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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-11206, Chambers v. United States.

Mr. Hochman.

ORAL ARGUMENT OF ROBERT N. HOCHMAN

ON BEHALF OF THE PETITIONER

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

Failure to report is not a violent felony under the Armed Career Criminal Act because it presents neither a serious potential risk of injury to others nor involves violent and aggressive conduct.

The Government argues that failure to report satisfies both the risk of injury and violent aggressive conduct standards for the same reason: The prospect that a offender will violently resist an arrest -- resist arrest upon completion of the offense or upon doing -- for having done the offense. That potential and that potential risk alone is neither as a matter of fact nor law sufficient to satisfy either the risk of injury or the violent, aggressive conduct standard.

Beginning with the risk of injury: The statute refers to a serious potential risk of injury,

1 and by using the word "serious" Congress indicated not
2 just any felony, not just any felony which carries
3 necessarily some risk of injury would be included. The
4 risk that must be generated must be one that's somehow
5 greater than -- something that warrants singling out
6 this sort of offender as the sort of person who's
7 deserving of greater punishment for his recidivism.

8 CHIEF JUSTICE ROBERTS: I take it you
9 concede that a breakout as opposed to a failure to
10 report would be covered by the statute?

11 MR. HOCHMAN: Yes, Your Honor, I think it
12 would. I think that in fact one of the critical errors
13 that the courts of appeals have made and that the
14 Government made here is equating breakout, prison
15 escape, with failure to report. They are entirely
16 different. They are importantly different, both again
17 as a matter of analytically the categorical rule and
18 what would you look at to determine whether this sort of
19 person satisfied the violent and aggressive standard.
20 And we now know, in light of the Sentencing Commission's
21 report that was filed just last -- that was filed with
22 the Court just last week, that the risk of injury
23 associated with prison breakout escape and failure to
24 report is dramatically different. And that mistake --

25 JUSTICE KENNEDY: But suppose it were shown

1 -- it's just hypothetical. Suppose it were shown that
2 90 percent of all escapes under the escape statute were
3 breakouts involving weapons; 10 percent were failure to
4 report. Would that affect how we decide the case?

5 MR. HOCHMAN: This case?

6 JUSTICE KENNEDY: Yes.

7 MR. HOCHMAN: Well, since -- I think since
8 this is not a prison breakout case, I don't know whether
9 data about breakouts --

10 JUSTICE KENNEDY: Do we look to the crime to
11 see generally whether or not it involves violence and
12 serious risk of harm?

13 MR. HOCHMAN: I think you -- I think the
14 categorical rule does require you to look at --

15 JUSTICE KENNEDY: So that, in my
16 hypothetical, it would be a more difficult case than the
17 case we have here or would it be the same?

18 MR. HOCHMAN: I think in your hypothetical,
19 where a prison breakout is involved -- where a prison
20 breakout is involved --

21 JUSTICE KENNEDY: No. My hypothetical is,
22 under the statute, if you look at the whole universe of
23 prosecutions under the escape statute, 90 percent of
24 them are for breakouts involving weapons.

25 MR. HOCHMAN: I don't think that you look to

1 the universe under the escape statute. You can under
2 Shepard --

3 JUSTICE KENNEDY: But that's what we looked
4 to in Begay.

5 MR. HOCHMAN: But the issue under Shepard
6 and the approach under the categorical rule requires you
7 -- allows you to look at a narrower subsection of the
8 statute if the charging document and other reliable
9 indicia indicate that. And in this case, it's
10 undisputed that Mr. Chambers was convicted only of
11 failing to report. He was not convicted of the more
12 serious offense of prison breakout. And in fact in
13 Illinois they are punished at different levels, and the
14 evidence is absolutely clear --

15 CHIEF JUSTICE ROBERTS: Well, maybe -- I
16 don't want to put words in his mouth, but I thought what
17 Justice Kennedy was asking is what if you have a statute
18 that is just escape or whatever and doesn't break it
19 down like that? At that point would we look to see what
20 the crime of escape was typically like, most of them
21 were breakout or most of them were the other thing? You
22 have, I gather, two separate provisions, but what if you
23 don't?

24 MR. HOCHMAN: Yes. And that -- that is a
25 difficult question under the categorical rule. I think

1 that the first step would be to determine whether there
2 is anything in the record. Under Shepard, you can look
3 to other indications of whether the conduct at issue
4 that was found by the jury or that was pled to, either
5 from an indictment or from plea colloquy, whether there
6 is some more specific indication. If not, I think then
7 what you would look at -- and I think here you would
8 look at, to the extent you're looking at the risk -- on
9 the risk of injury side, you would look at the best
10 available information. If that -- if that gives you a
11 run of cases where you say it's typically --

12 CHIEF JUSTICE ROBERTS: I'm sorry. If
13 that's the case, I'm looking at 720 Illinois Statutes
14 5/31-6. It's reproduced a page 2a of the Government's
15 brief. And they don't -- it doesn't seem to be a
16 separate provision, whether it's a breakout or a failure
17 to report.

18 MR. HOCHMAN: But here the charging document
19 was clear, and under Shepard the charging document is
20 something you're also allowed to take into
21 consideration. And there is no doubt, under the
22 charging document, that he was convicted of merely
23 failing to report.

24 JUSTICE GINSBURG: What was the sentence for
25 that?

1 MR. HOCHMAN: It -- the sentence appears
2 that they extended his probation. He had to serve the
3 four weekends that he had failed -- for which he had
4 failed to report, and his probation was extended.

5 JUSTICE GINSBURG: But he didn't get any
6 extra jail time?

7 MR. HOCHMAN: He did not get any additional
8 jail time as far as I can tell from the record, Your
9 Honor.

10 JUSTICE SCALIA: There is really a problem
11 about -- about what you suggest. It may destroy the
12 whole benefit of the categorical approach. I mean, you
13 can always shave something down to become a narrower
14 crime. An escape statute, for example, I suppose you
15 could look to see whether the particular escape in
16 question from the charging document was an escape that
17 used firearms or was an escape that, you know, that
18 injured or killed guards. And, you know, that gets us
19 into the case-by-case examination that it is the whole
20 purpose of the categorical approach to avoid. Now, how
21 do we -- how do we avoid getting to the bottom of that
22 slippery slope?

23 MR. HOCHMAN: I think this -- I think this
24 Court took that step in Shepard, and it did it in a very
25 narrow and circumscribed way. It did it by saying the

1 only things you're allowed to consider are things that
2 are as reliable as the charge itself and the elements
3 essential to --

4 JUSTICE SCALIA: Okay. But I mean, the
5 charge mentions -- mentions a firearm. Anything that's
6 in the charge can be used to narrow the crime that we
7 are looking at.

8 MR. HOCHMAN: If the jury instructions were
9 clear -- if it's clear that the jury had to find that
10 the presence of a firearm -- then I think it complicates
11 -- that is, I think some courts refer to it as the
12 modified categorical rule.

13 JUSTICE SCALIA: It has to be an element of
14 the crime. If using a firearm is not an element of
15 escape, then I don't have to worry about it.

16 MR. HOCHMAN: If -- if -- correct. If it's
17 not an element in the sense that he either pled to it or
18 the jury necessarily found it as a necessary matter.
19 And that's really what Shepard says. It has to be
20 something that we necessarily know occurred from the
21 fact of conviction, and --

22 JUSTICE SCALIA: Okay, but it doesn't have
23 to be an element. So, if all the evidence in the case
24 was that, you know, he wrestled a gun from the guard and
25 made his way out of the prison that way, if the jury

1 found him guilty, that was the only basis on which it
2 could have found him guilty, that would be enough.

3 MR. HOCHMAN: I don't think that Shepard
4 permits you to look into trial transcripts of evidence
5 that was presented. It just says: What did the jury
6 necessarily find? And what I mean by "jury
7 instructions," how was the jury instructed? What did it
8 have to find? What did the jury have to find in order
9 to convict? Only those facts.

10 JUSTICE SCALIA: Well, that sounds like an
11 element. That sounds like an element.

12 MR. HOCHMAN: I think it is elements, but if
13 you look --

14 JUSTICE ALITO: Well --

15 MR. HOCHMAN: Please, continue.

16 JUSTICE ALITO: If you look at the cases
17 that we've had to decide under this statute in the last
18 couple of years, do you think they illustrate that the
19 categorical approach just doesn't work in this
20 situation? Because it puts us in the position for every
21 single crime that comes up here of making -- of trying
22 to ascertain what is the serious risk when we don't have
23 any empirical -- we don't have a number quantifying what
24 a serious risk is, nor can we generally find what the
25 risk is that's associated with a particular class of

1 cases.

2 Maybe when Congress enacted this they never
3 anticipated that it would be done on a categorical
4 basis. Why not just have a determination as to whether
5 there was a serious potential risk in this particular
6 case? So, if you have a -- a nonviolent person who
7 walks away, that's one thing. If you have somebody who
8 has a long list of convictions for violent -- violent
9 crimes and escapes, that's another situation.

10 MR. HOCHMAN: I think there are two problems
11 with that approach, Your Honor: First, as the Court
12 said in Shepard, the categorical rule, which was adopted
13 way back when the Court first confronted the statute and
14 has been consistently applied ever since, more or less
15 anticipated the Sixth Amendment Apprendi concerns that
16 might come from digging in and trying to attribute
17 conduct which has not been found by a jury, which
18 doesn't have that level of reliability, whether it's an
19 element or was on a special verdict form or some -- or
20 some other -- or was admitted to in a plea colloquy.

21 JUSTICE ALITO: Isn't that a separate
22 question? If it had -- if it has to be found by a jury,
23 it could be submitted to the jury?

24 MR. HOCHMAN: Well, if it was submitted to
25 the jury, then I think under Shepard it's something that

1 could be considered, and that would be part of what's
2 been referred to as the modified categorical approach.
3 I think the problems with the categorical approach that
4 you're identifying, courts have tried and Shepard itself
5 in effect amended enough to provide some kind of
6 flexibility.

7 The other reason to hold back on such a sea
8 change is this is, after all, a statutory case and the
9 categorical rule has been this Court's approach from the
10 beginning. Congress could easily revise the statute.
11 If after 20 years it hasn't --

12 JUSTICE ALITO: Well, it could, and if it
13 had read these cases and it was paying attention to this
14 problem, you would think it would go through a list of
15 crimes and say, these fall within it and these don't
16 fall within it. But obviously it hasn't done that.

17 MR. HOCHMAN: I think that would make
18 everybody's job, the bar and this Court, much easier.

19 JUSTICE KENNEDY: Well, it might not, if it
20 just said "escape," and then you'd have this same
21 problem.

22 MR. HOCHMAN: That might be the case,
23 although if it just said "escape," I think I'd actually
24 have a substantially harder case than what we have here,
25 because what we have here doesn't resemble the kind of

1 violent, aggressive conduct that this Court in Begay
2 said is going to be the standard and exemplar of the
3 sort of conduct that Congress was thinking about. It
4 added -- this Court in Begay said that the serious
5 potential risk of injury is just one part of the
6 inquiry, that Congress was also singling out crimes
7 committed in a certain way, and if that -- if that
8 requirement is going to have any bite, if it's going to
9 do the job of singling out and separating out cases, it
10 has to be something beyond the mere routine,
11 ever-present prospect that an offender might resist
12 arrest for having committed the offense after police
13 discover that he has done so.

14 And in fact if you step back for a moment
15 and just visualize --

16 JUSTICE SCALIA: Surely it depends upon how
17 -- what should I say -- how often that prospect is
18 realized.

19 MR. HOCHMAN: There is no doubt. There is
20 no doubt that the prospect --

21 JUSTICE SCALIA: I mean, the statute itself
22 lists robbery and robbery very often doesn't involve any
23 threat of injury, but all and all we think it does.
24 Obviously, Congress thought it did, right?

25 MR. HOCHMAN: Well in the -- I actually

1 think robbery would satisfy under the first clause
2 because it has as an element the use, attempted use, or
3 threatened use of physical force against another. But I
4 think the concern that escape is much more easily
5 detected than other crimes is obviously true. And so
6 the prospect that the offender will be arrested is
7 obviously greater than in other -- in other crimes.

8 But the point is the standards, the standard
9 imposed by Begay and the notion that the conduct must be
10 violent and aggressive, if you step back and visualize
11 what it is about burglary, arson, extortion or the use
12 of explosives that can properly be characterized as
13 violent and aggressive, surely it is not the prospect
14 that an offender will have been found out for having
15 committed those offenses, police will be dispatched to
16 arrest them, and then the offender upon that
17 confrontation will violently resist arrest. It's
18 just -- it's not -- it's not what those enumerated
19 offenses are doing in the statute.

20 JUSTICE SCALIA: I didn't mean to say
21 robbery. I meant to say burglary. Why is burglary
22 violent or aggressive?

23 MR. HOCHMAN: I think the reason is because
24 --

25 JUSTICE SCALIA: I mean, burglary by its

1 nature is -- you do it at night. You don't want to be
2 detected. It's not violent or aggressive at all. It's
3 sneaky, is what it is.

4 MR. HOCHMAN: I assume that --

5 JUSTICE SCALIA: Robbery is violent or
6 aggressive. You're quite right about that.

7 JUSTICE SOUTER: When you say burglary, if
8 you're at home, if you're at home it's going to get
9 violent and aggressive.

10 JUSTICE SCALIA: Yes, but -- that may be,
11 but it does not in its nature indicate violence or
12 aggressiveness.

13 MR. HOCHMAN: Well, I think Justice Souter
14 has it exactly right. I think the reason why the Court
15 in *Begay* and *Taylor*, by the way, singled out burglary as
16 having some kind of inherent dangerousness or
17 violent and aggressive conduct associated with it is
18 because it involves an act of invading the space of
19 another, and cultural expectations and even common law
20 expectations about how others might respond suggest that
21 that scenario that you have willingly created, knowing
22 full well that another might respond violently to what
23 you've done in the event you've been detected --

24 JUSTICE SCALIA: It gets you right back into
25 the soup. What you're saying is all it requires is that

1 there be a potential for violence, or aggressiveness,
2 right? And that's what the Government says here: There
3 is a potential for violence and aggressiveness.

4 MR. HOCHMAN: What it -- what it requires is
5 the conscious creation of circumstances that you have
6 good reason to believe is going to ignite in violence.
7 And if we learned anything from the data that's been
8 submitted to the Court both by the Sentencing Commission
9 and by the Government, it's that there is very little
10 reason to believe that even the distant arrest scenario
11 for those who fail to report doesn't carry with it very
12 much of a risk of injury at all. In fact, in all the
13 materials that have been submitted to this Court, there
14 is not a single cited instance or case of an innocent
15 bystander or a police officer who has been injured in
16 connection with a confrontation from arrest for failure
17 to report. There are none.

18 Now to be sure, there are some instances of
19 violent confrontation and I'm not here saying it's
20 impossible that there would be injury associated with an
21 arrest scenario. The point is it's nothing different.
22 There is nothing in the record that would give us any
23 reason to believe this is the kind of special violent
24 conduct that Congress was singling out for special
25 treatment. I should also add that excluding failure to

1 report from the statute isn't going to create any kind
2 of crack through which the sorts of people the
3 Government appears to be concerned about might fall
4 through. And the reason is this: The several anecdotal
5 cases they cite in their brief and a couple of the cases
6 that Massachusetts reported back to them which had
7 involved some kind of violent resisting arrest, those
8 individuals were charged, separately charged for assault
9 and battery and similar crimes on a police officer.
10 It's unsurprising that when that happens, those
11 individuals will be separately charged and convicted for
12 their violent conduct.

13 So the only work that is done by sweeping
14 away the categorical rule, doing serious damage to the
15 categorical rule, undermining *Begay*, the only work
16 that's done is to encompass people who we have reason to
17 believe didn't engage in violent conduct. That seems to
18 me a strange way to interpret the statute, certainly not
19 the sort of things this Court would want to close its
20 eyes to.

21 The last thing, Your Honors, is it's
22 important to preserve the distinction in *Begay* between
23 the violent and aggressive standard on the one hand and
24 the risk of injury on the other hand, and Government's
25 approach collapses them. The Government says, why is

1 this violent and aggressive? Because in their view we
2 think falsely, as we've discussed, but because in their
3 view there is a sufficient risk of injury on arrest. If
4 that's going to be the case, if you're going to be able
5 to show conduct is violent and aggressive simply because
6 there is a sufficient risk of injury associated with it,
7 the violent and aggressive conduct standard does
8 nothing.

9 JUSTICE SCALIA: That doesn't square with
10 the answer you gave me with regard to burglary. If what
11 you just said is true, burglary wouldn't be among the
12 listed crimes.

13 MR. HOCHMAN: No. The distinction I'm
14 drawing here is the act that you take of invading
15 somebody else's space and the prospect -- what you're
16 doing is you're consciously taking an act fully aware
17 that violence might ensue, which suggests that you are
18 the sort of person who is comfortable in a violent
19 situation or at least dangerously comfortable in such a
20 violent situation, regardless of how frequently that --
21 that circumstance actually is realized. You're the sort
22 of person who has taken an action that expresses comfort
23 with that sort of situation.

24 Failing to report doesn't --

25 CHIEF JUSTICE ROBERTS: So invading

1 someone's space, so trespass would be covered by this
2 statute? You're invading someone's space.

3 MR. HOCHMAN: If it's -- if it's felonious,
4 trespass might be. You're invading someone's space in
5 the circumstance where the response is -- I think there
6 is a decent argument for trespass if for no other reason
7 than the act itself, on the violence and aggressive
8 standard side, the act itself is more or less the same
9 as burglary. It's not as if you can immediately tell
10 from observing the burglar enter the structure that he
11 has the intent -- the requisite intent to commit another
12 crime.

13 But the other reason why I doubt that
14 trespass might be -- might satisfy the standard is
15 because there may not -- there doesn't appear to be a
16 serious potential risk of injury. The second -- the
17 other requirement may not be satisfied. I just don't
18 have any information about that, Your Honor.

19 JUSTICE ALITO: Your argument is that the
20 failing to report is not violent and aggressive and
21 therefore, no matter what degree of risk the statistics
22 might show, it would not qualify?

23 MR. HOCHMAN: I'm making both arguments,
24 Your Honor. But yes, that is one -- that is one of my
25 arguments.

1 If there are no further questions, I'll
2 reserve the remainder of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Roberts.

5 ORAL ARGUMENT OF MATTHEW D. ROBERTS

6 ON BEHALF OF THE RESPONDENT

7 MR. ROBERTS: Mr. Chief Justice and may it
8 please the Court:

9 Failure-to-report escape qualifies as a
10 violent felony under the ACCA's residual clause because
11 it creates a serious potential risk of physical injury
12 that's comparable in both kind and degree to the risk
13 that's created by the enumerated offense of burglary.
14 Failure-to-report escape is similar in kind to burglary
15 because it's purposeful, violent, and aggressive in the
16 same way as burglary.

17 JUSTICE GINSBURG: Mr. Roberts, wouldn't
18 that be so of any crime? I mean, this is failure to
19 report. Any crime, any -- an arrest for any crime has a
20 certain risk that the arrestee is going to resist. Is
21 there anything different, is anything greater, about
22 this arrest for this kind of crime?

23 MR. ROBERTS: Yes, Your Honor. Two points
24 on that. First, escape and failure-to-report escape,
25 other types of escape and recapture, are linked in a

1 way that arrest and the typical crime aren't, because
2 escape inherently avoids -- inherently involves the
3 avoidance of custody and custody is the very obligation
4 that recapture is trying to impose. But avoiding arrest
5 isn't an element of the typical crime, so the connection
6 between arrest and the ordinary crime isn't close enough
7 to justify considering the violence in arrest -- in the
8 arrest in whether the crime is violent. Also the risk
9 --

10 JUSTICE SCALIA: Say that again. I didn't
11 understand it.

12 MR. ROBERTS: Okay. What I'm saying is it's
13 an element of escape that you're avoiding custody, and
14 escape is a continuing offense and so it doesn't end
15 until the avoidance of custody is over.

16 JUSTICE SOUTER: What's that got to do with
17 increasing the risk of violence?

18 MR. ROBERTS: What it shows is --

19 JUSTICE SOUTER: I see -- I see your kind of
20 elements argument, but it seems to be beside the point
21 that --

22 MR. ROBERTS: It shows the close connection
23 between the two. And so when you're -- when the
24 offender is committing the crime, it's appropriate to
25 hold him accountable for what he can see is so highly,

1 closely connected to the crime and which, in fact, has
2 to happen in order to end the crime; whereas --

3 JUSTICE SOUTER: Yes, but the crime is still
4 -- the crime that we are concerned with here is still
5 essentially a passive crime. He just doesn't show up.

6 MR. ROBERTS: Well --

7 JUSTICE SOUTER: And given, you know, the
8 close logical connections, I don't see that the close
9 logical connections convert the passive crime into a
10 higher degree of resisting arrest from any other. In
11 fact, it suggests just the opposite.

12 MR. ROBERTS: To address the -- the passive
13 point, deliberately failing to comply with your legal
14 duty to report to prison is not -- is not doing
15 nothing, as Petitioner says. It's not purely passive.
16 It is a criminal act.

17 JUSTICE SOUTER: Well, you know, you may
18 precisely be doing nothing. If I say, you know, it's
19 Monday morning at 9 o'clock, I'm supposed to -- to
20 report to prison, and I'm going to stay home, my purpose
21 is to stay put in my armchair. That's purposeful
22 conduct and it's about as passive as you can get.

23 MR. ROBERTS: It's purposefully inviting the
24 violent confrontation when the law enforcement officers
25 come to terminate --

1 JUSTICE KENNEDY: You can say the same thing
2 about failure to respond to a traffic ticket.

3 MR. ROBERTS: No. Because in -- in failure
4 to respond to the traffic ticket the -- first of all,
5 it's not clear that somebody is going to come after you
6 and try to physically bring you in.

7 Second of all, the offender isn't expecting
8 them and on edge and prone to react violently.

9 Third, he hasn't demonstrated already that
10 he is unwilling to submit to custody. And the fact that
11 --

12 CHIEF JUSTICE ROBERTS: The offender is
13 prone to react violently if he doesn't respond to a
14 traffic ticket?

15 MR. ROBERTS: No. I'm saying just the
16 opposite of that. I'm saying that it's different
17 because here you've got somebody who is expecting the
18 police to come. He is looking over his shoulder all the
19 time. He knows they know he didn't come to prison. He
20 knows they know who he is. They probably know where he
21 is. If he is sitting at home, they know where he is.

22 CHIEF JUSTICE ROBERTS: What is your
23 understanding of the Illinois statute? It is, I take
24 it, only triggered by failure to report for confinement?

25 MR. ROBERTS: This --

1 CHIEF JUSTICE ROBERTS: What about like, you
2 know, you've got to see your probation officer every --

3 MR. ROBERTS: This offense that he was
4 convicted of is failure to report to a penal
5 institution, failure to report to prison.

6 CHIEF JUSTICE ROBERTS: And you concede the
7 probation or parole situation?

8 MR. ROBERTS: I think a probation violation
9 is different -- different circumstances. It doesn't
10 involve the same refusal to submit to custody that this
11 offense involves, which --

12 CHIEF JUSTICE ROBERTS: So we need not so
13 many -- not so much statistics about how many times
14 violence results, but statistics about how serious the
15 police are about picking somebody up?

16 MR. ROBERTS: I don't think you really need
17 the statistics, Your Honor. I think it's a common --
18 it's common sense that the police are going to make
19 vigorous efforts to recapture people who fail to show up
20 to prison the way they are supposed to.

21 JUSTICE SCALIA: But it's not common sense
22 that the person who has been guilty of a crime so
23 gentlemanly that they only made him report to prison on
24 the weekends would confront the policeman with violence
25 when he comes. This is not normally what you think of

1 as a violent type who has -- who has been told to report
2 weekends to the prison.

3 MR. ROBERTS: Well --

4 JUSTICE SCALIA: But did he get additional
5 time, by the way, when -- when they finally brought him
6 back?

7 MR. ROBERTS: When he was sentenced -- when
8 he was convicted of escape, he was sentenced to six
9 months in prison -- in jail, that was stayed; probation
10 for 30 months, and he violated his probation and he
11 ended up in jail for 5 years.

12 JUSTICE SCALIA: No additional time. The
13 additional prison time was stayed, right? So he just --
14 he just had to make up the weekends that he had lost?

15 MR. ROBERTS: No. He didn't just have to
16 make up the weekends that he was lost.

17 JUSTICE GINSBURG: That's what Mr. Hochman
18 told us --

19 MR. ROBERTS: I know that, Your Honor.

20 JUSTICE GINSBURG: -- when I asked that
21 question.

22 MR. ROBERTS: But I don't think that's
23 accurate for the sentence for escape. On page 113 to
24 114 of the JA, Your Honor, which is the -- the PSR
25 describing what happened for this offense, it says that

1 he has 30 months probation. It's in the second volume,
2 the volume under seal.

3 JUSTICE SCALIA: Well, this guy doesn't
4 sound to me like Jack the Ripper. He really doesn't.

5 MR. ROBERTS: You know, we are not supposed
6 to be looking at the individual offender here. It's the
7 categorical approach. But he had been convicted of
8 robbery and aggravated battery, Your Honor. So he -- he
9 is not somebody who has not done any violent crimes,
10 either. And what's -- what's different is that he has
11 now deliberately failed to comply with his legal duty to
12 report. He has now deliberately resisted custody, so --

13 JUSTICE GINSBURG: But would the statute
14 apply if -- say he is supposed to go in on the weekends.
15 Instead, he goes out on a binge, and then he voluntarily
16 comes in on a Monday morning saying, yes, I failed to
17 report, and so here I am.

18 MR. ROBERTS: First of all, while he is out
19 on the binge, people could be coming and looking for him
20 and the violent confrontation could occur.
21 Second of all, even if in the unusual case of somebody
22 who comes in voluntarily hours late, a few days late,
23 there wasn't a -- a risk of -- of violence, which we
24 think there can be, but even if there was none, it
25 wouldn't matter because you're applying the categorical

1 approach here. And what you don't look at -- you don't
2 look at the unusual case. You look at the elements of
3 the offense in the ordinary case.

4 JUSTICE KENNEDY: Can you -- can you tell
5 me: The U.S. attorney has this case. The man failed to
6 report for custody some -- a few years earlier, and you
7 have this offense. Does the district attorney or --
8 pardon me -- the United States attorney have some
9 discretion here that he may not prosecute at all? What
10 -- what goes into the --

11 MR. ROBERTS: I think generally the policy
12 --

13 JUSTICE KENNEDY: What goes through the mind
14 of -- of a prosecutor who says: because this fellow
15 failed to report earlier for this offense, I'm going to
16 give him 15 extra years in jail?

17 MR. ROBERTS: Well, Your Honor, he is -- he
18 is looking at his whole --

19 JUSTICE KENNEDY: What -- what do the -- are
20 there many instances where you think in a case like this
21 a U.S. attorney would just elect not to file that
22 charge?

23 MR. ROBERTS: I --

24 JUSTICE KENNEDY: Or do you think they
25 automatically file it every time; and if not, how do

1 they decide?

2 MR. ROBERTS: I think generally that -- that
3 they look at the conduct that's been committed and they
4 -- that the policy is to charge the -- the maximum
5 charges that are supported by what the -- what the
6 defendant has done. But here you don't have --

7 JUSTICE KENNEDY: Do they ever look at the
8 -- do they ever look at the attorney? This attorney has
9 been giving us a hard time, and we ought to show him
10 that we really mean business? Do they look at the
11 nature of the -- the identity of the counsel of the
12 defendant? Do they ever look at that?

13 MR. ROBERTS: I'm -- I'm not aware of that.
14 I can't -- can't speak to the -- the fact that they
15 would do that, Your Honor. But here you've got in the
16 ACCA, you've got one previous violation for escape;
17 you've got three violent felonies that you have to have.
18 And this was his third one with -- in addition to
19 robbery and aggravated battery and in addition to
20 distributing cocaine within a thousand feet of public
21 housing. And so we are not talking about people --

22 CHIEF JUSTICE ROBERTS: I understood your
23 friend -- excuse me. I understood your friend to say
24 that you don't have a single example of failure to
25 report leading to a violent confrontation.

1 MR. ROBERTS: That's -- that's also
2 incorrect, Your Honor. Two of the four cases that we
3 cited in our -- in our brief, in our anecdotes, involved
4 injury to innocent bystanders. It's true we didn't
5 highlight that in the parentheticals to those cases, but
6 it's on page 19, the -- we cite various cases, and we
7 also then go on to cite some articles just as an
8 example.

9 CHIEF JUSTICE ROBERTS: So you have -- so
10 you have two examples.

11 MR. ROBERTS: We have those two examples. I
12 mean, I haven't gone out and looked for other cases.
13 Those are just two out of the four that we cited.

14 CHIEF JUSTICE ROBERTS: You haven't gone out
15 and looked for other -- I'm sorry. You haven't gone out
16 and looked for other cases? I thought you --

17 MR. ROBERTS: In -- in addition to those,
18 no. I -- I went to get some sample cases. I haven't
19 gone to see if I could find more cases of those. In
20 addition, in the Massachusetts data there are -- there
21 are two of the 18. Admittedly, the sample is small in
22 Massachusetts --

23 JUSTICE STEVENS: Mr. Roberts --

24 MR. ROBERTS: But it's 11 percent of the
25 people violently resisted, and they were charged with

1 assault and battery on a police officer. I think that
2 that's indicative of possible injury. And in any case
3 the question is --

4 JUSTICE STEVENS: Mr. Roberts, have you had
5 occasion to look at the -- the recent figures compiled
6 by the Sentencing Commission?

7 MR. ROBERTS: Yes, Your Honor. And I think
8 that the Sentencing Commission data also supports --
9 although, again, the -- the sample size is small. But
10 the question here is: Is there a potential risk? And
11 what the sentencing data shows for the failure-to-report
12 escapees is that 7.1 --

13 JUSTICE STEVENS: Is the magnitude of the
14 risk relevant? Suppose it happens one out of 10,000
15 times or 99 out of 100 times. Are they different cases?

16 MR. ROBERTS: We don't think that you should
17 be looking at the statistics at -- at all, Your Honor.
18 But -- and so -- I mean, you know, that's our -- our
19 fundamental point is that -- that the ACCA requires a
20 potential risk. The James case illustrates that you
21 decide these cases without statistics because the
22 statistics --

23 JUSTICE KENNEDY: But the potential risk is
24 based on an empirical assessment. What's -- how can we
25 make an empirical assessment without statistics?

1 MR. ROBERTS: What James says is that you
2 try to assess whether the degree of risk is comparable
3 to the degree of risk presented by one of the enumerated
4 offenses. And, as you did in James --

5 JUSTICE KENNEDY: But isn't that's based on
6 our experience because we have these cases; we've been
7 lawyers; we know what they usually involve. We have
8 some sort of a --

9 MR. ROBERTS: Yes.

10 JUSTICE KENNEDY: -- an instinct or a basis
11 for making a judgment.

12 MR. ROBERTS: Yes.

13 JUSTICE KENNEDY: If statistics can inform
14 that, why ignore the statistics?

15 MR. ROBERTS: I'm not saying that you should
16 ignore the statistics, but the statistics are neither
17 necessary nor dispositive. And I don't think the
18 statistics cast any doubt on the commonsense conclusion
19 based on some of the factors I was talking about before,
20 about why there's a potential for violence during
21 recapture --

22 JUSTICE SOUTER: But your argument goes
23 simply to whether there is potential and the statute
24 says "serious potential." Which gets us, it seems to
25 me, to the point that Justice Kennedy is making, and

1 that is, we've got to have something more than an
2 instinctive belief that something bad might happen.

3 MR. ROBERTS: Well, I think James addresses
4 that, Your Honor. And James says that in deciding
5 whether you have a serious potential, you look to the
6 enumerated offenses and you determine if they can be
7 comparable.

8 JUSTICE SOUTER: They were taken as
9 examples cases in which there was serious potential.
10 But in any event, you can't lose sight of the modifier.
11 It has got to be more than a so-called "potential risk."

12 MR. ROBERTS: It has -- it has to be more
13 than a potential. It has to be serious in the sense
14 that it's similar in degree, comparable in degree, to
15 one of the enumerated offenses.

16 JUSTICE BREYER: What are we to do
17 with -- Justice Stevens -- I think you should address
18 the statistics in the sentencing report.

19 MR. ROBERTS: Okay.

20 JUSTICE BREYER: As I read them, they put
21 together -- if you put together failing to report and
22 failing to return, you get 160 cases in their sample.
23 And the number of those cases, whether you looked at the
24 time when he had left or whether you looked at the time
25 he was apprehended, in which force was involved is zero.

1 The number of cases in which injury was involved is
2 zero. The number of cases where he had a dangerous
3 weapon is five.

4 MR. ROBERTS: That's right. And this
5 emphasizes --

6 JUSTICE BREYER: All right. So now there we
7 are. Now --

8 MR. ROBERTS: It's a 3.1 percent -- 3.1
9 percent rate of having this dangerous weapon when he is
10 being -- being taken into custody for -- for this
11 offense. And, you know, looking at the -- at the
12 failure-to-report people, which is what this person is
13 charged of, of those 42 people, that was 7.1 percent of
14 those people that had a weapon. And if one of those
15 people had used that weapon, that would have been a 2.4
16 percent chance of injury.

17 Now, I'm saying the sample size is small,
18 and this shows why it's dangerous to put too much weight
19 on it. But that would have been a 2.4 percent rate of
20 injury. And in *Tennessee v. Garner*, this Court cited a
21 statistic in the 1970s about the risk of violence during
22 burglary. And this was household burglary, which you
23 think might be likely --

24 JUSTICE BREYER: You had every opportunity,
25 when we have 160 cases out of the universe -- I guess I

1 don't know what the universe is, but sampling proceeds
2 through a small number of cases. And you could, of
3 course, criticize the Sentencing Commission effort if
4 you have a statistician or someone who will tell us
5 that that sampling was not an appropriate method to
6 proceed. Is there any such person?

7 MR. ROBERTS: Well, no, Your Honor. And I'm
8 not criticizing it. I'm saying that you have to take
9 into account the sample size and you have to take into
10 account that there are --

11 JUSTICE BREYER: No. Why -- that was my
12 question. Why take into account the sample size in the
13 absence of a statistician who would tell us that the
14 sample size is too small to reach the conclusion that
15 the commission reaches?

16 MR. ROBERTS: Because my point is that --
17 take the 42 failure-to-report people, which is the
18 offense here, okay. Three of them -- three of those 42,
19 had guns. If one of those three had used the gun, that
20 would have been a use of force, an instance of actual
21 violence.

22 That percentage -- I'm not -- I'm not
23 questioning the statistical validity of anything. I'm
24 taking it on its terms. That's a 2.4 percent statistic
25 there.

1 JUSTICE SCALIA: But they didn't use a gun.

2 MR. ROBERTS: And it's 3.8 percent in -- in
3 household burglary. So I just think that -- that the
4 statistics are -- are very low, the risk of actual
5 violence in burglary as well.

6 CHIEF JUSTICE ROBERTS: I'm sorry, counsel.
7 One of my colleagues is trying to ask a question.

8 MR. ROBERTS: Sorry.

9 JUSTICE SCALIA: The problem is that you say
10 if he had used a gun. And he didn't use a gun. I mean,
11 to come up with your statistics on the basis of
12 something that didn't happen is not using statistics;
13 it's using imagination.

14 MR. ROBERTS: Well, Your Honor, the statute
15 again talks about the potential risk. It doesn't talk
16 about the actual use of force or the actual injury. The
17 actual use of force is covered by clause one --

18 JUSTICE STEVENS: Do you think those
19 statistics show a greater danger than the dangers from
20 drunk driving that were involved in Begay?

21 MR. ROBERTS: No. But I think the drunk
22 driving -- that what concerned the Court about drunk
23 driving was that the crime is a strict liability crime.
24 It didn't involve deliberate conduct. This conduct is
25 purposeful. Petitioner doesn't -- doesn't contest that.

1 And the situation here is a different kind of risk.
2 It's like the risk in burglary. It's the deliberate
3 commission of the crime despite the clear risk of an
4 ensuing violent confrontation.

5 And so, the parallel, there really isn't a
6 parallel to the strict liability crime there, where the
7 injury -- the Court said in *Begay* there is a serious
8 risk of injury. The problem is that the crime is just
9 not purposeful, so it doesn't show this willingness to
10 harm others.

11 JUSTICE KENNEDY: Well, of course, that's
12 the point. *Begay* talked about purposeful violent
13 conduct, not just purposeful conduct.

14 MR. ROBERTS: Yes, Your Honor. But you have
15 to -- you have to talk about the violent conduct in
16 context. And what it said is that all these enumerated
17 crimes are violent crimes. But burglary is violent not
18 because the violence is some element of the offense.
19 There is nothing about the elements of the offense
20 that's violent. What makes burglary violent is the fact
21 that the offender deliberately commits it, even though
22 he knows it could trigger this violent confrontation.

23 JUSTICE GINSBURG: And your distinction
24 between this crime and crimes in general is that this
25 person has shown that he or she doesn't want to go back

1 into custody, is that --

2 MR. ROBERTS: I think it's -- it's numerous
3 things, but the avoidance of custody is sort of a
4 categorical difference between this and all the other
5 crimes, Your Honor. It's an element of this crime that
6 he is doing that.

7 That also factors into the fact that the
8 risk of violence during recapture is going to be greater
9 than the risk of violence in apprehending an ordinary
10 criminal for several different related reasons. One --

11 JUSTICE GINSBURG: There is -- there was,
12 this case comes to us from the Seventh Circuit, right?

13 MR. ROBERTS: Yes.

14 JUSTICE GINSBURG: And am I correct in
15 understanding that since this case was decided, the
16 Seventh Circuit has changed its position and has gone
17 the other way?

18 MR. ROBERTS: Yes. The Seventh Circuit
19 thought that applying the purposeful, violent and
20 aggressive requirement of Begay required a different
21 result because it -- it thought that it meant that the
22 crime had to involve violent conduct itself; and it
23 didn't appreciate the point I was making before, that
24 burglary doesn't involve that violent conduct itself,
25 and that burglary is violent because of the prospect of

1 the violent confrontation.

2 And so, that's the -- that's what led the
3 Seventh Circuit astray the second time around. But it
4 --

5 JUSTICE GINSBURG: The first time around,
6 didn't one of the judges suggest that there ought to be
7 a study comparing the frequency of violence in escapes
8 from custody to the frequency of violence in failure to
9 report, and isn't that what we now have from the
10 Sentencing Commission?

11 MR. ROBERTS: Yes. They did ask for -- for
12 statistics. But I would stress again why we think
13 that -- that looking to statistics as some kind of a
14 requirement is, you know, both perilous and not required
15 by the statute: One, because the statute requires just
16 potential risk, not actual injury.

17 Two, because these data are just generally
18 not going to be available. And you don't have even the
19 baseline for the other crimes, the enumerated crimes,
20 really to compare it to. And so the result, if you
21 start looking around for statistics and saying we need
22 these statistics to do it, is that virtually no crimes
23 are going to qualify under the residual clause.

24 And obviously, that isn't what Congress
25 intended when it adopted this broad residual clause.

1 JUSTICE ALITO: Do you happen to --

2 JUSTICE SOUTER: May I -- may I -- may I ask
3 you just to get some sense about what will qualify? I
4 mean, I think we -- we all agree that the risk of
5 violence in arrest is probably going to vary depending
6 on -- categorically depending on the crimes.

7 I think I would probably agree that
8 white-collar crimes are not likely to -- to carry a very
9 high risk of violence on arrest. So I -- there's one
10 category. Can you think of others, other categories
11 outside of white-collar crime, that are going to have a
12 lower risk of arrest than, say, the failure-to-report
13 category?

14 MR. ROBERTS: What -- we wouldn't sweep in
15 any crimes based on arrest if the crimes don't
16 themselves involve as part of the crime the avoidance of
17 custody, because that shows the close link between the
18 crime that I was explaining before. That's sort of the
19 categorical difference, although I would agree with you,
20 certainly, that in white-collar crimes in many cases the
21 offender is going to submit voluntarily to custody; they
22 are not even going to come after him. And he hasn't
23 done anything to show his likelihood to resist in any
24 way, and so there is going to be a significantly less
25 connection there.

1 Violent crimes where you might think that
2 there is going to be a higher incidence are going to be
3 covered based on the violence of the crime, anyway.

4 JUSTICE SOUTER: They are going to be in
5 category one.

6 MR. ROBERTS: Right. They are going to be
7 covered already.

8 JUSTICE SOUTER: Yes.

9 MR. ROBERTS: So you know, one, we think
10 there is a categorical difference between this kind of
11 crime which has as an element avoidance custody, and all
12 of the ordinary crimes that you're talking about. But
13 even if you go and set that aside and don't draw that
14 categorical line, and you look at, well, what's the risk
15 of violence, here what you've got is you've got you know
16 that they are going to come after him; he knows they are
17 coming; he is already deliberately -- he has already
18 indicated his unwillingness to submit to custody; they
19 know that; so they come prepared for resistance. And in
20 Illinois he is by definition a recidivist felon if he
21 has committed this crime, and those are characteristics
22 that are particularly indicative of dangerousness. So
23 we think this sets it quite apart from other crimes in
24 terms of the risk of violence that -- that we are
25 talking about.

1 JUSTICE ALITO: Do you happen to know how
2 many additional crimes are likely to raise issues like
3 this under the residual clause?

4 MR. ROBERTS: Not -- you know, how many
5 could be covered altogether? Or --

6 JUSTICE ALITO: Well after we decide this
7 case, how many more cases like this do you anticipate
8 that we're -- we may get under ACCA?

9 MR. ROBERTS: Well I'm hopeful that the
10 Court won't have to decide too many other cases with the
11 guidance that will be given by Begay and James and
12 now -- and now this case.

13 So, you know, it has been -- this case, the
14 Court took; it had been holding the case for Begay and
15 it took it rather than vacating and remanding. So it's
16 not as if this is a case where some conflict has
17 developed afterwards the Court was taken to resolve. We
18 think --

19 JUSTICE STEVENS: Mr. Roberts, I'm sorry; do
20 you think a soldier who is AWOL commits a violent crime?

21 MR. ROBERTS: I think a soldier that goes
22 AWOL -- I mean, the soldier that goes AWOL does probably
23 invite somebody to come after them. It's a little bit
24 harder case here because he is not somebody who is a
25 recidivist felon.

1 JUSTICE STEVENS: Well, he'd have to be a
2 Recidivist here. This is one of three offenses for an
3 aggravated sentence. You never have the isolated
4 question.

5 MR. ROBERTS: Well, when he did it first --
6 he could have done it in his first crime. So you don't
7 know when did this that he had the other two counting
8 under the ACCA.

9 JUSTICE STEVENS: It would only be a crime
10 if it's his third crime, but not if it's his first.

11 MR. ROBERTS: Well, you don't look to the
12 individual person; we're looking to the ordinary case
13 and we know from the elements here that you have a
14 recidivist -- you have a recidivist felon. I do think
15 that there is a risk of -- you know, there is a risk of
16 violent confrontation when a soldier goes AWOL, Your
17 Honor.

18 JUSTICE STEVENS: Sure.

19 MR. ROBERTS: I just don't think it's quite
20 as -- as clear a risk as it is -- as it is here, but you
21 know, I would have to say that there is some risk. Yes.

22 The -- if I could just address something
23 that Justice Kennedy had raised before about statutes
24 unlike Illinois's statute that has a -- that generally
25 prohibit escape. One -- one possible problem that could

1 arise from a holding that offenses like failure to
2 report are not violent felonies is that a statute that
3 broadly covered escape, the result would be that jail
4 break escapes would not be violent felonies under that
5 statute, because the statistics that are out there
6 suggest that 89 percent of all escapes are either
7 walkaways or failure to report.

8 And so unless the charging document
9 specifically charged it as a jail break escape, then the
10 general -- something that was charged under the general
11 escape statute would not qualify for coverage under the
12 ACCA.

13 And I guess, aside from that, if the Court
14 has no further questions, we would ask that the judgment
15 of the Court of Appeals be affirmed.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Hochman, you have 11 minutes remaining.

18 REBUTTAL ARGUMENT OF ROBERT N. HOCHMAN

19 ON BEHALF OF THE PETITIONER

20 MR. HOCHMAN: Thank you, Mr. Chief Justice.

21 Just to begin with where Mr. Roberts left
22 off, most states in fact do distinguish in their
23 statutes between failure to report and prison break
24 escapes. These are cited by both parties in the briefs
25 and you can review them, but there are clear

1 distinctions in the law. So the risk that prison break
2 escape is somehow going to escape -- escape, if you
3 will, from the scope of the statute as a result of a
4 reversal is -- is unfounded.

5 Just to make a couple of things clear.
6 First of all with respect to the sentence, Justice
7 Ginsburg, the -- he was sentenced to six additional
8 months but it was stayed as -- as was mentioned; and so
9 when I was answering that question he did not serve
10 additional time as a result of that, and that's what I
11 was referring to.

12 If you look at the sentencing transcript,
13 that's where the indication is that he did in fact serve
14 out four additional weekends. It's not noted in the --
15 it's not noted as an additional sentence and punishment
16 for it.

17 JUSTICE SCALIA: What was he serving those
18 weekends for? What was the crime?

19 MR. HOCHMAN: That was the armed robbery --
20 the robbery crime, not armed robbery, the robbery crime.
21 That's the first predicate offense here, Your Honor.

22 JUSTICE SCALIA: He just gets weekends for
23 that? How many weekends?

24 MR. HOCHMAN: 11.

25 JUSTICE SCALIA: Pretty good deal.

1 (Laughter.)

2 MR. HOCHMAN: Second, with respect to the
3 anecdotal cases, you know, we looked at them; you could
4 look at them. If there are two instances where there
5 are injury -- there are two instances where there are
6 injury, I didn't catch that, and I apologize if I
7 misspoke.

8 But it doesn't change the core of the
9 problem, which is that the anecdotal evidence
10 produced -- and that dates back all the way to 1977,
11 they looked back at cases -- I mean, they are covering
12 an extraordinary broad period of time in looking for
13 this stuff, and there is just not -- there is not a lot
14 there, if there is anything there at all, with respect
15 to injury associated with failure to report.

16 On the core substance of their argument,
17 Mr. Roberts emphasized that failing to report has as an
18 element avoiding arrest, avoiding confinement. I don't
19 actually think that's right. There is nothing about
20 concealment. There is nothing about hiding. There is
21 nothing about seeking to escape from a police officer
22 who comes to bring you back. He just didn't go; and in
23 fact we don't -- the record doesn't explain why; but you
24 know, it was the November to December period. It's the
25 holiday period of time for people when they, obviously,

1 for a variety of reasons might prefer to spend time with
2 their families. Whatever the reason was --

3 CHIEF JUSTICE ROBERTS: Statistics show that
4 the number of robberies increases during the holiday
5 season. He just needed to get --

6 (Laughter.)

7 JUSTICE GINSBURG: And I thought he did this
8 four times. I thought there were four.

9 MR. HOCHMAN: There were four periods from
10 the end of November, four consecutive weekends from the
11 end of November into December. There is no indication,
12 Mr. Chief Justice, that any further robberies were
13 committed during that period. But the point is --

14 CHIEF JUSTICE ROBERTS: Well, there is no
15 indication he meant to spend time with his family over
16 the holidays.

17 (Laughter.)

18 MR. HOCHMAN: It's not in the record. It's
19 absolutely not in the record, Your Honor. No doubt.
20 But the point is that while Mr. Roberts stood up and
21 said it's about avoiding arrest; it's about concealing
22 yourself; it's the sort of person that's prone to react
23 violently; the fact is, that's speculation; and
24 everything we know from the Sentencing Commission and
25 from their own efforts suggests the contrary. And

1 indeed even the dangerous weapon findings of the
2 Sentencing Commission, I think, should be excluded,
3 because under the guidelines, the mere possession of a
4 weapon is not a violent felony.

5 A felon in possession is not -- cannot be a
6 predicate offense under the guidelines. And so the mere
7 possession of a weapon, which is all you have on those
8 five instances -- by the way, the fact that they did not
9 double-count them as also including four suggests they
10 weren't used in any way, they weren't brandished in any
11 way. It's just not there. There is really nothing
12 there to support the Government's speculation. If there
13 is no further questions, thank you, Your Honors.

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

16 (Whereupon, at 10:54 a.m., the case in the
17 above-entitled matter was submitted.)

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