No. __-___

IN THE
**Supreme Court of the United States**

MICHAEL WISE,
*Petitioner,*
v.

UNITED STATES
*Respondent.*

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

# PETITION FOR WRIT OF CERTIORARI


JEREMY DELICINO
10 West Broadway, Suite 650
Salt Lake City, Utah 84101

STEPHEN B. KINNAIRD
*Counsel of Record*
ELIZABETH A. STEVENS
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700
stephenkinnaird@paulhastings.com

*Counsel for Petitioner Michael Wise*

## QUESTION PRESENTED FOR REVIEW

Does a conviction under a state statute for failure to stop a vehicle at the command of a police officer constitute a "crime of violence" under the residual clause of section 4B1.2 of the United States Sentencing Guidelines?

## PARTIES TO THE PROCEEDING

There are no other parties than those listed in the caption.

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In the Supreme Court of the United States

MICHAEL WISE, *Petitioner,*

v.

UNITED STATES

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

## PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Wise respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App., *infra,* 1a – 8a) is reported at 597 F.3d 1141.

## JURISDICTION

The Tenth Circuit denied rehearing *en banc,* (Pet. App., *infra,* 9a) on June 7, 2010. This court's jurisdiction rests on 28 U.S.C. § 1254(1). On August 24, 2010, Justice Sotomayor granted Application No. 10A207, extending the time within which to file a petition to and including date October 20, 2010.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Wise was sentenced pursuant to the 2006 United States Sentencing Guidelines ("USSG") § 2.K2.1(a)(4)(A), which applied a base offense level of 20 for a felony conviction of a "crime of violence" as defined by USSG § 4B1.2. USSG § 4B1.2 provides:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

(emphasis added).

The court determined that Utah's "Failure to Respond to Officer's Signal to Stop" statute qualifies as a "crime of violence" as defined by § 4B1.2's residual clause, emphasized above. Pet. App. 5a. Utah's statute provides:

> (1) (a) An operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not:
>
> (i) operate the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person; or
>
> (ii) attempt to flee or elude a peace officer by vehicle or other means.
>
> (b) (i) A person who violates Subsection (1)(a) is guilty of a felony of the third degree.

> (ii) The court shall, as part of any sentence under this Subsection (1), impose a fine of not less than $1,000.
>
> (2) (a) An operator who violates Subsection (1) and while so doing causes death or serious bodily injury to another person, under circumstances not amounting to murder or aggravated murder, is guilty of a felony of the second degree.
>
> (b) The court shall, as part of any sentence under this Subsection (2), impose a fine of not less than $5,000.
>
> (3) (a) In addition to the penalty provided under this section or any other section, a person who violates Subsection (1)(a) or (2)(a) shall have the person's driver license revoked under Subsection 53-3-220(1)(a)(ix) for a period of one year.
>
> (b) (i) The court shall forward the report of the conviction to the division.
>
> (ii) If the person is the holder of a driver license from another jurisdiction, the division shall notify the appropriate officials in the licensing state.

UTAH CODE ANN. § 41-6a-210.

## STATEMENT OF THE CASE

### I. Legal Background

The Armed Career Criminal Act ("ACCA") imposes a minimum prison term of 15 years on any person who commits certain federal firearm offenses and has three prior convictions "for a violent felony or a serious drug offense." 18 U.S.C. § 924(e). ACCA defines a "violent felony" as one 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.

*Id.* § 924(e)(2)(B).

In 28 U.S.C. § 994(h), Congress directed the United States Sentencing Commission to adopt guidelines to enhance sentences of persons previously convicted of committing "crimes of violence." The Commission did so, specifically referencing ACCA. United States Sentencing Commission, Special Report to Congress (August 1991), p. 23 & n.77. The Commission adopted language defining a "crime of violence" that is almost identical to the definition of a "violent felony" in ACCA, *supra* at 2. The only difference between the Guidelines and ACCA definition is that the former defines the subject offenses to include a "burglary of a dwelling," whereas ACCA simply uses the term "burglary." *Compare* 18 U.S.C. § 924(e)(2)(B) *with* USSG § 4B1.2(a)(2). Accordingly, the Tenth Circuit and other courts of appeals apply precedent pursuant to these parallel provisions interchangeably. Pet. App. 5a ("The residual clause of the ACCA is worded almost identically to that of § 4B1.2(a), and we have held that in interpreting 'crime of violence' under § 4B1.2, we may look for guidance to cases construing the ACCA's parallel provision."); *United States v. Mohr*, 554 F.3d 604, 609 n.4 (5th Cir.), *cert. denied*, 130 S. Ct. 56 (2009); *United States v. Young*, 580 F.3d 373, 379 n.5 (6th Cir. 2009); *United States v. Askew*,

No. 09-2846, 2010 U.S. App. LEXIS 13918, at *4 n.3 (7th Cir. 2010) (citing *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008)); *United States v. Tyler*, 580 F.3d 722, 724 n.3 (8th Cir. 2009); *United States v. Harrison*, 558 F.3d 1280, 1283 n.6 (11th Cir. 2009).

## II. Factual Background

On November 27, 2007, Wise pled guilty to one count of unlawful possession of a nine millimeter Smith & Wesson handgun in violation of 18 U.S.C. § 922(g)(1). Pet. App. 2a. The presentence report characterized Wise's prior Utah conviction for "Failure to Respond to Officer's Signal to Stop," in violation of UTAH CODE ANN. § 41-6a-210, as a "crime of violence" as defined by USSG § 4B1.2(a)(2). Pet. App. 3a. Thus, the probation officer recommended that Wise be sentenced under USSG § 2K2.1(a)(4)(A), which assesses a heightened base offense level when an offender has a prior conviction for a crime of violence. *Id.* Wise had been sentenced to 180 days' imprisonment for this prior violation, which is a third-degree felony under Utah Code. *Id.* The presentence report did not assign Wise any criminal history points. *Id.*

Wise challenged the presentence report's enhancement, objecting both to characterization of the prior Utah conviction as a crime of violence under USSG § 2K2.1 and to the application of an enhancement under USSG § 2K2.1's note 10 because Wise's prior offense had not received any criminal history points. *Id.* Holding that

Wise's prior conviction was a crime of violence, the district court rejected Wise's challenges and imposed a sentence of forty-eight months. *Id.*

Wise appealed the district court's denial of his objections to the presentence report, arguing that under *Begay v. United States,* 553 U.S. 137 (2008), a prior conviction for failure-to-stop does not constitute a crime of violence. Wise argued that failure-to-stop is not sufficiently similar to the crimes of burglary, arson, exhortation, and use of explosives enumerated in both residual clauses of USSG § 4B1.2(a)(2) and the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Pet. App. 4a-5a. Further, Wise argued that this Court's decision in *Chambers v. United States,* 129 S. Ct. 687 (2009), undermined controlling Tenth Circuit precedent in *United States v. West,* 550 F.3d 952 (10th Cir. 2008). *Id.*

On appeal, the Tenth Circuit upheld the district court's decision that failure-to-stop is a crime of violence under the Sentencing Guidelines. Pet. App. 7a. The court observed that the Utah statute on its face does not include as an element "the use, attempted use, or threatened use of physical force", and that failure-to-stop is not an enumerated crime under USSG § 4B1.2(a). Pet. App. 4a Therefore, the Tenth Circuit applied a modified version of the categorical approach to determine if Wise's past conviction is a crime of violence under

§ 4B1.2(a)'s residual clause, which includes crimes that "'otherwise involve[ ] conduct that presents a serious potential risk of physical injury to another.'" Pet. App. 3a (quoting USSG § 4B1.2(a)).

Under the modified categorical approach, the court of appeals examined the charging documents, plea agreement and the uncontested facts found by the district court. The Tenth Circuit found that "the record does not include any state-court documents that might indicate" whether Wise was convicted of subsection (1)(a)(i) of the Utah failure-to-stop statute – which criminalizes wanton or willful endangerment of the operation of a vehicle or of a person – or subsection 1(a)(ii), which criminalizes only an "attempt to flee or elude a peace officer by vehicle or other means" after being given a command to stop. Pet. App. 4a n.4. But the Tenth Circuit held that both subsections, even the mere attempt to flee or elude a police officer, constituted a crime of violence under the residual clause, because such conduct posed a serious potential risk of physical injury to another and that the offense is "'roughly similar in kind as well as in degree of risk posed" to § 4B1.2(a)(2)'s enumerated crime of burglary, arson, extortion, or crimes involving explosives. Pet. App. 4a (quoting *Begay*, 553 U.S. at 137) (internal quotation marks omitted), 5a.

In so ruling, the Tenth Circuit relied heavily upon *United States v. West*, which categorized this same Utah statute as a "violent

felony" under § 4B1.2's parallel provision in 18 U.S.C. § 924(e). *See West*, 550 F.3d at 963. In *West*, the Tenth Circuit found that Utah Code § 41-6a-210 requires the presence of a police officer, and thus, "poses the threat of a direct confrontation between the police officer and the occupants of the vehicle, which, in turn, creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders." *Id.* at 964-65 (citations and quotation marks omitted).

Wise argued that *West* was no longer good case law after this Court's ruling in *Chambers*, clarifying the use of the categorical approach in holding that not all escape types constitute crimes of violence. Pet. App. 4a-5a. The Tenth Circuit rejected Wise's argument, holding that *Chambers* did not explicitly overrule *West*. Instead, the Tenth Circuit distinguished the statute at issue in *Chambers*, which encompassed both crimes of inaction, such as the passive failure to report, and crimes of action, such as escape from custody, from UTAH CODE ANN. § 41-6a-210, which encompassed only deliberate action. Pet. App. 5a-6a. Having found that *West* remained binding precedent, the Tenth Circuit held that because failure-to-stop under Utah law was a violent crime under 18 U.S.C. § 924(e), it was also a crime of violence under USSG § 4B1.2(a). Pet. App. 5a.

## REASONS FOR GRANTING THE PETITION

The decision below cannot stand. Other courts that have considered whether felony convictions under failure-to-stop statutes are "crimes of violence" or "violent felonies" have struggled to classify vehicular fleeing statutes with any consistency. Because there is a split in authority among the United States courts of appeals regarding whether failure-to-stop is a crime of violence, and because significant additional time is imposed under USSG § 4B1.2 and 18 U.S.C. § 924(e) for crimes of violence, this Court should review the decision of the Tenth Circuit.

### I. THERE IS A DEEP, WELL-ESTABLISHED CONFLICT AMONG THE COURTS OF APPEALS REGARDING WHETHER VEHICULAR FLEEING IS A CRIME OF VIOLENCE

A review of the decisions of the other federal courts to consider whether failure-to-stop crimes are crimes of violence reveals a deep division in authority that this Court should resolve. The Eighth and Eleventh Circuits have held that failure-to-stop is not a crime of violence or a violent felony. *See Tyler*, 580 F.3d 722, 726 (explicitly disagreeing with the Sixth Circuit's view that vehicular fleeing is a crime of violence); *Harrison,* 558 F.3d 1280, 1296 (holding that Florida Statute § 316.1935(2), which criminalizes flight from a police officer in a vehicle, does not constitute a crime of violence under 18 U.S.C. § 924(e)'s residual clause); *but see United States v. Harris*, 586 F.3d

1283, 1283 (11th Cir. 2009) (holding that fleeing a police officer at high speed or "with wanton disregard for the safety of persons or property" under Florida statute § 316.1935(3) is a crime of violence under USSG § 4B1.2(a)'s residual clause). In opposition, the Fifth, Sixth, and Seventh Circuits explicitly agree with the Tenth Circuit's analysis that vehicular fleeing constitutes a crime of violence. *United States v. Harrimon*, 568 F.3d 531, 534 (5th Cir.), *cert denied*, 130 S. Ct. 1015 (2009); *United States v. Young*, 580 F.3d 373, 377-78 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1723 (2010); *Welch v. United States*, 604 F.3d 408, 429 (7th Cir. 2010).

### A. THE EIGHTH AND ELEVENTH CIRCUITS HAVE HELD THAT FAILURE-TO-STOP CRIMES ARE NOT CRIMES OF VIOLENCE

The Eighth and Eleventh Circuits have held that failure-to-stop vehicular fleeing statutes do not qualify as crimes of violence; both courts of appeals have held that the fleeing statutes at issue do not satisfy either prong of the *Begay* test, because they do not present a serious risk of physical injury, nor are they violent or aggressive. *Tyler*, 580 F.3d 722 (holding that a conviction under Minnesota law criminalizing vehicular fleeing does not constitute a crime of violence); *Harrison,* 558 F.3d at 1296 (holding that the Florida statute criminalizing vehicular fleeing does not constitute a crime of violence).

In *Tyler*, the Eighth Circuit held that Minnesota Statute § 609.487 subd. 3[1], a statute that criminalizes fleeing from a police officer in a motor vehicle, does not constitute a crime of violence under § 4B1.2(a)'s residual clause. *Tyler*, 580 F.3d at 725-26; *see also United States v. Johnson*, 601 F.3d 869, 873 (8th Cir. 2010). The Eighth Circuit reasoned that, when focusing on the "generic elements of the offense," a conviction pursuant to § 609.487 subd. 3 does not satisfy the elements of the test laid out in *Begay*. *Tyler*, 580 F.3d at 725.

Specifically, the Eighth Circuit found that actions criminalized by Minnesota's statute, while disobedient, did not "necessarily translate into a serious potential risk of physical injury" because the statute criminalized "increase[d] speed, extinguish[ed] motor vehicle headlights or taillights, [or] refus[al] to stop . . . with intent to attempt to elude a peace officer" but not high speed or reckless driving. *Tyler*, 580 F.3d at 725, 727. Further, the court held that although the behavior was purposeful conduct, the "statute's definition of 'fleeing' criminalizes conduct that is neither violent nor aggressive[.]" *Id.* at 725. The Eighth Circuit stated that vehicular fleeing was not a violent

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[1] MINN. STAT. § 609.487 subd. 3 reads in relevant part:

> Whoever by means of a motor vehicle flees or attempts to flee a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer, is guilty of a felony and may be sentenced to imprisonment for not more than three years and one day or to payment of a fine of not more than $5,000, or both.

crime because there was no implication of a "propensity in the perpetrator to commit violent acts against others." *Id.* The court refused to find that violent confrontation or chase – which other courts of appeals had found to present a risk of physical harm and were violent and aggressive – were elements of the Minnesota statute absent statutory language to the contrary. *Id.* at 725-26 (noting disagreement among the circuits regarding whether vehicular fleeing constitutes a violent felony).

Likewise, the Eleventh Circuit held that Florida Statute § 316.1935(2)[2], which similarly criminalizes flight from a police officer in a vehicle, does not constitute a crime of violence under 18 U.S.C. § 924(e)'s residual clause. *Harrison*, 558 F.3d at 1293-96. In its analysis, the *Harrison* court held that the behavior criminalized under Florida's vehicular fleeing statute, in which a driver who willfully refuses to stop at the signal of a police officer "makes it unlikely that the confrontation will escalate into a high-speed chase that threatens pedestrians, other drivers, or the officer." *Id.* at 1294. Disobedience to the command of the officer, without the requisite elements of high

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[2] FLA. STAT. § 316.1935(2) states in relevant part that:

> 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, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

speed or recklessness, fails to show that an offender would be more likely to commit to confront or resist the officer, thus producing the requisite "serious risk of physical harm." *Id.* (citing *Chambers*, 129 S. Ct. at 692). Further, the court concluded that even assuming a potential risk of physical harm, failure-to-stop at the command of an officer, without the attendant elements of high speed or recklessness, was "not sufficiently aggressive and violent enough to be like the enumerated ACCA crimes." *Id.* at 1295.

## B. THE FIFTH, SIXTH, SEVENTH, AND TENTH CIRCUITS INTERPRET VEHICULAR FAILURE-TO-STOP CRIMES AS CRIMES OF VIOLENCE

Standing in opposition to the Eighth and Eleventh Circuits, the Fifth, Sixth, and Seventh Circuits agree with the Tenth Circuit that a vehicular fleeing despite the command of a police officer to stop constitutes a crime of violence. *See Harrimon*, 568 F.3d 531, 534 (holding that intentional fleeing from an officer in a vehicle constitutes a violent felony under 18 U.S.C. § 924(e)); *United States v. Young*, 580 F.3d 373, 377-78 (6th Cir. 2009) (adopting the Fifth and Tenth Circuits' approach and conclusion that failure-to-stop are crimes of violence or violent felonies under USSG § 4B1.2 and 18 U.S.C. § 924(e)), *cert. denied*, 130 S. Ct. 1723 (2010)); *United States v. Askew*, No. 09-2846, 2010 U.S. App. Lexis 13918, at *14 (7th Cir. 2010) (refusing to adopt the Eighth and Eleventh Circuits' approach and

conclusion that convictions for vehicular fleeing constitute crimes of violence pursuant to USSG § 4B1.2).

The Fifth Circuit held that vehicular fleeing under the Texas statute[3] satisfied the test enunciated by this Court in *Begay* in determining whether a crime was a violent felony pursuant to § 4B1.2 or § 924(e). *Harrimon*, 568 F.3d at 535-36. In *Harrimon*, the Fifth Circuit reasoned that fleeing under the Texas statute "poses a serious risk of injury to others" and thus, satisfies the first prong of the *Begay* test. *Id.* at 536. Second, a violation of the statute is violent and aggressive, because vehicular fleeing typically involves violent force, which police officers, bystanders and other motorists are subject to, and thus, constitutes a crime of violence. *Id.* at 535 (citing agreement with the Seventh and Tenth Circuits and disagreement with the Eleventh Circuit).

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[3] The Texas Penal Code § 38.04(a)-(b) states:

> (a) A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him.
>
> (b) An offense under this section is a Class B misdemeanor, except that the offense is: (1) a state jail felony if the actor uses a vehicle while the actor is in flight and the actor has not been previously convicted under this section; (2) a felony of the third degree if: (A) the actor uses a vehicle while the actor is in flight and the actor has been previously convicted under this section; or (B) another suffers serious bodily injury as a direct result of an attempt by the officer from whom the actor is fleeing to apprehend the actor while the actor is in flight; or (3) a felony of the second degree if another suffers death as a direct result of an attempt by the officer from whom the actor is fleeing to apprehend the actor while the actor is in flight.

In *Young*, the Sixth Circuit also found that a felony offense of fleeing and eluding, in violation of Michigan law,[4] constitutes a violent felony under the residual clause of the ACCA. 580 F.3d at 377. The Sixth Circuit supported its holding by find that those "who willfully fail[ ] to obey [an officer's] direction" in violation of the Michigan statute will necessarily seek to "avoid detention or arrest by a police officer, and offenders typically attempt to flee by any means necessary, including speeding, extinguishing lights at nighttime, driving the wrong way, weaving, etc." *Id.* at 377-78 (citing *West*, 550 F.3d at 964; *Harrimon,* 568 F.3d at 536; *United States v. Spells*, 537 F.3d 743, 749 (7th Cir. 2008)), *cert. denied,* 129 S. Ct. 2379 (2009). Further, the Sixth Circuit justified this holding because it was consistent with the aims of the ACCA, stating "an offender [who] is willing to drive recklessly to elude a police officer . . . would not hesitate to use a gun

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[4] The Michigan vehicular fleeing statute states, in relevant part:

> A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the motor vehicle, extinguishing the lights of the motor vehicle, or otherwise attempting to flee or elude the officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform, and the vehicle driven by the police or conservation officer is identified as an official police or department of natural resources vehicle.

MICH. COMP. LAWS § 257.602a(1).

deliberately to harm a victim . . . when firearms are involved." *Young*, 580 F.3d at 378-79.

The Seventh Circuit refused to "part company with the Fifth, Sixth and Tenth Circuits" in determining that vehicular fleeing convictions are crimes of violence. *Welch v. United States*, 604 F.3d 408 (7th Cir. 2010); *Askew*, 2010 U.S. App. Lexis 13918, at *14 (holding that Illinois statute for vehicular fleeing constitutes a crime of violence); *United States v. Dismuke*, 593 F.3d 582, 596 (7th Cir. 2010), *petition for cert. filed*, No. 10-109 (U.S. July 19, 2010) (holding that Wis. Stat. § 346.04(3) constitutes a crime of violence). In *Welch*, the Seventh Circuit found that a conviction pursuant to Illinois's vehicular fleeing statute[5] was more similar to escape from confinement and "necessarily involves affirmative action on the part of the perpetrator." *Welch*, 604 F.3d at 424. Thus, a conviction under the Illinois vehicular fleeing statute qualified as a crime of violence within the meaning of the ACCA. *Id.* at 425 (recognizing the Seventh Circuit's agreement with the Fifth, Sixth, and Tenth Circuits and disagreement with the

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[5] The Illinois statute, 625 ILL. COMP. STAT. § 11-204.1(a), states that:

> The offense of aggravated fleeing or attempting to elude a peace officer is committed by any driver or operator of a motor vehicle who flees or attempts to elude a peace officer, after being given a visual or audible signal by a peace officer in the manner prescribed in subsection (a) of Section 11-204 of this Code, and such flight or attempt to elude: (1) is at a rate of speed at least 21 miles per hour over the legal speed limit; (2) causes bodily injury to any individual; (3) causes damage in excess of $300 to property; or (4) involves disobedience of 2 or more official traffic control devices.

Eighth and Eleventh Circuits). Judge Posner notably dissented from this holding in light of *Chambers*, because he reasoned that vehicular fleeing was not purposeful, aggressive or violent. *Id.* at 434 (Posner, J., dissenting). He further noted that "[o]nly the Supreme Court can resolve the issues presented in this appeal." *Id.* at 435.

There are no material differences in the state statutes at issue in the cases on either side of the split; the Fifth, Sixth, and Seventh Circuits (like the Tenth) would all categorize the offense of attempting "to flee or elude a peace officer by vehicle or other means" after being given a command to stop, UTAH CODE ANN. § 41-6a-210(a)(1)(ii), as a crime of violence for purposes of ACCA or the Sentencing Guidelines, and the Eighth and Eleventh Circuits would not. The acknowledged conflict among the courts of appeals regarding whether failure-to-stop at the command of a police officer or like vehicular fleeing statutes constitutes a crime of violence under § 4B1.2(a) and 18 U.S.C. § 924(e)'s residual clause demands this Court's guidance.

## II. THE CIRCUIT SPLIT ASSURES INCONSISTENT APPLICATION OF THE LAW, INCREASING MINIMUM SENTENCES FOR MANY DEFENDANTS BECAUSE OF THEIR GEOGRAPHY

Inconsistent interpretations of the same state statutes as violent crimes under ACCA and the Sentencing Guidelines will continue to arise if this Court does not resolve this issue. Individuals are often sentenced as felons in possession of a firearm in a state different from

the one where they earlier violated. The split on this issue creates non-uniform results on whether similar vehicular fleeing statutes warrant fifteen-year mandatory minimum prison sentences under 18 U.S.C § 924(e) and significant base-level enhancements that can double a sentence under the Sentencing Guidelines.

This Court should resolve the current inconsistency, which allows *different* circuits to interpret the *same* state statute with conflicting results. Both the Seventh Circuit and the Eighth Circuit have considered whether Minnesota Statutes § 609.487 subd. 3 constitutes a crime of violence and have reached opposite results. The Eighth Circuit held in *Tyler*, discussed *supra* at 10-11, that a conviction under this statute was not a crime of violence under the Sentencing Guidelines. The Seventh Circuit held that the same Minnesota statute constituted a crime of violence under the Sentencing Guidelines. *Compare Tyler*, 580 F.3d 722, *with Askew*, 2010 U.S. App. LEXIS 13918. Further, the Eighth Circuit has expressed, in dicta, that it would interpret Michigan's fleeing offense different than the Sixth Circuit did in *United States v. LaCasse*, 567 F.3d 763 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1311 (2010). *Compare Tyler*, 580 F.3d at 726 (disagreeing with the Sixth Circuit's holding that Michigan's fleeing and eluding statute codifies a crime of violence), *with LaCasse*, 567 F.3d at 766 (holding that Michigan's fleeing and eluding statute

codifies crime of violence because it involves purposeful, aggressive conduct that poses a risk of physical injury to another). Inconsistencies of application of the Sentencing Guidelines and the ACCA have and will continue to result in severe consequences for criminal defendants based solely on the Circuits in which they are convicted. Thus, this issue requires this Court's attention to resolve the hopelessly deadlocked courts of appeals.

## III. THE TENTH CIRCUIT MISAPPLIED THIS COURT'S PRECEDENT IN DETERMINING THAT UTAH'S STATUTE CODIFIED A CRIME OF VIOLENCE

The Tenth Circuit, relying on its precedent in *West*, held that a conviction pursuant to Utah's statute constituted a crime of violence under USSG § 4B1.2. The Tenth Circuit misapplied this Court's precedent in finding that both prongs of the Utah statute qualify as behavior that creates a serious potential risk of physical injury in the ordinary case under *Begay v. United States*, 553 U.S. 137 (2008) and in ignoring this Court's holding in *Chambers v. United States*, 129 S. Ct. 687 (2009).

A conviction under Utah's statute does not satisfy *Begay's* two-part test defining crime of violence under § 4B1.2 or 18 U.S.C. § 924(e)'s parallel residual clauses. The crime must (1) "present[] a serious potential risk of physical injury to another" and (2) be "roughly similar, in kind as well as in degree, of risk posed" to the enumerated crimes of burglary, arson, extortion, or crimes involving explosives in

§ 4B1.2(a)(2). *Begay,* 553 U.S. at 142-43. A "roughly similar" crime is one that "typically involve[s] purposeful, violent, and aggressive conduct". *Id.* at 145.

The Tenth Circuit erred when it held that Wise's conviction for failure-to-stop satisfied *Begay's* test, ignoring this Court's precedent in *Taylor v. United States,* 495 U.S. 575 (1990), and *James v. United States,* 550 U.S. 192 (2007). *Taylor* restricts sentencing courts to consider only "the statutory definitions of the prior offenses" under the categorical approach in determining whether a past conviction qualifies as a violent felony. 495 U.S. at 600. *James* clarified *Taylor's* categorical approach, holding 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." 550 U.S. at 208. This approach is limited to whether "the conduct encompassed by the elements of the offense, in the ordinary case." *Id.*

The Tenth Circuit, however, did not limit its analysis to whether "an attempt to flee or elude a peace officer by vehicle or other means" or whether "operat[ing] the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person" typically creates serious potential risk of injury to another. Instead, the Tenth Circuit, resting on the decision in *West,* concluded that because failure-to-stop occurs in the presence of a police

officer, likely occurs in the presence of bystanders, and involves overt disobedience of a police officer's command, it necessarily presents a serious potential risk of physical injury similar to § 4B1.2's enumerated crimes of burglary, arson, extortion, and crimes involving explosives. Pet. App. 6a (quoting *West*, 550 F.3d at 964 n.9).

This scenario, however, is not the typical or ordinary case under a plain reading of the Utah statute. A person may violate the statute by *either* "interfer[ing] with *or* endanger[ing] the operation of any vehicle or person." UTAH CODE ANN. § 41-6a-210(1)(a)(i) (emphasis added). Interference with the operation of any vehicle or person in the ordinary case does not pose a serious risk of physical injury sufficiently similar to burglary, arson, extortion, and crimes involving explosives. Further, "attempt[s] to flee or elude a peace officer by vehicle or other means" under the second prong of the Utah statute similarly do not present a serious potential risk of physical injury in the ordinary case. Because the Tenth Circuit failed to limit its analysis to whether interfering with the operation of a vehicle or person or attempting to flee or elude a peace officer constituted violent and aggressive behavior, the Tenth Circuit erred in finding Wise's conviction was a crime of violence.

The Tenth Circuit further misapplied the test in *Begay* in finding that the second prong of the Utah statute creates a serious

potential risk of physical injury to another. Under Utah's statute, "an attempt to flee or elude a peace officer by vehicle or other means" does not introduce the same degree of risk of physical injury required to be similar to burglary, arson, extortion, or crimes involving explosives. Nor does this prong of the Utah statute require attendant circumstances present in other state statutes, such as high speed, that might create a serious potential risk of physical injury. Abandoning a vehicle and fleeing or eluding a police officer on foot qualifies as "other means" under the Utah statute and is substantially dissimilar from the degree of risk of physical injury that burglary, arson, extortion, or crimes involving explosives create.

The Tenth Circuit also inappropriately disregarded this Court's holding in *Chambers*. Rather than analyzing the statute under *Chambers's* guidance, the Tenth Circuit relied on its reasoning in *West* (decided before the outcome in *Chambers*) that even if *Chambers* "concludes that an escape conviction does not categorically present a serious potential risk of physical injury to another, we would conclude that a Utah conviction for failing to obey an officer's command would categorically present a serious potential risk of physical injury to another." Pet. App. 6a (quoting *West*, 550 F.3d at 964 n.9). *Chambers* overruled many circuits, including the Tenth Circuit, that had held all escapes involve a serious risk of potential injury. 129 S. Ct. at 691-92.

The Tenth Circuit continues to rely on overturned precedent that because "[t]here is little doubt that felony fleeing involves, at the very least, the same risks of physical injury to another as a walk-away escape," vehicular fleeing must constitute a violent crime. *West*, 550 F.3d at 964 (quoting *United States v. Kendrick*, 423 F.3d 803, 809 (8th Cir. 2005)). The Tenth Circuit's continued reliance on *West* here is inappropriate in light of *Chambers* and its disavowal that all escape crimes are crimes of violence.

Certiorari is appropriate to correct the Tenth Circuit's departure from this Court's precedent on this issue, which affects Wise and other similarly situated defendants.

## IV. THIS CASE IS THE PERFECT VEHICLE TO RESOLVE THE SPLIT.

This case is the perfect vehicle to resolve the split, whether or not the Court has granted and set for argument the petition in *Dismuke*, 593 F.3d 582, *petition for cert. filed*, No. 10-109, an ACCA case which is slated for disposition at an earlier conference. If the Court grants *Dismuke*, this Court should consider granting this petition as well and setting both cases for argument in the same sitting. This would allow the Court to consider language of the Utah statute that is more consistent with many state vehicular-fleeing

statutes.[6] The Wisconsin statute at issue in *Dismuke* requires additional conduct beyond an attempt to flee the peace officer, including increasing the vehicle's speed or extinguishing the vehicles lights in an attempt to flee. *Compare* Wis. Stat. § 346.04(3) *with* Utah Code § 41-6a-210.

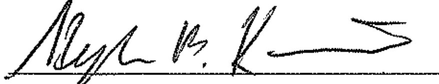
If the Court denies the *Dismuke* petition, this petition should be granted to resolve the split because of the typicality of the Utah statute and the interchangeability of ACCA and Guidelines precedent in the courts of appeals. This not a typical case in which this Court would ordinarily defer to the Sentencing Commission to resolve any conflict. *See Braxton v. United States*, 500 U.S. 344, 348-49 (1991) (choosing not to resolve a Circuit split arising interpreting the Sentencing Guidelines because "the [Sentencing] Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2"), The Sentencing Commission adopted the exact language of ACCA's residual clause in § 4B1.2 so that career-offender sentencing would be consistent with the statute, and it has not undertaken to resolve the conflict. This Court's intervention is imperative.

[6] *See* CONN. GEN. STAT. § 4103; FLA. STAT.§ 316.1935(2); 625 ILL. COMP. STAT. 5 § 11-204.1; IND. CODE ANN. § 35-44-3-3; MD. CODE. ANN., TRANSP. § 21-904; ME. REV. STAT. ANN. TIT. 23 § 2414; MICH. COMP. LAWS § 257.602a(1); MINN. STAT. § 609.487 subd. 3; NEB. REV. STAT. § 28-905; S.C. CODE ANN. § 56-5-750; VT. STAT. ANN. TIT. 23, § 1133; VA. CODE ANN. § 46.2-817; WASH. REV. CODE § 46.61.020.

## CONCLUSION

The petition should be granted.

Respectfully submitted,



STEPHEN B. KINNAIRD,
*Counsel of Record*
ELIZABETH A. STEVENS
Paul, Hastings, Janofsky &
Walker LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700

*Attorneys for Petitioner*
Michael Wise

LEGAL_US_E # 89651884.2