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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CURTIS DARNELL JOHNSON, :

4 Petitioner :

5 v. : No. 08-6925

6 UNITED STATES. :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 6, 2009

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:07 a.m.

14 APPEARANCES:

15 LISA CALL, ESQ., Assistant Federal Public Defender,
16 Jacksonville, Fla.; on behalf of the Petitioner.

17 LEONDRA R. KRUGER, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the Respondent.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-6925, Johnson v. United States.

Ms. Call.

ORAL ARGUMENT OF LISA CALL

ON BEHALF OF THE PETITIONER

MS. CALL: Mr. Chief Justice, and may it please the Court:

Mr. Johnson's conviction for battery in the State of Florida can be sustained by the slightest contact. Such a conviction does not qualify as a violent felony under the Armed Career Criminal Act. A violent felony means one that has as an element the use, attempted use, or threatened use of physical force against the person of another. Physical contact is not the same as physical force.

Physical force in this context means something more than a mere quantum of physical contact, and it requires violent aggression that is likely to cause physical injury. This conclusion is guided by the rules of statutory construction in this Court's precedents. The better-reasoned circuits have applied these principles to find that physical force means something more than de minimis contact.

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1 JUSTICE GINSBURG: And that's -- you say
2 that's Federal law. Would it make a difference if,
3 contra what Florida held in the Hearn case, a State had
4 typed a battery statute as a crime of violence?

5 MS. CALL: Yes, Your Honor. If the State
6 statute required that the offender admit the use of
7 force as part of the elements of his prior offense --

8 JUSTICE GINSBURG: No, no, no. It's exactly
9 the -- it's exactly the statute Florida has. And
10 somebody has a plea, and we don't know from the record
11 what the conduct was. But the State, unlike Florida,
12 says, our battery statute for our State law purposes is
13 a crime of violence; therefore, for our State law
14 enhancements the person who pleads guilty to a battery
15 offense will be deemed one who has committed a crime of
16 violence, if that's the State law.

17 MS. CALL: Then -- no, Your Honor, I'm
18 sorry. Then the mere fact that the State found that it
19 qualified under its own recidivist statute would not
20 bind the Federal court. Why we say that Hearn is
21 binding is the proposition that it found the elements of
22 a battery offense and the -- the ACC looks to those
23 elements to determine whether it is a violent felony.
24 Congress didn't say that it -- the offender had to have
25 conduct that involved the use of physical force, but a

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1 prior that had as an element the use.

2 So the fact that the State statute may
3 qualify under its State recidivism wouldn't be the same
4 determination that it didn't have as an element the use
5 of force. Here --

6 JUSTICE BREYER: But what -- what -- before
7 we can even get into this, I think we have to decide if
8 those words "striking or touching" describe one crime or
9 two. And what we said in Chambers is that the nature of
10 the behavior that likely underlies a statutory phrase
11 matters in this respect. If you think of the seven
12 different things covered by one statute in James or
13 Chambers, two of them, failing to return from a furlough
14 and failing to return from work in day release, seem to
15 me quite possibly to describe one thing, not two.

16 Now, how do we know that striking or
17 touching describes two things? I couldn't find any
18 instance, and we had the library looking. I couldn't
19 find any instance in Florida where those two things have
20 ever been charged separately. And they looked at
21 hundreds.

22 So -- so why do we think it's two crimes,
23 rather than just one called "striking or touching"?

24 MS. CALL: Your Honor, two reasons. First,
25 the face of the statute itself has "or," so it doesn't

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1 require --

2 JUSTICE BREYER: It does, too, in Chambers.
3 It's "not returning from furlough or not returning from
4 work release." You know, and I'd -- I would say the
5 behavior is the same. It's not like burglary of a
6 dwelling versus burglary of a boat. Those are two
7 separate things.

8 MS. CALL: Yes.

9 JUSTICE BREYER: Here, why do you think they
10 are two separate things?

11 MS. CALL: Your Honor, because Hearn, the
12 Florida State Supreme Court decision, described them as
13 three separate offenses and spelled out that this
14 statute could be violated and it said by: First,
15 touching someone intentionally and against their will;
16 second, by striking; or third, by causing bodily harm.

17 JUSTICE BREYER: Okay. If they are separate
18 things, what is the evidence? There is a legal
19 question. You say the touching. Spitting, is that
20 enough to rise under the -- to fall within the Federal
21 statute? Suppose I agree with you on that; the answer's
22 no.

23 How do I know whether touching as applied in
24 Florida as a separate matter in the mine run of cases,
25 involves spitting or involves something that causes far

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1 more serious harm? How do I know?

2 MS. CALL: Your Honor, you would apply first
3 the plain language of the statute, and "to touch" means
4 the slightest contact, as the courts have held. At
5 pages 41 to 42 we spelled out the offenses of spitting,
6 making slight contact, that justified a battery
7 conviction. "Strike" obviously has to mean something
8 else or the legislature wouldn't have included both
9 types of conduct within the battery provision.

10 JUSTICE SCALIA: This -- this statute is a
11 misdemeanor statute, isn't it?

12 MS. CALL: For a first offense, yes, Your
13 Honor.

14 JUSTICE SCALIA: Yeah. And the only reason
15 what happened here was elevated to a felony was that he
16 had a prior offense.

17 MS. CALL: Yes, Your Honor.

18 JUSTICE SCALIA: So it's understandable that
19 the slightest touch could -- could constitute a
20 misdemeanor.

21 MS. CALL: Your Honor, the problem with
22 saying that just because it's a felony, therefore it
23 can't be considered is that the statute first describes
24 the prohibited conduct and says that the conduct is in
25 the first subparagraph, the penalty is in the second.

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1 So the very same conduct is necessary for either a
2 felony or a misdemeanor, and essentially no force times
3 two is still zero.

4 JUSTICE ALITO: Well, ACCA uses the words
5 "physical force," and any touching involves some
6 physical force. Now, how do we determine how much more
7 than the minimum physical force is necessary in order to
8 fall within the Federal statute?

9 MS. CALL: Your Honor, it is a qualitative
10 line that sentencing judges would have to make, like all
11 of the other difficult decisions that they're called on
12 to make in the sentencing guidelines in these 3553
13 factors. We've asserted as a proposed test that it be
14 conduct just like the Begay test, that it would be
15 physical force of a kind that is violent and aggressive
16 and likely to cause injury.

17 JUSTICE BREYER: Well, there -- most -- this
18 statute actually, we looked into it and it seems to be
19 used, particularly the touching part, also to cover
20 unwelcome physical, sexual advances. And it's not hard
21 to consider such matters to have involved force of
22 exactly the kind that the Federal statute is aimed at.
23 And there was no striking, but there was in fact use of
24 harmful force, touching. That was serious.

25 Now, how do we know which is more normally

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1 the case when this statute is used in its touching
2 respect?

3 MS. CALL: Your Honor, the government has
4 cited a footnote of 6,000 convictions, and there is no
5 way to know of those convictions whether they were
6 charged as to touch, to strike, or to cause bodily harm.

7 JUSTICE SCALIA: But we don't have to know
8 what's more normal anyway, do we?

9 MS. CALL: No, Your Honor.

10 JUSTICE SCALIA: If -- if any conviction is
11 possible under the element of the crime to touch, when
12 there is simply slight physical force, your argument
13 still stands, right?

14 MS. CALL: Yes, Your Honor.

15 JUSTICE BREYER: I would say that's
16 certainly wrong under our cases. I mean, I would have
17 thought that the reason that burglary, for example, is a
18 violent crime is not because in every instance there is
19 a risk of physical harm, because in the mine run of
20 instances there is a risk of physical harm, and I
21 thought we said that in at least three cases.

22 MS. CALL: Yes, Your Honor, as to looking to
23 both the enumerated offenses and those that fall in the
24 otherwise. The first prong of the ACC, though, does not
25 talk about conduct and it does not refer to an ordinary

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1 case. It says an offense that has as an element. And
2 therefore it is directed to looking at a particular
3 Florida State statute rather than a generic battery or
4 how battery might ordinarily --

5 JUSTICE BREYER: I know, but an element --
6 you mean we should interpret "element" in the first part
7 of this in a radically different way than we have
8 interrupted equivalent words in the second part, and we
9 should say that burglary -- in other words, assault
10 or -- or -- in other words, unless in every case of
11 prosecution there is going to be force actually applied
12 or something like that, that it doesn't fall within one?
13 I'm surprised at it. I mean, I guess it's possible.
14 What would be the argument for doing that, which would
15 be totally different than we have handled the other one?

16 MS. CALL: Your Honor, the reason why is
17 that Congress was directing in the first prong those
18 crimes that were directed against persons and would be
19 defined by their elements. In the second prong Congress
20 did list out four enumerated offenses that they thought
21 were committed, A, by career criminals, and, B, that
22 created that substantial risk. In the first part it
23 does not talk about risk to others. It's that
24 offender's conduct and an elements-based test.

25 JUSTICE ALITO: If there were a State

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1 statute that made it a battery to engage in offensive
2 and unwelcome sexual touching, your argument would be
3 that that would not fall within the first prong of ACCA,
4 because there is not a -- it's not likely to cause a
5 physical injury?

6 MS. CALL: Yes, Your Honor.

7 JUSTICE ALITO: Is that right?

8 MS. CALL: Yes, Your Honor. Because --

9 JUSTICE ALITO: If there was a statute that
10 said -- in the old days I'm told people used to throw
11 the contents of chamber pots out the window. If there
12 were a -- a State statute that said it is a crime to
13 dump the contents of a chamber pot on somebody's head,
14 you would say that's -- that doesn't fall within the
15 first prong of ACCA?

16 MS. CALL: Yes, Your Honor, I would say that
17 that does not qualify under the first prong.

18 JUSTICE ALITO: Even -- those are classic
19 batteries --

20 MS. CALL: Yes, Your Honor.

21 JUSTICE ALITO: -- and the language of the
22 first prong of ACCA really tracks the language of the
23 common law crime of battery?

24 MS. CALL: Your Honor, it does because it
25 talks about in Florida the element is the slightest

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1 contact. And we were not arguing that that offender who
2 spits or touches or does these other disrespectful acts
3 doesn't deserve to be charged and can't be charged with
4 battery under Florida's State law.

5 JUSTICE BREYER: So -- so what about an
6 assault? I guess, using a law school hypothetical, I
7 mean, a statute for assault -- I guess you could assault
8 somebody by threatening to throw a marshmallow at them.

9 MS. CALL: Yes, Your Honor.

10 JUSTICE BREYER: Okay. Now, assault is out
11 of the statute.

12 MS. CALL: Your Honor, again, it depends on
13 each particular statute and its elements.

14 JUSTICE BREYER: No, no. But I mean, on
15 your definition, as you and Justice Scalia were
16 suggesting, because it is conceivable that you could
17 assault somebody by threatening to throw a marshmallow,
18 that means assault is no longer a crime of violence, and
19 that can't be right.

20 MS. CALL: Well, Your Honor --

21 JUSTICE SCALIA: Well, of course it's right.
22 You don't have to touch somebody for an assault.

23 MS. CALL: Correct.

24 JUSTICE SCALIA: You can just threaten
25 somebody.

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1 MS. CALL: Yes.

2 JUSTICE SCALIA: That's not a crime of
3 violence.

4 Ms. Call: And that would be --

5 JUSTICE SCALIA: Of course it's right.

6 JUSTICE BREYER: Assault is not a crime of
7 violence; it's not a use of force.

8 JUSTICE SCALIA: Certainly not.

9 MS. CALL: Two responses to that, Your
10 Honor. The first is, looking at the underlying facts
11 would violate the categorical approach of saying we're
12 not looking at what each offender might have done in any
13 particular case, but what are the elements that he
14 necessarily admitted. And under the Florida statute it
15 would qualify as a violent felony because the Florida
16 statute defines it as an offer to do violence coupled
17 with the --

18 JUSTICE BREYER: What about attempted
19 murder?

20 MS. CALL: Your Honor, yes, if it has as an
21 element the use of force. And that --

22 JUSTICE BREYER: But it didn't --

23 MS. CALL: Yes, but under the ACCA, which is
24 one of the phrases that the government elides out of its
25 analysis, it's not simply the actual use of force, but

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1 an attempted or threatened use of force.

2 JUSTICE SOTOMAYOR: Can I ask you something?

3 In your definition, you appear to hinge it on the fact
4 that the force used has to cause injury of some type,
5 that. That appears to be the only definition you can
6 give. But the use of physical force means just the use
7 of force, strong force, violent force, aggressive force,
8 but it doesn't mean that it necessarily has to cause
9 injury.

10 Would my rearing back and slapping you? In
11 those instances slapping doesn't cause physical injury
12 as that term is defined in the common law, which is an
13 injury of lasting effect. You may have some redness for
14 a second, but that's all. Would that qualify as a crime
15 of violence?

16 MS. CALL: Your Honor, some of these
17 questions will be difficult lines for the court -- a
18 sentencing court to draw. We have offered the
19 definition that violent felony, the word "violence"
20 encompasses sort of a rough use of force that could lead
21 to injury or is likely to lead to injury, not --

22 JUSTICE SOTOMAYOR: Well, but violence has a
23 broader meaning. It generally means a strong force or a
24 strong -- physical force generally has some relative
25 degree of -- of impact. I agree with you, the common

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1 definition talks that way. Why should we read something
2 more into it, like physical injury?

3 MS. CALL: Your Honor, the Court wouldn't
4 have to, and part of where we drew this from is the
5 Court's language in Begay that indicated that crimes
6 within clause (1) of ACCA are those crimes which are
7 also likely to present a serious risk of potential
8 injury to others.

9 JUSTICE SOTOMAYOR: Many will, but don't --
10 serious use of force doesn't necessarily always.

11 MS. CALL: Yes, Your Honor, and that's why
12 the qualitative line falls somewhere higher than mere
13 contact, which would simply be the standard for Florida
14 battery conviction.

15 JUSTICE GINSBURG: Suppose we knew -- knew
16 what happened. It's the same statute, and it would be
17 possible to have a conviction for a rude touching under
18 it. But this man, instead of pleading guilty, in fact
19 went to trial, and we know that he beat somebody badly.
20 If -- if that were the case, if we knew what the facts
21 were, then would the ACCA enhancement be in order?

22 The statute covers the waterfront from a
23 rude touching to beating somebody to a bloody pulp. But
24 we know, because there's been a trial, exactly what this
25 person does, and what he does would fall under the

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1 aggressive violence, capable of doing physical injury to
2 another.

3 MS. CALL: No, Your Honor. Knowing the
4 added fact of the actual conduct would not answer the
5 question because it is based on the elements. However,
6 if the prosecutor charged it as to strike, or there was
7 a division -- for example, at page 19 of our reply brief
8 we showed the Fifth Circuit case in Robledo. It tracked
9 the exact same Florida statute that is at issue here and
10 said the offender did touch or strike the victim, comma,
11 by striking him with a vehicle. And the Fifth Circuit
12 said under the modified categorical approach to look at
13 the charging document and the offender's necessary
14 admission shows that was, in fact, a crime of violence.

15 JUSTICE SCALIA: Isn't there a separate -- a
16 separate battery crime, aggravated battery, in -- in
17 Florida, which --

18 MS. CALL: Yes, Your Honor. There are two
19 other felony battery statutes, apart from this one that
20 do --

21 JUSTICE SCALIA: Well, this isn't -- this
22 isn't a felony battery statute. This is a misdemeanor
23 battery statute, which has been elevated to a felony in
24 this case only because the fellow had a prior.

25 MS. CALL: Yes, Your Honor.

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1 JUSTICE SCALIA: But, besides the
2 misdemeanor battery statute, there are two felony
3 battery statutes in Florida, right?

4 MS. CALL: There are. Two other separate --

5 JUSTICE SCALIA: And how -- how are they
6 defined?

7 MS. CALL: Your Honor, they add the mens rea
8 of whether or not the battery was intended to cause
9 great bodily harm, permanent disfigurement, or permanent
10 disability; and the other says simply that you committed
11 a battery and did cause -- the higher standards. But --
12 and, in addition, the misdemeanor battery includes the
13 element of causing bodily harm, and offenders can be
14 charged simply with that provision.

15 JUSTICE SCALIA: Misdemeanor does?

16 MS. CALL: Yes. Yes, Your Honor. The
17 felony version is to cause great -- great bodily harm.

18 JUSTICE SCALIA: Right.

19 MS. CALL: And the misdemeanor is to cause
20 bodily harm, which Florida law defines as low as causing
21 a bruise or mark like that.

22 So, if someone were charged with, in State
23 court, a predicate that involved that kind of injury, a
24 prosecutor using his or her discretion could charge
25 under causing bodily harm and -- which showed facts that

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1 could support the finding of a violent felony.

2 CHIEF JUSTICE ROBERTS: What -- what about
3 the government's argument that your interpretation would
4 dramatically limit the reach of this provision of ACCA
5 because of the number of States that define battery in
6 the same way Florida does?

7 MS. CALL: Your Honor, I think that the
8 government exaggerates the concerns of that because
9 there are statute that both require an admission of the
10 use of force or have that as an alternative that could
11 be prosecuted in the appropriate case.

12 JUSTICE BREYER: Well, but --

13 CHIEF JUSTICE ROBERTS: Yeah, but it's --
14 it's usually easier just to charge the lowest common
15 denominator, the battery that doesn't necessarily
16 require violent force, and the point -- this was the
17 argument that was accepted in -- in Hayes, that the
18 interpretation, say, advanced by the dissent in that
19 case, would mean that there be a vast number of States
20 that weren't covered.

21 I mean, presumably, Congress meant to cover
22 all the States.

23 MS. CALL: Yes, Your Honor. However,
24 because the -- in Hayes, the Court was looking at the
25 "committed by" and whether that was the -- the necessary

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1 part of the prior conviction.

2 Here, given the fact that the statute can be
3 charged both in Florida and many other statutes to be
4 included, shows that those cases would -- it would only
5 be a small number of cases that are likely to be
6 affected where --

7 JUSTICE SCALIA: You -- you would have to
8 have other States which only have a battery statute that
9 is defined as broadly as this misdemeanor battery
10 statute in Florida.

11 If they have a higher degree of battery,
12 just as Florida does, which is a felony, then, if the --
13 if the prosecutor wants this fellow to be convicted of a
14 violent crime, he -- he could charge him with that --
15 with that higher degree.

16 MS. CALL: Yes, Your Honor.

17 JUSTICE SCALIA: Are there any States that
18 have only this simple battery statute, which is -- which
19 is met by a simple touching?

20 MS. CALL: According to LaFave, only Florida
21 and I believe one other State has such a broad
22 definition --

23 JUSTICE SCALIA: No. No. You mistook my
24 question.

25 MS. CALL: I'm sorry.

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1 JUSTICE SCALIA: Are there any States in
2 which the only prosecution for battery that can be
3 brought is under a statute as broad as this one, which
4 is -- is covered by even a touching?

5 MS. CALL: No, Your Honor.

6 JUSTICE SCALIA: Don't all of the other
7 States that have a touching statute also have higher
8 degree of battery statutes?

9 MS. CALL: Yes, Your Honor, according to
10 LaFave, all States have aggravated battery statutes that
11 include either the use of a deadly weapon or --

12 CHIEF JUSTICE ROBERTS: But I thought the
13 evidence was pretty clear that Congress was adopting the
14 common law definition of battery here, which doesn't
15 require that higher degree of force or violence.

16 MS. CALL: Your Honor, in the legislative
17 history, the only time that they talked about battery --
18 in one House report it references battery and assault,
19 simply by those descriptions.

20 Every other time, they talked about assault
21 and battery with a deadly weapon and something more than
22 a simple touching.

23 JUSTICE SCALIA: Do they use battery in the
24 statute here? I am looking for it. I don't -- I don't
25 see the word "battery" at all.

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1 MS. CALL: No, Your Honor. There is no
2 enumerated offenses in the first prong.

3 JUSTICE BREYER: Well, what worries me more
4 than -- than your application to battery is the
5 methodology, because, if it's true that in Section 1,
6 unlike Section 2, a single instance of where you could
7 commit the crime without using force is sufficient to
8 take it out of the statute, then, just looking through
9 this, generally, you would take out assault, probably
10 have to take out kidnapping. You would probably have to
11 take out domestic violence. You would have to take out
12 extortion, certainly, explosives laws.

13 I mean, the very -- laws that I would think
14 Congress certainly intended to include in that first
15 definition.

16 MS. CALL: Your Honor, when they --

17 JUSTICE BREYER: So that's very worrying,
18 and why I don't think it's the right methodology.

19 MS. CALL: Well, Your Honor, they did use
20 the word "element," and an element is a constituent --

21 JUSTICE BREYER: Yes, but an element could
22 be an element that is a -- the word is "element," the
23 use or threatened use of physical force. Now, an
24 element, say like abduction, could be an element that
25 uses physical force if in the mine run of cases it uses

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1 physical force, even though one can sometimes think of
2 an exception. That's how we have interpreted 2.

3 So if we interpret 1 a different way, we are going to
4 take outside the statute the very things that Congress
5 wanted inside; and, if we interpret it the same way, I
6 think we would get to the right result.

7 MS. CALL: Your Honor, I would have two
8 responses to that. The first is, in the second prong,
9 Congress used the word "conduct." And if they had meant
10 conduct to be included in 1 rather than the elemental
11 definition, that would have been a very easy definition.

12 Second, when they talked about the crimes
13 intended for category 1, they gave the examples of
14 someone with murder convictions, rape convictions, a
15 gangland enforcer.

16 JUSTICE BREYER: Rape can be convicted
17 without -- rape can be conducted without force.

18 MS. CALL: Yes, Your Honor.

19 JUSTICE BREYER: All right. So now rape is
20 out.

21 MS. CALL: Your Honor, it depends on the
22 element of the offense.

23 JUSTICE BREYER: Well, the element of rape
24 is not force; it's lack of consent.

25 JUSTICE SCALIA: Excuse me. Under 1 it

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1 depends upon the elements, but what about 2 and
2 especially the residual provision of 2, "any other
3 conduct that presents a serious potential risk of
4 physical injury to another"? I would think rape
5 qualifies under that.

6 MS. CALL: And, certainly, if the government
7 believes --

8 JUSTICE SCALIA: And many of the other
9 crimes that Justice Breyer has been talking about.

10 MS. CALL: Yes, Your Honor. I certainly
11 agree that -- -

12 JUSTICE BREYER: You do? You agree that,
13 then -- in other words, Section 2 is not about property
14 crimes that involve force, which is what Congress
15 happened to say nonstop in the legislative history,
16 which I know isn't read by everyone. But it seemed to
17 me reading that history, the first part is dealing with
18 those things that aren't property crimes. The second
19 part, like arson, extortion, which they had in mind of a
20 certain kind, and whatever, the explosives-related
21 things, were things that they thought didn't -- could be
22 property crimes that also involved harm to people.

23 MS. CALL: Yes, Your Honor, and --

24 JUSTICE BREYER: Well, you can't say yes to
25 both of us.

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1 MS. CALL: Well -- I agree with Your Honor
2 that the legislative history certainly indicates that 1
3 and 2 had different purposes, but this Court didn't find
4 Begay and Chambers on the easy test, to say simply that
5 DUI is not a property crime, therefore it doesn't
6 qualify. So I hesitate to offer that as a solution to
7 the Court, but keeping in mind that the government --

8 JUSTICE SCALIA: I dare say that the next
9 time somebody comes to argue before this Court that a
10 crime is not included within Section 2 because it's not
11 a property crime, I don't think that person is going to
12 get one vote.

13 JUSTICE BREYER: They wouldn't have to say
14 that. They would have to say that it is not a crime
15 like the three that are mentioned, which I can't
16 remember -- it's arson, extortion -- and what's the
17 third? Using explosives.

18 MS. CALL: It is burglary, arson, extortion,
19 and --

20 JUSTICE BREYER: Yeah, burglary, arson,
21 extortion -- all right. You would say it's not like
22 that. It's DUI; it was not like that.

23 MS. CALL: Yes, Your Honor.

24 JUSTICE BREYER: And I get --

25 MS. CALL: But if the government failed to

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1 prove that a predicate qualified under the first prong,
2 it could offer argument in evidence to the sentencing
3 judge to show that it met the Begay test and was, in
4 fact a serious risk of injury, that -- purposeful
5 violence, et cetera. It's simply not that battery by
6 touching qualifies.

7 And, Your Honor, if I may reserve the
8 remainder.

9 JUSTICE GINSBURG: Would you just clarify an
10 answer that you gave. You described Florida as unique,
11 but I thought there were many States that had a
12 codification of common law battery that would include
13 both touching and more aggressive behavior. I thought
14 Florida was not alone in having that kind of statute.

15 MS. CALL: There are other States, Your
16 Honor, that have the common law definition, but they
17 also have alternative versions. Many of the States also
18 have alternative versions that require either the use of
19 force or the aggravated if the underlying conduct or the
20 underlying charge was that serious matter of involving
21 physical force to qualify under a violent felony.

22 JUSTICE SCALIA: I thought you said they all
23 had such -- such aggravated statutes in your answer to
24 me. Now you just said many of them do. Which is it?

25 MS. CALL: Well, many have alternative

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1 versions that require admission of use of force, not
2 simply, say, touching or striking like Florida. But all
3 do have felony versions of aggravated felony.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Ms. Kruger.

6 ORAL ARGUMENT OF LEONDRA R. KRUGER

7 ON BEHALF OF THE RESPONDENT

8 MS. KRUGER: Mr. Chief Justice, and may it
9 please the Court:

10 The primary definition of violent felony in
11 the Armed Career Criminal Act, as, Justice Alito, you
12 have noted and, Mr. Chief Justice, as you have noted,
13 almost precisely tracks the general definition of the
14 crime of battery; that is, the unlawful application of
15 physical force to the person of another.

16 Petitioner's primary submission --

17 CHIEF JUSTICE ROBERTS: Well, then why
18 didn't they say -- why didn't they just say battery, if
19 that's what they meant? It's a lot simpler and also
20 clearer than to say physical force against the person.

21 MS. KRUGER: I think it's certainly true,
22 Mr. Chief Justice, that Congress could have defined the
23 category of predicates for the ACCA in that way by
24 listing certain offenses, which would then require the
25 courts to determine what the generic elements of those

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1 offenses were, as this Court did with respect to
2 burglary in Taylor.

3 But Congress instead decided to list in its
4 primary definition of violent felony the common element
5 that it thought as a categorical matter indicated a
6 sufficient potential for harm that the crime ought to be
7 singled out as a predicate for ACCA enhancement. And
8 that single element was the use of physical force
9 against the person of another.

10 JUSTICE SCALIA: You -- you -- you would
11 have us believe that by "violent felony" in this -- in
12 this statute, Congress meant the threat -- the threat?
13 It doesn't even have to be the act. You know, if you
14 don't shut up, I am going to come over and thwunk you on
15 your shoulder with my index finger. I'm going to
16 (snap). This is a violent felony under this statute
17 which gets him how many more years?

18 MS. KRUGER: It creates a mandatory minimum
19 of 15 years.

20 JUSTICE SCALIA: Fifteen years for (snap).

21 (Laughter.)

22 MS. KRUGER: Justice Scalia, I think that
23 there are a few responses to that question. The first
24 is that a threatened use of force is normally considered
25 and normally punished under the criminal law as a crime

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1 of assault. And for the reasons that Justice Breyer has
2 noted already in the arguments, it seems awfully
3 unlikely, particularly in light of legislative history
4 of this provision for those Justices who consider such
5 considerations relevant, that Congress meant to exclude
6 the crime of assault.

7 JUSTICE SCALIA: But that's all he's
8 necessarily been convicted of. When a verdict is
9 brought in in Florida under this misdemeanor statute,
10 all you know for sure is that he threatened to go
11 (snap). That's all you know for sure that he has been
12 convicted of, and you are going to give him 15 years.

13 MS. KRUGER: And again, two responses: The
14 first is as a practical matter that is not a crime.
15 Normally the law of assault, in order to constitute a
16 criminal threat, there has to be more than simply the
17 use of words. There has to -- the defendant has to
18 manifest by conduct.

19 JUSTICE GINSBURG: But there have been rude
20 touchings where there is no danger of physical injuries
21 to the person. There have been prosecutions in Florida,
22 I understand, for what would be considered a rude
23 touching as opposed to an aggressive use of force that
24 would risk physical injury.

25 MS. KRUGER: That's correct. There have

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1 been a handful of cases, that are cited in Petitioner's
2 brief, in the -- in which the Florida statute has been
3 used to criminalize rude touchings. We think that those
4 rude touchings, as a matter of general usage in the
5 common law and in the general definition of battery, do
6 in fact have as an element the use of physical force.
7 That is a usage that has been in force in the majority
8 of States for quite some time. And we think that it
9 does no particular violence, if you will pardon the
10 expression, to the statute to interpret it to encompass
11 the full range of common law batteries, batteries as
12 they are prosecuted --

13 JUSTICE KENNEDY: How about pick pocketing,
14 would pick pocketing be a violent crime if it involves a
15 touching necessarily?

16 MS. KRUGER: Pick pocketing actually doesn't
17 involve a touching necessarily. Normally if you --

18 JUSTICE KENNEDY: I guess a very good pick
19 pocket could get -- could get just the wallet and not
20 touch the person, I'm not sure.

21 MS. KRUGER: Well, pick pocketing, normally
22 as it is criminalized in most states, does not, in fact,
23 require as an element that the prosecution prove that
24 the -- the defendant touched the victim.

25 JUSTICE SCALIA: No, but you don't prosecute

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1 them for pick pocketing. You have a clumsy pick pocket
2 and you prosecute him for battery, right? And he gets
3 15 years.

4 MS. KRUGER: Well, the clumsy pick pocket
5 would, in fact, be in most jurisdictions a robber. And
6 robbery is precisely the kind of offense that we know
7 that Congress was intending to cover in subsection 1 of
8 the ACCA. It was one of the first ACCA predicates, and
9 it remains, I think, a paradigmatic example of a crime
10 that has as an element the use of force and is,
11 therefore, covered under the plain statutory language.
12 But I think that --

13 JUSTICE SOTOMAYOR: Counsel -- I'm sorry.
14 Please finish and then I will --

15 MS. KRUGER: But I think that the essential
16 thrust of the argument so far has been that if it's
17 possible to commit battery under the common law under
18 the laws of 27 states, including Florida, under Federal
19 law in the way that individual instances doesn't seem to
20 present a serious risk of injury, then it can't possibly
21 be a violent felony. And I think that we know from the
22 way the Court has interpreted the statute to date that
23 that is simply not the case.

24 This Court addressed a very similar argument
25 in Taylor --

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1 JUSTICE SOTOMAYOR: Counsel, you see that
2 you don't have the inquiry. The issue is not whether it
3 causes serious injury or not, the issue is whether the
4 nature of the force used is physical force. And, so, if
5 you look at the common definition of "physical force" in
6 the dictionary, which your adversaries did very well in
7 their brief, physical force has in its ordinary meaning
8 the use of some strength, of some power, and generally
9 kissing doesn't require that strength or power, touching
10 someone on the shoulder, doesn't. All of these
11 activities are prohibited by this statute if they are
12 unwanted.

13 So the question is not whether or not they
14 present the risk of physical injury, the issue is
15 whether in all applications or in a substantial number
16 they don't require the use of strength to -- in its
17 application. That's a different question.

18 MS. KRUGER: Justice Sotomayor, I think that
19 you are exactly right, that the inquiry that is set out
20 in subsection 1 is simply, does this crime have as an
21 element the use of physical force?

22 Our submission is that every battery under
23 Florida law, under common law and under the laws of 27
24 states and the Federal Government does have an -- as an
25 element the use of physical force.

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1 JUSTICE SOTOMAYOR: Mainly because -- now we
2 are getting to Judge Easterbrook's argument about the
3 dime -- you know if I touch myself, I have now used
4 force.

5 MS. KRUGER: Right. There is some
6 suggestion in Judge Easterbrook's opinion that that
7 usage is somehow peculiar to Newtonian physics. The
8 fact of the matter is, it is actually a very common
9 usage in the criminal law. There are a number of
10 judicial opinions, for example, that we instead of using
11 the formulation that we see in Florida's battery
12 statute, instead use the formulation use of force of the
13 slightest degree.

14 JUSTICE BREYER: All right. Suppose we
15 interpret the statute, the act of the statute as
16 requiring more force than that, as requiring something
17 more than spitting. Now, suppose that sometimes, as
18 they have made a strong case, that touching is a
19 separate thing under this statute because that's what
20 the Florida Supreme Court said, and moreover, there are
21 prosecutions that seem not to fit within striking. How
22 do we know whether by and large this were a touching as
23 used in Florida, covers things with mostly minimal
24 touching, minimal force or enough force to get within
25 the statute?

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1 MS. KRUGER: Well, Justice Breyer, I think
2 that's precisely the problem with the Petitioner's
3 submission. It creates a kind of required element under
4 the ACCA that has no clear parallels in the substantive
5 criminal law. And it would require Federal sentencing
6 courts to ask precisely the kinds of questions the law
7 of battery has historically thought to avoid, just how
8 much physical force is enough.

9 The reason why a statute like Florida has
10 reached the least touching of another in anger is as
11 Blackstone told us, that too is a form of violence. It
12 has so been considered for centuries.

13 And, Justice Ginsburg, to return to your
14 question earlier, Florida itself actually does classify
15 the crime of battery as defined under its statute as a
16 crime of violence for certain purposes. The ordinary
17 understanding of the crime of battery --

18 JUSTICE GINSBURG: Not for recidivism. Not
19 for recidivism purposes.

20 MS. KRUGER: It --

21 JUSTICE GINSBURG: But are you saying that
22 suppose to Florida split this statute, and some states
23 do, so one crime is a rude touching crime, and the other
24 is the use of physical -- aggressive physical force that
25 endangers the physical safety of another. If you have

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1 both of those statutes, I take it that you would say
2 either one of them would fit under ACCA as a crime that
3 has the use of physical force, because you are saying
4 the rude touching is physical force? Even if you split
5 off the touching from the striking, you would say that
6 the touching falls under ACCA?

7 MS. KRUGER: That's correct, Justice
8 Ginsburg. We think that both variants of that offense
9 in your hypothetical would have as an element the use of
10 physical force.

11 JUSTICE STEVENS: But only as a felony.

12 JUSTICE GINSBURG: And what Congress was
13 trying to get at the worse of the worst in ACCA, the
14 Armed Career, whatever -- that they meant to get after
15 people who go around poking other people in a rude
16 manner?

17 MS. KRUGER: Well, Justice Ginsburg, I
18 think, first of all, it would be a mistake to think that
19 Congress defines the range of ACCA predicate with
20 particular consideration to the ways that hypothetical
21 defendants might -- might commit even quintessentially
22 violent crimes in particular cases.

23 This Court, for example, considered in
24 Taylor v. United States a very similar argument, which
25 was that the statutory reference to burglary ought to be

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1 interpreted in a way that would limit it to aggravated
2 burglaries of a certain sort, armed burglaries or
3 burglaries of occupied buildings, in order to make sure
4 that that reference to burglary better fit with
5 Congress's purposes in selecting the worst of the worst.

6 This Court declined that invitation because
7 it decided that Congress's unmodified views of the word
8 "burglary" indicated that Congress meant for that word
9 to take on its ordinary meaning as it was used in the
10 laws of the many states. It said that Congress would
11 have recognized that ordinary burglaries can be
12 committed in individual instances in ways that don't
13 seem particularly harmful, by unarmed defenders of
14 unoccupied buildings in remote locations, but that
15 Congress nevertheless made a categorical judgment that
16 burglaries as a whole present sufficient potential for
17 harm that they ought to be covered as ACCA predicates.

18 And I think a similar analysis applies here.
19 Congress probably wasn't focused on the least amount of
20 force that it takes to commit the crime of battery, but
21 it was entitled to make a judgment that any battery, any
22 unlawful use of force against another person,
23 categorically presents sufficient potential for harm
24 that --

25 JUSTICE BREYER: It might have, but battery

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1 by touching does seem a separate category. And at that
2 point, you have to decide, is there an element there of
3 force? And I think it requires more force than just the
4 simplest touching.

5 Now, on Justice Scalia's approach, the fact
6 that there is one conviction for spitting is sufficient
7 to take it outside the statute. That's not my approach.
8 I would say, in the mind run of cases, does there have
9 to be more force than just spitting? And now I don't
10 know how it's prosecuted. So why don't I say in this
11 case, from my perspective, very well, I don't know. No
12 one knows. No one has told me. No one has looked into
13 it. It's very hard to look into, but not impossible.

14 It's the Government's job, faced with a
15 15-year statute, to do the looking. They have the
16 resources. More than a defense attorney. Therefore,
17 uncertain as I am, I must decide this in favor of the
18 defendant. What's the response to that?

19 MS. KRUGER: Well, I think the response is,
20 first, we think that the proper approach is one that
21 pays respect to the words that Congress used to define
22 the crime. In ordinary criminal law, despite what some
23 intuitions seem to be, the least touching of another in
24 anger is a form of violence. It is a use of physical
25 force.

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1 I think to the extent that, Your Honor, you
2 are inclined to look to the purposes of this statute,
3 what Congress would have thought the mind run of cases
4 that would fall under Subsection 1's use of force
5 provision would cover, I think there you look at the
6 reported cases in Florida, we see that the kinds of
7 crimes that are prosecuted under the touching or
8 striking prong of that statute are, in fact, quite
9 harmful. It's not at all difficult to see why Congress
10 would have been concerned about these types of crimes,
11 both because in many instances they involve conduct that
12 is probably better described as touching or striking but
13 it is -- nevertheless risks substantial harm to the
14 victim, like choking, like beating the victim's head
15 against the car window, to use an example from one of
16 those cases cited in our brief.

17 JUSTICE SCALIA: You know, I guess it comes
18 down to whether we think that in -- in B1, Congress was
19 using technical language or Congress was using simply
20 ordinary language, because you are quite right that the
21 definition of -- of battery covers even the slightest
22 touching. The use of physical force, which would
23 include the slightest touching.

24 But in using that definition to define the
25 term "violent felony," I find it hard to believe that

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1 Congress was using the term in a technical sense, and
2 was not using the term "physical force," "the use of
3 physical force" to mean something more than a mere
4 touching.

5 But that's -- that's basically what we are
6 arguing, isn't it? Whether that -- whether that phrase
7 there, "threatened use of physical" -- "use or
8 threatened use of physical force," is technical language
9 which is the definition of battery, or rather more
10 common usage.

11 You -- you would acknowledge that, that in
12 more common usage, no one -- no one would think that if
13 you go over to somebody and point your finger at him on
14 his lapel and say, "Now, you listen to me," that that
15 would be considered the use or threatened use of
16 physical force?

17 MS. KRUGER: I think it probably is not the
18 way that we ordinarily talk in day-to-day conversation,
19 but it certainly is the way that the law has talked
20 about it for centuries, and I think there is a reason
21 that Congress had in mind the technical definition of
22 battery rather than ordinary parlance, if for no other
23 reason because it tracked so closely the general
24 definition, that technical definition of "battery," when
25 it defines "violent felony" in Subsection 1. And also

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1 because now that the --

2 JUSTICE STEVENS: May I ask -- may I ask
3 this, following up on Justice Scalia's point? Are there
4 any other crimes other than battery that -- that create
5 the same situation where in the first time it is
6 committed it's a misdemeanor, but then it becomes a
7 felony because it's committed twice? So what we have
8 here is conduct that first time is misdemeanor, second
9 time is a felony. Are there any other examples of
10 crimes that fit that category that come within
11 Subparagraph 1?

12 MS. KRUGER: I am not sure of the answer to
13 that, Justice Stevens. I do think that one reason why
14 the misdemeanor versus felony distinction is somewhat
15 unimportant to the interpretation of the "use of
16 physical force" language in this case is that if the
17 same language was deployed first in the "crime of
18 violence" definition of 18 U.S.C. 16, which by its
19 terms, applies to both misdemeanors and felonies, and
20 Congress has of course subsequently used that very same
21 language to define a class of misdemeanor crimes of
22 domestic violence in Section 922(g)(9), we think to the
23 extent that this Court is inclined to interpret the
24 extent of the similar language in the similar statutes
25 in a similar manner, the use of physical force language

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1 should remain consistent across them.

2 One of the principal vices of Petitioner's
3 arguments is also that it would leave the Federal
4 domestic violence provisions like Section 922(g)(9) with
5 relatively patchwork and haphazard application, which is
6 precisely one of the considerations that motivated this
7 Court's decision just last term in the United States v.
8 Hayes. Whether the Court --

9 JUSTICE GINSBURG: But there are no
10 provisions that would include domestic violence and the
11 gun possession provision.

12 MS. KRUGER: There are -- the range of
13 predicate offenses that can be used for the Section
14 922(g)(9) domestic gun violence prohibition, ordinarily,
15 as this Court recognized in Hayes, encompasses the
16 general assault and battery statutes of the United
17 States. Twenty-seven of these states define battery in
18 more or less the way that Florida does, to include a
19 range of uses of physical force from the least degree of
20 physical force to very severe beatings, so under
21 Petitioner's reading, it would be impossible to say for
22 sure in more than half of the country that a domestic
23 violence conviction, even a battery conviction that is
24 specifically denominated as a domestic violence battery
25 conviction in many a state, would qualify under Section

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1 922(g)(9).

2 It seems unlikely that Congress, in enacting
3 that statute, which was designed to create a nationwide
4 solution to the nationwide problem of the combination of
5 guns and domestic strife, would have intended for that
6 statute to have such a haphazard impact. And yet that
7 is precisely what the effect of Petitioner's reading
8 would be.

9 JUSTICE SCALIA: Where is the provision?
10 922(g)(9), is that in your brief somewhere?

11 MS. KRUGER: It is. It's in the statutory
12 appendix to the gray brief.

13 JUSTICE SCALIA: I am looking for it. I
14 don't see it. 922(g)(9).

15 MS. KRUGER: The --

16 JUSTICE SCALIA: I hate people talking about
17 statutes that I don't have in front of me.

18 MS. KRUGER: It's on page 3(a) of the
19 statutory appendix.

20 JUSTICE SCALIA: 3(a).

21 MS. KRUGER: It contains Section
22 921(a)(33)(a), which provides the definition of
23 "misdemeanor crime of domestic violence."

24 JUSTICE SCALIA: I thought you said 922.
25 That's what I thought you said.

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1 MS. KRUGER: That's correct. The
2 substantive prohibition is in Section 922(g)(9), and the
3 definitional provision is reprinted on page 3(a).

4 JUSTICE KENNEDY: It's really a question for
5 Petitioner's counsel, and I didn't have time to ask as
6 your white light goes on. I take it your position is
7 that if you do not prevail on your argument, that this
8 is under Roman -- small Roman 1, that if -- you have to
9 remand for small Roman 2?

10 MS. KRUGER: That's correct.

11 JUSTICE KENNEDY: Is there an argument that
12 you anticipate objecting to that remand? Or is this
13 absolutely clear-cut that we must remand?

14 MS. KRUGER: I think it's within the Court's
15 discretion to decide how to dispose properly of the
16 case. I think that the Section -- the Subsection 2
17 issue was preserved in the courts below. The district
18 court rested its decision on both Subsections 1 and 2,
19 and the court of appeals addressed only Subsection 1.

20 We think that if the Court decides that the
21 court of appeals is wrong in its interpretation of
22 Subsection 1, then the appropriate thing in order to
23 determine what Petitioner's correct sentencing should be
24 would be to remand to allow the court of appeals to
25 address the alternative argument about Subsection 2.

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1 But the reason why the Subsection 1 inquiry is so --

2 JUSTICE SOTOMAYOR: How -- I'm sorry.

3 Before you go on, your adversary claims you waived by
4 not raising this as an -- as an alternative in the sorts
5 stage. Could you fold that into your continuation of
6 this answer?

7 MS. KRUGER: Certainly. I think that rule
8 15.2 of the rules of this Court requires us in a brief
9 in opposition to raise any material matters that relate
10 to the question presented.

11 The question presented in this case concerns
12 just the basis for the court of appeals decision in this
13 case which was subsection (1) of the statute. We think
14 it's not at all unusual for this Court to decide that a
15 court of appeals judgment is in error and then remand to
16 allow the court of appeals to address --

17 JUSTICE BREYER: Hear what they said, what
18 the Eleventh Circuit said, it said that if battery under
19 Florida law fits within the description of (1), then it
20 is a violent crime for ACCA purposes. And then it says
21 if not, then not. And as long as the issue was in front
22 of them I would think that those last four words are a
23 holding.

24 MS. KRUGER: I think it's difficult to read
25 those four words in that manner, Justice Breyer.

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1 JUSTICE BREYER: Why?

2 MS. KRUGER: If for no reason because the
3 court of appeals didn't so much as acknowledge the
4 existence --

5 JUSTICE BREYER: Was it argued?

6 MS. KRUGER: It was argued. It was -- it
7 was briefed in the court of appeals, and the court of
8 appeals --

9 JUSTICE BREYER: It is pretty hard to see it
10 given Begay, how this is like arson or, you know, the
11 other three there, burglary, arson --

12 JUSTICE SCALIA: Explosives.

13 JUSTICE BREYER: -- explosives.

14 MS. KRUGER: Well --

15 JUSTICE BREYER: So, I mean, I don't know.
16 Maybe the court of appeals felt -- what they said was,
17 "if not, then not." And it was raised in argument.

18 MS. KRUGER: Well, I think it's -- again,
19 it's difficult to read that piece of loose language in
20 the Court's opinion as a direct holding, particularly
21 considering that the court of appeals didn't so much as
22 cite the language or even the code provision that
23 relates to the argument. But I think to the extent that
24 the Court questions whether it would qualify under
25 subsection (2), I think the answer is yes. Battery

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1 is -- qualifies under this Court's interpretations of
2 that subsection in Chambers and Begay and James. It is
3 a crime that is typically purposeful, violent and
4 aggressive.

5 JUSTICE BREYER: Yeah, but I -- I thought --
6 you know, it's -- it's like the other four listed out.

7 MS. KRUGER: Well, it is like them in that
8 it poses risks that are similar in --

9 JUSTICE BREYER: But then we are rereading
10 these three other examples out because then "other"
11 covers any crime that poses a risk of violence, or
12 whatever the words are there -- I forget the words.
13 Poses a risk.

14 MS. KRUGER: No, I think it would still be
15 consistent with this Court's analysis of subsection (2)
16 in Begay in that battery by touching, if you consider it
17 to be a separate crime, which again I think is a highly
18 contested --

19 JUSTICE BREYER: And you think drunk driving
20 doesn't present a serious potential risk of physical
21 injury?

22 MS. KRUGER: No, but what this Court said in
23 Begay was that it doesn't present risks that are similar
24 in degree and kind to the risks that are presented by
25 the enumerated offenses. And battery, including battery

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1 by touching or striking under Florida law, presents
2 risks that are quite similar in degree and kind to the
3 enumerated offenses, particularly burglary. It is --

4 CHIEF JUSTICE ROBERTS: Wait, I don't follow
5 that at all. I mean, I understand your argument that
6 physical force means the slightest touching, but I don't
7 understand the argument that the slightest touching
8 presents a serious risk of potential physical injury.

9 MS. KRUGER: Well, I think -- first of all,
10 to clear up a misconception, simply because the
11 statutory text covers the slightest touching doesn't
12 mean that it covers only the slightest touching. It
13 covers a wide range of degrees of physical force
14 beginning with the slightest touching and including --

15 CHIEF JUSTICE ROBERTS: Yeah, but your
16 argument is to try -- is asserting that the slightest
17 physical touching is covered by the statute.

18 MS. KRUGER: Right. And the question before
19 the Court in this case concerns only that question. It
20 concerns the proper interpretation of subsection (1).
21 Whether the crime is one that has as an element the use
22 of physical force.

23 JUSTICE STEVENS: The district court thought
24 that the two were related. The district court, if it
25 thought a slightest touching was qualified under (1) it

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1 was not unreasonable to say that it would also qualify
2 under (2). But if that argument is rejected under
3 (1), it seems to me it would follow necessarily that it
4 would also be rejected under (2).

5 MS. KRUGER: I'm not entirely sure why that
6 would be true. But I do think that it's right as a
7 descriptive matter that most of the crimes that are
8 encompassed by subsection (1) would also qualify under
9 subsection (2).

10 JUSTICE SCALIA: But (2) -- (2) looks to the
11 conduct, it doesn't look to the element of the crime.
12 So you could actually look to the conduct of which the
13 person was convicted, no?

14 MS. KRUGER: Well, you have to look at the
15 contact that the person was convicted of with respect to
16 the elements of the crime, that is the nature of the
17 category --

18 JUSTICE SCALIA: No, no, no. You look to
19 the crime -- under (1), you look to the crime he was
20 convicted of, and if -- if -- if none of its elements
21 require serious physical force, you can say it doesn't
22 qualify under (1), but under (2) if in fact you see the
23 misdemeanor he was convicted of was really whacking
24 somebody really hard, then -- then it could possibly
25 come within -- come under (2).

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1 MS. KRUGER: With respect, Justice Scalia, I
2 think that is incorrect. This Court has made clear that
3 subsection (2) like subsection (1) proceeds by looking
4 at the elements of the offense --

5 JUSTICE SCALIA: Just at the elements.

6 MS. KRUGER: Just at the elements of the
7 offense of which the defendant was convicted.

8 JUSTICE SCALIA: Can I ask you about --
9 about 922? You point to the -- the definition there,
10 the definition in 921. But that is a definition of the
11 term, misdemeanor crime of domestic violence. And in
12 the context of defining that term, I'm perfectly willing
13 to believe that the use or attempted use of physical
14 force means even the slightest touching, as -- as
15 battery does. You are talking about a misdemeanor crime
16 of domestic violence.

17 But what we have before us here is a term --
18 a different term that is being defined and that term is
19 violent felony. And I find it a lot harder to swallow
20 that -- that that definition embraces merely the
21 slightest touching.

22 MS. KRUGER: Well, Justice Scalia, I would
23 certainly be inclined to agree with you but it's
24 particularly clear given the text and context of the
25 purposes of section 922(g)(9) that battery ought to be

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1 covered by that definition, misdemeanor crime of
2 domestic violence. But we think that the reason why it
3 is also clear under subsection (1) of the ACCA is that
4 the use of force element of the definitional provision
5 is separate from the degree of seriousness with which
6 the State chooses to treat the crime, yet the crime is
7 punished as a felony, and if has as an element the use
8 of physical force, then it qualifies as a violent felony
9 under the ACCA, just as if it is punished as a
10 misdemeanor, it qualifies as a misdemeanor crime of
11 domestic violence under section 922(g)(9).

12 JUSTICE SCALIA: I dare say that Congress in
13 my view probably didn't even contemplate that something
14 which is a misdemeanor could become a violent felony if
15 you did it the second time.

16 MS. KRUGER: Well --

17 JUSTICE SCALIA: Have we ever approved that,
18 by the way, kicking it up to the felony category simply
19 because of recidivism?

20 MS. KRUGER: Well, the Court in United
21 States v. Rodriguez in analyzing the coordinate
22 provision of the ACCA that covers serious drug offenses
23 said that the felony aspect of that definition is
24 satisfied by a recidivist enhancement. And we think
25 that the conclusion in that case, and it is not disputed

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1 among the parties, applies with equal force in this case
2 to the proper interpretation of violent felony.

3 But it was certainly true by the time that
4 Congress enacted the ACCA, which the legislative history
5 indicates Congress understood would cover assault
6 crimes, for example, that there were certain kinds of
7 batteries and assaults that, although otherwise may be
8 punished as simple batteries and assaults, as
9 misdemeanors, could be elevated to a felony if for
10 example they were committed against a law enforcement
11 officer.

12 It simply was not unheard of for simple
13 battery to be elevated to a felony under certain
14 circumstances in 1986 Congress enacted the present
15 version of ACCA. At the end of the day, we think that
16 Congress -- every indication that we have in both the
17 text, the context, the purpose of the statute and its
18 background suggests that Congress was in fact
19 deliberately tracking the definition of battery when it
20 enacted the primary definition of violent felony in
21 subsection (1).

22 CHIEF JUSTICE ROBERTS: Well, every
23 indication except for the fact that they didn't use the
24 word battery.

25 MS. KRUGER: Aside from the fact that they

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1 didn't use the word battery. Instead they chose to
2 incorporate the general definition of the crime of
3 battery; that is correct, Mr. Chief Justice.

4 We think that to the extent that the Court
5 is inclined to restrict the terms of -- that Congress
6 chose to use itself to physical force as only exceeding
7 a certain threshold, to include some batteries and not
8 other batteries, the Court would be setting up a very
9 difficult test for Federal sentencing courts to apply in
10 the real world. Essentially --

11 JUSTICE SCALIA: States do it all the time
12 when they have different degrees of battery.
13 Misdemeanor -- felony battery -- they do it all the
14 time.

15 MS. KRUGER: Well, as the Chief Justice has
16 noted, States don't have quite the same compulsion to
17 sort different factual offenses into different boxes.
18 Prosecutors, as the prosecutor did in this case, can use
19 either of the two alternative prongs of Florida's
20 battery definition to punish what is essentially the
21 same offense, which is the crime of battery, that
22 deserves the same punishment regardless of which prong
23 the prosecutor proceeds under, whether the bodily injury
24 prong or the touching or striking prong.

25 And Petitioner's concession that at least

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1 Federal sentencing courts could draw distinctions
2 between touches and strikes, may have some resonance in
3 the State of Florida, but has resonance for the rest of
4 the country. Most State assault and battery statutes
5 don't contain explicit references to striking, but
6 subsume striking within the range of conduct prescribed
7 by their offensive touching prong.

8 So it simply wouldn't be possible, in most
9 cases, for a court to look at the cold record of the
10 underlying State conviction and try to discern exactly
11 how much force was involved in the offense and whether
12 that force satisfied the Petitioner's proposed
13 threshold, whatever it means.

14 At the end of the day, the principal
15 question before the court is one that is, primarily,
16 relevant to the Section 922(g)(9) provision and other
17 federal misdemeanor domestic violence provisions and one
18 that we think, in considering the purposes of those
19 statutes and the very serious dangers that they address,
20 the Court ought to interpret the plain text of the
21 statutes in light of their plain meaning.

22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

23 Ms. Call, you have four minutes remaining.

24 REBUTTAL ARGUMENT OF LISA CALL

25 ON BEHALF OF THE PETITIONER

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1 MS. CALL: Thank you, Your Honor.

2 JUSTICE KENNEDY: I -- I don't want to waste
3 too much of your time on the remand, but I can't really
4 fault the government for waiving a right to raise a
5 claim under Clause 2, which is your second reason for
6 not -- not remanding, and it -- it does seem, to, me
7 that the Eleventh Circuit -- one permissible reading was
8 that they were just looking at 1, so that we would have
9 to remand.

10 MS. CALL: Justice Kennedy, I would have to
11 disagree with that because it was fully briefed, fully
12 argued --

13 JUSTICE KENNEDY: I understand that.

14 MS. CALL: And I take the -- the provision
15 that when they indicated that the test was exclusively
16 under the first prong.

17 Second, Your Honor, I believe it would
18 simply be a waste of judicial resources if the Court
19 finds that this battery by touching doesn't have, as an
20 element, the use of force, the test would be to remand
21 it to decide whether it meets the Begay standard, which
22 is purposeful, violent, aggressive, and all of those
23 tests.

24 JUSTICE KENNEDY: Yes. Except in this area,
25 I am a little reluctant when it hasn't been argued

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1 before as to make a definitive holding, but I will look
2 at the Eleventh Circuit opinion again.

3 MS. CALL: Yes, Your Honor, and the other
4 note I would make is, factually, at page 40 of the joint
5 appendix, they indicated there were no other Shepard
6 documents to offer to the Court, so the entire record is
7 available for reconsideration and is available to this
8 Court.

9 JUSTICE KENNEDY: Thank you.

10 MS. CALL: And, Your Honor, I wanted to note
11 this is not just an academic exercise on noticing what
12 physical force means. Absent this one finding of
13 Mr. Johnson's prior conviction was a violent felony, it
14 raised his guideline range, from 27 to 33 months, to a
15 mandatory minimum sentence of 15 years.

16 So the danger of including this crime, when
17 the art or criminal act was not designed to include all
18 crimes or all offenders, means that it took all
19 discretion away from the sentencing judge.

20 In ACCA, Congress set a superior high
21 standard requiring three priors on three -- that
22 occurred on three separate occasions, and so looking at
23 this decision, when Mr. Johnson was put inside the box,
24 that tied the judge's hands.

25 If this were not considered a violent

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1 felony, the sentencing judge could consider that under
2 the guidelines in the 3553 factors. But to read
3 physical force so broadly is to, in essence, collapse
4 the distinction between those violent offenses that are
5 meant to be included in the Armed Career Criminal Act
6 and those that are not.

7 Your Honors, I would also note one matter,
8 that physical contact is used in the assault statutes
9 under the Federal Code, so there is a different
10 provision -- a different meaning to physical contact
11 than to physical force, and the physical force, in this
12 definition, is looking at what level and what sort of
13 force Congress intended to require to impose this very
14 high sentencing standard.

15 And this Court had rejected, in Shepard, the
16 government's same happenstance argument that
17 prosecutions would depend on recordkeeping and charging
18 decisions, and so, for all the reasons argued,
19 Mr. Johnson would ask that this Court vacate the lower
20 decision and remand for resentencing.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

23 The case is submitted.

24 (Whereupon, at 12:07 p.m., the case in the
25 above-entitled matter was submitted.)

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