No. 13-7120

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

MYTHILI RAMAN
Acting Assistant Attorney
General

JAMES I. PEARCE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's prior felony conviction under Minnesota law for possession of a short-barreled shotgun is a "violent felony" under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

IN THE SUPREME COURT OF THE UNITED STATES

No. 13-7120

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the Federal Reporter but is reprinted in 526 Fed. Appx. 708.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2013. The petition for a writ of certiorari was filed on October 28, 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 District of Minnesota, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 180 months of imprisonment under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A7.

1. Petitioner came to the FBI's attention in 2010 through his involvement with an organization called the National Socialist Movement, which advocates white supremacist views. Pet. App. A2; Revised Presentence Investigation Report (PSR) ¶ 5. In June 2010, petitioner left the National Socialist Movement to found the Aryan Liberation Movement, which he planned to support by counterfeiting United States currency. Pet. App. A2; PSR ¶¶ 6, 11. Throughout 2010, a confidential source and an undercover FBI agent were in regular contact with petitioner. PSR ¶¶ 5-6.

In November 2010, petitioner (who was a convicted felon) revealed to the confidential source and undercover agent that he had manufactured napalm, other explosives, and silencers for the Aryan Liberation Movement. Pet. App. A2; PSR ¶ 9. Petitioner also showed the undercover officer his AK-47 rifle and a large

cache of ammunition. Ibid. In December 2010, petitioner acquired a .22 caliber semiautomatic assault rifle and a .45 caliber semiautomatic handgun. Pet. App. A2; PSR ¶ 10. Throughout 2011, petitioner's comments about using violence to advance his cause escalated. PSR ¶ 15. Petitioner discussed various attacks he might plan on targets in Minnesota, including an attack on the Mexican consulate in St. Paul, Minnesota, on May 1, 2012. PSR ¶ 16.

In April 2012, law enforcement authorities arrested petitioner. Pet. App. A2; PSR ¶ 17. At the time of his arrest, petitioner admitted that he possessed an AK-47 rifle and a .22 caliber semiautomatic handgun. Ibid.

2. A grand jury in the United States District Court for the District of Minnesota returned an indictment charging petitioner with four counts of possession of a firearm by a convicted felon and two counts of possession of ammunition by a convicted felon, all in violation of 18 U.S.C. 922(g)(1). Indictment 1-6. The government contended that the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(1), applies to petitioner. The ACCA provides for a mandatory minimum sentence of 15 years of imprisonment for any defendant convicted of being a felon in possession of a firearm who has "three previous convictions * * * for a violent felony or a serious drug offense." 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 government contended that petitioner has at least three prior convictions that qualify as "violent felonies." Indictment 1-6; see PSR ¶ 34.

Petitioner pleaded guilty to one count of possession of a firearm by a convicted felon in exchange for the government dismissing the other counts of the indictment. Pet. App. A3. In his plea agreement, petitioner reserved the right to "challenge the applicability of the ACCA." Ibid. (quoting plea agreement).

At sentencing, the district court concluded that three of petitioner's prior Minnesota convictions -- for robbery, attempted robbery, and possession of a short-barreled shotgun -- qualify as violent felonies for ACCA purposes. See Pet. App. A4. The court therefore sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Id. at B2-B3.

3. The court of appeals affirmed in an unpublished, non-precedential opinion. Pet. App. A1-A7. As relevant here, the

court rejected petitioner's argument that possession of a short-barreled shotgun is not a "violent felony" under the ACCA. Id. at A5-A6. Relying on a prior decision, the court explained that possession of a short-barreled shotgun qualifies as a "violent felony" under the residual clause in 18 U.S.C. 924(e)(2)(B)(ii) because it "presents a serious potential risk of physical injury to another because it is roughly similar to the listed offenses within the ACCA, both in kind as well as the degree of risk for harm posed." Pet. App. A6 (quoting United States v. Lillard, 685 F.3d 773, 777 (8th Cir. 2012), cert. denied, 133 S. Ct. 1242 (2013)).[1]

ARGUMENT

Petitioner contends (Pet. 8-14) that his prior Minnesota conviction for possession of a short-barreled shotgun is not a "violent felony" under the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii). The court of appeals correctly rejected that contention, and its decision is consistent with recent decisions of this Court interpreting the ACCA's residual clause. The decisions on which petitioner relies predate this Court's intervening decision in Sykes v. United States, 131 S. Ct. 2267 (2011), or are factually distinguishable, and they do not

[1] The court of appeals also rejected petitioner's arguments that his conviction for attempted robbery was not a violent felony and that the ACCA is unconstitutionally vague. Pet. App. A6-A7. Petitioner does not renew those arguments before this Court.

present any circuit conflict warranting this Court's review. This Court recently has denied review of the question presented in several cases (including the decision upon which the court of appeals relied),[2] and the same result is appropriate here.

1. The court of appeals correctly held that petitioner's prior Minnesota felony conviction for possession of a short-barreled shotgun qualifies as a "violent felony" under the ACCA's residual clause. In Sykes, this Court held that a prior felony conviction under Indiana law for vehicular flight from a law enforcement officer is a "violent felony" under the ACCA's residual clause because vehicular flight categorically "presents a serious potential risk of physical injury to another." 131 S. Ct. at 2273. The Court rejected the defendant's argument that Begay v. United States, 553 U.S. 137 (2008), and Chambers v. United States, 555 U.S. 122 (2009), "require ACCA predicates to be purposeful, violent, and aggressive in ways that vehicle flight is not." 131 S. Ct. at 2275. The Court held that, "[i]n general, levels of risk divide crimes that qualify from those that do not," and so an inquiry into "risk levels provide[s] a categorical and manageable standard that suffices to resolve the case." Id. at 2275-2276. The Sykes Court distinguished Begay

[2] See Lillard v. United States, 133 S. Ct. 1242 (2013) (No. 12-6800) (relied upon by court of appeals below); Strother v. United States, 133 S. Ct. 148 (2012) (No. 11-10371); Vincent v. United States, 560 U.S. 927 (2010) (No. 09-8320).

as "involv[ing] a crime akin to strict liability, negligence, and recklessness crimes." Id. at 2276. Outside of that context, the Sykes Court explained, "[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk," and so focus on levels of risk is appropriate. Id. at 2275; id. at 2275-2276.

As in Sykes, the crime at issue involves knowing or intentional conduct. The Minnesota statute of conviction, Minn. Stat. Ann. § 609.67(2), prohibits "own[ing], possess[ing], or operat[ing] * * * a short-barreled shotgun." The Minnesota courts have interpreted that statute to include a knowledge requirement. See, e.g., State v. Salyers, 842 N.W.2d 28, 35 (Minn. Ct. App. 2014); see also State v. Ndikum, 815 N.W.2d 816, 821-822 (Minn. 2012) (interpreting similar firearm-possession statute).[3] Thus, unlike in Begay, the Minnesota statute does not

[3] The court of appeals in this case did not expressly address the mens rea required to violate the Minnesota statute. But it relied (Pet. App. A6) on United States v. Lillard, 685 F.3d 773, 776 (8th Cir. 2012), cert. denied, 133 S. Ct. 1242 (2013), which addressed a Nebraska possession statute with a knowledge mens rea, suggesting that it believed the Minnesota statute contained a similar requirement.

In another case, United States v. Brown, 734 F.3d 824 (8th Cir. 2013), petition for cert. pending, No. 13-8407 (filed Jan. 23, 2014), the court of appeals "assume[d] that possession of a short-barreled shotgun was a strict liability crime when [the defendant] committed it in 1998." Id. at 826-827. But the Brown Court recognized that current Minnesota jury instructions require the government to prove knowledge to obtain a conviction, id. at 827 n.2, and petitioner does not contend that his 2007 conviction was for a strict liability offense. See

create a strict liability offense but rather requires proof of a culpable mental state. Accordingly, an inquiry into "risk levels provide[s] a categorical and manageable standard that suffices to resolve the case." Sykes, 131 S. Ct. at 2275-2276.

In any event, possession of a sawed-off shotgun satisfies both the risk-of-injury requirement of Sykes and the "purposeful, violent, and aggressive" standard of Begay. Short-barreled shotguns (also known as "sawed-off" shotguns) are "inherently dangerous because they are not useful except for violent and criminal purposes." United States v. Lillard, 685 F.3d 773, 776 (8th Cir. 2012) (internal quotation marks omitted), cert. denied, 133 S. Ct. 1242 (2013); see United States v. Strother, 384 Fed. Appx. 539, 541 (8th Cir. 2010) ("[A] short barreled shotgun within the parameters of the Missouri statute serves no lawful purpose and will inflict serious physical injury."), cert. denied, 131 S. Ct. 3021 (2011). As this Court has recognized, sawed-off shotguns are "not typically possessed by law-abiding citizens for lawful purposes." District of Columbia v. Heller, 554 U.S. 570, 625 (2008). "People do not shorten their shotguns to hunt or shoot skeet. Instead, the shortened barrel makes the guns easier to

---

Pet. 12-14 (arguing that his offense does not qualify as a "violent felony" because it can involve "passive" possession). In any event, the Brown Court concluded that the Minnesota offense qualifies as a "violent felony" even without a knowledge requirement. See 734 F.3d at 827.

conceal and increases the spread of the shot when firing at close range." United States v. Upton, 512 F.3d 394, 404 (7th Cir.), cert. denied, 555 U.S. 830 (2008). As the Eighth Circuit has correctly observed, "[p]ossession of a dangerous weapon that has no lawful purpose creates a serious potential risk of physical injury to others." United States v. Vincent, 575 F.3d 820, 825 (2009), cert. denied, 560 U.S. 927 (2010); see United States v. McGill, 618 F.3d 1273, 1276 (11th Cir. 2010) (same).

In addition, possession of a powerfully destructive weapon that is typically used for unlawful purposes indicates a readiness to engage in unlawful violence of the sort the ACCA was intended to prevent. See United States v. Brown, 734 F.3d 824, 827 (8th Cir. 2013) ("Possession of a short-barreled shotgun indicates that the offender is prepared to use violence if necessary and is ready to enter into conflict."), petition for cert. pending, No. 13-8407 (filed Jan. 23, 2014); Vincent, 575 F.3d at 826 (explaining that an offender's possession of a sawed-off shotgun makes it "more likely that [he], later possessing a gun, will use that gun deliberately to harm a victim") (quoting Begay, 553 U.S. at 145); see also Begay, 553 U.S. at 146 (noting that among the ACCA's "basic purposes" is a focus on the "special danger created" when the prior crimes of an individual convicted of violating Section 922(g) "show an increased likelihood that the offender is the kind of person who

might deliberately point the gun and pull the trigger"). Possession of a sawed-off shotgun is thus "associated with a likelihood of future violent, aggressive, and purposeful 'armed career criminal' behavior" in a way that drunk driving and other nonviolent felonies are not. Id. at 148.

The United States Sentencing Commission has reached a similar conclusion about the risks of possessing sawed-off shotguns in the commentary to Sentencing Guidelines § 4B1.2(a), whose definition of a predicate "crime of violence" closely tracks the ACCA's definition of a "violent felony." See Vincent, 575 F.3d at 826. The Guidelines and accompanying commentary define the term "crime of violence" to encompass possession of firearms described in 26 U.S.C. 5845(a), which includes any sawed-off shotgun with a barrel less than 18 inches in length. Sentencing Guidelines § 4B1.2, comment. (n.1); see 26 U.S.C. 5845(a). As this Court noted in James v. United States, 550 U.S. 192 (2007), the Sentencing Commission's conclusion that a predicate crime is a "crime of violence" provides "further evidence" that the same crime qualifies as a "violent felony" under the ACCA, because the "Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between a particular

offense and the likelihood of accompanying violence." Id. at 206-207 (internal quotation marks and citation omitted).

2. Petitioner contends (Pet. 8-11) that this Court's review is warranted to resolve a division of authority among the courts of appeals on the proper characterization of offenses involving the possession of sawed-off shotguns. No developed circuit split warrants this Court's review at this time.

a. Before Begay, all but one of the courts of appeals to consider the issue, including the court below, had held that possession of a short-barreled (or sawed-off) shotgun qualifies either as a "violent felony" under the ACCA or as a "crime of violence" under the identically worded definition in Sentencing Guidelines § 4B1.2(a)(2). See United States v. Fortes, 141 F.3d 1, 8 (1st Cir.) (ACCA), cert. denied, 524 U.S. 961 (1998); United States v. Johnson, 246 F.3d 330, 334-335 (4th Cir.) (Guidelines), cert. denied, 534 U.S. 884 (2001); United States v. Serna, 309 F.3d 859, 864 (5th Cir. 2002) (Guidelines), cert. denied, 537 U.S. 1221 (2003); Upton, 512 F.3d at 404 (ACCA), called into question by United States v. Miller, 721 F.3d 435, 439-440 (7th Cir. 2013); United States v. Childs, 403 F.3d 970, 971 (8th Cir.) (ACCA), cert. denied, 546 U.S. 954 (2005). Only the Sixth Circuit had held otherwise. See United States v. Amos, 501 F.3d 524, 530 (2007) (ACCA).

In Amos, a divided panel of the Sixth Circuit held that a Tennessee statute prohibiting possession of a sawed-off shotgun did not qualify as a "violent felony."[4] In so holding, the court relied in part on circuit precedent requiring it to focus on the "least objectionable conduct" that would violate the statute at issue. 501 F.3d at 527 (internal citation omitted). The court reasoned that, because a defendant could, in theory, "be convicted for keeping an unloaded weapon locked or hidden in his attic or basement," mere possession of a weapon is insufficiently "assertive, violent conduct" to qualify under the ACCA. Id. at 529-530. This Court, however, has made clear that the ACCA does not require that "every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." James, 550 U.S. at 208. Rather, as Begay emphasized, the focus is on the "typical[]" case. 553 U.S. at 144.

---

[4] Amos concerned former Tenn. Code Ann. § 39-6-1713 (West 1982), which prohibited, inter alia, the possession of a sawed-off shotgun in serviceable condition. See Amos, 501 F.3d at 526; Tenn. Code Ann. § 39-6-1714(6) (West 1982). A later-enacted Tennessee statute provides an affirmative defense if the defendant possessed a sawed-off shotgun "solely as a curio, ornament, or keepsake" and the weapon "was in a nonfunctioning condition and could not readily be made operable," or if "[t]he possession was brief and occurred as a consequence of having found the weapon or taken it from an aggressor." Tenn. Code Ann. § 39-17-1302(c) (West 1989).

Since Amos and Begay, the Sixth Circuit has held that possession of a sawed-off shotgun is a "crime of violence" under Sentencing Guidelines § 4B1.2(a) and its accompanying commentary. See United States v. Hawkins, 554 F.3d 615, 616-617 (6th Cir.), cert. denied, 557 U.S. 914 (2009). As explained above, the Sentencing Commission's conclusion that a predicate offense is a "crime of violence" provides evidence that the same offense is a "violent felony" under the ACCA. See pp. 10-11, supra. The future of Amos is thus unclear, and the Sixth Circuit thus may revisit its analysis in Amos in an appropriate case.

b. Since Begay, other than the court below, only two courts of appeals (the Seventh and Eleventh Circuits) have addressed this issue in published opinions. In United States v. McGill, 618 F.3d 1273, 1279 (2010), the Eleventh Circuit held that the Florida offense of possession of a short-barreled shotgun is not a "violent felony" for ACCA purposes. The court did not, however, purport to apply the risk-of-injury requirement that this Court applied most recently in Sykes. To the contrary, although acknowledging that possession of a short-barreled shotgun involves conduct that presents a serious risk of physical injury to others, id. at 1276, the Eleventh Circuit decided the case "narrowly on another ground" not briefed by the parties -- namely, that "possession of a short-barreled shotgun

is not 'similar in kind' to 'use of explosives,' its closest enumerated analog, or to the other crimes listed in the ACCA's residual clause." Id. at 1277.

The Eleventh Circuit's analysis is incorrect for several reasons. As a threshold matter, after that court had determined that "possessing an unregistered short-barreled shotgun involves conduct that presents a serious potential risk of physical injury to another" under the ACCA, McGill, 618 F.3d at 1276 (internal quotation marks omitted), it should have ended its analysis. Under the residual clause's text and this Court's recent cases, that finding of a serious potential risk to others was enough to treat the offense as a violent felony. See Sykes, 131 S. Ct. at 2273. The Eleventh Circuit, however, proceeded to analyze whether possession of a short-barreled shotgun is similar to the "use of explosives," which the court asserted was the most closely analogous enumerated offense in the ACCA. McGill, 618 F.3d at 1277-1279. That approach finds no basis in the ACCA's text or this Court's precedents. To the contrary, comparing an offense to the most closely analogous enumerated crime is the method that this Court used in James to determine whether the offense presents the requisite degree of risk. See 550 U.S. at 203-207 (comparing the offense of attempted burglary to the enumerated crime of burglary). Yet the Eleventh Circuit already had concluded in McGill that possession of a short-

barreled shotgun presents the requisite degree of risk -- making its additional step unnecessary.

Even taken on its own terms, the Eleventh Circuit's analysis is flawed. That court rested its decision on the National Firearms Act (NFA), 26 U.S.C. 5841 et seq., which prohibits the possession of any unregistered "firearm." The NFA defines the term "firearm" to include, inter alia, any "shotgun having a barrel or barrels of less than 18 inches in length," 26 U.S.C. 5845(a), and any "destructive device," 26 U.S.C. 5845(a) and (f). The Eleventh Circuit reasoned that because the NFA treats short-barreled shotguns and destructive devices in the same way, the ACCA also should treat them in the same way. And because the ACCA expressly lists crimes involving "the use of explosives" but not their possession, 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added), the Eleventh Circuit concluded that the residual clause should be interpreted to include only crimes involving the use -- but not the possession -- of NFA-regulated firearms like short-barreled shotguns. See McGill, 618 F.3d at 1279.

That conclusion depends on a faulty premise. When the ACCA refers to "explosives," that term is much broader than the category of "destructive device[s]" regulated by the NFA. As the Eleventh Circuit itself has recognized, the NFA does not regulate all explosives. See United States v. Hammond, 371 F.3d

776, 780 (2004). Rather, the NFA regulates only a subset of particularly dangerous explosives that are designed for use as weapons: bombs, grenades, certain rockets and missiles, mines, and similar such devices. 26 U.S.C. 5845(f). That distinction makes sense: Congress regulated in the NFA the types of devices -- like short-barreled shotguns, bombs, or missiles -- that have no appropriate uses for sporting purposes or personal protection. Congress did not regulate other types of devices -- like handguns or dynamite -- that do have appropriate and lawful uses.

The ACCA does not draw that distinction: it covers all crimes involving the use of "explosives," without regard to the type of explosive at issue in the crime. The ACCA's enumerated category of crimes involving the use of explosives thus extends beyond the NFA's registration requirements. And the NFA sheds no light on the ACCA's residual clause, which encompasses crimes that "involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added). As the court of appeals has explained, possession of a sawed-off shotgun presents a serious potential risk because of the way in which such a weapon is typically used, and thus "[p]ossession of a short shotgun presents the type of danger similar in kind to the use of explosives."

Lillard, 685 F.3d at 777. The Eleventh Circuit in McGill erred by looking beyond that risk-of-injury requirement to the NFA.

Because the issue was not briefed in McGill, however, the Eleventh Circuit did not address its previous decision in Hammond. The Eleventh Circuit also did not address its previous decision in United States v. Miles, 309 Fed. Appx. 329 (2009) (unpublished; per curiam), holding that possession of a short-barreled shotgun is a violent felony for ACCA purposes. Id. at 331. The court in Miles recognized, as the court below did, that the Sentencing Guidelines treat possession of a short-barreled shotgun as a "crime of violence," and "cases interpreting crime of violence under § 4B1.2 provide important guidance in determining what is a violent felony under the ACCA because the definition[s] for both terms are virtually identical." Ibid. (internal quotation marks omitted). Moreover, to the government's knowledge, no other court has looked to the NFA in determining whether possession of a short-barreled shotgun qualifies under the ACCA's residual clause.

Petitioner also relies (Pet. 9-10) on the Seventh Circuit's decision in United States v. Miller, 721 F.3d 435 (2013), in which that court held that possession of a short-barreled shotgun under a Wisconsin statute did not constitute a "violent felony" under the ACCA. To determine whether "a violation of Wisconsin's short-barreled shotgun possession prohibition, in

the ordinary case, presents a serious potential risk of physical injury," the court looked to reported Wisconsin appellate decisions, which it found "often involve a passive possession in which the weapon is not exposed to others." Id. at 439-440. From this sample, the court concluded that "in the ordinary case, the possession of a short-barreled shotgun does not create any potential risks of harm to another person because all that is involved is the knowing possession of a weapon." Id. at 440.

The Seventh Circuit's analysis is flawed. The court placed dispositive weight on a handful of reported appellate decisions, 721 F.3d at 439-440, not recognizing that such decisions necessarily represent only a subset of prosecutions under the Wisconsin statute. Further, the court acknowledged that "a short-barreled shotgun is quite dangerous" and that "possession of a short-barreled shotgun suggests that the possessor might take a step, if presented with the chance, toward using it with its advantages of enhanced ability to conceal and wide spread of shot," id. at 440 -- precisely the concern articulated in Begay. See 553 U.S. at 146 (the ACCA focuses on prior convictions suggesting an "increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger").

In any event, no conflict exists between Miller and the decision below because of key differences between the Wisconsin

statute in Miller and the Minnesota statute at issue here. The Wisconsin statute at issue in Miller sweeps more broadly and contains fewer permitted exceptions than the Minnesota statute. Wisconsin, but not Minnesota, criminalizes the sale and purchase of a short-barreled shotgun, compare Wis. Stat. Ann. § 941.28(2), with Minn. Stat. Ann. § 609.67(2), and the Minnesota statute provides a specific exception, not available in Wisconsin, for individuals who possess short-barreled shotguns that the State Bureau of Criminal Apprehension has determined "by reason of the date of manufacture, value, design or other characteristics to be primarily collector's items, relics, museum pieces or objects of curiosity, ornaments or keepsakes, and are not likely to be used as weapons," Minn. Stat. Ann. § 609.67(3)(3). The more limited nature of the Minnesota statute confirms that, whatever may be the case in Wisconsin, the "ordinary case" of possession of a short-barreled shotgun under Minnesota law (as under federal law) "presents a serious potential risk of physical injury to another," Sykes, 131 S. Ct. at 2273, and thus constitutes a "violent felony" under the ACCA.[5] And because Miller concerned a materially

[5] To the extent that reported decisions provide evidence of whether a conviction for a certain offense ordinarily involves a risk of harm to others, many of the reported Minnesota decisions involve the use of violence. See State v. Behl, 564 N.W.2d 560, 563 (Minn. 1997) (short-barreled shotgun used in a murder); Johnson v. State, 421 N.W.2d 327, 329 (Minn. 1988) (short-barreled shotgun used in an assault); State v. Knaeble, 652 N.W.2d 551, 552-553 (Minn. Ct. App. 2002) (defendant was in

distinguishable Wisconsin statute, it does not conflict with the decision below. Even if there was such a conflict, intervention by this Court would be premature because the other courts of appeals had not had an opportunity to address the question presented post-Sykes.

c. Petitioner also cites (Pet. 8) the Fourth Circuit's unpublished decisions in United States v. Haste, 292 Fed. Appx. 249 (2008) (per curiam), and United States v. Ross, 416 Fed. Appx. 289 (2011) (per curiam). Neither case creates binding circuit precedent, and there is no circuit conflict warranting this Court's review.

In Haste, the Fourth Circuit held, in an unpublished, per curiam opinion and without analysis, that a defendant's prior North Carolina conviction for possession of a weapon of mass destruction (specifically, a sawed-off shotgun) is not an ACCA "violent felony." 292 Fed. Appx. at 250. In a subsequent case interpreting "crime of violence" under the Guidelines, however, the Fourth Circuit held that possession of a sawed-off shotgun is a "crime of violence," and it specifically noted that Haste "provides no precedential authority." United States v. Hood, 628 F.3d 669, 671-672 (2010). Then, in Ross, the Fourth Circuit

---

possession of a short-barreled shotgun when he threw a gas can at his brother, threatened to "chop his head off," and then threatened law enforcement officers with a hammer); State v. Stafford, 385 N.W.2d 392, 393-394 (Minn. Ct. App. 1986) (short-barreled shotgun used in a shootout with police).

reiterated its view that a prior conviction for possession of a sawed-off shotgun qualifies as a "crime of violence" for Guidelines purposes. 416 Fed. Appx. at 291. In so doing, the court followed Hood and did not question whether such conduct would constitute a "violent felony" under the ACCA. The Fourth Circuit's precedential decisions are therefore consistent with the decision below. And all three decisions were issued before Sykes, which clarified the appropriate analysis under the residual clause. For that reason as well, further review of the decision below is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MYTHILI RAMAN
Acting Assistant Attorney General

JAMES I. PEARCE
Attorney

FEBRUARY 2014