Driving Dangerously: Vehicle Flight and the Armed Career Criminal Act after *Sykes v. United States*

Isham M. Reavis

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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, 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.  

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(c)(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

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

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

In the wake of Sykes v. United States, 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) whether reaffirming their pre-Sykes interpretations, 22

13. Id. § 924(e)(2)(B).
15. Id. at 9.
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).
21. 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) (“The term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year . . . that . . . (i) 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).
considering statutes for the first time,\textsuperscript{24} or reversing course on vehicle-flight laws previously held \textit{not} to qualify as violent felonies.\textsuperscript{25} The lower courts’ across-the-board response reflects Justice Kennedy’s broad declaration in \textit{Sykes} that “[f]elony vehicle flight is a violent felony for purposes of ACCA.”\textsuperscript{26} However, the U.S. Supreme Court’s prior guidance for interpreting ACCA, a summary opinion following on \textit{Sykes’} heels, and parts of the \textit{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{30} But because states define their respective vehicle-flight

\textsuperscript{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).

\textsuperscript{25} United States v. Snyder, 643 F.3d 694, 698–700 (9th Cir. 2011), \textit{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), \textit{withdrawn and replaced by} 2011 WL 5041673 (9th Cir. Oct. 24, 2011)).

\textsuperscript{26} \textit{Sykes}, 131 S. Ct. at 2277.

\textsuperscript{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).

\textsuperscript{28} See \textit{id. at} 602 (describing the categorical approach).

\textsuperscript{29} See \textit{id. at} 599 (“If the state statute is narrower than the generic view, \textit{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.”).

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.\(^ {38}\)


\(^{32}\) United States v. Rogers, 594 F.3d 517 (6th Cir. 2010), rev’d, 131 S. Ct. 3018.

\(^{33}\) See supra note 22.


\(^{35}\) See infra Part I.D.

\(^{36}\) Sykes, 131 S. Ct. at 2295 (Kagan, J., dissenting).


\(^{38}\) 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).” In 2009, convictions involving violence or drugs produced thirty-five percent of federal felony sentences. 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, Sykes’ holding may trigger Career Offender sentencing provisions in similar cases involving prior vehicle-flight convictions.

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 risks—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, 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).
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 crime—it aims to “bring the Federal Government into the fight against street crime” by punishing these recidivist criminals. “In order to determine which offenders fall into this category, the Act looks to past crimes.” The trouble in interpreting ACCA arises from deciding which past crimes count towards identifying a career criminal. This Comment deals with the category of predicates falling into the residual provision of ACCA, 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. 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


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.


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.”).


should consider in testing for those substantive qualities. 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.” The U.S. Supreme Court has interpreted the residual provision as containing offenses similar to the four preceding enumerated offenses. But because these enumerated offenses have little in common with each other, 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. 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.” 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(c)(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(c)(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.\textsuperscript{58} ACCA started as the Career Criminal Life Sentence Act of 1981, a “pure three-strikes recidivist statute”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{62} When the bill was reintroduced during Congress’s next session,\textsuperscript{63} debate centered on these federalism concerns.\textsuperscript{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.\textsuperscript{65} Federal officials also objected to a contemplated provision allowing state district attorneys to veto federal prosecution under the bill.\textsuperscript{66}

The Subcommittee addressed these concerns by adopting the Hughes


\textsuperscript{59} Holman, supra note 22, at 229 n.108.

\textsuperscript{60} Id.

\textsuperscript{61} Id.

\textsuperscript{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.”).


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

\textsuperscript{65} H. R. REP. NO. 98-1073, at 4.

\textsuperscript{66} Id.
Amendment, which kept little of the proposed statute in place but the fifteen-year mandatory minimum sentence. The Hughes Amendment proposed avoiding the issue of federalism by having ACCA directly apply only to an existing federal crime—illegal firearm possession. Hughes relegated burglary and robbery, previously ACCA’s stars, to the role of predicate crimes. The Subcommittee’s discussion of the Hughes Amendment treated firearm possession mainly as a hook for federal jurisdiction. Even though this amendment radically restructured the legislation, it preserved what appears to be ACCA’s core feature: connecting career criminals with long sentences. Congress passed the amended bill as the Armed Career Criminal Act of 1984.

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; the 1984 Act used them as predicate offenses. In its current form ACCA no longer enumerates robbery. ACCA primarily reflected congressional concern with the small fraction of criminals thought to be the engine behind most of the violent crime in America—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.

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”).
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.
73. H.R. 6386, 97th Cong. (1982).
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. ACCA drafters settled on targeting robbers and burglars as reasonable proxies for career criminals. Throughout these amendments, ACCA’s focus remained “incarcerating unrehabilitative repeat violent felons for lengthy periods.”

Congress added the residual provision to ACCA with the Career Criminal Amendment Act of 1986 (1986 Amendment). Provoked by worries that ACCA’s predicates were too narrow, the 1986 Amendment expanded the predicate offenses from robbery or burglary to “a violent felony or a serious drug offense, or both”—essentially ACCA’s current form. 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. Robbery, burglary, or any other specific crime served as markers to identify these “hardened criminals.”

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.").
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).
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.”).
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.”\(^8^8\) The Court identified the risk requirement first, and has resolved most of its residual-provision cases on that basis.\(^8^9\)

The risk requirement arises from the interaction of ACCA’s residual provision and the enumerated offenses.\(^9^0\) 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.\(^9^1\) The question of exactly how to make this comparison has proved problematic, because the enumerated offenses collectively make a poor yardstick for measuring risk.\(^9^2\) The Court has variously tried or suggested comparing an offense to its closest analogue among the enumerated examples,\(^9^3\) comparing the offense to the least risky enumerated offense,\(^9^4\) or a more free-form comparison asking only for “roughly similar” risk\(^9^5\) or commonality with only one or two of the enumerated offenses.\(^9^6\)

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

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\(^8^9\) 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 . . . .”).

\(^9^0\) 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))).

\(^9^1\) 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”).

\(^9^2\) 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”).

\(^9^3\) See James, 550 U.S. at 203.

\(^9^4\) 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).

\(^9^5\) 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).

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, Remediying 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,\textsuperscript{108} causing a fire with the purpose of destroying a building,\textsuperscript{109} or purposefully obtaining another’s property by threat of force.\textsuperscript{110} Explosives use also implicated intent—“the word ‘use’ . . . most naturally suggests a higher degree of intent than negligent or merely accidental conduct.”\textsuperscript{111} In \textit{Sykes} the U.S. Supreme Court essentially endorsed this approach.\textsuperscript{112} The requirement thus excludes crimes of mere negligence, recklessness, or strict liability.\textsuperscript{113} Further, any knowing or purposeful intent must be specific to the risk-posing conduct.\textsuperscript{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.\textsuperscript{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. \textit{Taylor v. United States}\textsuperscript{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

\begin{itemize}
  \item “aggressive” satisfied by conduct only presenting the possibility of violence); Holman, \textit{supra} note 22, at 257 (noting that \textit{Dismuke} reduced the test to one of purposefulness).
  \item \textit{id.} (citing \textit{MODEL PENAL CODE} § 220.1(1) (1985)) (emphasis added).
  \item \textit{id.} (citing \textit{MODEL PENAL CODE} § 223.4 (1985)) (emphasis added).
  \item \textit{id.} (quoting \textit{Leocal v. Ashcroft}, 543 U.S. 1, 9 (2004)).
  \item See \textit{Sykes v. United States}, \textit{\_\_\_\_\_\_\_, U.S.} 131 S. Ct. 2267, 2276 (“\textit{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.”). \textit{But see Begay}, 553 U.S. at 152 (Scalia, J., concurring) (noting that explosives use includes crimes of negligence and recklessness) (citing \textit{MODEL PENAL CODE} § 220.2(2)); Holman, \textit{supra} note 22, at 258–61 (arguing \textit{Begay} should exclude only strict liability crimes).
  \item See \textit{Sykes}, 131 S. Ct. at 2275–76; \textit{id.} at 2285 (Scalia, J., dissenting) (characterizing the majority’s narrowing of \textit{Begay} as “the ‘purposeful’ test”).
  \item See \textit{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).
  \item See \textit{Sykes}, 131 S. Ct. at 2275 (noting that risk level decided every U.S. Supreme Court residual-provision case except \textit{Begay}, in which mens rea proved dispositive).
  \item 495 U.S. 575 (1989).
\end{itemize}
“burglary” for ACCA purposes, instead of determining the scope of the federal statute by reference to state statutes or common law. As the Court observed, relying on state statutory or common-law definitions would produce inconsistent punishment for the same conduct undertaken in different places. 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.” Because ACCA failed to supply its own burglary definition, 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.” 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. The generic burglary statute would thus be used to take the measure of Taylor’s conviction, rather than his offense conduct.

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. The categorical approach generally limits the trial court to looking at the existence of a conviction and the elements of its crime. These elements largely spring from the statute defining the crime, but may also include additional court-imposed requirements for conviction. 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


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.
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States 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. The categorical approach has applied to the entirety of ACCA ever since.

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. As discussed above, burglary for ACCA purposes requires illegal entry into a building. 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. 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. Beyond facts actually required to support the conviction, how the defendant allegedly perpetrated the crime remains irrelevant under the modified categorical approach. 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.

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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 Aguilá-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 conviction unquestionably failed to satisfy the elements of the generic offense.152 The Court’s opinion turned on whether attempted burglary presented a sufficient risk of injury.153 Consistent with Taylor, the Court applied the categorical approach.154

The Court first held that the residual provision included attempt crimes.155 According to the majority, narrowly reading the residual provision to exclude attempt crimes would be inconsistent with its broad catch-all function.156 Moreover, the specific enumerated offense of explosives use included inchoate crimes—“[a]n unsuccessful attempt to

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

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.

Justice Samuel Alito, writing for the majority, answered in the affirmative by comparing attempted burglary to its closest analog among the enumerated offenses—burglary. Though attempted burglary does not require successful entry into a building, an element of the enumerated offense, both present the same “possibility of a face-to-face confrontation between the burglar and a third party.” And because the residual provision requires only potential risk of injury, it might include attempted burglary even if in some cases the crime could be committed without actual risk. 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.” He reasoned that the “ordinary case” of attempted burglary involves an interrupted burglary, which presents the possibility of a violent conflict. 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.
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. Thus, attempted burglary “by its nature” presents the requisite risk to qualify as a predicate offense under the residual provision.

Justice Alito’s majority opinion drew a trenchant dissent from Justice Antonin Scalia, joined by Justices John Paul Stevens and Ruth Bader Ginsburg. Justice Scalia argued for comparing a crime to the least risky of the enumerated offenses instead of its closest enumerated cousin. 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. 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. 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.

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

In Begay, 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). New Mexico made DUI a felony after three previous DUI convictions, and Larry Begay had collected a dozen before police arrested him for threatening his aunt and sister with a rifle. 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.”).
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 DUls subjected him to federal prosecution as a felon in possession of a firearm. Did the DUls also suffice to trigger ACCA’s sentence enhancements?

The Court passed quickly over the risk-level question crucial to James. 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. 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. 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. 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.” Risk level notwithstanding, this difference set DUI outside the residual provision.

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 . . . .” The U.S. Supreme Court had previously held that DUls need neither be purposeful nor deliberate—they more closely resembled strict-liability offenses.

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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.
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 institution\(^ {193}\) 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 others\(^ {196}\)—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

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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.
193. 720 ILL. COMP. STAT. 5/31-6(a) (West Supp. 2008).
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.
199. *Id.* at 128–29.
200. *Id.* at 128 (internal quotation marks omitted).
201. *Id.* at 128–29.
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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 demonstrated 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.


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

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, possessed a curious structure that *Sykes* argued evinced a lack of categorical risk. 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.” Subsection (b) classified

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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).


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

228. *Id.*

229. *Id.*


these offenses for punishment purposes as either Class A misdemeanors or Class D, C, or B felonies. 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”, or (2) committing the subsection (a) offense of fledg[ing] an officer using a vehicle. 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.

Justice Elena Kagan, joined by Justice Ginsburg in dissent, characterized these two forms of the offense respectively as aggravated and simple vehicle flight.

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. In response, Justice Kennedy pointed out that Indiana punished both equally. 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.” By punishing the two subsections equally, the statute made simple vehicle flight the “rough equivalent” of aggravated vehicle flight—the latter described in language nearly mirroring the residual provision itself.

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. 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.
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.
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." Consistent with its holding in *United States v. Young*, 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.” Because fleeing “nearly always pose[s] a substantial danger to . . . pursuing officers,” 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, and employed a rationale echoed in *Sykes*—that officer pursuit typically accompanying vehicle flight “nearly always” places others in danger.

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*[.].” 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. If so, *Sykes* has little to say about vehicle-flight convictions from other states without a similar statutory feature. On the other hand,

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)).
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.*
as in *James* and *Chambers*, the risk level determination may have rested respectively on an ordinary case\textsuperscript{261} or statistical inquiry.\textsuperscript{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,\textsuperscript{263} and the circuit courts seem poised to adopt it.\textsuperscript{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.\textsuperscript{265} Thus, the tests *Sykes* borrows from these cases also stray outside the categorical approach’s permitted boundaries.\textsuperscript{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*.\textsuperscript{267} This narrow reading also explains—as the broad reading cannot—the summary remand of *Rogers*.\textsuperscript{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.

\textsuperscript{261} See supra Part I.C.1.
\textsuperscript{262} See supra Part I.C.3.
\textsuperscript{263} See, e.g., *Sykes*, 131 S. Ct. at 2274 (“Risk of violence is inherent to vehicle flight.”).
\textsuperscript{264} See supra notes 22–26 and accompanying text; infra Part III.
\textsuperscript{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).
\textsuperscript{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.”).
\textsuperscript{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).
Supreme Court in a difficult position. After adopting the categorical approach in *Taylor* for sound reasons of congressional intent, practicality, and basic fairness, 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. 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.” 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.” Neither statute addresses the degree of risk posed by the prohibited action. *James* held that attempted burglary posed a serious risk and *Chambers* held that failure to report did not, but the elements of the crimes—all the Court should have looked to under the categorical approach—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.

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

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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”).
272. 720 ILL. COMP. STAT. 5/31-6(a) (West Supp. 2008).
276. See supra notes 73–87 and accompanying text.
277. See *Chambers*, 555 U.S. at 128.
279. See supra Part I.C.2.
aggressive” inquiry, focuses on whether the crime was “characteristic of the armed career criminal.” This criterion is consistent with congressional intent, but lacks apparent textual basis.

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. 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.

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, it cites National Highway Safety Administration statistics in support of this assertion. Though common sense supports this conclusion, statistics are not among the sources Taylor permits a court to consult.

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

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

1. 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. 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. 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.” Because this language closely tracks the residual provision’s “serious potential risk of physical injury to another” language, 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. 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. 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.”

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.
294. Sykes, 131 S. Ct. at 2276; see also id. at 2282 (Thomas, J., concurring).
295. Id. at 2276.
requirement articulated in *Begay* and clarified in *Sykes* because the statute criminalizes only knowing and intentional conduct. 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.” Her approach would qualify as ACCA predicates only those offenses that expressly require a serious risk of injury and violent intent. 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,” and devotes her entire dissent to the issue. Counting heads, eight Justices thus considered statutory structure at least relevant to the determination, and two—Justices Kagan and Ginsburg—considered it dispositive. 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.

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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.


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. 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. 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. 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. 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. As such, the attempted burglar runs no risk of potentially dangerous confrontation with the building’s occupants. 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. 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. There is no way of determining whether Justice

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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).
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. 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. The ordinary case approach thus conflicts with the categorical approach that applies to ACCA.

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, Justice Kennedy opined that vehicle flight poses a risk of injury from possible confrontation between the criminal and the pursuing police. 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. The offense at issue in Sykes fails to include an explicit element of risk-causing behavior by the suspect or the police. 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. Only the statute’s punishment structure allowed the Court to escape this inference.

Though less subjective than the “ordinary case” inquiry, reliance on
statistics to determine the inherent riskiness of an offense, as the Court did in Chambers, also exceeds the supposed scope of the categorical approach. 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 States331 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).


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).

The remanded Sixth Circuit opinion held that a Tennessee vehicle-flight offense described a crime of violence. Like the statute at issue in Sykes, the Tennessee statute described a spectrum of vehicle-flight offenses requiring various risk levels. Also as in Sykes, the Tennessee offense under consideration in Rogers did not itself explicitly require an element of risk. 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. 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. 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. 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. 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.
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.
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 and United States v. Dismuke, 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. 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. 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. The Court only remanded Rogers, which lacked such a statutory hook.

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 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)).
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. 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,” she writes, “but a statute criminalizing only simple vehicular flight would not . . . .”

The Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have reexamined vehicle flight with the benefit of *Sykes*. While each determined that the vehicle-flight conviction at issue qualifies as a violent felony, 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”).


349. *Id.* at 2290.


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. 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. 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* and *United States v. Garrison*, two identically worded summary opinions, claim that *Sykes* validated the Fifth Circuit’s earlier decision in *United States v. Harrimon*. Instead of validating *Harrimon*, *Sykes* in fact calls it into question. *Harrimon* determined that vehicle flight as defined by Texas amounted to a violent felony within the meaning of ACCA. The court focused on whether the crime was “roughly similar” to the enumerated

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*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))); *Molinaro*, 428 F. App’x at 652 (characterizing *Sykes*’ holding as “upholding” 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).


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


362. *Harrimon*, 568 F.3d at 537.
offenses in both kind and degree of risk posed.\textsuperscript{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 \textit{Begay}'s violent intent requirement.\textsuperscript{364} The court determined “similar risk” by examining the risk of injury to another posed by the ordinary case of vehicle flight.\textsuperscript{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.\textsuperscript{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.\textsuperscript{367} The offense also poses the dangers caused by reckless driving and potential confrontation with police that typically attend vehicle flight.\textsuperscript{368} The same study cited by \textit{Chambers} confirmed the danger inherent in an “ordinary” vehicle flight.\textsuperscript{369} The \textit{Harrimon} court found this reasoning applicable to all vehicle-flight offenses.

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

\begin{itemize}
\item \textsuperscript{363} \textit{Id.} at 534.
\item \textsuperscript{364} \textit{Id.}
\item \textsuperscript{365} \textit{Id.} at 536–37.
\item \textsuperscript{366} \textit{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)).
\item \textsuperscript{367} \textit{Harrimon}, 568 F.3d at 535.
\item \textsuperscript{368} \textit{Id.}
\item \textsuperscript{369} \textit{Id.} at 537.
\item \textsuperscript{370} \textit{Begay} rejects the argument that purposeful conduct meets the residual provision’s mens rea requirement without also being directed towards some violent end. \textit{See} Begay v. United States, 553 U.S. 137, 145–46 (2008) (purposefully getting drunk did not satisfy intent requirement). And \textit{Chambers} casts doubt on the assumption that merely disobeying law enforcement qualifies as aggression. \textit{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).
\item \textsuperscript{371} \textit{See supra} Part II.B (arguing that the “ordinary case” and statistical-analysis approaches are inconsistent with the categorical approach).
\item \textsuperscript{372} \textit{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”).
\item \textsuperscript{373} \textit{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).
\end{itemize}
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. Because the Texas offense resembles the offense at issue in Rogers more than the offense upheld as a violent felony in Sykes, 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, 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.” In United States v. Thomas, the court asserted that the statute at issue was “identical in all relevant respects” 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. 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, the functional equivalent of a violent felony. Thomas concerned a vehicle-flight offense as defined by Kansas, and Stout involved an Oklahoma offense. 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).


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.

statute at issue in Stout requires willfully eluding police after being signaled to stop “in such manner as to endanger any other person.”

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. 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.

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. Less obviously risky aggravating factors such as roadblock-evasion “borrow” reckless driving’s risk level through implied legislative determination. The result in Thomas, which considered two convictions involving the aggravating factors of evading a tire-puncture device and separate felony commission, can therefore be explained under the categorical approach. Nonetheless, the Tenth Circuit’s expansive reading of Sykes 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).
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. They nonetheless fail to recognize legislative determination of the offenses’ risk level as Sykes’ dispositive element.

In United States v. Lamar, the Eighth Circuit held that a Missouri vehicle-flight offense qualifies as a violent felony. 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,” 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, 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.”

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. The offense considered in Lamar also connects intent to the risk-causing conduct—the offense requires actual knowledge of fleeing to prevent an arrest. But while the residual
provision does not explicitly require specific intent as to risk.\textsuperscript{401} Begay
interprets the provision to require some connection between intent and
risk.\textsuperscript{402}

With regard to risk, the Lamar court observes that the statute in Sykes
“did not require proof of a risk of injury.”\textsuperscript{403} The court’s reasoning does
not, however, acknowledge the implied legislative determination of risk
that overcame this lack in Sykes.\textsuperscript{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.\textsuperscript{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.\textsuperscript{406}

The Ninth Circuit likewise reads Sykes too broadly in United States v.
Snyder,\textsuperscript{407} which holds that vehicle flight as prohibited by Oregon\textsuperscript{408}
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.\textsuperscript{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

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\textsuperscript{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”).

\textsuperscript{402} See supra note 114 and accompanying text.

\textsuperscript{403} Lamar, 419 F. App’x at 705.

\textsuperscript{404} See supra notes 238–242 and accompanying text; supra Part II.B.1.

\textsuperscript{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).

\textsuperscript{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)).

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

\textsuperscript{408} OR. REV. STAT. § 811.540(1) (1997).

\textsuperscript{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
Snyder.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{414} The statute recognizes flight by foot as a lesser offense,\textsuperscript{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.\textsuperscript{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,\textsuperscript{417} United


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

\textsuperscript{412} OR. REV. STAT. § 811.540(1)(b)(A).

\textsuperscript{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).

\textsuperscript{414} Id. at 2276 (majority opinion).

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{417} No. 11-1147, 2011 WL 4381703 (7th Cir. Sept. 21, 2011).
States v. Griffin,\textsuperscript{418} and United States v. Molinaro\textsuperscript{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.\textsuperscript{420}

Before being arrested and charged on “a number of drug- and gun-related crimes,”\textsuperscript{421} Griffin had sustained a conviction for vehicle flight under the same Indiana statute as Sykes.\textsuperscript{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.”\textsuperscript{423} This argument, the court opined, left Griffin “without a leg to stand on.”\textsuperscript{424} As in Sykes, the Seventh Circuit discussed the statute’s penalty structure in response to an argument raised by the petitioner.\textsuperscript{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;\textsuperscript{426} Molinaro considered a vehicle-flight offense from Wisconsin.\textsuperscript{427} Both cases hold the conviction a crime of violence, reaffirming pre-Sykes Sixth and

\textsuperscript{418} 652 F.3d 793 (7th Cir. 2011), cert. denied, \textenquote{\_\_U.S.\_\_}, 132 S. Ct. 1124 (2012).
\textsuperscript{419} 428 F. App’x 649 (7th Cir. 2011), cert. denied, \textenquote{\_\_U.S.\_\_}, 132 S. Ct. 1124 (2012).
\textsuperscript{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.
\textsuperscript{421} Id.
\textsuperscript{422} Id. at 801–02.
\textsuperscript{423} Id. at 802.
\textsuperscript{424} Id.
\textsuperscript{425} See id. (“The [Sykes] Court rejected as ‘unconvincing’ an argument identical to Griffin’s here . . . .”).
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-
flight offense that Molinaro had been convicted of was a crime of
violence. Sykes gave the Seventh Circuit no reason to reconsider its
position, and it affirmed Molinaro’s sentence with little discussion of the
issue.

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. The offense sits atop three other less severe offenses
prohibiting disobeying police orders. The requirements of willfulness
and endangerment provide statutory bases both for the intent and risk of
injury necessary to qualify under the residual provision.

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.

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.


440. Id. §§ 346.04(1), (2), (2t).

441. See supra Part I.A.2.

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.