No. 14-282

IN THE
Supreme Court of the United States

TAVARES CHANDLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In opposing certiorari, the Government does not seriously dispute the core assertions of Chandler's petition: that the issue is squarely presented in this case, *i.e.*, that classifying his Nevada conspiracy conviction as a violent felony was dispositive of whether the 15-year ACCA mandatory minimum applied; that there is a division of existing circuit authority; or that this is a recurring issue of national importance. Rather, the Government protests largely on the merits, arguing that an agreement to commit a violent felony, absent any overt act, poses "a serious potential risk of physical injury" because it "increase[s] the chance that such violent felony would be committed." Opp. 14. But this is the very question on which the courts of appeals are divided and for which this Court's intervention is required. The Government then seeks not to discredit the circuit split—which is entrenched in decades of binding precedent—but rather to suggest that the courts on one side of the split might "reconsider" their positions if given the opportunity. Opp. 21, 23. Those opportunities have come and gone, with the circuits reaffirming and reapplying their conflicting outcomes, even in light of this Court's recent ACCA decisions. Certiorari should be granted to definitively resolve this question and reinstate uniformity in federal sentencing.

ARGUMENT

I. THE GOVERNMENT CONCEDES THE CIRCUITS ARE SPLIT ON THIS IMPORTANT ISSUE OF LAW

The Government does not disagree that the courts of appeals are split on this critical issue of law. Instead, the Government speculates that the Tenth and Eleventh Circuits—both of which hold that no-overt act conspiracy is not a "violent felony" under the ACCA—might overrule their precedent in light of more recent Supreme Court decisions in *James* and *Sykes*. Opp. 16-23. This argument overlooks the fact that the Tenth Circuit has expressly reaffirmed its position post-*James* and that the Eleventh Circuit has interpreted *Sykes* to leave its prior holding in *Whitson* intact. Most significantly, the Government ignores the three-judge panel of the Ninth Circuit that unanimously concurred in the judgment of this case, writing that, but for binding Ninth Circuit precedent, they would have sided with the Tenth and Eleventh Circuits in light of current Supreme Court guidance on the ACCA residual clause.

A. The Tenth Circuit Has Already Re-Affirmed *King* In Light of *James*

As detailed in our petition, there is a clear conflict with the Tenth Circuit. In *United States v. King*, 979 F.2d 801 (10th Cir. 1992), the Tenth Circuit held that a conviction for conspiracy to commit armed robbery does not fall within the residual clause because no-overt act conspiracies "do not nec-

essarily present . . . the high risk of violent confrontation inherent in a completed [substantive offense]." *Id.* at 804. In reaching that conclusion, the Court looked to prior circuit precedent in *United States v. Strahl*, 958 F.2d 980 (10th Cir. 1992), which held that attempted burglary was not a "violent felony" under the ACCA. *Id.* at 986.

While not disputing that the current Tenth Circuit law is squarely contrary to the Ninth Circuit's ruling here, the Government contends that the Tenth Circuit's decision in *Strahl*, and by extension its decision in *King*, are on shaky grounds. The Government argues that under *James*, "the 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." Opp. 19 (quoting *James v. United States*, 550 U.S. 192, 208 (2007)). *Strahl*, by contrast, had looked for the "unusual case[]" where "even a prototypically violent crime might not present a genuine risk of injury." Opp. 19. Under this "new framework," the Government suggests "[i]t is therefore unlikely that the Tenth Circuit would stand behind *King* if given an appropriate opportunity to reconsider the issue." Opp. 19-21.

The Government's reasoning is a non sequitur. While *James* clarified the appropriate scope of the categorical inquiry ("the ordinary case"), it expressly left intact the next step in the inquiry—to look at the "conduct encompassed by the elements of the offense" and determine whether that conduct "presents a serious potential risk of injury to another." 550 U.S. at 208. Because attempted burglary under

Florida law "require[s] an overt act directed toward entry of a structure," the test was met in *James*. *Id.* at 209. But this Court expressly distinguished *Strahl* and other cases involving an attempt law "that could be satisfied by preparatory conduct that does not pose the same risk of violent confrontation." *Id.* at 205 & n.4.[1] Thus, *James* simply does not implicate the holding of *King*.

While the Government speculates that the Tenth Circuit might change its mind in light of *James*, the Tenth Circuit had that very opportunity in *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007). In *Fell*, the court considered whether Colorado conspiracy to commit second-degree burglary was a "violent felony" under the *James* rubric. The court reasoned that "*James* instructs us to measure the risk of physical injury posed by conspiracy ... against the risk posed by the completed crime of burglary." *Id.* at 1042. Only if "the risk is comparable" is a conspiracy "properly characterized as a violent felony." *Id.* Although Colorado conspiracy contained an overt act requirement, the overt act "need not be directed toward the entry of a building or structure" and therefore posed "no risk of a violent confrontation between

[1] The Tenth Circuit has since acknowledged that, as to the substantive holding on attempted burglary, *Strahl* "survived *James*." *United States v. Martinez*, 602 F.3d 1166, 1173 (10th Cir. 2010). On the other hand, in a recent case discussing the scope of the categorical approach, the Tenth Circuit refers in dicta to *Strahl*'s categorical approach as "later overruled by *James*." *United States v. Trent*, 767 F.3d 1046, 1058 n.2 (10th Cir. 2014). These decisions are consistent with Petitioner's position here that *James* modified *Strahl*'s categorical approach while leaving its substantive holding intact.

the defendant and an individual interacting with the conspirator . . . ." *Id.* at 1044. The Tenth Circuit concluded, consistent with *King*, that a conspiracy is not a "violent felony" under the ACCA residual clause. Thus, contrary to the Government's suggestion, *King* remains the law of the Tenth Circuit post-*James*.

B. *Sykes* Does Not Alter The Eleventh Circuit's Holding In *Whitson*

The Eleventh Circuit in *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010), held under the Sentencing Guidelines that because there is "no violence or aggression in the act of agreement . . . non-overt act conspiracy is not a section 4B1.1 'crime of violence.'" *Id.* at 1223. In light of *Begay*, *Whitson* departed from the circuit's prior decision in *United States v. Wilkerson*, 286 F.3d 1324 (11th Cir. 2002), which had equated the risk of conspiracy with the risk of the substantive offense.

The Government does not deny that the governing law of the Eleventh Circuit cannot be squared with the ruling of the Ninth Circuit here. Rather, the Government hypothesizes that the Eleventh Circuit might flip-flop on the issue, treating *Sykes* as a reason to revert to its prior *Wilkerson* ruling. Opp. 21-23.

The Government's opposition, however, greatly overstates the effect of *Sykes* on *Begay* and the resulting impact on the Eleventh Circuit ruling in *Whitson*. The Court in *Sykes* noted that the phrase "'purposeful, violent, and aggressive' has no precise

textual link to the residual clause" but that "[i]n many cases the . . . inquiry will be redundant with the inquiry into risk" for the simple reason that "purposeful, violent, and aggressive" conduct and conduct that "present[s] serious potential risks of physical injury to others tend to be one and the same." *Sykes v. United States*, 131 S. Ct. 2267, 2275 (2011). Consistent with *Sykes*, *Whitson*'s observation that the "simple act of agreeing" is neither "violent" nor "aggressive" is a reflection on both the nature of the conduct and the likelihood that the conduct presents a "serious potential risk of physical injury to others." *Whitson*, 597 F.3d at 1222.

Moreover, neither *Sykes* nor the Eleventh Circuit's decision in *United States v. Chitwood*, 676 F.3d 971 (11th Cir. 2012), abrogated the requirement that a "violent felony" under the residual clause be both "similar, in kind *as well as* in degree of risk posed, to the examples themselves." *Begay v. United States*, 553 U.S. 137, 143 (2008) (emphasis added). In *Whitson*, the Eleventh Circuit cataloged Circuit precedent where the Court concluded that even "conduct, more 'confrontational' than mere agreement, fails to satisfy the similarity test." 597 F.3d at 1222. As to conspiracy, the Court reasoned that "[w]ithout more, agreement lacks the requisite violence and aggression to be 'roughly similar in kind' to 'burglary, arson,' and the other enumerated crimes." *Id.* That holding survives *Sykes* and *Chitwood* and is the law of the Eleventh Circuit.

C. The Government Ignores The Unanimous Concurrence Below

In arguing that recent Supreme Court precedent yields a different result than the one reached by the Tenth and Eleventh Circuits, the Government ignores the concurrence below in which all three judges agreed that, but for the Ninth Circuit's dated *Mendez* decision, the current state of ACCA jurisprudence dictates that a conspiracy is *not* a "violent felony" under the residual clause. Pet. 3-4. Judge Bybee, on behalf of all three panel members, reviewed this Court's recent precedents, including *Begay*, *Sykes*, *James*, and *Chambers*, and concluded that the cases are all "consistent with the well-established rule that inchoate offenses are separate from completed offenses." Pet. App. 25a.

The Ninth Circuit's critical error in *Mendez* was conflating the conspiracy with the substantive offense: *Mendez* failed to "recognize that although a person conspiring to commit robbery is 'doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury'" as required by the statute. Pet. App. 29a-30a (quoting *Chambers*, 555 U.S. 122, 128 (2009)). It is "only when overt acts directed toward the commission of the crime are committed that a crime begins to pose a 'serious potential risk of physical injury to another.'" Pet. App. 30a.

* * *

From the Tenth Circuit's 1992 decision in *King* to the Ninth Circuit's 2014 decision below, the courts

of appeals have dissected the ACCA residual clause, mined this Court's precedents for guidance, noted the disagreement among the circuits, and persisted in their diametrically opposed conclusions. Indeed, the Fourth Circuit recently held in *United States v. Melvin*, 577 F. App'x 179, 180 (4th Cir. 2014), that North Carolina conspiracy to commit robbery with a dangerous weapon, which does not require an overt act, was a "violent felony" under the ACCA residual clause. A petition for a writ of certiorari seeking review of *Melvin* is pending in this Court. *See Melvin v. United States*, No. 14-6510 (cert. pet. filed Sept. 26, 2014).

Further percolation of this deeply entrenched split only perpetuates the uneven application of federal law, with grave consequences for the liberty of individual defendants, including Petitioner here.[2]

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[2] The Government notes that this Court will address the residual clause in *Johnson v. United States*, No. 13-7120 (argued Nov. 5, 2014), to decide whether possession of a short-barreled shotgun qualifies as a "violent felony." A decision in *Johnson* is unlikely to resolve the circuit conflict presented here. The *actus reus* of a possession crime—physically possessing a violent weapon—may itself pose a "serious potential risk of physical injury" in a way that mere agreement with no overt act does not. Thus, there is no reason to delay reaching the issues presented in this case or to hold this petition pending *Johnson*. But at a minimum, the Government's view that *Johnson* could affect the outcome of this case would compel the conclusion that this Court should hold this petition pending the outcome in *Johnson*.

II. THE GOVERNMENT DOES NOT DISPUTE THAT THIS CASE PRESENTS A PROPER VEHICLE TO RESOLVE A RECURRING ISSUE OF NATIONAL IMPORTANCE

Notably, the Government opposition makes no effort to contest that this case presents an ideal vehicle for resolving this question. Indeed, it could not. The classification of Chandler's Nevada conspiracy conviction as a violent felony under the residual clause was wholly dispositive of whether the ACCA mandatory minimum applied. Opp. 2-3. And Nevada law is well established that "an overt act in furtherance of the conspiracy is not required to support a conviction for conspiracy" under the Nevada statute. Opp. 9.

Nor can the Government credibly deny that this issue implicates significant liberty interests, and that the goals of federal sentencing statutes as well as the institutional authority of the penal system are undermined by the inequalities that this split creates. The circuit split presented here flies in the face of the Court's admonition that "fundamental fairness" demands that the ACCA "ensure . . . that the same type of conduct is punishable on the Federal level in all cases." *Taylor v. United States*, 495 U.S. 575, 582 (1990). Because at least 12 states currently have conspiracy laws that do not require an overt act, this issue has widespread and recurring implications for criminal defendants nationwide.[3]

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[3] *See* Fla. Stat. §777.04(3); Mich. Comp. Laws §750.157a; Miss. Code Ann. §97-1-1; Nev. Rev. Stat. §199.490; N.M. Stat.

III. THE GOVERNMENT POSITION PERPETUATES THE ERROR OF THE NINTH CIRCUIT

The bulk of the Government's opposition addresses the merits of Petitioner's argument. The Government contends that conspiracy to commit robbery is a violent felony because the mere "formation of a conspiracy necessarily threatens the accomplishment of the conspiracy's object"—even when no overt acts are undertaken in furtherance of the conspiracy. Opp. 9. It would conclude that this sort of conspiracy offense poses "a serious potential risk of physical injury," based solely on the finding that a conspiracy "increase[s] the chance that [the robbery] would be committed." Opp. 14.

The application of the ACCA's residual clause, however, does not turn on whether the offense of conviction makes physical harm more likely than committing no offense at all. The correct inquiry focuses on whether a conspiracy, without any overt act in furtherance of the objective, presents a risk that is "comparable" to that of the enumerated offenses of burglary, extortion, arson, and crimes involving the use of explosives—all crimes with significant overt physical manifestations of a dangerous crime. *Sykes*, 131 S. Ct. at 2273; *see also James*, 550 U.S. at 203. No-overt act conspiracy is simply not

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Ann §30-28-2; Or. Rev. Stat. §161.450; S.C. Code Ann. §16-17-410; Va. Code Ann. §18.2-22; *Carroll v. State*, 53 A.3d 1159 (Md. 2012); *Commonwealth v. Nee*, 935 N.E.2d 1276 (Mass. 2010); *State v. DeSanto*, 603 A.2d 744, 746 (R.I. 1992); *State v. Brewer*, 129 S.E.2d 262 (N.C. 1963).

comparable. As Judge Bybee explained, no-overt act conspiracies are not violent felonies because "the 'step' between discussing or even agreeing on possibilities and physical action is a significant one." Pet. App. 30a-31a (Bybee, J., concurring).

The Government's rule suffers from the same fundamental error as the court of appeals' ruling. This analysis conflates distinct criminal offenses, so that, for purposes of the ACCA's residual clause, conspiring, attempting, or aiding and abetting the commission of a violent felony will always have the same sentencing consequences as committing the violent felony itself. In doing so, it flouts the categorical approach's emphasis on the elements of each specific offense of conviction as delineated by state law, and it ignores the requirement that "separate crimes" must be analyzed separately. *See* Pet. 12-14.

The Government does not dispute that no-overt act conspiracies carry inherently less risk of harm than the completed target offense—nor that the ordinary case requires no affirmative conduct whatsoever beyond a mere agreement. *See* Pet. 17-19. Instead, it invokes this Court's reasoning in *James* in finding that the attempted burglary offense was a particularly dangerous "subset" of the crime. Opp. 11 (quoting *James*, 550 U.S. at 204). *James*, however, was referring to a particularly dangerous "subset" of attempted burglaries that required, as an element of conviction, an overt act in the direction of entering the premises. *James*, 550 U.S. at 204-06 & nn.3-4. Defendants prosecuted for attempted burglary in Florida were caught on the verge of entry,

prompting the Court to observe that these attempted burglaries anomalously presented risks that "may be even greater" than those accompanying the completed crime. *Id.* at 194.

There is a stark difference in risk between an overt act that attempts completion of an enumerated offense, as in *James*, and a conspiracy crime with no overt act whatsoever. Contrary to the Government's position (Opp. 16), *James* recognizes that acts merely preparing to commit a burglary are "more attenuated conduct" than attempting to enter the structure, and thus may not present a serious potential risk of injury. *See James*, 550 U.S. at 205-06. Conspiracy under Nevada law is even further removed and more attenuated from the completed offense, for it requires no overt acts at all—preparatory or otherwise—and has a correspondingly lower risk of harm than the substantive robbery offense.

Finally, the court of appeals' decision finds no support in *Sykes*, notwithstanding the Government's argument to the contrary (Opp. 15-16). Central to *Sykes* was the conclusion that "[r]isk of violence is inherent to vehicle flight" stemming from, among other factors, the "intentional release of a destructive force dangerous to others." 131 S. Ct. at 2273. Serious and substantial risks, however, are not an inherent part of no-overt act conspiracies. As the Government rightly recognizes, "levels of risk" differentiate crimes that qualify as violent felonies from those that do not. Opp. 15 (quoting *Sykes*, 131 S. Ct. at 2275). No-overt act conspiracy requires no affirmative conduct that inherently puts others in

harm's way and, as a result, the level of risk associated with that offense is quantitatively and qualitatively different than vehicular flight. *Sykes* therefore does not bolster the court of appeals' holding; rather, it underscores the substantially lesser degree of risk posed by no-overt act conspiracies compared to the enumerated offenses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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