No. 09-11311

In The Supreme Court of the United States

MARCUS SYKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE PETITIONER

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QUESTION PRESENTED

Whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 598 F.3d 334 (7th Cir. 2010) and is reproduced in the Joint Appendix Volume I (hereinafter I J.A.) at 27.

Mr. Sykes was sentenced in the United States District Court for the Southern District of Indiana on October 8, 2008, and judgment was entered on October 14, 2008. *United States v. Sykes*, 1:08-CR-95 LJM/KPF (S.D. Ind. Oct. 14, 2008).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on March 12, 2010, and amended the opinion on March 22, 2010, to correct a technical error.[1] Petitioner timely filed his petition for writ of certiorari on June 9, 2010, and the Court granted the petition on September 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] The amended opinion corrected the description of a person subject to the Armed Career Criminal Act as being a person previously "convicted of two or more violent felonies" to read "convicted of three or more violent felonies." *See Sykes*, 598 F.3d at 335.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions – the Sixth Amendment to the Constitution, 18 U.S.C. § 922(g) and 18 U.S.C. § 924(e), and Ind. Code § 33-44-3-3 (2003) – are reproduced in an appendix at the end of this brief.

STATEMENT OF THE CASE

Marcus Sykes pled guilty in 2008 in federal court to possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). I J.A. 1 (Docket # 26). Ordinarily, this offense is punishable by a term of imprisonment not to exceed ten years. 18 U.S.C. § 924(a)(2). Where, however, a defendant has three qualifying convictions for a "violent felony" or "serious drug offense," the penalty increases to a minimum of fifteen years under the Armed Career Criminal Act (hereinafter ACCA), 18 U.S.C. § 924(e). The ACCA defines "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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).

Mr. Sykes had two prior convictions that unquestionably qualified as ACCA predicates. Presentence Investigation Report, Joint Appendix Vol. II Under Seal (hereinafter II J.A.) 5. For the third offense, the Presentence Investigation Report listed a 2003 Indiana conviction for resisting law enforcement. *Id*. This conviction was sustained under Indiana Code § 35-44-3-3. *United States v. Sykes*, 598 F.3d 334, 335 (7th Cir. 2010), I J.A. 28. Section (a)(3) of that statute makes it a crime to:

> knowingly or intentionally . . . flee[ ] from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop. . . .

Ind. Code § 35-44-3-3(a)(3). Normally, the (a)(3) offense constitutes a Class A misdemeanor under Indiana law. *Id.* However, it is enhanced to a "Class D felony if . . . the person uses a vehicle to commit the offense." Ind. Code § 35-44-3-3(b)(1)(A). Mr. Sykes was convicted under this subsection of using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop. He was not convicted of the distinct crime of operating a

vehicle in a manner that creates a substantial risk of bodily injury while fleeing, which is separately punishable as a felony under § 35-44-3-3(b)(1)(B). That provision applies to all the offenses in subsection (a) of the statute, if, "while committing [the] offense . . . , the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person." Ind. Code § 35-44-3-3(b)(1)(B).

Mr. Sykes objected to the application of the enhanced penalty provision of the ACCA. II J.A. 20. He acknowledged that the Seventh Circuit's decision in *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009), held that a conviction for fleeing a law enforcement officer in a vehicle under Indiana Code § 35-44-3-3(b)(1)(A) was a "violent felony." *Id.* He argued, however, that the *Spells* decision was contrary to current Supreme Court law. *Id.* The district court overruled the objection, finding that Mr. Sykes's conviction qualified as a violent felony. I J.A. 13-14. The court sentenced Mr. Sykes to 188 months of incarceration pursuant to the enhanced penalty provisions of the ACCA and U.S.S.G. § 4B1.4. I J.A. 1 (Docket # 28); *id*. at 24 (sentencing transcript).

Mr. Sykes appealed from the district court's ruling. He asked the United States Court of Appeals for the Seventh Circuit to reconsider its decision in *Spells* in light of this Court's recent decision in *Chambers v. United States*, 129 S. Ct. 687 (2009), as

well as the circuit court decisions in *United States v. Harrison*, 558 F.3d 1280, 1296 (11th Cir. 2009), and *United States v. Tyler*, 580 F.3d 722, 726 (8th Cir. 2009), which held that state statutes essentially identical to Indiana Code § 35-44-3-3(a)(3) and (b)(1)(A) were not violent felonies under the ACCA. I J.A. 33-34. The court of appeals acknowledged that *Spells* was in conflict with *Harrison*, I J.A. 35, but declined to overrule *Spells* and affirmed Mr. Sykes's classification as an armed career criminal and the 188-month sentence, I J.A. 38.

SUMMARY OF ARGUMENT

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides enhanced sentences for defendants who have three convictions for violent felonies. This case concerns the application of the ACCA's definition of "violent felony" as an offense punishable by more than one year of imprisonment that is "burglary, arson, or extortion, involves the 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)(ii). This Court has explained that the "otherwise" clause of § 924(e)(2)(B)(ii) looks back to the enumerated violent crimes in the definition – burglary, arson, extortion, and explosives offenses – and encompasses "only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" *Begay v. United States*, 553 U.S. 137, 142 (2008). An offense is

similar to the enumerated crimes if it is "roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id*. at 143. Under *Begay*, crimes that qualify as similar under the "otherwise" clause "all typically involve purposeful, 'violent' and 'aggressive' conduct." *Id.* at 144-45.

The Indiana offense of which Mr. Sykes was convicted did not involve violent, aggressive conduct. Mr. Sykes was convicted of felony resisting arrest by fleeing in a motor vehicle from a police officer who had ordered him to stop. Ind. Code § 35-44-3-3(a)(3) and (b)(1)(A). In determining whether this crime fits within the "otherwise" clause, the Court must look to "conduct encompassed by the elements of the offense, in the ordinary case[.]" *James v. United States*, 550 U.S. 192, 208 (2007). The elements of Mr. Sykes's offense require only that one who is driving decline to heed an order to stop – no more. These elements plainly do not encompass violent or aggressive conduct; this is confirmed by the existence of a separate provision under the same Indiana statute punishing flight from a law enforcement officer that creates a substantial risk of bodily injury to another person. Ind. Code § 35-44-3-3(b)(1)(B). While this separate flight offense could arguably qualify as a violent felony under § 924(e)(2)(B)(ii) and *Begay*, the two offenses are distinct, and, as the Court explained in *Chambers v. United States,* 129 S. Ct. 687, 690 (2009), it is important to keep offenses in their proper categories in making ACCA determinations. The specific Indiana flight offense of which Mr. Sykes

was convicted falls outside the category of violent, aggressive offenses, and thus falls outside the ACCA.

The Seventh Circuit, in ruling that Mr. Sykes's Indiana offense was a violent felony, is in conflict with this Court's teachings. Instead of looking to see if the conduct encompassed by the statute was purposeful, violent, *and* aggressive, as *Begay* instructs, the Seventh Circuit conflated violence and aggressiveness with mere purposefulness, concluding that a defendant's "purposeful decision to do something that is inherently likely to lead to violent confrontation is an aggressive, violent act." *Sykes*, 598 F.3d at 336. Instead of looking to see what conduct the specific offense of conviction encompassed, as *James* instructs, the court engaged in conjecture about what might happen after the occurrence of the statutorily required conduct. Instead of using the statutory categories, as *Chambers* instructs, the court blurred them, evaluating Mr. Sykes's Indiana flight offense as if the elements of the different Indiana offense of flight creating a substantial risk of injury applied. The court of appeals speculated that Mr. Sykes's flight offense might conceivably cause some risk of injury even though he was expressly not convicted of the separate risk-of-injury offense. This Court's precedent does not permit speculation beyond the actual offense of conviction. Indeed, such speculation invites the sort of extra-element fact-finding that, as this Court has noted, would raise serious constitutional concerns under the Sixth Amendment. *James*, 550 U.S. at 214.

The Indiana offense of which Mr. Sykes was convicted is neither similar in kind nor in degree of risk posed to burglary, arson, extortion or explosives crimes. It is not a violent or aggressive offense, and thus is not a violent felony within the meaning of the "otherwise" clause of § 924(e)(2)(B)(ii). Mr. Sykes could not be subjected to the increased punishment of the ACCA. The Seventh Circuit's decision must be reversed, and Mr. Sykes's sentence should be vacated.

ARGUMENT

THE INDIANA OFFENSE OF SIMPLE VEHICULAR FLEEING IS NOT A VIOLENT FELONY UNDER THE ACCA.

The Armed Career Criminal Act increases the maximum and minimum prison terms for persons convicted of illegally possessing firearms or ammunition if they have three previous convictions for a "violent felony." 18 U.S.C. § 924(e). The violent felony definition has two components. First, a conviction may qualify as a violent felony if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Second, a conviction may qualify if it 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)(ii). Only the final part of the definition is at issue here: Mr. Sykes's offense has no element of physical force, and it is not

burglary, arson, extortion, or an explosives offense. Accordingly, it can qualify as an ACCA predicate only if it "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id*.

Using the "categorical approach" developed in *Taylor v. United States*, 495 U.S. 575 (1990), this Court makes the determination whether a previous conviction is a "violent felony" by "examin[ing] it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay*, 553 U.S. at 141. In *James v. United States*, 550 U.S. 192 (2007), this Court explained that "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." *Id*. at 208 (emphasis added). When the elements of Mr. Sykes's offense are considered, they do not meet this test. To qualify as an ACCA predicate under the "otherwise" clause, a prior offense must be "roughly similar in kind as well as in degree of risk posed" to burglary, arson, extortion, and use of explosives. *Begay,* 553 U.S. at 143. Mr. Sykes's offense is neither.

A. Simple Vehicular Fleeing Is Not Similar in Kind to Burglary, Arson, Extortion or Explosives Offenses.

To be similar in kind to the offenses enumerated in 18 U.S.C. § 924(e)(2)(B)(ii), a crime must involve

purposeful, violent, and aggressive conduct. *Begay*, 553 U.S. at 144-45; *see also Chambers v. United States*, 129 S. Ct. 687, 692 (2009) (failure to report not violent felony because it "amounts to a form of inaction, a far cry from the purposeful, violent, and aggressive conduct" at issue in ACCA's enumerated offenses) (internal quotation marks omitted). As both the text and the history of the statute made clear, mere risk is not enough. *Begay*, 553 U.S. at 143-44. Thus, even an offense like driving under the influence, which the Court assumed to "present a serious potential risk of physical injury to another," could not rise to the level of a "violent felony" under the ACCA because it was "simply too unlike the provision's listed examples." *Begay*, 553 U.S. at 142.

Like driving under the influence, vehicular fleeing as defined in Indiana Code § 35-44-3-3(b)(1)(A) is simply too unlike the listed offenses to be a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii). The elements of the offense are that the defendant (1) knowingly or intentionally (2) fled from a law enforcement officer after the officer identified himself and ordered him to stop, and (3) used a vehicle in fleeing. *Woodward v. State*, 770 N.E.2d 897, 901 (Ind. App. 2002). In *Woodward*, the Indiana Court of Appeals rejected the defendant's contention that the court should "graft onto [§ 35-44-3-3(b)(1)(A)] the requirement that the flight be more than merely failing to stop." *Id*. This Court is bound by the state court's "interpretation of state law, including its determination of the elements." *Johnson v. United States*, 130 S. Ct.

1265, 1269 (2010). These elements do not meet the test set out in *Begay*.

A violation of § 35-44-3-3-(b)(1)(A) may be considered "purposeful" to the extent that it requires proof of knowledge or intent.[2] But not all purposeful crimes are "aggressive" and "violent" so as to qualify as ACCA predicates. For example, the crime at issue in *Chambers* (failure to report to a penal institution) required the same mens rea element, "knowingly," as the crime at issue here, yet this Court recognized that it was not sufficiently aggressive or violent to constitute a "violent felony." 129 S. Ct. at 691-92.

The Seventh Circuit's decision ignored this Court's teachings by construing a purposeful act alone to be sufficient to qualify the vehicular fleeing offense as a "violent felony." As the Seventh Circuit put it, "[t]he offender's purposeful decision to do something that is inherently likely to lead to violent confrontation is an aggressive, violent act," *United States v. Sykes*, 598 F.3d 334, 336 (7th Cir. 2010), I J.A. 31, and "this combination of mental state and likelihood of confrontation with authorities is

[2] Circuit Judge Richard Posner has recently offered an alternative interpretation. In *United States v. Welch*, 604 F.3d 408 (7th Cir. 2010), the court followed *Sykes* in holding that "aggravated fleeing" is a "violent felony." In his dissent, Judge Posner said, "'purposeful' should be interpreted to mean trying to harm a person's person or property, which is characteristic of the enumerated crimes." *Id*. at 434. Such analysis would foreclose the result reached by the court of appeals in Mr. Sykes's case.

aggressive and violent because it is an invitation to, or acceptance of the potential violent outcome by the offender." *Id*. at 337.

The Seventh Circuit's speculation as to the possible future consequences of the offense improperly expanded upon the elements. The elements of the Indiana offense of which Mr. Sykes was convicted do not encompass conduct that presents a serious potential risk of physical injury to another. Yet the court of appeals held that a district court could base an enhanced sentence on its findings that the "typical" commission of the offense would present such a risk, though the statute did not require or even contemplate it. *Sykes*, 598 F.3d at 335-36. This holding reads the § 924(e) "otherwise" clause as allowing a federal sentencing court to find conduct relating to the state offense that is outside the definition of the offense.

This Court rejected this approach in *James*. The *James* Court made clear that, in assessing whether an offense qualified under § 924(e)'s "otherwise" clause, the federal courts could consider only the conduct encompassed by the elements of the offense. 550 U.S. at 208. This rule was necessary to safeguard the Sixth Amendment right that any factual determination that increases a maximum statutory sentence must be proven to a jury beyond a reasonable doubt or admitted by the defendant in a guilty plea. *See James*, 550 U.S. at 214 (rejecting Sixth Amendment challenge); *see generally Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Seventh Circuit's approach ignores the *James* rule and revives the

serious constitutional problems posed by § 924(e)'s "otherwise" clause. This Court has long recognized that an interpretation that creates a serious question regarding a statute's constitutionality should be rejected if the statute can fairly be read in a way that avoids the constitutional doubt. *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."). The Seventh Circuit's reading violates this venerable rule.

The Seventh Circuit's speculation also improperly expanded the time frame of the offense. As this Court explained in *Chambers*, the "relevant time" under the "otherwise" clause of § 924(e)(2)(B)(ii) is the time the crime is committed, not the aftermath of the crime. 129 S. Ct. at 692 ("While an offender who fails to report must of course be doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury."). The Indiana vehicular fleeing offense is complete when the person fails to stop after a police officer has identified himself and ordered the person to stop. State precedent makes this clear. In *Swain v. State*, No. 02A03-0908-CR-387, 2010 WL 623720 (Ind. App. Feb. 23, 2010) (unpublished opinion), for example, the court upheld a conviction, under Indiana Code § 35-44-3-3(b)(1)(A), of a defendant who drove for 10 or 15 seconds after a person being chased on foot by police officers jumped into her car. *See id.* at *2. In *Woodward v. State*, 770 N.E.2d 897 (Ind.

App. 2002), the defendant testified that when he became aware of the officer's lights and siren, he did not stop immediately but waited until he came to "a clear, well-lighted place to stop where there would be someone who knew him." *Id.* at 901. In affirming his conviction, the Indiana Court of Appeals said, "we cannot say that a person who has admitted to knowing that a police officer wishes to effectuate a traffic stop can, without adequate justification, choose the location of the stop." *Id*. at 902. Since the element of flight under (b)(1)(A) is no "more than merely failing to stop," *id*. at 900, there is no basis for inferring that any aftermath, let alone a violent one, is an intrinsic component of the offense.

Finally, the Seventh Circuit's ruling is particularly inapt in light of the other provisions of the statute under which Mr. Sykes was convicted. That statute expressly makes a distinction between the simple vehicular fleeing offense under Indiana Code § 35-44-3-3(b)(1)(A) and the offense under § 35-44-3-3(b)(1)(B), which includes as an element "operat[ing] a vehicle in a manner that creates a substantial risk of bodily injury to another person." This element is indistinguishable from the language of the "otherwise" clause of § 924(e)(2)(B)(ii).[3] The Seventh Circuit

[3] The Seventh Circuit has held that a conviction under Indiana Code § 35-44-3-3(b)(1)(B) is a "crime of violence" under the definition of that term in U.S.S.G. § 4B1.2. *United States v. Jennings*, 544 F.3d 815, 820 (7th Cir. 2008). The definition of "crime of violence" in U.S.S.G. § 4B1.2 is nearly identical to the

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expressly held that Mr. Sykes was convicted of the § 35-44-3-3(b)(1)(A) offense. *Sykes*, 598 F.3d at 336, I J.A. 30. Yet despite the express absence of any risk element in Mr. Sykes's offense, the court of appeals held it to be an ACCA predicate.

Unlike the Seventh Circuit, the Eleventh Circuit has shown the proper respect for the statutory structure created by a state legislature when holding that a violation of the Florida fleeing statute,[4] which is essentially identical to the Indiana statute, is not a "violent felony." *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009). As that court said, "[o]ur 'categorization' of the crime here, as it is ordinarily committed, reflects the Florida legislature's decision to differentiate between very different types of fleeing behavior." *Id*. at 1293. Similar differentiations are made in Indiana, where other subsections of the statute of Mr. Sykes's conviction expressly include, as elements, even more serious consequences of fleeing, including injury or death. *See, e.g.*, Ind. Code § 35-44-3-3(b)(2), (b)(3). The presence of these crimes make it even clearer that Mr. Sykes's crime is not of the sort that can qualify as an ACCA predicate.

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definition of "violent felony" in 18 U.S.C. § 924(e). *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008).

[4] The Florida statute provides in relevant part: "Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree. . . ." Fla. Stat. § 316.1935(2).

Even if one assumes that the crime of failing to stop for a police officer, like failing to report to serve a sentence, is motivated by a desire to avoid detention by law enforcement authorities, that motivation still does not render the offense similar in kind to the ACCA's enumerated offenses. In *Chambers*, the Court rejected the government's argument that a failure to report to serve a sentence demonstrated a "special, strong aversion to penal custody" as "beside the point." 129 S. Ct. at 692. The Court said that even assuming "the relevance of violence that may occur long after an offender fails to report, . . . the question is whether such an offender is significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical injury.'" *Id.* at 692. That question was answered in the negative in *Chambers*; the same answer must be given here.

B. The Government Failed to Show That the Risk of Harm in Simple Vehicular Fleeing Is Similar in Degree to the Risk Posed by Burglary, Arson, Extortion or Explosives Offenses.

Because simple vehicular fleeing is not violent and aggressive, the offense is not similar in kind to the offenses enumerated in § 924(e)(2)(B)(ii), and thus is not a violent felony under the ACCA. On that basis alone, this Court should reverse the Seventh Circuit's contrary judgment. That nothing in the record shows that the offense posed sufficient risk to qualify as an

ACCA predicate provides an additional reason for reversal. *Cf. Chambers*, 129 S. Ct. at 691 (relying on empirical data in holding that failure to report to penal institution was not "violent felony"). The government did not present the district court or the court of appeals with any empirical data regarding the risk of injury created by a violation of Indiana Code § 35-44-3-3(b)(1)(A). The burden was on the government to prove that the ACCA penalty enhancement applied to Mr. Sykes. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975) (due process requires prosecutor to prove absence of heat of passion before court can impose higher sentence for homicide); *see also Chambers*, 129 S. Ct. at 693 (describing statistics from the U.S. Sentencing Commission and finding for the defense, in part because "the Government provides no other empirical information"); *Harrison*, 558 F.3d at 1299 (holding that government has burden to prove that prior offense is a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii)). The government did nothing to meet that burden.[5]

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[5] The concurring and dissenting opinions in *Begay* offered competing versions of a statistical approach in "otherwise" clause cases. *Compare Begay*, 553 U.S. at 154 (Scalia, J., concurring in the judgment) (the *ratio* between incidents of harm and the number of incidents of the offense must be as high as the ratio associated with the least risky enumerated offense) *with* 553 U.S. at 156 & nn.2-3 (Alito, J., dissenting) (large number of injuries resulting from conduct underlying offense sufficient to establish "serious potential risk of injury"). Neither approach need be considered here, as the government has presented no data whatsoever. This is hardly surprising, since, in the unlikely

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In the absence of empirical data demonstrating the potential risk of physical injury, courts are left with simple "conjecture as to the possible danger of physical injury[.]" *United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2007) (Posner, J.), *rev'd*, 129 S. Ct. 687 (2009). Conjecture, this Court taught in rejecting the government's risk arguments in *Chambers*, cannot be enough to demonstrate the type of risk required by § 924(e)(2)(B)(ii). Because conjecture cannot demonstrate the risk involved in the § 35-44-3-3(b)(1)(A) offense, the government cannot show that the offense is similar in degree of risk to that of burglary, arson, extortion, or use of explosives. Accordingly, it was error to treat the offense as a violent felony and to enhance Mr. Sykes's sentence.[6]

event that the annual number of injuries and the annual number of incidents of vehicular fleeing could be determined, the number of injuries attributable to violations of Indiana Code § 35-44-3-3(b)(1)(A) would likely be zero. Offenses involving such injuries would undoubtedly be charged under the other subsections of the statute that specifically contain risk of injury, injury, or death as an element. *See, e.g.*, Ind. Code § 35-44-3-3(b)(1)(B), (b)(2), and (b)(3).

[6] In the event that the Court finds it ambiguous whether § 924(e)(2)(B)(ii) was meant to encompass crimes like Mr. Sykes's, the rule of lenity requires that the statute be interpreted in his favor. *See Hughey v. United States*, 495 U.S. 411, 422 (1990); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978) (applying rule of lenity to federal statute that would enhance penalty).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 922(g) provides in relevant part:

> It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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18 U.S.C. § 924 provides in relevant part:

> (a)(1) Except as otherwise provided . . .
>
> (2) Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both
>
> * * *
>
> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; . . .

Ind. Code § 35-44-3-3 (2003) provided in relevant part:

(a) A person who knowingly or intentionally:

(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties;

(2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or

(3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop; commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).

(b) The offense under subsection (a) is a:

(1) Class D felony if:

(A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense; or

(B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

(2) Class C felony if, while committing any offense described in subsection (a), the person

operates a vehicle in a manner that causes serious bodily injury to another person; and

(3) Class B felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person.