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United States v. Wise: Is Failure to Stop for the Police a Sentence-Enhancing Crime of Violence?

I. INTRODUCTION

In *United States v. Wise*,¹ the Tenth Circuit held that a felony conviction under Utah's so-called "failure-to-stop"² (for the police) statute could be a "crime of violence."³ In 2007, Michael Charles Wise pleaded guilty to felony possession of a firearm;⁴ the issue for the Tenth Circuit was whether his 2006 failure-to-stop conviction would qualify as a sentence enhancing "crime of violence" under the United States Sentencing Guidelines ("USSG").⁵ The Tenth Circuit examined the statutory definition for "crime of violence," as well as the comparable term "violent felony,"⁶ to determine whether Wise's failure-to-stop offense presented a "serious potential risk of physical injury to another."⁷ The court held that his conviction qualified as a "crime of violence," reading the term broadly and relying on its own precedent, *United States v. West*,⁸ which had already been partially

1. 597 F.3d 1141 (10th Cir. 2010).

2. The Utah offense is actually designated "[f]ailure to respond to officer's signal to stop." UTAH CODE ANN. § 41-6a-210 (West Supp. 2010). Because the Tenth Circuit refers to the Utah provision as a "failure-to-stop statute," *Wise*, 597 F.3d at 1146, this Note will also use that phrase to describe the Utah statute and similar statutes from other states that criminalize the failure to stop when given a signal to do so by the police. Other states call this type of crime by many different names. *See, e.g.*, *United States v. Rivers*, 595 F.3d 558, 560 (4th Cir. 2010) (citing S.C. CODE ANN. § 56-5-750(A) (1976)) (referring to South Carolina's law as "failure to stop for a blue light"); *United States v. Tyler*, 580 F.3d 722, 724 (8th Cir. 2009) (citing MINN. STAT. § 609.487 (2009)) (referring to Minnesota's law as "fleeing a peace officer in a motor vehicle").

3. *Wise*, 597 F.3d at 1148.

4. *Id.* at 1142.

5. *Id.* at 1144 (citing U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(4)(A) (2006)).

6. The term "violent felony" is used in the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2006), and the wording is functionally equivalent to "crime of violence." *See infra* note 33 and accompanying text.

7. *Wise*, 597 F.3d at 1143-44 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2006) (internal quotation marks omitted)).

8. 550 F.3d 952 (2008). Interestingly enough, Judge Ebel wrote the Tenth Circuit opinion for both *West* and *Wise*, so it comes as no shock that he enthusiastically defended his prior opinion in *West*.

overruled by the Supreme Court's 2009 decision in *Chambers v. United States*.⁹

The Supreme Court's recent decisions, like *Chambers* and *Begay v. United States*,¹⁰ unambiguously indicate an unwillingness to liberally interpret the statutory language defining "crime of violence."¹¹ Even so, since the Court has not been able to articulate a fully workable test to effectively guide the lower courts,¹² the result has been a circuit split on whether a failure-to-stop conviction should qualify as a sentence enhancing "crime of violence."¹³ The Supreme Court has recently taken notice, granting certiorari in another case to review this particular question.¹⁴ This Note will argue that while the

9. 129 S. Ct. 687, 693 (2009) (holding that a criminal's failure to report to a local prison for weekend incarceration, in violation of state law, was not a "violent felony" under the Armed Career Criminal Act).

10. 553 U.S. 137, 148 (2008) (holding that a DUI charge was not a "violent felony" under the Armed Career Criminal Act).

11. Because the terms "crime of violence" and "violent felony" are functionally interchangeable, for convenience I will predominantly use "crime of violence" to refer to both terms. See *infra* note 33.

12. See Hayley A. Montgomery, Comment, *Remedying the Armed Career Criminal Act's Ailing Residual Provision*, 33 SEATTLE U. L. REV. 715, 719 (2010) (describing the Court's jurisprudence on the issue as "complicated and opaque").

13. In the wake of the Supreme Court's 2009 decision in *Chambers*, there are at least three circuits that have agreed with the Tenth Circuit that failure-to-stop felonies can be considered "crimes of violence." See *Welch v. United States*, 604 F.3d 408, 429 (7th Cir. 2010); *United States v. Young*, 580 F.3d 373, 381 (6th Cir. 2009); *United States v. Harrimon*, 568 F.3d 531, 537 (5th Cir. 2009). The Eighth Circuit is itself split on the issue. Compare *United States v. Tyler*, 580 F.3d 722, 725 (8th Cir. 2009) (holding that fleeing a peace officer in a vehicle under Minnesota law is not a crime of violence), with *United States v. Hudson*, 577 F.3d 883, 886 (8th Cir. 2009) (holding that resisting arrest by fleeing in a vehicle under Missouri law is a crime of violence). Besides the Eighth Circuit, at least two other circuits since 2009 have *not* allowed failure-to-stop felonies to be considered "crimes of violence." See *United States v. Rivers*, 595 F.3d 558, 560 (4th Cir. 2010); *United States v. Harrison*, 558 F.3d 1280, 1301 (11th Cir. 2009). Since *Chambers*, at least one circuit has issued a non-precedential opinion affirming its prior decision not to consider failure-to-stop felonies as "crimes of violence." *United States v. Peterson*, No. 07-30465, 2009 WL 3437834, at *1 (9th Cir. Oct. 27, 2009) (citing *United States v. Jennings*, 515 F.3d 980, 989-91 (9th Cir. 2008)) ("Peterson's conviction . . . for attempting to elude a police officer, is not categorically a crime of violence . . .").

14. The Supreme Court granted certiorari in September 2010 to review a Seventh Circuit opinion, *United States v. Sykes*, 598 F.3d 334 (7th Cir. 2010). *Sykes v. United States*, 131 S. Ct. 63 (2010) (granting certiorari). The Supreme Court will decide the question of "[w]hether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a 'violent felony' under the Armed Career Criminal Act, 18 U.S.C. § 924(e)." *Question Presented: Sykes v. United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/qp/09-11311qp.pdf> (last visited Feb. 23, 2011).

core holding of *West* (and *Wise*) was not directly overruled by the Supreme Court in *Chambers*, a careful analysis of the Court's often vague jurisprudence supports the conclusion that a felony conviction under Utah's sweeping failure-to-stop statute should not qualify as a "crime of violence." In contemplating how the Supreme Court might deal with this issue, this Note considers a proposal by Judge Richard Posner of the Seventh Circuit, as well as the possibility that the Court might strike the "crime of violence" residual clause on account of unconstitutional vagueness.

II. FACTS AND PROCEDURAL HISTORY

On August 22, 2007, Michael Charles Wise was "charged in a one-count indictment with being a previously-convicted felon in possession of a nine millimeter Smith & Wesson handgun, in violation of 18 U.S.C. § 922(g)(1)."¹⁵ That statute makes it unlawful for "any person . . . who has been convicted in any court of, [sic] a crime punishable by imprisonment for a term exceeding one year . . . [from] possess[ing] in or affecting commerce, any firearm or ammunition."¹⁶ Wise ultimately pleaded guilty to the gun possession a few months after he was charged.¹⁷

In its Presentence Investigation Report ("PSR"), the Probation Office "recommended that Wise be sentenced under USSG 2K2.1(a)(4)(a)."¹⁸ Under that section, the offender's base offense level¹⁹ is raised if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a crime of violence."²⁰ Section 4B1.2 of the USSG defines "crime of violence" as

15. *United States v. Wise*, 597 F.3d 1141, 1142 (10th Cir. 2010).

16. *Id.* at 1142 n.1 (alterations in original) (quoting 18 U.S.C. § 922(g)(1) (2006)) (internal quotations omitted).

17. *Id.*

18. *Id.* at 1142–43. The United States Sentencing Commission provides judges with recommended sentences, as found in the USSG, based on the offense level of the instant offense, and the criminal history of the offender. *See* UNITED STATES SENTENCING COMMISSION, *An Overview of the United States Sentencing Commission* 1–3, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview_20101122.pdf (last visited Feb. 23, 2011), [hereinafter *Commission Overview*].

19. *Commission Overview*, *supra* note 18, at 2 ("Based on the severity of the offense, the guidelines assign most federal crimes to one of 43 'offense levels.' Each offender is also assigned to one of six 'criminal history categories' based upon the extent and recency of his or her past misconduct.").

20. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(4)(A) (2006). Since Wise was

any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.²¹

The PSR noted that Wise had been previously convicted in 2006 “for failing to stop in response to a police officer’s command to do so, which under Utah Code § 41-6A-210 is a third-degree felony.”²² This failure-to-stop statute reads as follows:

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.²³

Wise objected to the characterization of his 2006 conviction as a prior “crime of violence.” The district court disagreed, and Wise appealed to the Tenth Circuit.²⁴

III. SIGNIFICANT LEGAL BACKGROUND

To help understand the import of the Tenth Circuit’s analysis, this Part will give a brief overview of the legislation that created the “crime of violence” sentence enhancement, as well as the various court decisions that have attempted to interpret that legislation.

A. Sentence Enhancements for a “Crime of Violence”

In 1984, Congress passed the Sentencing Reform Act of 1984,²⁵ which created the U.S. Sentencing Commission (“Commission”). The Commission is “required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons.”²⁶ Although these guidelines are not mandatory, the Supreme Court

convicted under the 2006 version of the USSG, *Wise*, 597 F.3d at 1143 n.2, this Note will refer to that version.

21. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2006).

22. *Wise*, 597 F.3d at 1143.

23. UTAH CODE ANN. § 41-6a-210(1)(a) (West Supp. 2010).

24. *Wise*, 597 F.3d at 1143.

25. Pub. L. No. 98-473, ch. 2, 98 Stat. 1987.

26. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2006).

has held that “district courts . . . *must* consult those Guidelines and take them into account when sentencing.”²⁷

That same year, Congress also passed the Armed Career Criminal Act (“ACCA”) of 1984.²⁸ This law provided that “any convicted felon found guilty of possession of a firearm, who had three previous convictions ‘for robbery or burglary,’ was to receive a mandatory minimum sentence of imprisonment for 15 years.”²⁹ In 1986, the ACCA was “recodified as 18 U.S.C. § 924(e),”³⁰ and several months later the scope of the provision was expanded beyond robbery and burglary.³¹ The current language of the statute imposes a “15-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*.’”³²

The statutory definition for “violent felony” is functionally identical to the Commission’s definition of “crime of violence” given above;³³ consequently, courts have treated the interpretation of one as functionally the interpretation of the other.³⁴ For purposes of this

27. United States v. Booker, 543 U.S. 220, 264 (2005) (emphasis added).

28. Pub. L. No. 98-473, ch. 18, 98 Stat. 2185, (codified as amended at 18 U.S.C. app. § 1202(a) (1982 ed., Supp. III)), *repealed by* Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 459 (1986).

29. Taylor v. United States, 495 U.S. 575, 581 (1990) (quoting ACCA § 1202(a)).

30. *Id.* at 582.

31. *Id.*

32. Chambers v. United States, 129 S. Ct. 687, 689 (2009) (second emphasis added) (quoting 18 U.S.C. § 924(e)(1) (2006)).

33. Montgomery, *supra* note 12, at 718 (“Obviously, the Sentencing Guidelines’ definition of a crime of violence is nearly identical to the ACCA’s definition of a violent felony.”). Compare U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2006) (“The term ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”), with 18 U.S.C. § 924(e)(2)(B) (“[T]he term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year . . . that . . . (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .”).

34. Montgomery, *supra* note 12, at 718 (“Not surprisingly, courts have interpreted crime of violence and violent felony as interchangeable terms; the case law applies to both. Opinions interpreting the ACCA’s violent felony are regularly used to construe the Sentencing Guidelines’ crime of violence and vice versa.”); *see, e.g.*, United States v. Rivers, 595 F.3d 558, 560 n.1 (4th Cir. 2010); *see also* James v. United States, 550 U.S. 192, 206 (2007) (noting the similar definitions between “crime of violence” and “violent felony”).

Note, it will be assumed that the Supreme Court's jurisprudence interpreting the term "violent felony" in the context of the ACCA will apply to the interpretation of the Commission's term "crime of violence." Furthermore, since the terms "crime of violence" and "violent felony" are functionally interchangeable, this Note will predominantly use "crime of violence" to refer to both terms.

B. The Categorical Approach to the Enumerated Crimes

In 1990, the Supreme Court examined the ACCA for the purpose of interpreting the definition of burglary,³⁵ which along with arson, extortion, and "use of explosives" constitute the enumerated crimes that explicitly qualify as sentence-enhancing "crimes of violence." In the case, *Taylor v. United States*, Arthur Lajuane Taylor argued that his prior convictions for burglary should not enhance his sentence because "Congress meant to include as predicate offenses only a subclass of burglaries whose elements include 'conduct that presents a serious risk of physical injury to another,' over and above the risk inherent in ordinary burglaries."³⁶

The Court disagreed, finding that "[t]here never was any proposal to limit the predicate offense to some special subclass of burglaries that might be especially dangerous."³⁷ Instead, under a so-called "categorical approach," courts are required to look to the statute, and not to the specific facts of the offense, to determine whether an offense *categorically* presents a "serious potential risk of physical injury to another."³⁸

C. The Problematic Residual Clause

While *Taylor* provided a somewhat workable test for the four enumerated crimes, it did little to interpret the reference in the residual clause to a "crime of violence." The residual clause includes crimes, other than the four enumerated offenses, that "otherwise involve[] conduct that presents a serious potential risk of physical

35. *Taylor v. United States*, 495 U.S. 575, 577 (1990).

36. *Id.* at 597.

37. *Id.* at 588.

38. *See id.* at 600 ("The Courts of Appeals uniformly have held that § 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions. We find the reasoning of these cases persuasive." (citations omitted)).

injury to another.”³⁹ The *Taylor* categorical test is much more difficult without an established generic definition of an offense because different judges are likely to formulate different generic definitions, resulting in circuit splits.⁴⁰ Given this uncertainty, the Supreme Court has made several attempts, with mixed results, to guide lower courts on how to interpret the residual clause.

1. *The James v. United States approach*

The issue before the Court in *James* was whether attempted burglary, although not one of the four enumerated offenses, would qualify as a “crime of violence” under the residual clause.⁴¹ The Court ultimately held that attempted burglary and other attempt crimes that present a “serious potential risk of physical injury to another” are covered by the residual clause.⁴²

While this five-to-four decision was clear on the result, the majority’s interpretation of the relationship between the residual clause and the enumerated crimes was confusing at best. The majority seemed unsure whether the enumerated crimes were merely *examples* of “crimes of violence” or whether they provided a *baseline* against which to measure the degree of risk of the non-enumerated crimes.⁴³

39. 18 U.S.C. § 924(e)(2)(B)(ii) (2006); U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2006).

40. See *Chambers v. United States*, 129 S. Ct. 687, 694 & n.2 (2009) (Alito, J., concurring in judgment). In *Chambers*, Justice Alito recognized circuit splits over whether the following crimes fell within the residual clause: rape, conspiracy to commit burglary, carrying a concealed weapon, possessing a sawed-off shotgun as a felon, unauthorized use of a motor vehicle, and automobile tampering. *Id.* (citations omitted).

41. *James v. United States*, 550 U.S. 192, 195 (2007).

42. *Id.* at 195, 198.

43. First, the Court explained that completed burglaries are a “baseline against which to measure the degree of risk that a non-enumerated offense must ‘otherwise’ present in order to qualify.” *Id.* at 208. Then a page later the majority stated, “Nothing in the language of § 924(e)(2)(B)(ii) rules out the possibility that an offense may present ‘a serious risk of physical injury to another’ without presenting as great a risk as any of the enumerated offenses.” *Id.* at 209. Instead, “As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)’s residual provision.” *Id.*

2. *The Begay v. United States revision*

Shortly after *James*, the Court clarified the relationship between the residual clause and the enumerated offenses. The issue before the Court in *Begay* was whether a felony conviction for driving under the influence of alcohol (“DUI”) could qualify as a “crime of violence.”⁴⁴ The majority reversed the Tenth Circuit,⁴⁵ and held that the residual clause only covers crimes that are “roughly similar, in kind as well as in degree of risk posed, to the [enumerated] examples.”⁴⁶ The majority explained that the enumerated crimes all “typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct,”⁴⁷ whereas DUI is typically a strict liability offense.⁴⁸ In other words, in order for an offense to fall within the residual clause, it has to be an offense that typically involves purposeful, violent, and aggressive conduct. The Court reasoned that prior crimes with these characteristics “reveal a degree of callousness toward risk . . . [and] also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.”⁴⁹ Furthermore, without this understanding, the Court feared that a harsh sentence enhancement “would apply to a host of crimes which, though dangerous, are not typically committed by those whom one normally labels ‘armed career criminals.’”⁵⁰

3. *The Chambers v. United States continuation*

About a year later, in *Chambers* the Court held that a conviction for failure to report to prison did not fall under the residual clause.⁵¹ Even though the charging statute nominally included the failure-to-report offense as a species of escape, the Court considered failure to report as a separate crime.⁵² Looking just at the failure-to-report offense, the Court observed, “the crime amounts to a form of inaction, a far cry from the ‘purposeful, violent, and aggressive

44. *Begay v. United States*, 553 U.S. 137, 139 (2008).

45. *United States v. Begay*, 470 F.3d 964 (10th Cir. 2006).

46. *Begay*, 553 U.S. at 143.

47. *Id.* at 144–45.

48. *Id.* at 145.

49. *Id.* at 146.

50. *Id.*

51. *Chambers v. United States*, 129 S. Ct. 687, 689 (2009).

52. *Id.* at 691.

conduct’ potentially at issue” during the commission of one of the enumerated offenses.⁵³ Thus, the Court not only continued the *Begay* doctrine, it appeared to reinforce its concern that lower courts have been interpreting the residual clause too liberally.

D. The Tenth Circuit’s Approach to Utah’s Failure-to-Stop Statute

After *Begay*, but before *Chambers*, the Tenth Circuit held in *United States v. West* that a conviction under Utah’s failure-to-stop statute fell within the ambit of the residual clause.⁵⁴ The court considered failure to stop as analogous to escape, which made its analysis relatively easy since previous Tenth Circuit precedent recognized that escape categorically “constitutes conduct that presents a serious potential risk of physical injury to another”⁵⁵ However, the court recognized that the Supreme Court might overrule the Tenth Circuit’s categorical approach to escape,⁵⁶ a prediction that ultimately proved correct.⁵⁷ Perhaps given this recognition, the *West* panel alternatively held that the failure-to-stop offense satisfied the new “purposeful, violent, and aggressive” test.⁵⁸ First, in finding that the statute required purposeful conduct, the court reasoned that “[d]isregarding a signal after receiving it will, in the ordinary case, be knowing and deliberate or intentional.”⁵⁹ Second, the court found that “[t]here is little doubt that knowingly flaunting the order of a police officer is aggressive conduct.”⁶⁰ Third, the court determined that failure to stop is akin to burglary in that there is a potential for a violent confrontation, therefore satisfying the “violent” prong of the *Begay* test.⁶¹

53. *Id.* at 692 (internal quotation marks omitted).

54. *United States v. West*, 550 F.3d 952, 960 (10th Cir. 2008).

55. *Id.* at 963 (quoting *United States v. Springfield*, 196 F.3d 1180, 1185 (10th Cir. 1999) (internal quotation marks omitted)).

56. *Id.* at 963 n.9.

57. *See Chambers*, 129 S. Ct. at 691; *United States v. Shipp*, 589 F.3d 1084, 1090 n.3 (10th Cir. 2009) (recognizing that *Chambers* overruled the Tenth Circuit’s “prior precedent characterizing escape as a per se ‘violent felony’ under the ACCA” (citation omitted)).

58. *West*, 550 F.3d at 968–71.

59. *Id.* at 971 (citation omitted).

60. *Id.* at 969.

61. *Id.* at 969–70 (“It is likely to lead, in the ordinary case, to a chase or at least an effort by police to apprehend the perpetrator. All of these circumstances increase the likelihood of serious harm to the officers involved as well as any bystanders that by happenstance get in the way of a fleeing perpetrator or his pursuers.”).

IV. THE COURT'S DECISION

More than a year after *West*, and in the wake of the Supreme Court's decision in *Chambers*, the Tenth Circuit again reviewed the issue of whether Utah's failure-to-stop offense could qualify as a predicate offense under the "crime of violence" residual clause.⁶² In *United States v. Wise*, Michael Charles Wise argued that *Chambers* undermined the precedential force of *West* because *Chambers* concluded that not all escape crimes are crimes of violence.⁶³ The Tenth Circuit disagreed; instead, it determined that "[t]he distinction upon which the Supreme Court in *Chambers* ultimately based its decision is the distinction between crimes of inaction, such as a passive failure to report, and crimes requiring action, such as an escape from custody."⁶⁴ Furthermore, the court reasoned, "it is clear that in *West*, the kinds of escape crimes we were talking about and drawing support from were the active, violent escape crimes not at issue in *Chambers*."⁶⁵

The court distinguished the Utah failure-to-stop offense from the failure-to-report offense at issue in *Chambers*. First, the court concluded that the failure-to-stop offense requires "deliberate action," which the court described as "a far cry from a mere failure to appear at a prison."⁶⁶ Second, it observed that the failure-to-stop offense would always occur in the presence of police officers, while "a failure to report to a penal institution will inherently not involve the physical presence of police officers."⁶⁷ Third, the Utah offense "is far more likely to endanger third parties," while the failure-to-report offense might not involve anyone else at all.⁶⁸ Finally, while the Supreme Court did not see failure to report as posing a serious potential risk of harm, the Tenth Circuit saw the violation of Utah's failure-to-stop statute as creating a risk of a confrontation.⁶⁹

62. *United States v. Wise*, 597 F.3d 1141, 1142 (10th Cir. 2010).

63. *Id.* at 1145.

64. *Id.* at 1146.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1146–47.

69. *Id.* at 1147 ("[T]he requirement that a violation of the Utah statute occur in the presence of a police officer 'poses the threat of a direct confrontation between the police officer and the occupants of the vehicle, which, in turn, creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders.'" (quoting *United States v. West*, 550 F.3d 952, 964–65 (10th Cir. 2008))).

V. ANALYSIS

This Note argues that the Tenth Circuit in *Wise* was probably correct in stating that *West* was not directly overruled; however, this assertion was correct only because the Supreme Court's jurisprudence has been so vague and ambiguous. Moreover, even if *West* is still controlling precedent, it is fundamentally inconsistent with the tenor and reasoning of *Begay* and *Chambers*. This Note argues that the trend of the Court has been to shrink the applicability of the "crime of violence" residual clause, and that it is probably only a matter of time before the Court forecloses all but the most violent and aggressive failure-to-stop offenses from the residual clause altogether. Furthermore, this Note considers several approaches the Court might take in reviewing this issue, including adopting a proposal by Judge Posner as well as the ultimate possibility of striking the "crime of violence" residual clause on account of unconstitutional vagueness.

A. *Did West Survive Chambers?*

Chambers almost certainly did not *directly* overrule *West*. In *Chambers*, the Supreme Court decided to review failure-to-report offenses separately from escape offenses, even though the Illinois statute lumped them together, treating failure to report as a form of escape.⁷⁰ The Court ultimately held that failure to report was "a form of inaction, a far cry from the 'purposeful, "violent," and "aggressive" conduct' potentially at issue" when an enumerated offense is committed.⁷¹ Furthermore, the Court said that "[t]he behavior that likely underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody."⁷² In other words, the Court held that a more passive and inactive form of escape—i.e., failure to report to prison—could not satisfy the *Begay* test.

70. *Chambers v. United States*, 129 S. Ct. 687, 691 (2009).

71. *Id.* at 692.

72. *Id.* at 691.

However, the Court did *implicitly* overrule the Tenth Circuit's precedent that all escape offenses, whether active or inactive, categorically "constitute[] conduct that presents a serious potential risk of physical injury to another."⁷³ Consequently, some lower courts have agreed with the Tenth Circuit that *Chambers* only dealt with inactive escapes, leaving active escape offenses untouched, and thus still within the residual clause.⁷⁴ Under this approach, the failure-to-stop offense is a species of active escape that was unaffected by *Chambers*.⁷⁵ However, other courts have been more skeptical, arguing that *Chambers* cannot be so easily distinguished.⁷⁶ Ultimately, without further guidance from the Supreme Court, the Tenth Circuit may plausibly assert that *West* was not directly overruled, and thus still remains the law of the Tenth Circuit.

B. The Shrinking Breadth of the Residual Clause

Even though *West*, and consequently *Wise*, nominally remain good law in the Tenth Circuit for now, it is important to realize that the recent trend of the Supreme Court has been to narrow the scope of the residual clause.

I. James—2007

When the Court initially reviewed the residual clause in *James*, the majority gave it a fairly generous reading—interpreting it to include essentially *any* crime that happened to present a "serious potential risk of physical injury to another."⁷⁷ There seemed to be no

73. *West*, 550 F.3d at 963 (quoting *United States v. Springfield*, 196 F.3d 1180, 1185 (10th Cir. 1999)); see also *id.* ("[E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so." (quoting *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)) (internal quotation marks omitted)).

74. See, e.g., *Welch v. United States*, 604 F.3d 408, 423–24 (7th Cir. 2010) ("Numerous courts have reaffirmed, however, that an escape from secure custody is not analogous to failure to report and, therefore, is not covered by *Chambers*.").

75. *Id.* at 424 ("*Chambers* . . . explicitly distinguished failure to report from escape from confinement. Vehicular fleeing, the offense at issue here, is much more similar to the latter. While failure to report is a passive crime characterized by inaction, vehicular fleeing necessarily involves affirmative action on the part of the perpetrator." (citations omitted)).

76. See, e.g., *id.* at 434 (Posner, J., dissenting) ("[T]he point of *Chambers* was that we can't treat all escapes alike."); *United States v. Harrison*, 558 F.3d 1280, 1294 (11th Cir. 2009) ("*Chambers* rejects the notion that all escapes are created equal. And, likewise, we reject the notion that all willful fleeing crimes should be treated equally . . .").

77. See *James v. United States*, 550 U.S. 192, 209 (2007).

limitation that the non-enumerated crimes have any similarity to the four enumerated crimes in the “crime of violence” definition. Instead, it seemed that the enumerated crimes were merely examples of crimes that had a certain degree of risk.⁷⁸ The Court, however, was unclear on this point.⁷⁹

The dissent, voiced by Justice Scalia, correctly criticized the majority’s approach as failing to provide any “guidance concrete enough to ensure that the ACCA residual provision will be applied with an acceptable degree of consistency by the hundreds of district judges that impose sentences every day.”⁸⁰ Consequently, lower court judges have been left “to their own devices in deciding, crime-by-crime, which conviction ‘involves conduct that presents a serious potential risk of physical injury to another.’”⁸¹

2. *Begay*—2008

Apparently unsatisfied with the *James* approach to the residual clause, the Court decided *Begay* less than a year later. Whereas the majority in *James* and the Tenth Circuit in the then-captioned *United States v. Begay* had interpreted the residual clause according to its broadest reading,⁸² the Supreme Court in *Begay* significantly limited its scope. Instead of seeing the enumerated examples as four random crimes that merely illustrate a certain degree of risk, the Court correctly held that the enumerated crimes were also the *kinds* of crime that Congress wanted to address.⁸³ Under this approach, the residual clause only covers crimes that are “roughly similar, in kind as well as in degree of risk posed, to the [enumerated] examples themselves.”⁸⁴

78. *Id.* at 198–200.

79. *See supra* notes 42–43 and accompanying text.

80. *James*, 550 U.S. at 215 (Scalia, J., dissenting).

81. *Id.* at 216.

82. *See* *United States v. Begay*, 470 F.3d 964, 973 (10th Cir. 2006) (“Thus, both the natural meaning of the statutory language and the apparent statutory purpose support a construction of the term *violent felony* to include felony DWI. Neither the legislative history nor canons of construction persuade otherwise.”), *rev’d*, 553 U.S. 137 (2008).

83. *Begay v. United States*, 553 U.S. 137, 142–43 (2008).

84. *Id.* at 143.

While it is significant that the Court explicitly held that the residual clause “covers only *similar* crimes, rather than *every* crime that ‘presents a serious potential risk of physical injury to another,’”⁸⁵ the Court narrowed the residual clause even more by how it defined the commonality of the enumerated crimes. The majority explained that the enumerated crimes all “typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.”⁸⁶ With the word “purposeful,” the Court immediately removed all negligent and reckless crimes, even though many of these crimes would typically present a “serious potential risk of physical injury to another.”⁸⁷ With the words “violent” and “aggressive,” the Court underscored that the residual clause only covers prior crimes that are typically committed by the hardened criminal who would be more likely to “deliberately point [a] gun and pull the trigger.”⁸⁸

With the Court’s new “purposeful, violent, and aggressive” definition, it sent a clear message to the lower courts that the “crime of violence” sentencing enhancement should be reserved for very serious crimes that are typically committed by hardened criminals. Otherwise, the Court feared that a harsh enhancement “would apply to a host of crimes which, though dangerous, are not typically committed by those whom one normally labels ‘armed career criminals.’”⁸⁹

3. Chambers—2009

About a year later, the Court narrowed the residual clause a bit more in *Chambers* when the Court held that a conviction for failure-to-report to prison did not fall under the residual clause.⁹⁰ By doing this, the Court showed that it was willing to not only buck a clear circuit majority,⁹¹ but also slice and dice a state statute to determine whether the underlying crime actually constituted “purposeful,

85. *Id.* at 142 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006)).

86. *Id.* at 144–45 (quoting *Begay*, 470 F.3d at 980 (McConnell, J., concurring in part and dissenting in part)).

87. *See id.* at 152 (Scalia, J., concurring in judgment).

88. *Id.* at 146 (majority opinion).

89. *Id.*

90. *Chambers v. United States*, 129 S. Ct. 687, 689 (2009).

91. *See United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2007) (noting almost unanimous agreement by other courts of appeals), *rev’d*, 129 S. Ct. 687 (2009).

violent, and aggressive” conduct.⁹² Merely labeling an offense as a form of escape was not sufficient for it to qualify for the residual clause.⁹³

C. *The Likely Fate of Failure-to-Stop Statutes*

The Court’s distinct skepticism about the reach of the residual clause might lead to excluding all but the most legitimately dangerous failure-to-stop offenses. Although various states have failure-to-stop statutes, they disagree over the necessary elements of the crime. Some states require other laws to be broken in the course of fleeing,⁹⁴ while others, like Utah, require almost nothing more than a mere failure to stop for the police.⁹⁵ Likewise, some circuit courts have held that a failure-to-stop offense *must* include elements of high speed and recklessness to fall within the residual clause.⁹⁶ Other courts, like the Tenth Circuit, have held that such elements are not required because any flight from the police *might* involve high speed and recklessness.⁹⁷

The problem with the Tenth Circuit’s position is that, while the Court’s jurisprudence has been “almost entirely ad hoc,”⁹⁸ gimmicky,⁹⁹ and “piecemeal,”¹⁰⁰ the Tenth Circuit has disregarded the Court’s clear message that it is unhappy with lower courts broadly applying the residual clause to crimes that are not *typically*

92. See *Chambers*, 129 S. Ct. at 691.

93. See *id.*; cf. *Taylor v. United States*, 495 U.S. 575, 588–89 (1990) (“Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled ‘robbery’ or ‘burglary’ by the laws of the State of conviction.”).

94. See, e.g., *Welch v. United States*, 604 F.3d 408, 417 (7th Cir. 2010) (citing 625 ILL. COMP. STAT. 5/11-204.1 (Supp. 2010)).

95. UTAH CODE ANN. § 41-6a-210(1)(a)(ii) (West Supp. 2010).

96. See, e.g., *United States v. Harrison*, 558 F.3d 1280, 1295 (11th Cir. 2009) (“[A] disobedient driver’s failure to accelerate to a high rate of speed or to drive recklessly signals a different type of criminal and suggests an unwillingness to engage in violent conduct.”); *United States v. Tyler*, 580 F.3d 722, 725 (8th Cir. 2009).

97. See *United States v. West*, 550 F.3d 952, 964 (10th Cir. 2008) (“[U]nder the stress and urgency which will naturally attend his situation, a person fleeing from law enforcement will likely drive recklessly and turn any pursuit into a high-speed chase with the potential for serious harm to police or innocent bystanders.” (quoting *United States v. Kendrick*, 423 F.3d 803, 809 (8th Cir. 2008)) (internal quotation marks omitted)).

98. *James v. United States*, 550 U.S. 192, 215 (2007) (Scalia, J., dissenting).

99. *Begay v. United States*, 553 U.S. 137, 150 (2008) (Scalia, J., concurring in judgment).

100. *Id.*

violent and aggressive. Instead of heeding this message, the Tenth Circuit is willing to engage in a flight of fancy—imagining that almost *any* failure to stop for the police is tantamount to a violent and aggressive confrontation with the police that may result in a dangerous high speed chase,¹⁰¹ no matter how improbable. In other words, the Tenth Circuit rationalizes its decision on little more than sheer speculation about what *any* criminal *might* do, rather than what a *hardened* criminal *typically* does.

However, even if the Tenth Circuit position contradicts the spirit of the Supreme Court’s jurisprudence, the Court will eventually need to step in and clarify its position. As mentioned above, the Court will have an opportunity this term to decide whether failure-to-stop offenses fall within the “crime of violence” residual clause.¹⁰² If the Court’s past decisions are any indication of its intentions, it will most likely narrow the scope of the residual clause even more, possibly by limiting the residual clause to only the most legitimately dangerous failure-to-stop offenses. However, it remains to be seen whether the Court will simply resolve this particular circuit split, or whether it will take any more drastic measures to deal with the residual clause in general.

Unless the Court is ready to strike down the “crime of violence” residual clause as unconstitutionally vague,¹⁰³ it will need to hone its jurisprudence to further constrain the circuit courts. If the Court chooses this second path, this Note recommends that the Court consider Judge Richard Posner’s proposal that the Court redefine its test so that “purposeful” (as in *Begay*’s “purposeful, violent, and aggressive”) would mean, “trying to harm a person’s person or property.”¹⁰⁴ As discussed above, the Court in *Begay* explained that the residual clause covers only crimes that are similar in kind and type to the four enumerated crimes—burglary, arson, extortion, and use of explosives.¹⁰⁵ Judge Posner aptly recognized that these are essentially crimes that require proof of intent to harm property

101. *See West*, 550 F.3d at 964–65.

102. *See supra* note 14 and accompanying text.

103. *See James*, 550 U.S. at 230 (Scalia, J., dissenting) (“Congress has simply abdicated its responsibility when it passes a criminal statute insusceptible of an interpretation that enables principled, predictable application; and this Court has abdicated its responsibility when it allows that.”).

104. *Welch v. United States*, 604 F.3d 408, 434 (7th Cir. 2010) (Posner, J., dissenting).

105. *See supra* notes 44–50 and accompanying text.

interests, and which only incidentally may involve harm to persons.¹⁰⁶ Consequently, under this approach, the crimes that fall under the residual clause should not permit a lesser standard of proof—i.e., just a bare risk of harm to persons—without any underlying intent to actually harm persons or property interests. This revision would likely prevent lower court judges from speculating whether a particular offense, like failure to stop for the police, *might* result in harm because judges would be required to see whether the underlying criminal statute expressly required proof of intent to harm persons or property.

However, while this Note believes that Judge Posner’s revision would help narrow the “crime of violence” residual clause, this approach may not ultimately prevent the seemingly perpetual circuit splits concerning the offenses that fall under the residual clause.¹⁰⁷ Obviously, it would help if Congress redrafted the statute to eliminate the ambiguities.¹⁰⁸ Failing that, the Court could force Congress’s hand by striking the statute as unconstitutionally vague.¹⁰⁹ Since the Court may not be ready to do that, it probably will just adopt narrowing revisions on a case-by-case basis. However, this case-by-case approach seems to confirm Justice Scalia’s prediction that it “will take decades, and dozens of grants of certiorari, to allocate all the Nation’s crimes to one or the other side of this entirely reasonable and entirely indeterminate line.”¹¹⁰

VI. CONCLUSION

Thus, under current precedent, the Tenth Circuit is nominally correct to hold that a conviction under Utah’s failure-to-stop statute constituted a “crime of violence.” However, this conflicts with the Supreme Court’s unequivocal message to the lower courts that the “crime of violence” residual clause should be narrowly construed. Given the Court’s past treatment of the residual clause, it will most likely choose to narrow it further, constraining the residual clause to

106. *See Welch*, 604 F.3d at 434.

107. *See Chambers v. United States*, 129 S. Ct. 687, 694 (2009) (Alito, J., concurring in judgment).

108. *Id.* at 695 (“At 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.”).

109. *James v. United States*, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting).

110. *Id.* at 216.

cover only the most legitimately dangerous failure-to-stop offenses. This Note suggests that the Court adopt Judge Posner's proposed revision to help narrow the residual clause. Ultimately, though, this Note recognizes that the Court's case-by-case approach to dealing with the residual clause is futile in preventing perpetual circuit splits, and that the Court should seriously consider striking the residual clause entirely because of its unconstitutional vagueness.

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