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

REPLY BRIEF OF THE PETITIONER

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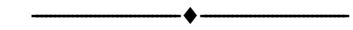
INTRODUCTION

The Armed Career Criminal Act (hereinafter "ACCA") requires the imposition of a fifteen-year mandatory minimum sentence upon gun possessors who have three previous convictions for a "violent felony." 18 U.S.C. § 924(e)(1) The district court imposed that sentence on Marcus Sykes, concluding that his Indiana conviction for failing to stop his vehicle when ordered was a violent felony. The government argues that the sentence should be affirmed. The principal problem with the government's argument is that it ignores the specific Indiana statute under which Mr. Sykes was convicted. Indiana Code § 35-44-3-3(b)(1)(A) (hereinafter "(b)(1)(A)") makes it a crime for a person to knowingly or intentionally flee in a vehicle after being ordered to stop by a police officer. This statute does not encompass conduct creating a serious potential risk of physical injury to another. A separate Indiana statute, Indiana Code § 35-44-3-3(b)(1)(B) (hereinafter "(b)(1)(B)"), criminalizes vehicular flight in a manner that risks injury. Ignoring the distinctions drawn by the Indiana legislature, the government seeks affirmance not on Mr. Sykes's specific crime, but on its posited generic version of vehicular flight. This generic-offense approach runs counter to the statutory language and this Court's precedents, particularly *Chambers v. United States*, 129 S. Ct. 687 (2009), which require a

focus on the specific crime that the government seeks to characterize as a "violent felony."

The government's unwillingness to accept the crime of conviction is the primary, but not the only, reason that its arguments fail. They also fail because they misread *Begay v. United States,* 553 U.S. 137 (2008) and *Chambers*. *Begay* held that, to qualify as a violent felony under the "otherwise" clause, a crime must be "violent and aggressive." *Chambers* reiterated those requirements. The government, however, insists that *Chambers* allows a conclusion that an offense is violent and aggressive on a mere showing of affirmative conduct that might lead to a confrontation. That assertion is wrong. Further, the government's argument relies on speculation concerning the degree of risk posed by the conduct ordinarily underlying a violation of (b)(1)(A). Finally, acceptance of the government's arguments creates serious Sixth Amendment constitutional concerns which can, and should be, avoided. For all these reasons, the government's arguments must be rejected and Mr. Sykes's sentence must be vacated.



ARGUMENT

A. The Government's Construction of a Generic Vehicular Fleeing Offense Is Contrary to the Statutory Language and to This Court's Teachings That the Particular State Crime of Conviction Is the Focus of § 924(e)'s "Otherwise" Clause.

The government's argument rests on the premise that the issue is whether "vehicular fleeing" as a generic offense is a "violent felony." That premise is flawed. Section 924(e)(2)(B)(ii)'s language looks not to a generic offense, but to the particular "crime." In *Chambers,* the Court gave effect to that plain language when it rejected the government's notion that all escapes are created equal. The proper application of the "otherwise" clause, the Court explained, was to look not at a general, generically defined "escape" offense, but to look at the particular statute under which the defendant had been convicted, its wording, and "the nature of the behavior that likely underlies a statutory phrase." *Chambers,* 129 S. Ct. at 690. The government appears not to have heeded that explanation. Its brief posits a generic vehicular fleeing offense, rather than focusing on the elements of the Indiana statute Mr. Sykes was convicted of violating.

In part, the government's error appears to arise from its confusion about the two distinct analyses that apply to the two distinct definitions set out in § 924(e)(2)(B)(ii). A "violent felony" is "any crime punishable by imprisonment for a term exceeding one year . . . that – (ii) is burglary, arson, 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). A "crime" may be a violent felony either because it "is" an enumerated offense, or because it presents a risk similar to the risks posed by the enumerated offenses.

When a defendant's prior conviction is asserted to be for one of the enumerated offenses, the question is whether the legislatively defined "crime" of which the defendant was convicted "is burglary, arson, extortion, or involves the use of explosives." The "is" question asks whether the crime of conviction shares the essential characteristics of the enumerated offense. For that question to be answerable, the essence of the enumerated offense had to be delineated.

In its opinion in *Taylor v. United States*, 495 U.S. 575 (1990), the Court established the approach to be used to analyze whether a state crime of burglary is the enumerated offense of "burglary" under the ACCA, and it provided a uniform generic definition of burglary "independent of the labels employed by various States' criminal codes." 495 U.S. at 592. This ensured a consistent definition of a crime that Congress specifically selected for inclusion as a "violent felony."

For offenses asserted to be under the "otherwise" clause, however, the question is not whether the crime "is" a particularly enumerated offense. Instead, the question is whether the crime is similar to the enumerated offenses both in kind and in the degree of

risk posed. *Begay,* 553 U.S. at 143. In making these determinations, the analysis focuses explicitly on the state's definition of the crime, not on a generic offense. *Chambers*, 129 S. Ct. at 690-91; *cf. Johnson v. United States*, 130 S. Ct. 1265, 1269 ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2)."). Thus the elements of the state statute, as defined by the state's courts, determine the way in which the crime is "ordinarily committed." *Chambers*, 129 S. Ct. at 691 (breaking down Illinois statute into separate elements for purpose of identifying relevant crime); *Begay*, 553 U.S. at 141 (quoting New Mexico's DUI statute for the purpose of identifying the relevant crime); *James v. United States*, 550 U.S. 192, 197 (2007) ("The question before the Court, then, is whether attempted burglary, as defined by Florida law, falls within the ACCA's residual provision . . . ").[1]

As discussed in Mr. Sykes's opening brief, Pet. Br. 10, the elements of the Indiana statute under which Mr. Sykes was convicted are that a person: 1) knowingly or intentionally; 2) fled from a law enforcement officer after the officer identified himself and ordered

[1] In describing the "typical" or "ordinary" case, and in asking this Court to hold that vehicular fleeing constitutes a "violent felony," the government appears to ask for a general advisory opinion concerning *all* vehicular fleeing offenses rather than address the narrower issue presented in this case involving Indiana Code § 35-44-3-3(b)(1)(A).

him to stop; and 3) used a vehicle in fleeing.[2] *See Woodward v. State*, 770 N.E.2d 897 (Ind. App. 2002) (noting that violation of (b)(1)(A) requires nothing more than failure to stop). These elements and the offense they define, and the Indiana statutory scheme addressing vehicular fleeing in which they exist, are what must be considered in assessing whether Mr. Sykes has been convicted of a violent felony. *See Chambers*, 129 S. Ct. 691 (recognizing that state statute set out different types of offenses and declining to treat them all the same under generic "escape" rubric). The statute defining Mr. Sykes's crime treats non-risky flight conduct differently from flight conduct that creates risk to another. As was true in *Chambers*, the government's approach offends the state legislature's differing treatment of the defined crime and the plain language of § 924(e)(2)(B). Like failure to report, simple vehicular flight as defined in (b)(1)(A) is not a violent felony.

B. The Specific Indiana Crime of Which Mr. Sykes Was Convicted Is Not a Violent Felony, Despite the Government's Effort to Subsume the Crime Into a More Serious Offense.

Chambers explained that, for purposes of the "otherwise" clause of the ACCA, it is necessary to look at the particular prior crime of conviction. Escape, a

[2] "Vehicle" is defined by Indiana statute to include any device for transportation by land, water, or air. Ind. Code § 35-41-1-28.

general term, was insufficient to allow a court to discern whether a particular escape crime was a violent felony. The same is true for offenses involving vehicular flight. The Eleventh Circuit recognized this in *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009). The *Harrison* court concluded that, like the crime of "escape," all vehicular fleeing offenses should not be treated equally, "especially where the [state] statute differentiates between types of willful fleeing." *Id*. at 1294.[3]

Like the escape statute in *Chambers* that contained various forms of escape conduct, Indiana Code § 35-44-3-3 describes different kinds of vehicular flight that must be separated for ACCA purposes. Mr. Sykes was convicted of violating Indiana Code § 35-44-3-3(b)(1)(A): knowingly or intentionally using a vehicle to flee from a law enforcement officer. Other types of vehicular fleeing proscribed under Indiana Code § 35-44-3-3 include flight resulting in death or injury or creating a substantial risk of injury as elements. The "ordinary conduct" underlying these latter offenses may well qualify them as violent felonies, but the "ordinary conduct" encompassed by the elements set forth in (b)(1)(A), Mr. Sykes's offense,

[3] The Eleventh Circuit has since held that conduct underlying another form of vehicular flight under Florida law that includes the elements of either driving at high speed or wantonly disregarding the safety of other persons is a crime of violence under U.S.S.G. § 4B1.2. *United States v. Harris*, 586 F.3d 1283 (11th Cir. 2009), *petition for cert. pending*, No. 09-10868 (filed May 14, 2010).

does not qualify as a predicate offense under the "otherwise" clause of the ACCA.

The government repeatedly disregards the importance of the distinction chosen by the Indiana General Assembly to differentiate between types of vehicular flight. It attempts to justify its disregard by contending that (b)(1)(A) (simple vehicular flight) and (b)(1)(B) (vehicular flight risking serious bodily injury) are "simply alternative forms of aggravated resistance to law enforcement" and that "neither is a lesser included offense of the other." Gov't Br. 48-49 & n.11. The government's contention, however, is simply in error under this Court's well established rule in *Blockburger v. United States*, 284 U.S. 299, 304 (1932): "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." While some (b)(1)(B) flight offenses may not include (b)(1)(A) as a lesser included offense, vehicular flight necessarily does.

Subsections (b)(1)(A) and (b)(1)(B) both enhance the penalty for fleeing from a law enforcement officer in violation of Indiana Code § 35-44-3-3(a)(3). In addition to the fleeing prohibited by (a)(3), the state can establish the violation of (b)(1)(A) by proving a single additional fact: that the person used a vehicle. To establish a violation of (b)(1)(B), the state must prove two additional facts: (1) that the defendant

operated a vehicle, and (2) that he did so in a manner that "create[d] a substantial risk of bodily injury to another person."[4] If the position of the government were correct, a single act of fleeing in a vehicle could result in consecutive sentences under both statutes, but that would violate the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States. *See generally Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).[5]

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[4] It is conceivable that a person could "use" a vehicle without "operating" it but the converse is not true. Proof that the person "operated" the vehicle would prove the use element of (b)(1)(A). Thus, the use/operate terminology does not create an element in (A) that is not found in (B).

[5] Nor do the cases cited by the government support the assertion that (b)(1)(A) is not a lesser included offense of (b)(1)(B). Gov't Br. 48-49 n.11. In *Zachary v. State*, 469 N.E.2d 744 (Ind. 1984), the Indiana Supreme Court upheld consecutive sentences for rape and criminal deviate conduct for a defendant who forced a woman to have intercourse and perform fellatio during a single incident. In a single paragraph of the opinion the court rejected the argument that criminal deviate conduct was a lesser included offense of rape because "the two offenses each require proof of one element which the other offense does not." *Id*. at 749.

In *Schmuck v. United States*, 489 U.S. 705 (1989), this Court held that a defendant indicted for mail fraud in a scheme to defraud that included rolling back the odometers on used cars was not entitled to a lesser included offense instruction pursuant to Fed. R. Crim. P. 31(c)(1). This rule provides that a defendant may be found guilty of "an offense necessarily included in the offense charged." The Court held that odometer tampering is not "necessarily included" in a charge of mail fraud. In contrast, Ind. Code § 35-44-3-3(b)(1)(A) is necessarily included in (b)(1)(B), so if Rule 31(c)(1) were applicable in Indiana courts it would

(Continued on following page)

In sum, focusing on the specific statutory provision under which Mr. Sykes was convicted and applying the proper analysis to that provision shows that his previous conviction under (b)(1)(A) does not qualify as a predicate offense under the "otherwise" clause of the ACCA.

C. The Government's Argument Converts *Begay*'s Requirements of "Violent and Aggressive" Conduct to Mere Active and Deliberate Conduct.

Begay made clear that, under the "otherwise" clause, a crime must be similar in kind to the enumerated offenses. 553 U.S. at 143. Similarity in kind means that the crime must, like the enumerated offenses, be purposeful, violent, and aggressive. *Id.* at 144-45.[6] The government maintains that Mr. Sykes's

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entitle a defendant charged with violating (b)(1)(B) to an instruction on the necessarily included offense of (b)(1)(A).

[6] This Court has not provided a precise definition of "purposeful" as the term is used in *Begay*. However, as noted in Petitioner's opening brief, Mr. Sykes concedes that a violation of subsection (b)(1)(A) may be considered "purposeful" to the extent that it requires knowledge or intent. Pet. Br. 11. Contrary to the government's assertion that Mr. Sykes is advocating a new test for "purposefulness" that would require a showing that the offense intrinsically involve "trying to harm a person's person or property," Gov't Br. 26 n.7, Mr. Sykes does not contend that such a showing is necessary under existing precedent. Rather, Mr. Sykes cited Circuit Judge Richard Posner's position simply for this Court's consideration. *See Welch v. United States*, 604 F.3d 408, 434 (7th Cir. 2010) (Posner, dissenting).

crime of conviction is an aggressive offense because all forms of vehicular flight involve affirmative conduct, not mere inaction like the failure to report crime at issue in *Chambers*. It contends that vehicular fleeing is violent because it occurs in the presence of police, thus constituting a clear challenge to an officer's authority and creating a risk of violent confrontation. Gov't Br. 27-31. These arguments misread the requirements of *Begay* and *Chambers*.

A crime is not aggressive simply because it involves active, deliberate conduct. *Begay* itself involved active and deliberate conduct – drinking to intoxication. *Chambers* did not alter *Begay*'s aggressiveness requirement. It held only that the passivity and inaction involved in a failure to report was not aggressive. It did not hold that an offense was aggressive if it involved any sort of affirmative action. *See Chambers*, 129 S. Ct. at 692. In this case, the specific proscribed conduct – a simple failure to stop a vehicle – is similarly unaggressive. "[A]ggressive may be defined as 'tending toward or exhibiting aggression,' which in turn is defined as 'a forceful action or procedure (as an unprovoked attack) esp[ecially] when intended to dominate or master.'" *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008) quoting Merriam-Webster's Collegiate Dictionary 24 (11th ed.2003). Leaving an order to stop unheeded and continuing to drive a car may be an affirmative act of disregard, but it is not a forceful action intended to dominate or master. Some crimes of vehicular fleeing may possibly be considered aggressive

depending on what is required by the statute that defines them, but the Indiana offense defined by (b)(1)(A) is not an aggressive offense.

Nor is the offense violent, contrary to the government's contention that a failure to stop creates a risk of confrontation sufficient to make the offense violent. The risk of confrontation in a case involving (b)(1)(A) is low when the fleeing driver is not operating the vehicle in a manner that creates a substantial risk of bodily injury to another. As the *Harrison* court noted, "a disobedient driver's failure to accelerate to a high rate of speed or to drive recklessly signals a different type of criminal and suggests an unwillingness to engage in violent conduct." 558 F.3d at 1295; *cf. United States v. Mosley*, 575 F.3d 603, 607 (6th Cir. 2009) (defendant's "knowing failure to comply with a lawful command – say, by refusing to produce information, by ignoring an officer's command not to cross the street or by failing to stay put at an accident scene – is no more aggressive and violent than walking away from custody, [citing *United States v. Ford*, 560 F.3d 420, 423 (6th Cir. 2009)], drunk driving, *Begay*, 128 S. Ct. at 1588, or a failure to report to prison, *Chambers*, 129 S. Ct. at 691-93.").

The government wrongly invokes *James v. United States,* 550 U.S. 192 (2007), to claim that the possibility of third-party encounters establishes that (b)(1)(A) involves "violent" conduct. Gov't Br. 29-30. The *James* opinion "considered only matters of degree, *i.e.*, whether the amount of risk posed by attempted burglary was comparable to the amount of

risk posed by the example crime of burglary. . . ." *Begay,* 553 U.S. 137, 142 (2008). After *James,* this Court established in *Begay* that predicate felonies must also manifest the same "type" of "purposeful, 'violent,' and 'aggressive' conduct" exemplified by the enumerated felonies. *Id*. at 145. The "violent" nature of burglary stems not from the risk of encountering an outsider, but from its generic elements requiring "unlawful or unprivileged entry into a building or other structure with [the] 'intent to commit a crime.'" *Id*. (citing *Taylor v. United States*, 495 U.S. 595, 598 (1990)). That the mere possibility that a motorist who fails to heed an officer's direction may be said to have had an encounter, or may have an encounter with an officer when the motorist eventually stops, fails to rise to a level of violence akin to a burglar's commitment to perpetrating more crime after an illegal entry. Indiana's non-violent vehicular flight lacks violent and aggressive conduct by legislative design. Violence and aggression may not be read into them by government speculation about things that may happen outside of the conduct encompassed by the elements of the crime of conviction.

Although *Begay*'s "purposeful, violent, and aggressive" test is used to determine whether an offense is similar in kind to the enumerated crimes, ultimately the question remains whether the crime is a "violent felony." The government's argument that Mr. Sykes's fleeing conviction was "violent," and therefore satisfies that aspect of the *Begay* test, is inconsistent with this Court's definition: "[e]ven by

itself, the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force. . . . When the adjective 'violent' is attached to the noun 'felony' its connotation of strong physical force is even clearer." *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010). Violence is not a speculative matter under the ACCA. It is either threatened or attempted and actualized. The elements of (b)(1)(A) do not involve any degree of force, let alone a "substantial degree of force" or a "strong physical force." The government's speculation does not change that.

Finally, the government, like the Seventh Circuit, relies on a study entitled "Firearm Use by Offenders," a survey of inmates in state and federal correctional facilities,[7] as evidence that "[a]n individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police, [he] would have a greater propensity to use that firearm in an effort to evade arrest." *Welch v. United States*, 604 F.3d 408, 425 (7th Cir. 2010) (quoting *United States v. Spells* 537 F.3d 743, 752 (7th Cir. 2008); Gov't Br. 32 (quoting *Welch*). This is mere conjecture, cloaked in a study that does not touch upon the relevant question.

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[7] Caroline Wolf Harlow, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders*, Bureau of Justice Statistics 11 (Nov. 2001), available at http://www.ojp.usdoj.gov/content/pub/pdf/fuo.pdf.

The survey was based on interviews of state and federal prison inmates in 1997, and was not limited to persons "convicted for brandishing or displaying a firearm" as suggested both by the government and by the Seventh Circuit in *Spells*. Thus, the analysis of the statistics in the *Spells* opinion and the government's brief includes inmates serving sentences for violent crimes in which the use of a gun is an integral part of the crime such as murder, armed robbery, and assault with a deadly weapon.

The analysis in the study cited by the Seventh Circuit and the government was of inmates who had used a gun during their offense.[8] The study found that 80.2% of state prison inmates and 48.6% of federal inmates who possessed a gun during the commission of their crime used the gun in some way; of those who had used a gun during their offense, 18.9% of state inmates and 11.6% of federal inmates used the gun to "get away." Wolf Harlow, *supra* at 11, Table 14. The Seventh Circuit erroneously concluded that this study demonstrates a "link between using a vehicle to flee an officer, and that same individual's likelihood of using a gun when fleeing in the future." *Spells*, 537 F.3d at 752.

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[8] Of the inmates surveyed, "an estimated 18% of the State prison inmates and 15% of the Federal prison inmates reported using, carrying, or possessing a firearm during the crime for which they were sentenced." Wolf Harlow, *supra* at 1.

The survey did not collect data regarding whether the person surveyed had a previous conviction for any variety of vehicular fleeing, let alone the low-risk vehicular fleeing as defined by (b)(1)(A), so none of the analysis in the survey includes that variable. Without it, the survey cannot support any assertion that there is a correlation between vehicular fleeing and using a firearm at some future time to harm another person. The Seventh Circuit's claim of a "link" is therefore incorrect. There is no link; there is only a leap by the Seventh Circuit from actual data on one subject to a speculative conclusion on an entirely different subject.

The government does not claim a "link." Instead, it uses the data as empirical veneer for its assertion that "[i]n the same way that a firearm can facilitate escape, so too can a motor vehicle. . . ." Gov't Br. 32. This is inaccurate and inapposite. It is inaccurate because a gun and a motor vehicle are very different in nature and thus do not facilitate fleeing in the same way. Brandishing a gun to "get away" is an inherently aggressive action threatening violence; driving away from a law enforcement officer is not. It is inapposite because the question is not whether driving away can facilitate an escape, it is whether driving away is indicative of a person likely to use a gun in the future. The study says nothing about that question. It does not bear in any way on the likelihood that a person convicted of vehicular flight, as defined in Indiana Code § 35-44-3-3(b)(1)(A), "later

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

The Court should reject the government's attempt to reduce *Begay*'s "purposeful, violent and aggressive" requirements to mere active and deliberate conduct.

D. The Government's Argument Casts the Net of Potential Risk of Harm Far More Broadly Than Is Justified by the Particular Offense at Issue in This Case.

In its brief, the government portrays the potential risk of harm from simple vehicular flight as comparable in degree to the risk created by ACCA's enumerated crimes. Gov't Br. 9. The problem with the government's argument is that it casts the net of potential risk of harm far more broadly than is justified by the particular offense at issue in this case. The cast is too broad both because of the government's speculation regarding the risk of confrontation escalating to violence and because the government relies on statistics that do not apply to Mr. Sykes's offense of conviction.

1. Risk of Confrontation Escalating to Violence.

In *James*, decided two years before *Chambers*, this Court observed that the main risk associated with attempted burglary is the potential for a face-to-face confrontation between the burglar and a third

party. *James*, 550 U.S. at 203. But *James* does not stand for the sweeping proposition that a risk of confrontation between an offender and a third party, by itself, renders any crime similar in risk to the enumerated offenses.

Indeed, any activity that brings citizens and police into contact, whether it be a *Terry* stop, a routine traffic stop, or an arrest pursuant to a warrant, carries a risk of confrontation that could escalate to violence. Yet immediate encounters between police and citizens, even those that occur following commission of an offense, do not necessarily present a risk comparable to the risks presented by the offenses enumerated in the ACCA. *See, e.g., United States v. Hopkins*, 577 F.3d 507, 514 (3d Cir. 2009) (crime of unlawfully removing oneself from arrest not a crime of violence; although "typical commission" of crime "does, indeed, present some potential risk of physical injury to another because it requires the arresting officer to use some degree of force to overcome the offender's behavior . . . . we would expect that the force with which the officer would be willing and/or required to employ would present materially less of a potential for physical injury to the officer than the potential for physical injury presented by the enumerated offenses"); *United States v. Mosley*, 575 F.3d 603, 607 (6th Cir. 2009) (prior conviction for resisting and obstructing police officer not crime of violence, as offense does not entail the same degree of risk of physical injury to other individuals as enumerated offenses). The risk of confrontation with an offender possessing an intent to commit a felony offense after

entering into a dwelling is significantly greater than any risk associated with an encounter by police with a driver who makes the spontaneous yet deliberate decision to disregard a police officer's order to stop. *See Harrison,* 558 F.3d at 1294 ("Indeed, the fact that the behavior underlying Florida's willful-fleeing crime, in the ordinary case, involves only a driver who willfully refuses to stop and continues driving on – but without high speed or recklessness – makes it unlikely that the confrontation will escalate into a high-speed chase that threatens pedestrians, other drivers, or the officer.").

The primary focus of the risk analysis is on the ordinary conduct underlying the offense itself, not merely the actions that others may take in response to the offender's behavior. In *Chambers*, this Court reserved the question of how much weight to accord to a possible response by law enforcement, finding that "even if we assume for argument's sake the relevance of violence that may occur long after an offender fails to report," the statistical evidence presented by the government in that case did not support a claim that the state crime created a serious risk of physical injury. 129 S. Ct. at 612. This Court's reservation in *Chambers* reflects an understandable hesitation in casting the net of potential risk of injury too wide, particularly given that the rest of the ACCA statutory definition of "violent felony" includes only a limited range of crimes that are themselves violent. To accept the government's argument that any encounter that may be speculated into a less-than-civil ending makes a crime a "violent felony" expands the

definition beyond what Congress intended or what the language it chose permits.

2. The Government's Statistical Evidence.

Contrary to the government's suggestion, Gov't Br. 16, Mr. Sykes does not contend that the government is required to present statistical evidence whenever a defendant disputes whether a prior conviction falls within the "otherwise" clause. However, statistical evidence can be crucial when the predicate crime's link to risk of physical injury is not obvious. For cases about which there is not widespread agreement regarding the potential risk created by the conduct constituting a violation of the statute, the use of "experience and common sense," Gov't Br. 16, as a standard does not give courts, advocates, and defendants an acceptable level of predictability as to whether a particular offense is a "violent felony." Relying on common sense, as the government advocates, is no different from the conjecture Circuit Judge Richard Posner described as an "embarrassment to the law." *United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2007), *rev'd*, 129 S. Ct. 687 (2009). Like the failure to report crime in *Chambers*, the existing circuit split on the issue presented here demonstrates that reasonable judges can reach conflicting conclusions based on their "experience and common sense." Considering the extraordinarily lengthy prison terms at stake in ACCA cases, empirical data takes on added significance.

The government's speculation that the "ordinary conduct" underlying (b)(1)(A) entails "a serious potential risk of a violent confrontation" is just that – speculation. Mr. Sykes would acknowledge that violence and mayhem can erupt during Hollywood-style high-speed chases, and that such conduct may place the safety of law enforcement officers, motorists, and pedestrians in danger. But that fact tells us nothing about the risk associated with the conduct underlying a violation of Indiana Code § 35-44-3-3(b)(1)(A). The data provided by the government here, which includes anecdotal examples from case law and media reports as well as statistics, are all based on conduct that goes beyond what is encompassed by the elements defining (b)(1)(A). The government's data sheds no light whatsoever on the degree of risk associated with the "typical case" when the only criminal conduct is a failure to stop driving when commanded to do so by police.

In sum, there is no empirical data that Mr. Sykes's previous conviction was for a crime that creates a serious potential risk of physical injury to another. Moreover, reliance by the federal judiciary on data such as what the government has presented here to override the statutory structure established by a state would be a serious affront to federalism and would create even greater uncertainty than currently exists regarding the meaning of a "previous conviction . . . for a violent felony." The Indiana General Assembly has distinguished between those vehicular fleeing cases that "create[ ] a substantial

risk of bodily injury to another person," Ind. Code § 35-44-3-3(b)(1)(B) and those that do not, Ind. Code § 35-44-3-3(b)(1)(A).[9] In the face of this careful delineation the government asks the Court to reject this categorization and hold that all vehicular flight "creates a substantial risk of bodily injury to another."

James, *Begay*, and *Chambers* all respect the statutory structure created by a state and the interpretations of the state statutes by its courts. There is no reason for the Court to deviate from that principle here. The structure the Indiana General Assembly has created for vehicular fleeing cases defines punishment in a manner that would treat similar cases similarly and establishes a reasonable, logical method for increasing the punishment as the conduct of the offender becomes more egregious.

E. Sixth Amendment and Constitutional Avoidance.

The government's overall approach and its disregard for the statutory distinctions drawn by the Indiana General Assembly reignite Sixth Amendment

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[9] The Seventh Circuit has said that an attempt to distinguish between "substantial risk," the language used in (b)(1)(B), and "serious potential risk," the language of the "otherwise" clause, is "a semantic quibble." *United States v. Jennings*, 544 F.3d 815, 820 (7th Cir. 2008).

concerns. This Court held in *James* that the categorical approach established by *Taylor* does not violate the Sixth Amendment because the question of whether a crime is a "violent felony" is decided by looking solely to the elements of the offense as defined by state law. 550 U.S. at 214-15. Reliance by the Court on the statistical data and anecdotal evidence in the government's brief would go beyond the elements of Mr. Sykes's previous conviction under Indiana Code § 44-33-3-3(b)(1)(A) and blend the five categories of vehicular fleeing created by the Indiana General Assembly into one crime of vehicular fleeing. This would create a serious constitutional question as to whether this new method for defining "violent felony" violates the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

As discussed above, one of the categories created by the Indiana General Assembly is (b)(1)(B), which is distinguished from (b)(1)(A) only by the additional element of "creat[ing] a substantial risk of bodily injury to another person." In holding that Mr. Sykes's violation of (b)(1)(A) "presents a serious potential risk of physical injury to another," the district court and the Seventh Circuit made a judicial finding of an element of the offense that was not included in Mr. Sykes's previous conviction. The serious constitutional question raised by this decision can be avoided by rejecting the government's position, by following the precedents of *James*, *Begay*, and *Chambers*, and by holding that the offense defined by (b)(1)(A) is not a "violent felony."

F. The Rule of Lenity.

The government argues against application of the rule of lenity, asserting that "[t]he serious risk standard, although it sometimes requires careful examination of the nature of particular crimes, is not ambiguous." Gov't Br. 51. But members of this Court have disagreed. *Chambers*, 129 S. Ct. at 694 (Alito, J., and Thomas, J., concurring) (emphasizing "that only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship and *Taylor*'s 'categorical approach' have pushed us"); *Begay*, 553 U.S. at 155 (Alito, J., dissenting) (stating that "the so-called 'residual clause' of [the ACCA] calls out for legislative clarification"); *James*, 550 U.S. at 216 (Scalia, J., dissenting) (stating that the boundaries of the ACCA's "residual provision" is "ill-defined"). Given the inconsistency among the circuits following their "careful examination" of the issue as to whether simple vehicular fleeing constitutes a violent felony, one is left to conclude that the "otherwise" clause constitutes a grievous ambiguity warranting application for the rule of lenity and an interpretation of the statute in Mr. Sykes's favor.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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