No. 13-7909

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL RAUL ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for felony assault with bodily injury (family violence) under Tex. Penal Code Ann. § 22.01(a)(1) and (b)(2) (West 2003) qualifies as 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 (Pet. App. A1-A9) is reported at 733 F.3d 568.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2013. The petition for a writ of certiorari was filed on December 13, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of

being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). The district court sentenced him to 188 months of imprisonment, to be followed by five years of supervised release. Pet. App. A2. The court of appeals affirmed. Id. at A1-A9.

1. On December 1, 2010, police officers in Austin, Texas, responded to a report of gunshots fired at a local men's cabaret. The manager told the responding officers that a club employee and patrons had reported a Hispanic male discharging a gun on the club's back patio. Officers then observed petitioner, who matched the description provided, exit the club to make a phone call. As an officer approached petitioner, he noticed a weapon resting on a ledge approximately one inch away from petitioner's right hand. The officer was able to take petitioner to the ground and place him in handcuffs. Presentence Investigation Report (PSR) ¶ 7. Petitioner, however, ran toward a nearby interstate highway and continued to resist arrest, prompting the officer to twice deploy a Taser to subdue him. PSR ¶ 8. Other officers identified the weapon on the ledge as a silver revolver with three expended rounds and three rounds remaining in the cylinder. Ibid. Although petitioner initially provided the police with an alias, he eventually admitted to his real identity and to possessing the silver revolver. PSR ¶ 10.

2. Based on the foregoing conduct, petitioner was charged in a single-count indictment with being a felon in possession of a

firearm, in violation of 18 U.S.C. 922(g). The government filed a notice that petitioner was subject to an enhanced sentence because he had at least three qualifying convictions under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). Doc. 18. Under the ACCA, a defendant with "three previous convictions * * * for a violent felony or a serious drug offense" is subject to a term of imprisonment of 15 years to life. 18 U.S.C. 924(e)(1). The ACCA 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 presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The final clause of that definition (beginning with "or otherwise") is conventionally referred to as the ACCA's "residual clause."

The government's notice identified four qualifying violent felonies: a 2006 Texas conviction for evading arrest or detention with a motor vehicle; a 2007 Texas conviction for aggravated assault with a deadly weapon; a 2007 Texas conviction for assault with bodily injury (family violence); and a 2009 Oklahoma conviction for eluding a peace officer. Doc. 18, at 1-2. As relevant here, the Texas assault statute in effect at the time of petitioner's offense conduct made it a misdemeanor for a person to

"intentionally, knowingly, or recklessly cause[] bodily injury to another, including the person's spouse," and it elevated the crime to "a felony of the third degree if," among other things, the offense was "committed against * * * a member of the defendant's family or household, if * * * the defendant has been previously convicted of [another assault] offense against a member of the defendant's family or household." Tex. Penal Code Ann. § 22.01(a)(1) and (b)(2) (West 2003).

The relevant state records revealed that petitioner had been charged by indictment in March 2005 with "intentionally, knowingly, and recklessly caus[ing] bodily injury" to "a member of [his] family or household, by applying pressure about the throat of [the victim] with [his] hands," and that the offense constituted a felony because petitioner had been previously convicted of assault "against a member of [his] family." Doc. 35-3, at 1. In pleading guilty to the 2005 assault charge, petitioner signed a "Judicial Confession" in which he "admit[ted] all of the allegations in the indictment" and "confess[ed] that [he] committed the offense as charged in the indictment * * * , as well as all lesser included offenses arising out of the same criminal episode." Id. at 13; Pet. App. A5. The state trial court found in accepting the plea that petitioner had "admitted all of the allegations charged in the indictment or information." Pet. App. A5.

3. Petitioner eventually entered an open guilty plea to the federal charge. During the plea colloquy, petitioner acknowledged that he was subject to a mandatory minimum sentence of 15 years as an armed career criminal. 6/6/2011 Tr. 11-12. He also admitted, in response to the factual basis for the charge offered by the prosecutor, that he had prior Texas convictions for evading arrest and aggravated assault, as well as convictions under Oklahoma law for eluding a peace officer and larceny on an automobile. Id. at 16-17.

The PSR calculated an advisory Sentencing Guidelines range of 188 to 235 months, based on an offense level of 31 and a criminal history category of VI. PSR ¶ 65. The Probation Office started its calculations with an offense level of 24, but increased that level to 33 under Sentencing Guidelines § 4B1.4 because petitioner had three qualifying convictions for violent felonies under the ACCA. PSR ¶ 26; see PSR ¶¶ 41-43 (petitioner's criminal history category was VI even without ACCA designation). Those convictions, the PSR stated, were for evading arrest with a vehicle, aggravated assault with a deadly weapon, and assault causing bodily injury (enhanced because of family violence), all under Texas law. PSR ¶ 11.

Petitioner objected to the PSR's conclusion that he was an armed career criminal, arguing principally that his Texas felony assault conviction did not qualify as a violent felony because it

did not have as an element the use of force. PSR Addendum 2A. The government responded that the assault conviction (and the two other qualifying convictions identified in the PSR) constituted violent felonies under ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii), because they involved "conduct that presents a serious potential risk of physical injury to another." Doc. 35, at 2. The government argued that, applying the "modified categorical approach," state records of petitioner's conviction showed that petitioner had pleaded guilty to the intentional and knowing versions of the assault offense and further argued that, even if the district court treated petitioner's conviction as resting on reckless conduct, a Texas reckless-assault conviction still qualified as a violent felony. Id. at 18-22 (citing United States v. Anderson, 559 F.3d 348, 355, 356 (5th Cir. 2009)).

The district court overruled petitioner's objection to his designation as an armed career criminal and sentenced him to 188 months of imprisonment, to be followed by five years of supervised release. Sent. Tr. 28, 35-36. With respect to the assault conviction, the court stated that "under no circumstances could it be construed otherwise that this offense was intentional and violent," because petitioner "broke in the door, threatened to kill and almost did [so]," by "strangl[ing] a lady." Id. at 28. The court further remarked that, from its review of petitioner's criminal history, "the thing that jumps out * * * is the

violence that [he] exercised for at least ten years" and also noted that petitioner had engaged in "twelve years of violent activity," culminating in the shooting at the nightclub. Id. at 35. The court thus rejected petitioner's view that a sentence under the ACCA "was not designed for this case," concluding instead that the statute was enacted precisely "to prohibit and limit the violence that [petitioner had] shown for all of this period of time." Id. at 36-37.

4. The court of appeals affirmed. Pet. App. A1-A9. Petitioner did not dispute that his Texas convictions for evading arrest with a vehicle and aggravated assault constituted violent felonies. He argued only that his felony assault conviction should be treated as resting on a mental state of "recklessness" and that, as such, it should not qualify as a violent felony under ACCA's residual clause. Pet. C.A. Br. 8-15.

The court of appeals agreed with petitioner that his felony assault conviction should be deemed to involve "a culpable mens rea of recklessness." Pet. App. A6. The court recognized that the 2005 indictment charged petitioner with "intentionally, knowingly, and recklessly caus[ing] bodily injury" to the victim and that in his signed judicial confession petitioner had both "admit[ted] all of the allegations in the indictment * * * and confess[ed] that [he] committed the offense as charged in the indictment." Id. at A4-A5 (emphases added). But in the court's view, the judicial

confession was "simply a blanket statement admitting that [petitioner] committed the assault with every listed category of mental culpability," and it did not demonstrate that petitioner "committed the act intentionally and knowingly and not recklessly." Id. at A5-A6. The court thus applied a "'least culpable means' analysis," as called for by circuit precedent, and it therefore "assume[d] that [petitioner's] offense was committed recklessly." Id. at A6 (citing United States v. Houston, 364 F.3d 243, 246 (5th Cir. 2004)).

The court of appeals next concluded that a conviction for reckless assault under Texas law qualifies as a violent felony under the ACCA's residual clause. Pet. App. A6. The court based its analysis on this Court's decisions in Begay v. United States, 553 U.S. 137 (2008), and Sykes v. United States, 131 S. Ct. 2267 (2011), which held (respectively) that a conviction for driving under the influence of alcohol (DUI) does not satisfy the residual clause but that a conviction for fleeing from law enforcement in a car does. Begay, the court of appeals recognized, described the residual clause as applying to offenses that "typically involve 'purposeful, violent and aggressive' conduct," and it limited the clause to covering "'crimes that are roughly similar, in kind as well as in degree of risk posed, to'" the enumerated offenses, i.e., burglary, arson, extortion, and use of explosives. Pet. App. A6 (quoting Begay, 553 U.S. at 143, 148). Sykes, the court of

appeals continued, had emphasized "the risk analysis that applied in th[is] Court's ACCA cases," but had treated the Begay analysis as an appropriate "guide-post for analyzing the ACCA's applicability to crimes that involve strict liability, negligence, or recklessness." Id. at A7 (emphasis omitted).

Applying those standards, the court of appeals held that petitioner's felony assault conviction satisfies the residual clause. Pet. App. A7-A9. The court explained that the offense qualifies under the risk-of-physical-injury analysis that Sykes found sufficient to resolve most residual-clause cases, because a reckless assault conviction like petitioner's "requires more than a 'risk' of physical harm"; the defendant's conduct "must result in actual physical harm." Id. at A8. "[R]eckless assault," the court explained, "creates, at a minimum, a similar degree of danger as [the enumerated offense of] burglary," id. at A9, which can similarly end in violent confrontation. The court of appeals also concluded that classifying reckless assault as a violent felony was consistent with the principles articulated in Begay. Referring to Texas's definition of recklessness (Tex. Penal Code Ann. § 6.03(c) (West 2003)), the court explained that a conviction for reckless assault "contemplates a scenario where a defendant appreciates the risk that his conduct may result in bodily injury to another, but 'consciously disregards' that risk and harms someone as a result." Pet. App. A8. That scenario, the court held, was akin to the kind

of "purposeful" conduct that "falls squarely within the parameters of the criminal conduct contemplated in Begay." Id. at A9.

ARGUMENT

Petitioner (Pet. 5-15) renews his contention that the district court erred in concluding that his Texas felony assault conviction qualifies as a "violent felony" under the ACCA, and he asks this Court to resolve a division among the circuits over whether offenses with a mens rea of recklessness can ever satisfy the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii). The court of appeals correctly determined that petitioner's felony assault conviction, which by definition entails bodily injury to another, qualifies as a violent felony under the residual clause. Although 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. In any event, this case would be an especially poor vehicle for addressing the proper treatment of crimes with a mens rea of recklessness because petitioner was charged with and pleaded guilty to intentional assaultive conduct. And even if petitioner's felony assault conviction did not qualify as a violent felony, petitioner should still have been sentenced under the ACCA based on his three

other prior convictions for violent felonies. Further review is not warranted in this case.

1. The court of appeals correctly concluded that petitioner's prior Texas felony assault conviction qualifies as a violent felony under the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii).

a. In a series of recent cases, this Court has addressed whether particular offenses qualify as "violent felon[ies]" under the ACCA's residual clause, which covers offenses that "involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). In Begay, this Court held that a felony conviction for DUI does not qualify as a violent felony under ACCA. 553 U.S. at 148. The Court explained that to qualify as a violent felony under the residual clause, an offense must be "roughly similar, in kind as well as in degree of risk posed, to the [statutory] examples" of burglary, arson, extortion, and offenses involving the use of explosives. Id. at 143 (citations omitted). The Court described those listed offenses as "typically involv[ing] purposeful, 'violent,' and 'aggressive' conduct." Id. at 144-145 (citation omitted). The Court concluded that recidivist drunk driving did not constitute a violent felony under that approach because, even assuming that drunk driving "presents a serious potential risk of physical injury to another," the offense "typically" does not involve "purposeful" conduct. Id.

at 141, 145-146 (drunk-driving statutes are akin to crimes imposing strict liability, "criminalizing conduct in respect to which the offender need not have had any criminal intent at all"). "[C]rimes involving intentional or purposeful conduct * * * are different than DUI, a strict liability crime," the Court explained, because prior convictions for the former "show an increased likelihood that the offender is the kind of person who might deliberately point [a] gun and pull the trigger." Id. at 146.

In Chambers v. United States, 555 U.S. 122 (2009), this Court held that failure to report for penal confinement is not a violent felony under ACCA because it is a crime "of inaction, a far cry from the 'purposeful, violent, and aggressive conduct' potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion." Id. at 128 (quoting Begay, 553 U.S. at 144-145) (internal quotation marks omitted). The Court explained that a typical offender convicted of failure to report is not "significantly more likely than others to attack, or physically to resist, an apprehender." Id. at 128-129.

Most recently, in Sykes, supra, this Court held that a felony conviction for intentional vehicular flight from a law enforcement officer is a violent felony under the ACCA's residual clause. The Court explained that, as a categorical matter, vehicular flight

"presents a serious potential risk of physical injury to another" because the offender "places property and persons at serious risk of injury" and the "expected result" of vehicular flight is a "[c]onfrontation with police." 131 S. Ct. at 2273, 2274. The Court also noted that, unlike the strict-liability offense in Begay, Indiana's vehicular flight offense required intentional or knowing conduct. Id. at 2276. The Court observed that Begay's reference to "'purposeful, violent, and aggressive' [conduct] has no precise textual link to the residual clause" and that, "outside the context of strict liability, negligence, and recklessness crimes," "[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same." Id. at 2275 (internal quotation marks and citation omitted). The Court concluded that, where vehicular flight from a law enforcement officer was concerned, "risk levels provide[d] a categorical and manageable standard that suffice[d] to resolve the case." Id. at 2275-2276.

b. The court of appeals' conclusion that a conviction for reckless felony assault under Texas law qualifies as a violent felony accords with those decisions. Petitioner does not dispute that an assault conviction under Texas law involves "violent" and "aggressive" conduct, see Begay, 553 U.S. at 144-145, and that it

readily satisfies the risk analysis found dispositive in Sykes. A Texas assault conviction by definition "requires proof that the defendant caused bodily injury to another person." Pet. App. A8; accord United States v. Johnson, 587 F.3d 203, 211 (3d Cir. 2009) (similar Pennsylvania assault statute "contemplates bodily harm to the victim as a prerequisite to conviction"). And where (as in this case) the offense is elevated to a felony based on family violence, see id. § 22.01(b)(2), the conviction will typically involve "a violent, physical confrontation between at least two people [that] leads to bodily injury." Pet. App. A8; see James v. United States, 550 U.S. 192, 208 (2007) ("[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.").

As for the mental element of the offense, Texas Penal Code Ann. § 22.01(a)(1) (West 2003) makes it a crime to "intentionally, knowingly, or recklessly cause[] bodily injury to another." Texas law follows the Model Penal Code in defining recklessness as consciously disregarding a known substantial risk of harm. Tex. Penal Code Ann. § 6.03(c) (West 2003); Model Penal Code § 2.02(2)(c); see Pet. App. A8 ("In Texas, reckless conduct involves conscious risk creation.") (internal quotation marks, citation and brackets omitted). Under Texas law, therefore, a defendant convicted of reckless assault consciously acted in a way

that disregarded a known risk, and his actions had to cause injury to the victim. Id. at A8-A9.

c. Petitioner's only contrary argument (Pet. 14) is that an assault committed recklessly can never be "purposeful," because it does not entail "deliberate action to injure," and Begay absolutely excludes such convictions from being violent felonies. Petitioner overreads Begay, particularly in light of this Court's more recent decisions.

As explained above, Begay addressed a DUI offense, which the Court described as "most nearly comparable to[] crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all." 553 U.S. at 144-145 (some quotation marks omitted). Felony assault in Texas is in no way comparable to a strict liability offense. The minimum mens rea required for conviction is recklessness, a heightened mental state that has long been unquestionably sufficient to establish criminal culpability. Model Penal Code § 2.02 cmt. 4, at 243 ("No one has doubted that purpose, knowledge, and recklessness are properly the basis for criminal liability, but some critics have opposed any penal consequences for negligent behavior."); see United States v. Bailey, 444 U.S. 394, 404 (1980) (describing the Model Penal Code's "hierarchy of culpable states of mind," which "are commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence") (citations

omitted); Farmer v. Brennan, 511 U.S. 825, 836-837 (1994) (noting the heightened standard of awareness of risk that distinguishes criminal recklessness from mere civil recklessness).

The distinction between criminal recklessness and the mental state characterizing crimes such as DUI is particularly clear under Texas law. Culpability under a recklessness theory in Texas (and in many States) requires that the defendant be "aware of but consciously disregard[] a substantial and unjustifiable risk that the * * * [required] result will occur." Tex. Penal Code Ann. § 6.03(c) (West 2003). The difference between that mental state and a state of knowledge (which all agree is embraced by the residual clause) is one of degree rather than kind. Compare ibid. with id. § 6.03(b) (defining knowledge as being "aware that [one's] conduct is reasonably certain to cause the [required] result"). Indeed, the Texas definition of recklessness resembles in significant respects the Indiana definition of "knowingly" that governed the statute of conviction at issue in Sykes. See Ind. Code § 35-41-2-2(b) ("A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so.").

In Begay, the Court did indicate that certain offenses requiring only a mental state of recklessness (or less) that this Court signaled would not fall within the residual clause. In particular, the Court expressed concern that, absent a standard

limiting the residual clause to "crimes involving intentional or purposeful conduct," the ACCA "would apply to a host of crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" Begay, 553 U.S. at 146. As examples, the Court cited provisions criminalizing reckless and negligent pollution, as well as "recklessly tamper[ing] with consumer products." Ibid. (citing 18 U.S.C. 1365(a), 33 U.S.C. 1319(c)(1), a federal law on accidents at sea, and an Arkansas law criminalizing reckless pollution). The Court saw "no reason to believe that Congress intended to bring within the statute's scope these kinds of crimes, far removed as they are from the deliberate kind of behavior associated with violent criminal use of firearms." Id. at 147.

But the offenses cited in Begay do not aid petitioner because they are regulatory or quasi-regulatory offenses that differ fundamentally from the violent face-to-face personal contact inherent in assault. For example, the cited criminal provision of the federal Clean Water Act, 33 U.S.C. 1319(c)(1), reaches merely negligent conduct and applies equally to natural and juridical persons, see Exxon Shipping Co. v. Baker, 554 U.S. 471, 479 (2008) (noting that the United States charged Exxon with "criminal violations" of 18 U.S.C. 1319(c)(1) for the Valdez disaster). That appears to be true of the Arkansas environmental statute as well.

See Ark. Code Ann. § 8-4-102(5) (defining "person" under environmental code to include "public or private corporation[s]").

As for the cited consumer-product-tampering statute -- which requires a showing of "reckless disregard for the risk that another person will be placed in danger of death or bodily injury," 18 U.S.C. 1365(a) -- that statute does not fail under the Begay standard because the conduct underlying the violation is insufficiently deliberate. Rather, product tampering does not qualify as a violent felony because the conduct is not, in the ordinary case, "violent" or "aggressive." See, e.g., United States v. Lyle, 742 F.3d 434, 439-440 (9th Cir. 2014) (sustaining indictment charging pharmacist under Section 1365(a) for opening a box containing prescription narcotics, removing the narcotics, and resealing empty box for sale). Assault, by contrast, ordinarily involves a face-to-face confrontation that inherently risks violence. Pet. App. A8 (a Texas assault conviction contemplates "a violent, physical confrontation between at least two people [that] leads to bodily injury"); see Sykes, 131 S. Ct. at 2273-2274; James, 550 U.S. at 203-204.

For these reasons, petitioner errs in reading Begay to announce a per se rule that an offense with a mens rea of recklessness cannot qualify as a "violent felony" under the ACCA's residual clause. Particularly when read in light of Sykes, Begay stands for the proposition that a crime involving a mens rea of

recklessness may not qualify as a violent felony (in particular, if it does not typically involve sufficiently purposeful, violent, and aggressive conduct). But that principle does not exclude from the residual clause's ambit crimes like felony assault, involve a subjectively culpable mental state of disregarding a known risk and are both violent and aggressive. The court of appeals was therefore correct to focus on the particular elements of Texas assault and to conclude that an assault conviction that requires proof of bodily injury to a third party "falls squarely within the parameters of the criminal conduct contemplated in Begay." Pet. App. A9.

2. Petitioner contends (Pet. 5, 10-15) that the lower courts "perceive[] tension" between the inquiries set forth in the Court's decisions in Begay and Sykes; he claims more specifically that this tension has engendered a conflict in the circuits on "whether offenses with a mens rea of recklessness toward the possibility of injury can ever" satisfy the residual clause.

a. As an initial matter, the larger "tension" that petitioner emphasizes is illusory. Every court of appeals expressly to consider the question since Sykes -- including the Fifth Circuit in this case -- has held that "purposeful, violent, and aggressive" inquiry set forth in Begay remains relevant, though only to "cases involving a strict liability, negligence, or recklessness offense." United States v. Spencer, 724 F.3d 1133, 1139 & n.4 (9th Cir. 2013)

(so holding, and collecting cases from six other circuits); see Pet. App. A7 ("Begay serves as a guide-post for analyzing the ACCA's applicability to crimes that involve strict liability, negligence, or recklessness." (emphasis in original)).

The two cases petitioner cites as illustrating "tension" in the Court's precedents in fact adhere to this "consensus." See United States v. Chitwood, 676 F.3d 971, 978-979 (11th Cir.) (joining "the general consensus of the circuits" to "have concluded that Sykes means that Begay's 'purposeful, violence, and aggressive' analysis is useful only when dealing with strict liability, negligence, or recklessness crimes"), cert. denied, 133 S. Ct. 288 (2012); United States v. Sandoval, 696 F.3d 1011, 1016-1017 & n.8 (10th Cir. 2012) (although noting criticism of the Begay standard, following circuit precedent that construed Sykes to have "limited Begay's test to strict liability, reckless, and negligent crimes"), cert. denied, 133 S. Ct. 1294 (2013).

b. Petitioner is, however, correct that the narrower issue -- whether some offenses with a mens rea of recklessness satisfy the residual clause under the Begay inquiry -- is a subject of disagreement in the circuits.

In the wake of Begay, the Fifth Circuit held that a Texas assault conviction qualified as a "crime of violence" under the similarly worded residual provision in Sentencing Guidelines § 4B1.2, even though assault could be committed recklessly rather

than intentionally. United States v. Anderson, 559 F.3d 348, 355-356 (5th Cir. 2009), cert. denied, 557 U.S. 913 (2009). The court of appeals in the decision below applied that precedent in reaching the same result under the ACCA's residual clause. Pet. App. A8 n.2; see United States v. Mohr, 554 F.3d 604, 609 n.4 (5th Cir. 2009) (explaining that courts of appeals have applied this Court's ACCA precedents in construing the residual clause in Sentencing Guidelines § 4B1.2), cert. denied, 558 U.S. 829 (2009).

As petitioner points out, the majority of the other courts of appeals have taken Begay to hold that many (or perhaps all) offenses involving a mens rea of recklessness do not qualify as violent felonies under the residual clause. See United States v. Ossana, 638 F.3d 895, 901 (8th Cir. 2011) (collecting cases). Some courts have held that particular predicate offenses that reach reckless conduct do not qualify, without excluding the possibility that a different recklessness offense could satisfy the residual clause. Id. at 901 n.6 (limiting its holding to the assault offense "at issue[,] which encompasses the unadorned offense of reckless driving resulting in injury"); see United States v. Montgomery, 701 F.3d 1218, 1222 n.3 (8th Cir. 2012) (reserving question as to Missouri domestic assault committed recklessly), cert. denied, 133 S. Ct. 2814 (2013).

Other courts have more clearly suggested that all recklessness-based offenses lie outside the ACCA's residual clause

(or analogous provisions of the Sentencing Guidelines). See, e.g., Brown v. Caraway, 719 F.3d 583, 593 (7th Cir. 2013); United States v. Duran, 696 F.3d 1089, 1093 (10th Cir. 2012); Jones v. United States, 689 F.3d 621, 626 (6th Cir. 2012). But intra-circuit tension exists in at least one of those circuits -- the Sixth Circuit has also held that a Kentucky conviction for wanton endangerment (where state law defined "wantonly" as Texas law defines "recklessly") qualified as a crime of violence under the residual clause in Sentencing Guidelines § 4B1.2. United States v. Meeks, 664 F.3d 1067, 1070-1071 & n.2 (6th Cir. 2011).

And at least one court of appeals has distinguished between "broad, general state statutes with recklessness standards" (which do not satisfy the residual clause), and statutes that can be violated recklessly but that have a separate element requiring more culpable conduct (which can qualify). United States v. Dancy, 640 F.3d 455, 467 & n.12 (1st Cir.) (holding that assault and battery of a police officer qualifies as a violent felony under the ACCA's residual clause), cert. denied, 132 S. Ct. 564 (2011); see also United States v. Hart, 674 F.3d 33, 43-44 (1st Cir.) (same conclusion as to assault and battery with a deadly weapon), cert. denied, 133 S. Ct. 228 (2012).

c. Although the disagreement among the court of appeals may in the future warrant the Court's review, that review would be premature here. It is as yet unclear that the competing analyses

actually lead to different outcomes with any frequency. Many cases, including petitioner's, involve an assault statute (or the like) that lists the sufficient mental states in the alternative (e.g., "intentionally, knowingly, or recklessly," Tex. Penal Code Ann. § 22.01(a)(1) (West 2003)). In such cases, even those courts that generally exclude recklessness offenses from the residual clause of the ACCA and Sentencing Guidelines § 4B1.2 have held that the offense may qualify as a violent felony under the modified categorical approach (see generally Descamps v. United States, 133 S. Ct. 2276 (2013)).

For example, while the Third Circuit has held that "conviction[s] for mere recklessness" fall outside the residual clause, United States v. Lee, 612 F.3d 170, 196 (2010) (cited at Pet. 10), that court has also concluded that an assault conviction under a divisible statute reaching reckless conduct qualifies when documents subject to examination under the modified categorical approach show that the conviction rested on intentional or knowing conduct. See United States v. Marrero, No. 11–2351, 2014 WL 627649, at *5 (Feb. 19, 2014). Likewise, both the Seventh and Tenth Circuits have concluded that the Texas assault statute at issue here does not categorically satisfy the residual clause in Sentencing Guidelines § 4B1.2 under circuit precedent governing recklessness offenses, but that a conviction under the statute will nonetheless qualify if documents examined under the modified

categorical approach confirm that the conviction was based on intentional or knowing conduct. See United States v. Ramirez, 606 F.3d 396, 397-398 (7th Cir. 2010) (holding that although reckless assault would not qualify in light of United States v. Woods, 576 F.3d 400, 410 (7th Cir. 2009) (en banc), intentional and knowing violations of a divisible Texas statute would qualify); United States v. Rodriguez, 528 Fed. Appx. 921, 925-927 (10th Cir. 2013) (holding that although a Texas assault conviction did not categorically qualify under prior decision in Duran, supra, the defendant's conviction qualified under the modified categorical approach in light of the defendants' judicial confession to mental states charged in the conjunctive); cf. United States v. Cooper, 739 F.3d 873, 881-883 (6th Cir.) (applying modified categorical approach to conclude that Tennessee aggravated assault conviction was not based on reckless variant of offense), cert. denied, No. 13-8450 (Mar. 10, 2014).

Because it is not clear that the differing recklessness rules will necessarily lead to different results in cases involving multiple mental states set forth in the disjunctive, the Court's review of the circuit conflict identified in the petition would be premature at this time.

3. Even if the circuit conflict over offenses with a mens rea of recklessness otherwise warranted this Court's review, this case would be an unsuitable vehicle, for two reasons.

a. Before reaching the question petitioner would present, this Court would need to concur with the court of appeals' conclusion that petitioner's felony assault conviction should be treated as involving a mens rea of recklessness. But the court of appeals' decision on that threshold issue was incorrect; petitioner was charged with and pleaded guilty to intentional (as well as knowing and reckless) assault.

In particular, petitioner pleaded guilty to a charging document alleging, in the conjunctive, that he "intentionally, knowingly, and recklessly cause[d] bodily injury to [the victim], a member of [his] Family or household, by applying pressure about the throat of [the victim] with [his] hands." Pet. App. A5. In pleading guilty, petitioner signed a Texas judicial confession, "an admission made in the course of judicial proceedings by a party" that Texas courts treat both as a sufficient "evidentiary basis to support a judgment of conviction on the charge without the need for any corroborating evidence" and "as providing necessary proof of prior convictions for state sentence enhancement purposes." United States v. Garcia-Arellano, 522 F.3d 477, 481 (5th Cir. 2008). That signed judicial confession stated that petitioner "admit[ted] all of the allegations in the indictment" and "confess[ed] that [he] committed the offense as charged in the indictment." Pet. App. A5. The state trial court, for its part, found in accepting the plea

that petitioner had "admitted all of the allegations charged in the indictment or information." Ibid.

By admitting every allegation in the indictment and admitting that he committed the offense as charged in the indictment, petitioner necessarily admitted not just that he caused the victim bodily injury by strangling her, but that he did so "intentionally." See Doc. 35, at 18-22 (government's sentencing memorandum making this point); Gov't C.A. Br. 11 (government's submission to the court of appeals making the same point). The court of appeals therefore should have conducted its residual clause analysis based on intentional, rather than reckless, assault. See Rodriguez, 528 Fed. Appx. at 926-927 (so holding based on similar Texas charging documents and judicial confession). That analysis of an intentional assault, of course, would not implicate the question petitioner would present concerning the appropriate treatment of an offense involving a mens rea of recklessness.

In treating petitioner's prior conviction as involving a mens rea of recklessness, the court of appeals stated that petitioner's judicial confession did "not provide conclusive evidence as to the [relevant] mens rea," because that confession was "simply a blanket statement admitting that he committed the assault with every listed category of mental culpability." Pet. App. A5-A6. But that reasoning is unsound. It ascribes no significance to the fact that

petitioner actually admitted each of a series of allegations charged in the conjunctive. See United States v. Williams, 47 F.3d 993, 995 (9th Cir.) ("When a defendant pleads guilty * * * to facts stated in the conjunctive, each factual allegation is taken as true.") (citation omitted), cert. denied, 516 U.S. 849 (1995); cf. United States v. Broce, 488 U.S. 563, 570 (1989) (holding that a guilty plea admits both "the discrete acts described in the indictment" and "guilt of a substantive crime").

For that reason, the court below had previously (and correctly) determined that a similarly worded Texas judicial confession admitting to acts charged in the conjunctive established that the defendant pleaded guilty to both acts. See Garcia-Arellano, 522 F.3d at 481 (reaching that conclusion in case involving the definition of "drug trafficking offense" in Sentencing Guidelines § 2L1.2(b)); United States v. Galvez-Morales, 538 Fed. Appx. 547, 549-550 (5th Cir. 2013) (unpublished) (treating Texas assault conviction as resting on intentional and knowing conduct where indictment charged mens rea in the conjunctive and the defendant "admitted in his plea that he committed the offense 'exactly as alleged in the indictment'").

The court below appeared to believe that this case was not controlled by its precedents because petitioner's admissions did not rule out a mental state of recklessness. See Pet. App. A6. But that misapprehends the relevant legal principles. The question

is whether petitioner pleaded guilty to an offense that qualifies as a violent felony; it is not whether his plea would have also established his guilt of some other offense that might not qualify as a violent felony. Moreover, under Texas law, as under the Model Penal Code, petitioner's admission that he committed the offense "intentionally" subsumes findings as to lesser forms of culpability like knowledge and recklessness. Tex. Penal Code Ann. § 6.02(e) (West 2003); Model Penal Code § 2.02(5); see Hicks v. State, 372 S.W.3d 649, 653 (Tex. Crim. App. 2012) ("[P]roof of a higher level of culpability constitutes proof of a lower level of culpability. Thus, proof of a defendant's intentional act also proves recklessness."). Thus, no guilty plea could have ruled out recklessness in the way the court of appeals seemed to demand.

In short, this case is an unsuitable vehicle for reaching the question on which petitioner seeks review because, at best, this Court would first need to address a substantial threshold issue that is not evidently certworthy in its own right -- and at worst, the Court would affirm the judgment below by resolving that question in the government's favor, and find itself entirely unable reach the question petitioner presents for review.

b. This case is also an unsuitable vehicle because even apart from the Texas felony assault conviction at issue, petitioner has three other prior convictions that qualify as violent felonies,

and therefore reversing the decision below should not ultimately affect petitioner's sentencing under the ACCA.

As noted above, p. 3, supra, the government identified four of petitioner's prior convictions that qualified as violent felonies in a "Notice of Intent to Seek Enhancement of Sentence." Doc. 18, at 1-2. The notice included, in addition to the three Texas convictions, a 2009 Oklahoma conviction for eluding a peace officer. According to the PSR and the relevant state records, petitioner fled when a police officer (who recognized the vehicle petitioner was driving as one reported stolen) tried to initiate a traffic stop; petitioner accelerated as the officer pursued him, and petitioner's car eventually spun out of control and crashed. A passenger was in the vehicle at the time. PSR ¶ 38.

Oklahoma's eluding statute makes it misdemeanor for a driver who has been signaled by a peace officer "to bring the vehicle to a stop [to] willfully increase[] the speed or extinguish[] the lights of the vehicle in an attempt to elude [the] peace officer." Okla. Stat. Ann. tit. 21, § 540A(A) (West 2002). But the offense is elevated to a felony if (as in petitioner's case) the offense is committed "in such manner as to endanger any other person," id. § 540A(B), or if, "while eluding or attempting to elude an officer," the offender "causes an accident * * * resulting in great bodily injury." Id. § 540A(C). Petitioner did not dispute (at the time of the government's sentence-enhancement notice) the

government's assertion that petitioner's Oklahoma offense qualified as a violent felony, and during petitioner's plea colloquy he admitted the fact of this felony conviction in response to the factual basis that the prosecutor offered to support his guilty plea and sentencing exposure of 15 years to life. 6/6/2011 Tr. 17-18. Although the PSR omits petitioner's Oklahoma eluding conviction from its list of petitioner's ACCA-qualifying convictions (see PSR ¶ 11), nothing in the record suggests that omission was more than an oversight on the part of the Probation Office.

Petitioner's Oklahoma conviction squarely qualifies as a violent felony under Sykes, in which this Court held that a felony conviction for intentional vehicular flight from a law enforcement officer is a violent felony under the ACCA's residual clause. 131 S. Ct. at 2270; see United States v. Hawkins, 512 Fed. Appx. 746, 748 (10th Cir.) (so holding with respect to the Oklahoma statute at issue), cert. denied, 134 S. Ct. 138 (2013); United States v. Stout, 439 Fed. Appx. 738, 750 (10th Cir. 2011) (same under residual clause in Sentencing Guidelines § 4B1.2), cert. denied, 132 S. Ct. 1599 (2012). Sykes explained that vehicular flight "presents a serious potential risk of physical injury to another" because the offender "places property and persons at serious risk of injury" and the "expected result" of vehicular flight is a "[c]onfrontation with police." 131 S. Ct. at 2273, 2274. The same

conclusion follows a fortiori as to the Oklahoma statute. Indeed, because a defendant cannot be convicted of a felony under that statute unless his flight "endanger[s]" [another] person" or "causes an accident * * * resulting in great bodily injury," Okl. Stat. Ann. tit. 21, § 540A(B)-(C) (West 2002), a serious risk of injury to others is inherent in the offense. And there is no need to resort to the Begay inquiry, because the Oklahoma statute "has a stringent mens rea requirement" of willfulness. See Sykes, 131 S. Ct. at 2275.

Accordingly, because the Oklahoma conviction clearly qualifies as a violent felony and petitioner does not dispute that he has two other qualifying convictions, he would remain subject to a sentence under the ACCA even if his Texas felony assault conviction were excluded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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