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DRIVING DANGEROUSLY: VEHICLE FLIGHT AND THE ARMED CAREER CRIMINAL ACT AFTER *SYKES v. UNITED STATES*

Isham M. Reavis

Abstract: The Armed Career Criminal Act (ACCA), a federal “three-strikes” recidivist statute, applies a mandatory enhancement to sentences of criminal defendants previously convicted of three qualifying predicate crimes. In *Sykes v. United States* the U.S. Supreme Court held that a conviction for fleeing police by car counted as a predicate under ACCA’s residual provision for crimes that “otherwise involve conduct that presents a serious potential risk of physical injury to another.” ACCA’s residual provision has produced a confusing series of U.S. Supreme Court decisions, each applying a different method for determining its scope. Though *Sykes* borrows methods from each of these prior cases, this Comment argues that only the narrowest of its bases—a finding of risk based on the statutory features of the state crime—controlled its outcome. This basis suffices to explain *Sykes*’ outcome, and best comports with the Court’s own precedent mandating a categorical approach when interpreting ACCA. Under the categorical approach, a court may consider only the elements of a crime, not the particulars of its commission by an individual defendant, to determine whether it qualifies as a predicate offense under ACCA. Applying this interpretation of *Sykes* in future cases, only vehicle-flight convictions that either (1) require risk of physical injury to another as an element themselves or (2) share the same punishment as a comparable offense containing this element will qualify under ACCA’s residual provision. However, in *Sykes*’ wake most federal courts have read *Sykes* broadly, employing reasoning this Comment argues is inconsistent with faithful application of the categorical approach.

INTRODUCTION

When Marcus Sykes pleaded guilty to illegally possessing a firearm in 2008,¹ nearly every day of his more than fifteen-year sentence—all but eight months out of 188—sprang from a five-year-old prior conviction. The Armed Career Criminal Act (ACCA) ratcheted what might otherwise have been jail time of less than five years for being a felon in possession of a firearm to more than fifteen years behind bars,²

1. 18 U.S.C. § 922(g) (2006) prohibits convicted felons, among other categories of prohibited persons including aliens and those adjudged mentally defective, from shipping, transporting, possessing, or receiving firearms or ammunition in or affecting interstate or foreign commerce.

2. When ACCA applies, it imposes a fifteen-year mandatory minimum. *Id.* § 924(e)(1). Given Sykes’ criminal history and prior sentences on comparable facts from the Southern District of Indiana, his attorney estimated that absent application of ACCA his sentence would have been between fifty-seven and seventy-one months. Joint Appendix Vol. I at 19, *Sykes v. United States*, ___U.S.___, 131 S. Ct. 2267 (2011) (No. 09-11311), 2010 WL 4628573 at *23 [hereinafter “Joint Appendix”].

based on Sykes' prior conviction in 2003 for fleeing when police tried to pull him over for driving without headlights.³

Sykes was arrested in March of 2008 after attempting to rob two people parked outside an Indianapolis liquor store.⁴ Sykes maintained that he had merely approached to speak to one of the car's occupants, a woman he knew.⁵ The Government asserted he instead tried to rob them at gunpoint, and only aborted his plans after recognizing one of his intended victims.⁶ While the federal district court found police information sufficient to conclude that Sykes had attempted robbery,⁷ he was not convicted for that crime, pleading only to illegal firearm possession.⁸ What he had been *doing* with the gun before his arrest only mattered inasmuch as possessing a firearm in connection with another felony lengthened his sentence.⁹

The majority of Sykes' sentence resulted from the fifteen-year minimum imposed by ACCA and triggered by his prior felony convictions.¹⁰ Whether Sykes had attempted robbery made no difference for ACCA purposes—ACCA applies to sentencing for the federal offense of illegal firearm possession whenever the convict's history contains three qualifying predicate convictions.¹¹ These predicates may be any combination of "serious drug offenses" and "violent felonies."¹² ACCA defines "violent felonies," the category at issue in Sykes' case, as any offense punishable by at least a year of imprisonment that either (1) requires the element of actual, attempted, or threatened use of force; (2) is burglary, arson, extortion, or involves using explosives; or (3) "otherwise involves conduct that presents a serious potential risk of

3. *Sykes*, 131 S. Ct. at 2272; *United States v. Sykes*, 598 F.3d 334, 335 (7th Cir. 2010), *aff'd*, 131 S. Ct. 2267.

4. Joint Appendix, *supra* note 2, at 7; Brief for the United States at ¶ 1, *Sykes v. United States*, 131 S. Ct. 2267 (No. 09-11311), 2010 WL 5087868 at *16 [hereinafter "U.S. Brief"].

5. Joint Appendix, *supra* note 2, at 7.

6. *Id.* at 10.

7. *Id.* at 13.

8. *See id.* at 15 ("I mean, I didn't try to rob them people, but I did hold the gun. I just want to say I apologize.").

9. *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(6)(B) (2008) (applying a four-level sentencing enhancement for possessing a firearm in connection with another felony). Sykes argued for a sentence of 180 months; the court calculated his range under the Sentencing Guideline as 188 to 235 months, and sentenced him to 188. Joint Appendix, *supra* note 2, at 8, 23.

10. *See* 18 U.S.C. § 924(e)(1) (2006).

11. *See id.*

12. *Id.*

physical injury to another.”¹³ Sykes conceded his two 1996 robbery convictions qualified as ACCA predicate crimes under the first prong.¹⁴ He disputed, however, the Government’s claim that his 2003 vehicle flight should count as a violent felony under the third “otherwise involving” category¹⁵—the so-called “residual provision.”¹⁶

The district court rejected Sykes’ vehicle-flight argument¹⁷—which Sykes admitted was foreclosed by a recent Seventh Circuit decision¹⁸—and on appeal the Seventh Circuit affirmed.¹⁹ In a 6–3 opinion written by Justice Kennedy, so did the U.S. Supreme Court.²⁰

In the wake of *Sykes v. United States*,²¹ district and circuit courts have uniformly found vehicle flight to be a violent felony or a “crime of violence” (a nearly synonymous term from the federal sentencing guidelines)²² whether reaffirming their pre-*Sykes* interpretations,²³

13. *Id.* § 924(e)(2)(B).

14. Joint Appendix, *supra* note 2, at 8–9.

15. *Id.* at 9.

16. See *James v. United States*, 550 U.S. 192, 197–98 (2007) (referring to the “otherwise involves” clause as “ACCA’s residual provision”).

17. See Joint Appendix, *supra* note 2, at 22 (holding at Sykes’ sentencing hearing that “under these circumstances” his statutory sentencing range was between fifteen years and life imprisonment).

18. *Id.* at 9. The preclusive holding appeared in *United States v. Spells*, 537 F.3d 743, 753–54 (7th Cir. 2008).

19. *United States v. Sykes*, 598 F.3d 334, 337–39 (7th Cir. 2010), *aff’d* __U.S.__, 131 S. Ct. 2267 (2011).

20. *Sykes v. United States*, __U.S.__, 131 S. Ct. 2267 (2011).

21. __U.S.__, 131 S. Ct. 2267 (2011).

22. The two terms share nearly identical definitions. Compare U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2010) (“The term ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” (emphasis added)), with 18 U.S.C. § 924(e)(2)(B) (2006) (“[T]he term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year . . . that . . . (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 . . .”). “Because the two provisions are so similar, all circuits have treated the case law regarding ‘violent felony’ and ‘crime of violence’ as fungible both before and after *Begay*[v. *United States*, 553 U.S. 137 (2008)].” David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 236 (2010).

23. See *United States v. Griffin*, 652 F.3d 793, 795, 801–02 (7th Cir. 2011), *cert. denied*, __U.S.__, 132 S. Ct. 1124 (2012) (holding an Indiana vehicle-flight conviction a crime of violence); *United States v. Tubbs*, No. 10-51043, 2011 WL 5026393 (5th Cir. Oct. 21, 2011), *cert. denied*, No. 11-8298, 2012 WL 123815 (U.S. Feb. 21, 2012) (holding a Texas vehicle-flight conviction a violent felony); *United States v. Garrison*, No. 11-10105, 2011 WL 3630116 (5th Cir. Aug. 16, 2011) (same); *United States v. Lamar*, 419 F. App’x 704 (8th Cir. 2011), *cert. denied*, __U.S.__, 1323 S. Ct. 538 (holding a Missouri vehicle-flight conviction a violent felony); *United States v. Wilson*, No.

considering statutes for the first time,²⁴ or reversing course on vehicle-flight laws previously held *not* to qualify as violent felonies.²⁵ The lower courts' across-the-board response reflects Justice Kennedy's broad declaration in *Sykes* that "[f]elony vehicle flight is a violent felony for purposes of ACCA."²⁶ However, the U.S. Supreme Court's prior guidance for interpreting ACCA, a summary opinion following on *Sykes*' heels, and parts of the *Sykes* opinion itself suggest the lower courts may be reading the case too broadly.

First, it is not obvious on its face that ACCA should treat all vehicle-flight convictions the same. Since ACCA's enactment, the U.S. Supreme Court has mandated a categorical approach to interpreting ACCA.²⁷ This categorical approach does not consider the particular commission of a crime by a particular defendant, but rather requires a court to look only to the statute and elements defining the offense in the abstract to determine whether it qualifies as an ACCA predicate.²⁸ Only if the state crime meets the definition of one of ACCA's predicate categories will it count towards triggering ACCA's sentence enhancement—ACCA's enumerated burglary predicate requires a set of generic elements,²⁹ for example, and a "serious drug offense" predicate must be punishable by ten years' imprisonment and involve manufacturing, distributing, or possessing a controlled substance with intent to manufacture or distribute.³⁰ But because states define their respective vehicle-flight

11-1147, 2011 WL 4381703 (7th Cir. Sep. 21, 2011) (holding a Michigan vehicle-flight conviction a crime of violence); *United States v. Stout*, 439 Fed. App'x 738, 748–50 (10th Cir. 2011), *cert. denied*, No. 11-8233, 2012 WL 113421 (U.S. Feb. 21, 2012) (holding an Oklahoma vehicle-flight conviction a crime of violence).

24. *See United States v. Thomas*, 643 F.3d 802 (10th Cir. 2011) (holding as a matter of first impression that a Kansas vehicle-flight conviction was a crime of violence).

25. *United States v. Snyder*, 643 F.3d 694, 698–700 (9th Cir. 2011), *petition for cert. filed*, No. 11-8249 (Dec. 30, 2011) (holding that an Oregon vehicle-flight conviction was a crime of violence after reaching the opposite conclusion in the preliminary disposition of *United States v. Peterson*, No. 07-30465, 2009 WL 3437834 (9th Cir. Oct. 27, 2009), *withdrawn and replaced by* 2011 WL 5041673 (9th Cir. Oct. 24, 2011)).

26. *Sykes*, 131 S. Ct. at 2277.

27. *See Taylor v. United States*, 495 U.S. 575, 599–602 (1990) (holding that a Missouri burglary conviction failed to qualify as "burglary" for ACCA purposes using a categorical approach in the first case calling the Court to interpret ACCA).

28. *See id.* at 602 (describing the categorical approach).

29. *See id.* at 599 ("If the state statute is narrower than the generic view, *e.g.*, in cases of burglary in common-law states or convictions of first-degree or aggravated burglary, there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary.")

30. *See* 18 U.S.C. § 924(e)(2)(A)(ii) (2006) (defining requirements of a state crime qualifying as a serious drug offense).

offenses differently, it is not a given that every state's version will categorically meet the residual provision's threshold requirements.

Second, *Rogers v. United States*,³¹ handed down just eleven days after *Sykes*, calls into question whether *Sykes* definitively gathers every vehicle-flight offense—no matter how defined—into the ACCA-predicate camp. In *Rogers*, the U.S. Supreme Court granted certiorari, summarily vacated, and remanded a Sixth Circuit opinion that had found violation of the Tennessee vehicle-flight statute to be a “crime of violence,”³² the practical equivalent to a violent felony.³³ If *Sykes* stands for the proposition that vehicle flight, however defined under state law, always constitutes a violent felony, remanding *Rogers* serves no obvious goal not already served by denying certiorari and letting the lower court decision stand.

Finally, *Sykes* itself does not clearly compel uniformly bundling vehicle flight into ACCA's residual provision. Justice Kennedy noted that the Seventh Circuit opinion upheld in *Sykes* was only “in tension,” rather than in direct conflict with, Eighth and Ninth Circuit cases excluding vehicle-flight convictions from the residual provision.³⁴ *Sykes* itself deploys several methods for determining whether to include vehicle flight in the residual provision but leaves murky which one controls the case's result.³⁵ Depending on which method was the dispositive basis, *Sykes* either justifies the lower court's lockstep response or, as Justice Kagan declares in her dissent, “decides almost no case other than this one.”³⁶

Significant periods of imprisonment hang in the balance. Congress designed ACCA to carry lengthy, incapacitating penalties,³⁷ and *Sykes*' own case demonstrates the heavy blow it delivers. Interpreting *Sykes* broadly thus threatens severe direct consequences for defendants whose vehicle-flight convictions would not have triggered ACCA in the past.³⁸

31. __U.S.__, 131 S. Ct. 3018 (2011).

32. *United States v. Rogers*, 594 F.3d 517 (6th Cir. 2010), *rev'd*, 131 S. Ct. 3018.

33. *See supra* note 22.

34. *United States v. Sykes*, __U.S.__, 131 S. Ct. 2267, 2272 (2011).

35. *See infra* Part I.D.

36. *Sykes*, 131 S. Ct. at 2295 (Kagan, J., dissenting).

37. *See* 134 CONG. REC. 15,806–07 (1988) (statement of Sen. Specter) (describing ACCA's purpose as “incarcerat[ing] unrehabilitative repeat violent felons for lengthy periods”).

38. Before *Sykes*, the Fourth, Eighth, Ninth, and Eleventh Circuits had held certain vehicle-flight offenses were not violent felonies. *United States v. Rivers*, 595 F.3d 558, 565 (4th Cir. 2010) (violation of S.C. CODE ANN. § 56-5-750(A) not a violent felony); *United States v. Tyler*, 580 F.3d 722, 726 (8th Cir. 2009) (violation of MINN. STAT. § 609.487(3) not a violent felony); *United States v. Harrison*, 558 F.3d 1280, 1290–96 (11th Cir. 2009) (violation of FLA. STAT. § 16.1935(2) not a

Further, *Sykes*' effect would be felt even in cases where ACCA does not apply: unlike ACCA, which only directly affects sentences for unlawful firearm possession, the Career Offender sentencing provisions apply during sentences for "crime(s) of violence" or "controlled substance offense(s)."³⁹ In 2009, convictions involving violence or drugs produced thirty-five percent of federal felony sentences.⁴⁰ Because courts have directly applied U.S. Supreme Court holdings regarding ACCA's residual provision when interpreting the similar residual provision of the U.S. Sentencing Guideline's Career Offender provisions,⁴¹ *Sykes*' holding may trigger Career Offender sentencing provisions in similar cases involving prior vehicle-flight convictions.⁴²

This Comment argues that *Sykes* should be read narrowly. Out of its hodge-podge of tests, only one—the Court's holding that the vehicle-flight statute's structure reflected Indiana's legislative judgment that vehicle flight poses inherent risks⁴³—remains true to the categorical approach governing all ACCA interpretations. This holding extends only to the Indiana statute *Sykes* considered and those statutes exhibiting a similar legislative determination. Because the other methods present in *Sykes* raise the very concerns that spurred the U.S. Supreme Court to adopt the categorical approach in the first place,⁴⁴ they should not be carried forward by courts considering vehicle flight for ACCA purposes in the future. Part I of this Comment discusses the substantive scope of the residual provision and the ambiguities that have developed from the U.S. Supreme Court's struggle to interpret that provision using a categorical approach. Part II argues that the holding in *Sykes* can be explained solely by features of Indiana's vehicle-flight statute, and that the other apparent bases for the opinion cannot be squared with the categorical approach or the Court's decision in *Rogers*. Accordingly,

violent felony); *United States v. Jennings*, 515 F.3d 980, 992–93 (9th Cir. 2007) (violation of WASH. REV. CODE § 46.61.024 not a violent felony).

39. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2011).

40. See BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2009, at 13 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf> (reporting 2365 violent felony convictions and 25,874 drug felony convictions out of a total 78,974 felony convictions).

41. See *supra* note 22.

42. Though lacking conclusive data, the International Association of Chiefs of Police suggests there may be roughly ten pursuits per year for every 100 officers. See CYNTHIA LUM & GEORGE FACHNER, INT'L ASS'N OF CHIEFS OF POLICE, POLICE PURSUIT IN AN AGE OF INNOVATION AND REFORM 55–56 (2008) (noting that this rate of pursuits per year per 100 officers appeared in their own data set, as well as in two previous statistical surveys).

43. See *infra* text accompanying notes 230–242.

44. See *infra* Part II.B.2.

only the part of the *Sykes* opinion resting on analysis of Indiana's vehicle-flight statute should bind the lower courts. Finally, Part III assesses circuit court opinions since *Sykes* to see which agree and which conflict with this suggested reading.

I. THE U.S. SUPREME COURT'S CONFUSING ACCA CASE-LAW PRODUCES AN AMBIGUOUS HOLDING IN *SYKES*

ACCA's purpose is to target the career criminals that Congress had determined were disproportionately responsible for violent crime⁴⁵—it aims to “bring the Federal Government into the fight against street crime”⁴⁶ by punishing these recidivist criminals.⁴⁷ “In order to determine which offenders fall into this category, the Act looks to past crimes.”⁴⁸ The trouble in interpreting ACCA arises from deciding which past crimes count towards identifying a career criminal.⁴⁹ This Comment deals with the category of predicates falling into the residual provision of ACCA,⁵⁰ under which the vehicle-flight offense in *Sykes* qualified. Of the various categories of ACCA predicate offenses, the residual provision presents the greatest interpretive difficulty.⁵¹ Deciding whether a particular offense qualifies as a violent felony under the residual provision involves two questions: (1) what substantive qualities distinguish residual-provision offenses, and (2) what information a court

45. See James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Towards Consistency*, 46 HARV. J. ON LEGIS. 537, 545–46 (2009) (noting that ACCA arose from Congress's “target[ing of] career criminals for punishment in light of social scientific research . . . concluding that a relatively small number of habitual offenders are responsible for a large fraction of crimes”).

46. *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 43 (1986) [hereinafter *1986 House Judiciary Hearing*] (statement of Sen. Specter) (explaining the goals of ACCA's 1984 enactment during its 1986 amendment).

47. See Levine, *supra* note 45, at 548 (characterizing ACCA's primary purpose as “incapacitating career criminals who are likely to re-offend and pose a danger to the public if not incarcerated”); see also *infra* notes 76–87 and accompanying text.

48. *Begay v. United States*, 553 U.S. 137, 146 (2008).

49. See Holman, *supra* note 22, at 212–13 (“The battle over the application of the ACCA is fought over whether a defendant's three prior convictions fall within the meaning of ‘violent felony’ or ‘serious drug offense,’ therefore triggering the ACCA.”).

50. 18 U.S.C. § 924(e)(2)(B)(ii) (2006).

51. See *Nijhawan v. Holder*, ___U.S. ___, 129 S. Ct. 2294, 2300 (2009) (noting that the residual provision's language “poses greater interpretive difficulty” than other ACCA predicate categories). Justice Scalia has excoriated the residual provision as “unintelligible” and characterized ACCA's enactment on the whole as an abdication of congressional responsibility. *James v. United States*, 550 U.S. 192, 230–31 (2007) (Scalia, J., dissenting).

should consider in testing for those substantive qualities.⁵² The combination of the U.S. Supreme Court's answers to those two questions has produced confusing case-law culminating in *Sykes*.

A. *The U.S. Supreme Court Has Developed the Residual Provision's Substantive Requirements Looking to Both the Legislative History and Text of ACCA*

The clause containing the residual provision—with the residual provision emphasized—includes as a violent felony a crime that “is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential of physical injury to another.*”⁵³ The U.S. Supreme Court has interpreted the residual provision as containing offenses similar to the four preceding enumerated offenses.⁵⁴ But because these enumerated offenses have little in common with each other,⁵⁵ the Court has also considered ACCA's purpose as expressed by its legislative history.

1. *ACCA's History Discloses Congress's Concern as Identifying Career Criminals Likely to Pose a Future Threat*

ACCA's direct effect is narrow, applying only during sentencing for illegal firearm possession.⁵⁶ However, it indirectly reaches the wide range of conduct included under its predicate offenses. The scope and variety of these predicate offenses have steadily grown, linked mainly by the sense that they are “the kind of thing an armed career criminal would do.”⁵⁷ Neither the offense ACCA directly penalizes nor the predicate offenses that trigger it have remained constant throughout its legislative history.

Though now ACCA most directly targets illegal firearm possession,

52. Holman, *supra* note 22, at 217.

53. 18 U.S.C. § 924(e)(2)(B)(ii) (applies during sentencing under § 922(g)).

54. *E.g.*, *Begay v. United States*, 553 U.S. 137, 142 (2008) (“In our view, the provision's listed examples—burglary, arson, extortion, or crimes involving the use of explosives—illustrate the kinds of crimes that fall within the statute's scope.”).

55. *See* Holman, *supra* note 22, at 217. Justice Scalia likened the enumerated offenses and residual provision to a list containing “fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red.” *James v. United States*, 550 U.S. 192, 230 n.7 (2007) (Scalia, J., dissenting).

56. 18 U.S.C. § 924(e)(1).

57. *See* *United States v. Harrison*, 558 F.3d 1280, 1295 (11th Cir. 2009) (citing *Begay*, 553 U.S. at 145).

its first incarnation lacked any reference to that offense.⁵⁸ ACCA started as the Career Criminal Life Sentence Act of 1981, a “pure three-strikes recidivist statute”⁵⁹ that would have made an individual’s third conviction for state law burglary or robbery into a federal offense punishable by life imprisonment without possibility of parole.⁶⁰ Burglary and robbery functioned both as the predicates for this early incarnation of ACCA and the offenses to which its sentencing provisions would apply.⁶¹

Congress switched ACCA’s target offense to illegal firearm possession after the initial bill stalled over concerns about prosecuting these quintessentially local crimes in federal court.⁶² When the bill was reintroduced during Congress’s next session,⁶³ debate centered on these federalism concerns.⁶⁴ At a hearing before the Subcommittee on Crime, representatives from both the American Bar Association and the National District Attorneys Association “made basic federalism arguments” against federal prosecution of “local” robberies and burglaries.⁶⁵ Federal officials also objected to a contemplated provision allowing state district attorneys to veto federal prosecution under the bill.⁶⁶

The Subcommittee addressed these concerns by adopting the Hughes

58. See S. 1688, 97th Cong., 1st Sess. 4 (1981); H.R. 6386, 97th Cong. (1982); see also H.R. REP. NO. 98-1073, at 3–4 (1984), reprinted in 1984 U.S.C.C.A.N. 3663–64 (briefly describing ACCA’s history in both houses of Congress). This first version applied to defendants who were charged with burglary or robbery and had two prior burglary or robbery convictions. Derrick D. Crago, Note, *The Problem of Counting to Three Under the Armed Career Criminal Act*, 41 CASE W. RES. L. REV. 1179, 1192 (1991).

59. Holman, *supra* note 22, at 229 n.108.

60. S. 1688, at § 2.

61. *Id.*

62. See H.R. REP. NO. 98-1073, at 4 (noting the earlier bill raised “numerous questions” about “coordination procedures in any prosecution . . . and the extent of Federal criminal resources that might be required in the prosecutions”); Holman, *supra* note 22, at 229 n.108 (“The legislative history reveals only one clear purpose for the ‘armed’ aspect of the ACCA: the trigger for federal authority.”). As well as purely constitutional reasons, federalism also bore on political and practical considerations. See Levine, *supra* note 45, at 546–47 (“In fact, it appears that the only reason that the minimum fifteen-year sentence is mandated for illegally possessing firearms is that imposing the sentence on all career criminals regardless of whether they were convicted of violating a federal law (such as by illegally possessing a gun) was not a politically feasible option due to the aforementioned federalism concerns.”).

63. H.R. 1627, 98th Cong. (1984).

64. See Levine, *supra* note 45, at 546–47 (describing federalism concerns during the introduction and amendment of the 1984 bill).

65. H.R. REP. NO. 98-1073, at 4.

66. *Id.*

Amendment, which kept little of the proposed statute in place but the fifteen-year mandatory minimum sentence.⁶⁷ The Hughes Amendment proposed avoiding the issue of federalism by having ACCA directly apply only to an existing federal crime—illegal firearm possession.⁶⁸ Hughes relegated burglary and robbery, previously ACCA's stars, to the role of predicate crimes.⁶⁹ The Subcommittee's discussion of the Hughes Amendment treated firearm possession mainly as a hook for federal jurisdiction.⁷⁰ Even though this amendment radically restructured the legislation, it preserved what appears to be ACCA's core feature: connecting career criminals with long sentences.⁷¹ Congress passed the amended bill as the Armed Career Criminal Act of 1984.⁷²

Robbery and burglary have also played shifting roles throughout ACCA's development. The original 1981 bill would have allowed direct federal prosecution of these offenses;⁷³ the 1984 Act used them as predicate offenses.⁷⁴ In its current form ACCA no longer enumerates robbery.⁷⁵ ACCA primarily reflected congressional concern with the small fraction of criminals thought to be the engine behind most of the violent crime in America⁷⁶—one recidivism study published before ACCA's enactment found that just six percent of men within an age-cohort committed between sixty and eighty percent of all homicides, rapes, robberies, and aggravated assaults perpetrated by its members.⁷⁷

67. *See id.* (describing the Hughes Amendment's proposed changes); Levine, *supra* note 45, at 546–47 (noting that the Hughes Amendment “significantly changed the legislation”).

68. H.R. REP. NO. 98-1073, at 4.

69. *Id.* at 5; Pub. L. No. 98-473, ch. XVIII, sec. 1801–1803, 98 Stat. 1837, 2185 (1984).

70. *See* H.R. REP. NO. 98-1073, at 4–5; *see also* Holman, *supra* note 22, at 229 n.108 (“The criminal must first commit the three predicate violent felonies, qualifying as a career criminal. The subsequent possession of the firearm then ‘brings the Federal Government into the fight.’” (quoting 1986 House Judicial Hearing, *supra* note 46, at 43)).

71. “Under this approach, if the local authorities arrest a three-time loser in possession of a gun (in the course of a robbery or burglary or otherwise) . . . the mandatory 15-year penalty is available. In this manner, H.R. 6248 will be giving law enforcement officials another option in dealing with career criminals.” H.R. REP. NO. 98-1073, at 5.

72. 130 Cong. Rec. 28,096 (1984).

73. H.R. 6386, 97th Cong. (1982).

74. H.R. 1627, 98th Cong. (1984).

75. *See* 18 U.S.C. § 924(e)(2) (2006). Robbery still qualifies as a predicate if it requires as an element “use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i).

76. *See* Levine, *supra* note 45, at 545 (noting that ACCA resulted after Congress “began to target career criminals for punishment in light of social scientific research conducted in the 1970s and 1980s concluding that a relatively small number of habitual offenders are responsible for a large fraction of crimes”).

77. H.R. REP. NO. 98-1073, at 1 (citing MARVIN E. WOLFGANG, ROBERT M. FIGLIO & THORSTEN

Satisfied by this and similar studies that some minority of the criminal population produced a majority of crime, Congress set about determining how to identify this most dangerous segment.⁷⁸ ACCA drafters settled on targeting robbers and burglars as reasonable proxies for career criminals.⁷⁹ Throughout these amendments, ACCA's focus remained "incarcerat[ing] unrehabilitative repeat violent felons for lengthy periods."⁸⁰

Congress added the residual provision to ACCA with the Career Criminal Amendment Act of 1986⁸¹ (1986 Amendment). Provoked by worries that ACCA's predicates were too narrow,⁸² the 1986 Amendment expanded the predicate offenses from robbery or burglary⁸³ to "a violent felony or a serious drug offense, or both"⁸⁴—essentially ACCA's current form.⁸⁵ The U.S. Supreme Court noted that the 1986 Amendment only extended ACCA's reach and did not alter its basic purpose of subjecting career criminals to lengthy sentences.⁸⁶ Robbery, burglary, or any other specific crime served as markers to identify these "hardened criminals."⁸⁷

SELLIN, DELINQUENCY IN A BIRTH COHORT (1972)).

78. *See id.* at 2–3.

79. *See id.* at 3 (explaining how most burglaries and robberies are committed by career criminals).

80. 134 CONG. REC. 15,806–07 (1988) (statement of Sen. Specter); *accord* H.R. REP. NO. 98-1073, at 1 ("This bill is designed to increase the participation of the federal law enforcement system in efforts to curb armed, habitual (career) criminals.").

81. Pub. L. No. 99-570, 100 Stat. 3207-39, § 1402 (1986).

82. *See The Armed Career Criminal Act Amendments: Hearing Before the Subcomm. on Criminal Law of the Comm. on the Judiciary*, 99th Cong. 6 (1986) (statement of David Dart Queen, Deputy Assistant Sec'y, U.S. Dep't of the Treasury) ("But except for armed robbers and burglars, the same level of deterrence does not exist for other violent criminals or drug traffickers who have armed themselves to continue a proven career of crime."); *see also* 1986 House Judiciary Hearing, *supra* note 46, at 44 (statement of Sen. Specter); *id.* at 19 (statement of James Knapp, Deputy Assistant Att'y Gen.) (noting that ACCA had only been used eleven times in its first year).

83. Pub. L. No. 98-473, ch. XVIII, 98 Stat. 1837, 2185 (1984).

84. H.R. REP. NO. 99-849, at 6 (1986).

85. The only further change was a 1988 amendment specifying that predicate offenses must be committed on separate occasions. *See* Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4402 (1988).

86. "The goals of the 1986 ACCA amendments were the same as that of the original act: deterrence and incapacitation." Sarah F. Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1178 (2010); *see also* Taylor v. United States, 495 U.S. 575, 583 (1990) ("Similarly, during the House and Senate hearings on the bills, the witnesses reiterated the concerns that prompted the original enactment of the enhancement provision in 1984: the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem.").

87. 134 Cong. Rec. 15,807 (1988) (statement of Sen. Specter).

2. *Residual-Provision Offenses Must Pose a Similar Risk of Injury and Present a Similar Level of Intent as the Enumerated Offenses*

The U.S. Supreme Court has identified two substantive requirements possessed by residual-provision offenses. The offense must pose a sufficient risk of physical injury to another, and also be of the right “kind.”⁸⁸ The Court identified the risk requirement first, and has resolved most of its residual-provision cases on that basis.⁸⁹

The risk requirement arises from the interaction of ACCA’s residual provision and the enumerated offenses.⁹⁰ The Court has read the “otherwise involves” language to require that the risk of physical injury of a residual-provision offense be similar to the risk level of the preceding enumerated offenses.⁹¹ The question of exactly *how* to make this comparison has proved problematic, because the enumerated offenses collectively make a poor yardstick for measuring risk.⁹² The Court has variously tried or suggested comparing an offense to its closest analogue among the enumerated examples,⁹³ comparing the offense to the *least* risky enumerated offense,⁹⁴ or a more free-form comparison asking only for “roughly similar” risk⁹⁵ or commonality with only one or two of the enumerated offenses.⁹⁶

Like risk level, the “kind” inquiry also turns on similarity to the

88. *Begay v. United States*, 553 U.S. 137, 143 (2008).

89. *See Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2275 (2011) (“The sole decision of this Court concerning the reach of ACCA’s residual clause in which risk was not the dispositive factor is *Begay* . . .”).

90. *See James v. United States*, 550 U.S. 192, 203 (2007) (“The specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other similar conduct ‘otherwise . . . presents a serious potential risk of physical injury.’” (quoting 18 U.S.C. § 924(e)(2) (2006))).

91. *See, e.g., James*, 550 U.S. at 203 (asking “whether the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses”).

92. *See Begay*, 553 U.S. at 142–43 (noting that the enumerated offenses “are so far from clear in respect to the degree of risk each poses that it is difficult to accept clarification in respect to degree of risk as Congress’s only reason for including them”); *James*, 550 U.S. at 229 (Scalia, J., dissenting) (remarking that the enumerated offenses share little in common, “most especially . . . the level of risk of physical injury they pose”).

93. *See James*, 550 U.S. at 203.

94. *See id.* at 219–26 (Scalia, J., dissenting) (proposing comparison to the least-risky enumerated offense—identified as burglary—as the test for the residual provision).

95. *See Begay*, 553 U.S. at 143 (limiting the residual provision to crimes “roughly similar, in kind as well as in degree of risk posed,” to the enumerated offenses).

96. *See Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2273 (2011) (comparing vehicle flight’s risk to burglary and arson).

enumerated offense.⁹⁷ Unlike the risk level requirement, the similar-kind limitation lacks a strict textual basis⁹⁸ and instead reflects ACCA's purpose of identifying and punishing career criminals.⁹⁹ An offense is more likely to identify a career criminal,¹⁰⁰ and thus properly serve as an ACCA predicate, if it shares the enumerated offenses' characteristic "purposeful, 'violent,' and 'aggressive' conduct."¹⁰¹ Such conduct makes it "more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim"—thus justifying ACCA's harsher penalties for firearm possession.¹⁰²

"Purposeful, violent, and aggressive" has been pared down to a requirement of purposefulness.¹⁰³ Initially, the test provoked confusion in the lower courts.¹⁰⁴ Some focused on a willingness to inflict violence;¹⁰⁵ others settled on challenges to authority.¹⁰⁶ The Seventh Circuit interpreted *Begay* as imposing little more than a mens rea requirement¹⁰⁷: in *Begay* Justice Breyer characterized the enumerated

97. See *Begay*, 553 U.S. at 143.

98. See *Sykes*, 131 S. Ct. at 2275 (remarking that the "kind" test, introduced in *Begay*, "is an addition to the statutory text" that "has no precise textual link to the residual clause").

99. See *Begay*, 553 U.S. at 144–47 (justifying the requirement as necessary to avoid sweeping in crimes "far removed . . . from the deliberate kind of behavior associated with violent criminal use of firearms," thus contravening congressional intent); see also *1986 House Judiciary Hearing*, *supra* note 46, at 26 (statement of Deputy Assistant Att'y Gen. James Knapp) ("Obviously, we would not consider what I would call misdemeanor burglary, or your technical burglaries, or anything like that.").

100. See *Begay*, 553 U.S. at 145–46 (noting that ACCA looks to past crimes to determine which offenders should be subject to its penalty).

101. *Id.* at 144–45 (quoting *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)).

102. *Id.* at 145.

103. See *Sykes*, 131 S. Ct. at 2275–76 (characterizing *Sykes*' argument that all ACCA predicates must be purposeful, violent, and aggressive as "overreading" *Begay*, and declining to apply *Begay*'s test beyond strict liability, negligence, or recklessness crimes).

104. See Holman, *supra* note 22, at 211 (describing ACCA application after *Begay* as "whimsical"); Hayley A. Montgomery, Comment, *Remedying the Armed Career Criminal Act's Ailing Residual Provision*, 33 SEATTLE U. L. REV. 715, 723–24 (2010). Montgomery excerpts a courtroom proceeding in which the district court judge accused the "purposeful, violent, and aggressive" test of "confus[ing] the entire issue, do[ing] a grave disservice to everybody like yourself and the defender's office and everyone else who's attempting to make sense out of their opinions and administer justice fairly to all." *Id.* at 724 n.67 (quoting Transcript of Proceedings at 15, *United States v. Christensen*, No. CR-04-267-EFS (E.D. Wash. Jul. 9, 2009)).

105. See, e.g., *United States v. Harrison*, 558 F.3d 1280, 1296 (11th Cir. 2009) ("The fleeing crime . . . seems more appropriately characterized as the crime of a fleeing coward—not an armed career criminal bent on inflicting physical injury.").

106. See, e.g., *United States v. Harrimon*, 568 F.3d 531, 535 (5th Cir. 2009) (noting that vehicle flight involves a "clear challenge" to police authority).

107. See *United States v. Dismuke*, 593 F.3d 582, 592–96 (7th Cir. 2010) (finding "violent" and

offenses as variously involving entering a building with *intent* to commit a crime,¹⁰⁸ causing a fire with the *purpose* of *destroying* a building,¹⁰⁹ or *purposefully* obtaining another's property by threat of *force*.¹¹⁰ Explosives use also implicated intent—"the word 'use' . . . most naturally suggests a higher degree of intent than negligent or merely accidental conduct."¹¹¹ In *Sykes* the U.S. Supreme Court essentially endorsed this approach.¹¹² The requirement thus excludes crimes of mere negligence, recklessness, or strict liability.¹¹³ Further, any knowing or purposeful intent must be specific to the risk-posing conduct.¹¹⁴

The U.S. Supreme Court has used no factors aside from risk level and intent to decide which offenses fit within the residual provision.¹¹⁵

B. Under the Categorical Approach, the Statute and Elements Defining an Offense Determine if It Qualifies as an ACCA Predicate

In its first case considering ACCA, years before taking up the residual provision, the U.S. Supreme Court adopted a categorical approach that limited the information a court could consider when determining whether a specific crime qualifies as an ACCA predicate offense. *Taylor v. United States*¹¹⁶ required the Court to decide whether a Missouri burglary conviction counted as a violent felony within the meaning of ACCA. The Court held that a single, nation-wide standard should define

"aggressive" satisfied by conduct only presenting the possibility of violence); Holman, *supra* note 22, at 257 (noting that *Dismuke* reduced the test to one of purposefulness).

108. *Begay v. United States*, 553 U.S. 137, 145 (2008) (citing *Taylor v. United States*, 495 U.S. 575, 598 (1990)) (emphasis added).

109. *Id.* (citing MODEL PENAL CODE § 220.1(1) (1985)) (emphasis added).

110. *Id.* (citing MODEL PENAL CODE § 223.4 (1985)) (emphasis added).

111. *Id.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)).

112. *See Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2276 ("*Begay* [excluded from the residual provision] a crime akin to strict liability, negligence, and recklessness crimes; and the purposeful, violent, and aggressive formulation was used in that case to explain the result."). *But see Begay*, 553 U.S. at 152 (Scalia, J., concurring) (noting that explosives use includes crimes of negligence and recklessness) (citing MODEL PENAL CODE § 220.2(2)); Holman, *supra* note 22, at 258–61 (arguing *Begay* should exclude only strict liability crimes).

113. *See Sykes*, 131 S. Ct. at 2275–76; *id.* at 2285 (Scalia, J., dissenting) (characterizing the majority's narrowing of *Begay* as "the 'purposeful' test").

114. *See Begay*, 553 U.S. at 145–46 (rejecting the argument that "the knowing nature of the conduct that produces intoxication" leading to a drunken-driving conviction suffices to display the element of intent).

115. *See Sykes*, 131 S. Ct. at 2275 (noting that risk level decided every U.S. Supreme Court residual-provision case except *Begay*, in which mens rea proved dispositive).

116. 495 U.S. 575 (1989).

“burglary” for ACCA purposes, instead of determining the scope of the federal statute by reference to state statutes or common law.¹¹⁷ As the Court observed, relying on state statutory or common-law definitions would produce inconsistent punishment for the same conduct undertaken in different places.¹¹⁸ A single federal definition would keep offenders from “invoking the arcane technicalities of the common-law definition” and prevent the “unfairness of having enhancement depend upon the label employed by the State of conviction.”¹¹⁹ Because ACCA failed to supply its own burglary definition,¹²⁰ the Court crafted its own—a generic burglary statute with the element of “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.”¹²¹ The Court remanded the case, instructing the sentencing court to determine whether Taylor had been convicted of a state offense satisfying the requirements of the generic statute using the categorical approach.¹²² The generic burglary statute would thus be used to take the measure of Taylor’s *statute of conviction*, rather than his offense conduct.¹²³

Courts applying the categorical approach determine whether conviction for a particular crime qualifies as a predicate across the board, regardless of the facts surrounding an individual defendant’s commission of that crime.¹²⁴ The categorical approach generally limits the trial court to looking at the existence of a conviction and the elements of its crime.¹²⁵ These elements largely spring from the statute defining the crime,¹²⁶ but may also include additional court-imposed requirements for conviction.¹²⁷ The events surrounding the particular

117. *Id.* at 590–94, 598.

118. *Id.* at 591–96.

119. *Id.* at 589.

120. ACCA’s 1984 version had included a definition of burglary, which was removed by the 1986 Amendment in what the Court termed “an inadvertent casualty of a complex drafting process.” *Id.* at 589–90.

121. *Id.* at 598–99. The Court based its generic burglary definition on Model Penal Code’s definition. *Id.* (citing MODEL PENAL CODE § 221.1 (1980)).

122. *Id.* at 599–602.

123. *Id.*; see also *James v. United States*, 550 U.S. 192, 202 (2007) (noting that under the categorical approach “we . . . do not generally consider the ‘particular facts disclosed by the record of conviction’”) (quoting *Shepard v. United States*, 544 U.S. 13, 17 (2005)).

124. See *James*, 550 U.S. at 202.

125. *Taylor*, 495 U.S. at 602.

126. *Id.*

127. *E.g.*, *Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2271 (considering, among the statutory elements of vehicle flight, the Indiana Court of Appeals’ mens rea requirement) (citing *Woodward v. State*, 770 N.E.2d 897, 901 (Ind. Ct. App. 2002)).

occurrence of a crime generally have no place in the categorical analysis.¹²⁸

Because the categorical approach considers the sufficiency of *statutes* as ACCA predicates instead of individual *conduct*, it does not necessarily treat similar conduct identically—absolute regularity in application gives way to “the prerogatives of the States in defining their own offenses.”¹²⁹ For example, when Taylor was convicted for burglary, not all Missouri statutes describing that crime included every element of ACCA’s generic burglary.¹³⁰ If Taylor had been convicted under one of these looser statutes—the record before the Court was unclear¹³¹—then the conviction would not count as an ACCA predicate, regardless of whether the same conduct could also have supported a conviction under a statute that *did* meet the generic offense’s requirements.¹³² The same would hold true for convictions under other states’ burglary statutes that “define burglary more broadly,” for instance by failing to require that the entry be unlawful, or allowing the burgled place to be something other than a building.¹³³

The *Taylor* Court warned that pursuing a fact-based, rather than categorical, approach would conflict with ACCA’s language and legislative history and raise serious practical and fairness concerns.¹³⁴ A conviction, especially a guilty plea, might provide little or no record for a sentencing court to determine the facts of the offense.¹³⁵ Further, enhancing a sentence based on such facts when a defendant had pleaded to a lesser offense seems unjust.¹³⁶ The Court found these reasons for adopting the categorical approach persuasive—and noted that every circuit interpreting ACCA had done likewise.¹³⁷ In *Shepard v. United*

128. *James*, 550 U.S. at 202; *Taylor*, 495 U.S. at 599–602.

129. See S. REP NO. 98-190, at 20 (1983) (describing Congress’s reasons for adopting a single federal definition of burglary in the 1984 ACCA).

130. *Taylor*, 495 U.S. at 578 n.1, 602.

131. *Id.* at 602.

132. *Id.* at 599–600; see also *James*, 550 U.S. at 197 (considering a Florida burglary statute that failed to satisfy ACCA’s generic definition).

133. *Taylor*, 495 U.S. at 599.

134. *Id.* at 601–02.

135. *Id.*

136. *Id.*; see also *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 964–66 (9th Cir. 2011) (Berzon, J., dissenting) (“Not only is this unfair, but it will undoubtedly discourage defendants from pleading guilty. What good is a bargain that a later court might rewrite?”); Holman, *supra* note 22, at 218 n.49 (“The Supreme Court has repeatedly affirmed the restriction on judicial fact-finding for sentencing purposes since *Taylor*.”).

137. *Taylor*, 495 U.S. at 600–02.

*States*¹³⁸ the Court added a constitutional buttress to the categorical approach, noting that enhancing a sentence based on facts neither found by a jury nor admitted by a defendant risked offending the Sixth Amendment.¹³⁹ The categorical approach has applied to the entirety of ACCA ever since.¹⁴⁰

A look at the “modified categorical approach” underscores the formal categorical inquiry’s rigor. Under the modified categorical approach a court may look beyond a crime’s statutory elements only when confronted with a statute describing several distinct crimes.¹⁴¹ As discussed above, burglary for ACCA purposes requires illegal entry into a building.¹⁴² A court considering a statute criminalizing “breaking into a ‘building, ship, vessel or vehicle’” will consequently need to know under which prong a conviction lies to determine whether it is a violent felony.¹⁴³ In only these cases, a court may look to a short list of documents—the indictment, charging information, jury instructions, or the terms of a plea agreement or colloquy establishing the factual basis for a plea—to determine which prong of a statute separately describing more than one offense was violated.¹⁴⁴ Beyond facts actually required to support the conviction, *how* the defendant allegedly perpetrated the crime remains irrelevant under the modified categorical approach.¹⁴⁵ Beyond supplementing the usual inquiry with a narrowly circumscribed list of documents when dealing with a particular subset of statute, the U.S. Supreme Court has permitted no other exception to the categorical approach.

138. 544 U.S. 13 (2005).

139. *Id.* at 24–26 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

140. *See Taylor*, 495 U.S. at 602 (“We think the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.”).

141. *Nijhawan v. Holder*, __U.S.__, 129 S. Ct. 2294, 2299 (2009). The various crimes must be “described separately.” *Id.* *But see Aguila-Montes de Oca*, 655 F.3d at 917 (applying the modified categorical approach beyond such divisible statutes, to statutes missing an element of a generic crime).

142. *Taylor*, 495 U.S. at 598–99.

143. *See Nijhawan*, 129 S. Ct. at 2299 (quoting MASS. GEN. LAWS, ch. 266, § 16 (West 2006) as an example).

144. *Shepard*, 544 U.S. at 26; *Taylor*, 495 U.S. at 602. However, the categorical approach “may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary.” *Taylor*, 495 U.S. at 602.

145. *See Taylor*, 495 U.S. at 602.

C. *Each Pre-Sykes Residual-Provision Case Applies the Categorical Approach Differently in Determining Risk Level and Intent*

Leading up to *Sykes*, the U.S. Supreme Court examined the residual provision in *James v. United States*,¹⁴⁶ *Begay v. United States*,¹⁴⁷ and *Chambers v. United States*.¹⁴⁸ Though answering the same questions in each case (whether a particular offense involved the requisite risk level and intent to qualify as an ACCA predicate offense) and using the same method (the categorical approach), these cases have relied on very different analyses in making their categorical determinations.¹⁴⁹

1. *The Court Determined Risk Level Based on the “Ordinary Case” of the Offense in James*

James called on the U.S. Supreme Court to interpret the residual provision for the first time.¹⁵⁰ *James*, like *Taylor*, involved burglary, but added two significant wrinkles: the conviction in question was for *attempted* burglary¹⁵¹ and the Florida statute of conviction¹⁵² unquestionably failed to satisfy the elements of the generic offense.¹⁵³ The Court’s opinion turned on whether attempted burglary presented a sufficient risk of injury.¹⁵⁴ Consistent with *Taylor*, the Court applied the categorical approach.¹⁵⁵

The Court first held that the residual provision included attempt crimes.¹⁵⁶ According to the majority, narrowly reading the residual provision to exclude attempt crimes would be inconsistent with its broad catch-all function.¹⁵⁷ Moreover, the specific enumerated offense of explosives use included inchoate crimes—“[a]n unsuccessful attempt to

146. 550 U.S. 192 (2007).

147. 553 U.S. 137 (2008).

148. 555 U.S. 122 (2009).

149. See Holman, *supra* note 22, at 219 (“The categorical approach’s relative simplicity does not appear to have survived its application to the residual clause.”); see also *Sykes v. United States*, ___ U.S. ___, 131 S. Ct. 2267, 2285 (2011) (Scalia, J., dissenting) (disparaging the majority’s use of various methods from earlier cases as a “tutti-frutti opinion”).

150. See *James*, 550 U.S. at 198.

151. *Id.* at 195–96.

152. FLA. STAT. §§ 777.04, 810.02 (1993).

153. *James*, 550 U.S. at 197.

154. *Id.* at 203.

155. *Id.* at 202.

156. *Id.* at 199–201.

157. *Id.* at 198–99.

blow up a government building, for example.”¹⁵⁸ Finally, Congress’s intent that ACCA apply broadly, as expressed during the 1986 amendment process, supported inclusion of attempt crimes.¹⁵⁹ Accordingly, the Court rejected James’ argument that the enumerated offenses contained only complete crimes and concomitant proposal that the residual provision should follow suit.¹⁶⁰

After disposing of this preliminary question, the Court turned to the meat of the case: deciding whether attempted burglary fit into the residual provision. To answer, the Court asked whether attempted burglary poses a sufficient danger of physical injury to qualify as a violent felony.¹⁶¹

Justice Samuel Alito, writing for the majority, answered in the affirmative by comparing attempted burglary to its closest analog among the enumerated offenses—burglary.¹⁶² Though attempted burglary does not require successful entry into a building,¹⁶³ an element of the enumerated offense,¹⁶⁴ both present the same “possibility of a face-to-face confrontation between the burglar and a third party.”¹⁶⁵ And because the residual provision requires only *potential* risk of injury,¹⁶⁶ it might include attempted burglary even if in some cases the crime could be committed without actual risk.¹⁶⁷ Justice Alito’s application of the categorical approach asked only “whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another.”¹⁶⁸ He reasoned that the “ordinary case” of attempted burglary involves an interrupted burglary, which presents the possibility of a violent conflict.¹⁶⁹ In this sense, the attempt crime posed, if anything, a *greater* risk of injury than the completed crime—a successful burglar might, after all, slip back into the night

158. *Id.* at 199 (citing 18 U.S.C. § 844(f)(1) (2000)).

159. *Id.*

160. *Id.* at 199–200.

161. *Id.* at 203.

162. *Id.* at 204–10.

163. *See* FLA. STAT. § 777.04(1) (1993) (describing attempt crimes under Florida law).

164. *James*, 550 U.S. at 197 (citing *Taylor v. United States*, 495 U.S. 575, 598 (1990)).

165. *Id.* at 203–04.

166. *See id.* at 207 (“[The] residual provision speaks in terms of a ‘potential risk.’ These are inherently probabilistic concepts.” (citing BLACK’S LAW DICTIONARY 1188 (7th ed. 1999))).

167. *Id.* at 208–09.

168. *Id.* at 208 (emphasis added).

169. *Id.* at 203–04.

without further incident.¹⁷⁰ Thus, attempted burglary “by its nature” presents the requisite risk to qualify as a predicate offense under the residual provision.¹⁷¹

Justice Alito’s majority opinion drew a trenchant dissent from Justice Antonin Scalia, joined by Justices John Paul Stevens and Ruth Bader Ginsburg.¹⁷² Justice Scalia argued for comparing a crime to the least risky of the enumerated offenses instead of its closest enumerated cousin.¹⁷³ Not every potential violent felony would pair so naturally as attempted burglary with burglary; the majority’s approach “[got] the case off [the] docket, sure enough,” but offered little guidance for the future.¹⁷⁴ He also disagreed with the majority regarding the relative risks of burglary and attempted burglary, suggesting that, by definition, a mere *attempted* burglar never could have entered the building.¹⁷⁵ The dissenting Justices agreed with the majority on two key points, though: that risk level governed the case’s outcome, and that the proper way to determine that risk level was to imagine the ordinary occurrence of a crime.¹⁷⁶

2. *The Court Determined Intent Looking Only to the Elements of the Offense in Begay*

In *Begay*,¹⁷⁷ the Court focused on a different dispositive issue than it did in *James*, and also used a different flavor of categorical approach. *Begay* involved a New Mexico conviction for driving under the influence (DUI).¹⁷⁸ New Mexico made DUI a felony after three previous DUI convictions,¹⁷⁹ and Larry Begay had collected a dozen before police arrested him for threatening his aunt and sister with a rifle.¹⁸⁰ Begay’s

170. *See id.* at 204 (“Many completed burglaries do not involve such confrontations.”).

171. *Id.* at 209.

172. *Id.* at 214 (Scalia, J., dissenting). Scalia suggested, as an alternative to the method applied in his concurrence, voiding the residual provision for vagueness. *Id.* at 229–30. Justice Clarence Thomas also dissented, on grounds that ACCA impermissibly allowed sentencing based on facts not found by a jury or admitted by the defendant. *Id.* at 231 (Thomas, J., dissenting).

173. *Id.* at 219.

174. *Id.* at 215.

175. *Id.* at 227.

176. *Id.* at 211 (majority opinion) (“In the end, Justice Scalia’s analysis of this case turns on the same question as ours—*i.e.*, the comparative risks presented by burglary and attempted burglary.”).

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

178. *Id.* at 140.

179. N.M. STAT. ANN. §§ 66-8-102(G)–(J) (West 2007).

180. *Begay*, 553 U.S. at 140.

prior felony DUIs subjected him to federal prosecution as a felon in possession of a firearm.¹⁸¹ Did the DUIs also suffice to trigger ACCA's sentence enhancements?

The Court passed quickly over the risk-level question crucial to *James*.¹⁸² Based on statistics by the National Highway Safety Administration and the lower court's opinion, the Court assumed that DUI presented a level of risk sufficient to qualify under the residual provision.¹⁸³ Risk level failed to decide the case, though, because the residual provision demanded an additional element: not only must a crime pose a *risk* similar to the enumerated offenses, it also had to be a similar *type* of crime.¹⁸⁴ *James* never considered the type of crime in taking the measure of attempted burglary, because the type-of-crime fit was never in doubt—Congress emblazoned “burglary” across ACCA at nearly every phase of the legislative process.¹⁸⁵ New Mexico's felony DUI struck the Court as categorically different from the sort of crime targeted by ACCA; unlike the enumerated offenses, DUI did not “typically involve purposeful, violent, and aggressive conduct.”¹⁸⁶ Risk level notwithstanding, this difference set DUI outside the residual provision.¹⁸⁷

This focus on intent instead of risk level marked a departure from *James*. Additionally, the *Begay* Court focused on a typical statute, instead of the typical commission of the crime at issue, to determine whether the offense qualified as an ACCA predicate. Instead of looking to the way a DUI offense is ordinarily *committed*, the Court looked to the ordinary DUI *statute*: “statutes that forbid driving under the influence, such as the statute before us, typically do not insist on purposeful, violent, and aggressive conduct”¹⁸⁸ The U.S. Supreme Court had previously held that DUIs need neither be purposeful nor deliberate¹⁸⁹—they more closely resembled strict-liability offenses.¹⁹⁰ As

181. *See* 18 U.S.C. § 922(g) (2006).

182. *Begay*, 553 U.S. at 141–42.

183. *Id.*

184. *Id.* at 143.

185. *See supra* Part I.A.I.

186. *Begay*, 553 U.S. at 144–45 (internal quotes omitted).

187. *See id.* at 142–45 (holding that after “read[ing] the examples as limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves. . . . DUI differs from the example crimes . . . in at least one pertinent, and important, respect”—purposeful, violent, and aggressive conduct).

188. *Id.*

189. *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).

a categorical matter, New Mexico's felony DUI possessed the risk level, but lacked the intent, necessary to qualify for the residual provision.¹⁹¹

3. *The Court Determined Risk Level Looking to Statistics in Chambers*

In *Chambers*,¹⁹² the Court answered “no” to both the risk level and intent inquiries when considering whether a conviction under Illinois law for failing to report to a penal institution¹⁹³ constitutes an ACCA predicate offense.¹⁹⁴ The entire Court joined or concurred with Justice Breyer's majority opinion, making it the only U.S. Supreme Court residual-provision case with no dissenters.¹⁹⁵ As Deondry Chambers had been convicted under a statute containing several distinct offenses—some resembling violent felonies more closely than others¹⁹⁶—the case also marked the first residual-provision application of the *modified* categorical approach to determine which prong produced the conviction.¹⁹⁷

The *Chambers* Court held that failing to report flunked both the residual-provision requirements of risk level *and* intent.¹⁹⁸ As a categorical matter, looking only at the elements of the crime appears decisive: as a “form of inaction,” failure to report involves no affirmative conduct or intent requirements.¹⁹⁹ Indeed, the Court held the crime “a far cry from the purposeful, violent, and aggressive conduct” evidencing the requisite intent under ACCA.²⁰⁰

The Court also cited statistics showing that failure to report poses little or no risk of injury.²⁰¹ Countering three examples given by the government where truant convicts shot at officers attempting recapture, Justice Breyer turned to a U.S. Sentencing Commission report that found

190. *See Begay*, 553 U.S. at 145 (describing DUI as “most nearly comparable to[crimes that impose strict liability]”).

191. *Id.* at 147–48.

192. *Chambers v. United States*, 555 U.S. 122 (2009).

193. 720 ILL. COMP. STAT. 5/31-6(a) (West Supp. 2008).

194. *Chambers*, 555 U.S. at 130.

195. *Id.* at 123. Justice Thomas joined Justice Alito's concurrence. *Id.*

196. The statute prohibited conduct ranging from failing to abide by conditions of home release to breaking out of jail. Ch. 720, § 5/31-6(a); *see also Chambers*, 555 U.S. at 126.

197. *See supra* notes 141–145 and accompanying text.

198. *Chambers*, 555 U.S. at 130.

199. *Id.* at 128–29.

200. *Id.* at 128 (internal quotation marks omitted).

201. *Id.* at 128–29.

no instances of violence within the 160 instances of failure to report in its sample.²⁰² The report provided a “conclusive, negative answer” to the question of whether a failure-to-report offender categorically poses a serious potential risk of physical injury.²⁰³ Justice Breyer reproduced the data in its entirety and devoted nearly half of the *Chambers* majority opinion to discussing it.²⁰⁴ *Chambers* thus suggests that statistics furnish a distinct basis for categorically determining risk level.²⁰⁵

D. The Sykes Court Failed to Specify on Which of Several Potentially Decisive Tests It Rests

Sykes held that an Indiana vehicle-flight crime presents both the intent and risk of injury demanded by ACCA’s residual provision.²⁰⁶ The state statute’s “stringent *mens rea* requirement” of a knowing attempt to flee satisfies the requisite level of intent.²⁰⁷ To demonstrate risk of injury, the Court looked to the danger posed by the usual characteristics of vehicular flight crimes²⁰⁸ and national statistical data evincing the fatalities and injuries vehicle flight causes.²⁰⁹ The Court also determined that the vehicle-flight statute itself supported the offense’s categorically high risk level.²¹⁰ Because Indiana had set the offense’s penalty equal to that of another explicitly risky offense in the same statute, the Court reasoned, the state had implicitly determined that the vehicle-flight offense considered poses an inherent danger.²¹¹ *Sykes* is first among the U.S. Supreme Court’s residual provision cases to employ this third

202. *Id.* at 129 (citing U.S. SENTENCING COMM’N, REPORT ON FEDERAL ESCAPE OFFENSES IN FISCAL YEARS 2006 AND 2007, at 6 (2008)).

203. *Id.*

204. The text of *Chambers*’ majority opinion spans pages 123 through 131 of the U.S. Reporter; the last three of these nine (129 to 31) discuss and reprint the Sentencing Commission’s data. *See id.* at 123–31.

205. *See Holman, supra* note 22, at 223–24 (noting that *Chambers* seemed to hold out a court’s own statistical inquiry as an independent test for determining a violent felony).

206. *See Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2276 (2011) (holding that vehicle flight satisfies the text of the residual provision because it “is not a strict liability, negligence, or recklessness crime and because it is, for the reasons stated and as a categorical matter, similar in risk to the listed crimes”).

207. *Id.* at 2275 (citing IND. CODE § 35-44-3-3(a) (1998); *Woodward v. State*, 770 N.E.2d 897, 901 (Ind. Ct. App. 2002)).

208. *Id.* at 2273–74.

209. *Id.* at 2274–75.

210. *Id.* at 2276.

211. *Id.* The Court inferred this legislative determination of the two offenses’ relationship because of “similarities in punishment for these related, overlapping offenses.” *Id.* (quoting *id.* at 2282 (Thomas, J., concurring)).

method of determining an offense's risk level through statutory analysis. The two other inquiries—looking to the typical occurrence of the crime and statistics—appeared in earlier residual-provision cases and decided the issue of risk.²¹² In *Sykes*, it is unclear what weight they carry.

Justice Anthony Kennedy's majority opinion opens with a lengthy quote invoking and explaining the categorical approach.²¹³ Adding his own emphasis to *James*' language, he wrote, "Under this approach . . . we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision."²¹⁴

Similar to the typical occurrence, or "ordinary case," approach used first in *James*,²¹⁵ Justice Kennedy then compared the risks attending vehicle flight to those of various enumerated offenses.²¹⁶ Vehicle flight equals or exceeds the risk presented by burglary because both "can end in confrontation leading to violence."²¹⁷ For vehicle flight this risk arises because "a typical case" requires police to give chase and "escalate their response to ensure the felon is apprehended."²¹⁸ Vehicle flight's risk is also comparable to that of arson because it involves indifference to possible collateral consequences—again, resulting from "the possibility that police will . . . exceed or almost match his speed or use force to bring him within their custody."²¹⁹ Although the "ordinary case" comparison decided *James*, it only opens the inquiry in *Sykes*. Vehicle flight's similarity to arson in terms of risk level supplied only "a beginning point in establishing that vehicle flight presents a serious potential risk of physical injury to another."²²⁰ Comparison to the risk posed by burglary was only "[a]nother consideration"²²¹ in the determination.

212. See *Chambers v. United States*, 555 U.S. 122, 129 (2009) (noting that a report showing no violence in two years of failure-to-report cases "strongly supports the intuitive belief that failure to report does not involve a serious potential risk of physical injury"); *Begay v. United States*, 553 U.S. 137, 141–42 (2008) (assuming DUI presents sufficient risk while citing only National Highway Traffic Safety Administration data on alcohol-related fatalities); *James v. United States*, 550 U.S. 192, 208–09 (2007) (holding the ordinary case of an attempted robbery sufficed to decide issue of risk).

213. *Sykes*, 131 S. Ct. at 2272.

214. *Id.* (quoting *James*, 550 U.S. at 202).

215. *James*, 550 U.S. at 208.

216. *Sykes*, 131 S. Ct. at 2273.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

Statistical evidence of vehicle flight's dangers, similar to that presented in *Chambers*,²²² also failed to decide *Sykes*.²²³ *Sykes* cites studies demonstrating the respective dangers of vehicle flight, burglary, and arson, suggesting that vehicle flight presents the greatest danger of the three.²²⁴ Whereas only 3.3 injuries result from every 100 arsons,²²⁵ and 3.2 injuries from the same number of burglaries,²²⁶ every 100 fleeing vehicles produce 4 injuries—even excluding injuries to suspects.²²⁷ However empirically damning, though, these numbers only “confirm the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony.”²²⁸ By themselves they were “not dispositive.”²²⁹

In the last section of the majority opinion, Justice Kennedy turned to the structure of Indiana’s vehicle-flight statute. The Indiana statute, superseded by the time the Supreme Court considered it,²³⁰ possessed a curious structure that *Sykes* argued evinced a *lack* of categorical risk.²³¹ Subsection (a) described three offenses: resisting or obstructing an officer, obstructing legal process or a court order, or fleeing from an officer “after the officer has, by visible or audible means, identified himself and ordered the person to stop.”²³² Subsection (b) classified

222. See *Chambers v. United States*, 555 U.S. 122, 129–31 (2009).

223. See *Sykes*, 131 S. Ct. at 2274 (noting that statistics are not dispositive of the issue of risk level).

224. *Id.* at 2274–75 (noting that the “risks [posed by vehicle flight] may outstrip the dangers of at least two [enumerated offenses]” before discussing statistical risks associated with burglary and arson). The ensuing discussion borrows from a lengthier statistical exegesis in Justice Thomas’ concurrence. See *id.* at 2279–80 (Thomas, J., concurring).

225. *Sykes*, 131 S. Ct. at 2274–75 (citing U.S. FIRE ADMIN., METHODOLOGY USED IN THE DEVELOPMENT OF THE TOPICAL FIRE RESEARCH SERIES, *available at* <http://www.usfa.fema.gov/downloads/pdf/tfrs/methodology.pdf>; U.S. FIRE ADMIN., 2010 NONRESIDENTIAL BUILDING INTENTIONAL FIRE TRENDS (2011), *available at* http://www.usfa.fema.gov/downloads/pdf/statistics/nonres_bldg_intentional_fire_trends.pdf; U.S. FIRE ADMIN., RESIDENTIAL BUILDING CAUSES, http://www.usfa.dhs.gov/downloads/xls/estimates/res_bldg_fire_cause.xlsx (last visited Jan. 6, 2012); U.S. FIRE ADMIN. RESIDENTIAL AND NONRESIDENTIAL FIRE ESTIMATE SUMMARIES, 2003–2009, <http://www.usfa.fema.gov/statistics/estimates/index.shtm> (last visited Jan. 6, 2012)).

226. *Id.* at 2274 (citing SHANNAN CATALANO, BUREAU OF JUSTICE STATISTICS, VICTIMIZATION DURING HOUSEHOLD BURGLARY 1 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/vdhhb.pdf>).

227. *Id.* (citing LUM & FACHNER, *supra* note 42, at 54).

228. *Id.*

229. *Id.*

230. A 2006 amendment, 2006 Ind. Acts 2470, established different punishments for vehicle flight requiring risk and simple vehicle flight. See *Sykes*, 131 S. Ct. at 2295 (Kagan, J., dissenting) (noting amendment).

231. *Sykes*, 131 S. Ct. at 2276.

232. IND. CODE § 35-44-3-3(a)(3) (1998).

these offenses for punishment purposes as either Class A misdemeanors or Class D, C, or B felonies.²³³ Two paths lead to a Class D felony: either (1) committing *any* of the three subsection (a) offenses by using a deadly weapon, injuring another person, or “operat[ing] a vehicle in a manner that creates a substantial risk of bodily injury to another person”,²³⁴ or (2) committing the subsection (a) offense of *fleeing an officer* using a vehicle.²³⁵ The first statutory route to a Class D Felony conviction for vehicle flight thus required operating a vehicle dangerously. The second route—under which Sykes was convicted—did not.²³⁶ Justice Elena Kagan, joined by Justice Ginsburg in dissent, characterized these two forms of the offense respectively as aggravated and simple vehicle flight.²³⁷

Sykes argued that because one method of charging vehicle flight expressly required risk of injury while the other did not, Indiana’s legislature must have intended only the first category to proscribe an ACCA-worthy offense.²³⁸ In response, Justice Kennedy pointed out that Indiana punished both equally.²³⁹ He reasoned that the statutory framework reflected the Indiana legislature’s judgment that “some offenses in subsection (a) can be committed without a vehicle or without creating substantial risks. [It] reflect[s] the further judgment that this is not so for vehicle flights.”²⁴⁰ By punishing the two subsections equally, the statute made simple vehicle flight the “rough equivalent” of aggravated vehicle flight²⁴¹—the latter described in language nearly mirroring the residual provision itself.²⁴²

Justice Kagan’s dissent differs from the majority’s analysis in two respects. First, she would have applied *Begay*’s “purposeful, violent, and aggressive” test in all residual provision inquiries, not just those lacking a mens rea component.²⁴³ She illustrated the test by applying it to two

233. *Id.* § 35-44-3-3(b).

234. *Id.* § 35-44-3-3(b)(1)(B).

235. *Id.* § 35-44-3-3(b)(1)(A).

236. *Sykes*, 131 S. Ct. at 2272.

237. *Id.* at 2289–90 (Kagan, J., dissenting).

238. *Id.* at 2276.

239. *Id.*

240. *Id.*

241. *Id.*

242. Compare IND. CODE § 35-44-3-3(b)(1)(B) (1998) (prohibition on resisting law enforcement while operating a vehicle “in a manner that creates a substantial risk of bodily injury to another person”), with 18 U.S.C. § 924(e)(2)(B)(ii) (2006) (residual provision “otherwise involves conduct that presents a serious potential risk of physical injury to another”).

243. *Sykes*, 131 S. Ct. at 2289 & n.1 (Kagan, J., dissenting).

hypothetical statutes, one prohibiting fleeing by “driving at high speed or otherwise demonstrating reckless disregard for the safety of others,”²⁴⁴ and the other banning only non-risky failure to stop.²⁴⁵ Second, Justice Kagan agreed with petitioner’s interpretation based on the statutory framework.²⁴⁶ The statute at issue criminalizes a spectrum of conduct, ranging from “flight resulting in death” to “flight resulting in physical injury,” then “flight creating a substantial risk of physical injury,” on down to “flight.”²⁴⁷ According to Justice Kagan, “[t]hat last category—flight—almost screams to have the word ‘mere’ placed before it.”²⁴⁸ “To count [each] as ACCA offenses is to pay insufficient heed to the way the Indiana Legislature drafted its statute—as a series of escalating offenses, ranging from the simple to the most aggravated.”²⁴⁹

Sykes thus provides three bases supporting its determination that vehicle flight poses a serious potential risk of injury to another, without indicating which is dispositive: an “ordinary case” analysis, statistics, and statutory analysis. The *Sykes* Court did not spell out which basis, or combination thereof, controls the outcome.

E. Immediately After Sykes the U.S. Supreme Court Vacated and Remanded a Lower Court’s Determination That Vehicle Flight is the Practical Equivalent of a Violent Felony

Rogers v. United States,²⁵⁰ handed down eleven days after *Sykes*, provides one last data point regarding the U.S. Supreme Court’s view of the relationship between vehicle flight and ACCA. In *Rogers*, the Court reviewed a Sixth Circuit holding that James Rogers’ Tennessee vehicle-flight conviction qualified as a “crime of violence” as defined in the U.S. Sentencing Guidelines Manual.²⁵¹ As discussed, courts treat the terms “crime of violence” and “violent felony” interchangeably.²⁵²

The Tennessee statute at issue made it a crime to “intentionally flee or attempt to elude any law enforcement officer, after having received any

244. *Id.* at 2289.

245. *Id.* at 2290.

246. *Id.* at 2290–92.

247. *Id.* at 2292–93.

248. *Id.* at 2293.

249. *Id.*

250. ___U.S.___, 131 S. Ct. 3018 (2011).

251. *United States v. Rogers*, 594 F.3d 517, 520–21 (6th Cir. 2010).

252. *See supra* note 22.

signal from the officer to bring the vehicle to a stop.”²⁵³ Consistent with its holding in *United States v. Young*,²⁵⁴ which considered a similarly worded Michigan statute, the Sixth Circuit held that Rogers’ conviction involved “purposeful, aggressive, and violent conduct,” and posed “a serious potential risk of physical injury to others.”²⁵⁵ Because fleeing “nearly always pose[s] a substantial danger to . . . pursuing officers,”²⁵⁶ it qualified as a crime of violence under the U.S. Sentencing Guidelines’ residual provision. The Sixth Circuit’s holding rested on boilerplate language out of *Begay* and the residual provision itself,²⁵⁷ and employed a rationale echoed in *Sykes*—that officer pursuit typically accompanying vehicle flight “nearly always” places others in danger.²⁵⁸

In its entirety, the U.S. Supreme Court’s opinion reads: “Judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Sykes v. United States*[.]”²⁵⁹ This result is entirely congruent with a narrow reading of *Sykes* but inexplicable under a broad reading.

II. SYKES CAN—AND SHOULD—BE READ NARROWLY

Sykes lends itself to two readings—one narrow and one broad—depending on which rationale offered by the Court met the residual provision’s requirement that vehicle flight pose a sufficient risk of injury. The risk-level determination may have rested primarily on the equivalent punishment shared by the vehicle-flight conviction considered in *Sykes* and Indiana’s other, explicitly risky, flight offense.²⁶⁰ If so, *Sykes* has little to say about vehicle-flight convictions from other states without a similar statutory feature. On the other hand,

253. *Rogers*, 594 F.3d at 520–21 (quoting TENN. CODE ANN. § 39-16-603(b)(1) (1995)).

254. 580 F.3d 373 (6th Cir. 2009).

255. *Rogers*, 594 F.3d at 521 (quoting *Young*, 580 F.3d at 377–78).

256. *Id.* (quoting *Young*, 580 F.3d at 378).

257. Compare 18 U.S.C. § 924(e)(2)(B)(ii) (2006) (“. . . or otherwise involves conduct that presents a serious potential risk of physical injury to another.”), and *Begay v. United States*, 553 U.S. 137, 144–45 (2008) (“The listed crimes all typically involve purposeful, violent, and aggressive conduct.” (internal quotations omitted)), with *Rogers*, 594 F.3d at 521 (requiring “purposeful, aggressive, and violent conduct” and “a serious potential risk of physical harm to others” of a would-be violent felony (quoting *Young*, 580 F.3d at 377–78)).

258. *Rogers*, 594 F.3d at 521; accord *Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2273–74 (2011) (explaining that vehicle flight’s risks arise from police officers’ attempts to seize the offender).

259. *Rogers v. United States*, __U.S.__, 131 S. Ct. 3018 (2011). The opinion also includes a grant of certiorari and leave to proceed in forma pauperis. *Id.*

260. See *supra* text accompanying notes 230–242.

as in *James* and *Chambers*, the risk level determination may have rested respectively on an ordinary case²⁶¹ or statistical inquiry.²⁶² These rationales apply with equal force no matter how a state chooses to define the offense. Because these bases for determining risk level do not stop at state lines, read this way *Sykes* would sweep all vehicle-flight convictions (with the right mens rea component) under the residual provision. Justice Kennedy used broad language that seems to support this reading,²⁶³ and the circuit courts seem poised to adopt it.²⁶⁴

Sykes should instead be read narrowly, as turning only on Indiana's statutory language. District and circuit courts considering vehicle-flight convictions as potential ACCA predicates should disregard statistics and ordinary case inquiries as inconsistent with the categorical approach mandated in *Taylor*. Instead, a vehicle-flight conviction should qualify as an ACCA predicate under the residual provision only if the statute defining the crime requires an element of risk or—similar to the Indiana statute considered in *Sykes*—expresses a legislative determination that the offense is inherently risky. *James*, *Chambers*, and to an extent *Begay* strayed from the categorical approach by necessity, because the statutes defining the offenses considered in those cases offered no statutory basis for categorically determining risk.²⁶⁵ Thus, the tests *Sykes* borrows from these cases also stray outside the categorical approach's permitted boundaries.²⁶⁶ Under the narrow reading suggested, *Sykes* is the first residual-provision case in which the U.S. Supreme Court cleaves to the categorical approach as defined in *Taylor*.²⁶⁷ This narrow reading also explains—as the broad reading cannot—the summary remand of *Rogers*.²⁶⁸

A. *Case-by-Case Necessity Forced the Court to Stray from the Categorical Approach in James, Chambers, and Begay*

The practicalities of applying the residual provision have left the U.S.

261. See *supra* Part I.C.1.

262. See *supra* Part I.C.3.

263. See, e.g., *Sykes*, 131 S. Ct. at 2274 (“Risk of violence is inherent to vehicle flight.”).

264. See *supra* notes 22–26 and accompanying text; *infra* Part III.

265. See FLA. STAT. § 810.02 (1993); 720 ILL. COMP. STAT. 5/31-6(a) (West Supp. 2008); N.M. STAT. ANN. §§ 66-8-102(G)–(J) (West 2007).

266. See *Sykes*, 131 S. Ct. at 2286 (Scalia, J., dissenting) (“In sum, our statistical analysis in ACCA cases is untested judicial factfinding masquerading as statutory interpretation.”).

267. See *Taylor v. United States*, 495 U.S. 575, 602 (1990) (describing the categorical approach as looking only to the fact of conviction and statutory elements of the crime).

268. *Rogers v. United States*, __U.S.__, 131 S. Ct. 3018 (2011).

Supreme Court in a difficult position. After adopting the categorical approach in *Taylor* for sound reasons of congressional intent, practicality, and basic fairness,²⁶⁹ the Court has never suggested abandoning it. Yet the crimes considered in *James*, *Chambers*, and *Begay* contained no plausible statutory basis for categorically determining whether each fits within the residual provision.

James and *Chambers* both turn on determining the risk of harm to others.²⁷⁰ The statute at issue in *James* defined burglary as “entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.”²⁷¹ The relevant part of *Chambers*’ failure-to-report statute criminalized “knowingly fail[ing] to report to a penal institution or to report for periodic imprisonment at any time.”²⁷² Neither statute addresses the degree of risk posed by the prohibited action. *James* held that attempted burglary posed a serious risk²⁷³ and *Chambers* held that failure to report did not,²⁷⁴ but the elements of the crimes—all the Court should have looked to under the categorical approach²⁷⁵—provide no basis for this distinction. Given how clearly Congress considered burglars as likely career criminals, it seems consistent with ACCA’s purpose that its sentencing provisions should also apply to attempted burglars.²⁷⁶ Likewise, holding that “a form of inaction,” as the Court characterized failure to report, counts as a violent felony would seem perverse.²⁷⁷

Begay also reaches its determination looking to elements beyond “the fact of conviction and the statutory definition of the prior offense.”²⁷⁸ Rather than degree of risk, *Begay* turned on whether a crime requires a suitably violent mental state.²⁷⁹ *Begay*’s “purposeful, violent, and

269. See *Taylor*, 495 U.S. at 600–02; see also *supra* notes 134–140 and accompanying text.

270. See *Sykes*, 131 S. Ct. at 2275 (explaining that *Begay* was the “sole decision of this Court concerning the reach of ACCA’s residual clause in which risk was not the dispositive factor”).

271. FLA. STAT. § 810.02(1) (1993). Florida’s criminal attempt statute, also considered in *James*, likewise lacks any mention of risk. See *James v. United States*, 550 U.S. 192, 197 (2007) (citing FLA. STAT. § 777.04.01 (1993)).

272. 720 ILL. COMP. STAT. 5/31-6(a) (West Supp. 2008).

273. *James*, 550 U.S. at 209.

274. *Chambers v. United States*, 555 U.S. 122, 129–30 (2009).

275. See *Taylor v. United States*, 495 U.S. 575, 602 (1990).

276. See *supra* notes 73–87 and accompanying text.

277. See *Chambers*, 555 U.S. at 128.

278. *Taylor*, 495 U.S. at 602.

279. See *supra* Part I.C.2.

aggressive” inquiry,²⁸⁰ focuses on whether the crime was “characteristic of the armed career criminal.”²⁸¹ This criterion is consistent with congressional intent, but lacks apparent textual basis.²⁸²

As introduced in *Begay*, the “purposeful, violent, and aggressive” test seemed to ask what conduct a crime “typically” involves, and so engages in a type of ordinary-case inquiry. As such, it conflicts with the categorical approach because this typical conduct is not usually spelled out in a crime’s statutory definition.²⁸³ In *Sykes* the Supreme Court narrowed *Begay* by holding that the “purposeful, violent, and aggressive” inquiry does not require specific conduct, but rather a mens rea element excluding crimes of negligence, recklessness, or strict liability.²⁸⁴

Even interpreting “purposeful, violent, and aggressive” in this way, some tension remains between *Begay* and the categorical approach. Though the Court only assumes that felony DUI poses a sufficient risk of injury to another,²⁸⁵ it cites National Highway Safety Administration statistics in support of this assertion.²⁸⁶ Though common sense supports this conclusion, statistics are not among the sources *Taylor* permits a court to consult.²⁸⁷

B. *Sykes Comports with the Categorical Approach Only if Read Narrowly*

The elements and structure of Indiana’s vehicle-flight statute justify its inclusion within the residual provision consistent with the categorical approach. Justice Kagan’s dissent in *Sykes*, though arriving at a conclusion contrary to the majority’s, reinforces the categorical approach by focusing on the primacy of the crime’s statutory

280. *Begay v. United States*, 553 U.S. 137, 144–45 (2008) (internal quotation marks omitted).

281. *See id.* at 145 (quoting *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)).

282. *See id.* at 150 (Scalia, J., dissenting) (“There is simply no basis (other than the necessity of resolving the present case) for holding that the enumerated and unenumerated crimes must be similar in respects *other than the degree of risk that they pose.*”); Holman, *supra* note 22, at 229–30 (arguing that “the ‘likely shooter’ inquiry is a judicial creation without any root in the ACCA or its legislative history”).

283. Holman, *supra* note 22, at 227–28.

284. *Sykes v. United States*, __ U.S. __, 131 S. Ct. 2267, 2275–76 (2011).

285. *Begay*, 553 U.S. at 141–42.

286. *Id.* (citing NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS, 2006 TRAFFIC SAFETY ANNUAL ASSESSMENT—ALCOHOL-RELATED FATALITIES 1 (2007), available at <http://www-nrd.nhtsa.dot.gov/Pubs/810821.pdf>).

287. *See Taylor v. United States*, 495 U.S. 575, 602 (1990).

definition.²⁸⁸ The “ordinary case” and statistical approaches should be considered non-dispositive because they cannot be squared with the categorical approach.

I. Sykes’ Vehicle-Flight Conviction Required a Knowing Mental State and Triggered Punishment Identical to an Offense That Unquestionably Poses a Serious Risk of Injury

In every one of the U.S. Supreme Court’s ACCA cases, two factors determine a crime’s inclusion in the residual provision: the requisite risk of injury and intent.²⁸⁹ The vehicle-flight statute considered in *Sykes* satisfies both requirements based on its statutory mens rea element and penalty structure.

For the *Sykes* majority, Indiana’s decision to punish simple and aggravated vehicle flight equally demonstrates that both subsets of the offense categorically involve the risk of physical injury.²⁹⁰ Aggravated vehicle flight, as the state defines it, requires operating a vehicle “in a manner that creates a substantial risk of bodily injury to another person.”²⁹¹ Because this language closely tracks the residual provision’s “serious potential risk of physical injury to another” language,²⁹² it indicates that aggravated vehicle flight, as defined by the Indiana legislature, possesses the risk level of a violent felony. Indeed, because it demands “risk” instead of mere “potential risk,” the aggravated crime arguably exceeds the residual provision’s threshold requirement.²⁹³ As the *Sykes* Court held, Indiana pegged the risk level of *simple* vehicle flight to its explicitly risky counterpart by subjecting them to the same penalty.²⁹⁴ As a whole, the statute containing the two flight crimes “reflect[s] a judgment that some offenses . . . can be committed without a vehicle or without creating substantial risks. They reflect the further judgment that this is not so for vehicle flights.”²⁹⁵

The statutory structure and elements also satisfy the intent

288. *See supra* notes 243–249 and accompanying text.

289. *See supra* Part I.A.2.

290. *See Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2276 (2011).

291. IND. CODE § 35-44-3-3(b)(1)(B) (1998).

292. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (2006); *Sykes*, 131 S. Ct. at 2293 (Kagan, J., dissenting) (noting similarity in language between Indiana statute and ACCA).

293. *Cf. James v. United States*, 555 U.S. 192, 207–08 (2007) (noting that the term “potential risk” is “inherently probabilistic”).

294. *Sykes*, 131 S. Ct. at 2276; *see also id.* at 2282 (Thomas, J., concurring).

295. *Id.* at 2276.

requirement articulated in *Begay*²⁹⁶ and clarified in *Sykes*²⁹⁷ because the statute criminalizes only knowing and intentional conduct.²⁹⁸ The statute defining vehicle flight thus provides a basis for both the risk level and intent requirement of an ACCA predicate, without trespassing the limits of the categorical approach.

Justice Kagan reinforced the importance of Indiana's statutory language in her *Sykes* dissent. She correctly focused on the statutory elements at issue instead of "some platonic form of an offence—here, some abstract notion of vehicular flight."²⁹⁹ Her approach would qualify as ACCA predicates only those offenses that expressly require a serious risk of injury and violent intent.³⁰⁰ Justice Kennedy buries his discussion of the Indiana vehicle-flight statute near the end of his opinion, which risks signaling that the argument carries only a little weight with the five Justices in the *Sykes* majority. Justice Kagan declares that a "focus on statutory structure resolves this case,"³⁰¹ and devotes her entire dissent to the issue.³⁰² Counting heads, eight Justices thus considered statutory structure at least relevant to the determination,³⁰³ and two—Justices Kagan and Ginsburg—considered it dispositive.³⁰⁴ By focusing her dissent on the state statute and its structure, Justice Kagan prevents the issue from being buried in the majority opinion. That Justice Kagan reaches a different conclusion from the *Sykes* majority and concurrence should not disguise that each takes the same approach—asking whether the state's definition of the offense suffices to meet the requirements of the residual provision.

296. See *Begay v. United States*, 553 U.S. 137, 144–46 (2008) (first articulating "purposeful, violent, and aggressive conduct" requirement).

297. See *Sykes*, 131 S. Ct. at 2275–76 (narrowing *Begay* to exclude only crimes of strict liability, negligence, and recklessness from the residual provision); *supra* notes 103–114 and accompanying text.

298. IND. CODE § 35-44-3-3(a) (1998).

299. *Sykes*, 131 S. Ct. at 2289 (Kagan, J., dissenting).

300. *Id.* at 2288–89.

301. *Id.* at 2292.

302. See *id.* at 2288–96. Justice Thomas' concurrence also concludes that equal punishment implies equal risk, echoing the majority's reasoning on this point. *Id.* at 2281–84 (Thomas, J., concurring).

303. Justice Scalia devotes his dissent to inveighing against the residual provision as unconstitutionally vague. *Id.* at 2284–88 (Scalia, J., dissenting).

304. *Id.* at 2292. (Kagan, J., dissenting).

2. *Looking to the “Ordinary Case” of a Crime or to Statistics Cannot be Squared with the Categorical Approach*

Constitutional, equitable, and practical concerns alike compelled the Court to adopt the categorical approach.³⁰⁵ As set forth in *Taylor*, the categorical approach generally demands that an offense be judged only on the basis of its statutory description and judicially engrafted elements.³⁰⁶ Both a crime’s “ordinary case” commission and statistical data of its risks stand outside the crime’s elements. As such, consideration of either goes beyond what the categorical approach allows.

The “ordinary case” approach first used in *James* is essentially an appeal to the judicial imagination.³⁰⁷ Comparing Justice Alito’s majority opinion in *James* with Justice Scalia’s dissent highlights the subjectivity of the “ordinary case” test. Justice Alito explained that because, by definition, an attempted burglary involves interruption, the risk of confrontation—and hence physical injury—is *greater* than for the completed crime.³⁰⁸ Justice Scalia argued the opposite—because successful entry of a building marks the line between completed and attempted burglary, a merely *attempted* burglar, perforce, never made it inside.³⁰⁹ As such, the attempted burglar runs no risk of potentially dangerous confrontation with the building’s occupants.³¹⁰ The Justices’ respective intuitions, rather than any facet of attempted burglary’s statutory definition, determined the inquiry’s outcome.

This exchange more importantly demonstrates how imagining the ordinary case departs from the categorical approach. Both Justices Alito and Scalia base the risk—or potential risk—of burglary on the possibility of confrontation between the burglar and some third party.³¹¹ Yet the Florida statute considered in *James* does not require a risk of a confrontation, entry into an occupied building, or interruption of the attempted burglary.³¹² There is no way of determining whether Justice

305. See *Taylor v. United States*, 495 U.S. 575, 600–02 (1990); *supra* notes 134–140 and accompanying text.

306. *Taylor*, 495 U.S. at 602.

307. See Holman, *supra* note 22, at 244–49 (arguing that the “ordinary case approach” is inconsistent with the categorical approach).

308. *James v. United States*, 550 U.S. 192, 204 (2007).

309. *Id.* at 225–26 (Scalia, J., dissenting).

310. *Id.* at 227.

311. *Id.* at 204 (majority opinion); *id.* at 227 (Scalia, J., dissenting).

312. See FLA. STAT. § 810.02 (1993).

Alito's, Justice Scalia's, or some other order of events represents the ordinary case of burglary "look[ing] only to the fact of conviction and the statutory definition of the prior offense"—the only considerations allowed under *Taylor*'s categorical approach.³¹³ Deciding what the ordinary case of an offense actually is—a necessary first step in determining the risk created in that ordinary case—requires the sort of factual finding *Taylor* sought to avoid.³¹⁴ The ordinary case approach thus conflicts with the categorical approach that applies to ACCA.³¹⁵

The ordinary case examples in *Sykes* have even less connection to the statutory elements than *James*. Similar to *James*, which posited a risk arising from conflict between a would-be burglar and a building's occupants,³¹⁶ Justice Kennedy opined that vehicle flight poses a risk of injury from possible confrontation between the criminal and the pursuing police.³¹⁷ Counterintuitively, the only risk he identifies arises from *police* conduct, as they will likely engage in dangerous maneuvers in their effort to apprehend the fleeing suspect.³¹⁸ The offense at issue in *Sykes* fails to include an explicit element of risk-causing behavior by the suspect or the police.³¹⁹ And because the statute defining that offense also sets out a spectrum of vehicle-flight offenses, only some of which explicitly require risk of injury, the state presumably did not consider this risk present in all vehicle-flight conduct.³²⁰ Only the statute's punishment structure allowed the Court to escape this inference.³²¹

Though less subjective than the "ordinary case" inquiry, reliance on

313. *Taylor v. United States*, 495 U.S. 575, 602 (1990).

314. *See id.* at 600–02; *James*, 550 U.S. at 231 (Thomas, J., dissenting) (arguing that the majority's approach involves an unproven factual determination, in contravention of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (prohibiting sentencing based on facts neither found by a jury nor admitted by the defendant)).

315. Holman, *supra* note 22, at 244–49.

316. *James*, 550 U.S. at 203–04.

317. *Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2273–74 (2011).

318. *See id.* at 2273 ("Because an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves duty bound to escalate their response to ensure the felon is apprehended.").

319. The case cited by Justice Kennedy as supporting risk in the ordinary case of vehicle flight, *Scott v. Harris*, 550 U.S. 372 (2007), involved a suspect rendered paraplegic after police rammed his fleeing car. The residual provision, however, requires serious potential risk of physical injury to *another*—not to the person committing the crime. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (2006) ("... or otherwise involves . . . potential risk of physical injury to *another*." (emphasis added)).

320. *See* IND. CODE § 35-44-3-3 (1998); *Sykes*, 131 S. Ct. at 2288–96 (Kagan, J., dissenting) (inferring a state determination that some vehicle-flight offenses are non-risky).

321. *Cf. infra* Part II.C (discussing the Court's failure to uphold a Sixth Circuit opinion holding that vehicle flight was a crime of violence based on a state statute similar to the one in *Sykes*, but lacking equivalent punishment to an offense requiring risk of injury as an element).

statistics to determine the inherent riskiness of an offense, as the Court did in *Chambers*, also exceeds the supposed scope of the categorical approach.³²² The studies set forth in *Sykes*—completed by the International Association of Chiefs of Police,³²³ the Department of Justice,³²⁴ and the U.S. Fire Administration³²⁵—provide compelling evidence of vehicle flight’s high risk level relative to burglary and arson.³²⁶ But because statistics are unconnected to a crime’s statutory elements, their use cannot be reconciled with faithful application of the categorical approach.³²⁷ Further, judicial use of statistical findings that have not been submitted to a jury or stipulated by the defendant in a plea raise constitutional concerns.³²⁸ Courts generally rely on legislation for such blanket factual determinations.³²⁹ Indeed, deference to legislative determination of what crimes present danger, either of physical injury or future criminal activity, lies at the heart of ACCA.³³⁰

C. *The Narrow Reading Explains Rogers’ Remand*

The Court’s remand in *Rogers v. United States*³³¹ is entirely congruent with the narrow reading of *Sykes* but inexplicable under the broad reading.

322. See *Chambers v. United States*, 555 U.S. 122, 133–34 (2009) (Alito, J., concurring) (“What is worse is that each new application of the residual clause seems to lead us further and further away from the statutory text. Today’s decision, for example, turns on little more than a statistical analysis of a research report prepared by the United States Sentencing Commission.”).

323. LUM & FACHNER, *supra* note 42, at 54 (showing 313 injuries to police or bystanders during 7737 vehicle flights).

324. CATALANO, *supra* note 226, at 1, 9–10 (showing injuries to a victim in 44.3% of the 266,160 burglaries where a household member was present, or 117,909 injuries, out of 3.7 million burglaries every year).

325. Relying on the sources cited *supra* note 225, Justice Kennedy found 1255 injuries resulted from an estimated 38,400 arsons in 2008. *Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2274–75 (2011).

326. See *Sykes*, 131 S. Ct. at 2280 (Thomas, J., concurring) (comparing statistics of injuries associated with arson, burglary, and vehicle flight).

327. See *Taylor v. United States*, 495 U.S. 575, 602 (1990) (restricting information a court may consider under the categorical approach); *supra* Part I.B.

328. See *supra* notes 138–139 and accompanying text.

329. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (noting that the legislature “is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions” (internal quotations omitted)).

330. See *supra* Part I.A.1 (arguing that ACCA rests on legislative determination that certain offenses are likely to identify career criminals).

331. __U.S.__, 131 S. Ct. 3018 (2011).

The remanded Sixth Circuit opinion³³² held that a Tennessee vehicle-flight offense described a crime of violence.³³³ Like the statute at issue in *Sykes*, the Tennessee statute described a spectrum of vehicle-flight offenses requiring various risk levels.³³⁴ Also as in *Sykes*, the Tennessee offense under consideration in *Rogers* did not itself explicitly require an element of risk.³³⁵ Unlike the statute in *Sykes*, however, Tennessee does not punish this lesser vehicle-flight offense equally as an aggravated offense that *does* require risk of injury to another as an element.³³⁶ This difference in allocating punishment is the only feature distinguishing the two states' vehicle-flight statutes. *Rogers*' offense thus lacks the statutory basis present in *Sykes* for determining that vehicle flight categorically poses sufficient risk of injury. Under the narrow reading of *Sykes* this Comment proposes, this statutory argument is the only basis for the outcome in *Sykes* that faithfully comports with the categorical approach.³³⁷ The lack of this statutory basis in *Rogers* explains the U.S. Supreme Court's decision to remand instead of denying certiorari and allowing the decision to stand.

The basis for that determination the Sixth Circuit actually does supply, though, is in perfect keeping with the "ordinary case" argument present in *Sykes*.³³⁸ Like the *Sykes* majority, the *Rogers* court reasons that "the decision to flee thus carries with it the requisite potential risk" because of the "marked likelihood of pursuit and confrontation" associated with vehicle flight.³³⁹ If such "ordinary case" reasoning provided a sufficient basis for the outcome in *Sykes*, then similar reasoning should also suffice in *Rogers*. A broad reading of *Sykes* that relies on an "ordinary case" approach provides no explanation for remanding *Rogers*.

332. *United States v. Rogers*, 594 F.3d 517 (6th Cir. 2010).

333. *Id.* at 520–21 (considering TENN. CODE ANN. § 39-16-603(b)(1) (1995)). As discussed, interpretations of the terms "crime of violence" and "violent felony" are fungible. *See supra* note 22.

334. *Compare* IND. CODE § 35-44-3-3 (1997), with TENN. CODE ANN. § 39-16-603.

335. Because the record was ambiguous, the *Rogers* court assumed the prior conviction had been for a less serious offense that did not require "a risk of death or injury to innocent bystanders or other third parties." *Rogers*, 594 F.3d at 521 (citing TENN. CODE ANN. § 39-16-603(b)(3)).

336. "[V]iolation of subsection (b) is a Class E felony unless the flight or attempt to elude creates a risk of death or injury to innocent bystanders or other third parties, in which case a violation of subsection (b) is a Class D felony." TENN. CODE ANN. § 39-16-603(b)(3).

337. *See supra* Part III.

338. *See Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2273–74 (2011).

339. *Rogers*, 594 F.3d at 521 (quoting *United States v. Harrimon*, 568 F.3d 531, 536 (5th Cir. 2009)).

In contrast, on the same day as *Rogers*, the U.S. Supreme Court denied certiorari in *United States v. Harris*³⁴⁰ and *United States v. Dismuke*,³⁴¹ two other cases involving categorical determinations of the risk posed by vehicle flight. *Harris* holds that a Florida offense requiring “[d]riv[ing] at high speed, or in any manner which demonstrates a wanton disregard for the safety of persons or property” is a crime of violence.³⁴² *Dismuke* holds that a Wisconsin offense requiring “interfere[ing] with or endanger[ing] the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians” is a violent felony.³⁴³ Both these state statutes contain some statutory requirement of risk, and the U.S. Supreme Court let stand categorical determinations that met the residual provision’s risk requirement.³⁴⁴ The Court only remanded *Rogers*, which lacked such a statutory hook.³⁴⁵

Interpreting *Sykes* to require that the determination of a vehicle-flight conviction’s risk level turns *solely* on statutory analysis of the state criminal law gives the best explanation for the remand in *Rogers*. This narrow reading also harmonizes *Sykes* with *Taylor*’s holding that the categorical approach be used in testing for ACCA predicates. Reading *Sykes* narrowly thus adheres to both the U.S. Supreme Court’s earliest and most recent ACCA precedent, and vindicates the fundamental concerns protected by *Taylor*’s categorical approach. For a vehicle-flight offense to qualify as a violent felony under ACCA’s residual provision, both the requirements of violent intent and risk level must be met by looking only to the statute describing the offense.

III. TAKING SYKES ON THE ROAD: HOW CIRCUIT COURT VEHICLE-FLIGHT DECISIONS FARE UNDER THE NARROW READING

Sykes effectively invalidates much of the reasoning behind prior lower court decisions concerning vehicle flight as an ACCA predicate. Though the U.S. Supreme Court did not purport to overrule *James*, *Begay*, or *Chambers*, the bases for those decisions did not control in *Sykes*³⁴⁶ or

340. 586 F.3d 1283 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 3018 (2011).

341. 593 F.3d 582 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 3018 (2011).

342. *Harris*, 586 F.3d at 1284 (emphasis added) (quoting FLA. STAT. § 316.1935(3)(a) (2004)).

343. *Dismuke*, 593 F.3d at 590 (emphasis added) (quoting WIS. STAT. § 346.04(3) (2000)).

344. *Harris v. United States*, __U.S.__, 131 S. Ct. 3018 (2011); *Dismuke v. United States*, __U.S.__, 131 S. Ct. 3018 (2011).

345. *Rogers v. United States*, __U.S.__, 131 S. Ct. 3018 (2011).

346. *See supra* Part II.B.2 (arguing that the “ordinary case” and statistical analysis approaches, respectively imported from *James* and *Chambers*, do not dispose of *Sykes*).

were significantly limited.³⁴⁷ Instead, only vehicle-flight offenses that require an element of risk or, as in *Sykes*, share equivalent punishment with another offense in the same statute that does feature that risk requirement, should be included as predicates under the residual provision. Justice Kagan sets the proper tone: “some vehicular flight offenses should count as violent felonies under ACCA,”³⁴⁸ she writes, “but a statute criminalizing *only* simple vehicular flight would not”³⁴⁹

The Fifth,³⁵⁰ Seventh,³⁵¹ Eighth,³⁵² Ninth,³⁵³ and Tenth Circuits³⁵⁴ have reexamined vehicle flight with the benefit of *Sykes*. While each determined that the vehicle-flight conviction at issue qualifies as a violent felony,³⁵⁵ their readings of *Sykes* differ. The Fifth and Tenth

347. *Sykes* narrows *Begay*'s “purposeful, violent, and aggressive conduct” test from many circuits' interpretations. See *Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2275–76 (2011) (clarifying that “purposeful, violent, and aggressive conduct” applies only to disqualify crimes of strict liability, negligence, or recklessness); *id.* at 2285 (Scalia, J., dissenting) (noting that all eleven circuits, as well as the Government brief in *Sykes*, had “overread” *Begay* in the same way the *Sykes* majority accuses *Sykes* of doing). But see *supra* notes 107–112 and accompanying text (noting the Seventh Circuit's interpretation of *Begay* essentially presaged the *Sykes* Court's narrowing of “purposeful, violent and aggressive”).

348. *Sykes*, 131 S. Ct. at 2289 (Kagan, J., dissenting).

349. *Id.* at 2290.

350. *United States v. Tubbs*, No. 10-51043, 2011 WL 5026393 (5th Cir. Oct. 21, 2011), *cert. denied*, No. 11-8298, 2012 WL 123815 (U.S. Feb. 21, 2012); *United States v. Garrison*, No. 11-10105, 2011 WL 3630116 (5th Cir. Aug. 16, 2011).

351. *United States v. Wilson*, No. 11-1147, 2011 WL 4381703 (7th Cir. Sept. 21, 2011); *United States v. Griffin*, 652 F.3d 793 (7th Cir. 2011); *United States v. Molinaro*, 428 F. App'x 649 (7th Cir. 2011), *cert. denied*, __U.S.__, 132 S. Ct. 1124 (2012).

352. *United States v. Lamar*, 419 F. App'x 704 (8th Cir. 2011), *cert. denied*, __U.S.__, 1323 S. Ct. 538.

353. *United States v. Peterson*, No. 07-30465, 2011 WL 5041673 (9th Cir. Oct. 24, 2011), *cert. denied*, No. 11-8464, 2012 WL 218134 (U.S. Feb. 21, 2012); *United States v. Snyder*, 643 F.3d 694 (9th Cir. 2011), *petition for cert. filed*, No. 11-8249 (U.S. Dec. 30, 2011).

354. *United States v. Stout*, 439 Fed. App'x 738, 748–50 (10th Cir. 2011), *cert. denied*, No. 11-8233, 2012 WL 113421 (U.S. Feb. 21, 2012); *United States v. Thomas*, 643 F.3d 802 (10th Cir. 2011).

355. *Peterson*, 2011 WL 5041673, at *1; *Tubbs*, 2011 WL 5026393, at *1; *Stout*, 439 Fed. App'x at 749–50; *Wilson*, 2011 WL 4381703, at *1; *Garrison*, 2011 WL 3630116, at *1; *Griffin*, 652 F.3d at 801–02; *Molinaro*, 428 F. App'x at 652; *Thomas*, 643 F.3d at 806; *Lamar*, 419 F. App'x at 705; *Snyder*, 643 F.3d at 700. Though *Peterson*, *Stout*, *Wilson*, *Griffin*, *Molinaro*, and *Thomas* each technically held that vehicle flight was a “crime of violence” under U.S.S.G. § 4B1.2(a) instead of a “violent felony” under ACCA, in each case the terms are equivalent. See *Peterson*, 2011 WL 5041673, at *1 (“[C]ases interpreting the term ‘violent felony’ are controlling as to whether a particular offense constitutes a ‘crime of violence’”); *Stout*, 439 Fed App'x at 749 (determining that holding from a case dealing with the definition of “crime of violence” controlled cases involving “violent felonies”); *Wilson*, 2011 WL 4381703, at *1 (“[W]e also have held that similar statutes in Indiana, Wisconsin, and Illinois define crimes of violence or violent felonies”);

Circuits read *Sykes* too broadly as standing for the proposition that *all* felony convictions for vehicle flight qualify as violent felonies.³⁵⁶ The Eighth and Ninth Circuits correctly consider only individual criminal statutes, but overlook which aspect of the Indiana statute at issue in *Sykes* produced the outcome in that case.³⁵⁷ Only the Seventh Circuit—*Sykes*' home—acknowledges the correct basis for the Supreme Court's decision.

A. *The Fifth and Tenth Circuits Misread Sykes as Holding That All Felony Vehicle-Flight Offenses Are Violent Felonies*

Two recent cases from the Fifth Circuit incorrectly read *Sykes* as sweeping every vehicle-flight felony offense into the residual provision. *United States v. Tubbs*³⁵⁸ and *United States v. Garrison*,³⁵⁹ two identically worded summary opinions, claim that *Sykes* validated the Fifth Circuit's earlier decision in *United States v. Harrimon*.³⁶⁰ Instead of validating *Harrimon*, *Sykes* in fact calls it into question.

Harrimon determined that vehicle flight as defined by Texas³⁶¹ amounted to a violent felony within the meaning of ACCA.³⁶² The court focused on whether the crime was "roughly similar" to the enumerated

Griffin, 652 F.3d at 802 ("[T]he definition of 'violent felony' under the ACCA is the same as the definition of 'crime of violence' in section 4B1.2 of the guidelines, and '[i]t would be inappropriate to treat identical texts differently just because of a different caption[]'" (quoting *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008))); *Molinero*, 428 F. App'x at 652 (characterizing *Sykes*' holding as "uph[olding] our conclusion that a conviction under a similar Indiana statute . . . is a crime of violence" (citation omitted)); *Thomas*, 643 F.3d at 805 ("Because of this commonality of language in the residual clauses of the ACCA and USSG § 4B1.2(a), we have consistently interpreted them identically."); *supra* note 22 and accompanying text (noting the interchangeability of jurisprudence interpreting the respective residual provisions).

356. See *Tubbs*, 2011 WL 5026393, at *1; (claiming *Sykes* affirmed decision in *United States v. Harrimon*, 568 F.3d 531 (5th Cir. 2009)); *Stout*, 2011 439 Fed. App'x at 749—50 (asserting that *Sykes* "categorically determined a defendant's intentional vehicular flight from an officer's command to stop is a 'violent felony' under the ACCA"); *Garrison*, 2011 WL 3630116, at *1 (decision worded identically to *Tubbs*).

357. See *Peterson*, 2011 WL 5041673, at *1 (asserting the Indiana statute considered in *Sykes* is functionally identical to an Oregon vehicle-flight statute with no comparable legislative indicia of risk); *Lamar*, 419 F. App'x at 705 (asserting *Sykes* required no proof of risk of injury).

358. No. 10-51043, 2011 WL 5026393 (5th Cir. Oct. 21, 2011), *cert denied*, No. 11-8298, 2012 WL 123815 (U.S. Feb. 21, 2012).

359. No. 11-10105, 2011 WL 3630116 (5th Cir. Aug. 16, 2011)

360. *Tubbs*, 2011 WL 5026393, at *1; *Garrison*, 2011 WL 3630116, at *1 (both citing *Harrimon*, 568 F.3d 531).

361. TEX. PENAL CODE ANN. § 38.04 (West 2011).

362. *Harrimon*, 568 F.3d at 537.

offenses in both kind and degree of risk posed.³⁶³ In determining whether the Texas vehicle-flight offense is similar to the enumerated offenses, the court asked whether vehicle flight is purposeful, violent, and aggressive, mirroring *Begay*'s violent intent requirement.³⁶⁴ The court determined "similar risk" by examining the risk of injury to another posed by the ordinary case of vehicle flight.³⁶⁵

The elements of Texas' vehicle-flight offense require knowingly and intentionally fleeing a police officer attempting a lawful arrest, and using a vehicle while in flight.³⁶⁶ As the Fifth Circuit explains, this offense involves the requisite violent intent because disregarding a lawful order "is a clear challenge to the officer's authority," and thus equivalent to aggression.³⁶⁷ The offense also poses the dangers caused by reckless driving and potential confrontation with police that typically attend vehicle flight.³⁶⁸ The same study cited by *Chambers* confirmed the danger inherent in an "ordinary" vehicle flight.³⁶⁹ The *Harrimon* court found this reasoning applicable to all vehicle-flight offenses.

Even passing over the Fifth Circuit's suspect basis for identifying violent intent,³⁷⁰ its bases for establishing risk are extra-statutory and thus inconsistent with the narrow reading of *Sykes*.³⁷¹ Rigorously applying the categorical approach as set out in *Taylor*, as this Comment proposes, does not permit a court to rest its determination of risk on hypothetical typical conduct or statistics.³⁷² The elements of Texas' vehicle-flight statute simply fail to evince any requirement of risk.³⁷³

363. *Id.* at 534.

364. *Id.*

365. *Id.* at 536–37.

366. *See Powell v. State*, 206 S.W.3d 142, 143 (Tex. Ct. App. 2006) (explaining elements of a violation of TEX. PENAL CODE ANN. § 38.04 (West 2003)).

367. *Harrimon*, 568 F.3d at 535.

368. *Id.*

369. *Id.* at 537.

370. *Begay* rejects the argument that purposeful conduct meets the residual provision's mens rea requirement without also being directed towards some violent end. *See Begay v. United States*, 553 U.S. 137, 145–46 (2008) (purposefully getting drunk did not satisfy intent requirement). And *Chambers* casts doubt on the assumption that merely disobeying law enforcement qualifies as aggression. *See Chambers v. United States*, 555 U.S. 122, 128–30 (2009) (noting that failure to report did not display purposeful, violent, and aggressive conduct, and was not a violent felony).

371. *See supra* Part II.B (arguing that the "ordinary case" and statistical-analysis approaches are inconsistent with the categorical approach).

372. *See Taylor v. United States*, 495 U.S. 575, 602 (1990) (requiring the court to "look only to the fact of conviction and the statutory definition of the prior offense").

373. *See Powell v. State*, 206 S.W.3d 142, 143 (Tex. Ct. App. 2006) (citing TEX. PENAL CODE ANN. § 38.04 (West 2003)) (providing elements of the crime).

There is no requirement of actual or potential risk, unless one assumes that such risk is inherent in the use of a vehicle. Further, Texas differentiates between simple and aggravated vehicle flight, and punishes the latter more severely.³⁷⁴ Because the Texas offense resembles the offense at issue in *Rogers*³⁷⁵ more than the offense upheld as a violent felony in *Sykes*,³⁷⁶ the decision in *Harrimon* should not stand.

The Tenth Circuit has also applied *Sykes* without due consideration of distinguishing statutory features. In *United States v. Stout*,³⁷⁷ the Tenth Circuit claimed that *Sykes* “categorically determined a defendant’s intentional vehicular flight from an officer’s command to stop is a ‘violent felony’ under the ACCA.”³⁷⁸ In *United States v. Thomas*,³⁷⁹ the court asserted that the statute at issue was “identical in all relevant respects”³⁸⁰ to the statute in *Sykes* without taking notice of Indiana’s penalty structure—the dispositive provision in *Sykes* because it gave a statutory mechanism for finding risk even though the offense did not require risk as an element.³⁸¹ However, unlike the vehicle-flight statutes the Fifth Circuit considered in *Harrimon*, *Tubbs*, and *Garrison*, the statutes the Tenth Circuit considered contain sufficient grounds to support *Thomas*’ and *Stout*’s respective results.

In *Thomas* and *Stout* the Tenth Circuit held that the offenses at issue qualify as crimes of violence,³⁸² the functional equivalent of a violent felony.³⁸³ *Thomas* concerned a vehicle-flight offense as defined by Kansas,³⁸⁴ and *Stout* involved an Oklahoma offense.³⁸⁵ The Oklahoma

374. Without aggravating factors, Texas treats vehicle flight as a state-jail felony punishable by up to two years’ imprisonment. TEX. PENAL CODE ANN. §§ 38.04(b)(1) (West 2011), 12.35(a) (West 1994). The aggravating factors of a previous vehicle-flight conviction or serious injury resulting from police attempts to apprehend the suspect transform the offense into a third-degree felony, punishable by up to ten years’ imprisonment. *Id.* §§ 38.04(b)(2), 12.34(a).

375. *United States v. Rogers*, 594 F.3d 517 (6th Cir. 2010) (considering TENN. CODE ANN. § 39-16-603(b)(3) (1995)), *vacated and remanded*, 131 S. Ct. 3018 (2011).

376. *Sykes v. United States*, __ U.S. __, 131 S. Ct. 2267 (2011) (considering IND. CODE § 35-44-3-3(b)(1)(A) (1998)).

377. 439 Fed. App’x 738, 748–50 (10th Cir. 2011), *cert. denied*, No. 11-8233, 2012 WL 113421 (U.S. Feb. 21, 2012).

378. *Id.* at 749–50.

379. 643 F.3d 802 (10th Cir. 2011).

380. *Id.* at 806.

381. *See supra* Part II.

382. *Stout*, 439 Fed. App’x at 750; *Thomas*, 643 F.3d at 806.

383. *Stout*, 439 Fed. App’x at 749; *Thomas*, 643 F.3d at 805; *see also supra* note 22 and accompanying text.

384. KAN. STAT. ANN. § 8-1568 (2009).

statute at issue in *Stout* requires willfully eluding police after being signaled to stop “in such manner as to endanger any other person.”³⁸⁶ The Kansas statute in *Thomas* differentiates vehicle flight from failure to stop based on the presence of certain aggravating factors—evading a roadblock or tire-puncture devices, engaging in reckless driving, causing vehicle accidents or property damage, multiple moving violations, or commission of a separate felony.³⁸⁷ Both Oklahoma and Kansas separately criminalize eluding *without* the additional element of endangerment or aggravating factors in the same statute but punish it less severely.³⁸⁸

Oklahoma’s statutory endangerment requirement categorically satisfies the residual provision’s risk level requirement, as does Kansas’ “reckless driving” aggravating factor. Kansas’ decision to equate reckless driving with the other aggravating factors for purposes of penalty enhancement is the functional equivalent of *Sykes*’ equal-punishment rationale.³⁸⁹ Less obviously risky aggravating factors such as roadblock-evasion “borrow” reckless driving’s risk level through implied legislative determination.³⁹⁰ The result in *Thomas*, which considered two convictions involving the aggravating factors of evading a tire-puncture device and separate felony commission,³⁹¹ can therefore be explained under the categorical approach. Nonetheless, the Tenth Circuit’s expansive reading of *Sykes*³⁹² does not ensure that the court’s future decisions will be consistent with U.S. Supreme Court precedent.

385. OKLA. STAT. tit. 21, § 540A(B) (2000).

386. *Id.*

387. KAN. STAT. ANN. § 8-1568(b). Kansas’ penalty structure partly resembles *Sykes*’ Indiana statute—three or more failures to stop receive equal punishment as aggravated vehicle flight. *Id.* § 8-1568(c)(3). Justice Kagan wrote that *Sykes* “decides *almost* no case other than this one,” *Sykes v. United States*, __U.S. __131 S. Ct. 2267, 2295 (2011) (Kagan, J., dissenting) (emphasis added), and a three-time Kansas failure-to-stop convict would justify her qualification.

388. The element of endangerment increases the maximum term of imprisonment from one year to five for an Oklahoma vehicle flight. OKLA. STAT. tit. 21, § 540A(B). Aggravating factors transform Kansas vehicle flight into a “level 9, person felony.” KAN. STAT. ANN. § 8-1568(c)(4).

389. *See Sykes*, 131 S. Ct. at 2276 (“[T]he similarity in punishment for these related, overlapping offenses suggests that subsection (b)(1)(A) is the rough equivalent of one type of subsection (b)(1)(B) violation” (internal quotation marks and alterations omitted)); *see also supra* text accompanying notes 325–33.

390. *Cf. Sykes*, 131 S. Ct. at 2276 (reasoning that the state legislature considered similarly punished vehicle-flight offenses similarly serious in risk).

391. *See United States v. Thomas*, 643 F.3d 802, 806 (10th Cir. 2011).

392. *See United States v. Stout*, 439 Fed. App’x 738, 748–50 (10th Cir. 2011), *cert. denied*, No. 11-8233, 2012 WL 113421 (U.S. Feb. 21, 2012).

B. *The Eighth and Ninth Circuits Consider Vehicle-Flight Offenses Individually but Overlook Sykes' Statutory Basis for Determining Risk*

The Eighth and Ninth Circuits read *Sykes* with more restraint than the Fifth and Eighth inasmuch as they only hold to be violent felonies offenses that they claim are equal to or greater than Indiana's vehicle-flight offense in terms of risk level.³⁹³ They nonetheless fail to recognize legislative determination of the offenses' risk level as *Sykes*' dispositive element.

In *United States v. Lamar*³⁹⁴ the Eighth Circuit held that a Missouri vehicle-flight offense qualifies as a violent felony.³⁹⁵ Because the offense requires "fleeing in such a manner that the person fleeing creates a substantial risk of serious physical injury or death to any person,"³⁹⁶ Missouri's statutory language suffices to show the requisite risk level. And because that flight must be purposeful as well as accomplished in a dangerous manner,³⁹⁷ the offense also involves sufficient intent to justify inclusion as a violent felony. But *Lamar* incorrectly reads *Sykes*' mens rea requirement, stating that "[i]n *Sykes*, the Court held that a driver of a vehicle who knowingly or intentionally flees from a law enforcement officer commits a violent felony even though in the statute at issue, as here, there was no mens rea requirement related to the risk of injury."³⁹⁸

The Eighth Circuit errs only slightly regarding intent. A violent felony within the residual provision requires more than reckless intent regarding the risk-causing behavior, which the "knowing" flight offense considered in *Sykes* evinced.³⁹⁹ The offense considered in *Lamar* also connects intent to the risk-causing conduct—the offense requires actual knowledge of fleeing to prevent an arrest.⁴⁰⁰ But while the residual

393. See *United States v. Lamar*, 419 F. App'x 704, 705 (8th Cir. 2011), *cert. denied*, __U.S.__, 1323 S. Ct. 538 ("[The offense in *Sykes*] did not require proof of a risk of injury unlike the Missouri law *Lamar* violated."); *United States v. Snyder*, 643 F.3d 694, 699 (9th Cir. 2011), *petition for cert. filed*, No. 11-8249 (Dec. 30, 2011). ("The statute at issue in *Sykes* is similar enough to the statute at issue here that the Supreme Court's *Sykes* ruling controls this case.")

394. 419 F. App'x 704 (8th Cir. 2011), *cert. denied*, __U.S.__, 1323 S. Ct. 538.

395. *Id.* at 705.

396. MO. REV. STAT. § 575.150(5) (2009).

397. *United States v. Hudson*, 577 F.3d 883, 886 (8th Cir. 2009) (holding after *Begay* and *Chambers* that "purposeful fleeing in a dangerous manner," as proscribed by the statute, is a crime of violence).

398. *Lamar*, 419 F. App'x at 705.

399. *Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2271 (2011) (quoting *Woodward v. State*, 770 N.E.2d 897, 901 (Ind. Ct. App. 2002)).

400. See MO. REV. STAT. § 575.150(1) (requiring violations be undertaken "knowing that a law

provision does not explicitly require specific intent as to risk,⁴⁰¹ *Begay* interprets the provision to require some connection between intent and risk.⁴⁰²

With regard to risk, the *Lamar* court observes that the statute in *Sykes* “did not require proof of a risk of injury.”⁴⁰³ The court’s reasoning does not, however, acknowledge the implied legislative determination of risk that overcame this lack in *Sykes*.⁴⁰⁴ The Eighth Circuit appears to read *Sykes* as holding that vehicle flight poses an inherent risk, without requiring risk as a specific element or some other legislative determination. By not requiring such a statutory basis, the Eighth Circuit departs from *Taylor*’s rigorous categorical approach.⁴⁰⁵ Though *Lamar* reaches a justifiable result because it considers a statute that does require the element of risk, the Eighth Circuit’s current reading of *Sykes* threatens to incorrectly sweep vehicle-flight offenses into the residual provision—for instance, the Minnesota vehicle-flight offense determined not to be a crime of violence in the 2009 case *United States v Tyler*.⁴⁰⁶

The Ninth Circuit likewise reads *Sykes* too broadly in *United States v. Snyder*,⁴⁰⁷ which holds that vehicle flight as prohibited by Oregon⁴⁰⁸ qualifies as a violent felony. The Ninth Circuit had concluded the offense was not a crime of violence in 2009 in *United States v. Peterson*.⁴⁰⁹ However, in October of 2011 the Ninth Circuit withdrew *Peterson*’s initial disposition and substituted an opinion concluding Oregon vehicle flight qualifies as a crime of violence under *Sykes* and

enforcement officer is making an arrest”); *Hudson*, 577 F.3d at 886 (noting offense requires “actual knowledge” of fleeing for the purpose of preventing an arrest).

401. See BLACK’S LAW DICTIONARY 882 (9th ed. 2009) (defining “general intent,” not requiring specific intent, as “[t]he intent to perform an act even though the actor does not desire the consequences that result”).

402. See *supra* note 114 and accompanying text.

403. *Lamar*, 419 F. App’x at 705.

404. See *supra* notes 238–242 and accompanying text; *supra* Part II.B.1.

405. See *supra* Part II.B (arguing that *Sykes* is only consistent with the categorical approach because of the statutory basis for determining that its offense presented a risk of injury).

406. 580 F.3d 722, 724, 726 (8th Cir. 2009). *Tyler* considered a statute which punishes anyone who “by means of a motor vehicle flees or attempts to flee a peace officer.” *Id.* (quoting MINN. STAT. § 609.487(3) (2011)).

407. 643 F.3d 694 (9th Cir. 2011), *petition for cert. filed*, No. 11-8249 (Dec. 30, 2011).

408. OR. REV. STAT. § 811.540(1) (1997).

409. No. 07–30465, 2009 WL 3437834 (9th Cir. Oct. 27, 2009), *withdrawn and replaced* by 2011 WL 5041673 (9th Cir. Oct. 24, 2011). The U.S. Supreme Court noted that the withdrawn opinion “stood at least in tension, if not in conflict,” with the Seventh Circuit’s reasoning. *Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2272 (2011).

Snyder.⁴¹⁰ *Peterson* (as amended) and *Snyder* both rely on the determination that “there is no material distinction between the Indiana and Oregon vehicle flight statutes.”⁴¹¹ Like the Eighth Circuit in *Lamar*, the Ninth Circuit passed over the statutory structure of *Sykes*’ state offense that supported a categorical determination of risk of injury.

Oregon’s vehicle-flight offense contains no element of risk: its elements are (1) a person operates a vehicle, and (2) an officer in uniform or driving a marked car signals the vehicle to stop, but (3) “[t]he person, while still in the vehicle, knowingly flees or attempts to elude a pursuing police officer.”⁴¹² The conduct encompassed by these elements “runs the gamut—from simple to aggravated vehicular flight, from the least violent to the most violent form of the activity.”⁴¹³ Nor does Oregon follow Indiana’s example and treat vehicle flight as a “crime[] of the same magnitude” of some other offense explicitly involving risk.⁴¹⁴ The statute recognizes flight by *foot* as a lesser offense,⁴¹⁵ but fails to peg vehicle flight’s risk level, through equal punishment or otherwise, to an offense with an explicit element of risk of injury.⁴¹⁶ Without a statutory basis for finding risk, *Snyder*’s holding that Oregon’s vehicle flight offense is a crime of violence is unsupported by the narrow reading of *Sykes*.

C. *The Seventh Circuit Recognizes Sykes’ Statutory Basis for Categorically Determining the Risk Posed by Vehicle Flight*

In three cases decided since *Sykes*—*United States v. Wilson*,⁴¹⁷ *United*

410. *United States v. Peterson*, No. 07–30465, 2011 WL 5041673 (9th Cir. Oct. 24, 2011), *cert. denied*, No. 11–8464, 2012 WL 218134 (U.S. Feb. 21, 2012).

411. *Id.* at *1; *see also Snyder*, 643 F.3d at 699.

412. OR. REV. STAT. § 811.540(1)(b)(A).

413. *See Sykes v. United States*, __U.S.__, 131 S. Ct. 2267, 2290–91 (2011) (Kagan, J., dissenting) (characterizing Indiana’s statute, and arguing that this feature was inconsistent with categorically deeming the offense a violent felony).

414. *Id.* at 2276 (majority opinion).

415. Flight by foot is a Class A misdemeanor, OR. REV. STAT. § 811.540(3)(b), and vehicle flight a Class C felony, *id.* at (3)(a).

416. Oregon’s code does elsewhere contain offenses which present a risk of injury, and which are punished as Class C felonies similar to vehicle flight. *E.g.*, OR. REV. STAT. § 811.705 (2001) (failure to remain at the scene of an accident); OR. REV. STAT. § 811.127 (2003) (organizing a speed-racing event). But because these offenses are defined in entirely separate statutes enacted in different years, they present a different situation than Indiana’s statute—which defined both “related, overlapping” (and equally punished) vehicle-flight offenses within the same statute. *Sykes*, 131 S. Ct. at 2276.

417. No. 11–1147, 2011 WL 4381703 (7th Cir. Sept. 21, 2011).

States v. Griffin,⁴¹⁸ and *United States v. Molinaro*⁴¹⁹—the Seventh Circuit reached a result consistent with the narrow reading of *Sykes*. *Griffin* goes one step further, explicitly acknowledging the statutory basis for this reading.⁴²⁰

Before being arrested and charged on “a number of drug- and gun-related crimes,”⁴²¹ Griffin had sustained a conviction for vehicle flight under the same Indiana statute as *Sykes*.⁴²² Because *Sykes* controlled, the Seventh Circuit’s holding that Griffin’s prior conviction qualified as a crime of violence is unquestionably correct. However, the Seventh Circuit did more than summarily dismiss the issue in the face of binding U.S. Supreme Court precedent: it analyzed *Sykes*’ discussion of the Indiana statute’s structure, which supported the proposition that under Indiana law “there is no need to independently prove that fleeing from an officer creates a substantial risk of bodily injury.”⁴²³ This argument, the court opined, left Griffin “without a leg to stand on.”⁴²⁴ As in *Sykes*, the Seventh Circuit discussed the statute’s penalty structure in response to an argument raised by the petitioner.⁴²⁵ *Griffin* provides no other basis for risk level. But because *Sykes* dealt with precisely the same statute, the *Griffin* court did not have to provide any discussion beyond pointing to the U.S. Supreme Court’s controlling decision. Its focus on this issue suggests that the Seventh Circuit identifies statutory language as the controlling feature of *Sykes*’ residual provision analysis.

Wilson and *Molinaro* do not contain the same level of analysis as *Griffin*, but reach results consistent with the narrow reading of *Sykes*. *Wilson* considered a vehicle-flight offense from Michigan,⁴²⁶ *Molinaro* considered a vehicle-flight offense from Wisconsin.⁴²⁷ Both cases hold the conviction a crime of violence, reaffirming pre-*Sykes* Sixth and

418. 652 F.3d 793 (7th Cir. 2011), *cert. denied*, __U.S.__, 132 S. Ct. 1124 (2012).

419. 428 F. App’x 649 (7th Cir. 2011), *cert. denied*, __U.S.__, 132 S. Ct. 1124 (2012).

420. Serendipity has it that the first circuit court opinion to grasp *Sykes* would be written by Circuit Judge Sykes. *See Griffin*, 652 F.3d at 795.

421. *Id.*

422. *Id.* at 801–02.

423. *Id.* at 802.

424. *Id.*

425. *See id.* (“The [*Sykes*] Court rejected as ‘unconvincing’ an argument identical to Griffin’s here . . .”).

426. *United States v. Wilson*, No. 11-1147, 2011 WL 4381703, at *1 (7th Cir. Sept. 21, 2011) (considering MICH. COMP. LAWS § 750.479a(1) (2002)).

427. *United States v. Molinaro*, 428 F. App’x 649, 651–52 (7th Cir. 2011) (considering WIS. STAT. § 346.04(3) (2000)), *cert. denied*, __U.S.__, 132 S. Ct. 1124 (2012).

Seventh Circuit precedent as undisturbed by the U.S. Supreme Court's decision.⁴²⁸

Wilson challenged the characterization of a prior vehicle-flight conviction as a crime of violence.⁴²⁹ Seventh Circuit precedent foreclosed Wilson's argument, but he sought to preserve the issue pending the U.S. Supreme Court's decision in *Sykes*.⁴³⁰ Because *Sykes* affirmed the Seventh Circuit's determination that vehicle-flight, "as defined by Indiana, is a violent felony," the *Wilson* court affirmed Wilson's sentence with little discussion.⁴³¹

The narrow reading of *Sykes* supports *Wilson*'s outcome. The Michigan statute at issue prohibits a spectrum of conduct: at its base, vehicle flight requires willfully failing to heed a police signal to stop, and instead "increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude."⁴³² Without other elements, the offense is "fourth-degree fleeing and eluding," punishable by up to two years.⁴³³ Aggravating factors—either causing a collision, or fleeing through a thirty-five miles-per-hour zone—increase the offense to the third-degree, which carries a maximum punishment of five years' incarceration.⁴³⁴ Because Wilson sustained a conviction for third-degree flight, the statute's elements of "willfulness" and aggravating factors categorically meet the residual provision's requirements of risk level and intent.⁴³⁵

Molinaro also summarily rejected a challenge brought during *Sykes*' pendency.⁴³⁶ The Seventh Circuit had previously held that the vehicle-

428. The Seventh Circuit held the Wisconsin law a crime of violence in *United States v. Dismuke*, 593 F.3d 582, 596 (7th Cir. 2010). It held the Michigan law both a crime of violence, *United States v. Martin*, 378 F.3d 578, 582–83 (6th Cir. 2004), and a violent felony, *United States v. LaCasse*, 567 F.3d 763, 764 (6th Cir. 2009).

429. *Wilson*, 2011 WL 4381703, at *1.

430. *Id.*

431. *Id.*

432. MICH. COMP. LAWS § 750.479a(1) (2002).

433. *Id.* § 750.479a(2).

434. *Id.* § 750.479a(3).

435. If Michigan had made fleeing through a thirty-five miles per hour zone the only aggravating factor (or at least the riskiest), this may arguably have failed to categorically establish risk level. However, setting it out as an aggravating factor equal to causing a collision presents the same implication of legislative determination of risk underlying *Sykes*. *Cf. supra* notes 290–295 and accompanying text (explaining legislative determination of equivalent risk implicit in ascribing the same penalty to different offense).

436. *See United States v. Molinaro*, 428 F. App'x 649, 652 (7th Cir. 2011), *cert. denied*, ___U.S. ___, 132 S. Ct. 1124 (2012). After noting that *Sykes* affirmed the Seventh Circuit's decision regarding Indiana's similar statute, the court passed over *Molinaro*'s argument without further

flight offense that Molinaro had been convicted of was a crime of violence.⁴³⁷ *Sykes* gave the Seventh Circuit no reason to reconsider its position, and it affirmed Molinaro's sentence with little discussion of the issue.⁴³⁸

The Wisconsin statute at issue in *Molinaro* nonetheless contains grounds for determining that the offense presents sufficient risk to qualify under the residual provision. It requires "willful or wanton disregard" for a police signal to stop, combined with endangering the police, traffic, or pedestrians, or increasing speed and extinguishing lights.⁴³⁹ The offense sits atop three other less severe offenses prohibiting disobeying police orders.⁴⁴⁰ The requirements of willfulness and endangerment provide statutory bases both for the intent and risk of injury necessary to qualify under the residual provision.⁴⁴¹

So far, only the Seventh Circuit has followed the narrow reading of *Sykes* by interpreting vehicle-flight offenses as spelled out in *Taylor*—looking only to the statutory definition.⁴⁴²

CONCLUSION

The U.S. Supreme Court adopted the categorical approach the very first time it was called on to determine whether an offense would trigger ACCA's sentencing provisions. In more than twenty years, the Court has never professed to stray from this approach: an offense's elements and statutory definition should be the only dispositive factors in deciding whether to count it as an ACCA predicate under the residual provision. If in practice the Court displayed less than complete fidelity to the categorical approach in cases involving ACCA's residual provision, the reasons which prompted the Court to adopt it in the first place have not lessened in force. In particular, fairness and constitutional concerns—that a defendant be able to contest factors underlying a sentence and demand they be proved in court—are implicated when a sentencing court resorts to an "ordinary case" approach or statistics, neither of

discussion. *Id.*

437. *Id.* Molinaro argued that the prior case had been wrongly decided. *United States v. Dismuke* was in the group the U.S. Supreme Court denied certiorari to along with *Rogers*. See *supra* notes 340–345 and accompanying text.

438. See *Molinaro*, 428 F. App'x at 651–52.

439. WIS. STAT. § 346.04(3) (2011).

440. *Id.* §§ 346.04(1), (2), (2t).

441. See *supra* Part I.A.2.

442. See *Taylor v. United States*, 495 U.S. 575, 602 (1989).

which may have been argued or briefed by the parties. In determining that vehicle flight presented a sufficient risk of physical injury to another to qualify as an ACCA predicate under the residual provision, the *Sykes* Court made only one argument based entirely on the Indiana statute defining that offense: that Indiana's determination to punish two flight offenses equally implied a legislative determination that both presented equal risk. Because only this basis for the *Sykes* opinion comports fully with the U.S. Supreme Court's own precedent, the district and circuit courts should read *Sykes* as a narrow decision regarding a particular statute, rather than a broad declaration that vehicle flight counts as an ACCA predicate no matter how a state defines it. Circuit court decisions since *Sykes*, however, indicate that most courts are reading *Sykes* broadly rather than narrowly. As illustrated by the case of Marcus Sykes, who saw his sentence increased *fifteen-fold* by his prior vehicle-flight conviction, ACCA levies too harsh a penalty to be applied with anything less than the caution demanded by the categorical approach.