IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - x

MARCUS SYKES, :

Petitioner :

v. : No. 09-11311

UNITED STATES :

- - - - - - - - - - - - - - - - - - x

Washington, D.C.

Wednesday, January 12, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

WILLIAM E. MARSH, ESQ., Indianapolis, Indiana; on behalf of Petitioner.

JEFFREY B. WALL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
WILLIAM E. MARSH, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
JEFFREY B. WALL, ESQ.	
On behalf of the Respondent	24
REBUTTAL ARGUMENT OF	
WILLIAM E. MARSH, ESQ.	
On behalf of the Petitioner	50

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 09-11311, Sykes v. United States.

Justice Ginsburg is not on the bench, but will participate in the argument through the transcripts and -- and the tapes.

Mr. Marsh.

ORAL ARGUMENT OF WILLIAM E. MARSH

ON BEHALF OF THE PETITIONER

MR. MARSH: Mr. Chief Justice, and may it please the Court:

The Armed Career Criminal Act enhances the punishment for possession of a firearm or ammunition for a person who has three previous convictions for a violent felony. This case involves, as you know, vehicular fleeing, which Indiana has divided into five categories. Indiana statute treats vehicular fleeing as a continuum of behavior ranging from merely failing to stop, on the low end, which is the crime Mr. Sykes was convicted of violating, all the way to fleeing which results in the death of a police officer, on the high end, which in Indiana is a class A felony.

JUSTICE SCALIA: What's in between?

MR. MARSH: The second tier up is what we refer to as (b)(1)(B), which is fleeing which either causes bodily injury or creates a substantial risk of bodily injury. The next category up is fleeing which causes serious bodily injury. The fourth category is fleeing which causes a death.

This Court recognizes --

JUSTICE SCALIA: So we can assume that the conviction here did not involve any risk of bodily injury to anybody?

MR. MARSH: That's our position, Your Honor. When the court considers the conduct encompassed by the elements of the offense --

JUSTICE SCALIA: Right.

MR. MARSH: -- then that conduct does not involve conduct which creates a risk of bodily injury.

JUSTICE ALITO: Why is that --

JUSTICE KENNEDY: I'm sure you'll do so in the course of your argument, but at some point give us some examples of violations of -- of this -- this statute which from a commonsense standpoint don't involve a serious risk. There was something in the brief about, oh, well, the defendant might want to just find a safe place to pull over. I -- I didn't follow that because it's an intent crime. I just don't see how

that would be a violation. But if at some point in your argument you could address those points.

MR. MARSH: Well, I'd be happy to respond now, Justice Kennedy. The court -- the case that you referred to is the Indiana case of Woodward, from the Indiana Court of Appeals, in which the court held that exactly that conduct did violate this statute because the -- knowingly or intentionally, the mens rea element, goes only to fleeing and using a vehicle. So that was one example --

CHIEF JUSTICE ROBERTS: Looking --

MR. MARSH: -- of merely failing to stop.

CHIEF JUSTICE ROBERTS: I'm sorry. Looking -- looking -- I don't mean to interrupt your answer, but looking for a safe place to stop violates the statute?

MR. MARSH: That was the holding of the Indiana Court of Appeals, yes.

JUSTICE KENNEDY: You're supposed to stop dead in your tracks and not pull off on the shoulder? I mean, I don't -- I just don't understand this. I'll go read the case, but --

MR. MARSH: Well, the court didn't --

JUSTICE SCALIA: I don't drive in Indiana. I think that's pretty tough.

MR. MARSH: The court did not elaborate,

Your Honor, on where the line is, but --

JUSTICE KENNEDY: Maybe that's why -- why it's a risk. You stop in the middle of the road and then everybody --

(Laughter.)

MR. MARSH: That would be more likely to create a risk, but the whole --

JUSTICE SCALIA: How can you say somebody is fleeing? I mean, doesn't fleeing mean you're trying to escape the -- the officer?

MR. MARSH: Justice Scalia, the holding of the Indiana Court of Appeals was in response to a position taken by the defendant, sort of along the lines of the two lines of questioning, which is surely the statute requires something more than merely failing to stop, but the Indiana Court of Appeals used precisely that language. It --

JUSTICE ALITO: I think the problem with your argument is that the prosecution is not under any obligation to charge any offense greater than the offense for which your client was convicted in a case in which there is a very grave risk created by a flight. Isn't that true?

MR. MARSH: The prosecutor is not under any obligation; was that the question, Justice Alito?

JUSTICE ALITO: Yes.

MR. MARSH: Yes, I think that's -- I think that's correct. The prosecutor --

JUSTICE ALITO: So you -- the fact that someone is convicted of this offense does not show that a broad category of offenses within this crime lack the risk that's necessary under the Armed Career Criminal Act.

MR. MARSH: Well, I suggest that it does, Your Honor, because the -- the James case makes clear that the court will determine whether the crime creates a serious potential risk of physical injury to another by looking at the conduct encompassed by the elements of the offense. Now, the fact that some other offense maybe could have been charged or was charged, I suggest, on the categorical approach is not relevant.

JUSTICE ALITO: Are you familiar with the case called Hape v. State, Indiana Court of Appeals 2009?

MR. MARSH: Tate versus --

JUSTICE ALITO: Hape. H-a-p-e.

MR. MARSH: I'm not, Your Honor.

JUSTICE ALITO: During a 45 -- and this involved the offense at issue here. During a 45-minute high-speed chase, officers shot at the defendant's truck

at least 20 times. The State's facts showed that the defendant drove over 100 miles an hour and at times drove into the oncoming traffic lane.

Do you think that creates a -- a serious potential risk of -- of harm?

MR. MARSH: Well, those, of course, aren't the facts here. And I would have to know what the individual was convicted of, because, of course, under the categorical --

JUSTICE ALITO: I believe he was convicted of the same offense as -- as Mr. Sykes.

MR. MARSH: But, of course, under the categorical approach established by Taylor and followed consistently by this Court since that time, the court doesn't look at the facts of the individual case. The court looks at it categorically. So if the --

JUSTICE BREYER: But looking at it categorically, I've always thought, means you look to see not just what the elements are on paper, but whether the elements as -- as used in reality in the State are applied to cases that do present -- in general, you apply it to cases that do present a serious risk of physical injury. And you'd think the answer is we don't know because no one's gone and looked. You could do it through sampling, but no one's gone and looked. I've

just said that's my view of it.

The -- the -- so what do we do? I mean, I can deal with a lot of other States, but Arizona has exactly the same classification of felony when you use a vehicle and when you use a vehicle creating a serious risk of physical harm to others. It's in the same provision, same statute, same category. How do we work with that, in your opinion?

MR. MARSH: If the --

JUSTICE BREYER: Are you following what I'm doing? You understand the difference between Arizona and 46 other States?

MR. MARSH: Yes.

JUSTICE BREYER: In the other States, they grade it. But here they don't.

MR. MARSH: Right. Well, Indiana, of course, does grade it, Your Honor.

JUSTICE BREYER: Indiana -- I'm sorry.

MR. MARSH: And it is significant that the second most serious category is where the conduct does present a substantial risk of bodily injury.

JUSTICE SCALIA: And I -- I don't know how we could proceed by looking at, you know, whether in fact a majority of the cases that come into this first relatively harmless category did indeed involve

situations that involved physical risk because, as everybody knows, prosecutors plea bargain, and it's probably very often the case that the defendant is charged only under -- under category 1, where, you know, if he went to trial, they'd charge him under 3; isn't that so?

MR. MARSH: But, of course, Your Honor --

JUSTICE SCALIA: Yes, yes. You want to say "yes."

(Laughter.)

MR. MARSH: Thank you. Yes.

JUSTICE BREYER: Well, I still -- look, what I'm thinking of -- and I need a little explanation -- we look to see in (b), and it says it's a class D felony if a vehicle is used. That's (A) under (1). Am I right?

MR. MARSH: Yes.

JUSTICE BREYER: Okay. Then we look to (B) under (1), and it's also a class D felony -- in other words, the same -- if a vehicle is operated in a manner that creates a substantial risk of bodily injury.

MR. MARSH: Yes.

JUSTICE BREYER: So a prosecutor looking at that will say: Why don't I just charge (A); what's the point of charging (B)?

I mean, it makes no difference apparently.

It's simpler to prove (A).

MR. MARSH: Justice Breyer, in 2003, when Mr. Sykes was convicted of this offense, what you said is exactly right. Of course, we have no way of knowing the motivation of prosecutors generally, let alone in this case. And it wouldn't really matter what it was in this case, what it is generally. But I think it's significant that in 2006 the Indiana General Assembly amended that statute so now the (B) violation carries with it a mandatory jail sentence, 60 days.

JUSTICE BREYER: I can deal with it more easily then, at least I have -- but what's worrying me now is what we're supposed to do is: ` Is the offense an offense that presents a serious risk of physical injury to another?

MR. MARSH: Yes.

JUSTICE BREYER: So we're here trying to decide whether the (A) one does.

MR. MARSH: Yes.

JUSTICE BREYER: And the answer is I don't know, and the reason I don't know is I don't know how that offense language of (A) is applied in Indiana.

MR. MARSH: If the --

JUSTICE SOTOMAYOR: Counsel, do you know if Indiana has an enhancement for convictions, sentencing

enhancement of any kind, for convictions that have an element of -- of risk of harm to others?

MR. MARSH: Your Honor, there are a number of habitual sentencing enhancements, one of which specifically relates to driving. I can't say that it is based on substantial --

JUSTICE SOTOMAYOR: So it's possible that there is a -- there's a use of the difference between the two categories that might not be implicated in this case but may lay the foundation for an enhancement later?

MR. MARSH: Yes. Now, that's a good point, Justice Sotomayor. The -- the enhancements generally in Indiana relate to previous convictions, and so I can't say for sure, but it's entirely possible that (B), (b)(1)(B), would be a predicate crime for a habitual traffic offender, which is what it's called.

JUSTICE SOTOMAYOR: In your brief, you take issue with the Government's definition of "aggressive," but would you give us yours?

MR. MARSH: Well, Your Honor --

JUSTICE SOTOMAYOR: How would you define it and on what basis?

MR. MARSH: Your Honor, the best definition of "aggressive" that I've seen was in the First Circuit

opinion in the Herrick case, which is cited in our brief, which the First Circuit refers to as forceful action, especially where intended to dominate or master.

But on general everyday language, it strikes me that when a law enforcement officer wants somebody to stop, whether they're in a vehicle or not, the fight or flee sort of comes into play. And the person who responds by going toward the police officer and resisting in that way, which is the first part of this Indiana statute, would be acting in an aggressive way. The person who flees is not acting in an aggressive way. They're trying to avoid the confrontation. They're trying to get away from the law enforcement.

JUSTICE KAGAN: Mr. Marsh, I take it that you would agree that (b)(1)(B) is a violent felony under -- under ACCA; is that right?

MR. MARSH: Your Honor, it may very well be. It certainly would satisfy the risk element, similar in risk to the -- to the Begay case. I think it would still have to be decided whether it's violent and aggressive, but it may very well be.

JUSTICE KAGAN: Well, if we think that (b)(1)(B) is a violent felony under ACCA, and we know that (b)(1)(A) and (b)(1)(B) can receive the same punishment, that they're both classed as a class D

felony, why should we make the distinction between the two under ACCA?

MR. MARSH: Your Honor, I would suggest because the Indiana General Assembly has decided in enacting this legislation that some vehicular fleeing presents a substantial risk of bodily injury to another and some doesn't, and they've drawn this distinction.

JUSTICE SCALIA: I presume that if --

JUSTICE KAGAN: But these are not nested offenses. These are not --

MR. MARSH: I'm sorry?

JUSTICE KAGAN: These are not lesser included offenses. Each has an element that the other lacks, and both are classed with -- apparently that the -- that the State thinks of them as equally severe. And if one is a violent felony under ACCA, there's an argument that the other should be treated in the exact same way.

MR. MARSH: Your Honor, I would suggest that the State doesn't treat them as equally severe. The range of punishment for a class D felony, which both of those crimes are, is all the way from zero to 3 years in prison, and the actual conduct undoubtedly is a factor in what the person's ultimate sentence will be.

JUSTICE SCALIA: And it may well be that in

deciding whether to accept a plea bargain of being guilty of (A) rather than going to trial on (B), if your client has two violent felonies already on the book, you might take -- take the plea bargain under (A) lest you run afoul of the violent felony act.

MR. MARSH: Yes, Your Honor, that's, of course, entirely possible. But, again, just as with the categorical approach the court cannot take into account the motives of prosecutors, I would suggest the motives of defendants and defense lawyers can't be taken into account, either. Further, I think it's more important that when Indiana enacted this statute, it was not thinking of ACCA and predicate crimes, I -- I assume. I don't think the legislature takes those kind of things into account.

JUSTICE ALITO: Suppose the legislature were to repeal (b)(1)(B). Would the offense for which Mr. Sykes was convicted then become an ACCA offense?

MR. MARSH: Your Honor, I -- that would be a question that would have to be decided on the basis of whether there's some basis to -- well, first of all, determine whether it's violent and aggressive. And my position would remain it's still not violent and aggressive. But even on the second part of the Begay approach, this Court has not seen anything that gives

you any basis for knowing what the risk of injury is.

JUSTICE SCALIA: I don't understand your answer to that question. I would have thought that your answer, if you're insisting on a categorical approach, would be "no," that there's nothing in -- in (3) that requires any violence at all. Just fleeing by visible or audible means, just -- just flees. That's all it says.

MR. MARSH: I'm sorry. I understood the question to be that (A) is repealed and (B) is left in place; was that --

JUSTICE ALITO: No, it's the opposite. If the aggravated offense -- you rely on the aggravated offense --

MR. MARSH: Right.

JUSTICE ALITO: -- in large part as a basis for your argument.

MR. MARSH: Right.

JUSTICE ALITO: Your argument -- one of your main arguments, as I understand it, is that -- what I'll call the simple offense doesn't qualify under ACCA because cases involving a serious risk of bodily injury fall under the aggravated category. And my question is whether a repeal of the aggravated offense would change -- would then convert the simple offense from a non-ACCA

offense to an ACCA offense. Or you could ask it a different way. If State 1 has the simple offense and the aggravated offense, State 2 has just the simple offense, is the simple offense an ACCA offense in one State and not in the other State even though the elements are exactly the same?

JUSTICE SCALIA: That's a good question.

MR. MARSH: Your Honor, the equation would be different because of the significance of the (B) offense. So that's not exactly our case. But I will adopt Justice Scalia's answer, which I think is exactly right. I -- it still would not be something that's violent or aggressive.

JUSTICE ALITO: But you're -- you're answering my question by making a totally different argument. Insofar as you're relying on the aggravated offense, the presence of the aggravated offense, I would appreciate an answer to it.

MR. MARSH: Justice Alito, the --

JUSTICE ALITO: In other words, you're saying -- maybe I haven't made myself clear. You're -- Justice Scalia's answer, which you have adopted, is that if you look at (A) by itself, forget about the aggravated offense completely; it doesn't qualify under ACCA. And that's -- that's one argument.

But your -- your other argument is that (A), the simple offense, doesn't qualify because of the presence of (B). And I'm trying to see whether that makes sense.

MR. MARSH: Yes, Justice Alito, I think it breaks down to the two parts of the Begay test. In order to be a violent felony, it has to be similar in kind and similar in degree of risk.

The existence of (B) makes clear that the degree of risk for violating (A) is not the same, because if you accept the continuum of behavior as created by the Indiana General Assembly, the person who's convicted of (A) has not created a substantial risk of bodily injury. It's --

JUSTICE SOTOMAYOR: Counsel, have you done or looked at -- not every burglary has a risk of harm to another or results in harm to another. The general definition of burglary is entering without permission and intent to commit a crime, and generically the crime doesn't have to be physical injury to others.

MR. MARSH: Right.

JUSTICE SOTOMAYOR: Yet, ACCA defines burglary as a qualifying crime of violence. It's measuring risk, not by the elements of that crime, but by something else, by some measure of incidents in which

violence might occur.

So how is that different than the Government's argument here and the question that Justice Breyer asked you, which was: It is true, potentially there's some forms of fleeing that might not pose a risk of injury, but statistically there's a large number of incidents in which violence follows.

So, how is that different than burglary? That's really my question. What -- it can't be that the elements have to pose a risk of injury, because burglary doesn't do that. So, what -- how do we measure it?

MR. MARSH: Your Honor, the inquiry, as the Court said in James, is whether the conduct encompassed by the elements of the offense presents the risk. And that's the -- the determination that the court has to consider.

It's not -- it is not necessary, and I'm not contending, that this crime is a violent felony only if every conceivable violation of the statute constitutes a risk of danger. That --

JUSTICE SOTOMAYOR: So if you're not doing that, that's my question: Where do we draw the line?

MR. MARSH: You draw it -- I'm sorry.

JUSTICE SOTOMAYOR: Where do we draw the line?

MR. MARSH: You draw the line --

JUSTICE SOTOMAYOR: I think that was what Justice Breyer was trying to ask you earlier, which is: When do we say that, as in burglary, that some risk is more likely to follow than not in a particular type of crime?

MR. MARSH: Well, the line is defined by the statute: Serious potential risk of physical injury to another.

Now, how do you make that determination? Well, the Court made clear in Chambers that empirical data is one way to do it. There isn't any here because of all the empirical data presented by the Government. It relates to vehicular fleeing as if there was one crime of vehicular fleeing, and most of it is -- is calculated based on death or injury, and that, of course, is not the category that we have here. If --

JUSTICE SCALIA: I suppose that if we agreed with you that whether it is a violent crime depends upon what other prosecutions for fleeing could have been brought. If we agree with you that (1)(A) is negligible because there are other bigger ones for which he wasn't charged, we could leave open the question of what -- what happens in a State that has only one crime for fleeing, and we would -- then we would have to confront

the question that Justice Sotomayor has asked.

But if we accept your notion that -- where you have a gradation that is adopted by the State, the lowest gradation cannot be determined to have a high percentage of bodily risk, right?

MR. MARSH: Yes, that's correct, Justice Scalia.

JUSTICE BREYER: My problem is there is arguably not here a gradation.

Suppose it only had (A). If it only had (A), for me -- I'm not saying for you -- this wouldn't be a tough case. That is to say, I can't imagine a person running away from a police in a car where there isn't a real risk to other people. He's speeding, you know. I would think -- I don't see how you get away from the policeman unless you speed, and there are going to be pedestrians. Who knows? But I think that was pretty -- at least as bad -- at least as much of a risk as burglary. So that would be the end of the case. It would be simple. At least assume that.

Now, then, however, suppose we have a State which says: But it's a worse thing to run away and create a risk. In a separate provision. It's a worse thing. All right? Then I'd say, huh, now I'm not so sure. Why didn't they charge the worse thing? This

must be reserved for cases where it isn't.

So here we have a rather weird situation. They're saying it's a different thing but not a worse thing. So now I say: Well, why didn't they charge -- Huh? Now I don't know. I don't know why they didn't charge the separate special one. I don't know what the facts are. I'm puzzled.

Now, that's your case. That's where I needed the enlightenment. So, what's the enlightenment?

MR. MARSH: Your Honor, it's not a weird situation, because the Indiana definition of the crime of vehicular fleeing is not one all-encompassing crime. It's -- they took the all-encompassing generic vehicular fleeing and divided it into five subparts, which I suggest makes it much easier to resolve the (b)(1)(A) question.

If there is no other categories, that would be Justice Scalia's point, I think, and then it would be a much harder question. And it may very well be that it would be considered a violent felony. For one thing --

JUSTICE ALITO: But isn't it still -- isn't it still an empirical question? If we were to look at all of the cases that are prosecuted under what I'll call the simple offense, we might discover that those are all cases in which there is no serious potential

risk of physical injury created because all of the risky cases are prosecuted under the aggravated label.

We might also find that there are still a great many cases that involve a serious potential risk that are prosecuted under the simple category. So the fact that there's a gradation doesn't allow us to escape the empirical issue, does it?

MR. MARSH: No, I think you're exactly right, Justice Alito. That would be possible. Empirical data could show what you have just suggested. Of course, that would be indicating that the Indiana General Assembly didn't have any rational basis for dividing the two, but the important thing here is --

JUSTICE ALITO: I wouldn't say that they didn't have a rational basis for dividing it. It would just show a pattern of prosecution and -- and plea bargaining. That's what it would show.

MR. MARSH: But the important thing here, Your Honor, is there simply is no such data before this Court. There -- there is no empirical data regarding (b)(1)(A).

JUSTICE ALITO: There never is really reliable empirical data, almost never, for any of the issues that have to be decided under the -- the catch-all, the residual clause, of ACCA. It has to be

based on basically common sense and experience, doesn't it?

MR. MARSH: Your Honor, I suggest that common sense and experience is not a reliable, predictable way of deciding these cases. You're right, there frequently is not empirical data. If there's not either empirical data that demonstrates the danger involved or a crime that -- where the danger is pretty obvious so that there would be widespread general agreement -- common sense is what has led to a lot of the conflicts in the circuits, I would suggest.

May I reserve my time, Your Honor?

CHIEF JUSTICE ROBERTS: Thank you, Mr. Marsh.

Mr. Wall.

ORAL ARGUMENT OF JEFFREY B. WALL

ON BEHALF OF THE RESPONDENT

MR. WALL: Mr. Chief Justice, and may it please the Court:

Just a very quick moment of history, I think, provides some useful background, and I'm on page 3a of the appendix to the Government's brief. Until 1998, subsection (B), which we've been talking about, was the only class D felony that involved vehicular flight in Indiana law. In 1998, the Indiana

General Assembly broke out and enacted subsection (A) so that in cases of vehicular flight prosecutors would not have to prove risk; they would just have to prove that defendant used a vehicle.

Since 1998, I have found 14 cases in the Indiana Court of Appeals, one of which is the Hape case that Justice Alito cited earlier. All of them, so far as I can tell, proceeded under (A) and not under (B). Of those 14 cases, 13 have enough facts to tell what the flight was -- of what kind; 10 involved speeding, disregarding traffic laws, or striking an officer with a vehicle. Of the other three, only one involved non-risky behavior, and even that was not a defendant who drove a short distance and then pulled over. It was a --

JUSTICE SCALIA: These were all litigated cases?

MR. WALL: Yes, Justice Scalia, these were all litigated to conviction and taken up on appeal, and the Indiana Court of Appeals addressed various legal issues --

CHIEF JUSTICE ROBERTS: Well, but that's not -- 14 isn't very many. And I assume the vast majority of these cases aren't litigated.

MR. WALL: I think that's right, Mr. Chief

Justice. The Government's point is that here we have extensive data, both empirical and otherwise, that indicates that flight as a basic offense is very dangerous. In --

CHIEF JUSTICE ROBERTS: Well, I read your brief, and I was -- I read your brief and was surprised that when you're -- the list -- one of the things you talk about to show that is media reports. You usually have a more concrete basis for -- for speculation than media reports.

MR. WALL: Mr. Chief Justice, if that is all we had put forward, I might agree with you, but we also put forward extensive statistical data.

My point is just that Indiana is typical. It's dangerous everywhere else. It's four times as dangerous as arson. It's more dangerous than household burglary. There's nothing different about Indiana. If one looks through these cases, these flights in Indiana are typically quite dangerous.

JUSTICE SCALIA: Suppose you have a State that has a separate crime for trespassing, criminal trespass. And you're saying that if -- if you could show that a large number of cases that were brought under criminal trespass in fact could have been prosecuted under burglary, then criminal trespass would

qualify as a -- as a violent felony. That doesn't seem -- that doesn't seem to me right.

MR. WALL: Justice Scalia, I thought --

JUSTICE SCALIA: Just because prosecutors make that choice, that doesn't establish that the elements of the crime, which is what we focus on in deciding whether it's a violent felony, fill the bill.

MR. WALL: That's right. This Court looks at the conduct encompassed by the elements in a typical case. And in a typical case of vehicular flight, what we have, according to the data, is someone fleeing police at an average of 25 miles an hour over the speed limit; someone who is, in a typical case, young, male, unlicensed, under the influence of alcohol; and who places the lives of other motorists, pedestrians, and police in harm's way.

Your approach to ACCA, Justice Scalia, has been to look at the conduct encompassed by the elements and ask whether the risk from that conduct is at least as great as the -- the least risky enumerated offense. And here --

JUSTICE SOTOMAYOR: That ignores the in-kind requirement of Begay, because you seem to be confusing the risk of violence with the in-kind inquiry, and that's where I'm trying -- I'd like you to concentrate a

little bit on, which is in burglary the defendant is breaking into, generally, a place and going without permission, and -- with an intent to commit a crime.

How is that comparable to merely not stopping when a police officer tells you not to stop? How is that an in-kind --

MR. WALL: Justice Sotomayor, it's absolutely true, there are two parts to the test, and we've been talking about the first risk. On the second prong, the purposeful, violent, or aggressive character of the conduct -- here I think there are three distinct things that make it purposeful, violent, and aggressive.

First, you have the defiance of the officer's order, which can cause injury at the scene. It has in some Indiana cases, but at least called the officer to give chase.

Second, you have the very real prospect --

JUSTICE SOTOMAYOR: What you're doing is saying I'm not -- you're not even saying I'm not stopping; you're just driving away.

MR. WALL: Well, yes, but you are driving --

JUSTICE SOTOMAYOR: Now, how is that aggressive --

MR. WALL: You're driving away in response to an officer's command to stop. You're calling the

officer to give chase. You're -- you're -- pursuit is likely. And even when there isn't pursuit, these offenders drive typically very recklessly, and then you've got the confrontation when the officers have to --

JUSTICE SOTOMAYOR: But that's the risk of --

MR. WALL: -- terminate.

JUSTICE SOTOMAYOR: That -- that is all the risk question, and you're confusing the police actions with the defendant's, because you're talking about the defendant responding to a police pursuit. So what -- what is in the act of the crime that makes it in-kind to burglary?

MR. WALL: So, let me analogize --

JUSTICE SOTOMAYOR: I concentrate on burglary because the others don't fit.

MR. WALL: No, let me concentrate on burglary, then, and analogize it to what this Court said in James. It said the risk of attempted burglary --

JUSTICE SOTOMAYOR: James -- James predated Begay. So you've got --

MR. WALL: That's right, but I -- the Court has talked about -- even in Chambers, about the risk of a violent confrontation with law enforcement officials,

and it's done that under the Begay part of the test. And whereas that confrontation is only possible with burglary, it's necessary with this crime. It requires that an officer order you to stop and that you flee.

So that -- that confrontation, which is only a possibility with burglary or attempted burglary, is elevated to a certainty with this offense.

JUSTICE KAGAN: Well, Mr. Wall, wouldn't that suggest that if I just ran from a police officer, it would be a violent felony under ACCA?

MR. WALL: I think it -- it would suggest that, Justice Kagan, but I think flight on foot is unlikely to satisfy the risk part of the test. I think certainly this case is much easier on the -- the James part of this test. I think the -- the flight in a vehicle poses risks, very real risks, to other motorists and pedestrians and police that flight on foot doesn't pose, although you'd still have the confrontation when the flight on foot was terminated. So I think some of the arguments would translate. You're right. I think there would be more difficult questions, though, on the risk prong. This is a much easier case.

JUSTICE SCALIA: Do -- do words mean nothing? I mean, we're talking about a violent felony. That's what the Federal law requires. And -- and you

want us to hold that failing to stop when a police officer tells you to stop is a violent felony. That -- that seems to me a -- a big leap. I mean, words have some meaning, and Congress focused on violent felonies.

MR. WALL: Justice Scalia, words do have meaning, but the words here are very broad: "serious potential risk of physical injury to others." And as you yourself have recognized in -- in multiple opinions, what those words call for is a comparison of risk between an offense and ACCA's enumerated crimes.

This offense, simply put, is more risky. It's four times as risky as arson in terms of injuries and fatalities.

CHIEF JUSTICE ROBERTS: Well, one of the --

MR. WALL: It's more risky than household burglary.

CHIEF JUSTICE ROBERTS: Another word is "aggressive" in Begay, and that's where I have a little difficulty with your argument. It seems to me, this is the exact opposite of aggressive. He's running away. Certainly, the other option is to turn and confront, and he doesn't want to. There's nothing aggressive about running away.

MR. WALL: Well, there is, Mr. Chief Justice, when you're doing it in a vehicle, and

typically at high speeds. So, in Chambers --

CHIEF JUSTICE ROBERTS: Well, that's the risk of violence, I understand that, and purposeful, which I guess everything is. But those are the three words: "purposeful, violent, and aggressive." I'll give you purposeful, I'll give you violent, but aggressive?

MR. WALL: Mr. Chief Justice, if you give me those two, I think we're home free, because this Court said --

(Laughter.)

MR. WALL: -- in Chambers --

CHIEF JUSTICE ROBERTS: I think you're two-thirds of the way home free.

(Laughter.)

MR. WALL: I'll take it, and let's work on the last third. So the -- what this Court said in Chambers is not all attempts to evade authorities are of the same stripe. So, it contrasted escape from prison with failure to report. Failure to report, you could do at home on your couch; you could just fail to show up. And the Court said: Look, that's passive; it's a crime of inaction.

This is not that. It's not sitting at home on one's couch. This is quintessentially a crime of

action.

CHIEF JUSTICE ROBERTS: There's a difference. The opposite of passive is active. It's not aggressive.

MR. WALL: Well, but --

CHIEF JUSTICE ROBERTS: This is active. He's running away, but --

MR. WALL: I think --

CHIEF JUSTICE ROBERTS: What's the aggression?

MR. WALL: But it's very -- it's hard to see what the difference would be between this and escape from custody. And this Court clearly indicated in -- in Chambers that escape from custody was different from failure to report under the statute in front of it. And I think this is as dangerous, maybe even more dangerous than escape from custody.

If the Court were going to say that all running away could not be aggressive within the meaning of that word for Begay purposes, so too escape from a maximum security Federal prison, which in some sense is just running away, but it is extremely aggressive, and it's extremely risky to others.

JUSTICE KAGAN: Mr. Wall, do you think that speeding or drag racing qualifies under your

understanding of the test?

MR. WALL: Justice Kagan, that's a difficult question. I don't know that I've seen any attempt to fit that offense in under the ACCA. I think that drag racing, where you're talking about speeds of 150, 160, 170 miles an hour, might qualify, but I haven't seen any cases like that.

JUSTICE SCALIA: What about speeding, just -- you know, you're going 15 miles over the speed limit?

MR. WALL: I -- again, I --

JUSTICE SCALIA: Is that a violent felony?

MR. WALL: Justice Scalia, I think then we'd have a serious question about the first part of the analysis and the -- the risk test. I mean, 10, 15 miles over -- I mean, speeding as a generic offense is likely to -- I mean, it encompasses categorically all speeding offenses, many of which are, you know, not that -- not likely to pose a serious risk to others. So I -- I -- we'd have to look at the -- the data. What we do have here is data that says this offense is four times as risky as the enumerated offense of arson. So I -- I -- speeding would be a difficult case. So far as I know, we -- the Government's never tried to make the case.

JUSTICE ALITO: Is speeding a felony?

MR. WALL: Not as far as I know, not the

basic offense. Now, whether in a Begay-type sense you might have some recidivism enhancement under State law that would get you there, I don't know. But I -- again, I haven't seen any case that involved that.

JUSTICE BREYER: Am I right about -- when you replied to Justice Scalia, I thought that he had said that we were dealing with a statute, and you seemed to agree, that said it is a crime to flee a policeman after being ordered to stop. But I thought we were dealing with a statute that says it is a crime to flee a policeman after being ordered to stop, in a vehicle.

MR. WALL: That's right. That's right. That's the offense here.

JUSTICE BREYER: And so you're -- okay.

MR. WALL: It's the vehicular flight offense. And one -- you know, I will take one issue with -- with -- you know, what my friend on the other side has said, which is (A) and (B) are not tiered. They're not greater and lesser offenses under State law.

JUSTICE KAGAN: But, Mr. Wall, suppose they were. I understand your point that they're not, and you might be right about that. But let's suppose that they were. Let's suppose you had a three-tier set-up. One was simple flight; one was flight that causes risk of injury; one that is a flight that causes injury. And

let's even say that the simple flight -- no, let's -- let's call them all felonies but different classes of felonies.

What would happen in that case? Would you still be here saying that the simple flight felony is a violent crime?

MR. WALL: Yes. It's a tougher case, but we would be here saying that, because when you're looking at an offense categorically -- for instance, arson -- you've got to look at all fires, all intentionally set fires, the ones that don't hurt anybody, the ones that do, and the ones that kill people, even though the fires that kill people will be prosecutable in most jurisdictions as a greater offense, like felony murder. And so when you're looking at it categorically, you've got to look at all of the conduct in that category, even conduct that may be prosecutable under some greater offense.

I think, you know, the other side sort of relies on this assumption that all conduct which might satisfy the greater will necessarily be prosecuted under the greater. And as a legal matter, it's included within the lesser, and as a factual matter, it's just not true that it always gets prosecuted under that greater offense.

So it's -- it would be a tougher case. It would make our case more difficult, but I think legally and factually the Government's answer would be the same.

JUSTICE KAGAN: I -- I asked my clerk to just do a survey of the States, and he came up with -- and I'm sure that this is rough -- but that 46 of the States have these tiered systems. Now, there may be some questions as to some of them, like you've raised some questions about Indiana's, but that 46 States essentially conceive of this as two different kinds of conduct, one which is the violent kind and the other which is the not violent crime.

MR. WALL: Well, my State law research is a little different from your clerk's. I've got 37 States and D.C. But the -- the point is that under the nested statutes, the aggravator isn't always like this one, risk. Sometimes it's, as in Indiana, injury or death. And where you're talking about actual injury or death, those aggravators far outstrip the level of potential risk that ACCA requires.

So I don't think in those States Petitioner would give an argument that those aggravators would affect at all the analysis of the basic offense. There are a handful of States that, unlike Indiana, have as an aggravator risk, though even some of those States treat

the basic offense as a felony, which is I think a judgment by the State that, even in the basic case, this is risky conduct, deserving of severe punishment under State law. So, you know, there are nested statutes, but --

JUSTICE SCALIA: Not necessarily risky. Conduct that shows disrespect for the law.

MR. WALL: Justice Scalia, I mean I -- again, I think it is significant that in 1998 the General Assembly broke this out as a separate subsection and said: We're not even going to require prosecutors to prove risk. I think that represents a judgment by the State that the conduct is risky on a typical basis: We just want the State to prove you used a vehicle.

JUSTICE SCALIA: Or even if it isn't risky, you should not thumb your nose at the police when they tell you to stop.

MR. WALL: Well, that's right, and the reason --

JUSTICE SCALIA: Risky or not.

MR. WALL: The reason you shouldn't, Justice Scalia, is because that's the kind of purposeful, violent, and aggressive conduct the State wants to deter by treating it as a felony. But I -- I mean, I -- whether one looks at the risk prong and the data and the

cases in Indiana or elsewhere, or whether one looks at the character of the conduct, this offense is just different in both degree and kind from the offenses that this Court has said fall outside of ACCA's residual clause.

It's much more like escape from custody. It's much more like the enumerated offenses. Indeed, the risk of confrontation is certain. I mean, I -- it's important, I think, that -- I mean, I -- these flights are not calm affairs. They're dangerous events. The average speed that the offender is traveling nationwide is 25 miles an hour over the speed limit. This is someone who on average is young, unlicensed, influenced by alcohol --

CHIEF JUSTICE ROBERTS: I thought there was -- I don't know where -- I don't remember where it was from. I thought there was a development of best police practices that you don't just chase people. You know, if they're going 30 miles an hour over the speed limit through a school zone, that doesn't mean the police officer should do that. You know, you call ahead, they put these strips on the road, whatever.

MR. WALL: Mr. Chief Justice, that's right. I think police agencies have been struggling with this question, which is why there's a lot of data on police

pursuits, frankly, especially in the last 10 or 15 years. I think some of them are becoming more restrictive, and so the data picks up pursuits. It doesn't pick up all flights. And I think if there were sound evidence that when people were not pursued, they were actually driving at low speeds and safely, that would affect the data, though not so much that it would move it outside of similarity to the enumerated offenses.

But I think the -- the data is pretty good in indicating that the typical flight is -- really does pose a serious potential risk of physical injury to others, a risk that materializes more often than with other crimes that Congress clearly intended to fall within the ACCA.

JUSTICE ALITO: Could I ask you this: If a person is convicted of vehicular flight that causes death, is that aggressive conduct?

MR. WALL: Yes, the Government would say it is, Justice Alito.

JUSTICE ALITO: Is the conduct there any different from the conduct when death doesn't result?

MR. WALL: No, Justice Alito. The Government's answer is that categorically the behavior is aggressive and that in some cases it will result in

injury or death and in some it will not, but in all cases it carries that potential.

CHIEF JUSTICE ROBERTS: Doesn't whether it's aggressive or not depend upon how it happened? I mean, it could be -- I mean, the flight puts in place the potential for -- for violence, I agree with that; but if somebody just, you know, jumps out between two cars while the fellow's fleeing, how has his conduct changed to aggressive?

MR. WALL: Mr. Chief --

CHIEF JUSTICE ROBERTS: It's not like he -- it's not like he's aiming for the guy. I mean, it's putting it in a dangerous situation. It's purposeful. Again, I'll give you violent in the sense that it has that potential. But he didn't want to hit the -- the person.

MR. WALL: Mr. Chief Justice --

CHIEF JUSTICE ROBERTS: It's not aggression against the person.

MR. WALL: There's no question that, on a case by case basis, you could flee in a way that was not very risky, that was not very violent, or not very aggressive. And if this Court went on a case-by-case basis, then we'd look at the conduct here, and the Government would still win, because this is the typical

case.

JUSTICE SCALIA: But he's saying even when it's risky, it's not aggressive.

MR. WALL: And I -- my --

JUSTICE SCALIA: You can be risky and not aggressive, can't you?

MR. WALL: Yes, on a case-by-case basis. But, categorically, which is what this Court looks at, the conduct encompassed by the elements in the ordinary case -- in the ordinary case -- the character of the conduct is aggressive.

CHIEF JUSTICE ROBERTS: Who's he aggressing against? When someone sees the police and says I'm getting out of here and drives down the highway, say, at 80 miles an hour, you know, 25 miles above the speed limit, who is he -- I'm sure it's not the right verb, but who is he aggressing against?

MR. WALL: Well, I don't know that he is aggressing against anyone, in the same way that if I recklessly I fire a gun into a large crowd of people, you know, I haven't aggressed against anyone in particular. He's aggressed against anyone who strays into his field of flight and who could be injured by what is typically a high-speed flight and pursuit. So I don't -- there is no specific target, but that will be

true of many of the crimes that are violent felonies, that the -- the aggressive nature --

CHIEF JUSTICE ROBERTS: Well, no. It's not that --

MR. WALL: -- of the conduct is directed generally.

CHIEF JUSTICE ROBERTS: -- there's no specific target. There's no target. What this guy hopes is that nobody gets in his way.

MR. WALL: Well, so, too, with the burglar, who hopes that no one will come home; maybe even the arsonist, who hopes no one is in the house; or the extortionist, who hopes someone will pay, so he won't have to use violence.

JUSTICE SCALIA: But they're mentioned; they're mentioned. They're mentioned, and you're trying to get this in under the residual clause.

MR. WALL: That's right, Justice Scalia, a residual clause that, as you yourself have recognized, is extremely broadly worded. It -- it abstracts out as the quality of the enumerated offenses that they create a serious potential risk of physical injury to others. And I can't find any metric along which flight doesn't do that, whether one looks through the cases, media reports, the statistical data, whatever one -- Indiana,

nationally -- whatever standard or metric one uses, this is an extremely risky offense to others.

And I, you know -- so it's very difficult to figure out what test, what interpretation of that language would exclude this from -- from ACCA.

JUSTICE BREYER: Suppose you have one of 36 States which treat this -- treat the general offense as a misdemeanor and then make it a felony if you put somebody at risk. Just reading that statute, you'd think those 36 States, when they have the general offense, do something where the guy acted pretty trivially; and where it's a felony, he actually put somebody at risk, sped off -- wouldn't that be your normal instinct in just guessing from the -- from the language?

MR. WALL: Justice Breyer, the States --

JUSTICE BREYER: How are we supposed to treat those, where there's a misdemeanor --

MR. WALL: The States --

JUSTICE BREYER: In your opinion, it's just a misdemeanor, we also treat it the same way; say it's a violent felony?

MR. WALL: The States treat it differently. Some, as Indiana --

JUSTICE BREYER: All right. Then that's

actually my question. Are we supposed to, in this Federal statute, try to track whether it's a misdemeanor, what the language is? We're going to have a nightmare of a Federal law for States to -- for judges to figure this out. I mean, every little variation in thousands and thousands of possible variations could make a difference as to whether it's violent or not, depending on data which no one will have.

MR. WALL: Justice Breyer, I don't think so. If the Court were to affirm here, what that would mean is that the offense of flight is a violent felony insofar as you have a predicate conviction under a State statute where it's been punishable by up to a year, and so it could qualify for ACCA coverage.

Now, some State convictions will have been treated as misdemeanors and won't be eligible for ACCA, but to the extent a State treats it as a felony, it's risky enough to satisfy the residual clause. Now, if the Court treats (A) and (B) as what they are not, which is greater or lesser, then, yes, I think there will be problems with various State statutes, as Justice Kagan pointed out, and this Court may have to clear it up down the road.

But if it treats this basic offense as what it is, not a greater or lesser, but alternative means of

proving a single offense that is risky, that would, I think, take care of all flight cases going forward.

JUSTICE KAGAN: Well, on this question of whether this statute is greater or lesser, it's greater or lesser if you just understand (b)(1)(A) as confined to vehicular flight. In other words, if one looks only at vehicular flight, then (b)(1)(A) and (b)(1)(B) are indeed greater or lesser offenses.

MR. WALL: Yes, Justice Kagan, if you're looking only -- I take it you're looking only at the vehicle prong of (B), but the test in Schmuck is whether it's impossible to -- to commit the greater without committing the lesser. It's not impossible to commit (B), because it does have the two other prongs, and I think --

JUSTICE KAGAN: Well, do you think that if I flee in a vehicle, I could be prosecuted under both and receive sentences under both?

MR. WALL: No, I don't think so, because I think the -- there is no evidence -- no case in Indiana that I'm aware of. There's no evidence that the General Assembly intended these to be multiple punishments for a single incident. They're alternative means of proving a single offense. The State has always treated them that way, so far as I can tell. I have not seen -- I've seen

prosecutions since 1998 that were all under (A). I haven't seen anything that went under (A) and (B) and tried to get multiple punishments --

JUSTICE SOTOMAYOR: Wait a minute.

MR. WALL: -- and I think that would be a serious problem.

JUSTICE SOTOMAYOR: I'm a little confused by what you said and what point you're making. You don't think that (B) is a lesser included of (A)? Is that -- no, that (A) is a lesser included of (B)?

MR. WALL: Your Honor, the Government does not think that (A) is a lesser included of (B).

JUSTICE SOTOMAYOR: You can't commit (B) without committing (A) first. (B) has just one additional element, but all of the elements of (A) are part of the elements of (B). So, how can it not be a lesser included?

MR. WALL: Well, the element of (B) that's different, Justice Sotomayor, is the "while committing any offense described in subsection (a)." So you can be resisting an officer or you can be obstructing the service of process and you can endanger someone in various ways, including with a vehicle, and you will have violated (B), and you can be prosecuted for that, and there are cases in Indiana like that. And you have

not -- you have not been fleeing in a vehicle from an officer at any point, so you haven't violated (A).

So the existence of the other prong there -- that's what I was trying to get into with Justice Kagan -- means that this is not a greater or lesser under Schmuck.

JUSTICE KAGAN: But as a vehicular flight only, it would be greater or lesser.

MR. WALL: If you divided up the prongs under Schmuck, but I think the Schmuck -- what follows logically from that test is that you look at the entire offense and ask whether it's possible to commit it without committing the lesser, and that test is not satisfied here. I don't think you carve it up prong by prong.

JUSTICE SCALIA: I'm -- this is greater or lesser for purposes of what? Double jeopardy?

MR. WALL: No, it's greater or lesser for purposes of Petitioner's argument that you should assume that every risky flight gets prosecuted under (B), and hence (A) is a non-risky offense. And that argument fails for multiple reasons, one of which I was trying to spin out. It's not even true that this is greater or lesser.

JUSTICE SCALIA: I just don't follow that

argument. I mean, it -- it seems to me that, yes, you could -- you could run afoul of (B) by committing an offense under subsection little (a) in some other ways, but if you run afoul of (B) by committing the offense of -- of flight from a law enforcement officer, it seems to me that that automatically includes (A).

MR. WALL: Well, except that there are two alternative means of proving the same offense under State law. They have the same State law penalties, so the prosecutors can go under (A) or they can go under (B). And as far as I can tell, for the last, say, 13 years, they've been going under -- they've been going under (A).

So it's not -- Justice Scalia, it's not -- there are aggravators in this statute for injury or death. They're the ones that are in (2) and (3), the class C and class B felonies. But this is not a greater or lesser. It's -- they're alternative means. I think only if you got -- set that aside would you get to the sort of Schmuck analysis that I was going through with -- with Justice Kagan.

And I think one of the important things to recognize about this offense is that, you know, in the -- 50 percent of these offenders are ultimately charged with a violation that's unrelated to their

flight, a serious felony unrelated to their flight.

And the reason I think that's important is because what you will look -- the reason that they're traveling at such high speeds, the reason they're evading officers, the reason the typical case is not someone just going a couple blocks and stopping, is because they've got drugs in the car or guns, they have parole violations or outstanding warrants. It is the background against which I think you have to assess the character of the -- of the conduct here. And whether you're looking at it under risk or under the character of the conduct, the Government submits that it easily satisfies the residual clause.

If there are no further questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Wall.

Mr. Marsh, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM E. MARSH

ON BEHALF OF THE PETITIONER

MR. MARSH: Thank you, Mr. Chief Justice.

I would suggest that it's helpful to start to look at the in-kind part of the Begay test on a more general level than we've been discussing.

JUSTICE SOTOMAYOR: Could you succinctly tell me how this is any less purposeful, aggressive, or

violent than escape from custody? What's your best answer to why this is just not identical to escape, which is a fleeing-from situation just as this is.

MR. MARSH: Justice Sotomayor, the basic distinction is that the person who's charged with escape, assuming that escape means escape from a secure institution or from a person, is that the person is in custody, and it takes, in the ordinary case, aggression and violence to get out of the custody of that person. The person who is fleeing is trying to avoid being taken.

JUSTICE SOTOMAYOR: Well, here an officer has told you to stop. They're trying to effect custody. And I don't know what the aggression or violence is, other than, you know, breaking a window, doing something. It doesn't require the escape -- that you actually injure someone to get out. It's just that you run away.

MR. MARSH: I think the phrase that you just used is the distinction that I was referring to. The person who is fleeing is trying to avoid being in custody. They're acting in a -- instead of going toward the officer and resisting, they're going away from the officer. The person who is in custody has to use some kind of force, and in Johnson, of course the -- this

Court referred to violent as the --

JUSTICE ALITO: That's not true. There are a lot -- you can -- there are prison escapes all the time where it's done through subterfuge.

MR. MARSH: That's -- that's true, Justice Alito, but as the Court held in James, finding an example of a case that would not be violent does not solve the ordinary case. The ordinary case, I would suggest, requires something more than that.

CHIEF JUSTICE ROBERTS: Well, it's, for me, anyway, an important question. I'll -- I'm not sure the ordinary case does. I assume the ordinary prison escape is -- I don't know -- over the wall, under the tunnel or, you know, while the guard's looking a different way, or some -- I don't know that it's typical that when the guard is there, you say now's my chance. The typical case doesn't involve aggression.

MR. MARSH: Of course, the ordinary case or the typical case, Mr. Chief Justice, is that the court needs to look at the conduct encompassed by the elements of the statute, and so we would have to look at exactly what the statute requires.

The circuit courts have been very divided on escape. In my circuit, the Seventh Circuit, the Federal statute, 751, has been held not to be -- which is a

general escape statute -- not to be a violent felony. But, again, the Court talks about the ordinary case in the James case for the purpose of disabusing the idea that one can't get out from under the violent felony designation just by coming up with a hypothetical case or an example where it can be done without -- without violence.

Here, I would suggest that counsel has just created for the Court some kind of a hypothetical case to define the typical or ordinary case. This Court has never done that, and this Court said in James that it's important to stick to the conduct encompassed by the elements of the offense, because if we start factoring in other kinds of conduct, as several of the things which have been mentioned by counsel for the Government, that begins to raise Apprendi problems, which is another whole issue. But the Court said in James -- and I would acknowledge is the law -- that so long as the determination as to whether there's a serious potential risk of physical injury is made by focusing on the conduct encompassed by the elements of the offense, then there's not an Apprendi problem.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

MR. MARSH: Thank you.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

A

above-entitled 1:11 54:2
absolutely 28:8
abstracts 43:20
ACCA 13:16,23 14:2,16 15:13 15:18 16:21 17:1,4,25 18:22 23:25 27:17 30:10 34:4 37:20 40:15 44:5 45:14,16
ACCA's 31:10 39:4
accept 15:1 18:11 21:2
account 15:8,11 15:15
acknowledge 53:18
act 3:14 7:8 15:5 29:13
acted 44:11
acting 13:10,11 51:22
action 13:3 33:1
actions 29:10
active 33:3,6
actual 14:23 37:18
additional 47:15
address 5:2
addressed 25:20
adopt 17:11
adopted 17:22 21:3
affairs 39:10
affect 37:23 40:7
affirm 45:10
afoul 15:5 49:2,4
agencies 39:24
aggravated 16:13,13,23,24 17:3,16,17,24 23:2
aggravator 37:16,25
aggravators 37:19,22 49:15
aggressed 42:21 42:22
aggressing 42:12 42:17,19
aggression 33:10 41:18 51:8,14 52:17
aggressive 12:19 12:25 13:10,11 13:21 15:22,24 17:13 28:10,12 28:23 31:18,20 31:22 32:5,7 33:4,19,22 38:23 40:18,25 41:4,9,23 42:3 42:6,11 43:2 50:25
agree 13:15 20:21 26:12 35:8 41:6
agreed 20:18
agreement 24:10
ahead 39:21
aiming 41:12
alcohol 27:14 39:14
Alito 4:17 6:18 6:25 7:1,4,17 7:21,23 8:10 15:16 16:12,16 16:19 17:14,19 17:20 18:5 22:21 23:9,14 23:22 25:7 34:24 40:16,20 40:21,23 52:2,6
allow 23:6
all-encompassi... 22:12,13
alternative 45:25 46:23 49:8,18
amended 11:9
ammunition 3:15
analogize 29:15 29:19
analysis 34:14 37:23 49:20
answer 5:14 8:23 11:20 16:3,4 17:11,18,22 37:3 40:24 51:2
answering 17:15
anybody 4:10 36:11
anyway 52:11
apparently 10:25 14:14
appeal 25:19
Appeals 5:6,17 6:12,16 7:18 25:6,20
APPEARANC... 1:14
appendix 24:22
applied 8:21 11:22
apply 8:22
appreciate 17:18
Apprendi 53:16 53:22
approach 7:16 8:13 15:8,25 16:4 27:17
arguably 21:9
argument 1:12 2:2,5,8 3:3,7,10 4:19 5:2 6:19 14:17 16:17,19 17:16,25 18:1 19:3 24:16 31:19 37:22 48:19,21 49:1 50:18
arguments 16:20 30:20
Arizona 9:3,11
Armed 3:14 7:7
arson 26:16 31:12 34:21 36:9
arsonist 43:12
aside 49:19
asked 19:4 21:1 37:4
Assembly 11:8 14:4 18:12 23:12 25:1 38:10 46:22
assess 50:9
Assistant 1:17
assume 4:8 15:13 21:20 25:23 48:19 52:12
assuming 51:6
assumption 36:20
attempt 34:3
attempted 29:20 30:6
attempts 32:18
audible 16:7
authorities 32:18
automatically 49:6
average 27:12 39:11,13
avoid 13:12 51:10,21
aware 46:21
a.m 1:13 3:2 54:1

B

b 1:17 2:6 4:2,2 10:14,17,24 11:9 12:15,16 12:16 13:15,15 13:23,23,24,24 13:24 15:2,17 15:17 16:10 17:9 18:3,9 22:15 23:21 24:16,23 25:8 35:18 45:19 46:5,7,7,7,11 46:14 47:2,9,10 47:12,13,14,16 47:18,24 48:20 49:2,4,11,17
background 24:21 50:9
bad 21:18
bargain 10:2 15:1,4
bargaining 23:17
based 12:6 20:16 24:1
basic 26:3 35:1 37:23 38:1,2 45:24 51:4
basically 24:1
basis 12:23 15:20,21 16:1 16:16 23:12,15 26:9 38:13 41:21,24 42:7
becoming 40:2
Begay 13:19 15:24 18:6 27:23 29:22 30:1 31:18 33:20 50:22
Begay-type 35:1
begins 53:16
behalf 1:15,19 2:4,7,10 3:11 24:17 50:19
behavior 3:20 18:11 25:13 40:24
believe 8:10
bench 3:6
best 12:24 39:17 51:1

big 31:3
bigger 20:22
bill 27:7
bit 28:1
blocks 50:6
bodily 4:3,4,5,9 4:16 9:21 10:20 14:6 16:22 18:14 21:5
book 15:3
breaking 28:2 51:15
breaks 18:6
Breyer 8:17 9:10 9:14,18 10:12 10:17,22 11:2 11:11,17,20 19:4 20:3 21:8 35:5,14 44:6,16 44:17,20,25 45:9
brief 4:23 12:18 13:2 24:22 26:6 26:6
broad 7:6 31:6
broadly 43:20
broke 25:1 38:10
brought 20:21 26:23
burglar 43:10
burglary 18:16 18:18,23 19:8 19:10 20:4 21:19 26:17,25 28:1 29:14,17 29:19,20 30:3,6 30:6 31:16

C

C 2:1 3:1 49:17
calculated 20:16
call 16:21 22:24 31:9 36:2 39:21
called 7:18 12:17 28:15
calling 28:25
calm 39:10
car 21:13 50:7
care 46:2
Career 3:14 7:7
carries 11:9 41:2
cars 41:7
carve 48:14
case 3:4,17 5:4,5 5:21 6:21 7:10 7:18 8:15 10:3 11:6,7 12:10 13:1,19 17:10 21:12,19 22:8 25:6 27:10,10 27:13 30:14,22 34:22,23 35:4 36:4,7 37:1,2 38:2 41:21,21 42:1,10,10 46:20 50:5 51:8 52:7,8,8,12,17 52:18,19 53:2,3 53:5,9,10,24 54:1
cases 8:21,22 9:24 16:22 22:1 22:23,25 23:2,4 24:5 25:2,5,9 25:17,24 26:18 26:23 28:15 34:7 39:1 40:25 41:2 43:24 46:2 47:25
case-by-case 41:23 42:7
catch-all 23:25
categorical 7:16 8:9,13 15:8 16:4
categorically 8:16,18 34:16 36:9,15 40:24 42:8
categories 3:19 12:9 22:17
category 4:4,5 7:6 9:7,20,25 10:4 16:23 20:17 23:5 36:16
cause 28:14
causes 4:3,5,6 35:24,25 40:17
certain 39:8
certainly 13:18 30:14 31:21
certainty 30:7
Chambers 20:11 29:24 32:1,12 32:18 33:14
chance 52:16
change 16:24
changed 41:8
character 28:10 39:2 42:10 50:10,11
charge 6:20 10:5 10:23 21:25 22:4,6
charged 7:15,15 10:4 20:23 49:25 51:5
charging 10:24
chase 7:25 28:16 29:1 39:18
Chief 3:3,12 5:11 5:13 24:13,18 25:22,25 26:5 26:11 31:14,17 31:24 32:2,8,13 33:2,6,9 39:15 39:23 41:3,10 41:11,17,18 42:12 43:3,7 50:16,20 52:10 52:19 53:23
choice 27:5
circuit 12:25 13:2 52:23,24,24
circuits 24:11
cited 13:1 25:7
class 3:24 10:14 10:18 13:25 14:21 24:24 49:17,17
classed 13:25 14:14
classes 36:2
classification 9:4
clause 23:25 39:5 43:17,19 45:18 50:13
clear 7:10 17:21 18:9 20:11 45:22
clearly 33:13 40:14
clerk 37:4
clerk's 37:14
client 6:21 15:3
come 9:24 43:11
comes 13:7
coming 53:5
command 28:25
commit 18:19 28:3 46:12,13 47:13 48:12
committing 46:13 47:14,19 48:13 49:2,4
common 24:1,4 24:10
commonsense 4:21
comparable 28:4
comparison 31:9
completely 17:24
conceivable 19:19
conceive 37:10
concentrate 27:25 29:16,18
concrete 26:9
conduct 4:12,15 4:16 5:7 7:13 9:20 14:23 19:13 27:9,18 27:19 28:11 36:16,17,20 37:11 38:3,7,13 38:23 39:2 40:18,21,22 41:8,24 42:9,11 43:5 50:10,12 52:20 53:12,14 53:21
confined 46:5
conflicts 24:11
confront 20:25 31:21
confrontation 13:12 29:4,25 30:2,5,18 39:8
confused 47:7
confusing 27:23 29:10
Congress 31:4 40:14
consider 19:16
considered 22:20
considers 4:12
consistently 8:14
constitutes 19:19
contending 19:18
continuum 3:20 18:11
contrasted 32:19
convert 16:25
convicted 3:22 6:21 7:5 8:8,10 11:3 15:18 18:13 40:17
conviction 4:9 25:19 45:12
convictions 3:16 11:25 12:1,14 45:15
correct 7:3 21:6
couch 32:21,25

counsel 11:24 18:15 53:8,15 53:23
couple 50:6
course 4:19 8:6,8 8:12 9:17 10:7 11:4 15:7 20:17 23:11 51:25 52:18
court 1:1,12 3:13 4:7,12 5:4,6,6 5:17,22,25 6:12 6:16 7:11,18 8:14,14,16 15:8 15:25 19:13,15 20:11 23:20 24:19 25:6,20 27:8 29:19,23 32:9,17,22 33:13,18 39:4 41:23 42:8 45:10,19,22 52:1,6,19 53:2 53:9,10,11,17
courts 52:23
coverage 45:14
create 6:7 21:23 43:21
created 6:22 18:12,13 23:1 53:9
creates 4:3,16 7:11 8:4 10:20
creating 9:5
crime 3:21 4:25 7:6,11 12:16 18:19,19,23,24 19:18 20:6,15 20:19,24 22:11 22:12 24:8 26:21 27:6 28:3 29:13 30:3 32:22,25 35:8 35:10 36:6 37:12
crimes 14:22 15:13 31:10 40:14 43:1
criminal 3:14 7:7 26:21,24,25
crowd 42:20
custody 33:13,14 33:17 39:6 51:1 51:8,9,13,22 51:24

D

D 3:1 10:14,18 13:25 14:21 24:24
danger 19:20 24:7,8
dangerous 26:4 26:15,16,16,19 33:16,16 39:10 41:13
data 20:12,13 23:10,19,20,23 24:6,7 26:2,13 27:11 34:19,20 38:25 39:25 40:3,7,10 43:25 45:8
days 11:10
dead 5:19
deal 9:3 11:11
dealing 35:7,10
death 3:23 4:6 20:16 37:17,18 40:18,22 41:1 49:16
decide 11:18
decided 13:20 14:4 15:20 23:24
deciding 15:1 24:5 27:7
defendant 4:23 6:13 8:2 10:3 25:4,13 28:1 29:12
defendants 15:10
defendant's 7:25 29:11
defense 15:10
defiance 28:13
define 12:22 53:10
defined 20:7
defines 18:22
definition 12:19 12:24 18:18 22:11
degree 18:8,10 39:3
demonstrates 24:7
Department 1:18
depend 41:4
depending 45:8
depends 20:19
described 47:20
deserving 38:3
designation 53:5
deter 38:23
determination 19:15 20:10 53:19
determine 7:11 15:22
determined 21:4
development 39:17
difference 9:11 10:25 12:8 33:3 33:12 45:7
different 17:2,9 17:15 19:2,8 22:3 26:17 33:14 36:2 37:10,14 39:3 40:22 47:19 52:14
differently 44:23
difficult 30:21 34:2,22 37:2 44:3
difficulty 31:19
directed 43:5
disabusing 53:3
discover 22:24
discussing 50:23
disregarding 25:11
disrespect 38:7
distance 25:14
distinct 28:11
distinction 14:1,7 51:5,20
divided 3:18 22:14 48:9 52:23
dividing 23:13,15
doing 9:11 19:21 28:18 31:25 51:15
dominate 13:3
Double 48:17
drag 33:25 34:4
draw 19:22,23,24 20:1
drawn 14:7
drive 5:23 29:3
drives 42:14
driving 12:5 28:20,21,24 40:6
drove 8:2,3 25:14
drugs 50:7
D.C 1:8,18 37:15

E

E 1:15 2:1,3,9 3:1 3:1,10 50:18
earlier 20:3 25:7
easier 22:15 30:14,22
easily 11:12 50:12
effect 51:13
either 4:2 15:11 24:7
elaborate 5:25
element 5:8 12:2 13:18 14:13 47:15,18
elements 4:13 7:13 8:19,20 17:6 18:24 19:10,14 27:6,9 27:18 42:9 47:15,16 52:20 53:13,21
elevated 30:7
eligible 45:16
empirical 20:11 20:13 22:22 23:7,10,20,23 24:6,7 26:2
enacted 15:12 25:1
enacting 14:5
encompassed 4:12 7:13 19:13 27:9,18 42:9 52:20 53:12,21
encompasses 34:16
endanger 47:22
enforcement 13:5,13 29:25 49:5
enhancement 11:25 12:1,10 35:2
enhancements 12:4,13
enhances 3:14
enlightenment 22:9,9
entering 18:18
entire 48:11
entirely 12:15

15:7
enumerated 27:20 31:10 34:21 39:7 40:8 43:21
equally 14:15,20
equation 17:8
escape 6:10 23:6 32:19 33:12,14 33:17,20 39:6 51:1,2,6,6,6,16 52:12,24 53:1
escapes 52:3
especially 13:3 40:1
ESQ 1:15,17 2:3 2:6,9
essentially 37:10
establish 27:5
established 8:13
evade 32:18
evading 50:5
events 39:10
everybody 6:4 10:2
everyday 13:4
evidence 40:5 46:20,21
exact 14:17 31:20
exactly 5:7 9:4 11:4 17:6,10,11 23:8 52:21
example 5:10 52:7 53:6
examples 4:20
exclude 44:5
existence 18:9 48:3
experience 24:1 24:4
explanation 10:13
extensive 26:2 26:13
extent 45:17
extortionist 43:13
extremely 33:22 33:23 43:20 44:2

F

fact 7:4,14 9:24 23:6 26:24
factor 14:23
factoring 53:13
facts 8:1,7,15 22:7 25:9
factual 36:23
factually 37:3
fail 32:21
failing 3:20 5:12 6:15 31:1
fails 48:22
failure 32:20,20 33:15
fall 16:23 39:4 40:14
familiar 7:17
far 25:7 34:22,25 37:19 46:25 49:11
fatalities 31:13
Federal 30:25 33:21 45:2,4 52:24
fellow's 41:8
felonies 15:3 31:4 36:2,3 43:1 49:17
felony 3:17,24 9:4 10:14,18 13:15,23 14:1 14:16,21 15:5 18:7 19:18 22:20 24:24 27:1,7 30:10,24 31:2 34:11,24 36:5,14 38:1,24 44:8,12,22 45:11,17 50:1 53:1,4
field 42:23
fight 13:6
figure 44:4 45:5
fill 27:7
find 4:24 23:3 43:23
finding 52:6
fire 42:20
firearm 3:15
fires 36:10,11,12
first 3:4 9:24 12:25 13:2,9 15:21 28:9,13 34:13 47:14
fit 29:17 34:4
five 3:18 22:14
flee 13:7 30:4 35:8,10 41:21 46:17
fleeing 3:18,19 3:22 4:2,4,6 5:9 6:9,9 14:5 16:6 19:5 20:14,15 20:20,25 22:12 22:14 27:11 41:8 48:1 51:10 51:21
fleeing-from 51:3
flees 13:11 16:7
flight 6:22 24:25 25:2,10 26:3 27:10 30:12,15 30:17,19 35:15 35:24,24,25 36:1,5 40:11,17 41:5 42:23,24 43:23 45:11 46:2,6,7 48:7 48:20 49:5 50:1 50:1
flights 26:18 39:9 40:4
focus 27:6
focused 31:4
focusing 53:20
follow 4:24 20:5 48:25
followed 8:13
following 9:10
follows 19:7 48:10
foot 30:12,17,19
force 51:25
forceful 13:2
forget 17:23
forms 19:5
forward 26:12,13 46:2
found 25:5
foundation 12:10
four 26:15 31:12 34:20
fourth 4:5
frankly 40:1
free 32:9,14
frequently 24:6
friend 35:17
front 33:15
further 15:11 50:14

G

G 3:1
general 1:18 8:21 11:8 13:4 14:4 18:12,17 23:12 24:9 25:1 38:10 44:7,10 46:21 50:23 53:1
generally 11:5,7 12:13 28:2 43:6
generic 22:13 34:15
generically 18:19
getting 42:14
Ginsburg 3:6
give 4:19 12:20 28:16 29:1 32:6 32:6,8 37:22 41:14
gives 15:25
go 5:20 49:10,10
goes 5:9
going 13:8 15:2 21:16 28:2 33:18 34:9 38:11 39:19 45:3 46:2 49:12 49:12,20 50:6 51:22,23
good 12:12 17:7 40:10
Government 20:13 40:19 41:25 47:11 50:12 53:15
Government's 12:19 19:3 24:22 26:1 34:23 37:3 40:24
gradation 21:3,4 21:9 23:6
grade 9:15,17
grave 6:22
great 23:4 27:20
greater 6:20 35:19 36:14,17 36:21,22,25 45:20,25 46:4,4 46:8,12 48:5,8 48:16,18,23 49:17
guard 52:16
guard's 52:14
guess 32:4
guessing 44:14
guilty 15:2
gun 42:20

guns 50:7
guy 41:12 43:8 44:11

H

habitual 12:4,16
handful 37:24
Hape 7:18,21 25:6
happen 36:4
happened 41:4
happens 20:24
happy 5:3
hard 33:11
harder 22:19
harm 8:5 9:6 12:2 18:16,17
harmless 9:25
harm's 27:16
hear 3:3
held 5:6 52:6,25
helpful 50:21
Herrick 13:1
high 3:23 21:4 32:1 50:4
highway 42:14
high-speed 7:25 42:24
history 24:20
hit 41:15
hold 31:1
holding 5:16 6:11
home 32:9,14,21 32:24 43:11
Honor 4:11 6:1 7:10,22 9:17 10:7 12:3,21,24 13:17 14:3,19 15:6,19 17:8 19:12 22:10 23:19 24:3,12 47:11
hopes 43:9,11,12 43:13
hour 8:2 27:12 34:6 39:12,19 42:15
house 43:12
household 26:16 31:15
huh 21:24 22:5
hurt 36:11
hypothetical 53:5,9
H-a-p-e 7:21

I

idea 53:3
identical 51:2
ignores 27:22
imagine 21:12
implicated 12:9
important 15:11 23:13,18 39:9 49:22 50:2 52:11 53:12
impossible 46:12 46:13
inaction 32:23
incident 46:23
incidents 18:25 19:7
included 14:13 36:22 47:9,10 47:12,17
includes 49:6
including 47:23
Indiana 1:15 3:18,19,24 5:5 5:6,17,23 6:12 6:16 7:18 9:16 9:18 11:8,22,25 12:14 13:10 14:4 15:12 18:12 22:11 23:11 24:25,25 25:6,20 26:14 26:17,18 28:15 37:17,24 39:1 43:25 44:24 46:20 47:25
Indianapolis 1:15
Indiana's 37:9
indicated 33:13
indicates 26:3
indicating 23:11 40:11
individual 8:8,15
influence 27:14
influenced 39:13
injure 51:17
injured 42:23
injuries 31:12
injury 4:3,4,5,10 4:16 7:12 8:23 9:21 10:20 11:14 14:6 16:1 16:22 18:14,20 19:6,10 20:8,16 23:1 28:14 31:7 35:25,25 37:17 37:18 40:12 41:1 43:22 49:15 53:20
inquiry 19:12 27:24
insisting 16:4
insofar 17:16 45:12
instance 36:9
instinct 44:14
institution 51:7
intended 13:3 40:14 46:22
intent 4:25 18:19 28:3
intentionally 5:8 36:10
interpretation 44:4
interrupt 5:14
involve 4:9,16,22 9:25 23:4 52:17
involved 7:24 10:1 24:8,24 25:10,12 35:4
involves 3:17
involving 16:22
in-kind 27:22,24 28:6 29:13 50:22
issue 7:24 12:19 23:7 35:16 53:17
issues 23:24 25:21

J

jail 11:10
James 7:10 19:13 29:20,21 29:21 30:14 52:6 53:3,11,17
January 1:9
JEFFREY 1:17 2:6 24:16
jeopardy 48:17
Johnson 51:25
judges 45:4
judgment 38:2 38:12
jumps 41:7
jurisdictions 36:14
Justice 1:18 3:3 3:6,12,25 4:8 4:14,17,18 5:4 5:11,13,18,23 6:2,8,11,18,25 7:1,4,17,21,23 8:10,17 9:10,14 9:18,22 10:8,12 10:17,22 11:2 11:11,17,20,24 12:7,13,18,22 13:14,22 14:8,9 14:12,25 15:16 16:2,12,16,19 17:7,11,14,19 17:20,22 18:5 18:15,22 19:3 19:21,24 20:2,3 20:18 21:1,6,8 22:18,21 23:9 23:14,22 24:13 24:18 25:7,16 25:18,22 26:1,5 26:11,20 27:3,4 27:17,22 28:7 28:18,22 29:6,9 29:16,21 30:8 30:12,23 31:5 31:14,17,25 32:2,8,13 33:2 33:6,9,24 34:2 34:8,11,12,24 35:5,6,14,20 37:4 38:6,8,15 38:20,21 39:15 39:23 40:16,20 40:21,23 41:3 41:11,17,18 42:2,5,12 43:3 43:7,15,18 44:6 44:16,17,20,25 45:9,21 46:3,9 46:16 47:4,7,13 47:19 48:4,7,16 48:25 49:14,21 50:16,20,24 51:4,12 52:2,5 52:10,19 53:23

K

Kagan 13:14,22 14:9,12 30:8,12 33:24 34:2 35:20 37:4 45:21 46:3,9,16 48:5,7 49:21
Kennedy 4:18 5:4,18 6:2
kill 36:12,13
kind 12:1 15:14

18:8 25:10 37:11 38:22 39:3 51:25 53:9
kinds 37:10 53:14
know 3:17 8:7,24 9:22,23 10:4 11:21,21,21,24 13:23 21:15 22:5,5,6 34:3,9 34:17,22,25 35:3,16,17 36:19 38:4 39:16,18,21 41:7 42:15,18 42:21 44:3 49:23 51:14,15 52:13,14,15
knowing 11:4 16:1
knowingly 5:8
knows 10:2 21:17

L

label 23:2
lack 7:6
lacks 14:14
lane 8:3
language 6:17 11:22 13:4 44:5 44:15 45:3
large 16:16 19:6 26:23 42:20
Laughter 6:5 10:10 32:11,15
law 13:5,13 24:25 29:25 30:25 35:2,19 37:13 38:4,7 45:4 49:5,9,9 53:18
laws 25:11
lawyers 15:10
lay 12:10
leap 31:3
leave 20:23
led 24:10
left 16:10
legal 25:20 36:22
legally 37:2
legislation 14:5
legislature 15:14 15:16
lesser 14:12 35:19 36:23 45:20,25 46:4,5 46:8,13 47:9,10 47:12,17 48:5,8 48:13,17,18,24 49:18
lest 15:4
let's 32:16 35:22 35:23 36:1,1,2
level 37:19 50:23
limit 27:13 34:9 39:12,19 42:16
line 6:1 19:22,25 20:1,7
lines 6:13,14
list 26:7
litigated 25:16 25:19,24
little 10:13 28:1 31:18 37:14 45:5 47:7 49:3
lives 27:15
logically 48:11
long 53:18
look 8:15,18 10:12,14,17 17:23 22:22 27:18 32:22 34:19 36:10,16 41:24 48:11 50:3,22 52:20 52:21
looked 8:24,25 18:16
looking 5:11,13 5:14,15 7:13 8:17 9:23 10:22 36:8,15 46:10 46:10 50:11 52:14
looks 8:16 26:18 27:8 38:25 39:1 42:8 43:24 46:6
lot 9:3 24:10 39:25 52:3
low 3:21 40:6
lowest 21:4

M

main 16:20
majority 9:24 25:23
making 17:15 47:8
male 27:13
mandatory 11:10
manner 10:19
MARCUS 1:3
Marsh 1:15 2:3,9 3:9,10,12 4:1 4:11,15 5:3,12 5:16,22,25 6:6 6:11,24 7:2,9 7:20,22 8:6,12 9:9,13,16,19 10:7,11,16,21 11:2,16,19,23 12:3,12,21,24 13:14,17 14:3 14:11,19 15:6 15:19 16:9,15 16:18 17:8,19 18:5,21 19:12 19:23 20:1,7 21:6 22:10 23:8 23:18 24:3,14 50:17,18,20 51:4,19 52:5,18 53:25
master 13:3
materializes 40:13
matter 1:11 11:6 36:22,23 54:2
maximum 33:21
mean 5:14,20 6:9 6:9 9:2 10:25 30:23,24 31:3 34:14,15,16 38:8,24 39:8,9 39:20 41:4,5,12 45:5,10 49:1
meaning 31:4,6 33:19
means 8:18 16:7 45:25 46:23 48:5 49:8,18 51:6
measure 18:25 19:11
measuring 18:24
media 26:8,10 43:24
mens 5:8
mentioned 43:15 43:16,16 53:15
merely 3:20 5:12 6:15 28:4
metric 43:23 44:1
middle 6:3
miles 8:2 27:12 34:6,9,14 39:12 39:19 42:15,15
minute 47:4
minutes 50:17
misdemeanor 44:8,18,21 45:3
misdemeanors 45:16
moment 24:20
morning 3:4
motivation 11:5
motives 15:9,9
motorists 27:15 30:16
move 40:8
multiple 31:8 46:22 47:3 48:22
murder 36:14

N

N 2:1,1 3:1
nationally 44:1
nationwide 39:11
nature 43:2
necessarily 36:21 38:6
necessary 7:7 19:17 30:3
need 10:13
needed 22:9
needs 52:20
negligible 20:21
nested 14:9 37:15 38:4
never 23:22,23 34:23 53:11
nightmare 45:4
non-ACCA 16:25
non-risky 25:13 48:21
normal 44:14
nose 38:16
notion 21:2
now's 52:16
number 12:3 19:6 26:23

O

O 2:1 3:1
obligation 6:20 6:25
obstructing 47:21
obvious 24:9
occur 19:1
offender 12:17

39:11
offenders 29:3 49:24
offense 4:13 6:20 6:21 7:5,14,14 7:24 8:11 11:3 11:13,14,22 15:17,18 16:13 16:14,21,24,25 17:1,1,2,3,4,4 17:4,10,17,17 17:24 18:2 19:14 22:24 26:3 27:20 30:7 31:10,11 34:4 34:15,20,21 35:1,13,16 36:9 36:14,18,25 37:23 38:1 39:2 44:2,7,11 45:11 45:24 46:1,24 47:20 48:12,21 49:3,4,8,23 53:13,21
offenses 7:6 14:10,13 34:17 35:19 39:3,7 40:9 43:21 46:8
officer 3:23 6:10 13:5,8 25:11 28:5,16 29:1 30:4,9 31:2 39:21 47:21 48:2 49:5 51:12 51:23,24
officers 7:25 29:4 50:5
officer's 28:14 28:25
officials 29:25
oh 4:23
okay 10:17 35:14
oncoming 8:3
ones 20:22 36:11 36:11,12 49:16
one's 8:24,25 32:25
open 20:23
operated 10:19
opinion 9:8 13:1 44:20
opinions 31:8
opposite 16:12 31:20 33:3
option 31:21
oral 1:11 2:2,5 3:10 24:16
order 18:7 28:14 30:4
ordered 35:9,11
ordinary 42:9,10 51:8 52:8,8,12 52:12,18 53:2 53:10
outside 39:4 40:8
outstanding 50:8
outstrip 37:19

P

P 3:1
page 2:2 24:22
paper 8:19
parole 50:8
part 13:9 15:24 16:16 30:1,13 30:15 34:13 47:16 50:22
participate 3:7
particular 20:5 42:22
parts 18:6 28:8
passive 32:22 33:3
pattern 23:16
pay 43:13
pedestrians 21:17 27:15 30:17
penalties 49:9
people 21:14 36:12,13 39:18 40:5 42:20
percent 49:24
percentage 21:5
permission 18:18 28:3
person 3:16 13:7 13:11 18:12 21:13 40:17 41:16,19 51:5,7 51:7,9,10,21 51:24
person's 14:24
Petitioner 1:4,16 2:4,10 3:11 37:21 50:19
Petitioner's 48:19
phrase 51:19
physical 7:12 8:23 9:6 10:1 11:14 18:20 20:8 23:1 31:7 40:12 43:22 53:20
pick 40:4
picks 40:3
place 4:24 5:15 16:11 28:2 41:5
places 27:15
play 13:7
plea 10:2 15:1,4 23:16
please 3:13 24:19
point 4:19 5:1 10:24 12:12 22:18 26:1,14 35:21 37:15 47:8 48:2
pointed 45:22
points 5:2
police 3:23 13:8 21:13 27:12,16 28:5 29:10,12 30:9,17 31:1 38:16 39:17,20 39:24,25 42:13
policeman 21:16 35:8,11
pose 19:5,10 30:18 34:18 40:12
poses 30:16
position 4:11 6:13 15:23
possession 3:15
possibility 30:6
possible 12:7,15 15:7 23:9 30:2 45:6 48:12
potential 7:12 8:5 20:8 22:25 23:4 31:7 37:19 40:12 41:2,6,15 43:22 53:19
potentially 19:4
practices 39:18
precisely 6:16
predated 29:21
predicate 12:16 15:13 45:12
predictable 24:5
presence 17:17 18:3
present 8:21,22 9:21
presented 20:13
presents 11:14 14:6 19:14
presume 14:8
pretty 5:24 21:18 24:8 40:10 44:11
previous 3:16 12:14
prison 14:23 32:19 33:21 52:3,12
probably 10:3
problem 6:18 21:8 47:6 53:22
problems 45:21 53:16
proceed 9:23
proceeded 25:8
process 47:22
prong 28:10 30:22 38:25 46:11 48:3,14 48:15
prongs 46:14 48:9
prosecutable 36:13,17
prosecuted 22:23 23:2,5 26:25 36:21,24 46:17 47:24 48:20
prosecution 6:19 23:16
prosecutions 20:20 47:1
prosecutor 6:24 7:3 10:22
prosecutors 10:2 11:5 15:9 25:2 27:4 38:11 49:10
prospect 28:17
prove 11:1 25:3 25:3 38:12,14
provides 24:21
proving 46:1,23 49:8
provision 9:7 21:23
pull 4:24 5:19
pulled 25:14
punishable 45:13
punishment 3:15 13:25 14:21 38:3
punishments

46:22 47:3
purpose 53:3
purposeful 28:10 28:12 32:3,5,6 38:22 41:13 50:25
purposes 33:20 48:17,19
pursued 40:5
pursuit 29:1,2,12 42:24
pursuits 40:1,3
put 26:12,13 31:11 39:22 44:8,12
puts 41:5
putting 41:13
puzzled 22:7

Q

qualifies 33:25
qualify 16:21 17:24 18:2 27:1 34:6 45:14
qualifying 18:23
quality 43:21
question 6:25 15:20 16:3,10 16:23 17:7,15 19:3,9,22 20:23 21:1 22:16,19 22:22 29:10 34:3,13 39:25 41:20 45:1 46:3 52:11
questioning 6:14
questions 30:21 37:8,9 50:14
quick 24:20
quintessentially 32:25
quite 26:19

R

R 3:1
racing 33:25 34:5
raise 53:16
raised 37:8
ran 30:9
range 14:21
ranging 3:20
rational 23:12,15
rea 5:8
read 5:21 26:5,6
reading 44:9
real 21:14 28:17 30:16
reality 8:20
really 11:6 19:9 23:22 40:11
reason 11:21 38:19,21 50:2,3 50:4,5
reasons 48:22
REBUTTAL 2:8 50:18
receive 13:24 46:18
recidivism 35:2
recklessly 29:3 42:20
recognize 49:23
recognized 31:8 43:19
recognizes 4:7
refer 4:2
referred 5:5 52:1
referring 51:20
refers 13:2
regarding 23:20
relate 12:14
relates 12:5 20:14
relatively 9:25
relevant 7:16
reliable 23:23 24:4
relies 36:20
rely 16:13
relying 17:16
remain 15:23
remaining 50:17
remember 39:16
repeal 15:17 16:24
repealed 16:10
replied 35:6
report 32:20,20 33:15
reports 26:8,10 43:25
represents 38:12
require 38:11 51:16
requirement 27:23
requires 6:15 16:6 30:3,25 37:20 52:9,22
research 37:13
reserve 24:12
reserved 22:1
residual 23:25 39:4 43:17,19 45:18 50:13
resisting 13:9 47:21 51:23
resolve 22:15
respond 5:3
Respondent 1:19 2:7 24:17
responding 29:12
responds 13:8
response 6:12 28:24
restrictive 40:3
result 40:22,25
results 3:23 18:17
right 4:14 9:16 10:15 11:4 13:16 16:15,18 17:12 18:21 21:5,24 23:9 24:5 25:25 27:2 27:8 29:23 30:20 35:5,12 35:12,22 38:18 39:23 42:16 43:18 44:25
risk 4:3,9,16,22 6:3,7,22 7:7,12 8:5,22 9:6,21 10:1,20 11:14 12:2 13:18,19 14:6 16:1,22 18:8,10,14,16 18:24 19:5,10 19:14,20 20:4,8 21:5,14,18,23 23:1,4 25:3 27:19,24 28:9 29:6,10,20,24 30:13,22 31:7,9 32:3 34:14,18 35:24 37:17,20 37:25 38:12,25 39:8 40:12,13 43:22 44:9,13 50:11 53:20
risks 30:16,16
risky 23:1 27:20 31:11,12,15 33:23 34:21 38:3,6,13,15 38:20 41:22 42:3,5 44:2 45:18 46:1 48:20
road 6:3 39:22 45:23
ROBERTS 3:3 5:11,13 24:13 25:22 26:5 31:14,17 32:2 32:13 33:2,6,9 39:15 41:3,11 41:18 42:12 43:3,7 50:16 52:10 53:23
rough 37:6
run 15:5 21:22 49:2,4 51:18
running 21:13 31:20,23 33:7 33:19,22

S

S 2:1 3:1
safe 4:24 5:15
safely 40:6
sampling 8:25
satisfied 48:14
satisfies 50:13
satisfy 13:18 30:13 36:21 45:18
saying 17:21 21:11 22:3 26:22 28:19,19 36:5,8 42:2
says 10:14 16:8 21:22 34:20 35:10 42:13
Scalia 3:25 4:8 4:14 5:23 6:8 6:11 9:22 10:8 14:8,25 16:2 17:7 20:18 21:7 25:16,18 26:20 27:3,4,17 30:23 31:5 34:8,11,12 35:6 38:6,8,15 38:20,22 42:2,5 43:15,18 48:16 48:25 49:14
Scalia's 17:11,22 22:18
scene 28:14
Schmuck 46:11 48:6,10,10 49:20
school 39:20
second 4:1 9:20

15:24 28:9,17
secure 51:6
security 33:21
see 4:25 8:19 10:14 18:3 21:15 33:11
seen 12:25 15:25 34:3,6 35:4 46:25,25 47:2
sees 42:13
sense 18:4 24:1 24:4,10 33:21 35:1 41:14
sentence 11:10 14:24
sentences 46:18
sentencing 11:25 12:4
separate 21:23 22:6 26:21 38:10
serious 4:5,22 7:12 8:4,22 9:5 9:20 11:14 16:22 20:8 22:25 23:4 31:6 34:13,18 40:12 43:22 47:6 50:1 53:19
service 47:22
set 36:10 49:19
set-up 35:23
Seventh 52:24
severe 14:15,20 38:3
short 25:14
shot 7:25
shoulder 5:19
show 7:5 23:10 23:16,17 26:8 26:23 32:21
showed 8:1
shows 38:7
side 35:18 36:19
significance 17:9
significant 9:19 11:8 38:9
similar 13:18 18:7,8
similarity 40:8
simple 16:21,25 17:2,3,4 18:2 21:20 22:24 23:5 35:24 36:1 36:5
simpler 11:1
simply 23:19 31:11
single 46:1,23,24
sitting 32:24
situation 22:2,11 41:13 51:3
situations 10:1
Solicitor 1:17
solve 52:8
somebody 6:8 13:5 41:7 44:9 44:13
sorry 5:13 9:18 14:11 16:9 19:23
sort 6:13 13:7 36:19 49:20
Sotomayor 11:24 12:7,13,18,22 18:15,22 19:21 19:24 20:2 21:1 27:22 28:7,18 28:22 29:6,9,16 29:21 47:4,7,13 47:19 50:24 51:4,12
sound 40:5
special 22:6
specific 42:25 43:8
specifically 12:5
speculation 26:9
sped 44:13
speed 21:16 27:12 34:9 39:11,12,19 42:15
speeding 21:14 25:10 33:25 34:8,15,16,22 34:24
speeds 32:1 34:5 40:6 50:4
spin 48:23
standard 44:1
standpoint 4:21
start 50:21 53:13
State 7:18 8:20 14:15,20 17:2,3 17:5,5 20:24 21:3,21 26:20 35:2,19 37:13 38:2,4,13,14 38:23 45:12,15 45:17,21 46:24 49:9,9
States 1:1,6,12 3:5 9:3,12,14 37:5,7,9,14,21 37:24,25 44:7 44:10,16,19,23 45:4
State's 8:1
statistical 26:13 43:25
statistically 19:6
statute 3:19 4:21 5:7,15 6:15 9:7 11:9 13:10 15:12 19:19 20:8 33:15 35:7 35:10 44:9 45:2 45:13 46:4 49:15 52:21,22 52:25 53:1
statutes 37:16 38:4 45:21
stick 53:12
stop 3:21 5:12,15 5:18 6:3,16 13:6 28:5,25 30:4 31:1,2 35:9,11 38:17 51:13
stopping 28:5,20 50:6
strays 42:22
strikes 13:4
striking 25:11
stripe 32:19
strips 39:22
struggling 39:24
submits 50:12
submitted 53:24 54:2
subparts 22:14
subsection 24:23 25:1 38:10 47:20 49:3
substantial 4:3 9:21 10:20 12:6 14:6 18:13
subterfuge 52:4
succinctly 50:24
suggest 7:9,15 14:3,19 15:9 22:15 24:3,11 30:9,11 50:21 52:9 53:8
suggested 23:10
suppose 15:16 20:18 21:10,21 26:20 35:20,22 35:23 44:6
supposed 5:18 11:13 44:17 45:1
Supreme 1:1,12
sure 4:18 12:15 21:25 37:6 42:16 52:11
surely 6:14
surprised 26:6
survey 37:5
Sykes 1:3 3:4,21 8:11 11:3 15:18
systems 37:7

T

T 2:1,1
take 12:18 13:14 15:4,4,8 32:16 35:16 46:2,10
taken 6:13 15:10 25:19 51:11
takes 15:14 51:8
talk 26:8
talked 29:24
talking 24:23 28:9 29:11 30:24 34:5 37:18
talks 53:2
tapes 3:8
target 42:25 43:8 43:8
Tate 7:20
Taylor 8:13
tell 25:8,9 38:17 46:25 49:11 50:25
tells 28:5 31:2
terminate 29:8
terminated 30:19
terms 31:12
test 18:6 28:8 30:1,13,15 34:1 34:14 44:4 46:11 48:11,13 50:22
thank 10:11 24:13 50:14,16 50:20 53:23,25
they'd 10:5
thing 21:22,24 21:25 22:3,4,20 23:13,18
things 15:14 26:7 28:12 49:22

53:14
think 5:24 6:18 7:2,2 8:4,23 11:7 13:19,22 15:11,14 17:11 18:5 20:2 21:15 21:17 22:18 23:8 24:21 25:25 28:11 30:11,12,13,15 30:19,20 32:9 32:13 33:8,16 33:24 34:4,12 36:19 37:2,21 38:1,9,12 39:9 39:24 40:2,4,10 44:10 45:9,20 46:2,15,16,19 46:20 47:5,9,12 48:10,14 49:18 49:22 50:2,9 51:19
thinking 10:13 15:13
thinks 14:15
third 32:17
thought 8:18 16:3 27:3 35:6 35:9 39:15,17
thousands 45:6,6
three 3:16 25:12 28:11 32:4
three-tier 35:23
thumb 38:16
tier 4:1
tiered 35:18 37:7
time 8:14 24:12 52:4
times 8:1,2 26:15 31:12 34:20
told 51:13
totally 17:15
tough 5:24 21:12
tougher 36:7 37:1
track 45:2
tracks 5:19
traffic 8:3 12:17 25:11
transcripts 3:7
translate 30:20
traveling 39:11 50:4
treat 14:20 37:25 44:7,7,18,21 44:23
treated 14:17 45:16 46:24
treating 38:24
treats 3:19 45:17 45:19,24
trespass 26:22 26:24,25
trespassing 26:21
trial 10:5 15:2
tried 34:23 47:3
trivially 44:12
truck 7:25
true 6:23 19:4 28:8 36:24 43:1 48:23 52:2,5
try 45:2
trying 6:9 11:17 13:12,13 18:3 20:3 27:25 43:16 48:4,22 51:10,13,21
tunnel 52:13
turn 31:21
two 6:14 12:9 14:2 15:3 18:6 23:13 28:8 32:9 37:10 41:7 46:14 49:7
two-thirds 32:14
type 20:5
typical 26:14 27:9,10,13 38:13 40:11 41:25 50:5 52:15,16,19 53:10
typically 26:19 29:3 32:1 42:24

U

ultimate 14:24
ultimately 49:24
understand 5:20 9:11 16:2,20 32:3 35:21 46:5
understanding 34:1
understood 16:9
undoubtedly 14:23
United 1:1,6,12 3:4
unlicensed 27:14 39:13
unrelated 49:25 50:1
use 9:4,5 12:8 43:14 51:24
useful 24:21
uses 44:1
usually 26:8

V

v 1:5 3:4 7:18
variation 45:5
variations 45:6
various 25:20 45:21 47:23
vast 25:23
vehicle 5:9 9:5,5 10:15,19 13:6 25:4,12 30:16 31:25 35:11 38:14 46:11,17 47:23 48:1
vehicular 3:18 3:19 14:5 20:14 20:15 22:12,13 24:25 25:2 27:10 35:15 40:17 46:6,7 48:7
verb 42:16
versus 7:20
view 9:1
violate 5:7
violated 47:24 48:2
violates 5:15
violating 3:22 18:10
violation 5:1 11:9 19:19 49:25
violations 4:20 50:8
violence 16:6 18:23 19:1,7 27:24 32:3 41:6 43:14 51:9,14 53:7
violent 3:17 13:15,20,23 14:16 15:3,5,22 15:23 17:13 18:7 19:18 20:19 22:20 27:1,7 28:10,12 29:25 30:10,24 31:2,4 32:5,6 34:11 36:6 37:11,12 38:23 41:14,22 43:1 44:22 45:7,11 51:1 52:1,7 53:1,4
visible 16:6

W

Wait 47:4
wall 1:17 2:6 24:15,16,18 25:18,25 26:11 27:3,8 28:7,21 28:24 29:8,15 29:18,23 30:8 30:11 31:5,15 31:24 32:8,12 32:16 33:5,8,11 33:24 34:2,10 34:12,25 35:12 35:15,20 36:7 37:13 38:8,18 38:21 39:23 40:19,23 41:10 41:17,20 42:4,7 42:18 43:5,10 43:18 44:16,19 44:23 45:9 46:9 46:19 47:5,11 47:18 48:9,18 49:7 50:16 52:13
want 4:23 10:8 31:1,22 38:14 41:15
wants 13:5 38:23
warrants 50:8
Washington 1:8 1:18
wasn't 20:22
way 3:22 11:4 13:9,10,11 14:18,22 17:2 20:12 24:5 27:16 32:14 41:21 42:19 43:9 44:21 46:25 52:14
ways 47:23 49:3
Wednesday 1:9
weird 22:2,10
went 10:5 41:23 47:2
We'll 3:3
we're 11:13,17 30:24 32:9 38:11 45:3
we've 24:23 28:9

50:23
widespread 24:9
WILLIAM 1:15 2:3,9 3:10 50:18
win 41:25
window 51:15
Woodward 5:5
word 31:17 33:20
worded 43:20
words 10:19 17:20 30:23 31:3,5,6,9 32:5 46:6
work 9:7 32:16
worrying 11:12
worse 21:22,23 21:25 22:3
wouldn't 11:6 21:11 23:14 30:8 44:13

X

x 1:2,7

Y

year 45:13
years 14:22 40:2 49:12
young 27:13 39:13

Z

zero 14:22
zone 39:20

0

09-11311 1:5 3:4

1

1 4:2 10:4,15,18 12:16 13:15,23 13:24,24 15:17 17:2 20:21 22:15 23:21 46:5,7,7
10 25:10 34:14 40:1
10:02 1:13 3:2
10:58 54:1
100 8:2
12 1:9
13 25:9 49:11
14 25:5,9,23
15 34:9,14 40:1
150 34:5
160 34:5
170 34:6
1998 24:23,25 25:5 38:9 47:1

2

2 17:3 49:16
20 8:1
2003 11:2
2006 11:8
2009 7:19
2011 1:9
24 2:7
25 27:12 39:12 42:15

3

3 2:4 10:5 14:22 16:5 49:16
3a 24:22
30 39:19
36 44:6,10
37 37:14

4

4 50:17
45 7:23
45-minute 7:24
46 9:12 37:6,9

5

50 2:10 49:24

6

60 11:10

7

751 52:25

8

80 42:15