No.

IN THE

Supreme Court of the United States

RICHARD DOUGLAS TRAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The court of appeals construed U.S.S.G. § 4B1.2(a)(2)'s residual clause to require that simple vehicle flight in violation of Fla. Stat. § 316.1935(1) always qualifies as a "crime of violence." But the State of Florida's decisional law demonstrates that the prototypical violation of § 316.1935(1) never presents a serious potential risk of physical injury to anybody. Does *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), license courts to disregard a State's decisional law?

2. Are the residual clauses of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), and U.S.S.G. § 4B1.2(a)(2) void for vagueness?

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Richard Douglas Travis, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 2014 U.S. App. LEXIS 6262 (11th Cir.) (published).

JURISDICTION

The court of appeals filed its opinion on April 4, 2014. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S.S.G. § 4B1.2(a)(2), which provides: "The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . 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."

2. 18 U.S.C. § 924(e)(2)(B)(ii), which provides: "the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

3. Fla. Stat. § 316.1935, which provides:

(1) It is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully to flee in an attempt to elude the officer, and a person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) 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.

(3) 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, and during the course of the fleeing or attempted eluding:

(a) Drives at high speed, or in any manner which demonstrates a wanton disregard for the safety of persons or property, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Drives at high speed, or in any manner which demonstrates a wanton disregard for the safety of persons or property, and causes serious

bodily injury or death to another person, including any law enforcement officer involved in pursuing or otherwise attempting to effect a stop of the person's vehicle, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Notwithstanding any other provision of law, the court shall sentence any person convicted of committing the offense described in this paragraph to a mandatory minimum sentence of 3 years imprisonment. Nothing in this paragraph shall prevent a court from imposing a greater sentence of incarceration as authorized by law.

(4) Any person who, in the course of unlawfully leaving or attempting to leave the scene of a crash in violation of s. 316.027 or s. 316.061, having knowledge of an order to stop by a duly authorized law enforcement officer, willfully refuses or fails to stop in compliance with such an order, or having stopped in knowing compliance with such order, willfully flees in an attempt to elude such officer and, as a result of such fleeing or eluding:

(a) Causes injury to another person or causes damage to any property belonging to another person, commits aggravated fleeing or eluding, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Causes serious bodily injury or death to another person, including any law enforcement officer involved in pursuing or otherwise attempting to effect a stop of the person's vehicle, commits aggravated fleeing or eluding with serious bodily injury or death, a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

> The felony of aggravated fleeing or eluding and the felony of aggravated fleeing or eluding with serious bodily injury or death constitute separate offenses for which a person may be charged, in addition to the offenses under ss. 316.027 and 316.061, relating to unlawfully leaving the scene of a crash, which the person had been in the course of committing or attempting to commit when the order to stop was given. Notwithstanding any other provision of law, the court shall sentence any person convicted of committing aggravated fleeing or eluding with serious bodily injury or death to a mandatory minimum sentence of 3 years imprisonment. Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law.

4. The Fifth Amendment to the United States Constitution, which provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. am. V.

STATEMENT OF THE CASE

The decision below affirmed a sentence enhancement because it concluded Travis's simple vehicle flight in violation of Fla. Stat. § 316.1935(1) qualified as a "crime of violence" pursuant to U.S.S.G. § 4B1.2(a)(2)'s residual clause.[1] This case therefore raises fundamentally important questions about just how much conduct the residual clause captures and the scope of this Court's decision in *Sykes* v. *United States*, 131 S. Ct. 2267 (2011).

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[1] The residual clauses of U.S.S.G. § 4B1.2(a)(2) and the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), are virtually identical.

The court of appeals relied on *Sykes* to disregard the State of Florida's decisional law that showed the prototypical prosecutions for simple vehicle flights in violation of Fla. Stat. § 316.1935(1) involved short, safe, and nonviolent pursuits. But the court of appeals misplaced its reliance, because the prototypical prosecutions for violations of the Indiana statute at issue in *Sykes* involved vehicle flights and pursuits that were long, dangerous, and violent. 131 S. Ct. at 2280-81 (Thomas, J., concurring in judgment) (collecting Indiana cases). Accordingly, *Sykes* did not license the court of appeals to disregard state law. And the fact that this issue is being litigated once again shows that the residual clause should be ruled void for vagueness.

A. THE RESIDUAL CLAUSE.

In a series of cases, this Court has developed, on an *ad hoc* basis, various standards for deciding whether prior felony convictions qualify under the ACCA's residual clause for sentence enhancement as a "violent felony." An understanding of this framework is critical for determining here whether a violation of Fla. Stat. § 316.1935(1) was a "crime of violence" for sentencing purposes.

In *Shepard* v. *United States*, this Court addressed "whether a sentencing court can look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary." 544 U.S. 13, 16 (2005). Elucidating a "categorical approach" to such questions, this Court held that sentencing courts "may not, and that a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charg-

ing document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.*

This Court elucidated *Shepard*'s categorical approach when it addressed, in *James* v. *United States*, "whether attempted burglary, as defined by Florida law, is a 'violent felony' under ACCA." 550 U.S. 192, 195 (2007). In answer to this question, the *James* Court explained the procedure animating *Shepard*'s "categorical approach." *Id.* at 202. To wit, "we 'look only to the fact of conviction and the statutory definition of the prior offense,' and do not generally consider the 'particular facts disclosed by the record of conviction.'" *Id.* at 202 (quoting *Shepard*, 544 U.S. at 17). In other words, "we consider whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *Id.* (emphasis in original).

Applying that categorical approach to the substantive question, *James* adopted the "closest analog" test and held attempted burglary is a violent felony because "the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses—here, completed burglary." *Id.* at 203. In doing so, this Court qualified that a categorical assessment of risk, however, does not "requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." Id. at 208. "Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id.*

Begay v. *United States* shifted away from *James*'s "closest analog" test in favor of a "purposeful, violent, and aggressive" test. 553 U.S. 137, 145 (2008). More specifically, *Begay* addressed "whether driving under the influence of alcohol is a 'violent felony' as the [ACCA] defines it." *Id.* at 139. In answering this question in the negative, the *Begay* Court explained that "DUI falls outside the scope of [the ACCA's residual clause because i]t is simply too unlike the provision's listed examples [i.e., burglary, arson, extortion, or crimes involving the use of explosives] for us to believe that Congress intended the provision to cover it." *Id.* at 142. Rather, DUI does not involve "purposeful, violent, and aggressive conduct" "such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Id.* at 145. In other words, a prior conviction was not a violent felony for ACCA purposes unless it thereby "increased [the] likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* at 146.

The Supreme Court applied *Begay*'s "purposeful, violent, and aggressive" test in deciding "whether a 'failure to report' for penal confinement is a 'violent felony' within the terms of the [ACCA]" in *Chambers* v. *United States*, 555 U.S. 122, 123 (2009). Like *Begay*, *Chambers* concluded failure to report was not a violent felony. *Id.* at 130. As a conceptual matter, the *Chambers* Court concluded failure to report merely amounted to a nonviolent "form of inaction." *Id.* at 128. In a new wrinkle, however, this Court bolstered that conceptual conclusion through reliance on statistical analyses that assessed the risk of violence presented by failure to report crimes. *Id.* at 129-30.

It is this Court's enigmatic decision in *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), however, that is at the heart of this case. *Sykes* involved "an Indiana statute that makes it a criminal offense whenever the driver of a vehicle knowingly or intentionally 'flees from a law enforcement officer.'" *Id.* at 2270. Seemingly retreating from *Begay*'s and *Chambers*'s application of the "purposeful, violent, and aggressive" test, the *Sykes* Court concluded that "[r]isk of violence is inherent to vehicle flight." Id. at 2274.

Harkening back to *James*'s "closest analog" test, the *Sykes* Court analogized vehicle flight to arson because it "entails intentional release of a destructive force dangerous to others," and to burglary because it "by definitional necessity occur[s] when police are present" and therefore "can end in confrontation leading to violence." Id. at 2273, 2274. As such, "[c]onfrontation with police is the expected result of vehicle flight," and it typically "places property and persons at serious risk of injury." *Id.* at 2274. Much like *Chambers*, the *Sykes* Court buttressed these conceptual conclusions with extensive statistical analyses. Id. at 2274-75.

Furthermore, the *Sykes* Court concluded the defendant had misplaced his reliance on *Begay* and *Chambers* by "overread[ing]" those decisions' application of the "purposeful, violent, and aggressive" test. *Id.* at 2275. Instead, *Sykes* explained that *Begay* and *Chambers* had "no precise textual link to the residual clause," but was rather were "an addition to the statutory text." *Id.* Accordingly, *Sykes* explained the "purposeful, violent and aggressive inquiry" often "will be redundant with the inquiry into risk" required by the text of the ACCA's residual clause. *Id.* Contrary to *Begay* and *Chambers*, "risk levels pro-

vide a categorical and manageable standard that suffices to resolve the case before us." *Id.* at 2275-76. Moreover, "Begay involved a crime akin to strict liability, negligence, and recklessness crimes; and the purposeful, violent, and aggressive formulation was used in that case to explain the result." *Id.* at 2276. The vehicle flight in *Sykes*, however, was "not a strict liability, negligence, or recklessness crime." *Id.*

Finally, *Sykes* rejected the defendant's argument that Indiana's vehicle flight statutory scheme distinguished nonviolent vehicle flights from violent vehicle flights. *Id.* This conclusion followed primarily from the observation that Indiana punished simple vehicle flight and aggravated vehicle flight identically. *Id.*

It is the illustrative concurrence and dissents, however, that best explain what the *Sykes* Court truly did and did not hold. For instance, Justice Thomas in pertinent part collected Indiana decisional law to support the proposition that simple vehicle flight prosecutions under Indiana law typically involved dangerous and violent pursuits and confrontations. *Id.* at 2280-81 (Thomas, J., concurring in judgment) (collecting cases).

Justice Scalia, in turn, argued that despite this Court's series of opinions and ever-evolving tests, the ACCA's residual clause remained unconstitutionally void for vagueness. *Id.* at 2284-88 (Scalia, J., dissenting). In that regard, Justice Scalia criticized the shortcomings of *James*'s "closest analog" test, *Begay*'s "purposeful, violent, and aggressive" test, *Chambers*'s "risky-as-the-least-risky" test, and *Sykes*'s "tutti-frutti" incorporation of all three and reliance on statistics. *Id.*

In contrast, Justices Kagan and Ginsburg illustrated their disagreement with the Court's holding by reframing the issue presented through the lens of two contrasting hypothetical statutes. *Id.* at 2289-90 (Kagan and Ginsburg, JJ., dissenting). On one hand, the dissent posited a hypothetical "statute that makes it a crime to 'willfully flee from a law enforcement officer by driving at high speed or otherwise demonstrating reckless disregard for the safety of others.'" *Id.* at 2289. On the other hand, the dissent set forth a hypothetical "statute making it a crime to 'willfully flee from a law enforcement officer without driving at high speed or otherwise demonstrating reckless disregard for the safety of others.'" *Id.* at 2290 (emphasis in original). Indiana's statute, however, "straddles the two hypothetical statutes." *Id.* Whereas Indiana's prohibition of "mere failure to stop . . . should not count as a violent felony under ACCA," the Indiana statute "also includes more violent forms of vehicular flight" such as "a person who speeds or drives recklessly, who leads the police on a 'Hollywood-style car chase,' and who endangers police officers, other drivers, and pedestrians." *Id.* at 2290 (emphasis in original) (citation omitted).

Viewing the statute "as a whole," Justices Kagan and Ginsburg concluded Indiana had set forth "not a single offense, but instead a series of separate, escalating crimes" for which simple vehicle flight was not a violent felony. Id. at 2292-93. Moreover, the dissent noted that "the Court reserves the question whether a vehicular flight provision like [the Indiana statute] is a crime of violence under ACCA 'where that offense carries a less severe penalty than [a greater] offense that includes it.'" *Id.* at 2295.

Finally, Justices Kagan and Ginsburg also found the *Sykes* Court's retreat from *Begay*'s and *Chambers*'s "purposeful, violent, and aggressive" test to be "puzzling." *Id.* at 2289 n.1. To square this circle, the dissent explained that it "understand[s] the majority to retain the 'purposeful, violent, and aggressive' test, but to conclude that it is 'redundant' in this case." *Id.* Far from rejecting the *Begay* and *Chambers* test wholesale, the dissent stated it "do[es] not think the majority could mean to limit the test to 'strict liability, negligence, and recklessness crimes'" because that (1) "would . . . eliminate the test's focus on 'violence' and 'aggression,'" and (2) "would collide with *Chambers*," which "applied the test to an intentional crime." *Id.* For those reasons, the dissent "assume[d] this test will make a resurgence—that it will be declared non-redundant—the next time the Court considers a crime, whether intentional or not, that involves risk of injury but not aggression or violence." *Id.*

In sum, after *Sykes*, there is now a veritable smorgasbord of tests this Court and the courts of appeals may apply in determining whether a given crime is a violent felony for residual clause purposes: the "closest analog" test (*James*); the "purposeful, violent, and aggressive" test (*Begay*); the "risky as the least risky" test (*Chambers*); or a mélange of all three tests sprinkled with reliance on statistics for good measure (*Sykes*).

B. THE PROCEEDINGS BELOW.

Travis pled guilty to possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g)(1). Pet. App. 1a. At sentencing, the district court calculated a base offense level of 24 under U.S.S.G. § 2K2.1(a)(2)

because, within the meaning of § 4B1.2(a)(2)'s residual clause, it concluded Travis had at least two prior convictions for a "crime of violence." Pet. App. 1a-2a. In this regard, the district court relied on two prior felony offenses: (1) a 2006 conviction for simple vehicle flight in violation of Fla. Stat. § 316.1935(1); and (2) a 2011 conviction for aggravated assault with a weapon. Pet. App. 2a. After a three-level reduction for acceptance of responsibility, Travis's adjusted offense level of 21 and criminal history category of VI yielded a sentencing guideline range of 77 to 96 months' imprisonment. Pet. App. 2a. The district court sentenced Travis to 96 months' imprisonment. Pet. App. 1a.

On appeal, Travis contended the district court erred in treating his conviction for vehicular flight as a crime of violence because Florida decisional law—unlike the Indiana decisional law at issue in *Sykes*—demonstrated that violations of Fla. Stat. § 316.1935(1) present no serious potential risk of physical injury to anybody. Pet. App. 2a, 6a. Travis also argued the residual clause was void for vagueness. Pet. App. 2a n.1. The court of appeals, however, affirmed Travis's sentence. Pet. App. 9a.

The court of appeals concluded that *Sykes* controlled the case. Pet. App. 6a. Specifically, the court of appeals ruled that, in all vehicle flights, "the '[r]isk of violence is inherent to vehicle flight,' even if 'the criminal attempting to elude capture drives without going at full speed or going the wrong way,' because '[c]onfrontation with police is the expected result of vehicle flight' and such confrontation 'places property and persons at serious risk of injury' both during and after the pursuit." Pet. App. 6a (quoting *Sykes*, 131 S. Ct. at 2274). As such, the court of appeals disre-

garded Florida decisional law to the contrary. Pet. App. 7a-8a. Instead, the court of appeals performed its own analysis of Fla. Stat. § 316.1935(1)—without regard to Florida decisional law that interprets that statute—and concluded it was "virtually indistinguishable" from the Indiana statute at issue in *Sykes*. Pet. App. 8a. Accordingly, the court of appeals affirmed the sentence. Pet. App. 9a.

REASONS FOR GRANTING THE PETITION

In this case, the residual clause once again presents important and recurring questions of federal law: does *Sykes* allow courts of appeals to disregard state decisional law about the absence of potential risks of injury? And is the residual clause void for vagueness? The Court should grant the petition to consider these questions.

I. *SYKES* DOES NOT ALLOW COURTS TO DISREGARD STATE DECISIONAL LAW ABOUT THE ABSENCE OF POTENTIAL RISKS OF INJURY.

1. The State of Florida's decisional law makes clear that Travis's prior conviction for simple vehicle flight in violation of Fla. Stat. § 316.1935(1) was not a "crime of violence" under U.S.S.G. § 4B1.2(a)(2)'s residual clause. It does not qualify under *James*'s "closest analog" test or *Chambers*'s "risky as the least risky" test, and the record on appeal contains no relevant statistical evidence.

Fla. Stat. § 316.1935(1) prohibits "willfully to refuse or fail to stop the vehicle in compliance with [an] order to stop" or "willfully to flee." Unlike Fla. Stat. § 316.1935(2)-(4), it does not require the law enforcement officer to be "in an authorized law enforcement patrol vehicle." Indeed, it is the least seri-

ous form of vehicle flight under Florida law—so much so that it was a misdemeanor until the Florida Legislature amended § 316.1935 on July 1, 2004. *E.g.*, *Arroyo* v. *State*, 901 So. 2d 1014, 1015 (Fla. 4th DCA 2005) (misdemeanor); *Anderson* v. *State*, 780 So. 2d 1012, 1014 (Fla. 4th DCA 2001) (same).

At any rate, Florida decision law makes clear that violation of Fla. Stat. § 316.1935(1) is not a crime of violence, because its prototypical prosecution does not "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2). For example, in *State* v. *Kirer*, "[n]either appellee nor the deputy went over approximately '10 miles an hour.'" 120 So. 3d 60, 61 (Fla. 4th DCA 2013). Similarly, *Ward* v. *State* involved a driver who traveled "approximately ten to twenty blocks, during which time the police officers who testified at trial conceded that Ward did not speed, violate traffic control devices or otherwise commit any traffic infractions." 59 So. 3d 1220, 1221 (Fla. 4th DCA 2011). Likewise, *Jackson* v. *State* involved a "car [that] continued to travel below the speed limit, but proceeded another mile before stopping." 818 So. 2d 539, 541 (Fla. 2d DCA 2002). The notion that law enforcement effectuated these traffic stops after a dangerous pursuit and with guns drawn is ridiculous; this is the kind of crime committed by an overwhelmed parent rushing to a child's soccer practice or a harried executive late for a meeting.[2]

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[2] To be sure, however, § 316.1935(1) remains a lesser-included offense of § 316.1935(2). For that reason, on appeal Florida appellate courts often have transformed highly dangerous and violent vehicle flight prosecutions and convictions under § 316.1935(2) into convictions under § 316.1935(1) on remand. *E.g.*, *Whitehall* v. *State*, 81 So. 3d 599, 601 (Fla. 2d DCA

In sum, Florida's prosecutions for highly dangerous and violent vehicle flight are typically charged as aggravated vehicle flights in violation of Fla. Stat. §§ 316.1935(2), (3), or (4). For example, in one typical prosecution under § 316.1935(2), "[a] chase ensued that involved speeds as high as 118 m.p.h., and which ended forty miles later after 'stop sticks' deflated Keough's tires, causing him to fail to negotiate a turn, hit a pole, and land in a river." *Keough* v. *State*, 714 So. 2d 666, 667 (Fla. 5th DCA 1998). Similarly, a prosecution under § 316.1935(3) requires "high speed" or "wanton disregard for the safety of persons or property." Finally, a prosecution under § 316.1935(4) requires "injury," "damage to any property," or "death."

In contrast, under *James*'s "categorical approach," as informed by Florida decisional law, prosecutions for simple vehicle flights in violation of § 316.1935(1) present no serious potential risk of physical injury to anybody and are therefore not a "crime of violence" in the ordinary case. For these reasons, § 316.1935(1) violations do not fit the "closest analog" or "risky as the least risky" tests. It is unlike arson because under Florida decisional law it does not "entail[] intentional release of a destructive force dangerous to others." *Sykes*, 131 S. Ct. at 2273. It is also unlike bur-

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2012); *Erskine* v. *State*, 23 So. 3d 1207, 1209 (Fla. 3d DCA 2010); *Cunniff* v. *State*, 986 So. 2d 656, 657 (Fla. 2d DCA 2008); *Steil* v. *State*, 974 So. 2d 589, 590 (Fla. 4th DCA 2008); *Hobson* v. *State*, 908 So. 2d 1162, 1163 (Fla. 1st DCA 2005); *Gorsuch* v. *State*, 797 So. 2d 649, 650-51 (Fla. 3d DCA 2001). But research has uncovered only two outlier cases in which prosecutors charged a defendant with a highly dangerous and violent vehicle flight under § 316.1935(1) from the beginning. *Morales* v. *State*, 35 So. 3d 122, 124 (Fla. 3d DCA 2010); *Creed* v. *State*, 886 So. 2d 301, 302 (Fla. 4th DCA 2004).

glary, although it "by definitional necessity occur[s] when police are present," because no such interactions under Florida decisional law "can end in confrontation leading to violence." *Id.* at 2273, 2274. Were it otherwise, any felony in which a defendant is confronted and arrested by police would be considered a "violent felony."[3]

2. This Florida decisional law distinguishes § 316.1935(1) from the Indiana statute at issue in *Sykes*, because simple vehicle flight prosecutions under Indiana law typically involved dangerous and violent pursuits and confrontations. 131 S. Ct. at 2280-81 (Thomas, J., concurring) (collecting cases).

As Justice Thomas explained, prototypical prosecutions under the Indiana statute at issue in *Sykes* involved highly dangerous and violent pursuits and confrontations. *Id.* For example, defendants facing

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[3] Moreover, the court of appeals did not assess any statistical evidence that vehicle flight in violation of § 316.1935(1) is more risky than arson or burglary. But "briefs are an inappropriate place to develop the key facts in a case." *Sykes*, 131 S. Ct. at 2286 (Scalia, J., dissenting). Instead, the court of appeals relied on national statistics instead of state statistics. Pet. App. 7a. This was an elementary statistical error. *Id.* at 2291 & n.4 (Kagan & Ginsburg, JJ., dissenting). "Although statistics are not dispositive," they may in some cases "confirm" whether particular crimes are violent felonies. *Id.* at 2276. But "statistical analysis" should never become "untested judicial factfinding masquerading as statutory interpretation." *Id.* at 2286 (Scalia, J., dissenting). The sounder and more judicious approach here, therefore, would have been to remand to give the district court the opportunity to develop the record regarding typical charging decisions under Fla. Stat. § 316.1935(1) through introduction of statistical evidence and expert testimony. Only then could the court of appeals have determined whether vehicle flight in violation of § 316.1935(1) "is ordinarily nonrisky." *Id.* at 2281 (Thomas, J., concurring in judgment).

prosecution under the Indiana statute suddenly drove a car toward police officers (who then fired), crashed into other cars, and was Tasered, *Mason* v. *State*, 944 N.E.2d 68, 69-70 (Ind. App. 2011), accelerated and crashed into a police car, *Jones* v. *State*, 938 N.E.2d 1248, 1253 (Ind. App. 2010), sped, drove into a yard between two houses, and crashed into a tree, *Haney* v. *State,* 920 N.E.2d 818, 2010 WL 305813, at *1 (Ind. App. 2010), fled for 40 minutes, at times in excess of 100 mph and into oncoming traffic, causing police to fire at least 20 times, and eluded capture until driving into a flooded area, *Hape* v. *State*, 903 N.E.2d 977, 984, 985 & n.4, 994 (Ind. App. 2009), led police on a stop-and-go chase for five minutes, which included traveling at 30 mph through a stop sign and crowded parking lot, and was chemically sprayed, *Smith* v. *State*, 908 N.E.2d 1280, 2009 WL 1766526, at *1 (Ind. App. 2009), led a chase at speeds up to 80 mph, swerved into the path of an oncoming vehicle, and eventually jumped from the car while it was still moving, *Butler* v. *State*, 912 N.E.2d 449, 2009 WL 2706123, at *1 (Ind. App. 2009), led police on a 15-mile chase at speeds up to 125 mph, ending in a crash, *Amore* v. *State*, 884 N.E.2d 434, 2008 WL 1032611, at *1 (Ind. App. 2008), led a chase at 65-70 mph at 1:00 A.M. with no tail lights, crashed his car, and caused a police car to crash, *Johnson* v. *State*, 879 N.E.2d 24, 2008 WL 131195, at *1 (Ind. App. 2008), and led a 12:30 A.M. chase, which ended after careening off the road, crashing through a corn silo, and hitting a fence, *Tinder* v. *State*, 881 N.E.2d 735, 2008 WL 540772, at *1, *3 (Ind. App. 2008) (rev'g on other grounds). In short, prosecutions under the Indiana statute at is-

sue in *Sykes* could not be more different from prosecutions under Fla. Stat. § 316.1935(1).

3. It follows, then, that the court of appeals erred when it disregarded the State of Florida's decisional law (which animates the statute's four-part legislative scheme) regarding prototypical prosecutions under Fla. Stat. § 316.1935(1) and instead adopted a *per se* rule that all vehicle flight—no matter how a State endeavors to prosecute it—is a "crime of violence." This Court should grant the petition to correct the court of appeals' *per se* rule.[4]

II. THE RESIDUAL CLAUSE IS VOID FOR VAGUENESS.

The time has come to put the residual clause out of its misery and hold it is a drafting error that is void for vagueness. *See Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting); *Derby* v. *United States*, 131 S. Ct. 2858, 2859-60 (2011) (Scalia, J., dissenting).

The Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. am. V. "It is a fun-

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[4] Additionally, this issue (i.e., whether vehicular flight and related offenses categorically qualify as crimes of violence or violent felonies) commonly recurs in the courts of appeals. *E.g.*, *United States* v. *Hockenberry*, 730 F.3d 645 (6th Cir. 2013), *pet. for cert. filed* (Dec. 16, 2013) (failure to comply); *United States* v. *Hampton*, 675 F.3d 720 (7th Cir. 2012) (insulting or provoking contact); *United States* v. *Hudson*, 673 F.3d 263 (4th Cir. 2012) (vehicular flight); *United States* v. *West*, 646 F.3d 745 (10th Cir. 2011) (failure to stop); *United States* v. *Wise*, 597 F.3d 1141 (1th Cir. 2010) (failure to stop); *United States* v. *Rivers*, 595 F.3d 558 (4th Cir. 2010) (failure to stop); *United States* v. *Dismuke*, 593 F.3d 582 (7th Cir. 2010) (vehicular flight); *United States* v. *Tyler*, 580 F.3d 722 (8th Cir. 2009) (vehicular flight).

damental tenet of due process that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979) (quotation and alteration omitted). Rather, a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally* v. *Gen. Const. Co.*, 269 U.S. 385, 391 (1926). A statute that is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.*

"Many years of prison hinge on whether a crime falls within [the residual clause]." *Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting). Yet, after *Sykes*, there are simply too many tests this Court and the courts of appeals may apply in determining whether a given crime is a violent felony for residual clause purposes: the "closest analog" test (*James*); the "purposeful, violent, and aggressive" test (*Begay*); the "risky as the least risky" test (*Chambers*); or a mix of all three tests seasoned with reliance on statistics for good measure (*Sykes*). *Id.* at 2284-87 (Scalia, J., dissenting). Regrettably, "[t]he residual -clause series will be endless, and we will be doing ad hoc application of ACCA to the vast variety of state criminal offenses until the cows come home." *Id.* at 2287 (Scalia, J., dissenting). Indeed, "[t]he Court's ever-evolving interpretation of the residual clause will keep defendants and judges guessing for years to come." *Id.* (Scalia, J., dissenting).

Judged by these metrics, the residual clause is unconstitutionally vague. Indeed, the vagueness of the residual clause is thrown into sharp relief here, because it is clear under the State of Florida's decision-

al law that a conviction under Fla. Stat. § 316.1935(1) is not a dangerous or violent offense. Yet, the court of appeals concluded it was by adopting a *per se* rule that all vehicle flight is dangerous and violent. A well-informed citizen, who studied Florida case law reported in the Southern Reporter, could not have known this before the court of appeals rendered its decision. Hence, the residual clause is unconstitutionally vague. *See* U.S. Const. am. V; *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983).

To further illustrate the residual clause's vagueness by way of example, the court of appeals had previously held that sexual battery in violation of Fla. Stat. § 800.04(3) is not a crime of violence. *United States* v. *Harris*, 608 F.3d 1222, 1232 (11th Cir. 2010). It is difficult, to say the least, to explain to a layman how sexual battery is not categorically a crime of violence, but fleeing or refusing to stop—in a short, safe, and nonviolent manner—categorically is.

* * *

The court of appeals adopted a *per se* rule that all vehicle flight, no matter how a State prosecutes it, constitutes a "crime of violence." But *Sykes* does not license the courts to disregard a State's decisional law. Indeed, prosecutions under the Indiana statute at issue in *Sykes* involved highly dangerous and violent chases, 131 S. Ct. at 2280-81 (Thomas, J., concurring) (collecting cases), unlike prosecutions under Fla. Stat. § 316.1935(1). The Court should grant the petition to consider this issue, which *Sykes* left open.[5] Moreover, the Court should grant the petition

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[5] The Court also left this residual clause interpretive question open in *Descamps* v. *United States*: "We may reserve the question whether, in determining a crime's elements, a sentenc-

to consider, once again, whether the residual clause is void for vagueness.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 18, 2014

ing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it." 133 S. Ct. 2276, 2291 (2013).

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-10400
Non-Argument Calendar

D.C. Docket No. 3:12-cr-00055-LC-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RICHARD DOUGLAS TRAVIS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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(April 4, 2014)

Before CARNES, Chief Judge, HULL and MARCUS, Circuit Judges.

PER CURIAM:

Richard Travis appeals his 96-month sentence, imposed after he pleaded guilty to possessing a firearm as a convicted felon. See 18 U.S.C. § 922(g)(1). At

sentencing, the district court calculated a base offense level of 24 under § 2K2.1(a)(2) of the United States Sentencing Guidelines because Travis had at least two prior convictions for a "crime of violence" within the meaning of the residual clause of § 4B1.2, which defines a predicate crime of violence as any felony offense that "involves conduct that presents a serious potential risk of physical injury to another." *See* U.S.S.G. §§ 2K2.1(a)(2), 2K2.1 cmt. n.1, 4B1.2(a)(2). The court relied on two prior felony offenses: (1) a 2006 conviction for vehicular flight from a law enforcement officer under Fla. Stat. § 316.1935(1); and (2) a 2011 conviction for aggravated assault with a weapon. With a three-level reduction for acceptance of responsibility, Travis' adjusted offense level of 21 and criminal history category of VI yielded a sentencing guideline range of 77 to 96 months imprisonment. Travis challenges the calculation of that sentencing range, contending that the district court erred in treating his conviction for vehicular flight as a crime of violence.[1]

We review de novo whether a prior conviction qualifies as a "crime of violence" under the sentencing

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[1] Travis, for purposes of preservation only, also argues that the residual clause of the career offender guideline, U.S.S.G. § 4B1.2, is unconstitutionally vague. He concedes that the argument is foreclosed by binding precedent. *See United States* v. *Gandy*, 710 F.3d 1234, 1239 (11th Cir. 2013); *see also James* v. *United States*, 550 U.S. 192, 210 n.6, 127 S. Ct. 1586, 1598 n.6 (2007) ("[W]e are not persuaded . . . that the [ACCA's] residual provision is unconstitutionally vague. The statutory requirement that an unenumerated crime otherwise involve conduct that presents a serious potential risk of physical injury to another is not so indefinite as to prevent an ordinary person from understanding what conduct it prohibits.") (quotation marks and brackets omitted).

guidelines. *United States* v. *Lockley*, 632 F.3d 1238, 1240 (11th Cir. 2011). For purposes of § 2K2.1(a)(2), which specifically references the career offender guideline, a "crime of violence" is defined as any felony offense 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a) (emphasis added).

In determining whether a prior conviction qualifies as a crime of violence under the residual clause of the career offender guideline, we apply a categorical approach, looking "only to the fact of conviction and the statutory definition of the prior offense," and not to the "particular facts disclosed by the record of conviction." *James*, 550 U.S. at 202, 127 S. Ct. at 1593–94 (quotation marks omitted).[2] Using that approach, we must decide whether the offense "as it is ordinarily committed . . . poses a serious potential risk of physical injury that is similar in kind and in degree to the risks posed by the enumerated crimes" of burglary, extortion, arson, and those involving the use of explosives. *United States* v. *Owens*, 672 F.3d 662, 968 (11th Cir. 2012) (quotation marks omitted). The question is whether the "offense is of a type that, by its nature, presents a serious potential risk of injury to another," not whether "every conceivable factual offense covered by [the] statute . . . necessarily pre-

[2] Because the Armed Career Criminal Act (ACCA) provides a definition of "violent felony" that is virtually identical to the definition of "crime of violence" under the career offender guideline, "decisions about one apply to other." *Gilbert* v. *United States*, 640 F.3d 1293, 1309 n.6 (11th Cir. 2011) (en banc).

sent[s] a serious potential risk of injury." *James*, 550 U.S. at 208–09, 127 S. Ct. at 1597.

Travis was convicted under Fla. Stat. § 316.1935, which contains several subsections covering the use of a vehicle to flee or elude a police officer. Subsection (1), the specific provision under which Travis was convicted, makes it a third-degree felony "for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order" or "willfully to flee in an attempt to elude the officer." Fla. Stat. § 316.1935(1). Subsection (2) also makes it a third-degree felony to "willfully flee[] or attempt[] to elude a law enforcement officer," but only where the officer is "in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed" and "with siren and lights activated." *Id.* § 316.1935(2). Finally, subsection (3) increases the penalty associated with a violation of subsection (2) where the defendant flees "at high speed" or "in any manner which demonstrates a wanton disregard for the safety of persons or property." *Id.* § 316.1935(3).

The Supreme Court's decision in *Sykes* v. *United States*, — U.S. —, 131 S. Ct. 2267 (2011), and our recent decision in *United States* v. *Petite*, 703 F.3d 1290 (11th Cir. 2013), dictate the outcome of this appeal by compelling a single conclusion: vehicle flight in violation of Fla. Stat. § 316.1935(1) constitutes a crime of violence for purposes of the sentencing guidelines. In *Sykes*, the Supreme Court addressed whether a defendant's prior conviction for intentional vehicle flight was a "violent felony" under the residual clause of the ACCA. 131 S. Ct. at 2270-73. The

defendant had been convicted under an Indiana statute that made it a Class D felony to "use[] a vehicle" to knowingly or intentionally "flee[] from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop." *Id.* at 2271. The Supreme Court held that a violation of that statute was categorically a violent felony under the ACCA because it presented a serious potential risk of physical injury comparable to both arson and burglary. *Id.* at 2273-74. The Court emphasized that the "[r]isk of violence is inherent to vehicle flight," even if "the criminal attempting to elude capture drives without going at full speed or going the wrong way," because "[c]onfrontation with police is the expected result of vehicle flight" and such confrontation "places property and persons at serious risk of injury" both during and after the pursuit. *Id.* at 2274 (emphasis added).

In *Petite*, we held that simple vehicle flight in violation of Fla. Stat. § 316.1935(2) is a violent felony under the ACCA. 703 F.3d at 1301. Finding "little meaningful distinction for ACCA purposes between Florida's simple vehicle statute and the Indiana statute of conviction in *Sykes*," and faced with the "Supreme Court's detailed analysis in *Sykes* regarding the substantial risks that inhere in any confrontational act of intentional vehicle flight," we concluded that "Florida's offense of simple vehicle flight from a flashing patrol car presents a serious potential risk of physical injury comparable to the ACCA's enumerated crimes of burglary and arson." *Id.* at 1300-01. Indeed, given *Sykes*'s emphasis on "the dangers created by the law enforcement response that any act of intentional vehicle flight provokes," we noted that "there are sound reasons to conclude . . . that any

form of intentional vehicle flight from a police officer presents powerful risks comparable to those presented by arson and burglary." *Id.* at 1296, 1298.

Travis contends that neither *Sykes* nor *Petite* compel the conclusion that vehicle flight in violation of Fla. Stat. § 316.1935(1) is a crime of violence because "Florida decisional law" makes clear that violations of that statute, unlike violations of § 316.1935(2) or Indiana's vehicle flight statute, typically involve nonviolent pursuits at low speeds over short distances. He also argues that refusing to stop a vehicle in compliance with a police officer's order to do so is far less likely "to result in potential injury to others or a dangerous confrontation" than when a defendant violates § 316.1935(2) by fleeing from a patrol car with its siren and lights activated. We disagree.

Travis' argument that violations of § 316.1935(1) are not crimes of violence because they typically do not involve high speeds or reckless driving was flatly rejected in both *Sykes* and *Petite*. The Supreme Court's *Sykes* decision made clear that vehicle flight is an inherently risky enterprise, even when it does not involve high speeds or other reckless conduct, because it can end in a violent confrontation between the offender and the police. 131 S. Ct. at 2273-74. The Court explained:

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and others drivers an inherent part of the offense. Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or

> almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent—even lethal—potential for others.

Id. at 2273. In reaching that conclusion, the Court did not rely on statistics specific to Indiana and how its vehicle flight statute is typically violated. Instead, it relied on the "commonsense" notion that "vehicle flights from an officer by definitional necessity occur when police are present, are flights in defiance of their instructions, and are effected with a vehicle that can be used in a way to cause serious potential risk of physical injury to another." *Id.* at 2274. The Court then bolstered its "commonsense conclusion" with nationwide, not state-specific, statistics concerning the risk of crashes and injuries involved in police pursuits. See id. (citing nationwide studies showing "that between 18% and 41% of chases involve crashes" and a 2008 study showing that 313 police pursuits over a 7-year period in 30 states resulted in injuries to police and bystanders).

Similarly, in *Petite* we rejected the defendant's contention that, because a typical offender of Fla. Stat. § 316.1935(2) "observes all traffic requirements" and "simply continues to drive without pulling over for the officer," the offense does not pose a serious potential risk of injury. 703 F.3d at 1296 (quotation marks omitted). We explained that "even less-than-extreme driving on the part of an offender during the course of vehicle flight can be expected to provoke a lawful but dangerous confrontational response from the law enforcement officer in the ordinary course of events." *Id.*

Contrary to Travis' invitation for us to make the crime of violence determination based on the actual

conduct involved in typical Florida prosecutions for violations of § 316.1935(1), "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." *See James*, 550 U.S. at 208, 127 S. Ct. at 1597. The Supreme Court effectively answered that question in the affirmative when it ruled that violations of a virtually indistinguishable Indiana statute, which like § 316.1935(1) criminalized the simple act of fleeing from a police officer after being ordered to stop, present a serious potential risk of injury to others. *Sykes*, 131 S. Ct. at 2271-74. And we reaffirmed that conclusion in *Petite* by holding that simple vehicle flight under § 316.1935(2) is a violent felony for ACCA purposes because "any form of intentional vehicle flight from a police officer presents powerful risks comparable to those presented by arson and burglary." 703 F.3d at 1296.

That § 316.1935(1), unlike § 316.1935(2), does not require that the offender flee from a marked patrol vehicle with its sirens and lights activated does not meaningfully distinguish this case from either *Petite* or *Sykes*. Our decision in *Petite* did not focus on the statutory requirement that the police officer have his sirens and lights activated, but instead, on "the dangers created by the law enforcement response that any act of intentional flight provokes." *Id.* at 1298.

And the vehicle flight statute at issue in *Sykes* was, as we have already noted, identical in every material respect to § 316.1935(1)—both statutes require nothing more than using a vehicle to flee after an officer has ordered the driver to stop. *See* Fla. Stat. § 316.1935(1) (prohibiting the willful failure to stop after being ordered to do so by a law enforcement of-

ficer); Ind. Code § 35-44-3-3(a)(3), (b)(1)(A) (2011) (prohibiting vehicle flight "from a law enforcement officer after the officer has . . . identified himself and ordered the person to stop").

Because Travis' prior conviction for vehicle flight under Fla. Stat. § 316.1935(1) qualifies as a crime of violence under the sentencing guidelines, we affirm his sentence.[3]

AFFIRMED.

[3] Travis requests that we "affirm [his] conviction without prejudice to his raising an ineffective assistance of counsel claim" in a collateral proceeding under 28 U.S.C. § 2255. That request is unnecessary because a defendant may bring an ineffective-assistance claim in a § 2255 proceeding regardless of whether he could have raised it on direct appeal. *See Massaro* v. *United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 1694 (2003). In fact, as Travis acknowledges, we generally will not address claims of ineffective assistance of counsel on direct appeal. *See United States* v. *Andrews*, 953 F.2d 1312, 1327 (11th Cir. 1992).