No. _____

In The
Supreme Court of the United States

MICHAEL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is stalking a violent felony under the Armed Career Criminal Act's residual clause?

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Trial & Direct Appeal Court

United States of America v. Michael Johnson, No. 3:10-cr-00145-1 (District Court for the Middle District of Tennessee at Nashville, 2010)

United States of America v. Michael Johnson, 707 F.3d 655 (6th Cir. 2013) (no petition for rehearing filed)

BASIS OF JURISDICTION

On February 20, 2013, the United States Court of Appeals for the Sixth Circuit handed down its ruling in this matter. No rehearing was requested and this Writ is filed within the ninety-day limit to seek review.

Jurisdiction is conferred on this Court via the United States Constitution, Article III, Section 2, as this appeal deals solely with United States federal criminal law issues. *See also Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816); Section 25 of the Judiciary Act of 1789, and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN CASE

18 U.S.C. § 924(e) (Armed Career Criminal Act)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

(A) the term "serious drug offense" means –

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of

imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Kentucky Revised Statutes § 508.140

(1) A person is guilty of stalking in the first degree,

(a) When he intentionally:

1. Stalks another person; and

2. Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:

a. Sexual contact as defined in KRS 510.010;

b. Serious physical injury; or

c. Death; and

(b) 1. A protective order has been issued by the court to protect the same victim or victims and the defendant has been served with the summons or order or has been given actual notice; or

2. A criminal complaint is currently pending with a court, law enforcement agency, or prosecutor by the same victim or victims and the defendant has been served with a summons or warrant or has been given actual notice; or

3. The defendant has been convicted of or pled guilty within the previous five (5) years to a felony or to a Class A misdemeanor against the same victim or victims; or

4. The act or acts were committed while the defendant had a deadly weapon on or about his person.

Kentucky Revised Statutes § 508.130(1) and (2) define stalking as:

engag[ing] in an intentional course of conduct:

1. Directed at a specific person or persons;

2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and

3. Which serves no legitimate purpose.

The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.

"Course of conduct" means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose.

STATEMENT OF THE CASE

On January 11, 2010, Officer Evon Parks stopped the car driven by Johnson based on a seat-belt law violation committed by the passenger of the vehicle. As Officer Parks approached the vehicle, he smelled burnt marijuana and noticed a second license plate sitting on the back seat of the vehicle. Upon questioning Johnson and his female passenger, the passenger allegedly admitted she had smoked marijuana in the car a few minutes earlier.

During the stop, Officer Parks requested Johnson's license and registration and the passenger's identification information. The passenger initially provided Officer Parks with her sister's information rather than her own. Officer Parks left Johnson's vehicle to enter the information he had received into the national database, NCIC. At that point, Johnson gestured to Officer Parks and asked to speak with him away from the vehicle. After Officer Parks agreed, Johnson informed Officer Parks that he knew he would be arrested because a condition of release for a prior conviction required him to stay away from

the passenger. Johnson also told Officer Parks that he was a convicted felon and had a loaded gun underneath the passenger seat, but could convince the passenger to claim ownership of the weapon. Once NCIC confirmed that Johnson in fact had a condition of release ordering him to stay away from a person named LuShanda Giles, Officer Parks handcuffed Johnson and placed him in the back of the police vehicle. Officer Parks then asked the passenger to exit the vehicle and, based on the aroma of marijuana in the vehicle, also asked to search her purse. Officer Parks then located the passenger's real identifying information and confirmed that she was LuShanda Giles. He searched the vehicle and recovered the weapon. After Officer Parks conducted the search, NCIC confirmed that Johnson was a convicted felon, and also informed Officer Parks that Johnson had an active warrant for his arrest.

The government indicted Johnson on May 26, 2010, on one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924. On November 23, 2010, Johnson filed a motion to suppress the firearm. The district court held a suppression hearing and denied Johnson's motion orally from the bench.

On March 7, 2011, Johnson pleaded guilty to the sole count of the indictment pursuant to a conditional plea petition wherein he reserved the right to appeal the denial of his motion to suppress. In its sentencing memorandum, the government argued that Johnson should be sentenced as an armed career criminal

based on his four qualifying felony convictions under the ACCA: Aggravated Burglary; Sale of a Controlled Substance Over 0.5 grams; First-Degree Stalking; and Facilitation to Commit Aggravated Robbery.

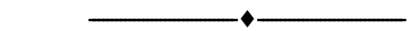
Johnson disputed that his facilitation and stalking convictions were qualifying felonies under the ACCA. *See* supra, page 3, for text of Kentucky Aggravated Stalking law.

The district court found that Johnson's Kentucky conviction of first-degree stalking did so qualify. The court sentenced Johnson to 180 months in prison, the minimum mandatory sentence under the ACCA, with five years of supervised release.

Mr. Johnson timely made application to appeal the denial and sentencing issues to the United States Court of Appeals for the Sixth Circuit based on that court's appellate jurisdiction over the lower court. The Court issued its ruling on February 20, 2013 upholding the trial court's finding that the Kentucky stalking charge was a crime of violence under the residual clause of the ACCA. The Court of Appeals first ruled that the crime was not categorically a violent felony under the force prong of the ACCA. However, when the Court conducted its residual clause analysis, the Court found that the crime of stalking was akin to extortion and that a stalking charge would more likely cause a person with a gun in the future to use it. Therefore the Court held that the Kentucky crime was a qualifying offense under the residual clause

and found Mr. Johnson to be subject to the ACCAs enhanced punishment.

The sole issue for this appeal is whether the Kentucky crime of Stalking in the First Degree is a qualifying violent felony under the ACCAs residual clause.



ARGUMENT

THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER OR NOT STALKING IS A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT'S RESIDUAL CLAUSE.

The battle over the application of the Armed Career Criminal Act (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. Under the text of the ACCA, a felony is violent if it fulfills any one of three conditions: (1) it "has as an element the use, attempted use, or threatened use of physical force against the person of another," (2) it "is burglary, arson, or extortion, [or] involves use of explosives," or (3) it "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(i)-(ii) (2006). Parenthetical three, more commonly known as the residual clause, is problematic because lower federal courts are split between the text of the ACCA, a complex analysis

known as the "categorical approach," and the Supreme Court's recent decision in *Begay v. United States*, 553 U.S. 137 (2008) which requires that a prior conviction be "purposeful, violent, and aggressive" to fall under the residual clause. Also, lower Courts have been split on the residual clause application to State stalking felonies.[1]

The issue before the Court in this Writ is whether Chapter 508 of the Kentucky Penal Code fits within this "problematic" patchwork of statutory code and case law such that Stalking would be a violent crime under the residual clause of the ACCA statute. The Court of Appeals has ruled that the stalking charge does not meet the force prong and therefore is not "categorically" a violent crime. The only question for the Court of Appeals was whether the statute met the residual clause analysis for the ACCA.

In *United States v. Begay*, the Supreme Court held that regardless whether a crime poses a serious potential risk of physical injury to another, only crimes that are similar in kind and degree to the enumerated offenses of burglary, arson, and extortion, in that they involve "purposeful, violent, and aggressive conduct," are violent felonies under the

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[1] See, *U.S. v. Insaulgarat*, 378 F.3d 456 (5th Cir. 2004); *U.S. v. Jones*, 231 F.3d 508 (9th Cir. 2000); *U.S. v. Esquivel-Arellano*, 208 F.App'x 758 (11th Cir. 2006) (stalking not a crime of violence); *United States v. Randy G. Meherg*, 2013 U.S. App. LEXIS 7031 (D.C. Wis. 2013) (aggravated stalking is a crime of violence).

ACCA's residual clause. 553 U.S. 137, 144-45 (2008). The *Begay* Court explained that purposeful, violent, and aggressive conduct is conduct that makes it "more likely that an offender, *later possessing a gun*, will use that gun deliberately to harm a victim." *Id.* at 145 (emphasis added). Under this rationale, the *Begay* Court determined that driving under the influence was not such conduct and thus was not a violent felony. However, the "later possessing a gun" requirement has now added an element not contained in the plain language of the statute. The "later possessing a gun" requirement has been called the "likely shooter test" by some commentators.[2]

The Supreme Court addressed this issue again in *Sykes v. United States*, when it considered whether the crime of vehicle flight, part of Indiana's resisting-law-enforcement statute, is a violent felony under the ACCA's residual clause. 131 S. Ct. 2267 (2011). The pertinent provision of Indiana's statute states:

(a) A person who knowingly or intentionally:

(3) flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop; commits resisting law enforcement. Ind. Code § 35-44-3-3(a)(3). This offense is increased from a misdemeanor to a

[2] David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 Conn. L. Rev. 209 (2010).

felony if "the person uses a vehicle to commit the offense." Ind. Code § 35-44-3-3(b)(1)(A).

To determine whether the crime of vehicle flight presents a serious potential risk of physical injury to another, the *Sykes* Court used the standard set forth in *James v. United States*, 550 U.S. 192 (2007) – whether "the risk posed by [the crime in question] is comparable to that posed by its closest analog among the enumerated offenses." *Sykes*, 131 S. Ct. at 2273 (quoting *James*, 550 U.S. at 203). The Court noted that although the *Begay* Court used the "purposeful, violent, and aggressive standard" to evaluate a crime "akin to strict liability, negligence, or recklessness," the comparable risk standard was sufficient to analyze the crime of vehicle flight. 131 S. Ct. at 2276. Nevertheless, the Court recognized that the two standards generally lead to the same result because "[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same." *Id.* at 2275.

Utilizing the comparable risk standard, the *Sykes* Court deemed arson and burglary the most similar enumerated crimes to vehicle flight. In analogizing the crime of burglary to vehicle flight, the Court stated:

> Burglary is dangerous because it can end in confrontation leading to violence. The same

> is true of vehicle flight, but to an even greater degree. The attempt to elude capture is a direct challenge to an officer's authority. It is a provocative and dangerous act that dares, and in a typical case requires, the officer to give chase. The felon's conduct gives the officer reason to believe that the defendant has something more than a serious traffic violation to hide.
>
> Because an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves duty bound to escalate their response to ensure the felon is apprehended. . . . And once the pursued vehicle is stopped, it is sometimes necessary for officers to approach with guns drawn to effect arrest. Confrontation with police is the expected result of vehicle flight. It places property and persons at serious risk of injury.

131 S.Ct. at 2273-74.

In *James*, the Supreme Court explained that "the most relevant common attribute of the enumerated offenses of burglary, arson, extortion, and explosives . . . is that all of these offenses, while not technically crimes against the person, nevertheless create significant risks of bodily injury or *confrontation that might result in bodily injury*." 550 U.S. at 199 (emphasis added). The Court further explained that in determining whether a crime poses a comparable risk of physical injury as an enumerated felony, it is not necessary that "every conceivable factual offense covered

by a statute . . . present a serious potential risk of injury" *Id.* at 208. Rather, "[a]s long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the [ACCA's] residual provision." *Id.* at 209. The Court illustrated this principle in the context of extortion through discussion of a hypothetical scheme involving an anonymous blackmailer who threatened to reveal embarrassing personal information about the victim unless he received regular payments. *Id.* at 208. According to the Court, despite the fact that the risk of physical injury to another in that particular situation was nonexistent, the crime of extortion could not be considered categorically non-violent. *Id.*

Unlike the enumerated offenses, when a defendant commits first-degree stalking the likelihood of injurious confrontation is not necessarily high. Kentucky's version of first-degree stalking is akin to a simple assault or threat of future harm by an individual who has already intentionally alarmed, annoyed, harassed, or intimidated the victim on two or more occasions in such a severe manner that a reasonable person would suffer substantial mental distress as a result. In addition, the threat is made either while the stalker has a deadly weapon, after the victim has either obtained an order of protection or filed a criminal complaint against the stalker, or when the victim has previously been a victim of a felony or Class A misdemeanor committed by the stalker. Under these circumstances, placing someone in reasonable fear of, for example, the most innocuous

sexual contact is unlikely to result in a violent confrontation or "predict" that the defendant is likely to possess a weapon at some later date.

CONCLUSION

For the aforementioned law and arguments, Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari and order briefing on the merits.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant Sixth Circuit I.O.P. 32.1(b)

File Name: 13a0044p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	
v.	No. 11-5769
MICHAEL JOHNSON, *Defendant-Appellant*.	

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:10-cr-00145-1 – Aleta Arthur Trauger,
District Judge

Argued: July 20, 2012

Decided and Filed: Feb. 20, 2013

Before: BOGGS and WHITE, Circuit Judges;
and BLACK, District Judge.*

COUNSEL

ARGUED: Michael J. Flanagan, Nashville, Tennessee, for Appellant. Clay T. Lee, UNITED STATES

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* The Honorable Timothy S. Black, United States District Judge for the Southern District of Ohio, sitting by designation.

ATTORNEY'S OFFICE, Nashville, Tennessee, for Appellee. **ON BRIEF:** Michael J. Flanagan, Nashville, Tennessee, for Appellant. Philip H. Wehby, UNITED STATES ATTORNEY'S OFFICE, Nashville, Tennessee, for Appellee.

OPINION

HELENE N. WHITE, Circuit Judge. Michael Johnson appeals the district court's denial of his motion to suppress physical evidence as well as the district court's determination that his Kentucky state stalking conviction is a violent felony under the Armed Career Criminal Act (ACCA). We AFFIRM.

I.

On January 11, 2010, Officer Evon Parks stopped the car driven by Johnson based on a seat-belt law violation. As Officer Parks approached the vehicle, he smelled burnt marijuana and noticed a second license plate sitting on the back seat of the vehicle. Upon questioning Johnson and his female passenger, the passenger admitted she had smoked marijuana in the car a few minutes earlier.

During the stop, Officer Parks requested Johnson's license and registration and the passenger's identification information. The passenger initially provided Officer Parks with her sister's information rather than her own. Officer Parks left Johnson's

vehicle to enter the information he had received into the national database, NCIC. At that point, Johnson gestured to Officer Parks and asked to speak with him away from the vehicle. After Officer Parks agreed, Johnson informed Officer Parks that he knew he would be arrested because a condition of release for a prior conviction required him to stay away from the passenger. Johnson also told Officer Parks that he was a convicted felon and had a loaded gun underneath the passenger seat, but could convince the passenger to claim ownership of the weapon. Once NCIC confirmed that Johnson in fact had a condition of release ordering him to stay away from a person named LuShanda Giles, Officer Parks handcuffed Johnson and placed him in the back of the police vehicle. Officer Parks then asked the passenger to exit the vehicle and, based on the aroma of marijuana in the vehicle, also asked to search her purse. Officer Parks then located the passenger's real identifying information and confirmed that she was LuShanda Giles. He searched the vehicle and recovered the weapon. After Officer Parks conducted the search, NCIC confirmed that Johnson was a convicted felon, and also informed Officer Parks that Johnson had an active warrant for his arrest.

The government indicted Johnson on May 26, 2010, on one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924. On November 23, 2010, Johnson filed a motion to suppress the firearm on four grounds: 1) the initial traffic stop was not supported by reasonable suspicion

or probable cause; 2) the stop of Johnson's vehicle was not the result of a valid traffic stop; 3) there was no valid consent to search Johnson's vehicle; and 4) Johnson's statements to Officer Parks were obtained in violation of his Fifth Amendment right to remain silent and in contravention of his *Miranda* rights.

The district court held a suppression hearing and denied Johnson's motion orally from the bench.

On March 7, 2011, Johnson pleaded guilty to the sole count of the indictment pursuant to a conditional plea petition wherein he reserved the right to appeal the denial of his motion to suppress. In its sentencing memorandum, the government argued that Johnson should be sentenced as an armed career criminal based on his four qualifying felony convictions under the ACCA: Aggravated Burglary; Sale of a Controlled Substance Over 0.5 grams; First-Degree Stalking; and Facilitation to Commit Aggravated Robbery.

Johnson disputed that his facilitation and stalking convictions were qualifying felonies under the ACCA. The district court agreed with Johnson that his Tennessee state conviction of facilitation to commit aggravated robbery was not a violent felony based on our then-recent decision in *United States v. Vanhook*, 640 F.3d 706 (6th Cir. 2011). However, the district court found that Johnson's Kentucky conviction of first-degree stalking did so qualify. The court sentenced Johnson to 180 months in prison, the minimum mandatory sentence under the ACCA, with five years of supervised release.

II.

"When reviewing the denial of a motion to suppress, we review the district court's findings of fact for clear error and its conclusions of law *de novo,*" *United States v. Simpson*, 520 F.3d 531, 534 (6th Cir. 2008) (internal quotation marks omitted), and we consider the evidence "in the light most favorable to the United States." *United States v. Freeman*, 209 F.3d 464, 466 (6th Cir. 2000).

On appeal, Johnson claims that the court erred in denying his motion to suppress because the search of his vehicle was not incident to a valid arrest.[1] Johnson argues that Officer Parks arrested him prior to confirming the identity of the passenger and that without Officer Parks knowing that the passenger was actually LuShanda Giles, the person listed on Johnson's conditions of release, Johnson should not have been arrested for being with the passenger.

This argument lacks merit. Johnson does not challenge the stop, and "an officer's detection of the smell of marijuana in an automobile can by itself establish probable cause for a search." *United States v. Bailey*, 407 F. App'x. 27, 28-29 (6th Cir. 2011) (quoting *United States v. Elkins*, 300 F.3d 638, 659 (6th Cir. 2002)). *See also Carroll v. United States*, 267

[1] On appeal, Johnson does not raise the arguments made below that the initial traffic stop for the seatbelt violation was not supported by reasonable suspicion or probable cause, or that his statements were obtained in violation of his *Miranda* rights.

U.S. 132, 149 (1925) ("[I]f the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid"). As mentioned, the passenger admitted to Officer Parks that she smoked marijuana in the vehicle minutes before the traffic stop.

More generally, "[u]nder the automobile exception to the warrant requirement, 'an officer may search a readily mobile vehicle without a warrant if he has probable cause to believe that the vehicle contains evidence of a crime.'" *United States v. Redmond*, Nos. 10-5636, 10-5644, 2012 WL 1237787, at *4 (6th Cir. Apr. 13, 2012) (quoting *Smith v. Thornburg*, 136 F.3d 1070, 1074 (6th Cir. 1998)). Aside from the probable cause that arose from Officer Parks smelling marijuana in the vehicle, Johnson also voluntarily informed Officer Parks that he was a convicted felon in possession of a firearm. Although Officer Parks did not obtain corroboration of Johnson's felon status prior to conducting the search, "'[a]dmissions of crime, like admissions against proprietary interests, carry their own indicia of credibility – sufficient at least to support a finding of probable cause to search.'" *United States v. Burton*, 334 F.3d 514, 519 (6th Cir. 2003) (quoting *United States v. Harris*, 403 U.S. 573, 583 (1971)).

Because Officer Parks had probable cause to search Johnson's vehicle, the district court's denial of Johnson's motion to suppress is affirmed.

III.

Johnson next argues that the district court erred in determining that his conviction under Kentucky's first-degree stalking statute is a violent felony under the ACCA. We review this issue *de novo*. *United States v. Bartee*, 529 F.3d 357, 358-59 (6th Cir. 2008).

Under the ACCA, a defendant who violates 18 U.S.C. § 922(g) and has three prior convictions of serious drug offenses or violent felonies must receive a fifteen-year mandatory minimum sentence. *United States v. Johnson*, 675 F.3d 1013, 1016 (6th Cir. 2012) (citing 18 U.S.C. § 924(e)(1)). The ACCA defines "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year . . . that –
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B). We refer to 18 U.S.C. § 924(e)(2)(B)(i) as the "force" prong and the portion

of 18 U.S.C. § 924(e)(2)(B)(ii) involving the non-enumerated offenses as the "residual clause."

In *United States v. Wynn*, we explained:

> To determine whether a prior conviction constitutes a "crime of violence," [2] we must apply the categorical approach. . . . Under this categorical approach, the court must look only to the *fact of conviction* and the statutory definition – not the facts underlying the offense – to determine whether that definition supports a conclusion that the conviction was for a crime of violence. . . . There is, however, an exception to the categorical approach: When the statutory definition of the prior crime to which the defendant pleaded guilty is ambiguous . . . the court may examine . . . the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

579 F.3d 567, 571 (6th Cir. 2009) (internal quotation marks and citations omitted).

Johnson pleaded guilty to first-degree stalking in 1998. Neither party indicates which provision of the

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[2] "A 'crime of violence' under the career-offender provision is interpreted identically to a 'violent felony' under ACCA." *United States v. Young*, 580 F.3d 373, 379 n.5 (6th Cir. 2009).

Kentucky stalking statute Johnson pleaded guilty under, and there are no documents from the Kentucky state court in this record that can provide further clarity. Because the categorical approach requires us to first look solely at the face of the statute rather than the facts of the offense, the absence of state-court documents will only be problematic if we conclude that Kentucky's stalking statute is ambiguous, in that an individual can violate the statute in a way that constitutes a violent felony and in a way that does not.

Under Chapter 508 of the Kentucky Penal Code:

(1) A person is guilty of stalking in the first degree,

(a) When he intentionally:

1. Stalks another person; and

2. Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:

a. Sexual contact as defined in KRS 510.010;

b. Serious physical injury; or

c. Death; and

(b) 1. A protective order has been issued by the court to protect the same victim or victims and the defendant has been served with the summons or order or has been given actual notice; or

> 2. A criminal complaint is currently pending with a court, law enforcement agency, or prosecutor by the same victim or victims and the defendant has been served with a summons or warrant or has been given actual notice; or
>
> 3. The defendant has been convicted of or pled guilty within the previous five (5) years to a felony or to a Class A misdemeanor against the same victim or victims; or
>
> 4. The act or acts were committed while the defendant had a deadly weapon[3] on or about his person.

Ky. Rev. Stat. § 508.140.

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[3] In Kentucky, a deadly weapon includes any of the following:

> (a) A weapon of mass destruction;
>
> (b) Any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged;
>
> (c) Any knife other than an ordinary pocket knife or hunting knife;
>
> (d) Billy, nightstick, or club;
>
> (e) Blackjack or slapjack;
>
> (f) Nunchaku karate sticks;
>
> (g) Shuriken or death star; or
>
> (h) Artificial knuckles made from metal, plastic, or other similar hard material[.]

Ky. Rev. Stat. § 500.080(4).

> "Stalk" is defined as:
>
> engaging in an intentional course of conduct:
>
> 1. Directed at a specific person or persons;
> 2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and
> 3. Which serves no legitimate purpose.
>
> . . .
>
> The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.
>
> . . .
>
> "Course of conduct" means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose.

Id. § 508.130(1) and (2).

Johnson argues that a person can be convicted under Kentucky's first-degree stalking statute for only making threats that intentionally cause a person to ***fear*** physical harm, rather than for actually threatening physical harm to another. According to Johnson, causing a person to fear physical harm does not require the use, attempted use, or threatened use of physical force.

This Circuit has not yet determined whether any state stalking conviction is a violent felony under the ACCA. The Fourth Circuit did, however, reject a

similar argument in *United States v. Seay*, 553 F.3d 732, 739 (4th Cir. 2009). In *Seay*, the court considered whether North Carolina's felony stalking statute is a crime of violence under the career-offender provision of the sentencing guidelines. Under North Carolina's felony stalking statute at the time:

> a person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose and with the intent to cause death or bodily injury or with the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury.

N.C. Gen. Stat. § 14-277.3.[4]

In *Seay*, the defendant, who had been charged with violating the "emotional distress" prong of the statute, argued that the statute "did not require that a defendant make a 'credible threat' to the victim [and] [c]onduct intended to cause another reasonable fear of bodily injury does not naturally include the threatened use of physical force." 553 F.3d at 737-38. The Fourth Circuit disagreed, finding that conduct "purposefully carried out with the intended effect of placing a reasonably prudent person in fear of bodily harm . . . threatens [the] use of physical force against the person of another." That court further reasoned that such conduct "can only be characterized as purposeful, violent, and aggressive." *Id.* at 738.

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[4] Repealed in 2008, now replaced by § 14.277.3A.

However, other circuits have found that where it is possible to violate a stalking statute solely through harassing conduct or by making a threat that intentionally causes another to reasonably fear only non-physical harm, *i.e.*, emotional harm, a conviction under that statute is not categorically a violent felony. In *United States v. Insaulgarat*, 378 F.3d 456, 466 (5th Cir. 2004), the Fifth Circuit held that Florida's aggravated stalking statute, which proscribes a person subject to an injunction from "knowingly, willfully, maliciously, and repeatedly following or harassing the beneficiary of the injunction," is not a crime of violence. Florida's definition of harassment includes "'engaging in a course of conduct directed at a specific person that causes substantial emotional distress in such person. . . .'" *Id.* at 469 (quoting Fla. St. § 784.048(1)(a)). Because the infliction of emotional harm was sufficient to violate the statute, the Fifth Circuit determined the use or threatened use of physical force was not necessarily required, and thus the offense was not a violent crime. *Id.* at 470-71.

In *United States v. Jones*, 231 F.3d 508 (9th Cir. 2000), the Ninth Circuit considered California's stalking statute, which provides:

> Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking. . . .

Cal. Penal Code § 646.9(a).

Because the California Court of Appeals had construed the statute as encompassing more than just "physical" safety, the *Jones* court determined that it was possible to violate the statute in a way that did not constitute a crime of violence. 231 F.3d at 519-20.

The Eleventh Circuit also addressed this issue in *United States v. Esquivel-Arellano*, 208 F. App'x. 758 (11th Cir. 2006). Under Georgia law, a person is guilty of aggravated stalking when:

> such person, in violation of [various bonds and orders], follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person.

Ga. Code § 16-5-91(a).

The phrase "harassing and intimidating" is defined as:

> a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person's safety or the safety of a member of his or her immediate family, by establishing a pattern of harassing and intimidating behavior, and which serves no legitimate purpose. This Code section shall not be construed to require that an overt threat of death or bodily injury has been made.

Ga. Code § 16-5-90(a)(1).

After reviewing the Georgia cases applying the statute to specific circumstances, the Eleventh Circuit determined that the Georgia offense was broad enough to allow for conviction without the use, attempted use, or threatened use of physical force and therefore held it was not a crime of violence. *Esquivel-Arellano*, 208 F. App'x. at 764-65.

A. The Use, Attempted Use, or Threatened Use of Physical Force Against the Person of Another under Kentucky's Statute

To be convicted of first-degree stalking in Kentucky, a defendant must make a threat with the intent to place the person stalked in reasonable fear of death, serious physical injury, or sexual contact. Thus, the statute requires a threat made with the actual intent to cause the person to fear an actual physical injury – either death, serious physical injury, or sexual contact. Negligent or reckless conduct is not enough. Further, similar to the North Carolina statute at issue in *Seay* and unlike the statutes at issue in *Insaulgarat, Jones*, and *Esquivel-Arellano*, Kentucky's statute does not encompass situations where fear of only emotional, psychological, or other non-physical harm is intended. In addition, the Kentucky statute, like its North Carolina counterpart, requires that the victim's fear be reasonable.

Unlike the North Carolina statute, however, Kentucky's stalking statute allows for conviction based on a threat made with the intent to place

someone in reasonable fear of sexual contact. The Kentucky Penal Code defines "sexual contact" as "any touching of the sexual or other intimate parts of a person . . . for the purpose of gratifying the sexual desire of either party." Ky. Rev. Stat. § 510.010(7). The Kentucky Supreme Court has construed "sexual contact" as "not limited to the sex organ." *Bills v. Kentucky*, 851 S.W.2d 466, 471 (Ky. 1993). That court further explained that although sexual contact requires "[a]n actual touching," the touching "need not be directly with the body." *Id.* However, neither inadvertent nor accidental touching is sufficient. *Id.*

In *Johnson v. United States*, 130 S. Ct. 1265 (2010), the Supreme Court considered whether battery under Florida's statute qualified as a violent felony. Under Florida law, an individual could be convicted of battery for any intentional non-consensual touching, no matter how slight. The *Johnson* Court clarified that the physical force required to satisfy the force prong of the ACCA is "*violent* force – that is, force capable of causing physical pain or injury to another person." *Id.* at 1271. Because the crime of battery did not require the use or threatened use of violent force, the Court held it was not categorically a violent felony. *Id.* at 1270, 1274.

Similarly, under Kentucky law the definition of sexual contact is broad enough to cover the slightest touch to a sexual or intimate part of another. Although a threat intended to place someone in reasonable fear of such contact may involve a threat to use

force, it does not necessarily require a threat to use *violent* force.

Because a conviction under the sexual-contact provision does not necessarily require the threatened use of violent force, a violation of Kentucky's statute is not categorically a violent felony under the force prong of the ACCA.

B. Serious Potential Risk of Physical Injury to Another

We next determine whether a conviction under the sexual-contact provision of Kentucky's first-degree stalking statute is a violent felony under the ACCA's residual clause.

In *United States v. Begay*, the Supreme Court held that regardless whether a crime poses a serious potential risk of physical injury to another, only crimes that are similar in kind and degree to the enumerated offenses of burglary, arson, and extortion, in that they involve "purposeful, violent, and aggressive conduct," are violent felonies under the ACCA's residual clause. 553 U.S. 137, 144-45 (2008). The *Begay* Court explained that purposeful, violent, and aggressive conduct is conduct that makes it "more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Id.* at 145. Under this rationale, the *Begay* Court determined that driving under the influence was not such conduct and thus was not a violent felony.

The Supreme Court addressed this issue again in *Sykes v. United States* when it considered whether the crime of vehicle flight, part of Indiana's resisting-law-enforcement statute, is a violent felony under the ACCA's residual clause. 131 S. Ct. 2267 (2011). The pertinent provision of Indiana's statute states:

> (a) A person who knowingly or intentionally:
>
> . . .
>
> (3) flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop; commits resisting law enforcement. . . .

Ind. Code § 35-44-3-3(a)(3). This offense is increased from a misdemeanor to a felony if "the person uses a vehicle to commit the offense." Ind. Code § 35-44-3-3(b)(1)(A).

To determine whether the crime of vehicle flight presents a serious potential risk of physical injury to another, the *Sykes* Court used the standard set forth in *James v. United States*, 550 U.S. 192 (2007) – whether "the risk posed by [the crime in question] is comparable to that posed by its closest analog among the enumerated offenses." *Sykes*, 131 S. Ct. at 2273 (quoting *James*, 550 U.S. at 203). The Court noted that although the *Begay* Court used the "purposeful, violent, and aggressive standard" to evaluate a crime "akin to strict liability, negligence, or recklessness," the comparable risk standard was sufficient to analyze

the crime of vehicle flight. 131 S. Ct. at 2276. Nevertheless, the Court recognized that the two standards generally lead to the same result because "[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same." *Id.* at 2275.

Utilizing the comparable risk standard, the *Sykes* Court deemed arson and burglary the most similar enumerated crimes to vehicle flight. In analogizing the crime of burglary to vehicle flight, the Court stated:

> Burglary is dangerous because it can end in confrontation leading to violence. . . . The same is true of vehicle flight, but to an even greater degree. The attempt to elude capture is a direct challenge to an officer's authority. It is a provocative and dangerous act that dares, and in a typical case requires, the officer to give chase. The felon's conduct gives the officer reason to believe that the defendant has something more than a serious traffic violation to hide.
>
> . . .
>
> Because an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves duty bound to escalate

> their response to ensure the felon is apprehended. . . . And once the pursued vehicle is stopped, it is sometimes necessary for officers to approach with guns drawn to effect arrest. Confrontation with police is the expected result of vehicle flight. It places property and persons at serious risk of injury.s [sic]

131 S. Ct. at 2273-74.

In *James*, the Supreme Court explained that "the most relevant common attribute of the enumerated offenses of burglary, arson, extortion, and explosives . . . is that all of these offenses, while not technically crimes against the person, nevertheless create significant risks of bodily injury or *confrontation that might result in bodily injury.*" 550 U.S. at 199 (emphasis added). The Court further explained that in determining whether a crime poses a comparable risk of physical injury as an enumerated felony, it is not necessary that "every conceivable factual offense covered by a statute . . . present a serious potential risk of injury. . . ." *Id.* at 208. Rather, "[a]s long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the [ACCA's] residual provision." *Id.* at 209. The Court illustrated this principle in the context of extortion through discussion of a hypothetical scheme involving an anonymous blackmailer who threatened to reveal embarrassing personal information about the victim unless he received regular payments. *Id.* at 208. According to the Court, despite the fact that the

risk of physical injury to another in that particular situation was nonexistent, the crime of extortion could not be considered categorically non-violent. *Id.*

As with the enumerated offenses, when a defendant commits first-degree stalking the likelihood of injurious confrontation is high. A victim of first-degree stalking has been threatened with the intent to place the victim in reasonable fear of sexual contact, serious physical injury or death by an individual who has already intentionally alarmed, annoyed, harassed, or intimidated the victim on two or more occasions in such a severe manner that a reasonable person would suffer *substantial* mental distress as a result. In addition, the threat is made either while the stalker has a deadly weapon, after the victim has either obtained an order of protection or filed a criminal complaint against the stalker, or when the victim has previously been a victim of a felony or Class A misdemeanor committed by the stalker. Under these circumstances, placing someone in reasonable fear of death, serious physical injury or even the most innocuous sexual contact could elicit an intensified response that might result in violent confrontation.

The government's comparison of first-degree stalking to the enumerated crime of "extortion" is apt. Extortion is defined under the Model Penal Code as:

> purposely obtain[ing] property of another by threatening to:
>
> (1) inflict bodily injury on anyone or commit any other criminal offense; or

> (2) accuse anyone of a criminal offense; or
>
> (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
>
> (4) take or withhold action as an official, or cause an official to take or withhold action; or
>
> (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or
>
> (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense1 [sic]; or
>
> (7) inflict any other harm which would not benefit the actor.

Model Penal Code § 223.4.

First-degree stalking (of all three types) poses more risk of injury than many of the above-listed forms of extortion. To be guilty of extortion under the Model Penal Code definition, one only needs to obtain the victim's property and threaten the victim on one occasion with some type of harm, physical *or* non-physical. The victim in that instance knows that the extortioner is after property and that harm may be avoided by handing over that property. However, in the case of first-degree stalking, before any threat is ever made, the stalker has already accosted the victim with an intentional course of conduct severe

enough to cause substantial mental distress. It is only after the stalker has engaged in this conduct that the stalker makes a threat with the intent to place that same victim in reasonable fear of a death, serious physical injury, or non-consensual touching of a sexual or intimate area of the body. Although a victim of extortion may feel able to ameliorate the situation by giving up the desired property, the first-degree stalking victim has no such recourse. Similarly, while an extortioner may leave the victim alone once obtaining possession of the desired object, the first-degree stalker has already demonstrated the intent to torment the victim continuously. If an injurious confrontation is likely to result from a threat to expose embarrassing information about someone for the purpose of obtaining property, it is even more likely in the case of a threat sufficient to create a reasonable fear of death, physical injury or sexual contact that is made by a stalker intent on instilling fear in the victim.

In sum, first-degree stalking under Kentucky law is the type of offense that by its nature poses a serious risk of physical injury to another. Even if one could imagine a hypothetical scenario of first-degree stalking where the risk of injury were not present, the combination of acts necessary for a conviction under Kentucky's first-degree stalking statute – 1) intentionally and repeatedly performing acts that seriously alarm, annoy, intimidate, or harass another, serve no legitimate purpose, and would cause a reasonable person to suffer substantial mental distress;

2) threatening that same victim while intending to place the victim in reasonable fear of death, serious physical injury or sexual contact; and 3) committing the threats either with a deadly weapon or disregarding being the named party on an order of protection or criminal complaint filed by the victim, or having a previous conviction for conduct involving the victim – is not only purposeful and violent conduct, but also conduct of escalating aggression that makes it more likely that the individual, if in possession of a gun, would use that gun deliberately to harm a victim. *See Begay*, 553 U.S. at 145. Based on the rationales in *James, Begay*, and *Sykes*, we hold that a violation of Kentucky's first-degree stalking statute is categorically a violent felony under the ACCA's residual clause.[5] We affirm.

[5] Accordingly, we need not consider the government's alternative argument that the district court plainly erred in concluding that Johnson's conviction of facilitation of aggravated robbery was not a violent felony under the ACCA.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA

vs. CASE NO. 3:10-00145

MICHAEL JOHNSON

TRANSCRIPT OF PROCEEDINGS
SENTENCING HEARING

BEFORE: THE HONORABLE ALETA A. TRAUGER

DATE: JUNE 13, 2011
TIME: 2:30 P.M.

APPEARANCES:

FOR THE GOVERNMENT
BROOKLYN SAWYERS
U.S. Attorney's Office
Nashville, Tennessee

FOR THE DEFENDANT:
MICHAEL FLANAGAN
Nashville, Tennessee

REPORTED BY:
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THE COURT: Good afternoon. We're here on United States versus Michael Johnson. We have Brooklyn Sawyers for the government and Michael

Flanagan for the defendant. The defendant is in the courtroom.

Mr. Johnson has entered a plea of guilty to being a felon in possession of a firearm. Mr. Johnson, are you prepared to proceed on your guilty plea and be sentenced today?

MR. JOHNSON: Yes, ma'am.

THE COURT: Okay. I'm going to go ahead then and accept the plea.

Mr. Johnson, have you read the presentence report?

MR. JOHNSON: Yes, ma'am.

THE COURT: And do you feel you understand it?

MR. JOHNSON: Yes, ma'am.

THE COURT: Okay. The main issue here is whether or not the armed career criminal enhancement applies to this defendant.

I have read all the briefing in this case. My provisional ruling – I'm prepared to hear anything else anybody wants to say – but my provisional ruling is that the facilitation to committing aggravated robbery under Tennessee law is not a qualifying conviction for purposes of armed career criminal.

There is a recent Sixth Circuit case ruling on this [3] statute, this Tennessee statute, Van Hook, U.S. vs.

Van Hook. It's an April 13, 2011 reported decision of the Sixth Circuit, and I think it's very clear that the first offense that the probation office has assigned for purposes of armed career criminal does not apply.

However, there are three remaining convictions, and the Court finds that those three do apply. Aggravated burglary I find is an appropriate enhancement under the armed career criminal. The drug charge, Tennessee statutory drug charge, out of Montgomery County qualifies.

And the only one, therefore, that would be in question is the first degree stalking charge from February of '98 out of Christian County, Kentucky. And it seems to me that this meets both prongs required for the armed career criminal.

Before I make that my final ruling, Mr. Flanagan, do you have anything further to say about the stalking conviction?

MR. FLANAGAN: I do, Your Honor. And I'll let the Court know that I researched whether or not that Kentucky stalking statute has ever come out of the Sixth Circuit, whether there's ever been a ruling on that, and I couldn't find a case, but it's our position that it doesn't meet the two prong test because if it threatened physical force, it would be assault instead of stalking.

So it's our position – and we won't concede that it [4] is a qualifier – is that making an explicit threat with intent to place a person in reasonable fear of

serious physical injury is not the same thing as threatening.

If it was – if you threatened serious physical injury, that would be assault, and that's addressed elsewhere in the Kentucky revised statute, so that would be our position, Your Honor.

THE COURT: Okay. And I have considered that argument, and I overrule that objection.

So I find that the defendant is an armed career criminal but the facilitation does not contribute to that ruling.

Therefore, I'm going to accept the presentence report as my findings of fact on all issues and on the application of the guidelines except that – should I ask you to remove – Ms. Haney, should I ask you to remove the first conviction cited on page 8 or I can just reflect that in my J&C, however you want to do it?

MS. HANEY: I can remove it.

THE COURT: Why don't you remove it –

MS. HANEY: I will.

THE COURT: – so it appears that there are just three that make him an armed career criminal? Okay.

So with that correction, I will accept the presentence report. The offense level is a 33. The criminal history [5] category is IV. The resulting guideline

range is 188 to 235 months with three to five years of supervised release.

There is in effect a minimum mandatory 180 month sentence because of the armed career criminal.

Mr. Flanagan, did you have any testimony to present today?

MR. FLANAGAN: I don't have any testimony, Your Honor, but if I may have a moment with Mr. Johnson?

THE COURT: And, Mr. Johnson, you have the opportunity to address the Court and tell me anything you want me to hear before I sentence you. I hope that you will. You don't have to, but you have a right to.

MR. FLANAGAN: Judge, he's asked me to just make a brief statement on his behalf.

THE COURT: Okay.

MR. FLANAGAN: He wants the Court to know that he has his GED. I'm not the sure whether that was reflected.

THE COURT: It is.

MR. FLANAGAN: Okay. And he's been to barber college. That he – his position on the testimony in the suppression hearing hasn't changed.

His opinion of the government witness hasn't changed, and wanted me to – even though this is not

the place to do it, he asked me to reiterate that to the Court, so I'll do that.

* * *

[7] All right. Does the government have anything to say on sentencing?

MS. SAWYERS: In regard to sentencing argument, Your Honor, very briefly. The government concurs with the recommendation in the presentence report on sentencing to 188 months, which is the very low end of the advisory guideline range.

The defendant's criminal history is extensive, dating back many years, at least to the age of 18, not even looking at any juvenile conduct, Your Honor.

Much of it is violent, including drug offenses, and the government believes that the presentence report accurately reflects all of the considerations of 3553(a), and that a 188 month sentence would be appropriate under the circumstances of this specific case, especially taking into consideration the defendant's criminal history and the obstruction in this case.

Thank you, Your Honor.

THE COURT: Okay. Anything further, Mr. Flanagan?

* * *

[10] The presentence report says that the Tennessee Department of Corrections has confirmed that Mr. Johnson is a member of a gang. He denies that,

but it apparently has been confirmed in the Tennessee system at least.

At any rate, it seems to me that the minimum mandatory sentence here of 188 months for such a young man despite his record and this offense is sufficient but not greater than – it is greater than necessary, but my hands are tied. It's a minimum mandatory sentence – I don't have a choice – because he qualifies as an armed career criminal.

I think it's greater than necessary, but I don't have a choice. So I will give him the minimum mandatory of 180 months to be followed by five years of supervised release.

I feel that that sentence is just a small variance downward from the guideline range, which is advisory anyway. I feel the sentence will reflect the seriousness of the offense, promote respect for the law, be a just punishment and protect the public from further crimes. I hope it will [11] provide Mr. Johnson with necessary mental health and alcohol treatment while he is incarcerated.

I do not levy a fine because I find he's financially unable to pay a fine. The $100 special assessment must be paid.

The special conditions of supervised release are that he participate in a program of substance abuse treatment as required by the probation office. He also shall participate in mental health treatment if they consider it advisable.

He's to furnish all financial records and tax returns. He's prohibited from owning, carrying or possessing firearms, destructive devices or other dangerous weapons. And he's to cooperate in the collection of DNA.

Does anyone have objections to my sentence that have not previously been raised?

MS. SAWYERS: No objections from government, Your Honor.

MR. FLANAGAN: None not previously raised, Your Honor.

* * *