Swimming against the Tide: The Eighth Circuit Holds That Fleeing a Police Officer in a Motor Vehicle is Not a Crime of Violence

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NOTE

Swimming Against the Tide: The Eighth Circuit Holds That Fleeing a Police Officer in a Motor Vehicle Is Not a Crime of Violence

United States v. Tyler, 580 F.3d 722 (8th Cir. 2009).

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I. INTRODUCTION

In 2009, the U.S. Court of Appeals for the Eighth Circuit held that the Minnesota offense of fleeing a peace officer in a motor vehicle is not a “crime of violence” for the purposes of the Federal Sentencing Guidelines.¹ Under the Federal Sentencing Guidelines (Sentencing Guidelines), a crime of violence is defined as any state or federal offense “punishable by imprisonment for a term exceeding one year” that involves the use of physical force against another person or 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 If the offender has two prior convictions for crimes of violence or controlled substances offenses, the court may consider the defendant a “career offender,”³ which could result in a much stiffer sentence.⁴

¹. 580 F.3d 722, 723 (8th Cir. 2009).
³. The Sentencing Guidelines state:
   (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Id. § 4B1.1(a).
The Eighth Circuit's holding that fleeing a peace officer in a motor vehicle is not a crime of violence is the minority position among circuits that have considered the issue. Despite the overwhelming opposition to the Eighth Circuit's position, this Note argues that the Eighth Circuit reached the correct conclusion because the crime of fleeing an officer does not always present a serious risk of physical harm to others and because fleeing is not an inherently aggressive or violent act. Unfortunately, the court's focus on Minnesota's statutory language makes the *United States v. Tyler* decision of limited precedential value when interpreting the statutes of other states. Each state within the Eighth Circuit, including Missouri, has different statutory language that could lead courts to an opposite outcome. Such uncertainty makes it difficult for state court judges and attorneys to know when a defendant should be labeled as a career offender based on a conviction for fleeing a police officer in a motor vehicle. Therefore, the Eighth Circuit's focus on Minnesota's statutory language has the potential to create vast sentencing inequalities among defendants who commit similar crimes in different states. This disparity seems highly unfair and completely at odds with the purpose of the Sentencing Guidelines, which is to create uniform sentencing and to curtail judicial discretion.

II. FACTS AND HOLDING

Minnesota resident Gregory Scott Tyler had an unfortunate history of criminal activity. Tyler was convicted of fleeing a peace officer in a motor vehicle in June of 1998. Officers conducted a routine traffic stop after they observed Tyler "driving a vehicle owned by an individual with an outstanding gross misdemeanor warrant and a revoked driving status." Tyler drove off when the officers approached the vehicle, and the officers pursued. During the pursuit, Tyler "dr[ove] at excessive speeds" and "failed to adhere to traffic signals and lights." After losing control of the vehicle, Tyler skidded...
into a steel cemetery gate.\textsuperscript{11} He then fled on foot and was apprehended by the police a short time later.\textsuperscript{12} In addition to the 1998 conviction for fleeing a peace officer, Tyler also was convicted in 2000 of one count of first degree robbery and three counts of second degree robbery.\textsuperscript{13} Then, Tyler pled guilty to one count of bank robbery under 18 U.S.C. § 2113(a) in February 2008.\textsuperscript{14} There was no dispute in this case that bank robbery was a crime of violence or that Tyler’s prior robbery convictions were also crimes of violence.\textsuperscript{15} However, the presentence investigation report (PSR)\textsuperscript{16} prepared prior to Tyler’s sentencing hearing also classified his Minnesota conviction for fleeing a peace officer in a motor vehicle as a crime of violence.\textsuperscript{17} On the basis of his prior convictions for fleeing a peace officer and burglary, the PSR

\begin{quote}
11. Id.
12. Id.
13. Id. at 1.
15. Brief of Appellee, supra note 7, at 4 (internal citations omitted).
16. Presentence investigation reports are completed by a probation officer prior to sentencing and provide the judge with information about the accused’s background, which may be taken into account in determining sentencing. For a history of presentence investigation reports and their uses, see Center on Juvenile and Criminal Justice, The History of the Pre-sentence Investigation Report, available at http://www.cj.cj.org/files/the_history.pdf.
17. Brief of Appellee, supra note 7, at 2. The U.S. Sentencing Commission’s Guidelines Manual defines a “crime of violence” as:

\begin{quote}
[A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
\begin{enumerate}
\item has as an element the use, attempted use, or threatened use of physical force against the person of another, or
\item 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.
\end{enumerate}
\end{quote}

U.S. SENTENCING GUIDELINES MANUAL § 4B1.2.
\end{quote}
"recommended that Tyler be sentenced as a career offender." Tyler objected to his classification as a career offender on the ground that his underlying conviction for fleeing a peace officer in a motor vehicle did not qualify as a crime of violence.

Despite Tyler's objection to the PSR, the district court determined that his prior conviction for fleeing a peace officer was a crime of violence. The district court concluded that fleeing a peace officer involves "purposeful[, violent[, and aggressive conduct" because someone who is "willing to disregard or elude a peace officer who has told [him] to stop" is putting "anybody in close proximity in danger and it's an intentional, purposeful act." After classifying Tyler as a career offender, the district court determined that his offense level was twenty-nine and that he had a criminal history category of VI. Based on this determination, the district court concluded that the advisory sentencing range for Tyler's offense was between 151 and 188 months. The district court stated that it would have sentenced Tyler to 170 months; however, the government moved for downward departure based on his "substantial assistance" to authorities. The district court ultimately imposed a sentence of 120 months.

18. Tyler, 580 F.3d at 723.
19. Id.
20. Id.
21. Id. (first alterations in original).
22. Base offense levels are determined by looking at the type of crime involved and the accused's criminal history; points are then added or removed from the offense level based on specific elements present during the instant offense. See U.S. SENTENCING COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, available at http://ftp.ussc.gov/TRAINING/GLOverview04.pdf. For example, Tyler's conviction for bank robbery carried a statutory maximum of twenty years imprisonment. 18 U.S.C. § 2113(a) (2006). The twenty-year maximum penalty for robbery automatically made Tyler's offense level twenty-nine and his criminal history category a VI under the Career Offender Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1. If Tyler had not been sentenced as a career offender, his base offense level would have been twenty. See id. § 2B3.1. It would then have been increased by two because the offense involved a financial institution and reduced by three points for acceptance of responsibility. Id.; Brief of Appellant, supra note 4, at 1.
23. Tyler, 580 F.3d at 724. The sentencing table used to determine the period of imprisonment can be found in Chapter Five, Part A of the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 5A.
24. Tyler, 580 F.3d at 724.
25. Id. Substantial assistance allows the court to depart from the sentence specified by the Guidelines when the defendant has provided assistance to the authorities "in the investigation or prosecution of another person who has committed an offense."
U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. It is unclear from the court's opinion and the appellate documents available what form of substantial assistance Tyler provided to officers to warrant this reduction in sentence.
26. Tyler, 580 F.3d at 724.
Tyler appealed his sentence, and the sole issue on appeal to the Eighth Circuit was whether a crime of violence includes fleeing a police officer in a motor vehicle under Minnesota's statutory definition of the crime.\(^{27}\) The Eighth Circuit concluded, based on the statutory elements of the offense, that "Minnesota's crime of fleeing a peace officer in a motor vehicle does not constitute a 'crime of violence' under the Sentencing Guidelines" because the offense typically does not involve conduct that presents "a serious risk of physical injury to another or... that is violent and aggressive."\(^{28}\)

The Eighth Circuit then held that the district court made a significant procedural error by designating Tyler a career offender and calculating his offense level and Sentencing Guidelines range according to that erroneous status.\(^{29}\) Despite the fact that the district court actually sentenced Tyler below the improperly calculated range, the Eighth Circuit found that it could not determine what his sentence would have been if calculated correctly.\(^{30}\) Therefore, because the court could not say that the error in calculation was harmless to Tyler, it vacated his sentence and remanded the matter for resentencing.\(^{31}\)

### III. LEGAL BACKGROUND

#### A. Statutory Provisions of the Sentencing Guidelines and ACCA

The Federal Sentencing Guidelines define a crime of violence as a state or federal offense, punishable by more than one year of imprisonment, that involves the use of physical force against another person or 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."\(^{32}\) Based on that definition, the Sentencing Guidelines label a defendant a career offender if

1. the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; 2. the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and 3. the defendant has at least

\(^{27}\) Tyler, 580 F.3d at 724. Minnesota law states that anyone who "by means of a motor vehicle flees or attempts to flee a peace officer... is guilty of a felony." Minn. Stat. Ann. § 609.487(3) (West 2010). The statute defines the term "flee" as "to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle." Id. § 609.487(1).

\(^{28}\) Tyler, 580 F.3d at 726.

\(^{29}\) Id.

\(^{30}\) Id.

\(^{31}\) Id.

\(^{32}\) U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2009).
two prior felony convictions of either a crime of violence or a controlled substance offense.\textsuperscript{33}

Similarly, the Armed Career Criminals Act (ACCA) defines a "violent felony" as a "crime punishable by imprisonment for a term exceeding one year" that also either "(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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."\textsuperscript{34} The ACCA imposes a fifteen-year mandatory prison term on an individual convicted of being a felon in possession of a firearm if that individual has "three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another."\textsuperscript{35}

Most of the applicable precedent cited by the Eighth Circuit in \textit{Tyler} addresses the ACCA, which defines the term violent felony similarly to the Sentencing Guidelines' definition of crime of violence. The court noted that the two definitions are virtually identical, and therefore it is appropriate to apply the same test to both terms.\textsuperscript{36} Other circuits appear to be in agreement that the definitions are nearly identical and that precedent regarding both provisions is interchangeable.\textsuperscript{37}

\textbf{B. Supreme Court Decisions}

One of the foundational cases in interpreting the ACCA is \textit{Taylor v. United States}, in which the United States Supreme Court determined how crimes enumerated in the ACCA should be defined.\textsuperscript{38} Taylor claimed that his Missouri convictions for second-degree burglary did not present a risk of physical injury and therefore should not have counted as violent felonies for the purpose of enhancing his sentence.\textsuperscript{39} Based on the legislative history and the express listing of burglary as a violent felony, the Court concluded that Congress intended the ACCA to apply to all burglaries, regardless of whether the specific circumstances presented a risk of physical injury.\textsuperscript{40} The Court reasoned that if Congress had intended the ACCA to apply only to those burglaries that created a risk of physical injury, then it would not have enumerated the applicable crimes because dangerous burglaries already would have

\begin{itemize}
  \item 33. \textit{Id.} § 4B1.1(a).
  \item 35. \textit{Id.} § 924(e)(1).
  \item 36. \textit{Tyler}, 580 F.3d at 725.
  \item 37. See \textit{United States v. LaCasse}, 567 F.3d 763, 765 (6th Cir. 2009), \textit{cert. denied}, 130 S. Ct. 1311 (2010); \textit{United States v. Harrison}, 558 F.3d 1280, 1291 (11th Cir. 2009).
  \item 39. \textit{Id.}
  \item 40. \textit{Id.} at 596-97.
\end{itemize}
FLEEING IS NOT A CRIME OF VIOLENCE

been covered by the residual clause. The Court held that an offense constitutes burglary for purposes of the ACCA, regardless of its exact statutory definition or label, as long as it contains the generic elements of burglary. The Court also held that sentencing courts should apply a formal categorical approach to the ACCA; thus, sentencing courts should look only to the statutory definitions of the prior offenses without considering the particular facts underlying those convictions. The Court worried that allowing a particular crime to count towards enhancement in some cases but not others, depending on the facts of the case, would require the sentencing court to engage in an elaborate fact-finding process and could create potential unfairness.

The Court addressed the issue of crimes not specifically enumerated in the ACCA in Begay v. United States. Begay argued that his New Mexico felony convictions for driving under the influence (DUI) were not violent felonies within the meaning of the statute. The Court assumed that a DUI offense “involves conduct that ‘presents a serious potential risk of physical injury to [others].’” Nonetheless, the Court found that DUI is not within the scope of the residual clause because it is “too unlike” the listed crimes. The Court found that the examples of burglary, arson, extortion, and crimes involving the use of explosives listed in the provision are illustrative of the types of crimes that come within the statute’s scope. The Court concluded that “the statute covers only similar crimes, rather than every crime that ‘presents a serious potential risk of injury to another.’” The Court rejected the idea that Congress intended the examples merely to demonstrate the degree of risk required to bring a crime within the statute’s scope. The Court concluded that in order to give effect to every word in the statute, the examples should be read to limit the scope of the residual clause to crimes that are

41. Id. at 597.
42. Id. at 598 (“[T]he generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.”).
43. Id. at 600.
44. Id. at 601.
46. Begay had been convicted a dozen times for DUI, which under New Mexico Statutes sections 66-8-102(G)-(J) becomes a felony the fourth time an individual commits the offense. Id. at 140. As a result, the sentencing judge found that Begay had at least three prior convictions for crimes punishable by imprisonment exceeding one year. Id.
47. Id.
48. Id. at 141.
49. Id. at 142.
50. Id.
51. Id.
52. Id. at 142-43.
“roughly similar, in kind as well as in degree of risk posed, to the examples themselves.”

Applying this statutory interpretation, the Court ruled that DUI does not fall within the ACCA’s residual clause because it differs from the example crimes in a very important way: all of the listed crimes involve “purposeful, violent, and aggressive” conduct. This type of prior conduct increases the likelihood that the offender is the “kind of person who might deliberately point the gun and pull the trigger.” DUI, on the other hand, need not involve conduct that is purposeful, violent, and aggressive. Instead, DUI is more like a strict liability crime because the actions of the drunk driver are punishable regardless of whether he or she has any criminal intent. The Court recognized that DUI involves serious risks, but for the purposes of the ACCA, DUI differs from violent and aggressive crimes committed intentionally. Therefore, the Court held that New Mexico’s crime of “driving under the influence” did not fit within the definition of a violent felony under the ACCA.

In Chambers v. United States, the Supreme Court again had the opportunity to examine the meaning of a violent felony under the ACCA’s residual clause. In 1998, Chambers had been convicted of robbery and aggravated battery and as part of his sentence was required to “report to a local prison for [eleven] weekends of incarceration.” When he did not report as required, he was convicted of the crime of “fail[ing] to report to a penal institution.” Chambers later was convicted of being a felon in possession of a firearm and was sentenced to 188 months’ imprisonment because the district court found that his prior Illinois conviction for failing to report to a penal institution was

53. Id. at 143.
54. Id. at 144-45 (internal citations omitted).
55. Id. at 146.
56. Id. at 145-46.
57. Id. at 145.
58. Id. at 147-48.
59. Id. at 148.
60. 129 S. Ct. 687 (2009).
61. Id. at 690.
62. Id. (alteration in original). The statute states:
A person convicted of a felony or charged with the commission of a felony, or charged with or adjudicated delinquent for an act which, if committed by an adult, would constitute a felony, who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony, or adjudicated delinquent for an act which, if committed by an adult, would constitute a felony, who knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement is guilty of a Class 3 felony.

720 ILL. COMP. STAT. 5/31-6(a) (West Supp. 2008).
a violent felony. The Seventh Circuit agreed with the district court's conclusion; however, the U.S. Supreme Court reversed, holding that failure to report for penal confinement is not a violent felony within the meaning of the ACCA.

The Court found that failure to report is a crime distinct from escape, despite the fact that they are contained in the same statutory section. The Court noted that failure to report is more passive and is less likely to involve a risk of physical harm than escape. The Court also pointed out that the statute punishes escape more harshly than failure to report, indicating their different degrees of seriousness. The Court concluded that failure to report does not present "a serious potential risk of physical injury to another." The Court stated:

Conceptually speaking, the crime amounts to a form of inaction, a far cry from the "purposeful, 'violent,' and 'aggressive' conduct" potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion. While an offender who fails to report must of course be doing something at the relevant time, there is no reason to believe that the something poses a serious potential risk of physical injury. To the contrary, an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct.

For those reasons, the Court held that failure to report to a penal institution falls outside the ACCA's definition of a violent felony.

C. Circuit Courts of Appeals Decisions

Prior to Begay, the Eighth Circuit held that Oregon's offense of fleeing or attempting to elude a police officer was a crime of violence for purposes of the Sentencing Guidelines. Under the Oregon statute at issue in United

64. Chambers, 129 S. Ct. at 690.
65. Id. at 691.
66. Id.
67. Id.
68. Id.
69. Id. at 692 (citations omitted).
70. Id. at 693.
71. United States v. Kendrick, 423 F.3d 803, 809 (8th Cir. 2005). Kendrick was convicted in the United States District Court for the Northern District of Iowa of dis-
States v. Kendrick, a person commits the crime of fleeing a police officer in a motor vehicle by "knowingly flee[ing] or attempt[ing] to elude an identifiable police officer after the officer has just given a visual or audible signal to stop."\textsuperscript{72} The court stated that the conduct involved in fleeing "calls to mind the risks associated with escape and automobile theft."\textsuperscript{73} According to the court, every escape, no matter how peaceable, has the potential to "explode into violence and result in physical injury to someone."\textsuperscript{74} That danger is compounded by the individual’s operation of a motor vehicle, which has the potential to become a deadly weapon when used to flee from a police officer.\textsuperscript{75} The "stress and urgency" of fleeing is likely to cause the individual to drive recklessly and result in a high speed chase, thereby presenting a risk of harm to the police officer and innocent bystanders.\textsuperscript{76} Based on these assumptions, the Kendrick court held that under the Oregon statute, fleeing a police officer constitutes a crime of violence.\textsuperscript{77} Begay, however, has significantly changed the test used to determine if an offense is a violent crime for purposes of the ACCA or the Sentencing Guidelines. Given Begay’s new approach, it is unclear how much weight the Eighth Circuit’s holding in Kendrick retains.

The Eighth Circuit relied on Begay in its more recent decision, United States v. Gordon, interpreting another crime not specifically enumerated in the ACCA.\textsuperscript{78} In Gordon, the offense at issue was the Missouri statutory offense of endangering the welfare of a child, which the government argued was a violent felony because of its similarity to statutory rape.\textsuperscript{79} The court noted that prior to Begay, its decisions interpreting the ACCA’s residual clause focused solely on whether the risk of physical injury presented by the offense is similar in degree to the risk associated with the listed crimes.\textsuperscript{80} Based on Begay’s holding, the court had to consider whether the crime of child endangerment "poses a similar degree of risk of physical injury and tributing and conspiring to distribute methamphetamine. Id. at 807. The district court sentenced him as a career offender based on his prior California conviction for first degree burglary and his Oregon conviction for fleeing or attempting to elude a police officer. Id. On appeal to the Eighth Circuit, Kendrick "challenge[d] his classification as a career offender, arguing that the district court erroneously held that the Oregon offense of fleeing [a police officer] is a crime of violence. Id. Therefore, the Eighth Circuit was required to interpret Oregon law. Id.

\textsuperscript{72} Id. at 809; see also OR. REV. STAT. § 811.540 (1997).
\textsuperscript{73} Kendrick, 423 F.3d at 809.
\textsuperscript{74} Id. (quoting United States v. Nation, 243 F.3d 467, 472 (8th Cir. 2001)).
\textsuperscript{75} Id. (citing United States v. Sun Bear, 307 F.3d 747, 753 (8th Cir. 2002)).
\textsuperscript{76} Id. (citing Sun Bear, 307 F.3d at 753).
\textsuperscript{77} Id.
\textsuperscript{78} 557 F.3d 623, 627 (8th Cir. 2009) (citing Begay v. United States, 553 U.S. 137, 146 (2008)).
\textsuperscript{79} Id. at 624.
\textsuperscript{80} Id. at 625 (citing United States v. Williams, 537 F.3d 969, 972 (8th Cir. 2008); United States v. Mincks, 409 F.3d 898, 900 (8th Cir. 2005)).
whether it typically involves conduct that is similarly purposeful, violent and aggressive when compared to ... its closest analogue among the example crimes."

The Eighth Circuit expressed the test for determining if an unenumerated crime is a violent felony under the residual clause of the ACCA as "whether [the] offense (1) 'involves conduct that presents a serious potential risk of physical injury to another,' and (2) 'typically involve[s] purposeful, violent, and aggressive conduct.'"81 In performing this analysis, the court used the categorical approach adopted in Taylor.82 However, because the child endangerment statute can be violated in a number of ways,83 the court looked at the charging papers for the limited purpose of determining what elements of the crime were the basis of Gordon's conviction.84 The court presumed that violation of the child endangerment statute presents a serious potential risk of physical harm to another based on the statutory definition.85 However, the court concluded that the second requirement of the residual clause, that the offense be similar in kind to the enumerated crimes, was not met by Gordon's child endangerment conviction.86 Child endangerment is not like burglary, arson, extortion, or the use of explosives because nothing in the statutory definition of the offense suggests that it usually involves purposeful, violent, and aggressive conduct.87 The court concluded that all three of those characteristics must be present; therefore, it rejected the government's argument that child endangerment is different than DUI, the crime at issue in Begay, because DUI requires intentional conduct.88 Though child endangerment may be intentional, the court believed that purposeful conduct

81. Id. (citing Williams, 537 F.3d at 972).
82. Id. at 625-26 (last alteration in original) (citation omitted).
83. Id. at 625.
84. In Missouri, a person commits the felony offense of endangering the welfare of a child in the first degree if he or she knowingly (1) acts so as to create "a substantial risk to the life, body, or health of a child" under seventeen; (2) engages in sexual conduct with a child under seventeen and over whom the person is a parent, guardian, or otherwise has a custodial relationship; (3) induces a child under seventeen to violate any provision of Chapter 195 of the Missouri Revised Statutes; (4) enlists the aid of a child under seventeen in the commission of any one of various offenses involving methamphetamine or amphetamine; or (5) commits any one of various offenses involving methamphetamine or amphetamine in the presence of a child under seventeen. See Mo. REV. STAT. § 568.045.1(1)-(5) (2000 & Supp. 2009).
85. Gordon, 557 F.3d at 625 (citing United States v. Livingston, 442 F.3d 1082, 1084 (8th Cir. 2006)). Gordon's conviction arose out of his relationship with a young girl; he pleaded guilty to endangering the welfare of a child by "knowingly act[ing] in a manner that created a substantial risk to the body and health of . . . a child less than seventeen years old." Id. at 625 (alteration in original).
86. Id. at 626.
87. Id.
88. Id.
89. Id. at 627.
alone was insufficient. The court therefore held that child endangerment is not a violent felony under the “otherwise” clause of the ACCA because it typically does not involve violent and aggressive conduct.

The Tyler court applied Gordon’s approach, which was faithful to Begay’s requirement that the crime be purposeful, violent, and aggressive, in addition to posing a serious potential risk of physical injury to another. In several subsequent opinions, however, the Eighth Circuit has limited Tyler’s holding based on the statutory language and misapplied the Begay test. In United States v. Hudson, the defendant contested the classification of his felony conviction for resisting arrest under Missouri law as a crime of violence. Missouri Revised Statutes section 575.150.5 makes it a class D felony to resist arrest “by fleeing in such a manner that the person fleeing creates a substantial risk of physical injury or death to any person.” Hudson was charged with violating that provision by driving “at excessive speeds and failing to stop for signs.” The Eighth Circuit found that the crime involves dangerous conduct by its definition and that it is purposeful. The court stated that

[...] resisting arrest by fleeing in a dangerous manner also involves violent and aggressive conduct. Resisting arrest by fleeing inevitably invites confrontation, as it “calls the officer to give chase, and . . . dares the officer to needlessly endanger himself in pursuit.” Resisting arrest by fleeing in a dangerous manner involves more violent and aggressive conduct.

This statement suggests that fleeing is violent and aggressive because it is dangerous; essentially, the court conflated the two prongs of the Begay test. The court also rejected Hudson’s argument that his Missouri offense was distinguishable from fleeing offenses in other states because Missouri’s crime of resisting arrest does not require the use of a motor vehicle. The court found that this distinction was not material, because like Hudson’s arrest, most violations of section 575.150.5 involve fleeing in an automobile.

In United States v. Malloy, the Eighth Circuit again distinguished Tyler and held that the Iowa offense of eluding or attempting to elude a pursing law

90. Id.
91. Id. at 628.
93. 577 F.3d 883, 884 (8th Cir. 2009), cert. denied, 130 S. Ct. 1310 (2010).
95. Hudson, 577 F.3d at 884.
96. Id. at 885-86.
97. Id. at 886 (last alteration in original) (citations omitted).
98. Id.
99. Id.

http://scholarship.law.missouri.edu/mlr/vol76/iss1/10
enforcement officer is a crime of violence. The court found that this statute is different from the Minnesota statute because “unlike the Minnesota statute at issue in Tyler, Iowa’s fleeing statute only applies to those who 'exceed[... the speed limit by twenty-five miles per hour or more.' The court stated that

[b]y definition, section 321.279(3) does not criminalize the passive conduct that troubled the Tyler court. Instead, it applies only to those who fleeing police, at high speed, while simultaneously (1) committing another felony, (2) operating under the influence of drugs or alcohol or possessing a controlled substance, or (3) injuring a person other than the driver. Such actions are much more aggressive than “merely extinguishing motor vehicle headlights or taillights,” or merely refusing to stop after being instructed to do so. The court also found that the offense is violent because it could lead to the possibility of a violent confrontation with the police. The court stated that “[f]ar from being passive, a highspeed chase involves violent force and is similar to the behavior underlying an escape from custody, which, as the Supreme Court noted in Chambers, is less passive and more aggressive than that likely underlying failure to report.” This decision suggests that Tyler’s holding is extremely limited. Its reasoning applies only to statutes like Minnesota’s that by their terms encompass passive, non-dangerous behavior.

The only other circuit to hold that fleeing a police officer is not a crime of violence is the Eleventh Circuit, which also focused on the language of the applicable state statute. In United States v. Harrison, the Eleventh Circuit determined that Florida’s crime of willfully fleeing a police officer is not a

100. 614 F.3d 852, 866 (8th Cir. 2010). Iowa Code section 321.279 states:
The driver of a motor vehicle commits a class “D” felony if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle that is driven by a uniformed peace officer after being given a visual and audible signal as provided in this section, and in doing so exceeds the speed limit by twenty-five miles per hour or more, and if any of the following occurs:
a. The driver is participating in a public offense, as defined in section 702.13, that is a felony.
b. The driver is in violation of section 321J.2 or 124.401.
c. The offense results in bodily injury to a person other than the driver.

101. Malloy, 614 F.3d at 864 (alteration in original) (citing Iowa Code § 321.279; United States v. Tyler, 580 F.3d 722, 725 (8th Cir. 2009)).
102. Id. at 865 (citations omitted).
103. Id.
104. Id. (internal quotation marks omitted) (quoting United States v. Harrimon, 568 F.3d 531, 535 (5th Cir. 2009)).
violent felony for purposes of the ACCA.\textsuperscript{105} The court adopted the categorical approach first outlined by the U.S Supreme Court in \textit{Taylor}.\textsuperscript{106} The Eleventh Circuit stated that after \textit{Chambers},\textsuperscript{107} "the categorical approach requires classification of the crime, a consideration of the generic crime, and an assessment of the crime as generally committed."\textsuperscript{108} The Eleventh Circuit also noted that \textit{Begay} added an element to the violent felony determination: the crime must be similar in kind and in degree of risk posed to those crimes enumerated in the ACCA, in addition to presenting a serious potential risk of physical harm to another.\textsuperscript{109} This means that the crime must involve purposeful, violent, and aggressive conduct.\textsuperscript{110} The court held that after \textit{Begay}, there is a three-step inquiry that courts must conduct: (1) how the crime ordinarily is committed in order to place the crime in its relevant category; (2) whether the crime poses a "serious potential risk of physical injury" that is similar to the statute's listed crimes; and (3) whether the crime is "similar in kind" to the listed crimes.\textsuperscript{111}

Unlike most state fleeing statutes, Florida's statute divides the crime of fleeing or eluding a police officer into three different categories: (1) "willful failures to stop a vehicle or willful fleeing after being ordered to stop by an officer"; (2) "willful fleeing after a police vehicle has activated its lights and sirens"; and (3) "willful fleeing (after a police vehicle has activated its lights and sirens) with 'high speed' or 'wanton disregard for the safety of persons or property.'"\textsuperscript{112} The provision at issue in \textit{Harrison} was the second subsection

\begin{footnotes}{\footnotesize
\footnote{105. 558 F.3d 1280, 1295-96 (11th Cir. 2009).}
\footnote{106. \textit{Id.} at 1284-85.}
\footnote{107. \textit{Chambers} v. United States, 129 S. Ct. 687 (2009).}
\footnote{108. \textit{Harrison}, 558 F.3d at 1288 (internal quotation marks omitted) (quoting \textit{Chambers}, 129 S. Ct. at 690).}
\footnote{109. \textit{Id.} at 1286.}
\footnote{110. \textit{Id.} at 1287.}
\footnote{111. \textit{Id.} The test was solidified by the holding in \textit{Begay}, but it also incorporates the holding of \textit{James v. United States}, 50 U.S. 192 (2007).}
\footnote{112. \textit{Id.} at 1291 (citing \textit{FLA. STAT.} § 316.1935(1)-(3) (2004)). Florida Statutes section 316.1935 reads in pertinent part:

(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.}}
of the statute. The court noted that this section does not include high speed or wanton disregard for persons or property. According to the court, a violation of subsection three of the Florida statute ordinarily presents a "serious potential risk of injury," but a crime committed in violation of subsection two does not. The court admitted that intentionally fleeing a police officer is a confrontational act but found that such defiance does not always create a serious potential risk of injury.

The court next looked at whether the offense was "similar in kind" to the enumerated crimes. The court noted that the Supreme Court in Begay did not interpret the text of the ACCA as written but instead "infused" the "similar in kind" requirement into the ACCA in order to effectuate Congress' perceived intent. This is an important comment because it addresses an arguable problem with the Begay approach: the "purposeful, violent, and aggressive" requirement is not found in the text of the statute. The Eleventh Circuit had no problem finding that subsection two of the Florida statute involves purposeful conduct; however, the court found that "without high speed or reckless conduct," the crime was not "sufficiently aggressive and violent enough to be like the enumerated ACCA crimes." The court noted that the fleeing crime at issue in Harrison "seems more appropriately characterized as

(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.

FLA. STAT. § 316.1935(1)-(3).
113. Harrison, 558 F.3d at 1293.
114. Id.
115. Id. at 1294.
116. Id.
117. Id. at 1295.
119. Harrison, 558 F.3d at 1295.
the crime of a fleeing coward— not an armed career criminal bent on inflicting physical injury.”

Despite the Harrison court’s convincing analysis, most circuit courts of appeals have reached a different conclusion than the Eleventh Circuit. For instance, in United States v. West, the Tenth Circuit found that a defendant’s Utah felony conviction for failing to stop at a police officer’s command is a violent felony for purposes of the ACCA. The court used a two-part inquiry based on Begay: "(1) whether the offense of conviction ‘presents a serious risk of physical injury to another’; and (2) whether the offense is ‘roughly similar, in kind as well as in degree of risk posed,’” to the enumerated offenses in the ACCA. The court also adopted the categorical approach but noted that it would use a modified categorical approach, which looked at the relevant charging and conviction documents when the applicable statute covered a broader range of conduct than the language of ACCA’s

120. Id. at 1296.
121. Utah law states:
   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.
   UTAH CODE ANN. § 41-6a-210(1)(a) (West 2010).
122. 550 F.3d 952, 960 (10th Cir. 2008), overruled by United States v. Shipp, 589 F.3d 1084 (10th Cir. 2009). In United States v. Shipp, the Tenth Circuit held that failure to return as directed is not a violent felony under the ACCA. 589 F.3d at 1090-91. In Shipp, the court recognized that West was overruled to the extent that it characterized escape as a “per se ‘violent felony’ under the ACCA.” Id. at 1091 n.3. However, the Tenth Circuit has reaffirmed its West holding in United States v. McConnell and United States v. Wise. United States v. McConnell, 605 F.3d 822, 829-30 (10th Cir. 2010) (holding that fleeing and eluding a police officer under Kansas law is a crime of violence for purposes of the Sentencing Guidelines); United States v. Wise, 597 F.3d 1141, 1148 (10th Cir. 2010) (holding that fleeing a police officer under Utah law is a crime of violence for purposes of the Sentencing Guidelines). Wise argued that Chambers undermined the court’s holding in West because the Chambers opinion showed that the court should treat separate sections of a statute as “distinct crimes for purposes of the residual clause” and because it held that some forms of escape are not violent crimes. Wise, 597 F.3d at 1145. The Tenth Circuit rejected both arguments as unconvincing and held that West controlled the outcome of the case. Id. McConnell also argued that West was overruled by Chambers, but the Tenth Circuit again rejected this argument. McConnell, 605 F.3d at 829. The Tenth Circuit noted that “[a]lthough Chambers does overturn West’s observation that ‘under the ACCA and the . . . Sentencing Guidelines, escape is always a violent felony,’ West’s characterization of fleeing and eluding convictions remains good law. In fact, our recent decision in Wise reaches that very conclusion.” Id. (alteration in original) (citations omitted).
123. West, 550 F.3d at 960 (citations omitted).
residual clause. The Tenth Circuit also drew an analogy between fleeing a police officer and attempting to escape from police custody or jail. According to the court, every escape is a "powder keg" that always has the potential to explode into violence at any time. This statement was made prior to the Supreme Court's decision in Chambers; however, the Tenth Circuit noted that the Court had granted certiorari and stated that regardless of the outcome in Chambers it would still conclude that disobeying a police officer's command in violation of Utah law "categorically presents a serious potential risk of physical injury to another." Furthermore, the court went on to say that fleeing presents a greater risk of injury than escape, and if escape is always a violent crime, then fleeing must also be a violent crime. The Tenth Circuit has recently recognized that its characterization of escape is at odds with the holding of Chambers; however, the court has refused to apply the same logic to the offense of fleeing.

The Tenth Circuit stated that the crime of eluding the police in a vehicle generally involves deliberate conduct and that disobedience creates the potential for confrontation. Therefore, the court concluded that violation of the Utah statute always creates a serious potential risk of harm to other individuals. The court followed the majority of jurisdictions and focused on whether the crime involves conduct that is violent, purposeful, and aggressive. The court found that "knowingly flaunting the order of a police officer is aggressive conduct" because it "calls the officer to give chase . . . [and] needlessly endanger himself in pursuit." The court concluded that fleeing a police officer is also a violent offense because it presents the potential for violent conflict with the officer. This is similar to the rationale in Taylor that burglary is a violent offense because it creates the potential for a confrontation between the burglar and the occupant of the dwelling. The court also determined that all violations of the Utah statute require deliberate or intentional conduct, even though only one subsection of the statute requires "willful or wanton" disregard of the officer's signal. According to the Tenth Circuit, any disregard for an officer's signal after it is received is purpose-

124. Id.
125. Id. at 963.
126. Id.
127. Id. at 963 n.9.
128. Id. at 964.
129. See supra note 122 and accompanying text.
130. West, 550 F.3d at 964-65.
131. Id. at 965.
132. Id. at 967-68.
133. Id. at 969.
134. Id. at 969-70.
135. Id. at 969; see also Taylor v. United States, 495 U.S. 575, 558 (1990).
136. West, 550 F.3d at 970-71.
Therefore, the court found that fleeing a police officer is a violent felony.

In United States v. Harrimon, the Fifth Circuit determined that the Texas crime of “evading arrest or detention by use of a vehicle” is a violent felony for purposes of the ACCA. The elements of fleeing by vehicle under Texas law include:

(1) a person, (2) intentionally flees, (3) from a peace officer, (4) with knowledge he or she is a peace officer, (5) the peace officer is attempting to arrest or detain the person, (6) the attempted arrest or detention is lawful, and (7) the person uses a vehicle while . . . in flight.

Following the Begay test, the Fifth Circuit found that the crime is purposeful, violent, and aggressive. According to the court, the conduct is purposeful because it is intentional, unlike the DUI conviction at issue in Begay. The court defined aggressive behavior as “offensive and forceful and characterized by initiating hostilities or attacks.” The court found that fleeing meets this definition because it is a “challenge to the officer’s authority” and is likely to cause a pursuit. Furthermore, the court stated that the offense is violent because the use of a vehicle involves violent force, which poses a risk to the officer trying to overcome the force and to innocent bystanders. The court declined to follow the Eleventh Circuit decision in Harrison because it felt that an offender’s willingness to flee from an officer shows “an increased likelihood” of violent behavior. The court next determined that fleeing is also similar in degree of risk to the enumerated crimes. The court stated that not every possible factual offense covered by the statute must present a serious risk of injury; rather, it is sufficient if the offense presents a serious potential for injury in the ordinary case. While the court admitted that it is possible to violate the statute despite obeying all traffic laws and surrendering quietly, in the “typical case” an offender would likely drive recklessly and become involved in a high speed chase with the

137. Id. at 971.
138. Id.
139. 568 F.3d 531, 532 (5th Cir. 2009), cert. denied, 130 S. Ct. 1015 (2009).
140. Id. at 533 (alteration in original) (quoting Powell v. State, 206 S.W.3d 142, 143 (Tex. App. 2006)).
141. Id. at 534.
142. Id.
143. Id. (quoting West, 550 F.3d at 969).
144. Id. at 535.
145. Id.
146. Id. (quoting Begay v. United States, 533 U.S. 137, 146 (2006)).
147. Id. at 536.
148. Id. (quoting James v. United States, 550 U.S. 192, 208 (2007)).
FLEEING IS NOT A CRIME OF VIOLENCE

This likelihood of pursuit and confrontation, according to the court, distinguishes fleeing from the crime of failing to report to a penal institution at issue in Chambers. Therefore, the Fifth Circuit determined that the Texas crime is a violent felony for purposes of the ACCA.

Like the Fifth Circuit, in United States v. LaCasse the Sixth Circuit held that violation of Michigan's "fleeing and eluding" statute, worded very similarly to the Minnesota statute at issue in Tyler, did qualify as a violent felony under the ACCA. The case was before the court on remand from the U.S. Supreme Court to reconsider its decision in light of Begay and Chambers. The court determined that neither precedent altered its prior conclusion that violation of the Michigan statute constitutes a violent felony.

The Sixth Circuit admitted that at first glance Begay and Chambers appeared to support the defendant's argument that the Michigan crime of flee-

149. Id.
150. Id.
151. Id. at 537.
152. Michigan statute section 750.479a(1) states:
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 vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle.

MICH. COMP. LAWS § 750.479a(1) (West 2011).
153. 567 F.3d 763, 764 (6th Cir. 2009), cert. denied, 130 S. Ct. 1131 (2010). The Sixth Circuit affirmed its LaCasse holding and declined to follow Tyler in United States v. Stephens. 393 Fed. App'x 340, 345 (6th Cir. 2010). The court rejected the defendant's argument that the court's post-remand holding in LaCasse was inconsistent with Begay and Chambers and that the Sixth Circuit should follow the Eighth Circuit's logic in Tyler. Id. The court stated:
Stephens argues that when the Supreme Court vacated the original panel decision in LaCasse, the court was "sending a message . . . that LaCasse was out of alignment" with Begay and Chambers. Even if Stephens is correctly interpreting the Supreme Court's decision to vacate and remand, our post-remand LaCasse decision clearly represents binding authority in this circuit holding that Begay and Chambers had no effect on the conclusion that fleeing and eluding in the third degree under Michigan law constitutes a violent felony under the ACCA.
Id. (quoting LaCasse, 567 F.3d at 764). In declining to follow Tyler, the Sixth Circuit also noted that "the fact that a sister circuit disagrees with our case law does not demonstrate that our law is wrong, or that we are free to ignore circuit precedent." Id.
154. LaCasse, 567 F.3d at 764.
155. Id.
ing or eluding a police officer cannot categorically be considered a crime of violence because the statute can be violated without creating a serious potential risk of physical harm to another.\textsuperscript{156} However, the court distinguished Michigan's fleeing and eluding statute from the DUI statute at issue in \textit{Begay}.\textsuperscript{157} According to the Sixth Circuit, fleeing and eluding requires intent, while DUI is a strict liability or status crime.\textsuperscript{158} The court also determined that Michigan's fleeing statute requires aggressive behavior because in order to violate the statute, an offender must attempt to outrun the police either in a low speed-limit area or in a way that causes an accident.\textsuperscript{159} The court also distinguished the "failure to report" statute at issue in \textit{Chambers}.\textsuperscript{160} \textit{Chambers} held that failing to report is not purposeful, aggressive, and violent in the same way as an actual attempt to escape from penal confinement.\textsuperscript{161} Fleeing, on the other hand, requires intentional conduct and according to the Sixth Circuit is essentially a form of escape.\textsuperscript{162}

Originally, the Eighth Circuit ruled in \textit{Kendrick} that fleeing a police officer is a "crime of violence" under the Sentencing Guidelines.\textsuperscript{163} The reasoning utilized by the Eighth Circuit in reaching that decision was similar to many other circuit courts of appeals that had addressed the issue. Since then, however, the Supreme Court has issued major rulings that conflict with that line of reasoning. In response to those Supreme Court decisions, the circuits have split on the issue of whether fleeing an officer in a motor vehicle is a

\begin{itemize}
\item \textsuperscript{156} \textit{Id.} at 765-66.
\item \textsuperscript{157} \textit{Id.} at 766.
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 766-67.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.} at 767. The Seventh Circuit also recently weighed in on this debate, siding with the Fifth, Sixth, and Tenth Circuits. \textit{See United States v. Dismuke}, 593 F.3d 582, 585, 592 n.3 (7th Cir. 2010) (holding that Wisconsin's vehicular fleeing crime is a violent felony for purposes of the ACCA); \textit{United States v. Sykes}, 598 F.3d 334, 335, 338 (7th Cir. 2010) (holding that Indiana's crime of resisting law enforcement in a vehicle is a violent felony for purposes of the ACCA). In \textit{Dismuke}, the court rejected the defendant's argument that fleeing is not a violent act and therefore does not meet the \textit{Begay} requirements. \textit{Dismuke}, 593 F.3d at 594. The Seventh Circuit took a novel approach to the \textit{Begay} test, which essentially nullifies the violence requirement; however, the court at least attempted to rationalize its decision. \textit{Id.} The court stated:

The crimes enumerated in the residual clause are violent and aggressive not because they invariably involve acts of violence but because they are characterized by aggressive conduct that carries the genuine potential for violence and thus physical injury to another. Unlike \textit{Begay}'s "purposeful" requirement, which focuses on the \textit{mens rea} element of the predicate crime, \textit{Begay}'s "violent and aggressive" requirement is a descriptive phrase and focuses on the character of the conduct encompassed by the elements of the crime, not the elements themselves. \textit{Id.} (citations omitted).

\item \textsuperscript{163} \textit{United States v. Kendrick}, 423 F.3d 803, 809 (8th Cir. 2005).
\end{itemize}
crime of violence. In Tyler, the Eighth Circuit had the opportunity to weigh in on the debate.

IV. INSTANT DECISION

A. Majority Opinion

Circuit Judge Shepherd began the Eighth Circuit’s discussion of the issue by determining what portion of the Sentencing Guidelines’ definition of crime of violence the court should apply. The court concluded that fleeing a peace officer in a motor vehicle does not involve "the use, attempted use, or threatened use of physical force' nor does it constitute 'burglary of a dwelling, arson, . . . extortion, [or the] use of explosives.' Therefore, the question before the court was whether fleeing a peace officer falls under the residual clause of subdivision two, which covers felonies that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.” The Eighth Circuit applied the test developed in United States v. Gordon, which considers “whether the offense ‘(1) involves conduct that presents a serious potential risk of physical injury to another and (2) typically involves purposeful, violent, and aggressive conduct.’”

The Eighth Circuit applied the categorical approach adopted by the U.S. Supreme Court in Taylor v. United States and focused on the generic elements of the offense rather than the specific facts underlying Tyler’s conviction. After examining the elements of “fleeing a peace officer” as defined in the Minnesota statute, the court could not say that the crime typically involves conduct that presents a serious risk of injury to another. Minnesota Statute section 609.487, subdivision three, states that anyone who “by means of a motor vehicle flees or attempts to flee a peace officer . . . is guilty of a felony.” The statute defines the term “flee” as “to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle.” The court noted that section 609.487.4 separately criminalizes the act of fleeing a peace officer in a motor vehicle when death or bodily injury to another person oc-

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164. United States v. Tyler, 580 F.3d 722, 724 (8th Cir. 2009).
165. Id. (alterations in original) (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2009)).
166. Id. (quoting United States v. Gordon, 557 F.3d 623, 626 (8th Cir. 2009)).
167. Id. (quoting Gordon, 557 F.3d at 626).
168. Id. at 724-25 (discussing the categorical approach defined in Taylor v. United States, 495 U.S. 575, 602 (1990)).
169. Id. at 725.
170. MINN. STAT. § 609.487.3 (West 2010).
171. Id. § 609.487.1.
The court appeared to view this as persuasive evidence that violating the ordinary statutory definition under subdivision three does not require conduct that creates a risk of bodily harm.

The court specifically noted that the elements of fleeing a peace officer do not include high speed or reckless driving. The perpetrator must only "increase speed, extinguish motor vehicle headlights or taillights, [or] refuse to stop." The court found that while these actions are "admittedly disobedient," they do not "necessarily" result in serious potential risk of physical injury. Fleeing ordinarily involves purposeful conduct because the perpetrator must act with the intent to evade a peace officer. Therefore, the purposeful element of the Gordon test was met. However, even if the court assumed that serious risk of physical injury exists in a typical violation of section 609.487, the court was still unable to conclude that the offense normally involves violent and aggressive conduct because the Minnesota statute encompasses conduct that is neither violent nor aggressive.

The court pointed out that those offenses found to be "crimes of violence" generally suggest "a propensity . . . to commit violent acts against others." Conversely, extinguishing one's headlights to avoid being pulled over, one of the ways in which the statute can be violated, does not indicate a tendency to act violently. The government argued that when an individual flees from a peace officer, a chase and a confrontation ordinarily result; however, the court rejected this argument because the statutory language does not require a chase, confrontation, or any other violent or aggressive conduct to occur before an individual can be convicted of violating the statute.

The court recognized that there was an existing circuit split regarding this issue. However, the court distinguished Harrimon and West because the Texas and Utah statutes at issue in those cases are worded differently than the Minnesota statute and do not define fleeing "so broadly as to encompass nonviolent conduct." Although Michigan's statute is worded similarly to

172. Tyler, 580 F.3d at 725 (citing § 609.487.4).
173. Id.
174. Id. (alteration in original) (internal quotation omitted).
175. Id.
176. Id.
177. Id.
178. Id.
179. Id.; see Begay v. United States, 553 U.S. 137, 146 (2008) (noting that the offender's prior crimes under the Armed Career Criminal Act were important because "they . . . show an increased likelihood that the offender is the kind of person who might deliberately point [a] gun and pull the trigger").
180. Tyler, 580 F.3d at 725.
181. Id.
182. Id. at 726.
183. Id.
the Minnesota statute, the Eighth Circuit ultimately disagreed with the Sixth Circuit's analysis in LaCasse.\textsuperscript{184}

In a footnote, the court also addressed its own prior decision in United States v. Kendrick, where it found that Oregon's offense of fleeing a police officer in a motor vehicle is a crime of violence.\textsuperscript{185} The court stated that Kendrick still remains good law but did not bind its decision in this case because the Oregon and Minnesota statutes differ.\textsuperscript{186} Furthermore, because Kendrick was decided prior to Begay, its analysis focused only on the offense's potential for injury, rather than on whether the offense typically involves conduct that is "purposeful, violent, and aggressive."\textsuperscript{187}

Focusing on the generic elements of the crime, as defined in Minnesota Statute section 609.487, the Eighth Circuit held that fleeing a police officer in a motor vehicle is not a crime of violence under the Sentencing Guidelines because the crime does not typically involve conduct presenting a serious risk of physical injury to another or conduct that is violent and aggressive.\textsuperscript{188} For that reason, the Eighth Circuit determined that the district court had committed a significant procedural error by sentencing Tyler as a career offender, and it vacated his sentence and remanded for resentencing.\textsuperscript{189}

\textbf{B. Dissenting Opinion}

Judge Stephen N. Limbaugh, Jr., from the U.S. District Court for the Eastern District of Missouri, sitting by designation, filed a dissenting opinion.\textsuperscript{190} Judge Limbaugh argued that fleeing a peace officer by means of a motor vehicle "typically and categorically" involves conduct that presents a serious risk of potential injury to another.\textsuperscript{191} According to Judge Limbaugh, the majority opinion correctly identified the issue but mistakenly failed to acknowledge the importance of the word "potential."\textsuperscript{192} He pointed out that the opinion left "potential" out of the test and merely stated it as "conduct presenting a serious risk of physical injury to another."\textsuperscript{193}

Judge Limbaugh argued that in many instances, increasing speed, extinguishing headlights or taillights, or refusing to stop are behaviors that in and of themselves present a potential risk of serious harm to others.\textsuperscript{194} When such

\begin{footnotesize}
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\item 184. \textit{Id.}
\item 185. \textit{Id.} at 726 n.4 (citing United States v. Kendrick, 423 F.3d 803, 808-09 (8th Cir. 2005)).
\item 186. \textit{Id.}
\item 187. \textit{Id.}
\item 188. \textit{Id.} at 726.
\item 189. \textit{Id.}
\item 190. \textit{Id.} at 727 (Limbaugh, J., dissenting).
\item 191. \textit{Id.}
\item 192. \textit{Id.}
\item 193. \textit{Id.}
\item 194. \textit{Id.}
\end{itemize}
\end{footnotesize}
acts are taken with the intent to elude a peace officer, the risk becomes even greater.\textsuperscript{195} According to the dissent, these actions are not “mere ‘disobedience’ as the principal opinion puts it, but instead [are] a recipe for disaster.”\textsuperscript{196} Limbaugh argued that a chase and confrontation typically will result from the offender’s attempt to elude the police, and by his actions, the offender turns his vehicle into a “dangerous instrumentality.”\textsuperscript{197} The offender’s actions put pedestrians, bystanders, other drivers, and the police in danger.\textsuperscript{198} When the offender chooses to flee, “the risk is no longer potential, but real and immediate.”\textsuperscript{199}

The dissent also disagreed with the majority about the application of the categorical approach.\textsuperscript{200} While he agreed that the categorical approach is appropriate and generally looks only to the generic elements of the offense, Judge Limbaugh argued that the court should look at the specific facts of the case, to the extent that “those facts are representative and typical of the ways the offense occurs.”\textsuperscript{201} Taking such an approach, Judge Limbaugh concluded the facts underlying Tyler’s conviction illustrate the risk to both people and property that occurs when an offender attempts to flee.\textsuperscript{202}

The dissent next took issue with the majority’s reliance on subdivision 4 of section 609.487, which increases the penalty for fleeing a peace officer when death or bodily injury to another person occurs.\textsuperscript{203} Rather than preclude ordinary fleeing under subdivision 3 as a crime of violence, the dissent asserted that the increased penalty for fleeing when injury occurs recognizes that fleeing in and of itself creates a latent danger that such physical injury will result.\textsuperscript{204}

Judge Limbaugh’s biggest problem with the majority opinion, however, was that he felt it misapplied the holdings of \textit{Begay} and \textit{Gordon}.\textsuperscript{205} According to the dissent, the crimes in \textit{Gordon} and \textit{Begay} are “wholly dissimilar” to the offense of fleeing a police officer in a motor vehicle.\textsuperscript{206} Unlike driving while intoxicated, which is a strict liability crime, Judge Limbaugh concluded that fleeing a police officer is purposeful conduct.\textsuperscript{207} He also reasoned that fleeing a police officer is aggressive, unlike endangering the welfare of a

\begin{thebibliography}
\item[195.] \textit{Id}.
\item[196.] \textit{Id}.
\item[197.] \textit{Id}.
\item[198.] \textit{Id}.
\item[199.] \textit{Id}.
\item[200.] \textit{Id}.
\item[201.] \textit{Id}.
\item[202.] \textit{Id} at 727-28.
\item[203.] \textit{Id} at 728.
\item[204.] \textit{Id}.
\item[205.] \textit{Id}.
\item[206.] \textit{Id} at 729.
\item[207.] \textit{Id}.
\end{thebibliography}
child, which requires only passive behavior. Additionally, Judge Limbaugh characterized fleeing as violent because it often will cause a pedestrian to be run over, a crash, or a violent confrontation with the police. He argued that the risk of physical injury is similar to that presented by burglary, arson, extortion, or explosives, if not greater.

Judge Limbaugh also disagreed with the majority’s conclusion that the Minnesota definition encompasses conduct that is neither violent nor aggressive. To support its conclusion, the majority cited extinguishing one’s headlights or taillights as an example of behavior criminalized by the statute. The dissent objected to this analysis because it identified only one way in which the statute can be violated. The dissent argued that this was in direct opposition to the Eighth Circuit’s decision in Gordon, which stated that when a statute can be violated in a number of ways, the court should look to the facts to determine the specific elements for which the defendant was convicted. Adopting that approach, Judge Limbaugh pointed out that Tyler was charged with “driving at excessive speeds and disregarding traffic signals,” not with merely extinguishing his headlights or taillights. Furthermore, even if such were the case, Limbaugh felt that extinguishing one’s headlights or taillights, when combined with the intent to evade a peace officer, suggests a propensity to act violently toward others. When an offender turns off his headlights to elude a police officer, it is usually only one of several means of flight used – other elements of the statute are almost always present.

The dissent had a “fundamental disagreement” with the majority’s argument that the statute does not require confrontation, chase, or any other indication of serious physical injury or violent conduct. Judge Limbaugh read Begay to require only that the government prove that the conduct at issue “typically presents a serious potential risk of injury to another” and not that the statute itself identify exactly how the risk occurs. For these reasons, the dissent would have held that the district court did not err in finding the crime of fleeing a police officer in a motor vehicle to be a violent crime and would have affirmed the judgment of the district court.

208. Id.
209. Id.
210. Id.
211. Id. at 729-30.
212. Id. at 729.
213. Id.
214. Id.
215. Id.
216. Id.
217. Id. at 729-30.
218. Id. at 730.
219. Id.
220. Id.
V. COMMENT

The Eighth Circuit’s position in *Tyler* that fleeing a police officer in a motor vehicle is not a violent crime is the minority position among the circuits that have examined this issue.\(^{221}\) Despite this fact, this Note takes the position that the Eighth Circuit reached the correct conclusion for a number of reasons. Certainly, fleeing from the police is behavior that the state has an interest in regulating and punishing. It makes the life of police officers undoubtedly more difficult. The fundamental question, however, is whether that behavior should be enough to label someone as a career offender and in some instances nearly double the amount of time that he or she will spend in prison. Should fleeing from the police on one occasion be enough to create these types of consequences? And should fleeing a police officer be grouped together with such serious offenses as burglary and arson?

The U.S. Supreme Court, in its *Begay* opinion, recognized that not all potentially risky offenses should be covered by the residual clause of the ACCA.\(^{222}\) Therefore, the Court looked at congressional intent and chose to limit the crimes to those that were similar in kind and in degree of risk to the enumerated crimes.\(^{223}\) As a result, the Court held that the crime must be “purposeful, violent and aggressive,” in addition to posing a serious risk of physical injury to another.\(^{224}\) While many strict constructionists might be quick to point out that this language is not found in the statute itself and that the Supreme Court simply grafted the requirement into the statute, the Court’s reasoning is logical. Without this additional test, the number of potentially risky crimes that could fall under this category would be enormous and would vary greatly depending on the jurisdiction. For the sake of fairness and efficiency, some crimes should be excluded from the coverage of both the ACCA and the Sentencing Guidelines.

Despite potential for disagreement over the manner in which the Court formulated its decision, most jurisdictions seem to have accepted the *Begay* test without seriously questioning its logic.\(^{225}\) However, differences arise in how the *Begay* test is applied. Some jurisdictions focus heavily on the statutory definition of the crime to determine if the required elements are present,\(^{226}\) while other jurisdictions seem to ignore statutory construction and

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221. Compare *id.* at 726 (majority opinion), with United States v. LaCasse, 567 F.3d 763, 765-67 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1131 (2010), and United States v. Harrimon, 568 F.3d 531, 534-37 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1015 (2009), and United States v. West, 550 F.3d 952, 961-63 (10th Cir. 2008), *overruled by* United States v. Shipp, 589 F.3d 1084 (10th Cir. 2009).


223. *Id.*

224. *Id.* at 144-45.

225. See, e.g., *Tyler*, 580 F.3d at 726; *LaCasse*, 567 F.3d at 765-67; *Harrimon*, 568 F.3d at 534-37; *West*, 550 F.3d at 961-63.

226. See United States v. Harrison, 558 F.3d 1280, 1290-96 (11th Cir. 2009).
assume that all instances of fleeing contain the characteristics of a violent crime. On the contrary, all instances of fleeing do not exhibit the same degree of risk. As the Eighth Circuit points out, depending on how fleeing is defined by the applicable state statute, a conviction for a crime easily could encompass behavior that is not inherently risky, violent, and aggressive. Someone who merely drives off from a traffic stop while staying under the speed limit and obeying traffic signals does not necessarily present a risk of harm to others. Also, even if the individual drives recklessly and does present a risk of harm to others, that behavior is not necessarily violent and aggressive.

Jurisdictions that have found fleeing to be violent and aggressive have not provided much justification for their reasoning; in addition, these courts have often misapplied the Begay test by either ignoring portions of the test completely or lumping portions of the test together in problematic ways. For instance, the Sixth Circuit in LaCasse found that fleeing under the Michigan statute was aggressive because the statute required the fleeing to take place “in a low speed-limit area or in a manner that results in a collision or an accident.” These factors suggest that fleeing could well present a serious risk of physical harm, but fail to explain how such conduct is aggressive. In addition, the Sixth Circuit fails to address the violence requirement of the Begay test. It is unclear whether the court left out this analysis intentionally or if the court considers aggressiveness and violence to be one and the same. These factors are clearly separate portions of the test, and the Supreme Court would not have chosen to list all three factors if each did not have to be individually present.

Similarly, the Tenth Circuit in West completely ignored the fact that there are two separate ways to violate the Utah statute, only one of which requires “willful and wanton” conduct according to the statutory definition, and instead simply assumed that both violations require purposeful conduct. The Tenth Circuit also relied on other jurisdictions’ conclusions that fleeing presents a serious risk of harm, despite the fact that those decisions interpreted statutes from other states that are worded differently than the Utah statute. The Tenth Circuit also analogized fleeing to a form of escape, stating that fleeing and escape “categorically” present a risk of serious physical harm. This assertion seems to be in direct contention to the holding of

227. West, 550 F.3d at 964.
228. See, e.g., Tyler, 580 F.3d at 725-26.
229. See, e.g., LaCasse, 567 F.3d at 766.
230. Id.
231. See id.
232. West, 550 F.3d at 961, 970-71.
233. Id. at 961-63.
234. Id. at 963-64.
and is problematic for a number of reasons. When a statute does not define fleeing or includes actions in the definition of fleeing that are not inherently dangerous, such as the Minnesota statute did in *Tyler*, it does not seem logical to say that a violation of the statute always presents a serious risk of harm. The potential for harm may exist in a wide variety of offenses, but whether that potential harm rises to the level of being serious is a completely different question.

Although the Eighth Circuit seemed to correctly apply the *Begay* test in *Tyler*, the court's subsequent decisions present many of the same issues as the cases discussed above. In *United States v. Hudson*, the Eighth Circuit held that Missouri Revised Statutes section 575.150.5, which makes it a class D felony to “[r]esist[ ] an arrest, detention or stop by fleeing in such a manner that the person fleeing creates a substantial risk of serious physical injury or death to any person,” 236 is a crime of violence. 237 Also in *United States v. Malloy*, the Eighth Circuit held that the Iowa offense of eluding or attempting to elude a pursuing law enforcement officer is a crime of violence because Iowa's fleeing statute 238 only applies to those who exceed the speed limit by twenty-five miles per hour or more. 239 The Eighth Circuit's statements in *Hudson* and *Malloy* suggest that the Eighth Circuit has in effect nullified the "similar in kind" prong of the *Begay* test. The *Hudson* court essentially found that fleeing is violent and aggressive because it presents a danger to others. This finding is in direct contention with the *Begay* court's statement that not all crimes that present a serious risk of physical injury to another are crimes of violence; a crime must be similar in kind as well as similar in the degree of risk posed, hence the separate requirement that an offense be purposeful, violent, and aggressive.

Admittedly, the crime of fleeing from a police officer in a motor vehicle can present a serious risk of physical harm to others in many instances. And even if a specific state of mind is not required by the statute, fleeing is probably a purposeful act. However, finding that fleeing evinces aggressiveness is

235. *See* Chambers v. United States, 129 S. Ct. 687 (2009). The Tenth Circuit recognized that *West* is overruled under *Chambers* to the extent that it characterizes escape as a violent felony per se, *see* Shipp, 589 F.3d at 1091 n.3 (holding that failure to return as directed is not a violent felony under the ACCA); however, the court has reaffirmed its characterization of fleeing in *West*. *See* United States v. McConnell, 605 F.3d 822, 829-30 (10th Cir. 2010) (holding that fleeing and eluding a police officer under Kansas law is a crime of violence for purposes of the Sentencing Guidelines); United States v. Wise, 597 F.3d 1141, 1148 (10th Cir. 2010) (holding that fleeing a police officer under Utah law is a crime of violence for purposes of the Sentencing Guidelines).

239. United States v. Malloy, 614 F.3d 852, 862 (8th Cir. 2010).
much more difficult, and finding that it is violent is almost impossible. Webster’s Dictionary defines “aggressiveness” as “marked by combative readiness.” Does fleeing a police officer indicate a readiness to do combat with the police? Perhaps, but more often fleeing seems like a way to avoid combative and also to avoid punishment. Webster’s Dictionary defines “violent” as “marked by extreme force or sudden intense activity.” If a motorist used his or her vehicle to ram another car and intentionally force it off the road, then that action would be forceful and violent. Merely fleeing from the police, on the other hand, does not seem to involve force. It could sometimes be characterized as involving “sudden intense activity” but not in all instances. The problem is that these are determinations of opinion rather than fact. The outcome of many ACCA and Sentencing Guidelines cases will largely depend on what judge hears the case, and such cases will likely result in many appeals.

Though agreeing with Tyler’s holding, this Note takes issue with the Eighth Circuit majority’s analysis for several reasons. First, because the court focused so heavily on the statutory definition of the crime, an individual in one state may be a career offender because of a fleeing conviction, while an individual in another state who committed exactly the same offense may not be labeled as a career offender. States within the Eighth Circuit itself will be subject to conflicting precedent and expectations. Not all instances of fleeing present the same degree of risk; however, the court’s decision would have had much more precedential value if it had concentrated on how the crime is ordinarily committed rather than on one way in which the statute could be violated. The court could have categorically stated that fleeing a police officer is or is not a crime of violence. A better way to avoid a purely statutory approach would be for the court to utilize a generic definition of fleeing, similar to the generic definition of burglary adopted by the Taylor Court. Generic definitions of crimes, such as fleeing, could be created by the United States Sentencing Commission and incorporated in the Sentencing Guidelines or adopted as amendments to the ACCA. A conviction would then count as a violent felony only if the substance of the state statute matches the generic definition of the offense. Justice Alito made a similar suggestion in his concurring opinion in Chambers; he noted the confusion regarding the application of the ACCA’s residual clause and argued that “[a]t this point, the only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA’s sentencing enhancement.”

241. Id. at 1314.
242. The Taylor Court stated that the generic definition of burglary involves “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” Taylor v. United States, 495 U.S. 575, 599 (1990).
The second problem with the Tyler court’s reasoning is its distinction between the Texas and Utah statutes at issue in Harrimon and West, respectively, and the Minnesota statute.244 Because the Texas and Utah statutes do not provide any definition of “fleeing,” the court stated that those statutes “do not define fleeing so broadly as to encompass nonviolent conduct.”245 This distinction seems to be slightly backwards and illogical. It is difficult to understand how a statute that fails to give a definition of fleeing is narrower than a statute that explicitly defines the term. Also, in statutes that do not explicitly require a serious risk of physical injury, failing to give a definition of fleeing leaves open the possibility that someone could be convicted for conduct that does not create a potential risk of serious physical harm. In fact, an individual could arguably be convicted for the same conduct that the majority finds so problematic in the Minnesota definition. This creates difficult problems for an attorney whose client faces the possibility of being convicted as a career offender for fleeing a police officer. It likely will take a Supreme Court ruling on the issue to determine whether fleeing categorically presents a serious risk of physical injury and is purposeful, violent, and aggressive.

The possibility of vastly different sentences for those convicted of similar crimes is problematic because it goes against the very purpose of the Sentencing Guidelines. The Sentencing Guidelines were created by the U.S. Sentencing Commission, under the direction of Congress, to curtail the discretion that judges and parole commissioners exercised over criminal sentences.246 Essentially, they represent a goal of society that individuals be treated equally and fairly. The Sentencing Guidelines also developed as a result of the progressive ideal that such decision-making should be insulated from the “passions of politics.”247 In fact, the Sentencing Commission was instructed to eliminate sentences that do not reflect the gravity of the offense.248 Treating a conviction for fleeing a police officer as a violent crime seems to overstate the seriousness of the offense in many cases. Also, many judges seem to make sentencing decisions based on personal or public sentiment. Fleeing a police officer is behavior that states clearly want to discourage, but sentencing an individual as a career offender does not seem to serve that purpose. The purpose of the ACCA and the Sentencing Guidelines is to get violent criminals off the streets. If fleeing a police officer is a violent crime, this prohibition seems to sweep too broadly and unnecessarily imprison individuals who are merely stupid or reckless, but who are not violent. In a country facing an ever-growing prison population, this is a route that we cannot afford to take.

244. United States v. Tyler, 580 F.3d 722, 726 (8th Cir. 2009).
245. Id.
246. UNITED STATES SENTENCING COMM’N, supra note 6, at 2 (the Sentencing Reform Act created the U.S. Sentencing Commission that promulgates the Federal Sentencing Guidelines discussed in this Note).
247. Id. at 1.
248. Id. at 2 (citing 28 U.S.C. § 994(m) (2006)).
VI. CONCLUSION

The majority of jurisdictions have reached the opposite conclusion from the Eighth Circuit in *Tyler*, and the Eighth Circuit has recently backpeddled from its own holding in that case because finding fleeing to be a violent crime is an easy and more popular position to take. Fleeing a police officer is a clearly disobedient and troubling behavior that the state has an interest in preventing. Unfortunately, labeling it a violent crime is tenuous at best under the standard created by the U.S. Supreme Court in *Begay*. Fleeing, though often dangerous and risky, does not present a serious potential risk of physical harm in all circumstances. Unless a statute is carefully constructed, it easily can encompass behavior that does not rise to the level of presenting a serious potential for physical harm. Moreover, even if such harm is presumed, fleeing does not meet the *Begay* requirement of being “purposeful, violent and aggressive.”

Though the Eighth Circuit reached the correct decision, its focus on statutory language makes the decision only applicable to Minnesota, and even then only as long as the statute remains unchanged. The court has subsequently reached different conclusions when interpreting statutes with different language but has not provided clear guidelines as to when fleeing will or will not be a crime of violence. Post-*Tyler*, the Eighth Circuit has misapplied *Begay* and has only created further confusion for attorneys and judges attempting to interpret state fleeing statutes. The court’s focus on statutory language is troublesome because it could lead to vastly different results for defendants depending on where the defendant’s conviction occurs. This is extremely unfair and completely at odds with the purpose of the Sentencing Guidelines, which were intended to reduce disparity in sentencing for similar crimes.
