*, 553 U.S. 137 (2008).

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Petitioner asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 17, 2013.

PARTIES TO THE PROCEEDING

All parties to the proceedings in the courts below are named in the caption.

OPINION BELOW

The opinion of the court of appeals is published at 733 F.3d 568 (5th Cir. 2013). A copy of the opinion is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on September 17, 2013. This petition is filed within 90 days after entry of judgment. See SUP. CT. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

The text of Title 18 U.S.C. § 924(e) is reproduced in Appendix B.

STATEMENT

Petitioner Daniel Espinoza pleaded guilty to a charge of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g).[1] The usual statutory maximum sentence for a felon-in-possession offense is ten years' imprisonment. See 18 U.S.C. §§ 922(g), 924(a)(2). The Armed Career Criminal Act (ACCA) increases the statutory maximum sentence to life, and mandates a minimum sentence of 15 years' imprisonment, when the government shows that the defendant has three prior convictions for violent felonies. 18 U.S.C. § 924(e).

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

The Government sought an ACCA-enhanced sentence in Espinoza's case. It alleged that Espinoza had the required three "violent felony" convictions. The three convictions put forth by the government were (1) a Texas conviction for evading arrest by using a vehicle, in violation of Texas Penal Code § 38.04, (2) a Texas conviction for aggravated assault, in violation of Texas Penal Code § 22.02, and (3) a Texas conviction for felony assault in violation of Texas Penal Code § 22.01(a). The presentence report prepared by the probation officer accepted these convictions as proof of Espinoza's alleged career-criminal status and, using guideline §4B1.4, recommended a guideline sentence range of 188 to 235 months' imprisonment.

Espinoza objected to the application of the ACCA enhancement, and thus to the imposition of any sentence above ten years' imprisonment. App. C (excerpts from sentencing hearing). He argued that his Texas assault conviction was not a qualifying predicate offense because the mens rea for his offense was not shown to be greater than recklessness. The Texas statute defines assault as causing injury to another intentionally, knowingly, or recklessly. See Tex. Penal Code § 22.01 (2004). The charging information to which Espinoza pleaded guilty alleged all three mental states in the conjunctive. At his state plea hearing, Espinoza had simply acknowledged the charge; he has not been asked to admit a particular mental state and the State did not specify one. See App. A at 4-6. Espinoza

asserted that, in light of Texas law that merely required a factual basis supporting the least culpable mental state, his conviction was for recklessness. App. C at 270-75.

The assistant U.S. attorney urged the sentencing court to look to the conduct underlying Espinoza's offense for evidence that Espinoza committed the assault intentionally or knowingly. App. C at 278-79. She cautioned the court that, in the light of *Begay v. United States,* 553 U.S. 137 (2008) and *Sykes v. United States,* 131 S. Ct. 2267 (2011), offenses with a mens rea of recklessness might not qualify as ACCA predicate crimes. App C. at 278-79. The district court did look to the underlying facts. After doing so, it opined that "under no circumstances could it be construed otherwise [than] that this offense was intentional and violent." App. C at 280. The court ruled that the ACCA enhancement applied. App. C at 280-81. It sentenced Espinoza to 188 months' imprisonment.

Espinoza appealed, arguing that, read together, *Begay* and *Sykes* taught that reckless crimes could not be ACCA predicate crimes, a lesson drawn by the Sixth and Seventh Circuits. *See Jones v. United States,* 689 F.3d 621 (6th Cir. 2012); *Brown v. Caraway,* 719 F.3d 583 (7th Cir. 2013). The Fifth Circuit acknowledged that the record showed nothing more than that Espinoza had been convicted of reckless assault. App. A at 5-6. It ruled that reckless offenses should be analyzed by analogizing them to the enumerated residual clause offenses and then applying the *Begay*

"purposeful, violent, and aggressive" test. App. A at 7-8. The court of appeals decided that the Texas reckless assault offense was most similar to the listed offense of burglary, and observed that reckless crimes involve disregard of a risk. App. A at 8-9. From this, the court concluded that "[b]ecause reckless assault creates, at a minimum, a similar degree of danger as burglary, we hold that it is a violent felony." App. A at 9.

The Fifth Circuit recognized that *Begay* and *Sykes* stated that, for offenses with a mens rea of recklessness or less, the ACCA analysis included whether the prior crime was a "purposeful, violent, and aggressive" one. The court found that, under this analysis, the Texas offense of reckless assault triggered the ACCA because "[r]eckless assault under § 22.01 requires proof that the defendant consciously disregarded a substantial and unjustifiable risk and in doing so caused bodily injury to another." App. C at 9. The court did not explain how this proof of recklessness made the offense "purposeful."

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIVISION AMONG THE CIRCUITS AS TO WHETHER THE SENTENCE ENHANCEMENT SET FORTH BY THE ARMED CAREER CRIMINAL ACT ENCOMPASSES OFFENSES WITH A MENS REA OF RECKLESSNESS.

This Court has considered the sentence enhancement provided in the Armed Career Criminal Act on several occasions. Many of the Court's ACCA decisions involved the meaning of the enhancement-triggering term "violent felony," as it is defined in 18 U.S.C. § 924(e)(2)(B)(ii). *See, e.g., James v. United States*, 550 U.S. 192 (2006); *Chambers v. United States*, 555 U.S. 122 (2009). That subsection consists of a list of four offenses that Congress has declared to be violent felonies, followed by a "residual clause" whose reach has generated much debate and division. The Court's opinions have instructed how to determine whether an offense falls within the listed offenses, *see, e.g., Descamps v. United States*, 133 S. Ct. 2276 (2013), and they have articulated how the Act's residual clause applies to offenses of some types, *see, e.g,. Sykes v. United States,*131 S. Ct. 2267 (2011). Still, questions about the reach of the residual clause remain that have divided the circuits.

One question that has split the courts of appeal is whether offenses with a mens rea of recklessness toward the possibility of injury can ever trigger the ACCA's enhancement. Some circuits hold that they cannot. *See, e.g., Jones v. United States*, 689 F.3d 621 (6th Cir. 2012). Others, such as

the Fifth Circuit Court of Appeals in this case, hold that reckless offenses can trigger the ACCA increase. *United States v. Espinoza*, 733 F.3d 568 (5th Cir. 2013). The courts that have held reckless offenses cannot trigger the ACCA enhancement find support for that position in *Sykes* and in *Begay v. United States*, 553 U.S. 137 (2008). The courts that have reached the opposite conclusion have also done so in reliance on *Sykes* and *Begay*. The courts that hold reckless offenses may trigger the ACCA have purported to apply the "purposeful, violent, and aggressive" analysis set out in *Begay*, reasoning that *Sykes* counsels that course. The courts, however, have not explained how a reckless offense may be purposeful. *See, e.g.*, *Espinoza*, 733 F.3d at 574. Their inability to do so suggests that the better reading of *Sykes* and *Begay* is that the ACCA residual clause does not apply to offenses that do not require the "stringent mens rea" proof of intentional and knowing offenses. *Sykes*, 131 S. Ct. at 2275. Because the division among the circuits results in disparate application of the ACCA, the Court should grant certiorari and resolve the division.

A. The Statutory Language and the *Begay* Decision Indicate That § 924(e) Aims to Increase the Sentences of Knowing, Deliberate Offenders.

The Armed Career Criminal Act increases the statutory maximum sentence for a § 922(g) felon-in-possession offense from ten years' imprisonment to life imprisonment, and it requires a minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). These enhanced sentences

apply to defendants who have three times been convicted of a serious drug offense or a "violent felony." *Id.* The ACCA defines violent felony in three ways. An offense is a violent felony if it has, as an element, the use, attempted use, or threatened use of force against the person of another. 18 U.S.C. § 924(e)(2)(B)(i). It is a violent felony if it is one of the four offenses enumerated by the statute—burglary, arson, extortion, or the use of explosives. 18 U.S.C. § 924(e)(2)(B)(ii). Finally, it is a violent felony if it "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). This last definition is referred to as the residual clause.

This Court has explained that the residual clause looks back to the enumerated violent crimes and brings in "only *similar* crimes, rather than *every* crime that `presents a serious potential risk of physical injury to another.'" *Begay*, 553 U.S. at 142 (emphasis original) (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). The Court observed that this must be so, for, if Congress meant to include all risky crimes, it would not have needed anything but the residual clause. The listed offenses would add nothing, and neither would the elements-based use-of-force definition contained in § 924(e)(2)(B)(i). *Begay*, 553 U.S. at 142. The Court found it untenable that the listed offenses had no meaning or purpose, emphasizing the rule that every word of a statute should be given effect. *Id.* (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).The Court therefore decided that the

listed offenses served as examples of the kinds of offenses that Congress meant to capture with the residual clause. 553 U.S. at 142. The examples limit the "crimes that clause (ii) covers to crimes that are roughly similar in kind as well as in degree of risk posed, to the examples themselves." *Begay*, 553 U.S. at 143.

The Court then looked for the connection between the listed, limiting crimes. It concluded that the connection was that the listed offenses, while at first glance a varied group, shared important traits: all were purposeful, violent, and aggressive crimes. *Id.* at 144-45. Burglary involved the unprivileged entry into a building with the intent to commit a crime in the building. Arson involved starting a fire for the purpose of destroying a building. Extortion involved the purposeful obtaining of another's property through threats. The "use" of explosives required that the person have a significant degree of intent. *Id.* "Use," the Court had explained in prior cases, "signifies `active employment.'" *Jones v. United States*, 529 U.S. 848, 855 (2000) (quoting *Bailey v. United States*, 516 U.S. 137, 143 (1995)). This common thread connecting the offenses Congress had listed indicated that the type of offenses Congress meant to capture with the residual clause had to be a similarly purposeful and violent. This interpretation fit with the aim of the statute because prior purposeful, violent conduct is the kind of conduct "that it makes it more likely that an

offender, later possessing a gun, will use that gun deliberately to harm a victim." *Begay,* 553 U.S. at 145.

The *Begay* Court also found a limit in the name of the statute, the Armed Career Criminal Act. The name of the statute strongly suggests that the enhancement targets offenders who make a deliberate livelihood out of crime, not simply anyone who ever committed three crimes that posed any sort of risk to another person. The Court remarked that purposeful, violent crimes are "characteristic of the armed career criminal, the eponym of the statute." *Id.* (quoting *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)).

Offenses requiring only that a person be shown to have acted recklessly or negligently do not fit obviously in the statute. The ACCA seeks to punish the purposeful, knowing, deliberate acts engaged in by a person who makes his livelihood through purposeful crime. *Begay*, 553 *U.S.* at 146-48. It is difficult to think of reckless or negligent acts as constituting a "career" or a "livelihood," as opposed to evidencing a transient temperament or a temporary lapse of reason.

The *Begay* Court's reasoning supports this view. The Court did not doubt that driving under the influence (DUI) posed a serious risk of physical injury to others; it characterized DUI as an "extremely dangerous crime." 553 U.S. at 141. But, the Court held that a DUI offender was not the kind of offender the ACCA was aimed at. In so holding, the Court

observed that "the conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate." 553 U.S. at 145. The kind of offender the ACCA sought to punish was the "kind of person who might deliberately point the gun and pull the trigger," not every person who ever acted in a risky manner. *Id.* at 146. The Court concluded "[w]ere we to read the statute without this distinction, its 15–year mandatory minimum sentence would apply to a host of crimes which, though dangerous, are not typically committed by those whom one normally labels "armed career criminals." *Id. Begay* concluded that the New Mexico driving under the influence offense before it was not similar in kind to the listed offenses and thus was not captured by the residual clause.

After *Begay*, some courts of appeals held that reckless or negligent offenses could not be violent felonies under the ACCA, or its analogue in the sentencing guidelines. *See, e.g., United States v. Lee*, 612 F.3d 170, 196 (3d Cir. 2010); *United States v. Smith*, 544 F.3d 781 (7th Cir. 2008); *United States v Gray*, 535 F.3d 128, 129-31 (2d Cir. 2008) (New York crime of reckless endangerment is not a crime of violence under guideline §4B12). That view appeared to follow from *Begay's* reasoning and its emphasis on purposeful criminal behavior of the type engaged in by one who makes a career of crime.

B. After *Sykes*, the Courts of Appeal Divided As to Whether Recklessness Offenses Could Be ACCA Predicate Crimes.

The *Sykes* Court considered whether the Indiana offense of knowingly or intentionally using a vehicle to flee from a law enforcement officer was a violent felony under the residual clause of § 924(e). It concluded that it was. In so doing, the Court looked to the listed offenses of arson and burglary. It concluded that a person who flees from police in a car creates a risk like that inherent in arson, an offense that "entails intentional release of a destructive force dangerous to others." 131 S. Ct. at 2270, 2273. The Court also compared flight in a vehicle to burglary because both offenses involved provocative and dangerous acts that could end in confrontation. *Id.* at 2273.

The *Sykes* court reaffirmed *Begay*'s teaching that the residual clause is limited to crimes "typically committed by those whom one normally labels 'armed career criminals[.]'" *Id.* at 2275. It focused its analysis solely on risk of injury, however, rejecting the defendant's argument that his offense had to be analyzed under the *Begay* purposeful, violent and aggressive rubric. *Id.* The Court found it unnecessary to apply the *Begay* analysis because the "statute at issue here has a stringent mens rea requirement. Violators must act `knowingly or intentionally.'" *Id.* at 2275 (quoting IND. CODE § 35-44-3-3(a)).

Sykes distinguished *Begay*, observing that, in *Begay*, mere risk was an insufficient measure because the DUI offense was one committed through negligence or recklessness. 131 S. Ct. at 2275. The "purposeful,

violent, and aggressive formulation was used in that case to explain the result." *Id.* at 2276. The key to *Begay*, *Sykes* explained, is that "`the conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate[.]'" *Id.* (quoting *Begay,* 553 U.S. at 145).

The Sixth and Seventh Circuits viewed *Sykes* as reaffirming that offenses with a mens rea of recklessness were not offenses that could trigger application of the ACCA enhancement. [2] The Sixth Circuit, in *Jones v United States,* ruled that a Kentucky conviction for reckless homicide was not an ACCA-triggering offense because it involved only reckless conduct and not purposeful deliberate conduct. 689 F.3d 621, 626 (6th Cir. 2012). Given that the offense it was considering had to end in death, the Sixth Circuit clearly rejected the idea that risk of injury alone was the test used to determine whether a reckless offense fit within the residual clause.

The Seventh Circuit in *Brown v Caraway,* ruled that a Delaware conviction for arson in the third degree was not an ACCA predicate. 719 F.3d 583, 591 (7th Cir 2013). The court found the Delaware offense was not "generic" arson—a listed offense. Generic arson criminalizes purposefully starting a fire to damage a building by fire. The Delaware offense criminalized intentionally starting a fire, but being merely reckless as to whether the fire might spread and damage a building. *Id.*

[2] The First Circuit has opined that intentionality was the key to the *Sykes* decision. *United States v. Rodriguez,* 659 F.3d 117, 119 (1st Cir. 2011).

The *Brown* Court then rejected the idea that *Sykes* had altered the analysis for recklessness offenses in a way that would qualify the Delaware offense as an ACCA predicate under the residual clause. "*Sykes* drew an explicit distinction between statutes which criminalize `purposeful or deliberate conduct' (such as vehicular flight) and statutes with less stringent *mens rea* requirements, including recklessness, negligence, and strict liability crimes[.]" 719 F.3d at 593. The Seventh Circuit interpreted "*Sykes* as having recognized that the purposefulness inquiry embraced in *Begay* remains applicable to statutes with less stringent *mens rea* requirements, including those with a *mens rea* of recklessness." *Id.* The court therefore affirmed its law that the "residual clause encompasses only purposeful crimes; crimes with the *mens rea* of recklessness do not fall within its scope." *Id.* (quoting *United States v. Woods*, 576 F.3d 400, 412-13 (7th Cir. 2009)).[3] That Seventh Circuit law relied on *Begay*, which rejected the government's equation of volitional acts with purposeful ones. As the *Woods* court explained, "Begay intended both the act of drinking alcoholic beverages and the act of driving his car; he was reckless only with respect to the consequences of those acts." 576 F.3d at 410. That the act that posed the risk, or even caused injury or death, was volitional was not enough to

[3] *Woods* held that a conviction of Illinois involuntary manslaughter was not a residual clause violent felony

render an offense purposeful if the mens rea for the act under the offense is only recklessness. *Id.*

Where the Sixth and Seventh Circuits saw a reaffirmance in *Sykes* of *Begay*'s intimation that recklessness offenses could not be ACCA predicates, other circuits saw an articulation of a test that might allow reckless offenses to qualify as ACCA predicates. *See, e.g. United States v Chitwood*, 676 F.3d 971, 978-979 (11th Cir. 2012) (*Begay*'s purposeful, violent, and aggressive analysis is to be applied to crimes with a mens rea of recklessness or less); *United States v Sandoval*, 696 F.3d 1011, 1016 (10th Cir. 2012) (purposeful, violent, and aggressive inquiry applies to crimes with a mens rea of recklessness or less). The Fifth Circuit in this case held that a reckless offense—Texas assault—did qualify as an ACCA predicate under the purposeful, violent, and aggressive analysis. App. A at 7-9. The court claimed to be applying the analysis, but it did not explain how Espinoza's reckless assault offense was purposeful. It wrote of aggression; it wrote of risk; it wrote of violence; it wrote of the fact that injury was caused. It did not identify markers of deliberate action to injure, and thus did not write of purposefulness.

The Fifth Circuit's elision of purposefulness, its focus on the fact of injury, and its decision that a reckless offense can be an ACCA predicate because of risk brings it into direct conflict with the rulings of the Sixth and Seventh Circuit. Those courts stress purposefulness, discount the fact of

injury (and even death), and hold that reckless offenses cannot, under *Begay* and *Sykes*, be ACCA predicates. Petitioner's case presents the conflict squarely and provides the Court with a good vehicle to clarify the perceived tension between *Begay* and *Sykes* and to resolve the circuit split the perceived tension has engendered.

CONCLUSION

FOR THESE REASONS, Petitioner 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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PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: December 13, 2013.

APPENDIX A

United States v. Espinoza

733 F.3d 568 (5th Cir. 2013)

APPENDIX B

18 U.S.C. § 924(e)

APPENDIX C

Excerpts from Sentencing Hearing