No. 10-109

In the Supreme Court of the United States

ANTHONY DISMUKE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior felony conviction under Wisconsin law for intentional vehicular flight from a law enforcement officer is a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and guidelines:

Statutes and guidelines—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 593 F.3d 582.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2010. A petition for rehearing was denied on April 29, 2010 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on July 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 180 months of imprisonment, to be followed by three

years of supervised release. The court of appeals affirmed. Pet. App. 1a-28a.

1. On January 27, 2007, Milwaukee police were contacted by a confidential informant who reported that petitioner was in possession of a shotgun and two handguns. The informant provided petitioner's address and identified him in a photograph. Police confirmed that petitioner had prior felony convictions and that he resided at the address supplied by the informant. Police obtained a search warrant and searched petitioner's residence, where they recovered two handguns and ammunition. Petitioner was indicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), and a jury found him guilty of that offense. Pet. App. 4a-5a.

Pursuant to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), petitioner was subject to a mandatory minimum sentence of 15 years if he had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B).

At sentencing, petitioner did not dispute that his prior convictions under Wisconsin law for burglary and

armed robbery qualified as "violent felon[ies]" for ACCA purposes. Pet. App. 30a-31a. Petitioner did dispute, however, whether his prior conviction under Wisconsin law for intentional vehicular flight from a law enforcement officer qualified as an ACCA violent felony. *Id.* at 31a.[1] The district court concluded that petitioner's prior conviction for intentional vehicular flight was a violent felony, which meant that petitioner's advisory Guidelines range was 210 to 262 months of imprisonment (based on his criminal history category of V and his total offense level of 33). *Id.* at 31a-34a. After considering the factors in 18 U.S.C. 3553(a), however, the district court sentenced petitioner to the ACCA's statutory minimum of 180 months of imprisonment, to be followed by three years of supervised release. *Id.* at 37a-38a; see 2:07-CR-00081-LA-1 Docket entry No. 73 (E.D. Wis. Mar. 13, 2008).

2. The court of appeals affirmed. Pet. App. 1a-28a. It noted that petitioner did not dispute that Wisconsin's fleeing offense "present[s] a serious potential risk of physical injury similar in degree to the [ACCA's] enumerated crimes of burglary, arson, extortion, or crimes involving the use of explosives." *Id.* at 16a-17a. The court then rejected petitioner's argument that Wisconsin's fleeing offense does not involve "'purposeful, violent, and aggressive' conduct." *Id.* at 17a (quoting *Begay* v. *United States*, 553 U.S. 137, 146 (2008)). The court reasoned that "Wisconsin's fleeing offense requi-

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[1] According to the Presentence Investigation Report (PSR), on March 3, 1998, Milwaukee police officers attempted to conduct a traffic stop of petitioner's vehicle. Petitioner increased his speed, made several turns, and disregarded two stop signs. Petitioner eventually fled his vehicle on foot and was apprehended after a brief chase. PSR para. 46.

res a 'knowing' act of fleeing; this satisfies *Begay*'s 'purposeful' requirement." *Id.* at 20a. The court further reasoned that the Wisconsin offense involves "conduct [that] is violent and aggressive in the sense required by *Begay*," *id.* at 23a, because vehicular flight "will typically lead to a confrontation with the officer being diobeyed" and "[i]t is likely to lead, in the ordinary case, to a chase or at least an effort by police to apprehend the perpetrator," *id.* at 26a (quoting *United States* v. *West*, 550 F.3d 952, 970 (10th Cir. 2008)). The court concluded that "[a]ll of these circumstances increase the likelihood of serious harm to the officers involved as well as any bystanders that by happenstance get in the way of a fleeing perpetrator or his pursuers." *Ibid.* (quoting *West*, 550 F.3d at 970).

ARGUMENT

Petitioner contends (Pet. 10-26) that his prior felony conviction under Wisconsin law for intentional vehicular flight from a law enforcement officer is not a "violent felony" under the ACCA. Petitioner also contends that the decision below is inconsistent with this Court's decisions in *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 129 S. Ct. 687 (2009), as well as with decisions of the Eighth and Eleventh Circuits. Those contentions are without merit. Petitioner's vehicular flight conviction is significantly different in kind and degree from the driving-under-the-influence conviction at issue in *Begay* and the failure-to-report conviction at issue in *Chambers*. Moreover, there is no square conflict in the courts of appeals on the question presented. The Court has declined to review this question several times, and the same disposition is appropriate here.

1. a. In *Begay*, this Court held that felony driving under the influence (DUI) does not qualify as a violent felony under the ACCA. The Court reasoned that, to qualify as a violent felony under the ACCA's residual clause, an offense must be "roughly similar, in kind as well as in degree of risk posed, to the [statutory] examples" of burglary, arson, extortion, and offenses involving use of explosives, and thus must "typically involve purposeful, violent, and aggressive conduct." *Begay*, 553 U.S. at 142-145 (internal quotation marks omitted). The Court held that the DUI offense at issue did not satisfy that definition because, even assuming that DUI "presents a serious potential risk of physical injury to another," it is a "strict-liability" offense that "typically" does not involve "purposeful" conduct. *Id.* at 144-146.

The decision below is consistent with *Begay*. Unlike drunk driving, vehicular flight from a law enforcement officer involves purposeful, violent, and aggressive conduct. As an initial matter, vehicular flight from police is purposeful conduct because the Wisconsin statute provides that the flight must be done "knowingly." Wis. Stat. Ann. § 346.04(3) (West 2005); see *United States* v. *Harrimon*, 568 F.3d 531, 534 (5th Cir.) ("[U]nlike the DUI statute at issue in *Begay*, fleeing by vehicle requires intentional conduct."), cert. denied, 130 S. Ct. 1015 (2009). And because vehicular flight "calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit," it is an inherently violent and aggressive crime. *United States* v. *Spells*, 537 F.3d 743, 752 (7th Cir. 2008), cert. denied, 129 S. Ct. 2379 (2009). Vehicular flight "'will typically lead to a confrontation with the officer being disobeyed,' a confrontation fraught with risk of vio-

lence." *Harrimon*, 568 F.3d at 535 (quoting *United States* v. *West*, 550 F.3d 952, 970 (10th Cir. 2008)).

An offender's "willingness to use a vehicle to flout an officer's lawful order to stop" also demonstrates an increased risk that "the offender would, if armed and faced with capture, 'deliberately point the gun and pull the trigger.'" *Harrimon*, 568 F.3d at 535 (quoting *Begay*, 553 U.S. at 146); see *Welch* v. *United States*, 604 F.3d 408, 425 (7th Cir. 2010) ("An 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.") (quoting *Spells*, 537 F.3d at 752, and brackets in original), petition for cert. pending, No. 10-314 (filed Sept. 1, 2010). Vehicular flight by its very nature "creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders." *Harrimon*, 568 F.3d at 536 (quoting *West*, 550 F.3d at 964-965).

b. The decision below is also consistent with *Chambers*, which held that failure to report for penal confinement is not a violent felony under the ACCA. Vehicular flight from police presents risks different in kind and degree from those presented by the failure-to-report offense at issue in *Chambers*. Unlike the passive conduct of failing to report, vehicular flight from police cannot be characterized as "a form of inaction," *Chambers*, 129 S. Ct. at 692, because it involves deliberate movement to evade the police. See *United States* v. *Sykes*, 598 F.3d 334, 337 (7th Cir. 2010) ("[The Indiana statute's] knowing and intentional requirement means that a typical offender does not simply fail to appear before authorities, but affirmatively eludes police custody by

choosing to continue driving rather than pull over."), petition for cert. pending, No. 09-11311 (filed June 9, 2010). For that reason, vehicular flight from police is similar not to the crime of failure to report for penal confinement but to the crime of escape from custody. See *Chambers*, 129 S. Ct. at 691 (contrasting "[t]he behavior that likely underlies a failure to report" with "the less passive, more aggressive behavior underlying an escape from custody"); Pet. App. 27a ("Th[e] active defiance of an attempted stop or arrest is similar to the behavior underlying an escape from custody.") (quoting *Harrimon*, 568 F.3d at 535) (brackets in original).

c. The decision below is also consistent with *Taylor* v. *United States*, 495 U.S. 575 (1990), and *James* v. *United States*, 550 U.S. 192 (2007), which direct courts applying the ACCA to focus on "the conduct encompassed by the elements of the offense, in the ordinary case." *Id.* at 208. In the ordinary case, flight from an officer's command to stop involves a substantial and inherent risk of physical injury because of the "marked likelihood of pursuit and confrontation." *Harrimon*, 568 F.3d at 536; see *ibid.* ("[W]e think that, in the typical case, an offender fleeing from an attempted stop or arrest will not hesitate to endanger others to make good his or her escape."). Vehicular flight, like escape from custody, is a continuing offense that encompasses conduct likely to occur at the end of the pursuit by law enforcement officers. See *United States* v. *Martin*, 378 F.3d 578, 582-583 (6th Cir. 2004) ("Both escape and fleeing from a police officer represent continuing offenses, which heighten the emotions and adrenaline levels of the parties involved, and which generally end with a confrontation between the officer and the escapee or fleeing driver.") (internal quotation marks, brackets, and cita-

tions omitted). As with the ACCA's enumerated crimes (like burglary or arson), vehicular flight creates the potential for a dangerous confrontation between the suspect and other individuals.

2. Petitioner contends (Pet. 10-22) that the courts of appeals are in conflict over whether vehicular flight from police is a "violent felony" under the ACCA or a "crime of violence" under Sentencing Guidelines § 4B1.2(a).[2] But there is no disagreement among the courts of appeals with respect to offenses like petitioner's that typically present a substantial risk of injury to police officers or other individuals.

Five courts of appeals (the First, Fifth, Sixth, Tenth, and Eleventh Circuits) have agreed with the Seventh Circuit that intentional flight from a law enforcement officer is a violent felony under the ACCA or a crime of violence under Section 4B1.2(a) of the Guidelines. See *United States* v. *McConnell*, 605 F.3d 822, 827-830 (10th Cir. 2010) (Guidelines); *United States* v. *Layton*, 356 Fed. Appx. 286, 290 (11th Cir. 2009) (Guidelines), cert. denied, 130 S. Ct. 3467 (2010); *Harrimon*, 568 F.3d at 534-537 (ACCA); *United States* v. *LaCasse*, 567 F.3d 763, 767 (6th Cir. 2009) (ACCA), cert. denied, 130 S. Ct. 1311 (2010); *Powell* v. *United States*, 430 F.3d 490, 491 (1st Cir. 2005) (per curiam) (ACCA), cert. denied, 547 U.S. 1047 (2006). Those courts have reasoned that a driver's intentional act of fleeing from a law enforcement officer is a purposeful, violent, and aggressive act. See, *e.g.*, *Harrimon*, 568 F.3d at 534-537.[3]

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[2] The ACCA's definition of a "violent felony" is identical for present purposes to Sentencing Guidelines § 4B1.2(a)'s definition of a "crime of violence."

[3] In *United States* v. *Rivers*, 595 F.3d 558 (2010), the Fourth Circuit held that a conviction under South Carolina law for failure to stop for

a. Petitioner claims (Pet. 12) a conflict with *United States* v. *Tyler*, 580 F.3d 722 (8th Cir. 2009), in which a divided panel held that the Minnesota offense of vehicular flight from a law enforcement officer is not a crime of violence under Sentencing Guidelines § 4B1.2(a). The Minnesota statute at issue in *Tyler*, like the Wisconsin statute at issue here, prohibits increasing a vehicle's speed or extinguishing its lights in an attempt to flee or elude officers. See 580 F.3d at 725; see also Wis. Stat. Ann. § 346.04(3) (West 2005) (prohibiting an "operator of a vehicle" from "increas[ing] the speed of the * * * vehicle or extinguish[ing] the lights of the vehicle in an attempt to elude or flee"). As petitioner recognizes (Pet. 13), the Eighth Circuit concluded in *Tyler* that although "such actions are admittedly disobedient, they do not necessarily translate into a serious potential risk of physical injury." 580 F.3d at 725. In this case, however, petitioner "concedes that the [Wisconsin] offense involves conduct that presents a serious potential risk of physical injury and is sufficiently similar to the residual clause's enumerated crimes in respect to the 'degree of risk posed' to satisfy this part of the *Begay* framework."

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a blue light, S.C. Code Ann. § 56-5-750(A) (2006), does not constitute a violent felony under the ACCA. *Rivers*, 595 F.3d at 565. Unlike the Wisconsin statute at issue, however, the South Carolina blue light statute does not require that a driver have acted intentionally. *Ibid*. The Fourth Circuit reasoned that, as "a strict liability crime," the statute does not proscribe purposeful, aggressive, and violent conduct as required by *Begay*. *Ibid*. (quoting *Begay*, 553 U.S. at 148). *Rivers* therefore does not conflict with the decisions of the other courts of appeals that have held that intentional vehicular flight is a violent felony under the ACCA or a crime of violence under Section 4B1.2(a) of the Guidelines.

Pet. App. 17a.[4] The present case is therefore distinguishable from *Tyler*, because petitioner did not dispute before the lower courts that the Wisconsin offense satisfies the risk requirement of the ACCA's residual clause.

Although the Eighth Circuit held in the alternative in *Tyler* that the Minnesota offense did not involve violent and aggressive conduct in the typical case, see 580 F.3d at 725, its discussion of that issue built on and was influenced by its earlier holding that the Minnesota offense did not necessarily involve a serious risk of physical injury to others. See *ibid.* ("[T]he elements of the statute do not require a confrontation, chase, or any other conduct indicating that the crime in question nec-

[4] According to petitioner (Pet. 23 n.11), he did not concede below that the Wisconsin offense involves conduct presenting a serious risk of physical injury comparable to that posed by the ACCA's enumerated crimes, as required under this Court's decision in *Begay*. In his brief to the court of appeals, petitioner stated in a single sentence that the conduct of which he was convicted—eluding police by increasing his vehicle's speed—"[did] not require interference with or endangerment of the police, other vehicles, or pedestrians." Pet. C.A. Br. 31. Petitioner did not develop that argument in any way. Rather, he noted contrary circuit precedent holding that vehicular flight does present a serious risk of physical injury to others, *ibid.* (citing *United States* v. *Howze*, 343 F.3d 919 (7th Cir. 2003)), without offering any argument to show that the precedent was incorrect or had been undermined by this Court's subsequent decision in *Begay*. Petitioner then argued at length that the Wisconsin offense did not involve violent and aggressive conduct within the meaning of *Begay*. *Id.* at 32-35. In those circumstances, the court of appeals reasonably concluded that petitioner was contesting only the second component of the *Begay* test. Petitioner also claims (Pet. 24 n.11) that he disputed the first component of the *Begay* test in his rehearing petition, but he simply cited a decision from the Ninth Circuit addressing a different state statute. See C.A. Pet. for Reh'g 2. Petitioner did not develop any argument that vehicular flight under Wisconsin law does not present a serious risk of physical injury to others.

essarily involves conduct presenting a serious risk of physical injury to another or conduct that is violent and aggressive."). Thus, the issue that petitioner failed to dispute in the court of appeals in this case not only was the Eighth Circuit's principal ground of decision in *Tyler*, but also was a ground that influenced the Eighth Circuit's subsequent discussion of whether simple vehicular flight is violent and aggressive within the meaning of *Begay*. For that reason, whatever the tension between a portion of the decision in *Tyler* and the decision below in this case, there is no square conflict warranting review in this case.

b. Petitioner further claims (Pet. 14) a conflict with *United States* v. *Harrison*, 558 F.3d 1280 (11th Cir. 2009). The Florida statute at issue in *Harrison* created separate offenses for simple vehicular flight and aggravated vehicular flight that involves high speed or that recklessly disregards the safety of persons or property. See Fla. Stat. Ann. § 316.1935(1), (2), and (3) (West 2006). In *Harrison*, the Eleventh Circuit held that simple vehicular flight is not a violent felony for ACCA purposes, while indicating that Florida's forms of aggravated vehicular flight would be violent felonies. See 558 F.3d at 1291, 1295-1296.

Here, the court of appeals similarly held that the Wisconsin statute creates two different kinds of fleeing offenses: knowing flight from an identified law enforcement officer (i) by "willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians" or (ii) by "increas[ing] the speed of the operator's vehicle or extinguish[ing] the lights of the vehicle in an attempt to elude or flee." Wis. Stat. Ann. § 346.04(3) (West 2005); see Pet. App. 15a-16a. The

court of appeals therefore consulted the state court criminal complaint, which indicated that petitioner had committed the Wisconsin offense by increasing the speed of his vehicle in an attempt to elude officers. *Id.* at 16a.

The court of appeals correctly concluded—in accord with the majority of other circuits but not in accord with the Eleventh Circuit's decision in *Harrison* —that even if flight that occurs by increasing the vehicle's speed does not create an actual risk of death or injury to third parties in every case, it does create a potential risk of serious harm to others in the typical case. For instance, the Sixth Circuit has held that "[a]s a categorical matter, the decision to flee thus carries with it the requisite potential risk, even if the resulting chase does not escalate so far as to create [an] actual risk of death or injury." *United States* v. *Rogers*, 594 F.3d 517, 521 (6th Cir. 2010), petition for cert. pending, No. 09-10276 (filed Apr. 13, 2010). Likewise, the Fifth Circuit has held that "while it is possible * * * to be guilty of fleeing by vehicle despite obeying all traffic laws and later surrendering quietly, * * * in the typical case, an offender * * * will not hesitate to endanger others to make good his or her escape." *Harrimon*, 568 F.3d at 536.

The Eleventh Circuit's decision in *Harrison* is distinguishable, however, because the court's holding rested on the limited evidentiary record in that case. See 558 F.3d at 1295-1296. The court recognized that in similar cases the Supreme Court "has used statistical evidence to aid its risk assessment" and that its own consideration "would benefit from empirical evidence of the likelihood of physical injury in statutory willful fleeing crimes that do not have the elements of high speed or

reckless disregard." *Id.* at 1294-1295. "[B]ased on the limited record," which did not contain any "empirical data," the court concluded that the government had not satisfied its burden of showing that the Florida offense was a violent felony for ACCA purposes. *Id.* at 1296. Thus, the court left the door open for the government to make such a showing on a more developed factual record in a future case. *Ibid.*

Other courts have considered the sort of statistical evidence not present in *Harrison*. For instance, the Fifth Circuit in *Harrimon* noted that, according to a study "collecting police pursuit data from fifty-six law enforcement agencies in thirty states, 314 injuries (including fatal injuries) to police and bystanders resulted from 7,737 reported pursuits," or "roughly .04 injuries to others per pursuit." 568 F.3d at 537. By comparison, "there are roughly 267,000 fires attributed to arson per year, resulting in over 2,475 injuries * * * or roughly .009 injuries per arson." *Ibid.* The Fifth Circuit therefore concluded that "the risk of injury to others [from vehicular flight] would appear to be at least 'roughly similar' to that associated with arson." *Ibid.* (quoting *Begay*, 553 U.S. at 143). In light of the Fifth Circuit's analysis, this Court's review would be premature, because the Eleventh Circuit should be permitted to revisit the question on a more developed evidentiary record.

3. Further consideration in the courts of appeals—including examination of pertinent differences among the state statutes in question—will bear directly on the need for this Court's review. The Court has denied several petitions for writs of certiorari presenting the question of whether prior convictions under state vehicular flight statutes qualify as violent felonies under the

ACCA or crimes of violence under the Guidelines. See *Spells* v. *United States*, 129 S. Ct. 2379 (2009) (No. 08-8136) (Indiana statute); see also *Layton* v. *United States*, 130 S. Ct. 3467 (2010) (No. 09-9658) (Florida statute); *Collier* v. *United States*, 130 S. Ct. 1882 (2010) (No. 09-7631) (Texas statute); *LaCasse* v. *United States*, 130 S. Ct. 1311 (2010) (No. 09-8204) (Michigan statute); *Sneed* v. *United States*, 130 S. Ct. 1285 (2010) (No. 09-7276) (Texas statute); *Harrimon* v. *United States*, 130 S. Ct. 1015 (2009) (No. 09-6395) (Texas statute). The same disposition is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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