

1 convictions to qualify as ACCA predicates, can make sure
2 they have a generic offense where the conviction clearly
3 requires proof of generic burglary. The government's
4 position will -- will cause a significant
5 Sixth Amendment problem because sentence enhancements
6 are going to be based on something beyond the mere fact
7 of a conviction. It would require this Court to
8 consider whether to expand the Almendarez-Torres
9 exception.

10 JUSTICE ALITO: You're seriously arguing
11 that -- you're seriously arguing that all of the States
12 will or should go back and reformulate their burglary
13 statutes so as --

14 MR. FLEMING: No, Your Honor.

15 JUSTICE ALITO: -- to make the conviction?

16 Well, that's what you just said. So if they
17 want them to count as ACCA predicates, no problem. They
18 can just go back and change their burglary statutes.

19 MR. FLEMING: As -- as some States have
20 generic burglary statutes that do require proof of all
21 the elements of generic burglary, if Congress is
22 dissatisfied with the reach of ACCA, it can amend ACCA.
23 ACCA used to have a definition of burglary in it in
24 1984. It said burglary involves a building. Congress
25 could very easily say, you know what? That was too

1 narrow. We're going to overrule that aspect of Taylor,
2 and we'll say burglary, for purposes of ACCA, will
3 include boats and houses.

4 Nothing prevents themselves from doing that.
5 They could amend ACCA so it focuses on conduct instead
6 of convictions. There have been many calls for Congress
7 to do that. But for 25 years -- and stare decisis is
8 particularly important -- in this statutory area,
9 Congress has let this Court --

10 JUSTICE ALITO: What do you make of the fact
11 that until this case, the Court has never analyzed
12 whether something was an element or a means?

13 MR. FLEMING: The -- the same point could
14 have been made in Descamps. And Descamps
15 specifically --

16 JUSTICE ALITO: Well, you said this has been
17 established for 25 years and the Court has used the term
18 element, element, element, but has it ever before gone
19 into the question of whether what it was talking about
20 in that particular case was in the technical sense,
21 either an element or a means?

22 MR. FLEMING: May I respond, Mr. Chief
23 Justice?

24 The issue did not come up before Descamps.
25 So as the previous cases came to the Court, the issue

1 either did not matter or it was not disputed. And it is
2 not uncommon for this Court to take as assumed issues
3 that the parties are not disputing. In Descamps, it was
4 disputed; in this case, it is disputed. And for it to
5 be resolved consistently with what the Court has said
6 for -- for 25 years, it's important that the Court
7 maintain the focus on the elements and not on the means.
8 Otherwise, Descamps would have come out the wrong way.

9 We submit it came out the right way, and
10 this case should come out the same way. We would
11 respectfully submit the judgment should be reversed and
12 the case remanded so Mr. Mathis can be resentenced
13 without regard to ACCA.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 11:09 a.m., the case in the
17 above-entitled matter was submitted.)

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