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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ARTHUR LAJUANE TAYLOR, Petitioner V.
UNITED STATES

CASE NO: 88-7194

PLACE: Washington, D.C.

DATE: February 28, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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ARTHUR LAJUANE TAYLOR, :
Petitioner :
V. : No. 88-7194
UNITED STATES :
-----x

Washington, D.C.
Wednesday, February 28, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:25 p.m.

APPEARANCES:

BRUCE D. LIVINGSTON, ESQ., St. Louis, Missouri; appointed
by this Court on behalf of the Petitioner.
MICHAEL R. LAZERWITZ, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Respondent.

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P R O C E E D I N G S

(1:25 p.m.)

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2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 88-7194, Arthur Lajuane Taylor v. United
5 States.

6 Mr. Livingston.

7 ORAL ARGUMENT OF BRUCE D. LIVINGSTON

8 ON BEHALF OF THE PETITIONER

9 MR. LIVINGSTON: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 This case involves the statutory interpretation
12 of 18 U.S.C. 924(e), which provides for a mandatory
13 minimum term of imprisonment of 15 years without parole to
14 persons found in violation of Section 922(g) of that Title
15 and who have three previous convictions for a violent
16 felony.

17 A violent felony under that statute is defined
18 as a crime punishable by a term of imprisonment exceeding
19 one year and for purposes of this case is burglary, arson,
20 or extortion, involves use of explosives or otherwise
21 presents a risk of serious -- serious potential risk of
22 physical injury to another.

23 In the district court, for purposes of facts of
24 this case, the court relied upon four felony convictions,
25 two of which we do not contest, but two of which were

1 burglary second-degree under Missouri law, which we
2 contend were not within the definition of violent felony
3 under this statute.

4 The Eighth Circuit affirmed that holding and
5 affirmed a 15-year sentence, holding that anything labeled
6 burglary under any state law fell within the definition of
7 violent felony.

8 The sole issue, as far as we can ascertain, is
9 whether the definition should give effect to the statutory
10 language and limited definition to burglaries which
11 present a serious potential risk of physical injury or
12 whether a definition which was repealed from the
13 predecessor statute, the 1984 act, should be given effect
14 as the government argues.

15 As applied to Petitioner, if those second-degree
16 burglaries are found to present a risk of injury, then he
17 would have been properly sentenced. Otherwise, he should
18 be given a new sentence, reversed and remanded so that he
19 would be given a maximum term of five years.

20 In the abstract, the term "burglary" in the
21 statute is ambiguous. There are a large number of
22 definitions for that term starting, first, I think, with
23 the common law definition which is the breaking and
24 entering of a dwelling place in the night time.

25 There are numerous other definitions, though.

1 Only about five -- as many as -- forms of common law
2 burglary, maybe six or seven states have that definition.
3 And there are many, many varying definitions of burglary
4 among the other states.

5 QUESTION: I -- I take it that something might
6 not qualify as burglary under Roman numeral ii, but might
7 qualify as presenting a serious potential risk of physical
8 injury to another?

9 MR. LIVINGSTON: I believe that's correct.
10 Insofar as there may be a vagueness problem with the term
11 burglary, it is possible, I believe, to find some crimes
12 which could be labeled something other than burglary, or
13 maybe be burglary and, if you ruled out the definition
14 entirely, you could still get it under a catch-all
15 definition as conduct that presents a risk of physical
16 injury to others.

17 QUESTION: You haven't challenged the statute as
18 being vague, have you?

19 MR. LIVINGSTON: No. I -- I think this statute
20 can be construed without any constitutional problems. I
21 didn't raise the issue below. It does strike me, though,
22 as burglary without being defined when it has a number of
23 definitions so that it is difficult to ascertain an
24 ordinary --

25 QUESTION: There would to be some -- some

1 conduct that any fool would know is burglary, wouldn't
2 there?

3 MR. LIVINGSTON: Well, not -- it depends whether
4 any fool was in Maryland, Virginia or Missouri.

5 QUESTION: Well, I know, I know. But isn't
6 there some -- isn't there some core meaning to burglary
7 that all -- every state would recognize?

8 MR. LIVINGSTON: No. I -- I don't believe there
9 is. At least not -- insofar as the government seeks to
10 have you take their definition as one which would be any
11 concept of burglary, because that definition really is a
12 distillation or conglomeration of the broadest thing. If
13 you take statutes --

14 QUESTION: Well, I'm not -- I'm not suggesting
15 you take -- take right now -- take the government's. I'm
16 just wondering if -- I'm just going into the possible
17 argument about vagueness, which you have given up anyway,
18 I take it.

19 MR. LIVINGSTON: That's right. I don't propose
20 that this case turn on vagueness. The -- the question is
21 what definition of burglary is appropriate in the statute
22 and there's a long history of case law in this Court which
23 would allow you, when you are not presented with a clear
24 definition of what burglary -- should be taken as the
25 proper definition that Congress intended, you can take the

1 common law definition.

2 However, I think there are other definitions.
3 The government-suggested definition, which includes really
4 all state burglaries, it is drafted so broadly that it
5 appears to me somebody in legislative staff or the Justice
6 Department back in 1984 said, how can we come up with a
7 definition that includes them all even though they are
8 very different from state to state.

9 QUESTION: There -- there is a common law
10 definition of burglary, isn't it the --

11 MR. LIVINGSTON: There certainly is and that's
12 the --

13 QUESTION: Of breaking and entering in a
14 dwelling place at night with intent to commit a felony?

15 MR. LIVINGSTON: That's right. So --

16 QUESTION: And you say the second-degree
17 burglary in Missouri would -- would not meet that
18 definition?

19 MR. LIVINGSTON: Because there is no requirement
20 under that statute that the breaking and entering had
21 occurred in dwelling house or at night.

22 QUESTION: Or that it be -- does second-degree
23 burglary in Missouri require the entry be unlawful?

24 MR. LIVINGSTON: It depends on whether you are
25 looking at my -- Petitioner's convictions, which under a

1 repealed Federal statute, or the present-day statute.
2 They have changed the definition since the time Petitioner
3 was convicted in 1963 and 1971.

4 The statute he was convicted under was a
5 breaking and entering statute. The statute in present day
6 is framed as entering or remaining unlawfully. So it
7 would appear to include shoplifting, which would be entry
8 in a building with intent to commit a crime.

9 QUESTION: But at the time he was convicted, it
10 required breaking and entering?

11 MR. LIVINGSTON: That's correct.

12 Among the --

13 QUESTION: Excuse me, it was entering or -- and
14 it's the government's proposed definition, too, isn't it?
15 Entering or remaining surreptitiously?

16 MR. LIVINGSTON: Surreptitiously.

17 QUESTION: Does the surreptitiously go only with
18 the remaining or does it go with the entering, too?

19 MR. LIVINGSTON: I would --

20 QUESTION: Most shoplifters don't sneak in. I
21 mean they sort of walk in and then -- I don't think it
22 would cover --

23 MR. LIVINGSTON: I don't believe that the
24 unlawful part needs to be tied to entry. And in that
25 respect, I think --

1 QUESTION: Well, then any -- any crime you
2 commit in a building would be burglary?

3 MR. LIVINGSTON: Essentially that's right and
4 that's the way California, in fact, has it. Shoplifting
5 is burglary in California. Breaking into a vending
6 machine in a building in which you were allowed to be, or
7 even not within a building in some states, is burglary.

8 You may recall the movie Cool Hand Luke. He
9 broke into parking meters, and that would be burglary in
10 Texas. The states have a wide variety of --

11 QUESTION: (Inaudible).

12 MR. LIVINGSTON: Excuse me.

13 QUESTION: Were the parking meters inside a
14 building in Texas?

15 MR. LIVINGSTON: No. No. Texas has a burglary
16 statute -- coin-operated machines --

17 QUESTION: Setting out along the sidewalk or --

18 MR. LIVINGSTON: I think that's right. Or what
19 about the vending machines at roadside rest or in a gas
20 station? There are places where you don't need to be
21 within a building, which I think further highlights the
22 problem of the government's definition.

23 In -- I'm not sure whether it's North or South
24 Dakota, but I've cited in my brief, breaking -- or not
25 breaking, just taking, say, a carpenter's tools out of the

1 open back end of a pick-up truck would be burglary.

2 QUESTION: But I thought the government's
3 definition picked up on the definition that was left out
4 in those two- or three-year periods, and that requires a
5 building, doesn't it?

6 MR. LIVINGSTON: That's right, which would again
7 -- I don't know why it hasn't been raised by other people
8 before, but it seems to me that, again, highlights the
9 problem of a potential fact case-bound inquiry that that
10 test requires, because many of these statutes do not
11 require a building. Auto burglary is a problem.

12 QUESTION: Well, but then --

13 MR. LIVINGSTON: In many places that's counted
14 as burglary.

15 QUESTION: -- then they wouldn't be covered. I
16 don't understand the problem.

17 MR. LIVINGSTON: Well, that's right, but that --
18 that's just another example. The government tries to say
19 that their test is an easy test for this apply -- Court to
20 apply. Not only did Congress just make a mistake and we
21 should supply the definition for them today, but they are
22 also saying this is an easy test that this Court should
23 take as a matter of policy, when, in fact, there are many
24 burglary statutes which will not be easily applied because
25 they include conduct that may include a building or may

1 not. And you still will have to investigate the
2 underlying offense.

3 QUESTION: Well, excuse me. The principle would
4 -- well -- that depends on one comes out on the other
5 issue. But you -- you -- you maintain that the way we
6 have to decide whether your client has been convicted of
7 burglary or not is not -- let's assume we decide that
8 burglary has to be in a building.

9 As I understand it, your contention is that we
10 would not look to the particular offense that he committed
11 to see if in fact he was in a building, but we would look
12 to see whether the element of the crime -- the elements of
13 the crime of which he was convicted under state law -- one
14 of the elements was being in a building.

15 MR. LIVINGSTON: Well, if you --

16 QUESTION: Now, that wouldn't require any case-
17 by-case analysis. And that's --

18 MR. LIVINGSTON: That's right. If you -- if you
19 held that a building was required, which hasn't been in my
20 definition, but if -- if it was -- it could be a
21 structure, so --

22 QUESTION: We would just -- we would just look
23 to the state's statute.

24 MR. LIVINGSTON: You would look to the element
25 of the state, and I think that that is the best way to

1 take it.

2 QUESTION: Right.

3 MR. LIVINGSTON: That's my test. So I would
4 have no problems with that.

5 QUESTION: So under your -- your own test, we're
6 not confronting a problem of -- of uncertainty here if we
7 -- I mean there may be other problems with the
8 government's position, but it's not -- it's not the
9 difficulty of doing case-by-case analysis.

10 MR. LIVINGSTON: Well, it is if you limit
11 yourself to buildings. All I was saying is the government
12 -- the way I read the government's test, which seems to
13 vary in their brief, but in at least one place the
14 government's test says building -- I believe that's in the
15 repealed 1984 definition.

16 And because that test includes the word
17 building, there are any number of state burglary statutes
18 all across this great land which do not require entry into
19 building in order to fall into that statute and be a
20 conviction.

21 So, okay. If you -- if you are taking my test
22 and not the government's test and just adding in the word
23 burglary into my test, which I didn't put into the brief,
24 then that's fine and I would agree and they would be
25 entitled to not consider my convictions as burglary.

1 QUESTION: Would you tell us once more what your
2 test is?

3 MR. LIVINGSTON: My test would be that you take
4 the government's proposed test from the '84 definition --

5 QUESTION: Well, but -- I mean, don't
6 incorporate by reference. I mean, just tell us from the
7 beginning --

8 MR. LIVINGSTON: Entering --

9 QUESTION: -- what your test is.

10 MR. LIVINGSTON: -- taking crimes that are
11 punishable by a term exceeding one year. Any crime that
12 consists of entering or remaining unlawfully in a building
13 with intent to commit a crime that is a Federal or state
14 offense and which has as an element necessary for
15 conviction, conduct that presents a serious potential of
16 risk of physical injury to another.

17 In -- by way of example, the present-day first-
18 degree burglary statute in the higher aggravated forms of
19 burglary in almost every state -- not all of them, I don't
20 want to mislead you -- but many states, most of them have
21 higher degrees of burglary. And those are targeted at the
22 so-called violent or aggravated crimes.

23 QUESTION: Well, let me interrupt you just a --
24 just a minute, Mr. Livingston. Doesn't your definition
25 kind of meld together the burglary in Section 2 and the

1 catch-all?

2 MR. LIVINGSTON: Yes, it does. I believe --

3 QUESTION: Well, what -- what is the
4 justification for that? They're phrased in the
5 disjunctive.

6 MR. LIVINGSTON: Well, this Court, first of all,
7 does not always rely on something like "or." For example,
8 the mail fraud case not too long ago -- I think it was
9 McNally -- you had an "or" and you related -- the
10 requirement that there be property or money taken in the
11 mail fraud cases you related to artifice or scheme to
12 defraud. So that alone I do not think is dispositive.

13 More important, the plain language of the
14 statute says "otherwise." "Otherwise" clearly makes an
15 inference that although Congress didn't define what
16 burglary, we sure do know that whatever burglary they were
17 talking about, it had a potential risk of physical injury
18 to others.

19 QUESTION: So you say it's in -- incorporated in
20 the definition of burglary by the word "otherwise" is the
21 requirement that there be a serious potential risk of
22 physical injury to others.

23 MR. LIVINGSTON: That's right.

24 QUESTION: So you are not really melding it
25 together then in your view. You -- you are simply

1 construing the statute.

2 MR. LIVINGSTON: That's right. And -- and the
3 legislative history, I think, thoroughly supports it. I
4 know not everybody thinks the legislative history is
5 important, but the comments we have from the people in the
6 House, who were voting on this and fighting not to include
7 any property crimes at all because we just want to get bad
8 people and are burglaries really that bad -- that was the
9 gist of the debate in the House.

10 And they finally got convinced by the people in
11 the Justice Department and the Senate that, well, perhaps,
12 some of these burglaries should stay and be enhancing
13 offenses, and so let's get the violent ones. I think
14 that's really what happened in this case, although the
15 final enacted version of the statute is not clear because
16 there was no committee report.

17 QUESTION: Of course, that --

18 QUESTION: I'm sorry.

19 QUESTION: It seems -- the way you put it awhile
20 ago, you would require the burglary that justifies
21 enhancement with -- it would have to have as an element of
22 the offense --

23 MR. LIVINGSTON: That's right.

24 QUESTION: -- the conduct. Which is different
25 than what is stated in -- in Roman numeral ii here.

1 MR. LIVINGSTON: That's right. Roman numeral ii
2 has the word conduct, which could be --

3 QUESTION: And it -- and it would qualify, if
4 it's conduct, that it might endanger others even if it's
5 not a part of the offense.

6 MR. LIVINGSTON: That's right and if -- I think
7 it is within this Court's prerogative, certainly, to
8 construe it that way and examine the underlying conduct in
9 a case-by-case basis.

10 As a matter of policy, I'm not sure that's what
11 you want to do and force the district courts to be
12 burdened that way. And I think you have a body of case
13 law which supports interpreting it otherwise. Normally,
14 Federal criminal statutes are construed in a uniform way.
15 The intent of Congress is presumed to be that they will be
16 applied from some definition.

17 And although they may make a reference to state
18 law, that the state definitions themselves should not
19 control it, that it will be a Federal definition applied
20 to the state crimes. Just as convictions in this statute
21 have been previously interpreted I think in the Dickerson
22 case. They --

23 QUESTION: Is it -- is it your position that one
24 looks to the conduct involved in the particular crime for
25 which the defendant was convicted or in the statutory --

1 to the statutory elements of the crime?

2 MR. LIVINGSTON: No. My proposed test is that
3 it is the elements of the crime itself. As -- I'm just
4 willing to -- to understand, yes, it does say conduct and
5 it's not positively clear that they were saying, well,
6 there could a categorical approach. It could be conduct
7 in an element or it may not be and so --

8 QUESTION: Even -- even in that event, we're
9 still going to have to decide, not case by case but
10 certainly element by element, which particular things in
11 burglary statutes create a serious potential risk of
12 physical injury to another.

13 For example, does nighttime do it for those
14 burglary statutes that require entering a building by
15 night? Or, for that matter, does the requirement of a
16 building that belongs to another, is that alone enough?

17 And it may well be that after applying your
18 test, we could very well end up right where the
19 government's test is, by your root, determining that every
20 element the government would -- would include in its test,
21 is indeed the sort of element that creates a serious
22 potential risk of physical injury to another.

23 MR. LIVINGSTON: I think you could. But I think
24 after you consider the statutes that are out there and
25 realize that you will be including crimes like

1 shoplifting, which, believe it or not, really is a
2 burglary -- felony burglary offense out in California,
3 that those kinds of crimes simply are not violent conduct.
4 And I think if you frame a test that way, you are not
5 doing justice to the words that Congress chose when they
6 said violent felony.

7 We're talking about felonies where there is
8 somebody there and they could get hurt.

9 QUESTION: Why don't you urge the common law
10 definition of burglary?

11 MR. LIVINGSTON: Well, I -- I think because a
12 common law definition of burglary could still involve
13 places where there is nobody home and there is no risk of
14 injury.

15 QUESTION: Well, but I -- I think that the
16 common law theory of burglary was that if you broke into a
17 dwelling at the -- nighttime, the people could come home
18 while you were there even if they weren't there when you
19 came. That there was a risk. It didn't have to be a risk
20 which materialized.

21 MR. LIVINGSTON: Well, I think that the risk of
22 a response or someone returning alone is not enough to
23 find the serious potential risk of injury to another. If
24 -- if you decide that a -- somebody could return is
25 enough, then you really by implication, I think, have to

1 extend that to almost every crime that there is.

2 Somebody could investigate. The police could
3 always stumble upon a numbers runner or a prostitution
4 ring or, you know, somebody else could come upon the crime
5 while it's happening. Whether or not it's a burglary or
6 anything else, I think just the mere risk of
7 investigation --

8 QUESTION: Well, how about an attempted robbery
9 with a phoney gun?

10 MR. LIVINGSTON: Well, attempted robbery with a
11 phoney gun falls under the first definition. Any crime
12 against the person is already covered under the statute.
13 Subdivision 1, which is printed in the briefs, says "any
14 crime that has as an element the threatened or actual use
15 of force against the person of another." So, we've
16 already got all of those crimes in Subdivision 1. And
17 that extends from all the robberies to murder, rape,
18 kidnapping, any number of other things.

19 The only question, really, with respect to
20 Subdivision 2 is what property crimes --

21 QUESTION: But that seems to me to call into
22 question your definition of burglary, and it's -- it's
23 just not clear to me what cases would fall under your
24 definition.

25 Would the statute have to have an element that

1 the person be present in the burglarized premises? Is
2 that the logical import of your --

3 MR. LIVINGSTON: That -- that's one of them. I
4 set forth a number, and I believe really that number three
5 is duplicated because it says threatening somebody and
6 that means somebody's there also. So there is somebody
7 occupied.

8 I also include the presence of a weapon, which,
9 you know, you may be able to say, well, how can a weapon
10 be dangerous if there's nobody there to be shot? But I
11 think that states an awful lot about the burglar's state
12 of mind. This isn't just somebody who's sneaking around,
13 casing joints where he can get in and out when nobody is
14 there. This is somebody who's going in and he is ready
15 willing and able to kill them, harm them or maim them, or
16 do whatever is necessary if somebody returns.

17 And that's when I think you take that minimal
18 risk which is always there of somebody investigating.
19 That gets heightened to a serious risk if they have a gun
20 or a dangerous weapon.

21 QUESTION: Well, Mr. Livingston, in your view I
22 guess these other provisions in the statute for arson and
23 extortion would likewise have to have built into them some
24 other element that one wouldn't usually find.

25 I mean, you can have arson if somebody goes out

1 and sets a haystack on fire where there's no one around.
2 Or you could have extortion based on the threat of
3 disclosure of information, not some physical --

4 MR. LIVINGSTON: That's right. And as --

5 QUESTION: -- violence. And so it's more than
6 just burglary here.

7 MR. LIVINGSTON: Uh-huh.

8 QUESTION: I assume that because Congress
9 included those three words that they should have at least
10 their common ordinary meaning so far as we can determine
11 them, and they wouldn't necessarily include, I think, the
12 elements as you've described them.

13 MR. LIVINGSTON: Well, I don't think that that
14 is a -- a fair way to go when you consider the language at
15 the end of the statute. And it's just --

16 QUESTION: Well, I think it's a pretty logical
17 explanation. Congress had different proposals in front of
18 it. Some people thought it ought to be limited only to
19 crimes where there was risk of physical injury, and other
20 members of Congress thought that burglary should be
21 included in the list, arson and extortion. And they
22 amalgamated the two in -- in the way that we see here,
23 which I think can logically be read to include burglary,
24 arson and extortion regardless of the risk of physical
25 injury.

1 MR. LIVINGSTON: I would just have to
2 respectively disagree with respect to that because of the
3 "otherwise" clause and the fact that it really states
4 serious potential physical risk of injury to others.

5 QUESTION: Mr. Livingston, the "otherwise"
6 clause doesn't necessarily mean -- doesn't refer
7 necessarily back to burglary arson or extortion. It may
8 only refer back to the immediately preceding phrase which
9 is "involves use of explosives."

10 And, indeed, one is lead to believe that that's
11 what it refers back to since it also uses the word
12 "involves." So the thing reads, is burglary, arson or
13 extortion, involves use of explosives or otherwise
14 involves conduct that presents a serious potential risk of
15 injury.

16 It seems to me that all the "otherwise" is
17 attached to is the use of explosives, not the -- not the
18 three crimes that are specifically named.

19 MR. LIVINGSTON: Well, I suppose I will have to
20 agree that that's a possibility, as is Justice O'Connor's
21 interpretation. But the fact of the matter is, is that
22 the language is not clear. What we have here is an
23 ambiguous criminal statute and the rule of lenity which
24 this Court has consistently upheld as recently as
25 yesterday, mandates that this Court construe the statute

1 in favor of the defendant.

2 QUESTION: That doesn't mean you construe it
3 like you suggest. The common law definition would get
4 your client off the hook, wouldn't it?

5 MR. LIVINGSTON: As a fall-back position, we
6 have indicated in our briefs --

7 QUESTION: Well, that's --

8 MR. LIVINGSTON: -- that that would be an
9 acceptable alternative, although I think --

10 QUESTION: Well, you want to win your case on
11 any ground, I suppose.

12 QUESTION: Like the common law --

13 MR. LIVINGSTON: We are interested in winning
14 the case, Justice White.

15 (Laughter.)

16 QUESTION: So, the common law definition would
17 win it for you, I take it?

18 MR. LIVINGSTON: I believe so, although it
19 depends whether or not you then look to the statutes
20 themselves to determine it or whether you look at the
21 underlying conduct. I can't --

22 QUESTION: Well, what -- what precisely --

23 MR. LIVINGSTON: -- really -- pardon?

24 QUESTION: What precisely, again, was the
25 conduct of which your client was convicted?

1 MR. LIVINGSTON: Well, that's a big problem in
2 this case because we really don't know. In 1971 I was
3 able to -- I was able to locate the police report from
4 1971. But that -- and that was a commercial structure, a
5 gas station, at 3:00 in the morning that was unoccupied
6 and the defendant was unarmed. He got caught -- or his
7 friends got caught crawling out of a window with a case of
8 oil.

9 (Laughter.)

10 MR. LIVINGSTON: But the 1963 conviction, we
11 don't know. The government was -- didn't produce any
12 evidence of the police reports or the case files. I
13 called and was unable to locate it and the probation
14 office report indicates the same, that they were unable to
15 locate those files.

16 QUESTION: All you know is that it's second-
17 degree burglary under Missouri law.

18 MR. LIVINGSTON: It's second-degree burglary and
19 we also know that there was \$15.25 in restitution ordered
20 to be made to Wilkin's Food Shop, wherever that may be.
21 But -- so, I would assume with Wilkin's Food Shop being
22 involved, that that particular count wouldn't be common
23 law burglary. But there were two other counts -- because
24 that was a three-count conviction -- and we really don't
25 know what was involved in those counts.

1 I believe I would like to save the rest of my
2 time for rebuttal.

3 QUESTION: Very well, Mr. Livingston.

4 Now, Mr. Lazerwitz.

5 ORAL ARGUMENT OF MICHAEL R. LAZERWITZ

6 ON BEHALF OF THE RESPONDENT

7 MR. LAZERWITZ: Thank you, Mr. Chief Justice,
8 and may it please the Court:

9 The Armed Career Criminal Amendments Act of 1986
10 defines the term "violent felony," which may trigger a
11 mandatory minimum sentence, to include any felony that is
12 "burglary, arson or extortion, involves the use of
13 explosives, or otherwise involves conduct that presents a
14 serious potential risk of injury to another." Congress,
15 however, did not further define the term burglary, as it
16 did in the predecessor 1984 statute.

17 The narrow question presented here is whether
18 Petitioner's Missouri burglary convictions are violent
19 felonies under the 1986 act. But in order to resolve that
20 question, the Court must first decide what Congress meant
21 by the term "burglary" and then square that definition
22 with the precise language in Subsection 2 of Section
23 924(e)(2)(B).

24 But as it turns out, getting to the bottom of
25 the first inquiry, effectively resolves the second issue

1 of statutory construction and ultimately the question
2 presented in this case.

3 In our view, the pertinent language of Section
4 924(e), "accepted principles of statutory construction,"
5 and the available evidence, show that Congress intended to
6 retain in the 1986 version of the statute, the broad
7 contemporary definition that was explicitly contained in
8 the 1984 act.

9 QUESTION: Well, you'd have us read into this as
10 the definition the definition that was actually contained
11 in the earlier act, I gather.

12 MR. LAZERWITZ: Yes, Justice O'Connor, and
13 although that --

14 QUESTION: That's a little hard to do, faced
15 with the fact that they didn't reenact it.

16 MR. LAZERWITZ: Well, it -- it strikes you at
17 first --

18 QUESTION: You'd use normal principles of -- of
19 use of legislative history, or what not -- I would assume
20 you would say, whatever it means, one thing we know it
21 doesn't mean -- that is, what they defined it as in -- in
22 1984 and took out.

23 MR. LAZERWITZ: Well, in fact, although at first
24 glance it seems like our position is cockeyed, it turns
25 out to be just the opposite, because even --

1 QUESTION: (Inaudible).

2 (Laughter.)

3 MR. LAZERWITZ: I will explain. And Petitioner
4 essentially concedes the point in his proposed definition.

5 The first thing we have to do -- first of all,
6 we could make believe that there were no '84 definition.
7 We have a statute now. Congress uses the term burglary.
8 Well, what does that term mean? This Court has long held
9 that when a term has an ordinary contemporary meaning and
10 Congress doesn't otherwise define it the Court will
11 presume that Congress intends that meaning.

12 Today, and in 1986, the term burglary does have
13 a core, shared meaning in this country and that is the
14 unlawfully entering or remaining in someone else's
15 building with the intent to commit a state or Federal
16 offense.

17 QUESTION: That -- that was the '84 definition?

18 MR. LAZERWITZ: Yes. And just to clarify one
19 point --

20 QUESTION: Well -- well wait a minute Mr. -- you
21 -- you say it does have commonly accepted meaning. I
22 mean, is that meaning commonly accepted other than having
23 been adopted by Congress in 1984?

24 MR. LAZERWITZ: That is the core definition of
25 burglary that is in place in 41 states today and, agreed,

1 there are many states that have a broader definition. But
2 this is what, in terms of the common denominator, so to
3 speak, of what burglary is today.

4 There's no doubt that some states, many states,
5 will punish as burglary, breaking into a car, breaking
6 into a vending machine.

7 QUESTION: And I take it nine would not punish
8 some of those things as burglaries but --

9 MR. LAZERWITZ: Well, there are -- there are --
10 as we counted and -- there are five states that have
11 retained the common law definition of burglary.

12 And just to take care of that point now, one of
13 the reasons why this Court shouldn't adopt the common law
14 definition is it would effectively write the burglary
15 predicate offense out of the statute. And we certainly
16 know that Congress didn't want that because the whole
17 point of the act, at least in '84, was to get burglars in
18 Federal prisons if they commit enough crimes.

19 QUESTION: Why would it write the burglary part
20 of the thing out?

21 MR. LAZERWITZ: Because there are five states
22 that have burglary. If burglary means the common law
23 definition --

24 QUESTION: And if -- and if you do not do it
25 case by case, but you look to the elements of the offense

1 rather than to the actual offense that occurred.

2 MR. LAZERWITZ: Yes. And we -- and --

3 QUESTION: It assumes that.

4 MR. LAZERWITZ: Yes, but -- and under subsection
5 -- we're not -- we're not here to quibble with -- we
6 essentially agree with Petitioner, that you have to look
7 at what the man was convicted of and that, by definition,
8 is the -- the statutory offense.

9 QUESTION: I see.

10 MR. LAZERWITZ: And that is the problem with the
11 common law definition, apart from the fact that it doesn't
12 make much sense to presume that Congress intended to adopt
13 a definition that has been discarded for so many years.

14 QUESTION: Well, if you adopt a common law
15 definition, you're really narrowing the kind of burglary
16 that it was reached by this act.

17 MR. LAZERWITZ: Yes, and the --

18 QUESTION: And I -- and the -- and this -- this
19 new act was intended to expand the coverage of the act.

20 MR. LAZERWITZ: Yes, and that's -- and again,
21 back in '84 the generating force of this act was the
22 congressional finding that career offenders are
23 responsible for a grossly disproportionate number of
24 crimes. And career offenders have a penchant for
25 committing burglaries and robberies. And burglaries are

1 the breaking and entering of -- well, the entering
2 unlawfully of someone else's building with an intent to
3 commit an offense.

4 QUESTION: Well, you've left out the definition
5 of breaking and -- I mean, in the definition of breaking
6 and --

7 MR. LAZERWITZ: Well, I'd like to --

8 QUESTION: -- entering. I mean, in the
9 definition of breaking and entering.

10 MR. LAZERWITZ: -- to return to -- to return
11 to --

12 QUESTION: You just say entering or remaining
13 surreptitiously.

14 MR. LAZERWITZ: I'd like to clarify one point
15 that wasn't as clear in our brief as it should have been.

16 The word "entering" in a burglary provision is a
17 term of art. It doesn't mean walking into a public
18 building. And here's an example. Suppose a witness
19 intends to commit perjury on the witness stand. He walks
20 into the Federal courthouse intending to commit an
21 offense. He may become a perjurer that day, but he is not
22 a burglar.

23 And that is not what Congress had in mind, and
24 that is not what most states have in mind. California
25 does. My adversary is correct. California punishes as

1 burglary shoplifting.

2 QUESTION: Can you just -- in your definition,
3 is there any unlawful aspect required for the entry?

4 MR. LAZERWITZ: It has to be unauthorized and it
5 would distinguish between the shoplifter and the person
6 who lawfully enters into a store and stays behind after
7 hours and then commits the offense.

8 And that was the point of --

9 QUESTION: Well, which one didn't enter
10 lawfully?

11 MR. LAZERWITZ: They both entered lawfully, but
12 the -- our position is that if you lawfully enter a
13 building and commit an offense inside, you have not
14 committed burglary, except -- and the limited exception is
15 if you stay after hours, which then makes your staying
16 unauthorized and then you commit an offense. And that
17 is --

18 QUESTION: That is not the literal reading of
19 the definition you propose, though, because the definition
20 you propose is entering with intent to commit a -- a
21 felony.

22 MR. LAZERWITZ: Yes, but the word entering in
23 the context of a burglary provision --

24 QUESTION: Well, how do we know this? I mean,
25 certainly you don't get that out of the language. Your

1 perjury example, I think is an excellent hypothetical.

2 MR. LAZERWITZ: We get --

3 QUESTION: It falls squarely within the text of
4 your proposed definition.

5 MR. LAZERWITZ: You get that --

6 QUESTION: We'll have another lawsuit on -- on
7 that one. Right?

8 MR. LAZERWITZ: Pardon?

9 QUESTION: We'll have another lawsuit on that
10 one after we --

11 MR. LAZERWITZ: Well, it's one of those
12 hypotheticals that, of course, will never come up and
13 if -- but --

14 QUESTION: Well, no, but the shoplifting example
15 comes up.

16 MR. LAZERWITZ: Yes, Justice Stevens.

17 QUESTION: Say somebody goes into the department
18 store lawfully but with an intent to steal something.

19 MR. LAZERWITZ: There's no doubt that those are
20 potential predicate offenses, but not in the government's
21 view and we don't prosecute those people and we would not
22 include those as predicate offenses.

23 QUESTION: I know you don't prosecute them, but
24 -- maybe that's what happened to this particular --
25 defendants in Missouri.

1 MR. LAZERWITZ: No, we -- we'd --

2 QUESTION: I mean, maybe -- I don't -- I don't
3 know the Missouri definition. But if the Missouri
4 definition is -- is in exactly the same words as yours,
5 how do we know it didn't include the perjury --

6 MR. LAZERWITZ: Well --

7 QUESTION: -- or the shoplifting?

8 MR. LAZERWITZ: Well, we know it for two
9 reasons. One, the repealed Missouri statutes that are
10 attached as appendices to Petitioner's brief, all show
11 that the offense was breaking and entering. Now, breaking
12 and entering in a burglary statute means you're not
13 supposed to be there.

14 QUESTION: Well, but --

15 MR. LAZERWITZ: And today --

16 QUESTION: -- that may be. But supposing the
17 state -- you -- one of your arguments is that about 40 or
18 41 states have very similar statutes. And say all we know
19 about the other state statute involved -- it may not be
20 true in this case -- is that it has the same text as your
21 definition, and he was convicted of it.

22 How do we know that that court didn't decide all
23 he did was walk in intending to commit perjury or
24 shoplifting? How do we tell without getting into the
25 case-by-case business that everybody seems to agree we

1 don't want?

2 MR. LAZERWITZ: Well, it's one thing to say you
3 don't want to get into the case-by-case, but it's another
4 thing to say you don't -- just want to look at the statute
5 which is not our position.

6 QUESTION: Well, the statute as construed by the
7 highest court of the state, but it's never had this
8 particular question.

9 MR. LAZERWITZ: In a particular case, you look
10 at how does the government prove or attempt to prove that
11 this person needs the -- deserves the predicate -- excuse
12 me -- the enhanced sentence. The government would --
13 typical example would be the government would have
14 certified copies of convictions.

15 QUESTION: Right.

16 MR. LAZERWITZ: We'd have the charging documents
17 if -- if we could find them. We'd have probation reports.
18 Would put on -- would present evidence.

19 QUESTION: Well, let me just make -- be sure --
20 I --

21 MR. LAZERWITZ: And if a judge were concerned
22 that this person were convicted of burglary, although all
23 he did was walk into a store and steal a box of
24 Twinkies --

25 QUESTION: Well, let me go back if I may because

1 I thought earlier we'd all agreed that it's an elements of
2 the offense test. And supposing you have in the other
3 state a definition of burglary that clearly includes
4 robbing a parking meter out in the -- in some public area.
5 That's burglary in Texas, but it also covers a lot of
6 other stuff.

7 And in the particular case you've got a
8 defendant -- if you look at the record, you find that he
9 really broke and entered a home in a classic common law
10 burglary. Do you use that or not to enhance?

11 MR. LAZERWITZ: If the statute could be -- if
12 the statute --

13 QUESTION: The statute is broad enough to cover
14 parking meters, the facts of the case where a home.

15 MR. LAZERWITZ: No doubt about it.

16 QUESTION: No doubt about it? What's the
17 answer? Which way?

18 MR. LAZERWITZ: You would count it.

19 QUESTION: Oh, you do count it?

20 MR. LAZERWITZ: Yes.

21 QUESTION: So you don't look at elements of the
22 offense, you look at the actual facts.

23 MR. LAZERWITZ: You look at the elements of the
24 offense of which he was convicted. There are many
25 burglary statutes --

1 QUESTION: And if your record shows nothing but
2 conviction, murder two pursuant to statute certain number
3 so and so, that's not enough to answer the question.
4 You've got to go behind that?

5 MR. LAZERWITZ: Yes. You would. And that
6 happens every day. In fact, we have cases that are on
7 appeal that involved these types of issues. You have
8 to --

9 QUESTION: So it's not an element of the offense
10 test, it's a particular fact in the charging papers?

11 MR. LAZERWITZ: It's elements of what you --
12 it's the elements of the offense as applied to what he was
13 convicted of. There's -- there is no other way around it,
14 given the way that the burglary statutes today are
15 written. Most states read them -- there is no doubt that
16 many states criminalize as burglary conduct that we think
17 Congress intended to cover and -- and --

18 QUESTION: Supposing the charging papers in this
19 case say burglary of department store, Hecht's, at such
20 and such an address, period?

21 MR. LAZERWITZ: Well, here we know what he did.

22 QUESTION: Yeah, but lots of times you don't. I
23 mean, --

24 MR. LAZERWITZ: Well, if we don't know, then
25 that's going to be a problem in a particular case.

1 QUESTION: I see. Okay.

2 QUESTION: Well, I thought Petitioner's counsel
3 said we don't know what was done on one of the prior
4 convictions --

5 MR. LAZERWITZ: Well --

6 QUESTION: -- except that there was an order for
7 restitution to a store for \$15.

8 MR. LAZERWITZ: There are two answers to that,
9 Justice O'Connor. We do know what happen because
10 petitioner, himself, conceded what he did. And you find
11 it in the Joint Appendix at 11 and 12, which is a filing
12 that he made in the district court.

13 He told us, one, that we know from -- actually
14 we know from the police reports that were in evidence that
15 there was a break-in into a service station. The second
16 offense, the '63 burglary was in Petitioner's own words
17 which he said to a probation officer, "I went with a
18 friend, and he broke into his girlfriend's house to pick
19 up his clothes."

20 Now, that might sound innocuous, but that's a
21 burglary. That's, in fact, a more serious burglary than
22 the service station.

23 QUESTION: Mr. Lazerwitz, what is the current
24 status of any efforts to get Congress to amend or enact a
25 definition of burglary?

1 MR. LAZERWITZ: As you know, the Senate has
2 passed an amended version last year, and the House is
3 having hearings starting next month. And that's as far as
4 we know.

5 QUESTION: And the proposal would do what?
6 Reenact the old definition?

7 MR. LAZERWITZ: It would be to -- yes, to insert
8 the definition that was taken out back into the statute to
9 avoid the problems that this Court is seeing.

10 QUESTION: Mr. Lazerwitz, I am afraid that in
11 the course of this discussion, we not only have not come
12 closer together, we seemed to have walked further apart.
13 I am no longer sure that -- that the two sides agree on
14 the basic approach to applying this statute.

15 That is, I think, that your adversary would
16 probably say that what he means by applying the statute
17 generically is, if the burglary statute did not require
18 that there be found as an element of the offense the
19 particular item that's included in the definition --
20 building or at night or whatever -- I think he'd say that
21 you can't count it.

22 And why isn't that a better way? Why isn't that
23 a better way to do it?

24 MR. LAZERWITZ: That's not the way the statute's
25 written. That's Subsection 1.

1 QUESTION: Why isn't it written --

2 MR. LAZERWITZ: That's Subsection 1, that's not
3 Subsection 2. Subsection 1 speaks of elements.
4 Subsection 2 speaks of any crime that involves -- that is
5 burglary, involves use of explosives or otherwise involves
6 conduct.

7 QUESTION: No, but that -- but -- but you -- you
8 look to the definition of the crime and if the definition
9 of the crime involves conduct that presents a serious
10 potential risk of injury, then that's it.

11 MR. LAZERWITZ: Well, that's --

12 QUESTION: And -- and if that element has to be
13 found in order to convict of the crime, then -- then it's
14 okay. If it doesn't have to be found, then it's not okay.

15 MR. LAZERWITZ: Well, that -- that effectively
16 reads burglary out of the statute. And that is one thing
17 that we don't think Congress -- you can read the statute
18 that way. Congress --

19 QUESTION: Why? Why? Because all state
20 burglary statutes are so expansive and include so many
21 things in them that --

22 MR. LAZERWITZ: No, because Congress
23 specifically inserted the word burglary into the statute
24 as a result of what was the legislative compromise.

25 QUESTION: I'm saying --

1 MR. LAZERWITZ: And so now we have to figure out
2 what burglary means.

3 QUESTION: I'm not sure you are understanding
4 what I think is a difference between the two of you.

5 I agree that burglary is a crime under the
6 statute. You don't have to prove separately that there
7 was a danger to another person. We accept your
8 definition, let's say. It requires that it be in a
9 building.

10 What I believe your adversary is saying is that
11 means if you have a state which has a definition of a
12 statute that says it is burglary if it's done at night or
13 in a building, you would not be able to use that for
14 purposes of this statute because it was not necessary in
15 order to obtain that conviction, to prove that the
16 defendant was in a building. You might have proven,
17 instead, that it was at night.

18 Now, why isn't that a very sensible way of
19 applying this statute?

20 MR. LAZERWITZ: It's not a sensible way because,
21 first of all, it's not what Congress had in mind and it
22 effectively would take out of the -- would narrow the
23 statute's reach in such a way that would make it
24 ineffective as opposed -- with respect to burglaries. And
25 that's not the way -- and it's -- again, there's a

1 difference between Subsection 1 and Subsection 2.

2 In Subsection 1, Congress is speaking about
3 elements necessary for a conviction. That's not the
4 language in Subsection 2, which is broader. And that's
5 our position. And if the Court is concerned about a case-
6 by-case inquiry, I really think that's not such -- it's
7 not such an onerous burden. This is what happens in
8 sentencings all the time.

9 QUESTION: What's -- what's the provision of
10 Missouri law? How does it read that makes it a burglary
11 to break into your girlfriend's house to get your clothes?

12 MR. LAZERWITZ: That's common law burglary. If
13 it's not --

14 QUESTION: Yeah -- I know, entering -- entering
15 to commit a felony --

16 MR. LAZERWITZ: Yes.

17 QUESTION: -- is common law. Picking up your
18 own clothes is a felony?

19 MR. LAZERWITZ: Well, apparently in this case,
20 the guy wasn't -- he wasn't authorized to be in the house
21 and maybe they weren't his clothes.

22 QUESTION: Anyway, he was -- he was --

23 QUESTION: Well, I thought -- I thought you -- I
24 thought you said he was convicted of entering his
25 girlfriend -- for helping entering his girlfriend's house

1 to pick up his clothes.

2 MR. LAZERWITZ: Well, that's what his story was
3 but obviously the police must have found out it was
4 different and he was convicted of it.

5 QUESTION: At least he was convicted of burglary
6 under the state law.

7 MR. LAZERWITZ: Yes. We can't go behind the
8 conviction on what Petitioner had said.

9 Just to clarify one point, or to stress one
10 point, the Court should not be swayed by this sort notion
11 that district courts are going to be inundated with
12 sentencing hearings and making difficult choices. This is
13 what goes on all the time. This is a burden the
14 government has in every case with enhancement, and
15 especially under the guidelines where criminal history and
16 particular conduct is so important.

17 QUESTION: But then -- part of your argument
18 against using the common law burglary definition, I
19 thought, was you wanted to avoid all these inquiries. But
20 that's not -- your reason on the common law -- objecting
21 the common law burglary is that it's just too narrow and
22 Congress want something broader. That's basically --

23 MR. LAZERWITZ: Well, there are a couple of
24 reason. One, it's -- it's not only too narrow but it
25 doesn't make any sense. And, in fact, Petitioner, as a

1 background point, raises this. But no one is seriously
2 arguing --

3 QUESTION: But his reason for not agreeing with
4 it is he wants to avoid -- he wants to rely on elements of
5 the offense and he agrees that that wouldn't fit in the
6 common law burglary because most states copy, except five.

7 MR. LAZERWITZ: Well, under his elements of the
8 offense test, if that were adopted, it would accomplish
9 the same result, in our -- in our view, because if you
10 look at most state burglary statutes, they do cover things
11 other than buildings.

12 QUESTION: Well, why do you say the common law
13 definition makes no sense? It certainly made sense to the
14 common law judges.

15 MR. LAZERWITZ: Yes, but we are no longer --
16 that's not the way things have been in this country for
17 years.

18 QUESTION: You say 41 states have rejected it?

19 MR. LAZERWITZ: Yes.

20 QUESTION: Well, but I think the Court has
21 adopted common law definitions at times when perhaps
22 common law had been superseded in places by -- by statute.

23 MR. LAZERWITZ: Well, in Parron and Bell and
24 even in the Reagan case from 1895, the Court has said,
25 listen, when common law no longer applies or obtains in

1 society, we are not going to infer that Congress used it.
2 And that's -- it couldn't be more apparent than here where
3 everyone agrees that there are so few states that have
4 common law.

5 Now, with the elements of the offense test, we
6 certainly reject that approach because it would accomplish
7 the same thing and read the statute in such a way that
8 it's not written and also ignore -- I haven't harped on
9 the legislative record, but it is important because the
10 legislative record shows that Congress had something
11 particular in mind.

12 QUESTION: Can you explain to me again why the
13 language of your proposed definition does not cover
14 entering the courthouse with the intent to commit perjury?

15 MR. LAZERWITZ: Because the word entering means,
16 entering without -- without authorization, without
17 privilege.

18 QUESTION: And -- unlawfully entering -- you are
19 in effect -- you are adding -- you have not given us an
20 accurate definition of what your real position is then.
21 The word entering could be unlawfully entering --

22 MR. LAZERWITZ: Well --

23 QUESTION: -- unconsented entering.

24 MR. LAZERWITZ: The -- the word "entering" is a
25 -- is a loaded term. But to make it more --

1 QUESTION: But that's what you're saying, isn't
2 it?

3 MR. LAZERWITZ: Yes, that -- when we say
4 entering -- when Congress used the term "entering,"
5 Congress meant entering without permission, without
6 authorization. There is no -- and that -- that's not a
7 startling proposition. The model penal code has a --

8 QUESTION: It's not startling except it isn't
9 the position I understood your brief to advocate. That's
10 why I'm startled.

11 MR. LAZERWITZ: Well, I want to make it clear
12 that we are not advocating that the perjurer is a burglar.
13 And there --

14 QUESTION: Or the shoplifter then?

15 MR. LAZERWITZ: Or the shoplifter. And we would
16 not, if we were presented with the California predicate
17 offense in that -- of that type, we would not include it.
18 And as far as I know, we haven't seen anything like that.

19 In a similar vein, a lot of states criminalize
20 breaking and entering into a car as burglary. Again, that
21 wouldn't satisfy the definition that Congress had in mind.
22 That's not the type of offense that Congress wanted as a
23 predicate offense.

24 QUESTION: Have you cited us any cases in which
25 a definition is used in a statute after the Congress has

1 repealed it, or would this be a novel application?

2 MR. LAZERWITZ: We didn't cite any case and I
3 don't know of a particular one, but I don't think this is
4 an example of Congress repealing the definition. And I
5 say that because Congress -- there's no doubt that
6 Congress changed the definitions of the statute. It
7 reworked the entire statute when it included drug offenses
8 and what is now violent felony.

9 But, at the same time, it inserted the word
10 "burglary." And that is a telling point, because if
11 Congress were repealing entirely its treatment of
12 burglary, it wouldn't have put burglary back in. And it
13 wouldn't have done so because, if in fact Petitioner is
14 right -- the words "burglary, arson, extortion" are
15 essentially superfluous, because the burglaries that he's
16 concerned about would fall within the catch-all phrase.

17 But Congress did just the opposite. They --
18 Congress put in the word "burglary, arson and extortion"
19 -- words -- and for the Court's information, three
20 predicate offenses that were first voiced to the House in
21 the hearings from the Justice Department.

22 QUESTION: And what's your position on the use
23 of the ending phrase "or otherwise involves conduct"? You
24 say that just modifies explosives?

25 MR. LAZERWITZ: The way I have been thinking

1 about it is the "or otherwise" modifies the -- the verbs
2 "is" a crime, "is" burglary, "involves" use of explosives,
3 or --

4 QUESTION: Well, then that suggests that
5 burglary must somehow involve conduct that presents a
6 serious potential risk of physical injury, don't you
7 think?

8 MR. LAZERWITZ: No, I don't think so because I
9 don't think the word "otherwise" can bear that type of
10 weight. And one way of looking at is -- there are several
11 ways. The most natural reading is that Congress has
12 decided that certain generic offenses -- burglary, arson,
13 extortion -- do present the type of conduct that presents
14 a danger.

15 And that goes back to what the court was
16 discussing before. Congress can be seen as essentially
17 preempting the inquiry that was raised before. How do we
18 know whether if it's a building, it's potentially violent?
19 How do we know whether someone is inside? Does that make
20 it potentially violent?

21 If the Court wants to give the phrase "or
22 otherwise" an aggressive reading, which we don't urge at
23 all, but even if the Court wants to, I think the most that
24 you can get out of is Congress had decided that
25 burglaries, as we define them, as excluding the breaking

1 of a car, the breaking of a Coke machine, the shoplifter,
2 that --

3 QUESTION: That would also shed some light on
4 what Congress meant by burglary. If we are in doubt about
5 what the definition of burglary is, it would suggest that
6 the definition of burglary would have to involve conduct
7 that presents a serious potential risk of physical injury
8 to other -- to another.

9 MR. LAZERWITZ: Well, I don't think so and
10 frankly, the -- the phrasing "or otherwise," while we
11 don't even think that it should be given an aggressive
12 reading, is because look what it does. It actually takes
13 away a negative inference. And if Congress -- Congress
14 put back in the statute burglary, arson, extortion, it
15 didn't want courts to decide whether a particular burglary
16 is violent or not.

17 And so it -- it included certain predicate
18 property offenses, but said, look, we also want to include
19 other types of offenses. Other offenses -- for example,
20 vandalizing a train track, that would be conduct that
21 otherwise presents a potential violence to person. The
22 Tylenol poisoning case, that type of conduct would fit
23 within the catch-all.

24 And so Congress' using of that phrasing doesn't
25 suggest at all that it meant to modify the word burglary,

1 which would be an awfully cramped reading of -- of that
2 phrase. And "otherwise," in any event, as used as an
3 adverb means in different circumstances, differently, in
4 other circumstances.

5 QUESTION: Is there any other statute besides
6 the '84 statute that defines burglary -- I mean Federal
7 statute?

8 MR. LAZERWITZ: One example would be in Section
9 2118(b) of Title 18, which is the offense of burglarizing
10 a place of business that's licensed to dispense controlled
11 substances. And there again, Congress defined the offense
12 as entering unlawfully this place of business with the
13 intent to steal controlled substances.

14 QUESTION: Where do you get the -- where do you
15 get the -- to what do you refer in saying there are 41
16 states that have a core meaning to burglary? Is that in
17 the model penal code --

18 MR. LAZERWITZ: No, we --

19 QUESTION: -- somewhere or you counted them up?

20 MR. LAZERWITZ: No, we counted them up and
21 perhaps it would have been wise to give you a statutory
22 appendix, but we looked at each one of them --

23 QUESTION: But each one of them isn't -- isn't
24 the '84 definition.

25 MR. LAZERWITZ: No. There's no doubt.

1 QUESTION: Because -- because -- what -- the '84
2 definition just covered mere entering.

3 MR. LAZERWITZ: Again, Congress' using the term
4 "entering" didn't mean the shoplifter and there's been
5 indication -- I know of no cases where we prosecuted --

6 QUESTION: Well, do the 41 states you talk about
7 cover mere entering or does it require --

8 MR. LAZERWITZ: Very few.

9 QUESTION: -- unlawful entering?

10 MR. LAZERWITZ: Very few require mere entering.
11 California is by -- is certainly in the minority and I'd
12 refer you the discussion of the model penal code which is
13 cited in our brief.

14 QUESTION: (Inaudible).

15 MR. LAZERWITZ: Oh, excuse me. That would --
16 that would give you an example of the -- the few states
17 that do criminalize the --

18 QUESTION: Is the model penal code definition
19 what you're --

20 MR. LAZERWITZ: Yes, --

21 QUESTION: -- looking for?

22 MR. LAZERWITZ: -- it's essentially the same.

23 QUESTION: Yeah.

24 QUESTION: May I ask you again, if we -- if we
25 modify the definition on page 28 of your brief by adding

1 "unlawfully" in front of "entering," how many of the 41
2 states would fit that definition?

3 MR. LAZERWITZ: Every one of them.

4 QUESTION: Every one of them would? So -- and
5 if that's an element then I -- then the only states in
6 which you would lose under my suggestion -- you just look
7 at the element of offense -- are in the other nine states.

8 MR. LAZERWITZ: Well, your -- but I was
9 concerned with your statement about its got to be a
10 building. There are lots of -- there -- not every --

11 QUESTION: Well, your definition has got to be a
12 building.

13 MR. LAZERWITZ: Right, but in -- but in --

14 QUESTION: Well, isn't that true of all 41
15 states?

16 MR. LAZERWITZ: A building plus any other type
17 -- lots of other structures are covered. And under the --

18 QUESTION: Oh, so those definitions are broader
19 than this --

20 MR. LAZERWITZ: Oh, yes, there are lots of -- I
21 don't want to mislead you, Justice --

22 QUESTION: How many -- how many -- do you know
23 off the top of your head how many states have a crime of
24 burglary that is defined in this way and no more broadly?

25 MR. LAZERWITZ: That would probably be in the

1 minority.

2 QUESTION: Oh. So this is not -- this is not at
3 all typical then?

4 MR. LAZERWITZ: I -- again, as I said in the
5 beginning, it is the common denominator. It is what the
6 -- what you will -- what the man on the street -- what a
7 Mr. Taylor would think is burglary. And that's what
8 Congress had in mind.

9 QUESTION: Well, how do we know that?

10 QUESTION: Well, but you could also say they all
11 cover going in with an armed gun in the middle of the
12 night when there are people there. Then you say all 50
13 states have adopted that definition --

14 MR. LAZERWITZ: Well, again --

15 QUESTION: -- because they all include it.

16 MR. LAZERWITZ: Congress took this definition
17 from the National Commission of the Reform of the Criminal
18 Laws in the early 1970s. That's where this definition came
19 from. And that is what's been developed as the consensus
20 of burglary.

21 The fact that other states criminalize broader
22 conduct doesn't -- you can't fault Congress for -- for
23 adopting a more narrow definition. And -- I mean, that's
24 our position we -- and that's one of the reasons why we
25 disagree with the Eighth Circuit here.

1 It just doesn't matter what the state calls it,
2 it's what is actually going on. Because we don't think a
3 guy who breaks into a car should be subject to an enhanced
4 penalty if he does it three times.

5 QUESTION: Mr. Lazerwitz, I -- I gather from
6 what you've said that the way -- the way the Department
7 interprets this statute to come under the portion that
8 says "involves use of explosives," it isn't necessary that
9 the statute be a statute prohibiting a crime with the use
10 of explosives. That is, you could get somebody if they
11 were convicted of -- oh, I don't know -- mayhem by the --
12 but in the facts of the case they did it by use of
13 explosives.

14 MR. LAZERWITZ: If he were convicted of mayhem
15 and the elements of mayhem didn't include the use of
16 explosives, no, I don't think we would -- that would -- we
17 could charge him with that predicate.

18 QUESTION: And you would do that for the last
19 clause also, "otherwise it presents a serious risk of
20 physical injury to another"?

21 MR. LAZERWITZ: We --

22 QUESTION: That risk of physical injury must be
23 in the statute -- not the exclusive thing in the statute?

24 MR. LAZERWITZ: No. It's got to be what he's
25 convicted of, yes.

1 QUESTION: Okay.

2 MR. LAZERWITZ: We don't think, for example, if
3 you're charged with armed robbery and you plead to simple
4 larceny that we can walk into a district judge and say,
5 look, although he is convicted of simple larceny he really
6 used a gun. That's not fair because that's not what he
7 stands convicted of. And that's how we -- that's how
8 we've been applying that -- the statute.

9 If there are no further question, thank you.

10 QUESTION: Thank you, Mr. Lazerwitz.

11 Mr. Livingston, you have four minutes remaining.

12 REBUTTAL ARGUMENT OF BRUCE D. LIVINGSTON

13 ON BEHALF OF THE PETITIONER

14 MR. LIVINGSTON: Thank you, Mr. Chief Justice.

15 I would just like to point out a couple of quick
16 items in my remaining minutes.

17 First, I note -- Note 8 of the government's
18 brief, they indicate several places where there are the
19 use of the common law burglary or other statutes different
20 than their interpretation for the term "burglary."

21 Second, I think this is a plain language case.
22 More than anything, although the legislative history
23 supports us, in a response to Justice Scalia's question
24 about the comma or about "or otherwise" modifying
25 "involves use of explosives," I think that the comma after

1 "involves use of explosives" and before "or otherwise"
2 precludes that interpretation and it's just as likely that
3 it could be interrupted to modify the entire portion of
4 the statute.

5 QUESTION: May I ask you one question that's
6 very important to me? That -- in your view of elements
7 supposing your client had been charged with a crime,
8 whatever the definition we end up with, that fit the
9 definition but the statute in the state involved permitted
10 conviction for a broader category. Do you say you look at
11 the charging papers or you look at the statute?

12 MR. LIVINGSTON: I say you look at the statute.

13 QUESTION: So you would say in all those cases
14 that it doesn't count, even though they can prove without
15 any question that the elements of the offense were present
16 in the particular case, if the statute didn't require them
17 to be in every case?

18 MR. LIVINGSTON: If the statute didn't require
19 them to be in every case, then, under my interpretation,
20 it would not be an enhancing offense. You've still got
21 the guy. He's serving his time now. It's just a --

22 QUESTION: No, I understand.

23 MR. LIVINGSTON: -- question of whether he gets
24 the extra time.

25 QUESTION: But you -- you and the government do

1 differ on this point in --

2 MR. LIVINGSTON: That's right.

3 QUESTION: I just want to be sure.

4 MR. LIVINGSTON: I also would like to address
5 Justice White's question about expanding the act. I think
6 it is important, and we made the point in our reply brief,
7 and I think the legislative history definitely supports us
8 in this regard, that although the change from 1984 to 1986
9 expanded the act -- which it undeniably did; it added all
10 of the various crimes -- it used to just be robbery and
11 burglary and they expanded it to get murder, rape, mayhem,
12 whatever else.

13 But there was a great deal of debate about
14 excluding property crimes and, specifically, burglary.
15 And what we have here now is a definition where I
16 believe --

17 QUESTION: Your claim is that it narrowed the
18 reach of the burglary predicate offense.

19 MR. LIVINGSTON: Only to those burglars which
20 would be like the first-degree burglary statute in
21 Missouri which really have that serious potential risk of
22 injury. I also think that it's very clear that the
23 government definition that's proposed is not an ordinary
24 or contemporary definition.

25 It's a subset. Somehow or other it will reach

1 the various burglary crimes across this country, but it is
2 not the burglary crime themselves. They are very
3 different.

4 And it clearly omits any consideration of the
5 very, very narrow burglary crimes which we -- it's our
6 position -- are really what Congress was intending and
7 that's the aggravated burglaries and the violent
8 burglaries, the higher degrees of burglary. Nothing in
9 the government's definition addresses that distinction and
10 all of those other statutes that are out there and are
11 also called burglary.

12 QUESTION: Are arson and extortion defined in
13 this statute, or can we look forward to those cases coming
14 up later?

15 MR. LIVINGSTON: They also are not defined. We
16 have stated in our brief that extortion, particularly is
17 problematic. I think you might be able to somehow, when
18 you're defining what's a risk of injury, maybe arson seems
19 to be a kind of crime that has a risk of injury, and I
20 wouldn't contest it. It is not an issue here to day
21 anyway.

22 Extortion, Justice O'Connor's example, is a very
23 good one of the kind of extortion that doesn't present a
24 risk of injury and I think it's very appropriate that that
25 not be an enhancing offense. It's not the same as, hey,

1 give me some money or I'll shoot or kill your child.
2 That's the kind of extortion that was meant, not, hey, I'm
3 going to tell some nasty stories about you if you don't
4 give me some money. That's not a risk of injury, and I
5 would think there's a difference between those two kinds
6 of extortion.

7 I see my time is up.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Livingston.

10 The case is submitted.

11 (Whereupon, at 2:25 p.m., the case in the above-
12 entitled matter was submitted.)

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NO. 88-7194 - ARTHUR LAJUANE TAYLOR, Petitioner V. UNITED STATES

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