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IN THE SUPREME COURT OF THE UNITED STATES

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 RICHARD MATHIS, :
 Petitioner, : No. 15-6092
 v. :
 UNITED STATES. :

- - - - - x

Washington, D.C.
Tuesday, April 26, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

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 of Petitioner.
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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	MARK C. FLEMING, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	NICOLE A. SAHARSKY, ESQ.	
7	On behalf of the Respondent	30
8	REBUTTAL ARGUMENT OF	
9	MARK C. FLEMING, ESQ.	
10	On behalf of the Petitioner	61
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 15-6092, Mathis v. United States.

Mr. Fleming.

ORAL ARGUMENT OF MARK C. FLEMING

ON BEHALF OF THE PETITIONER

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

The Iowa statute under which Mr. Mathis was convicted defines one crime, and Iowa does not need to prove generic burglary to convict under it. The Eighth Circuit below and the government here, nonetheless, want to use the modified categorical approach. Not for its usual purpose, which is to identify the kind of conviction, we know what that is, but rather to identify the means of commission. That is contrary to ACCA's categorical approach, and it's irreconcilable with both the result and the reasoning of this Court's decision in Descamps.

One of --

JUSTICE GINSBURG: Why is that so? I mean, here we have the crime, burglary, and there are two ways of committing it. One involves a structure; one

1 involves a vehicle. And those can be easily divided.
2 We look at the charge. The charge is for a structure,
3 not for a vehicle. Why -- why is it not divisible?

4 MR. FLEMING: For the exact same reason,
5 Justice Ginsburg, that the California statute at issue
6 in Descamps was not divisible. In that case as well,
7 the indictment charged that Mr. Descamps had unlawfully
8 and feloniously entered the grocery store. The
9 prosecutor stated as much, that Mr. Descamps had broken
10 and entered into a grocery store, and Mr. Descamps did
11 not object to that.

12 Nonetheless, this Court, quite properly,
13 held that it was not divisible because California was
14 not required to prove unlawful entry in order to get a
15 conviction.

16 The same is true of Mr. Mathis. Iowa did
17 not have to prove the type of occupied structure that he
18 supposedly burglarized.

19 JUSTICE GINSBURG: But he did one or the
20 other. In Descamps, there was an element that didn't
21 have to be proved under the State statute. You didn't
22 have to prove unlawful.

23 MR. FLEMING: The -- the -- California would
24 have had to prove entry, just as Iowa would have to
25 prove an occupied structure. But California did not

1 have to prove whether the entry was unlawful as would
2 have been required to make the offense a generic
3 burglary offense.

4 Similarly here, Iowa did not need to prove
5 burglary of a building as opposed to burglary of a land,
6 air, or water vehicle or similar place. Those are
7 issues that there's no dispute a jury could have divided
8 on or Mr. Mathis would not have had to admit
9 specifically in order to permit a conviction under the
10 Iowa statute.

11 JUSTICE BREYER: But they have to prove
12 one -- they define, somewhere, structure, right, in the
13 statute?

14 MR. FLEMING: They do, Justice Breyer.

15 JUSTICE BREYER: And don't you have to prove
16 that definition applies? I mean, you know, suppose it
17 was a structure for -- for an animal at a zoo or
18 something. I mean, that wouldn't count, would it?

19 MR. FLEMING: It might not. But --

20 JUSTICE BREYER: Right. Well, if it does
21 not, don't you have to at least prove that it falls
22 within the definition?

23 MR. FLEMING: The definition of occupied
24 structure.

25 JUSTICE BREYER: Yes.

1 MR. FLEMING: Yes, Your Honor.

2 JUSTICE BREYER: Okay.

3 MR. FLEMING: And we don't --

4 JUSTICE BREYER: And, similarly, in Taylor,
5 you have to prove that it falls within the statute's
6 definition of boat or car or house. Right? You have to
7 prove one of the three.

8 MR. FLEMING: That is the difference.

9 JUSTICE BREYER: But you don't have to
10 prove -- you have to prove in Massachusetts if you have
11 an indictment which says it was like a houseboat, so
12 they're not certain what it counts as. So they say,
13 don't you have to prove our prosecutor says it's a boat
14 or a house? Now, would that get a conviction in
15 Massachusetts? They proved that. It's either a boat or
16 a house. Do they get a conviction or not?

17 MR. FLEMING: This Court in Shepard assumed
18 that --

19 JUSTICE BREYER: Now, we don't know
20 Massachusetts law. I'm saying under --

21 MR. FLEMING: Yeah.

22 JUSTICE BREYER: -- Massachusetts law, would
23 you be able to convict the person?

24 MR. FLEMING: I -- this Court assumed
25 because it wasn't disputed in Shepard that the answer is

1 no and that --

2 JUSTICE BREYER: The answer is no? You
3 cannot convict a person, say, on a houseboat in
4 Massachusetts where the prosecutor says it's either a
5 house or a boat? They have to go into what the
6 difference is?

7 MR. FLEMING: As this Court interpreted it
8 in -- in Shepard, house or a boat are elements of the
9 crime.

10 JUSTICE BREYER: So, in other words, if six
11 people think a houseboat is a boat and six people think
12 a houseboat is a house, the guy gets off --

13 MR. FLEMING: If -- if --

14 JUSTICE BREYER: -- in Massachusetts? Do
15 you have any case on that? I would be rather surprised.

16 MR. FLEMING: Not in Massachusetts,
17 Your Honor, but this is an Iowa case.

18 JUSTICE BREYER: I know. But what I'm
19 driving at, it's the same thing, the same thing. But
20 you've made up a very ingenious difference. But why
21 isn't it just the same thing here as was in
22 Massachusetts?

23 MR. FLEMING: Because Massachusetts and Iowa
24 have chosen to define different crimes, and they have
25 the prerogative to do that. If Iowa says, we don't

1 care, as it has said, ultimately what the means is --
2 the location of the burglary is a means -- the jury can
3 divide on that and still convict as long as they find an
4 occupied structure. State v. Duncan holds that.
5 There's no dispute.

6 In that circumstance, one cannot be sure
7 whether it's a jury trial, which this -- and this was
8 not except for the case of one, as revealed by the
9 record, or a plea, if Mr. Mathis had been told you are
10 being charged with burglarizing a garage and he said, oh
11 no, I didn't break into a garage. I broke into a car
12 parked outside the garage; that would have made no
13 difference under Iowa law and he would have had no basis
14 to contest the means of commission. A judge might not
15 even have allowed him to do it, and certainly his
16 defense attorney would have said, let's not burden the
17 prosecutor.

18 JUSTICE BREYER: That's why I asked you
19 about Massachusetts.

20 MR. FLEMING: Massachusetts will be
21 different.

22 JUSTICE BREYER: You violated Section blah,
23 blah, blah. Prosecutor: You broke into a house.

24 Defendant: No, I broke into a boat.

25 Admitted? Yes. Guilty or not guilty?

1 MR. FLEMING: It -- in Massachusetts, the --
2 the statute itself is not clear on the point. We give
3 the example of Vermont where it does make a difference.
4 And the reason it makes a difference is because Vermont
5 punishes burglary of a dwelling more severely than
6 burglary of a boat. And so a Vermont prosecutor does
7 need to show which it is because it makes a difference
8 to the sentence. And in that circumstance, the statute
9 is divisible, and it would be proper to go to the
10 modified categorical approach.

11 JUSTICE ALITO: Well, there are a lot of
12 reasons why Iowa might want to take the approach that
13 it -- that it does. Suppose the person is convicted --
14 suppose the evidence involves the burglary of a trailer.
15 So you'd have the rather ridiculous situation of a
16 jury -- if that was -- if those are separate elements,
17 then if six of the jurors thought, well, this trailer is
18 not very movable, so I think it's a house, and the other
19 others say, well, you know, it's possible you could hook
20 it up to a truck and move it, so it's a vehicle. So
21 there couldn't be an agreement, and the defendant would
22 be acquitted. That's a rather strange result that the
23 Iowa legislature might want to avoid.

24 But you want to attribute the same -- you
25 want to -- you want to say the Massachusetts legislature

1 in the case of a houseboat would permit the same thing?

2 You have no Massachusetts case that says that.

3 MR. FLEMING: The -- I do not, Your Honor.

4 But this is not a Massachusetts case. And Vermont
5 clearly does. The Vermont legislature has made that
6 choice.

7 JUSTICE ALITO: Well, maybe they have more
8 houseboats in Massachusetts than they do in Vermont.

9 (Laughter.)

10 MR. FLEMING: But the -- the point,
11 Justice Alito, is that the State is free to define its
12 crime as it wishes. You are absolutely right that Iowa
13 may decide it prefers to make it easier for its State
14 prosecutors to get convictions so that they don't have
15 to get jury unanimity on the specific location, and then
16 they care less about whether their convictions are going
17 to be used as --

18 JUSTICE ALITO: Well, the point is, what is
19 the Federal -- under your approach, what is the Federal
20 sentencing court supposed to do in the situation like
21 the Massachusetts situation where there is no case,
22 there is no Massachusetts case? So what is the court
23 supposed to do?

24 Now, in -- this Court has said it's -- it's
25 as simple as pie to determine whether something is -- is

1 an element or a means. That's your view, too. But just
2 tell me what the -- what the Federal sentencing court
3 would do in that situation.

4 MR. FLEMING: If there truly were a
5 situation where all else had failed, all the standard
6 tools of statutory interpretation --

7 JUSTICE ALITO: Which will often be the
8 case.

9 MR. FLEMING: Will sometimes be the case.
10 There are a number of them that we cite where State law
11 is plain on the point, and the State courts have had to
12 resolve this, whether in the context of the double
13 jeopardy challenge or a challenge to the indictment or
14 request for unanimous jury instructions.

15 JUSTICE ALITO: So what -- what happens if
16 there is that State case that says whether this is
17 definitively an element or a means?

18 MR. FLEMING: In the situation where that
19 arises, obviously, the sentencing court will apply the
20 ordinary tools of statutory interpretation, looking at
21 the text to say -- for instance, in the case of
22 Vermont -- are they punishing one of the particular
23 locations more severely than another? In that
24 circumstance, we know they have to be elements, not --

25 JUSTICE ALITO: Well, suppose they --

1 suppose they don't. So if it looks at a case like
2 Massachusetts, what's the Federal sentencing court
3 supposed to do?

4 MR. FLEMING: Obviously, one would look to
5 authoritative sources like -- like jury instructions.
6 One could look at commentaries. One would look at
7 legislative history. One would look at how the
8 Massachusetts courts had interpreted comparable statutes
9 to see if there are any general principles that the
10 Massachusetts courts --

11 JUSTICE KAGAN: Isn't there also something
12 that Descamps says that -- that can be done, which is,
13 you know, maybe you have a case and it just gives you
14 the answer. Maybe you have jury instructions and it
15 gives you the answer. If they don't, Descamps indicates
16 in footnote 2 that you can look to the charging
17 documents for the limited purpose of seeing whether
18 the -- the prosecutor is treating the house or a boat as
19 a means or as an element. And sometimes that will be
20 clear.

21 I mean, you might have one set of charging
22 documents, and it will say the person burgled either a
23 house or a boat. And then it will be clear that the --
24 that the thing is a means, and it's not an element. Or
25 another charging document can say, as to a houseboat,

1 the person burgled a house, and then that indicates that
2 Massachusetts law does treat this as an element and that
3 you have to prove one or the other and that the
4 prosecutor has made his choice. Isn't that right?

5 MR. FLEMING: It's certainly right as to the
6 first point, and I -- I think certainly looking at
7 Shepard documents to determine, for instance, if house
8 and boat are charged in the same count, then to avoid
9 duplicity --

10 JUSTICE KAGAN: These documents are a clue
11 to whether something is an element or instead a means.

12 MR. FLEMING: I --

13 JUSTICE KAGAN: Sometimes they're a very
14 good clue. Sometimes they won't get you all the way
15 there, but they're certainly a clue as to whether
16 something is an element or a means. And so you can look
17 to the Shepard documents to try to figure out that
18 question.

19 MR. FLEMING: I think as Your Honor has
20 phrased it, we have no quarrel with that, as long as the
21 Court is being cautious about --

22 JUSTICE ALITO: Why is that correct,
23 Mr. Fleming? That depends on State pleading law. Are
24 you -- are you telling us that in every State, if
25 something is a -- if you have a category of means, it is

1 impermissible for the charging indictment, whether it's
2 an indictment or an information, to specify the thing
3 that was done, it has to be done in terms of the
4 elements of the statute? You're going to tell us that
5 that is State pleading law in every jurisdiction?

6 MR. FLEMING: No, Your Honor, that's not our
7 position.

8 JUSTICE ALITO: Well, then how can you tell
9 from the -- from the charging document that something is
10 an element or a means?

11 MR. FLEMING: I think if, in the limited
12 situation that Justice Kagan's question posited, which
13 is when you have a situation where a prosecutor charges
14 house and boat together in one count, that would be a
15 duplicitous indictment if they were different elements.
16 So that is a clue that at least the prosecutor viewed
17 them as different means of commission of a single
18 offense.

19 JUSTICE ALITO: What if the charge is one?

20 MR. FLEMING: If --

21 JUSTICE ALITO: What if -- in this case,
22 what if the charge -- what if the charging document just
23 charged one? Does that make it an element?

24 MR. FLEMING: I think in that situation, the
25 Shepard document would be inconclusive, and it would not

1 be -- it would not be indicative of which it was. And
2 so in that circumstance --

3 JUSTICE SOTOMAYOR: So Mr. Fleming --

4 MR. FLEMING: I apologize, Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: Why don't we use this
7 case?

8 MR. FLEMING: I would welcome that, Your
9 Honor.

10 JUSTICE SOTOMAYOR: All right -- at the
11 Joint Appendix it says -- one of the charging elements
12 says that Richard Allen Mathis, on such-and-such a date
13 in Iowa, unlawfully and willfully break -- I'm sorry
14 about the tenses -- broke and entered a storage shed
15 belonging to -- to the victim with the intention to
16 commit a theft. If I read that, do I know what's an
17 element or a means?

18 MR. FLEMING: No, your Honor.

19 JUSTICE SOTOMAYOR: It is very clear that
20 the only thing being charged is breaking into a shed.

21 MR. FLEMING: Absolutely. A prosecutor will
22 often add detail that is not an element.

23 JUSTICE SOTOMAYOR: Well, I mean, this
24 doesn't say willfully -- willfully -- unlawfully and
25 willfully. Do I have to go further, and why, meaning,

1 isn't the issue here what we left off -- open in
2 Descamps? Iowa calls this a means, but if I read the
3 instrument, it seems like an element.

4 So what does a judge do? Give me the steps
5 of interpretive principles that a judge would do with a
6 case like this.

7 MR. FLEMING: Of course, Your Honor.

8 JUSTICE SOTOMAYOR: The State law
9 dispositive, that's number -- first, let's start there.

10 MR. FLEMING: Yes, Your Honor. State law is
11 dispositive, because States define the elements of their
12 crimes. This Court made that very clear in -- in the
13 plurality opinion in *Schad*. It's true in *Richardson*.
14 The State is defining the crime, and as usual in matters
15 of State law, Federal courts defer to the State
16 interpretation of their own laws.

17 JUSTICE SOTOMAYOR: So that's your entire
18 case, correct?

19 MR. FLEMING: Well, in this case --

20 JUSTICE SOTOMAYOR: Let's assume Iowa was
21 silent. That was the question that Justice Breyer --

22 MR. FLEMING: If --

23 JUSTICE SOTOMAYOR: -- was coming to. If I
24 look at this, it seems -- it doesn't say, enter a
25 storage area or a structure as a -- a structure or a

1 boat. It says just enter a storage shed.

2 MR. FLEMING: The same -- the same problem
3 would have occurred and did occur in Descamps.

4 Mr. Descamps's criminal information said, feloniously
5 entered a building -- a grocery store, I believe it
6 was --

7 JUSTICE SOTOMAYOR: Yes, the problem --

8 MR. FLEMING: -- and --

9 JUSTICE SOTOMAYOR: -- with Descamps there
10 is that "feloniously entered" had two potential
11 meanings: You broke and you entered, or you remained
12 unlawfully and committed a crime. And what we said in
13 Descamps was, reading felonious entry, you don't know
14 which of the two it is because it -- it's not an
15 element. You just have to do one or -- it's not an
16 element. It's a means. We didn't know which one, but
17 this is sort of different. This is the indictment
18 saying the structure you broke into is this particular
19 one.

20 MR. FLEMING: If I may, Justice Sotomayor,
21 I -- I -- if you -- if Your Honor had thought that
22 the -- either the indictment or the plea colloquy were
23 dispositive of figuring out whether the generic offense
24 was involved for purposes of ACCA, Mr. Descamps would
25 have lost, because his indictment said, "willfully,

1 unlawfully, and feloniously entered a building." And at
2 the plea hearing, the prosecutor said, without objection
3 from Mr. Descamps, that the crime involved the breaking
4 and entering of a grocery store.

5 So there was no question, if you were to --
6 looking at the Shepard documents in Descamps, that they
7 set forth generic burglary.

8 Nonetheless, that wasn't enough, because --
9 and these are the Court's words -- California, to get a
10 conviction, need not prove that Descamps broke and
11 entered. And it does not matter whether he did. It
12 doesn't matter whether the prosecutor said he did. It
13 doesn't matter whether he admitted that he did. The
14 statute -- the elements of the statute --

15 JUSTICE SOTOMAYOR: Do you see a difference
16 between -- he had to do one or the other here. He had
17 to break into a house or break into a vehicle. But in
18 Descamps, he could have done one of two things. He
19 could have broken and entered, or he could have stayed
20 unlawfully.

21 MR. FLEMING: And the point is that
22 California did not need to -- to show beyond a
23 reasonable doubt --

24 JUSTICE SOTOMAYOR: Exactly.

25 MR. FLEMING: -- whether --

1 JUSTICE SOTOMAYOR: He wasn't pleading
2 guilty to one or the other. He way saying, I did
3 unlawfully what the indictment said, feloniously
4 entered. But I -- he did not have to and did not admit
5 exactly which of the two ways he did it.

6 MR. FLEMING: But the -- the nongeneric
7 aspect of the California offense was that you could
8 enter lawfully and then shop with the intent to
9 shoplift, and that could still be punishable under this
10 statute. And that was the point on which the -- the
11 statute swept --

12 JUSTICE SOTOMAYOR: Go back to my ultimate
13 question. Tell me the steps.

14 MR. FLEMING: The steps for how the
15 sentence --

16 JUSTICE SOTOMAYOR: You say State law is
17 dispositive.

18 MR. FLEMING: Yes, it is.

19 JUSTICE SOTOMAYOR: Assume State law is
20 unclear.

21 MR. FLEMING: So there's a general answer to
22 the question and a specific answer to the question. The
23 general answer is that the Court determines the elements
24 of the State crime in the same way as it applies State
25 law in its civil diversity cases or how it would

1 determine the elements of a State crime in a double
2 jeopardy challenge or, for that matter, under the
3 categorical approach. This Court did it itself in
4 *Duenas-Alvarez*, in *James*, in *Johnson*. Federal courts
5 ascertaining the State -- State law components of a
6 particular statute in front of them is nothing new, nor
7 is it particularly difficult.

8 The specific answer: You -- if there is no
9 State case law available, you look at the text of the
10 statute as always to begin with. It may be that the
11 text of the statute tells you that a particular
12 alternative is punished more harshly than others.
13 That's the case in *Vermont*. Then you know that they are
14 elements.

15 You would look at the case law backdrop of
16 the enactment. It's possible the State legislature was
17 reacting to a particular prior decision. The Maryland
18 Court of Appeals did that in the *Rice* case, which is
19 cited in the *American Immigration Lawyers* brief case.

20 They looked at the backdrop of the enactment
21 of the statute and determined that the new theft statute
22 in Maryland had amalgamated larceny, receiving stolen
23 property, embezzlement as different means of committing
24 one theft offense. You would --

25 JUSTICE GINSBURG: Must everything be either

1 a means or an element? Suppose I just looked at this
2 statute and I said, here's a statute, punishing
3 burglary, and it tells us two ways in which this offense
4 can be committed, one way or the other way. Why do I
5 have to type it an element or a means rather than saying
6 what it is? It is a way of committing the offense.

7 MR. FLEMING: I -- I view, Justice Ginsburg,
8 a way of committing the offense as a synonym for the
9 means. The definition of an element, which this Court
10 used in Richardson -- and I don't think it's disputed.
11 I think the government uses it in its own brief -- is a
12 fact that the prosecution must prove to the jury beyond
13 a reasonable doubt in order to get a conviction of the
14 crime. And that goes back to the Court's opinion in
15 Taylor, which is why ACCA is a categorical approach, is
16 because it turns on the elements of the statute of
17 conviction.

18 Congress never intended that convictions
19 were --

20 JUSTICE GINSBURG: This -- this defendant
21 pled guilty to an information that charged unlawfully
22 entering a garage, a house. That's what he pled guilty
23 to, right?

24 MR. FLEMING: The -- the information states
25 that. There is no -- nothing in the record about --

1 JUSTICE GINSBURG: He doesn't think that --
2 there wasn't any possibility of a boat or a car being in
3 this picture.

4 MR. FLEMING: The -- the record does not
5 exclude that, Your Honor. If my client had said, upon
6 appearing for the plea to his lawyer, you know, I know
7 the information says a garage, but I actually only went
8 into the car that was parked outside the garage, his
9 lawyer would in all likelihood have said that doesn't
10 matter. If you say that you're just admitting your
11 guilt in the same way because that is not an element of
12 the offense. Under Iowa law, it won't affect your
13 guilt; it won't affect your sentence.

14 JUSTICE KENNEDY: I was curious to know, you
15 said Congress never intended, and then we didn't get the
16 never.

17 MR. FLEMING: Never --

18 JUSTICE KENNEDY: I'm sure Congress never
19 intended that we have the dialogue that we're having
20 here today.

21 (Laughter.)

22 JUSTICE KENNEDY: This is such an art -- you
23 were going to say, what did Congress intend? You
24 couldn't finish that.

25 MR. FLEMING: I'd be happy to, Justice

1 Kennedy.

2 Congress intended that a -- that a
3 conviction for a particular crime would be an ACCA
4 predicate offense in all cases or in none. That is what
5 this Court said in Taylor, reaffirmed it in Descamps; it
6 is an on/off switch. And a conviction for Iowa burglary
7 under Section 713.1 of the Iowa Code either is an ACCA
8 predicate or it is not in all cases.

9 It does not matter what was particularly
10 charged in a particular case. It does not matter what
11 the plea agreement said. It doesn't matter what the
12 jury instructions said because the crime itself is
13 unitary. This is not a statute that sets up multiple
14 different crimes with multiple different elements where
15 the modified categorical approach is necessary to figure
16 out what crime he was convicted of. We know what crime
17 he was convicted of, and it is not a generic offense.

18 And to -- to the extent there's any doubt
19 about that, I think it's important to go back to the --
20 the reasons why Mr. Descamps won, and why this Court
21 rejected the Ninth Circuit's approach in Aguila-Montes
22 De Oca, which is essentially what the government is now
23 arguing, which is that you can go to the Shepard
24 documents to try to find out, not the offense of
25 conviction, but what this defendant specifically did.

1 And this Court rejected that soundly. And there were
2 three reasons.

3 The first was the statutory intent behind
4 what Congress enacted, which is to make sure that each
5 conviction of a particular crime is an on/off switch and
6 produces the same results all the time.

7 The second --

8 JUSTICE ALITO: What is -- what is the
9 evidence in -- in the -- you said the statutory text.
10 What is the evidence in the statutory text of ACCA that
11 this is what Congress intended?

12 MR. FLEMING: It's the -- it's the --

13 JUSTICE ALITO: Prior to Apprendi and all
14 this other stuff. What is the statutory evidence?

15 MR. FLEMING: This -- this Court in Taylor
16 relied on the fact that Congress used the word
17 "convictions" as opposed to someone who had committed an
18 offense, and also looked at the legislative history,
19 which specifically indicated that Congress did not mean
20 a conviction for a particular crime to sometimes be an
21 act of predicate and sometimes not.

22 JUSTICE ALITO: So if someone were
23 explaining what -- what your client pled guilty to, they
24 wouldn't say he was convicted for -- for breaking into a
25 garage? They wouldn't say that?

1 MR. FLEMING: It may -- I mean an -- an
2 ordinary person may well use that description. He --
3 they may also say he was convicted of breaking into the
4 garage at 123 Main Street, but that's not an element
5 either.

6 JUSTICE KENNEDY: Wasn't Congress interested
7 in what the person did rather than what the statute
8 said?

9 MR. FLEMING: On the contrary, Your Honor.
10 That's exactly what Taylor and its progeny say is not
11 the case. And Descamps says that too. They're not
12 interested in what the --

13 JUSTICE KENNEDY: It's -- it's not the case
14 that that's what Congress wanted?

15 MR. FLEMING: Congress was not -- by -- by
16 passing ACCA, Congress was interested in what the person
17 was convicted of, which is why they use the word
18 "convictions." They did not use the language, for
19 instance, of the statute in Nijhawan, which is different
20 and does not trigger a categorical approach because it
21 looks to conduct. Congress could have passed that
22 statute.

23 After this Court decided Taylor, Congress
24 could have amended ACCA in order to make it conduct
25 based. It hasn't done so.

1 JUSTICE KENNEDY: Well, you're -- you're
2 entitled, probably required, to argue the cases as -- as
3 we've written them, and you're -- and you're doing that.

4 MR. FLEMING: Yes, Your Honor.

5 JUSTICE KENNEDY: It does seem to me that
6 this -- we're living in a very artificial world.

7 Does -- does Judge Kozinski's approach, as
8 set forth in the Ninth Circuit in his separate opinion,
9 what would be the result in your case if we used his
10 approach?

11 MR. FLEMING: We would prevail, Your Honor.
12 Judge Kozinski's approach is exactly the same as one of
13 the questions Justice Kagan asked earlier --

14 JUSTICE KENNEDY: Right.

15 MR. FLEMING: -- which is you can look at
16 the Shepard documents for the very limited purpose of
17 figuring out what the elements of the State crime are
18 to the extent there isn't dispositive State case law or
19 other interpretive aids that the Court can use. In this
20 case we have dispositive State case law, so Judge
21 Kozinski's approach would -- would work exactly the way
22 we think it should.

23 He was very clear that the modified
24 categorical approach only works in the circumstance we
25 say it works in; namely, when the State defines more

1 than one crime in a single statute. He did not say that
2 you could look for means of commission. That was the
3 position of the -- the other judge, Graber's, dissental
4 in the Rendon case, and it's the one that the Ninth
5 Circuit rejected en banc in the Almanza-Arenas case.

6 CHIEF JUSTICE ROBERTS: This case --

7 JUSTICE BREYER: I'd like to try with one --
8 one -- what I'm trying to do is get the essence of your
9 argument.

10 MR. FLEMING: Trying to get it --

11 JUSTICE BREYER: And so you can just say I
12 don't have it or I do have it. If I don't have it, I'll
13 go back and read it, I promise, and I'll get it before I
14 decide this.

15 I think you're looking at Descamps. And you
16 say, look, the word in the statute, "Federal," is crime.
17 It doesn't mean what a person does on a particular
18 occasion; it means the kind of thing in a statute.

19 So imagine we have the word "burglary," and
20 that's all the statute said. And then a court said you
21 can commit this in any one of five ways: A boat, a
22 house, a car, et cetera. Now, even if the charging
23 document there said "house," that wouldn't be good
24 enough because the crime is what the statute says. So
25 you start there.

1 And you say, now, what difference could it
2 possibly make? If in a different section of the statute
3 there are some statutory words but they say just what
4 the Court just said in the other case, now, okay, I'll
5 go back and read it. I mean --

6 MR. FLEMING: No, no. I'm waiting for
7 your --

8 JUSTICE BREYER: And that's what you're
9 saying. You're saying that in both cases the key point
10 is that the -- the court was telling you in the first
11 case that the burglary can be committed in different
12 ways, which means you don't have to charge it, and the
13 jury doesn't have to be unanimous in respect to it.

14 Now, if you take those same words out of
15 what the court said and put it in the statute, which you
16 think happened here, then those words don't require the
17 jury -- they either charge it or the -- the -- the jury
18 to find it unanimously, so it's not an element. And if
19 it was good enough to get my client out of the statute
20 in the first case, it should be good enough when the
21 same thing appears in a statute.

22 MR. FLEMING: And the reason --

23 JUSTICE BREYER: Is that your basic
24 argument?

25 MR. FLEMING: It is.

1 JUSTICE BREYER: Thank you.

2 MR. FLEMING: And the reason for that,
3 Justice Breyer, is that it does not matter from --

4 JUSTICE BREYER: Because it's not part of
5 the crime.

6 MR. FLEMING: It's not the crime.

7 JUSTICE BREYER: And what Congress wanted
8 was crimes.

9 MR. FLEMING: Was the crime.

10 JUSTICE BREYER: Okay. Got it.

11 MR. FLEMING: And the difficulty of the
12 government's position --

13 JUSTICE BREYER: No. Just trying to get it.

14 MR. FLEMING: No, I appreciate it, Justice
15 Breyer. And I'd like -- I'd like, if I may, to -- I
16 think the question tees up the difficulty in the
17 government's position, which is the government says it
18 makes all the difference in the world whether this
19 statute uses the word "or."

20 And if the California statute in Descamps
21 had been phrased instead of saying every person who
22 enters, had said every person who enters lawfully or
23 unlawfully, then the outcome would have been completely
24 different in the government's mind, even though it would
25 not have changed what a California prosecutor had to

1 prove. It would not change what someone had to admit in
2 a plea, and it would have created significant Sixth
3 Amendment difficulties to enhance someone's sentence
4 based on something like that where the intention and the
5 State proceeding is in no way focused on that.

6 With the Court's permission, I'd reserve the
7 balance of my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Ms. Saharsky.

10 ORAL ARGUMENT OF NICOLE A. SAHARSKY

11 ON BEHALF OF THE RESPONDENT

12 MS. SAHARSKY: Mr. Chief Justice, and may it
13 please the Court:

14 From Taylor forward, this Court has never
15 adopted a means-elements distinction that turns on
16 parsing State law. In fact, it's done and said the
17 opposite. And adopting such an inquiry now would be
18 highly disruptive and detrimental to the uniform
19 administration of Federal law.

20 I want to start where Petitioner's counsel
21 ended, which was saying that what we're doing in this
22 case is the same as Descamps, et cetera. I think that
23 Justice Sotomayor correctly identified the difference
24 between this case and Descamps. In Descamps, there was
25 a component of generic burglary that was just not

1 present in the State statute. You didn't have statutory
2 alternatives. And as a result of that, you couldn't do
3 the matching that happens under the modified categorical
4 approach. The approach is all about trying to match,
5 was the defendant's conviction under this State statute
6 or --

7 JUSTICE KAGAN: Well, I'm not --

8 MS. SAHARSKY: -- was it a federal offense
9 or not.

10 JUSTICE KAGAN: -- sure that that's true,
11 Ms. Saharsky. I mean, you could take that Descamps law,
12 and as Mr. Fleming did or some other way, essentially do
13 the exact same thing with an explicit disjunctive. The
14 way Mr. Fleming did it, he said lawfully or unlawfully,
15 you could say breaking and entering or not breaking and
16 entering. I mean, there would be a zillion ways of
17 phrasing the exact same thing disjunctively on the face
18 of a statute. And I think Mr. Fleming is right that
19 that would not have made a difference to our analysis.

20 MS. SAHARSKY: Well, I think that it did
21 make a difference to the Court's analysis, and what I
22 would give you is an example. And this was in the
23 Court's opinion in Descamps, was the way that this Court
24 showed that the Ninth Circuit was wrong was it gave two
25 examples of an assault-with-a-weapon statute. It said

1 imagine an assault-with-a-weapon statute that just says
2 "a weapon" and doesn't specify any weapons. And then
3 imagine a second statute that says "assault with a
4 weapon" and specifies eight individual weapons. Is
5 there a difference between those two cases?

6 And the Court's opinion says yes. The first
7 case does not have a component of generic burglary, and
8 so you cannot match it with the Federal offense. It
9 doesn't have the entry component. But in the second
10 case, you do have -- I mean, I'm sorry, that was an
11 assault -- but you do have a component that you can
12 match with the Federal offense. And so --

13 JUSTICE KAGAN: Assuming that the component
14 is an element. So that gets you back to your first
15 statement, which is that it didn't matter whether it was
16 an element or something else. A means was just as good
17 as long as it's phrased in the disjunctive.

18 And, you know, all of our cases -- it's not
19 just Descamps -- it goes back to Taylor and Shepard and
20 Johnson. They all use the language of elements.
21 Descamps in the introduction uses the word "elements"
22 ten times. So if we really meant elements or means or
23 whatever, it's a funny thing -- it's a funny way to
24 write all of our opinions.

25 MS. SAHARSKY: Well, two -- I think this is

1 a critical question, and there are really two responses
2 to it. The first is when describing divisibility, which
3 is this question of, can you divide up the statute for
4 matching purposes, the Court said "element," and it also
5 equated that with the statutory alternatives. It did
6 that throughout the opinion.

7 The second point is that there's a reason
8 that when the Court -- the Court could say "element" and
9 "statutory alternatives" interchangeably, because a
10 distinction between means and elements doesn't matter to
11 divisibility. I think really the heart of the modified
12 categorical approach is -- if I can just explain as the
13 Court has explained, is you need to make sure that the
14 defendant was convicted of the generic offense, that
15 the -- the jury or the fact-finder necessarily found the
16 generic offense and not something else. And you can
17 tell that from the ordinary application in the modified
18 categorical approach using the Shepard documents.

19 JUSTICE KAGAN: But you see, Descamps makes
20 it quite clear that there's two different kinds of
21 looking -- what Descamps says is you have to be able to
22 say that a person was necessarily convicted of
23 something.

24 MS. SAHARSKY: Okay.

25 JUSTICE KAGAN: Meaning that the statute

1 requires him to be convicted of something. It is not
2 good enough to look at the course of proceedings and to
3 infer that a jury or a judge actually did find
4 something. Descamps says this in no uncertain terms,
5 that -- you know, I mean, sometimes those inferences can
6 be very powerful. And Descamps says it's not enough.
7 That what you have to find is a necessary finding in the
8 sense that a statute makes something necessary in order
9 for a conviction to occur. And that's the distinction
10 between elements and means.

11 And I'll just say one last thing. And I
12 know I've been talking for a while, so I'll let you
13 talk. But the entire discussion between the dissent and
14 the majority was about this.

15 MS. SAHARSKY: Right.

16 JUSTICE KAGAN: The -- the dissent said,
17 it's really terrible what the Court just did. It just
18 created this distinction between elements and means.
19 And the majority said, yes, that's exactly the
20 distinction we're using, and we think it's the right
21 decision -- distinction.

22 So nine members of this Court thought that
23 the distinction that we were using was a distinction
24 between elements and means.

25 MS. SAHARSKY: Okay. Well, a few responses

1 to that. I think you're -- you're pointing to the
2 Court's footnote 2. And when the Court was talking
3 about means as a general matter in Descamps, it was
4 talking about things not specified in the statute.
5 Because, of course, the statutory term was overbroad in
6 Descamps.

7 But if we look to what the Court meant in
8 footnote 2, you're right. It talks about a distinction
9 between means and elements, but the Court's ultimate
10 conclusion --

11 JUSTICE KAGAN: It's not just footnote 2, if
12 I could just interrupt. I mean, the footnote 2 comes as
13 a substance to the dissent, and the dissent says, this
14 is the problem with the entire opinion, is that it keeps
15 on talking about elements, but it's hard to distinguish
16 between elements and means. And we shouldn't be
17 distinguishing between those two things.

18 So the whole opinion is this elements focus,
19 which then the dissent attacks.

20 MS. SAHARSKY: Right. I understand the
21 question, and I will talk about both footnote 2 and the
22 rest of the Court's opinion.

23 So if we look at this discussion in footnote
24 2, I think the Court's ultimate conclusion is very
25 telling and important to us, because the Court says

1 there's no real-world reason to worry about the kind of
2 discussion with State law that we're having today. The
3 Court says whatever a statute lists, whether elements or
4 means, the Court need not parse State law when State law
5 is drafted. In the alternative, you resort to the
6 Shepard documents. And I think your -- one of your
7 earlier questions suggested, can't we look to the
8 Shepard documents to see whether something is an
9 element? And we think that --

10 JUSTICE KAGAN: If you need to.

11 MS. SAHARSKY: Okay. Well, we think that
12 that general approach is correct, which, to us, we --
13 you know, we understood this to say, just look to the
14 statute of conviction in the Shepard documents.

15 Now, when -- when only one thing is at
16 issue, like in this case, which is burglary of a house,
17 then I don't think you necessarily know whether it would
18 be a means in a different case where two things are
19 charged. But I think you confidently know that the
20 person was convicted of burglary of a house in this
21 case. The statute --

22 JUSTICE KAGAN: Well, here, you have a
23 particular statute, a particular State -- excuse me -- a
24 particular State court decision that says exactly what
25 is an element and what is a means and that this is --

1 this is not an element.

2 MS. SAHARSKY: Right, but I don't think --

3 JUSTICE KAGAN: So you don't need to look
4 any further than a dispositive State court decision on
5 the subject.

6 MS. SAHARSKY: A couple of -- a couple of
7 responses. The first is, is that these decisions, I
8 don't think -- these questions don't arise under the
9 State courts very often. I think between all of the
10 resources and the parties in this case, we've only found
11 two State court decisions that address a place being
12 burgled. And I think that's problematic in light of the
13 fact that this burglary of a building or a boat, this
14 Massachusetts, is really a paradigmatic example that
15 this Court has always offered of a divisible statute.
16 So to not know now under State law whether that's
17 divisible is particular problematic under Petitioner's
18 approach.

19 But just to get back to what I think was
20 your -- your central question, because I think this is
21 really important about Descamps and why we're reading
22 the opinion our way: Aside from this conclusion at the
23 end of footnote 2, which we think essentially says that
24 for ACCA purposes, when you have something in the
25 Shepard documents, it is -- it functions as an element

1 in that case.

2 But aside from that, I think there are two
3 other very telling parts of the Court's opinion in
4 Descamps. One is that the Court starts its opinion, and
5 throughout its opinion says, that settled law, the
6 Court's 20 years of precedent up to that point, pretty
7 much resolved that question, all but settles this
8 question. The Court was not purporting to change
9 settled law. It wasn't purporting to do something
10 extraordinary like require a State law inquiry.

11 In fact, the whole Petitioner's argument in
12 Descamps, why you couldn't do the thing the Ninth
13 Circuit wanted to do was because this whole thing is
14 settled. You just look at the text of the statute, and
15 the Ninth Circuit is really doing this kind of outlier
16 approach and you shouldn't do that.

17 So we read the opinion in Descamps as a
18 whole to say we're just applying settled law. And
19 that's our position in this case, is we just want to
20 apply the settled law in divisibility.

21 JUSTICE SOTOMAYOR: Applying your approach
22 now, how does Descamps come out? How does Descamps come
23 out?

24 MS. SAHARSKY: Same result. Same result,
25 because I think, as your question suggested, there is a

1 critical difference between Descamps and this case.
2 Because there, there was an overbroad statutory term,
3 and there just was nothing in the statute that
4 corresponded to generic burglary. So you can't do what
5 the Court said is what you have to do. Which version of
6 the offense was the person committed -- convicted of,
7 and does it correspond to generic burglary? You
8 couldn't make that inquiry --

9 JUSTICE SOTOMAYOR: That -- that's
10 stretching things. I think 99 percent of the courts
11 across the country would have looked at the plea
12 agreement and said, the prosecutor said he broke and
13 entered a garage. We're going to find he broke and
14 entered a garage.

15 MS. SAHARSKY: Well --

16 JUSTICE SOTOMAYOR: And he didn't stay a --
17 I'm sorry, a grocery store -- and he didn't stay
18 unlawfully. So how do we get courts, assuming we accept
19 your argument, not to do the kind of inferential
20 retrying of the case --

21 MS. SAHARSKY: Right.

22 JUSTICE SOTOMAYOR: -- that often happens
23 when you're relying on Shepard documents?

24 MS. SAHARSKY: Right. And I think this --
25 this really goes to the heart of why the Court decided

1 Descamps the way that it did, was the difference between
2 a statute like one that just prohibits assault with a
3 weapon and one that prohibits assault with one of eight
4 specified weapons. When it just says "assault with a
5 weapon," the Court's opinion in Descamps says you could
6 infinitely divide up the terms of the statute to imagine
7 any number of subcrimes and then try to match them to
8 the Federal offense.

9 When you don't have a statutory alternative,
10 the Court's opinion in Descamps says what you're really
11 doing is just matching the facts of the defendant's
12 conviction, if you can find them in the Shepard
13 documents, with the generic Federal offense? So it is
14 in the case where there is no statutory alternative,
15 like you said, you're just kind of combing through the
16 documents, and the court in Descamps said, don't do
17 that. But we're not doing that here. We don't need to
18 try to comb through the facts. All we're saying is that
19 this statute, like many burglary statutes, including the
20 example the Court has given, covers burglary of multiple
21 places, right? It covers burglary of buildings and
22 boats and whatever else. And you just need to see which
23 version of the offense was this person convicted of.
24 Was it the burglary of a house, or was it the burglary
25 of a boat?

1 And so you look at the conviction documents
2 to do it, and you're just matching the offense as
3 defined by the legislature in that case with the Federal
4 generic offense. You're not trying to just match
5 facts --

6 JUSTICE KAGAN: Here's what the statute
7 doesn't do. The statute doesn't make it necessary for
8 anybody to convict you of any single one of those
9 things. And one of the points, since 95 percent of
10 cases end in pleas, the statute doesn't make it
11 necessary for you to plead to any one of those things.

12 So whatever information is floating around
13 in these opinions, nobody has had to find -- and the
14 defendant has not had to plead to a particular offense
15 with one of those alternative means.

16 MS. SAHARSKY: Well --

17 JUSTICE KAGAN: And that's the critical
18 thing under, not just Descamps, under all of these
19 elements-based decisions, is that it doesn't matter what
20 you did. It doesn't even matter that you say you did
21 something. What we have to be able to say is that under
22 the law, you absolutely -- the law required a particular
23 finding that matches the generic crime. And in this
24 case, that finding is not there.

25 MS. SAHARSKY: Well, I think that there are

1 two different -- I think it's important to divide
2 between the two different parts of the inquiry. There
3 is two questions, right?

4 The first is, is this statute divisible,
5 meaning is there an alternative in it that corresponds
6 to generic burglary. And then the second is, was the
7 person actually convicted of generic burglary.

8 And I think your question gets to the heart
9 of we need to make sure this person actually was
10 convicted of generic burglary, and I don't think you
11 need to do a separate State law inquiry to answer that
12 question because that's really what the modified
13 categorical approach was designed to do, that you look
14 at the Shepard documents and see.

15 Can we tell that the person was convicted of
16 this form of burglary or not? And you do -- you look at
17 the modified that -- the Shepard documents in
18 combination with the statute that sets out those
19 alternatives.

20 Just to give you -- just to give one
21 example, right? In a case where we have a defendant who
22 is convicted of burglarizing -- burglarizing a building,
23 whether by guilty plea or by a jury trial, the only
24 thing that's ever at issue is a -- is a building. And
25 no one, I think, ever asks the question, well, in a

1 separate different hypothetical case, could a defendant
2 who was charged with a building and a boat be convicted
3 if they didn't find if it was the building or find if --
4 no one thinks about it, because in this case where only
5 the building is at issue, you have to find the building
6 to convict it.

7 I mean, it's functioning as an element in
8 that case. Either you find building and the person is
9 convicted, or you don't find building and the
10 individual, as a matter of law, can't be convicted.

11 So we think that the modified categorical
12 approach resolves and answers this concern that you have
13 suggested about the Court ensuring that the person
14 actually was convicted of generic burglary. And what
15 Petitioner's approach would do, even though in a
16 modified categorical approach already answered that
17 question, would try to ingraft this State law inquiry
18 onto divisibility. And it's one that, you know, the
19 Court's opinions, regardless of what the Court said in
20 Descamps, the Court's opinions definitely have not done
21 before.

22 And I think this goes back to Descamps and
23 why we think it goes our way is that the Court provided
24 these examples in Descamps, and it's provided them in
25 other cases too. And those examples just didn't depend

1 on parsing State law. Those examples for -- I think
2 the -- the most paradigmatic was the one Justice Breyer
3 suggested, which was a burglary statute that covers
4 buildings and houses, that covers houses and boats,
5 et cetera.

6 And the Court has said on at least five
7 occasions, I mean, Descamps says this twice, that that
8 statute is divisible, and it -- it just would be odd for
9 the Court to have said so many times that the statute is
10 divisible if, in fact, it's divisible in some cases, if
11 you can find a case under State law, but it's not
12 divisible in other cases, if you can't find the case
13 law --

14 JUSTICE GINSBURG: What was --

15 JUSTICE KAGAN: I think --

16 JUSTICE GINSBURG: What was the purpose for
17 which the State may classify this as a means rather than
18 an element? What was the context in which the State
19 made that determination?

20 MS. SAHARSKY: This question only arises
21 when a person has been charged with more than one thing,
22 so a burglary of a building and a boat, for example.
23 And then the question is, if this goes to trial and the
24 jury -- and it goes to the jury, does the jury
25 unanimously have to find which he did, the house or the

1 boat, or can the -- can six members find house and six
2 members find boat?

3 And so this -- this question actually just
4 doesn't arise very much under State law. I mean,
5 frankly, I was kind of surprised when we started looking
6 at this case. I thought I'd be able to look at all 50
7 States and find one, and we just couldn't. Between the
8 parties in this case, I think we found cases in two
9 States.

10 And I think another example that -- that
11 illustrates how this doesn't come up very often is the
12 drug statutes. I think this Court knows from other
13 prior cases that some State drug schedules list a lot of
14 drugs that aren't on the Federal schedule. So in
15 Mellouli, the Court, you know, had to figure out, is
16 this like the Federal offense or is this not like the
17 Federal offense? And the Ninth Circuit justices who
18 looked at this or judges who looked at this said, you
19 know, it's amazing because there are so many California
20 drug convictions, and there is just no law in whether
21 the drug is -- has to be -- the type of drug has to be
22 proven unanimously in the case where more than one is at
23 issue.

24 And when you talk about, you know, things
25 like that where the Court in itself has assumed that the

1 drug statutes would be divisible, and we don't know that
2 answer for a case like California, I think it -- it
3 would really be a remarkable change to what the Court
4 has done so far with the modified categorical approach.
5 It's really not something that the Court's opinions have
6 done in any meaningful way, and I think it would be
7 unfortunate when the Court has provided examples like
8 the burglary of a building or a boat and the Court's
9 relied on those examples. Like the district court in
10 this case and the Court of Appeals both relied on those
11 examples and said, this is the exact --

12 JUSTICE BREYER: Is this right? Is this
13 like -- like even with the Massachusetts statute, the
14 question has never come up. So we don't really know
15 what the jury has to find in the case of a houseboat.

16 But where there's a word in the statute,
17 like Descamps, and that alternative thing like
18 houseboat, da da, da, is not in the statute, but rather
19 it's a judge-made interpretation of the statute, and the
20 courts say there is several different categories, it
21 would be virtually impossible for a court under those
22 circumstances to say that the A, B and C, which it
23 divided the statute into, that they're elements. You
24 would have to say they're means. Do you think?

25 I don't think a State court would have the

1 power to, in the face of a statute that doesn't itself
2 divide things, to say that, A is an element of the crime
3 that has to be defined, and then B is a different
4 element of a different crime.

5 MS. SAHARSKY: Well --

6 JUSTICE BREYER: Is that -- is that -- I
7 have no idea of the answer to that question. I'm
8 looking for ways of simplifying this case. And if you
9 knew the answer to that question, it would help me.

10 MS. SAHARSKY: Well, I think there are two
11 answers to that question. The first is, we do think --
12 and this is -- the Court left this question open in
13 Descamps about the extent to which you could use
14 judicial decisions. But we do think that in some
15 circumstances a judge could or a court could define a
16 crime. I mean, they're common law crimes that are just
17 defined by the courts and that those could be divisible,
18 but that's not -- that was -- that was reserved in
19 Descamps. That's not something the Court had to answer.

20 But I think the second answer, which
21 hopefully gets to your question, is, you know, can we --
22 either rules of thumb or something with the State courts
23 that we can try to figure out whether something is a
24 means or is an element based on how the statute's
25 written? And I think the real trouble is that we can't.

1 I mean, we've looked to try to find a source
2 of law in Massachusetts, and we've also looked to what
3 the -- what the State courts have told us their
4 approaches are, and this is in our brief. But, for
5 example, they say, you know, we don't have bright-line
6 rules. We have to use a multi-factor test. We set out
7 rules, but they're mind bending in their application.
8 That's what one of the State courts said. You know,
9 this is not a predictable area. And I think actually
10 the Court recommends the same thing. And this was a key
11 component of the Court's reasoning in *Schad*.

12 *Schad* was the plurality opinion that was
13 asking if -- are there constitutional limitations on how
14 a court -- how a State legislature can define "means"
15 versus "elements." That was a case in which the State
16 legislature had said, the jury doesn't unanimously have
17 to agree on whether murder is premeditated murder or
18 felony murder. And the defendant came in and said, wow,
19 can you really say that the jury doesn't have to agree
20 on that? There should be some constitutional limit.

21 And one critical part of the Court's opinion
22 was that there aren't any bright-line rules about what
23 constitutes a means or what constitutes an element.
24 It's a matter of State law, and there is wide variation
25 of that.

1 So as much as we have looked, we don't think
2 that there is an easy answer to the State law questions,
3 and we think, you know, it's really asking a lot to
4 think that Federal courts are going to be doing those in
5 the first instance. I mean, these are questions about
6 the State legislature's intent, and you're talking
7 about, you know, either taking those questions kind of
8 away from the State courts and having Federal courts
9 start to do them on a routine basis or -- we're talking
10 about what one judge in the Ninth Circuit suggested,
11 which is we're never going to find out these answers
12 unless we certify these questions to the State courts.
13 And if you're talking about sentencing judges who
14 sentence every day and have to use the modified
15 categorical approach, you know, certifying to the State
16 courts, I think that really would be, you know,
17 an extraordinary intrusion.

18 So, you know, at the end of the day, I think
19 we think that the Court really has a choice in this case
20 between the approach that it's used for 25 years and the
21 examples that it's given and Petitioner's approach, and
22 we think that Petitioner's approach really would up end
23 the modified categorical approach. It would require the
24 State law question to be answered in lots of cases. In
25 the first instance by Federal judges, we think that it

1 would create a lot of uncertainty. The ACCA, as the
2 Court has said in *Descamps*, is supposed to function as
3 an on/off switch, and it certainly wouldn't --

4 JUSTICE SOTOMAYOR: I'm sorry. Tell me what
5 your approach is that you think is our approach?

6 MS. SAHARSKY: Sure. Yeah. I'm glad to.

7 That a statute is divisible when it sets out
8 statutory alternatives, one of which corresponds to the
9 Federal generic offense, that you don't need to
10 undertake a State law inquiry into whether something is
11 a means or element.

12 JUSTICE KAGAN: Which is to say that
13 elements don't matter, and that's the thing that is
14 contrary to 25 years of this Court's precedents, because
15 if this Court's precedents say anything, they say that
16 this is an elements-based inquiry, which means that we
17 have to decide whether something is an element.

18 MS. SAHARSKY: I -- and that's -- that's
19 really, I think, the next thing I was -- I was hoping to
20 say, which is that the reason that the Court has talked
21 about elements as well as the statutory alternatives is
22 because it wants to have an assurance that the person
23 actually was convicted of generic burglary. And the way
24 you get the assurance is not through this State law
25 inquiry into whether something is a means in a

1 hypothetical case. You get the assurance through the
2 review of the Shepard documents.

3 And we think that the courts -- the aim of
4 the courts --

5 JUSTICE KAGAN: But that sounds -- that
6 sounds very fact-based. You look at the Shepard
7 documents and you see what they actually did. But this
8 Court has said in no uncertain terms that that's not
9 what we do.

10 Much as -- much as some people think that
11 that's an intuitive way to decide these questions, much
12 as some people think that maybe we should have done that
13 25 years ago, but we don't do that. We don't look at,
14 let's look at the documents and see what the guy did.
15 We say, let's look at the documents and see if he was
16 necessarily convicted of something, meaning that the law
17 required him -- the law required that a particular
18 finding be made in order for this conviction to occur.

19 And that's where your approach is something
20 very different from what we've ever done, because you're
21 saying that, notwithstanding that the law did not
22 require that a particular finding be made, we'll take a
23 look at the documents and decide that that finding was
24 made.

25 MS. SAHARSKY: Well, maybe I should clarify

1 a little bit and say that we think that we look to see
2 whether the law required that this finding be made in
3 reality in this case, not hypothetically in some
4 different case. And what I mean by that is, we are
5 using the Shepard documents in conjunction with the fact
6 that the statute lists alternatives.

7 And what we are doing -- the reason that
8 we're not looking at facts is because the alternatives
9 show that the legislature has defined this thing, entry
10 into a building, as part of the offense, as a way to
11 commit the offense.

12 And then the question, the whole point of
13 the modified categorical approach, is: Can we know if
14 the person was convicted of that thing or something else
15 with certainty using the Shepard documents?

16 JUSTICE KAGAN: But the point of the
17 modified categorical approach is to take a truly
18 divisible statute -- in other words, a statute with
19 three separate elements in it, of which you only need to
20 be convicted of one -- and to figure out whether the one
21 that you were convicted of, the one particular element,
22 matches up with the generic offense.

23 It's not to do anything more than that.
24 Descamps is quite clear on this -- on this matter, that
25 it takes -- it's -- it's three separate elements. Do

1 you -- does what you were convicted of, is that the
2 right element to match the generic offense?

3 MS. SAHARSKY: I think that we're in
4 agreement to the extent that we're talking about
5 matching the statutory alternatives with the generic
6 Federal offense.

7 JUSTICE KAGAN: Except that you say
8 "statutory alternatives," and I say "elements," because
9 for 25 years we've been saying "elements," and that we
10 can't do this inquiry if we're in the world of
11 nonelemental facts.

12 MS. SAHARSKY: Well, frankly, I think the
13 Court has said both things. You know, in the opinion in
14 Descamps, there's actually a part of the Court's opinion
15 that equates the two. It says, "Sentencing courts may
16 look only at the statutory definitions"; i.e. --

17 JUSTICE KAGAN: Elements are what defines
18 the crime.

19 MS. SAHARSKY: Right. But I think that the
20 -- the court used "elements" to mean the statutory
21 definition, because the alternatives set out in the
22 statute do define the crime.

23 And I -- I take your point, that the
24 ultimate concern of the modified categorical approach is
25 ensuring that the individual actually was convicted of

1 generic burglary. But I don't think that we need to
2 look to the separate State law question about what
3 happens in a different defendant's case. I mean, that's
4 what the means analysis that -- that was Justice
5 Ginsburg's question, right, goes to, which is: What
6 happens in a different case when more than one thing is
7 at issue?

8 When -- when we have a statute that sets
9 out, this is a form of burglary, and the Court has
10 talked about different version of the offense, a version
11 of the offense is burglary of a building, and so the
12 legislature has defined that as an offense. And the
13 question is: Did the defendant -- was he convicted of
14 that offense?

15 I think -- and this, I think, goes to the
16 other part of your question, which is, you're asking
17 about how is that any different from fact-finding,
18 right? That's just fact-finding. And I think the Court
19 answered that question in Descamps when it gave the
20 example of a statute that doesn't have the alternatives,
21 like the weapons one, as opposed to a statute that does
22 have the alternatives. Because when the statute doesn't
23 have the alternatives, you don't have an option that was
24 identified by the legislature as part of the definition
25 of the crime that you're trying to match to the Federal

1 offense.

2 You're not just -- you're not looking at
3 something that the legislature has defined and saying,
4 well, did the Shepard documents show that or do they not
5 show that? What you're doing is, there's -- there's a
6 hole in the statute, right? It doesn't tell you, for
7 example, in Descamps, the different types of entries.
8 And you're just filling in that hole with facts. You're
9 just looking at, what are the facts of what the
10 defendant did? Can I clean them from the Shepard
11 documents? And then you're trying to match them up with
12 the Federal generic offense.

13 And at that point, you know, the opinion in
14 Descamps says, you know, it's not a categorical approach
15 anymore. The Ninth Circuit -- one judge in the Ninth
16 Circuit, and the court called it a modified factual
17 approach at that point, right, because you're just
18 trying to match the facts of what the defendant did.
19 There's no statutory basis for calling this building --
20 this type of burglary, you know, burglary.

21 But here we have that statutory basis. We
22 have those statutory alternatives. And the Court has
23 said on so many different occasions, and the lower
24 courts have relied on it, that it's the presence of
25 statutory or alternatives that are critical because when

1 you have that -- those in combination with the Shepard
2 documents, you can make the decision of whether that
3 statutory phrase was the basis for the conviction,
4 whether the person was convicted of that version of
5 burglary or not.

6 But when you don't have that statutory
7 phrase there -- the Court said this on page 2287 of its
8 opinion in Descamps -- you're just asking what the
9 defendant actually did. And then once you're doing
10 that, when you're not looking at the way the legislature
11 has defined the crime, there's really no stopping point,
12 right? And I think that was the -- the -- one of the
13 concern of the Court's opinion in Descamps, is that he
14 could have been convicted of something that has nothing
15 to do with burglary, and we'll just try to look through
16 all the facts in the Shepard documents and see if
17 they're really burglary. The Court said don't do that.

18 But here, the legislature has defined this
19 offense so that it -- the -- all components of generic
20 burglary are in the offense. And I understand the
21 Court's instinct, to think, well, we said "elements,"
22 and elements means we have to make sure that the
23 person -- that this actually was proven. But we think
24 that the modified categorical approach itself, by taking
25 the statute and then looking at the Shepard documents,

1 does that, that it really satisfies the concern.

2 And frankly, that's -- that -- that was the
3 message that we got. And of course, the Court knows
4 best what its opinion in Descamps meant, but that was
5 the message we got from the end of footnote 2 of
6 Descamps, which says, you know, whether something is a
7 means or elements, you shouldn't parse State law. You
8 should just look to the Shepard documents. And that's
9 what we're saying, is just to look to the Shepard
10 documents, and if something is --

11 JUSTICE KAGAN: Well, the end of footnote 2
12 said in some cases you won't need to parse State law
13 because you can figure it out from the Shepard
14 documents, because Shepard documents are a clue to
15 whether something is a means or an element.

16 And so in the situation in which State law
17 is not, as it is in this case, utterly clear on the
18 subject, you won't have to go 1,000 layers down, because
19 the Descamps -- the -- the Shepard documents will tell
20 you, because of the way the prosecutor has charged
21 something, looks like this is just a means, or looks
22 like this is really an element.

23 MS. SAHARSKY: Well, I mean, we don't think
24 you need to do the State law inquiry in the first place,
25 because the Shepard documents will tell you that the

1 person actually was convicted of that. And I just think
2 this question about whether it was --

3 JUSTICE KAGAN: Well, why wouldn't you look
4 to State law? You have a State law that says exactly
5 that this is not an element. Why wouldn't you just take
6 that?

7 MS. SAHARSKY: Because -- because it doesn't
8 matter that that case is about what would happen to a
9 different defendant in a case where more than one thing
10 is charged. And it doesn't matter for our purposes what
11 happens in that hypothetical case because this
12 individual, and the individuals where we're trying to
13 use the Shepard documents to actually enhance, have just
14 one thing charged, right? Like, it's burglary of a
15 building, and burglary of a building is generic
16 burglary, and there's no dispute that the -- the statute
17 says burglary of a building, and this is burglary of a
18 building, and it would be odd to give that defendant a
19 pass because --

20 JUSTICE KAGAN: The only --

21 JUSTICE GINSBURG: Why is it
22 conviction-based not -- rather than conduct-based? It's
23 conviction-based, it's okay; conduct-based isn't.
24 Conduct charge is burgling a house.

25 MS. SAHARSKY: Right. It's -- it's

1 conviction-based, the Court said in Taylor, because you
2 want to have uniformity, right? Congress said burglary,
3 and you want to make sure that everyone who's been
4 convicted of the same type of offense actually is
5 treated the same.

6 And I think that the problem with
7 Petitioner's approach is that you could have defendants
8 convicted in two states that have the exact same State
9 statute, their Shepard documents could look exactly the
10 same, and then this answer might turn on whether you
11 could find some sort of State law that would say what
12 would happen in a different case where defendant is
13 charged with more than one thing.

14 So we think that the Court's approach is
15 really -- come from this concern about uniformity.

16 JUSTICE KAGAN: It --

17 MS. SAHARSKY: And I --

18 JUSTICE KAGAN: Please.

19 MS. SAHARSKY: Just -- just one other point,
20 which is: I think it's really telling that the reason
21 that the Court adopted -- and let's go back to where
22 this started, right? It's: What does burglary mean
23 under the ACCA? And the Court adopted the burglary
24 definition it did, which is generic burglary, because it
25 encompassed the definitions in most States. The Court

1 wanted to reach the common denominator in most States.

2 And the effect of Petitioner's position, I
3 think we all agree, is that it would not -- the modified
4 categorical approach would not reach burglary in -- in
5 most States; that the ACCA would have a very limited
6 application at best under Petitioner's approach.

7 And of course, you know the modified
8 categorical approach is used in so many different areas,
9 and so these problems with parsing State law, et cetera,
10 would just be multiplied through all of the other
11 different statutes in which the Court has used the
12 modified categorical approach.

13 So we really think that Petitioner is -- is
14 doing what, you know, was the outlier approach in -- in
15 Descamps, which is trying to change, you know, 20-plus
16 years of settled law and start having this new
17 additional inquiry. We just think you shouldn't do it.

18 JUSTICE KAGAN: Here you have a State
19 statute that specifically tells you that this is not an
20 element of the offense. And you were saying why it was
21 that you thought that you could ignore that -- excuse
22 me, not a State statute, but a State judicial opinion --
23 why it was that you could ignore that.

24 The only reason you could ignore that State
25 judicial opinion is because if you don't care it's an

1 element. And that's very much against what we've been
2 saying since Taylor.

3 MS. SAHARSKY: Could I respond?

4 I -- I don't think that's true. The reason
5 that you don't care is because you can tell from the
6 Shepard documents that the individual in this case, and
7 in some similar cases, actually was convicted of generic
8 burglary.

9 And that defendant doesn't care whether it's
10 a means or an element, because it had to be proven in
11 his case for him to get convicted.

12 We think the judgment should be affirmed.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Three minutes, Mr. Fleming.

15 REBUTTAL ARGUMENT OF MARK C. FLEMING

16 ON BEHALF OF THE PETITIONER

17 MR. FLEMING: Thank you, Mr. Chief Justice.

18 What has been on the books for 25 years is
19 this Court's statement in Taylor that the categorical
20 approach turns on "the elements of the statute of
21 conviction." Or as the Court put it in Moncrieffe,
22 "what facts are necessarily established by a conviction
23 for the State offense."

24 It's been very clear from my colleague's
25 argument that the government is interested in what

1 Mr. Mathis did, and that is not what ACCA looks to. It
2 is not the categorical approach. The government has
3 offered no reason of principle to distinguish this case
4 from Mr. Descamps' case. The only distinction between
5 the two cases is that Iowa statute uses the word "or"
6 with a disjunctive list, and California does it by
7 silence by simply using the word "enters" without adding
8 "lawfully" or "unlawfully."

9 There is no reason to treat those situations
10 differently, given that both California, through
11 silence, and Iowa, through an express list, are setting
12 out only the means of commission. And they have nothing
13 to do with what Taylor calls the focus of the -- of the
14 modified and the traditional categorical approach, which
15 is the elements of the statute of conviction.

16 The drug statutes in California are an
17 example of the workability of the position that we and
18 the Ninth Circuit and the Fourth Circuit have set out.
19 They have -- there have been many decisions. We cite
20 them in our reply brief, finding that the drug statutes
21 are indeed divisible by drug type, and so the modified
22 categorical approach does apply.

23 There are numerous other decisions where the
24 modified categorical approach will continue to apply.
25 States obviously can also, if they want their

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

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

14 MR. FLEMING: No, Your Honor.

15 JUSTICE ALITO: -- to make the conviction?

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

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

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

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

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

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

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A				
a.m 1:13 3:2 65:16	aim 51:3	47:11 49:11	argue 26:2	27:13 28:5
able 6:23 33:21 41:21 45:6	air 5:6	anybody 41:8	arguing 23:23 63:10,11	32:14,19 37:19 43:22 59:21
above-entitled 1:11 65:17	Alito 9:11 10:7 10:11,18 11:7 11:15,25 13:22 14:8,19,21 24:8,13,22 63:10,15 64:10 64:16	anymore 55:15	argument 1:12 2:2,5,8 3:3,7 27:9 28:24 30:10 38:11 39:19 61:15,25	63:12,18 backdrop 20:15 20:20
absolutely 10:12 15:21 41:22	Allen 15:12	Appeals 20:18 46:10	arises 11:19 44:20	balance 30:7 banc 27:5
ACCA 17:24 21:15 23:3,7 24:10 25:16,24 37:24 50:1 59:23 60:5 62:1 63:1,17 63:22,22,23 64:2,5 65:13	allowed 8:15	APPEARAN... 1:14	art 22:22	based 25:25 30:4 47:24 63:6
ACCA's 3:18	Almanza-Are... 27:5	appearing 22:6	artificial 26:6	basic 28:23
accept 39:18	Almendarez-... 63:8	appears 28:21	ascertaining 20:5	basis 8:13 49:9 55:19,21 56:3
acquitted 9:22	alternative 20:12 36:5 40:9,14 41:15 42:5 46:17	Appendix 15:11	aside 37:22 38:2	behalf 1:15,19 2:4,7,10 3:8 30:11 61:16
act 24:21	alternatives 31:2 33:5,9 42:19 50:8,21 52:6,8 53:5,8 53:21 54:20,22 54:23 55:22,25	application 33:17 48:7 60:6	asked 8:18 26:13	believe 17:5
add 15:22	amalgamated 20:22	applies 5:16 19:24	asking 48:13 49:3 54:16 56:8	belonging 15:15
adding 62:7	amazing 45:19	apply 11:19 38:20 62:22,24	asks 42:25	bending 48:7
additional 60:17	amend 63:22 64:5	applying 38:18 38:21	aspect 19:7 64:1	best 57:4 60:6
address 37:11	amended 25:24	appreciate 29:14	assault 32:3,11 40:2,3,4	beyond 18:22 21:12 63:6
administration 30:19	Amendment 30:3 63:5	Approendi 24:13	assault-with-a... 31:25 32:1	bit 52:1
admit 5:8 19:4 30:1	American 20:19	approach 3:15 3:19 9:10,12 10:19 20:3 21:15 23:15,21 25:20 26:7,10 26:12,21,24 31:4,4 33:12 33:18 36:12 37:18 38:16,21 42:13 43:12,15 43:16 46:4 49:15,20,21,22 49:23 50:5,5 51:19 52:13,17 53:24 55:14,17 56:24 59:7,14 60:4,6,8,12,14 61:20 62:2,14 62:22,24	Assistant 1:17	boat 6:6,13,15 7:5,8,11 8:24 9:6 12:18,23 13:8 14:14 17:1 22:2 27:21 37:13 40:25 43:2 44:22 45:1,2 46:8
admitted 8:25 18:13	analysis 31:19 31:21 54:4	approaches 48:4	assume 16:20 19:19	blah 8:22,23,23
admitting 22:10	analyzed 64:11	April 1:9	assumed 6:17,24 45:25 65:2	books 6:6,13,15 7:5,8,11 8:24 9:6 12:18,23 13:8 14:14 17:1 22:2 27:21 37:13 40:25 43:2 44:22 45:1,2 46:8
adopted 30:15 59:21,23	animal 5:17	area 16:25 48:9 64:8	assuring 32:13 39:18	boats 40:22 44:4 64:3
adopting 30:17	answer 6:25 7:2 12:14,15 19:21 19:22,23 20:8 42:11 46:2 47:7,9,19,20 49:2 59:10	areas 60:8	assurance 50:22 50:24 51:1	break 8:11 15:13 18:17,17
affect 22:12,13	answered 43:16 49:24 54:19		attacks 35:19	breaking 15:20 18:3 24:24 25:3 31:15,15
affirmed 61:12	answers 43:12		attorney 8:16	Breyer 5:11,14 5:15,20,25 6:2 6:4,9,19,22 7:2 7:10,14,18
ago 51:13			attribute 9:24	
agree 48:17,19 60:3			authoritative 12:5	
agreement 9:21 23:11 39:12 53:4			available 20:9	
Aguila-Montes 23:21			avoid 9:23 13:8	
aids 26:19			B	
			B 46:22 47:3	
			back 19:12 21:14 23:19	

<p>8:18,22 16:21 27:7,11 28:8 28:23 29:1,3,4 29:7,10,13,15 44:2 46:12 47:6 brief 20:19 21:11 48:4 62:20 bright-line 48:5 48:22 broke 8:11,23 8:24 15:14 17:11,18 18:10 39:12,13 broken 4:9 18:19 building 5:5 17:5 18:1 37:13 42:22,24 43:2,3,5,5,8,9 44:22 46:8 52:10 54:11 55:19 58:15,15 58:17,18 63:24 buildings 40:21 44:4 burden 8:16 burglaring 42:22,22 burglarized 4:18 burglarizing 8:10 burglary 3:13 3:24 5:3,5,5 8:2 9:5,6,14 18:7 21:3 23:6 27:19 28:11 30:25 32:7 36:16,20 37:13 39:4,7 40:19 40:20,21,24,24 42:6,7,10,16 43:14 44:3,22 46:8 50:23 54:1,9,11</p>	<p>55:20,20 56:5 56:15,17,20 58:14,15,16,17 58:17 59:2,22 59:23,24 60:4 61:8 63:3,12 63:18,20,21,23 63:24 64:2 burgled 12:22 13:1 37:12 burgling 58:24</p> <hr/> <p style="text-align: center;">C</p> <p>C 1:15 2:1,3,9 3:1,7 46:22 61:15 California 4:5 4:13,23,25 18:9,22 19:7 29:20,25 45:19 46:2 62:6,10 62:16 called 55:16 calling 55:19 calls 16:2 62:13 64:6 car 6:6 8:11 22:2 22:8 27:22 care 8:1 10:16 60:25 61:5,9 case 3:4 4:6 7:15 7:17 8:8 10:1,2 10:4,21,22 11:8,9,16,21 12:1,13 14:21 15:7 16:6,18 16:19 20:9,13 20:15,18,19 23:10 25:11,13 26:9,18,20,20 27:4,5,6 28:4 28:11,20 30:22 30:24 32:7,10 36:16,18,21 37:10 38:1,19 39:1,20 40:14 41:3,24 42:21</p>	<p>43:1,4,8 44:11 44:12 45:6,8 45:22 46:2,10 46:15 47:8 48:15 49:19 51:1 52:3,4 54:3,6 57:17 58:8,9,11 59:12 61:6,11 62:3,4 64:11 64:20 65:4,10 65:12,15,16 cases 19:25 23:4 23:8 26:2 28:9 32:5,18 41:10 43:25 44:10,12 45:8,13 49:24 57:12 61:7 62:5 64:25 categorical 3:15 3:19 9:10 20:3 21:15 23:15 25:20 26:24 31:3 33:12,18 42:13 43:11,16 46:4 49:15,23 52:13,17 53:24 55:14 56:24 60:4,8,12 61:19 62:2,14 62:22,24 categories 46:20 category 13:25 cause 63:4 cautious 13:21 central 37:20 certain 6:12 certainly 8:15 13:5,6,15 50:3 certainty 52:15 certify 49:12 certifying 49:15 cetera 27:22 30:22 44:5 60:9 challenge 11:13 11:13 20:2</p>	<p>change 30:1 38:8 46:3 60:15 63:18 changed 29:25 charge 4:2,2 14:19,22 28:12 28:17 58:24 charged 4:7 8:10 13:8 14:23 15:20 21:21 23:10 36:19 43:2 44:21 57:20 58:10,14 59:13 charges 14:13 charging 12:16 12:21,25 14:1 14:9,22 15:11 27:22 Chief 3:3,9 27:6 30:8,12 61:13 61:17 64:22 65:14 choice 10:6 13:4 49:19 chosen 7:24 Circuit 3:14 26:8 27:5 31:24 38:13,15 45:17 49:10 55:15,16 62:18 62:18 Circuit's 23:21 circumstance 8:6 9:8 11:24 15:2 26:24 circumstances 46:22 47:15 cite 11:10 62:19 cited 20:19 civil 19:25 clarify 51:25 classify 44:17 clean 55:10 clear 9:2 12:20 12:23 15:19 16:12 26:23</p>	<p>33:20 52:24 57:17 61:24 clearly 10:5 63:2 client 22:5 24:23 28:19 clue 13:10,14,15 14:16 57:14 Code 23:7 colleague's 61:24 colloquy 17:22 comb 40:18 combination 42:18 56:1 combing 40:15 come 38:22,22 45:11 46:14 59:15 64:24 65:8,10 comes 35:12 coming 16:23 comitted 28:11 commentaries 12:6 commission 3:18 8:14 14:17 27:2 62:12 commit 15:16 27:21 52:11 committed 17:12 21:4 24:17 39:6 committing 3:25 20:23 21:6,8 common 47:16 60:1 comparable 12:8 completely 29:23 component 30:25 32:7,9 32:11,13 48:11 components 20:5 56:19 concern 43:12</p>
--	--	---	--	---

53:24 56:13 57:1 59:15 conclusion 35:10,24 37:22 conduct 25:21 25:24 58:24 64:5 conduct-based 58:22,23 confidently 36:19 Congress 21:18 22:15,18,23 23:2 24:4,11 24:16,19 25:6 25:14,15,16,21 25:23 29:7 59:2 63:21,24 64:6,9 conjunction 52:5 consider 63:8 consistently 65:5 constitutes 48:23,23 constitutional 48:13,20 contest 8:14 context 11:12 44:18 continue 62:24 contrary 3:18 25:9 50:14 convict 3:13 6:23 7:3 8:3 41:8 43:6 convicted 3:12 9:13 23:16,17 24:24 25:3,17 33:14,22 34:1 36:20 39:6 40:23 42:7,10 42:15,22 43:2 43:9,10,14 50:23 51:16 52:14,20,21	53:1,25 54:13 56:4,14 58:1 59:4,8 61:7,11 conviction 3:17 4:15 5:9 6:14 6:16 18:10 21:13,17 23:3 23:6,25 24:5 24:20 31:5 34:9 36:14 40:12 41:1 51:18 56:3 61:21,22 62:15 63:2,7,15 conviction-ba... 58:22,23 59:1 convictions 10:14,16 21:18 24:17 25:18 45:20 63:1 64:6 correct 13:22 16:18 36:12 correctly 30:23 correspond 39:7 corresponded 39:4 corresponds 42:5 50:8 counsel 30:8,20 61:13 65:14 count 5:18 13:8 14:14 63:17 country 39:11 counts 6:12 couple 37:6,6 course 16:7 34:2 35:5 57:3 60:7 court 1:1,12 3:10 4:12 6:17 6:24 7:7 10:20 10:22,24 11:2 11:19 12:2 13:21 16:12 19:23 20:3,18 21:9 23:5,20 24:1,15 25:23	26:19 27:20 28:4,10,15 30:13,14 31:23 33:4,8,8,13 34:17,22 35:2 35:7,25 36:3,4 36:24 37:4,11 37:15 38:4,8 39:5,25 40:16 40:20 43:13,19 43:23 44:6,9 45:12,15,25 46:3,7,9,10,21 46:25 47:12,15 47:19 48:10,14 49:19 50:2,20 51:8 53:13,20 54:9,18 55:16 55:22 56:7,17 57:3 59:1,21 59:23,25 60:11 61:21 63:7 64:9,11,17,25 65:2,5,6 Court's 3:20 18:9 21:14 30:6 31:21,23 32:6 35:2,9,22 35:24 38:3,6 40:5,10 43:19 43:20 46:5,8 48:11,21 50:14 50:15 53:14 56:13,21 59:14 61:19 courts 11:11 12:8,10 16:15 20:4 37:9 39:10,18 46:20 47:17,22 48:3 48:8 49:4,8,8 49:12,16 51:3 51:4 53:15 55:24 covers 40:20,21 44:3,4 create 50:1	created 30:2 34:18 crime 3:12,24 7:9 10:12 16:14 17:12 18:3 19:24 20:1 21:14 23:3,12,16,16 24:5,20 26:17 27:1,16,24 29:5,6,9 41:23 47:2,4,16 53:18,22 54:25 56:11 crimes 7:24 16:12 23:14 29:8 47:16 criminal 17:4 critical 33:1 39:1 41:17 48:21 55:25 curious 22:14	43:1 48:18 54:13 55:10,18 56:9 58:9,18 59:12 61:9 defendant's 31:5 40:11 54:3 defendants 59:7 defense 8:16 defer 16:15 define 5:12 7:24 10:11 16:11 47:15 48:14 53:22 defined 41:3 47:3,17 52:9 54:12 55:3 56:11,18 defines 3:12 26:25 53:17 defining 16:14 definitely 43:20 definition 5:16 5:22,23 6:6 21:9 53:21 54:24 59:24 63:23 definitions 53:16 59:25 definitively 11:17 denominator 60:1 Department 1:18 depend 43:25 depends 13:23 Descamps 3:21 4:6,7,9,10,20 12:12,15 16:2 17:3,9,13,24 18:3,6,10,18 23:5,20 25:11 27:15 29:20 30:22,24,24 31:11,23 32:19 32:21 33:19,21
---	--	---	--	---

D

D 3:1
D.C 1:8,18
da 46:18,18,18
date 15:12
day 49:14,18
De 23:22
decide 10:13
27:14 50:17
51:11,23
decided 25:23
39:25
decision 3:20
20:17 34:21
36:24 37:4
56:2
decisions 37:7
37:11 41:19
47:14 62:19,23
decisis 64:7
defendant 8:24
9:21 21:20
23:25 33:14
41:14 42:21

<p>34:4,6 35:3,6 37:21 38:4,12 38:17,22,22 39:1 40:1,5,10 40:16 41:18 43:20,22,24 44:7 46:17 47:13,19 50:2 52:24 53:14 54:19 55:7,14 56:8,13 57:4,6 57:19 60:15 64:14,14,24 65:3,8 Descamps' 62:4 Descamps's 17:4 describing 33:2 description 25:2 designed 42:13 detail 15:22 determination 44:19 determine 10:25 13:7 20:1 determined 20:21 determines 19:23 detrimental 30:18 dialogue 22:19 difference 6:8 7:6,20 8:13 9:3 9:4,7 18:15 28:1 29:18 30:23 31:19,21 32:5 39:1 40:1 different 7:24 8:21 14:15,17 17:17 20:23 23:14,14 25:19 28:2,11 29:24 33:20 36:18 42:1,2 43:1 46:20 47:3,4 51:20 52:4 54:3,6,10,17</p>	<p>55:7,23 58:9 59:12 60:8,11 differently 62:10 difficult 20:7 difficulties 30:3 difficulty 29:11 29:16 discussion 34:13 35:23 36:2 disjunctive 31:13 32:17 62:6 disjunctively 31:17 dispositive 16:9 16:11 17:23 19:17 26:18,20 37:4 dispute 5:7 8:5 58:16 disputed 6:25 21:10 65:1,4,4 disputing 65:3 disruptive 30:18 dissatisfied 63:22 dissent 34:13,16 35:13,13,19 dissental 27:3 distinction 30:15 33:10 34:9,18,20,21 34:23,23 35:8 62:4 distinguish 35:15 62:3 distinguishing 35:17 district 46:9 diversity 19:25 divide 8:3 33:3 40:6 42:1 47:2 divided 4:1 5:7 46:23 divisibility 33:2 33:11 38:20</p>	<p>43:18 divisible 4:3,6 4:13 9:9 37:15 37:17 42:4 44:8,10,10,12 46:1 47:17 50:7 52:18 62:21 document 12:25 14:9,22,25 27:23 documents 12:17,22 13:7 13:10,17 18:6 23:24 26:16 33:18 36:6,8 36:14 37:25 39:23 40:13,16 41:1 42:14,17 51:2,7,14,15 51:23 52:5,15 55:4,11 56:2 56:16,25 57:8 57:10,14,14,19 57:25 58:13 59:9 61:6 doing 26:3 30:21 38:15 40:11,17 49:4 52:7 55:5 56:9 60:14 64:4 double 11:12 20:1 doubt 18:23 21:13 23:18 drafted 36:5 driving 7:19 drug 45:12,13 45:20,21,21 46:1 62:16,20 62:21 drugs 45:14 Duenas-Alvarez 20:4 Duncan 8:4 duplicitous 14:15</p>	<p>duplicity 13:9 dwelling 9:5</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 26:13 36:7 easier 10:13 easily 4:1 63:25 easy 49:2 effect 60:2 eight 32:4 40:3 Eighth 3:13 either 6:15 7:4 12:22 17:22 20:25 23:7 25:5 28:17 43:8 47:22 49:7 64:21 65:1 element 4:20 11:1,17 12:19 12:24 13:2,11 13:16 14:10,23 15:17,22 16:3 17:15,16 21:1 21:5,9 22:11 25:4 28:18 32:14,16 33:4 33:8 36:9,25 37:1,25 43:7 44:18 47:2,4 47:24 48:23 50:11,17 52:21 53:2 57:15,22 58:5 60:20 61:1,10 64:12 64:18,18,18,21 elements 7:8 9:16 11:24 14:4,15 15:11 16:11 18:14 19:23 20:1,14 21:16 23:14 26:17 32:20,21 32:22 33:10 34:10,18,24</p>	<p>35:9,15,16,18 36:3 46:23 48:15 50:13,21 52:19,25 53:8 53:9,17,20 56:21,22 57:7 61:20 62:15 63:21 65:7 elements-based 41:19 50:16 embezzlement 20:23 en 27:5 enacted 24:4 enactment 20:16 20:20 encompassed 59:25 ended 30:21 enhance 30:3 58:13 enhancements 63:5 ensuring 43:13 53:25 enter 16:24 17:1 19:8 entered 4:8,10 15:14 17:5,10 17:11 18:1,11 18:19 19:4 39:13,14 entering 18:4 21:22 31:15,16 enters 29:22,22 62:7 entire 16:17 34:13 35:14 entitled 26:2 entries 55:7 entry 4:14,24 5:1 17:13 32:9 52:9 equated 33:5 equates 53:15 ESQ 1:15,17 2:3 2:6,9</p>
--	--	--	---	--

essence 27:8	30:16 37:13	48:1 49:11	35:2,8,11,12	give 9:2 16:4
essentially 23:22	38:11 44:10	59:11	35:21,23 37:23	31:22 42:20,20
31:12 37:23	52:5 63:6	finding 34:7	57:5,11	58:18
established	64:10	41:23,24 51:18	form 42:16 54:9	given 40:20
61:22 64:17	fact-based 51:6	51:22,23 52:2	forth 18:7 26:8	49:21 62:10
et 27:22 30:22	fact-finder	62:20	forward 30:14	gives 12:13,15
44:5 60:9	33:15	finish 22:24	found 33:15	glad 50:6
evidence 9:14	fact-finding	first 3:4 13:6	37:10 45:8	go 7:5 9:9 15:25
24:9,10,14	54:17,18	16:9 24:3	Fourth 62:18	19:12 23:19,23
exact 4:4 31:13	facts 40:11,18	28:10,20 32:6	frankly 45:5	27:13 28:5
31:17 46:11	41:5 52:8	32:14 33:2	53:12 57:2	57:18 59:21
59:8	53:11 55:8,9	37:7 42:4	free 10:11	63:12,18
exactly 18:24	55:18 56:16	47:11 49:5,25	front 20:6	goes 21:14 32:19
19:5 25:10	61:22	57:24	function 50:2	39:25 43:22,23
26:12,21 34:19	factual 55:16	five 27:21 44:6	functioning 43:7	44:23,24 54:5
36:24 58:4	failed 11:5	Fleming 1:15	functions 37:25	54:15
59:9	falls 5:21 6:5	2:3,9 3:6,7,9	funny 32:23,23	going 10:16 14:4
example 9:3	far 46:4	4:4,23 5:14,19	further 15:25	22:23 39:13
31:22 37:14	federal 10:19,19	5:23 6:1,3,8,17	37:4	49:4,11 63:6
40:20 42:21	11:2 12:2	6:21,24 7:7,13		64:1
44:22 45:10	16:15 20:4	7:16,23 8:20	G	good 13:14
48:5 54:20	27:16 30:19	9:1 10:3,10	G 3:1	27:23 28:19,20
55:7 62:17	31:8 32:8,12	11:4,9,18 12:4	garage 8:10,11	32:16 34:2
examples 31:25	40:8,13 41:3	13:5,12,19,23	8:12 21:22	government
43:24,25 44:1	45:14,16,17	14:6,11,20,24	22:7,8 24:25	3:14 21:11
46:7,9,11	49:4,8,25 50:9	15:3,4,8,18,21	25:4 39:13,14	23:22 29:17
49:21	53:6 54:25	16:7,10,19,22	general 1:18	61:25 62:2
exception 63:9	55:12	17:2,8,20	12:9 19:21,23	government's
exclude 22:5	felonious 17:13	18:21,25 19:6	35:3 36:12	29:12,17,24
excuse 36:23	feloniously 4:8	19:14,18,21	generic 3:13 5:2	63:3
60:21	17:4,10 18:1	21:7,24 22:4	17:23 18:7	Graber's 27:3
expand 63:8	19:3	22:17,25 24:12	23:17 30:25	grocery 4:8,10
explain 33:12	felony 48:18	24:15 25:1,9	32:7 33:14,16	17:5 18:4
explained 33:13	figure 13:17	25:15 26:4,11	39:4,7 40:13	39:17
explaining	23:15 45:15	26:15 27:10	41:4,23 42:6,7	guilt 22:11,13
24:23	47:23 52:20	28:6,22,25	42:10 43:14	guilty 8:25,25
explicit 31:13	57:13	29:2,6,9,11,14	50:9,23 52:22	19:2 21:21,22
express 62:11	figuring 17:23	31:12,14,18	53:2,5 54:1	24:23 42:23
extent 23:18	26:17	61:14,15,17	55:12 56:19	guy 7:12 51:14
26:18 47:13	filling 55:8	63:14,19 64:13	58:15 59:24	
53:4	find 8:3 23:24	64:22	61:7 63:2,3,20	H
extraordinary	28:18 34:3,7	floating 41:12	63:21	happen 58:8
38:10 49:17	39:13 40:12	focus 35:18	Ginsburg 3:23	59:12
F	41:13 43:3,3,5	62:13 65:7	4:5,19 20:25	happened 28:16
face 31:17 47:1	43:8,9 44:11	focused 30:5	21:7,20 22:1	happens 11:15
fact 21:12 24:16	44:12,25 45:1	focuses 64:5	44:14,16 58:21	31:3 39:22
	45:2,7 46:15	footnote 12:16	Ginsburg's 54:5	54:3,6 58:11

happy 22:25	identified 30:23	42:2,11 43:17	irreconcilable	11:25 12:11
hard 35:15	54:24	50:10,16,25	3:19	13:10,13,22
harshly 20:12	identify 3:16,17	53:10 57:24	issue 4:5 16:1	14:8,12,19,21
hear 3:3	ignore 60:21,23	60:17	36:16 42:24	15:3,4,6,10,19
hearing 18:2	60:24	instance 11:21	43:5 45:23	15:23 16:8,17
heart 33:11	illustrates 45:11	13:7 25:19	54:7 64:24,25	16:20,21,23
39:25 42:8	imagine 27:19	49:5,25	issues 5:7 65:2	17:7,9,20
held 4:13	32:1,3 40:6	instinct 56:21		18:15,24 19:1
help 47:9	Immigration	instructions	J	19:12,16,19
highly 30:18	20:19	11:14 12:5,14	James 20:4	20:25 21:7,20
history 12:7	impermissible	23:12	jeopardy 11:13	22:1,14,18,22
24:18	14:1	instrument 16:3	20:2	22:25 24:8,13
holds 8:4	important 23:19	intend 22:23	Johnson 20:4	24:22 25:6,13
hole 55:6,8	35:25 37:21	intended 21:18	32:20	26:1,5,13,14
Honor 6:1 7:17	42:1 64:8 65:6	22:15,19 23:2	Joint 15:11	27:6,7,11 28:8
10:3 13:19	impossible	24:11	judge 8:14 16:4	28:23 29:1,3,4
14:6 15:9,18	46:21	intent 19:8 24:3	16:5 26:7,12	29:7,10,13,14
16:7,10 17:21	include 64:3	49:6	26:20 27:3	30:8,12,23
22:5 25:9 26:4	including 40:19	intention 15:15	34:3 47:15	31:7,10 32:13
26:11 63:14	inconclusive	30:4	49:10 55:15	33:19,25 34:16
hook 9:19	14:25	interchangeably	judge-made	35:11 36:10,22
hopefully 47:21	indicated 24:19	33:9	46:19	37:3 38:21
hoping 50:19	indicates 12:15	interested 25:6	judges 45:18	39:9,16,22
house 6:6,14,16	13:1	25:12,16 61:25	49:13,25	41:6,17 44:2
7:5,8,12 8:23	indicative 15:1	interpretation	judgment 61:12	44:14,15,16
9:18 12:18,23	indictment 4:7	11:6,20 16:16	65:11	46:12 47:6
13:1,7 14:14	6:11 11:13	46:19	judicial 47:14	50:4,12 51:5
18:17 21:22	14:1,2,15	interpreted 7:7	60:22,25	52:16 53:7,17
27:22,23 36:16	17:17,22,25	12:8	jurisdiction 14:5	54:4 57:11
36:20 40:24	19:3	interpretive	jurors 9:17	58:3,20,21
44:25 45:1	individual 32:4	16:5 26:19	jury 5:7 8:2,7	59:16,18 60:18
58:24	43:10 53:25	interrupt 35:12	9:16 10:15	61:13,17 63:10
houseboat 6:11	58:12 61:6	introduction	11:14 12:5,14	63:15 64:10,16
7:3,11,12 10:1	individuals	32:21	21:12 23:12	64:23 65:14
12:25 46:15,18	58:12	intrusion 49:17	28:13,17,17	justices 45:17
houseboats 10:8	infer 34:3	intuitive 51:11	33:15 34:3	
houses 44:4,4	inferences 34:5	involved 17:24	42:23 44:24,24	K
64:3	inferential 39:19	18:3	44:24 46:15	Kagan 12:11
hypothetical	infinitely 40:6	involves 3:25	48:16,19	13:10,13 26:13
43:1 51:1	information	4:1 9:14 63:24	Justice 1:18 3:3	31:7,10 32:13
58:11	14:2 17:4	Iowa 3:11,12	3:9,23 4:5,19	33:19,25 34:16
hypothetically	21:21,24 22:7	4:16,24 5:4,10	5:11,14,15,20	35:11 36:10,22
52:3	41:12	7:17,23,25	5:25 6:2,4,9,19	37:3 41:6,17
	ingenious 7:20	8:13 9:12,23	6:22 7:2,10,14	44:15 50:12
I	ingraft 43:17	10:12 15:13	7:18 8:18,22	51:5 52:16
i.e 53:16	inquiry 30:17	16:2,20 22:12	9:11 10:7,11	53:7,17 57:11
idea 47:7	38:10 39:8	23:6,7 62:5,11	10:18 11:7,15	58:3,20 59:16

<p>59:18 60:18 Kagan's 14:12 keeps 35:14 Kennedy 22:14 22:18,22 23:1 25:6,13 26:1,5 26:14 key 28:9 48:10 kind 3:16 27:18 36:1 38:15 39:19 40:15 45:5 49:7 kinds 33:20 knew 47:9 know 3:17 5:16 6:19 7:18 9:19 11:24 12:13 15:16 17:13,16 20:13 22:6,6 22:14 23:16 32:18 34:5,12 36:13,17,19 37:16 43:18 45:15,19,24 46:1,14 47:21 48:5,8 49:3,7 49:15,16,18 52:13 53:13 55:13,14,20 57:6 60:7,14 60:15 63:25 knows 45:12 57:3 Kozinski's 26:7 26:12,21</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>land 5:5 language 25:18 32:20 larceny 20:22 Laughter 10:9 22:21 law 6:20,22 8:13 11:10 13:2,23 14:5 16:8,10 16:15 19:16,19</p>	<p>19:25 20:5,9 20:15 22:12 26:18,20 30:16 30:19 31:11 36:2,4,4 37:16 38:5,9,10,18 38:20 41:22,22 42:11 43:10,17 44:1,11,13 45:4,20 47:16 48:2,24 49:2 49:24 50:10,24 51:16,17,21 52:2 54:2 57:7 57:12,16,24 58:4,4 59:11 60:9,16 lawfully 19:8 29:22 31:14 62:8 laws 16:16 lawyer 22:6,9 Lawyers 20:19 layers 57:18 left 16:1 47:12 legislative 12:7 24:18 legislature 9:23 9:25 10:5 20:16 41:3 48:14,16 52:9 54:12,24 55:3 56:10,18 legislature's 49:6 let's 8:16 16:9 16:20 51:14,15 59:21 light 37:12 likelihood 22:9 limit 48:20 limitations 48:13 limited 12:17 14:11 26:16 60:5 list 45:13 62:6</p>	<p>62:11 lists 36:3 52:6 little 52:1 living 26:6 location 8:2 10:15 locations 11:23 long 8:3 13:20 32:17 look 4:2 12:4,6,6 12:7,16 13:16 16:24 20:9,15 26:15 27:2,16 34:2 35:7,23 36:7,13 37:3 38:14 41:1 42:13,16 45:6 51:6,13,14,15 51:23 52:1 53:16 54:2 56:15 57:8,9 58:3 59:9 looked 20:20 21:1 24:18 39:11 45:18,18 48:1,2 49:1 looking 11:20 13:6 18:6 27:15 33:21 45:5 47:8 52:8 55:2,9 56:10 56:25 looks 12:1 25:21 57:21,21 62:1 lost 17:25 lot 9:11 45:13 49:3 50:1 lots 49:24 lower 55:23</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Main 25:4 maintain 65:7 majority 34:14 34:19 MARK 1:15 2:3 2:9 3:7 61:15</p>	<p>Maryland 20:17 20:22 Mass 1:15 Massachusetts 6:10,15,20,22 7:4,14,16,22 7:23 8:19,20 9:1,25 10:2,4,8 10:21,22 12:2 12:8,10 13:2 37:14 46:13 48:2 match 31:4 32:8 32:12 40:7 41:4 53:2 54:25 55:11,18 matches 41:23 52:22 matching 31:3 33:4 40:11 41:2 53:5 Mathis 1:3 3:4 3:11 4:16 5:8 8:9 15:12 62:1 65:12 matter 1:11 18:11,12,13 20:2 22:10 23:9,10,11 29:3 32:15 33:10 35:3 41:19,20 43:10 48:24 50:13 52:24 58:8,10 65:1,17 matters 16:14 mean 3:23 5:16 5:18 12:21 15:23 24:19 25:1 27:17 28:5 31:11,16 32:10 34:5 35:12 43:7 44:7 45:4 47:16 48:1 49:5 52:4 53:20 54:3</p>	<p>57:23 59:22 meaning 15:25 33:25 42:5 51:16 meaningful 46:6 meanings 17:11 means 3:18 8:1 8:2,14 11:1,17 12:19,24 13:11 13:16,25 14:10 14:17 15:17 16:2 17:16 20:23 21:1,5,9 27:2,18 28:12 32:16,22 33:10 34:10,18,24 35:3,9,16 36:4 36:18,25 41:15 44:17 46:24 47:24 48:14,23 50:11,16,25 54:4 56:22 57:7,15,21 61:10 62:12 64:12,21 65:7 means-elements 30:15 meant 32:22 35:7 57:4 Mellouli 45:15 members 34:22 45:1,2 mere 63:6 message 57:3,5 mind 29:24 48:7 minutes 61:14 modified 3:15 9:10 23:15 26:23 31:3 33:11,17 42:12 42:17 43:11,16 46:4 49:14,23 52:13,17 53:24 55:16 56:24 60:3,7,12 62:14,21,24 Moncrieffe</p>
--	---	--	--	--

<p>61:21 morning 3:4 movable 9:18 move 9:20 multi-factor 48:6 multiple 23:13 23:14 40:20 multiplied 60:10 murder 48:17 48:17,18</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 narrow 64:1 necessarily 33:15,22 36:17 51:16 61:22 necessary 23:15 34:7,8 41:7,11 need 3:12 5:4 9:7 18:10,22 33:13 36:4,10 37:3 40:17,22 42:9,11 50:9 52:19 54:1 57:12,24 never 21:18 22:15,16,17,18 30:14 46:14 49:11 64:11 new 20:6,21 60:16 NICOLE 1:17 2:6 30:10 Nijhawan 25:19 nine 34:22 Ninth 23:21 26:8 27:4 31:24 38:12,15 45:17 49:10 55:15,15 62:18 nonelemental 53:11 nongeneric 19:6 notwithstandi... 51:21</p>	<p>number 11:10 16:9 40:7 numerous 62:23</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 object 4:11 objection 18:2 obviously 11:19 12:4 62:25 Oca 23:22 occasion 27:18 occasions 44:7 55:23 occupied 4:17 4:25 5:23 8:4 occur 17:3 34:9 51:18 occurred 17:3 odd 44:8 58:18 offense 5:2,3 14:18 17:23 19:7 20:24 21:3,6,8 22:12 23:4,17,24 24:18 31:8 32:8,12 33:14 33:16 39:6 40:8,13,23 41:2,4,14 45:16,17 50:9 52:10,11,22 53:2,6 54:10 54:11,12,14 55:1,12 56:19 56:20 59:4 60:20 61:23 63:2 offered 37:15 62:3 oh 8:10 okay 6:2 28:4 29:10 33:24 34:25 36:11 58:23 on/off 23:6 24:5 50:3</p>	<p>once 56:9 open 16:1 47:12 opinion 16:13 21:14 26:8 31:23 32:6 33:6 35:14,18 35:22 37:22 38:3,4,5,17 40:5,10 48:12 48:21 53:13,14 55:13 56:8,13 57:4 60:22,25 opinions 32:24 41:13 43:19,20 46:5 opposed 5:5 24:17 54:21 opposite 30:17 option 54:23 oral 1:11 2:2,5 3:7 30:10 order 4:14 5:9 21:13 25:24 34:8 51:18 ordinary 11:20 25:2 33:17 outcome 29:23 outlier 38:15 60:14 outside 8:12 22:8 overbroad 35:5 39:2 overrule 64:1</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 page 2:2 56:7 paradigmatic 37:14 44:2 parked 8:12 22:8 parse 36:4 57:7 57:12 parsing 30:16 44:1 60:9 part 29:4 48:21</p>	<p>52:10 53:14 54:16,24 particular 11:22 17:18 20:6,11 20:17 23:3,10 24:5,20 27:17 36:23,23,24 37:17 41:14,22 51:17,22 52:21 64:20 particularly 20:7 23:9 64:8 parties 37:10 45:8 65:3 parts 38:3 42:2 pass 58:19 passed 25:21 passing 25:16 people 7:11,11 51:10,12 percent 39:10 41:9 permission 30:6 permit 5:9 10:1 person 6:23 7:3 9:13 12:22 13:1 25:2,7,16 27:17 29:21,22 33:22 36:20 39:6 40:23 42:7,9,15 43:8 43:13 44:21 50:22 52:14 56:4,23 58:1 Petitioner 1:4,16 2:4,10 3:8 60:13 61:16 Petitioner's 30:20 37:17 38:11 43:15 49:21,22 59:7 60:2,6 phrase 56:3,7 phrased 13:20 29:21 32:17 phrasing 31:17 picture 22:3</p>	<p>pie 10:25 place 5:6 37:11 57:24 places 40:21 plain 11:11 plea 8:9 17:22 18:2 22:6 23:11 30:2 39:11 42:23 plead 41:11,14 pleading 13:23 14:5 19:1 pleas 41:10 please 3:10 30:13 59:18 pled 21:21,22 24:23 plurality 16:13 48:12 point 9:2 10:10 10:18 11:11 13:6 18:21 19:10 28:9 33:7 38:6 52:12,16 53:23 55:13,17 56:11 59:19 64:13 pointing 35:1 points 41:9 posited 14:12 position 14:7 27:3 29:12,17 38:19 60:2 62:17 63:4 possibility 22:2 possible 9:19 20:16 possibly 28:2 potential 17:10 power 47:1 powerful 34:6 precedent 38:6 precedents 50:14,15 predicate 23:4,8 24:21 predicates 63:1</p>
--	--	--	--	---

<p>63:17 predictable 48:9 prefers 10:13 premeditated 48:17 prerogative 7:25 presence 55:24 present 31:1 pretty 38:6 prevail 26:11 prevents 64:4 previous 64:25 principle 62:3 principles 12:9 16:5 prior 20:17 24:13 45:13 probably 26:2 problem 17:2,7 35:14 59:6 63:5,17 problematic 37:12,17 problems 60:9 proceeding 30:5 proceedings 34:2 produces 24:6 progeny 25:10 prohibits 40:2,3 promise 27:13 proof 63:3,20 proper 9:9 properly 4:12 property 20:23 prosecution 21:12 prosecutor 4:9 6:13 7:4 8:17 8:23 9:6 12:18 13:4 14:13,16 15:21 18:2,12 29:25 39:12 57:20 prosecutors 10:14 prove 3:13 4:14</p>	<p>4:17,22,24,25 5:1,4,11,15,21 6:5,7,10,10,13 13:3 18:10 21:12 30:1 proved 4:21 6:15 proven 45:22 56:23 61:10 provided 43:23 43:24 46:7 punishable 19:9 punished 20:12 punishes 9:5 punishing 11:22 21:2 purporting 38:8 38:9 purpose 3:16 12:17 26:16 44:16 purposes 17:24 33:4 37:24 58:10 64:2 put 28:15 61:21</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify 63:1 quarrel 13:20 question 13:18 14:12 16:21 18:5 19:13,22 19:22 29:16 33:1,3 35:21 37:20 38:7,8 38:25 42:8,12 42:25 43:17 44:20,23 45:3 46:14 47:7,9 47:11,12,21 49:24 52:12 54:2,5,13,16 54:19 58:2 64:19 questions 26:13 36:7 37:8 42:3 49:2,5,7,12</p>	<p>51:11 quite 4:12 33:20 52:24</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 reach 60:1,4 63:22 reacting 20:17 read 15:16 16:2 27:13 28:5 38:17 reading 17:13 37:21 reaffirmed 23:5 real 47:25 real-world 36:1 reality 52:3 really 32:22 33:1,11 34:17 37:14,21 38:15 39:25 40:10 42:12 46:3,5 46:14 48:19 49:3,16,19,22 50:19 56:11,17 57:1,22 59:15 59:20 60:13 reason 4:4 9:4 28:22 29:2 33:7 36:1 50:20 52:7 59:20 60:24 61:4 62:3,9 reasonable 18:23 21:13 reasoning 3:20 48:11 reasons 9:12 23:20 24:2 REBUTTAL 2:8 61:15 receiving 20:22 recommends 48:10 record 8:9 21:25 22:4</p>	<p>reformulate 63:12 regard 65:13 regardless 43:19 rejected 23:21 24:1 27:5 relied 24:16 46:9,10 55:24 relying 39:23 remained 17:11 remanded 65:12 remarkable 46:3 Rendon 27:4 reply 62:20 request 11:14 require 28:16 38:10 49:23 51:22 63:7,20 required 4:14 5:2 26:2 41:22 51:17,17 52:2 requires 34:1 63:3 resentenced 65:12 reserve 30:6 reserved 47:18 resolve 11:12 resolved 38:7 65:5 resolves 43:12 resort 36:5 resources 37:10 respect 28:13 respectfully 65:11 respond 61:3 64:22 Respondent 1:19 2:7 30:11 responses 33:1 34:25 37:7 rest 35:22 result 3:20 9:22 26:9 31:2 38:24,24</p>	<p>results 24:6 retrying 39:20 revealed 8:8 reversed 65:11 review 51:2 Rice 20:18 Richard 1:3 15:12 Richardson 16:13 21:10 ridiculous 9:15 right 5:12,20 6:6 10:12 13:4,5 15:10 21:23 26:14 31:18 34:15,20 35:8 35:20 37:2 39:21,24 40:21 42:3,21 46:12 53:2,19 54:5 54:18 55:6,17 56:12 58:14,25 59:2,22 65:9 ROBERTS 3:3 27:6 30:8 61:13 65:14 routine 49:9 rules 47:22 48:6 48:7,22</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 Saharsky 1:17 2:6 30:9,10,12 31:8,11,20 32:25 33:24 34:15,25 35:20 36:11 37:2,6 38:24 39:15,21 39:24 41:16,25 44:20 47:5,10 50:6,18 51:25 53:3,12,19 57:23 58:7,25 59:17,19 61:3 satisfies 57:1 saying 6:20</p>
--	---	--	---	---

17:18 19:2 21:5 28:9,9 29:21 30:21 40:18 51:21 53:9 55:3 57:9 60:20 61:2 says 6:11,13 7:4 7:25 10:2 11:16 12:12 15:11,12 17:1 22:7 25:11 27:24 29:17 32:1,3,6 33:21 34:4,6 35:13 35:25 36:3,24 37:23 38:5 40:4,5,10 44:7 53:15 55:14 57:6 58:4,17 Schad 16:13 48:11,12 schedule 45:14 schedules 45:13 second 24:7 32:3 32:9 33:7 42:6 47:20 section 8:22 23:7 28:2 see 12:9 18:15 33:19 36:8 40:22 42:14 51:7,14,15 52:1 56:16 seeing 12:17 sense 34:8 64:20 sentence 9:8 19:15 22:13 30:3 49:14 63:5 sentencing 10:20 11:2,19 12:2 49:13 53:15 separate 9:16 26:8 42:11 43:1 52:19,25 54:2	seriously 63:10 63:11 set 12:21 18:7 26:8 48:6 53:21 62:18 sets 23:13 42:18 50:7 54:8 setting 62:11 settled 38:5,9,14 38:18,20 60:16 settles 38:7 severely 9:5 11:23 shed 15:14,20 17:1 Shepard 6:17,25 7:8 13:7,17 14:25 18:6 23:23 26:16 32:19 33:18 36:6,8,14 37:25 39:23 40:12 42:14,17 51:2,6 52:5,15 55:4,10 56:1 56:16,25 57:8 57:9,13,14,19 57:25 58:13 59:9 61:6 shop 19:8 shoplift 19:9 show 9:7 18:22 52:9 55:4,5 showed 31:24 significant 30:2 63:4 silence 62:7,11 silent 16:21 similar 5:6 61:7 similarly 5:4 6:4 simple 10:25 simplifying 47:8 simply 62:7 single 14:17 27:1 41:8 situation 9:15 10:20,21 11:3	11:5,18 14:12 14:13,24 57:16 situations 62:9 six 7:10,11 9:17 45:1,1 Sixth 30:2 63:5 Solicitor 1:17 someone's 30:3 sorry 15:13 32:10 39:17 50:4 sort 17:17 59:11 Sotomayor 15:3 15:5,6,10,19 15:23 16:8,17 16:20,23 17:7 17:9,20 18:15 18:24 19:1,12 19:16,19 30:23 38:21 39:9,16 39:22 50:4 soundly 24:1 sounds 51:5,6 source 48:1 sources 12:5 specific 10:15 19:22 20:8 specifically 5:9 23:25 24:19 60:19 64:15 specified 35:4 40:4 specifies 32:4 specify 14:2 32:2 standard 11:5 stare 64:7 start 16:9 27:25 30:20 49:9 60:16 started 45:5 59:22 starts 38:4 State 4:21 8:4 10:11,13 11:10 11:11,16 13:23 13:24 14:5	16:8,10,14,15 16:15 19:16,19 19:24,24 20:1 20:5,5,9,16 26:17,18,20,25 30:5,16 31:1,5 36:2,4,4,23,24 37:4,9,11,16 38:10 42:11 43:17 44:1,11 44:17,18 45:4 45:13 46:25 47:22 48:3,8 48:14,15,24 49:2,6,8,12,15 49:24 50:10,24 54:2 57:7,12 57:16,24 58:4 58:4 59:8,11 60:9,18,22,22 60:24 61:23 stated 4:9 statement 32:15 61:19 states 1:1,6,12 3:5 16:11 21:24 45:7,9 59:8,25 60:1,5 62:25 63:11,19 statute 3:11 4:5 4:21 5:10,13 9:2,8 14:4 18:14,14 19:10 19:11 20:6,10 20:11,21,21 21:2,2,16 23:13 25:7,19 25:22 27:1,16 27:18,20,24 28:2,15,19,21 29:19,20 31:1 31:5,18,25 32:1,3 33:3,25 34:8 35:4 36:3 36:14,21,23 37:15 38:14 39:3 40:2,6,19	41:6,7,10 42:4 42:18 44:3,8,9 46:13,16,18,19 46:23 47:1 50:7 52:6,18 52:18 53:22 54:8,20,21,22 55:6 56:25 58:16 59:9 60:19,22 61:20 62:5,15 statute's 6:5 47:24 statutes 12:8 40:19 45:12 46:1 60:11 62:16,20 63:13 63:18,20 statutory 11:6 11:20 24:3,9 24:10,14 28:3 31:1 33:5,9 35:5 39:2 40:9 40:14 50:8,21 53:5,8,16,20 55:19,21,22,25 56:3,6 64:8 stay 39:16,17 stayed 18:19 steps 16:4 19:13 19:14 stolen 20:22 stopping 56:11 storage 15:14 16:25 17:1 store 4:8,10 17:5 18:4 39:17 strange 9:22 Street 25:4 stretching 39:10 structure 3:25 4:2,17,25 5:12 5:17,24 8:4 16:25,25 17:18 stuff 24:14 subcrimes 40:7 subject 37:5
---	--	---	---	---

57:18 submit 65:9,11 submitted 65:15 65:17 substance 35:13 such-and-such 15:12 suggested 36:7 38:25 43:13 44:3 49:10 suppose 5:16 9:13,14 11:25 12:1 21:1 supposed 10:20 10:23 12:3 50:2 supposedly 4:18 Supreme 1:1,12 sure 8:6 22:18 24:4 31:10 33:13 42:9 50:6 56:22 59:3 63:1 surprised 7:15 45:5 swept 19:11 switch 23:6 24:5 50:3 synonym 21:8	23:5 24:15 25:10,23 30:14 32:19 59:1 61:2,19 62:13 64:1 technical 64:20 tees 29:16 tell 11:2 14:4,8 19:13 33:17 42:15 50:4 55:6 57:19,25 61:5 telling 13:24 28:10 35:25 38:3 59:20 tells 20:11 21:3 60:19 ten 32:22 tenses 15:14 term 35:5 39:2 64:17 terms 14:3 34:4 40:6 51:8 terrible 34:17 test 48:6 text 11:21 20:9 20:11 24:9,10 38:14 Thank 29:1 30:8 61:13,17 65:14 theft 15:16 20:21,24 thing 7:19,19,21 10:1 12:24 14:2 15:20 27:18 28:21 31:13,17 32:23 34:11 36:15 38:12,13 41:18 42:24 44:21 46:17 48:10 50:13,19 52:9 52:14 54:6 58:9,14 59:13 things 18:18 35:4,17 36:18 39:10 41:9,11	45:24 47:2 53:13 think 7:11,11 9:18 13:6,19 14:11,24 21:10 21:11 22:1 23:19 26:22 27:15 28:16 29:16 30:22 31:18,20 32:25 33:11 34:20 35:1,24 36:6,9 36:11,17,19 37:2,8,9,12,19 37:20,23 38:2 38:25 39:10,24 41:25 42:1,8 42:10,25 43:11 43:22,23 44:1 44:15 45:8,10 45:12 46:2,6 46:24,25 47:10 47:11,14,20,25 48:9 49:1,3,4 49:16,18,19,22 49:25 50:5,19 51:3,10,12 52:1 53:3,12 53:19 54:1,15 54:15,18 56:12 56:21,23 57:23 58:1 59:6,14 59:20 60:3,13 60:17 61:4,12 thinks 43:4 thought 9:17 17:21 34:22 45:6 60:21 three 6:7 24:2 52:19,25 61:14 thumb 47:22 time 24:6 30:7 times 32:22 44:9 today 22:20 36:2 told 8:9 48:3 tools 11:6,20 traditional	62:14 trailer 9:14,17 treat 13:2 62:9 treated 59:5 treating 12:18 trial 8:7 42:23 44:23 trigger 25:20 trouble 47:25 truck 9:20 true 4:16 16:13 31:10 61:4 truly 11:4 52:17 try 13:17 23:24 27:7 40:7,18 43:17 47:23 48:1 56:15 trying 27:8,10 29:13 31:4 41:4 54:25 55:11,18 58:12 60:15 Tuesday 1:9 turn 59:10 turns 21:16 30:15 61:20 twice 44:7 two 3:24 17:10 17:14 18:18 19:5 21:3 31:24 32:5,25 33:1,20 35:17 36:18 37:11 38:2 42:1,2,3 45:8 47:10 53:15 59:8 62:5 type 4:17 21:5 45:21 55:20 59:4 62:21 types 55:7	unanimous 11:14 28:13 unanimously 28:18 44:25 45:22 48:16 uncertain 34:4 51:8 uncertainty 50:1 unclear 19:20 uncommon 65:2 understand 35:20 56:20 understood 36:13 undertake 50:10 unfortunate 46:7 uniform 30:18 uniformity 59:2 59:15 unitary 23:13 United 1:1,6,12 3:5 unlawful 4:14 4:22 5:1 unlawfully 4:7 15:13,24 17:12 18:1,20 19:3 21:21 29:23 31:14 39:18 62:8 use 3:15 15:6 25:2,17,18 26:19 32:20 47:13 48:6 49:14 58:13 uses 21:11 29:19 32:21 62:5 usual 3:16 16:14 utterly 57:17
T				V
T 2:1,1 take 9:12 28:14 31:11 51:22 52:17 53:23 58:5 65:2 takes 52:25 talk 34:13 35:21 45:24 talked 50:20 54:10 talking 34:12 35:2,4,15 49:6 49:9,13 53:4 64:19 talks 35:8 Taylor 6:4 21:15				v 1:5 3:4 8:4 variation 48:24 vehicle 4:1,3 5:6 9:20 18:17 Vermont 9:3,4,6
			U	
			ultimate 19:12 35:9,24 53:24 ultimately 8:1 unanimity 10:15	

<p>10:4,5,8 11:22 20:13 version 39:5 40:23 54:10,10 56:4 versus 48:15 victim 15:15 view 11:1 21:7 viewed 14:16 violated 8:22 virtually 46:21</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waiting 28:6 want 3:14 9:12 9:23,24,25,25 30:20 38:19 59:2,3 62:25 63:17 wanted 25:14 29:7 38:13 60:1 wants 50:22 Washington 1:8 1:18 wasn't 6:25 18:8 19:1 22:2 25:6 38:9 water 5:6 way 13:14 19:2 19:24 21:4,4,6 21:8 22:11 26:21 30:5 31:12,14,23 32:23 37:22 40:1 43:23 46:6 50:23 51:11 52:10 56:10 57:20 65:8,9,10 ways 3:24 19:5 21:3 27:21 28:12 31:16 47:8 we'll 3:3 51:22 56:15 64:2 we're 22:19 26:6</p>	<p>30:21 34:20 36:2 37:21 38:18 39:13 40:17,18 49:9 49:11 52:8 53:3,4,10 57:9 58:12 64:1 we've 26:3 37:10 48:1,2 51:20 53:9 61:1 weapon 32:2,4 40:3,5 weapons 32:2,4 40:4 54:21 welcome 15:8 went 22:7 wide 48:24 willfully 15:13 15:24,24,25 17:25 wishes 10:12 won 23:20 word 24:16 25:17 27:16,19 29:19 32:21 46:16 62:5,7 words 7:10 18:9 28:3,14,16 52:18 work 26:21 workability 62:17 works 26:24,25 world 26:6 29:18 53:10 worry 36:1 wouldn't 5:18 24:24,25 27:23 50:3 58:3,5 wow 48:18 write 32:24 written 26:3 47:25 wrong 31:24 65:8</p> <hr/> <p style="text-align: center;">X</p> <hr/>	<p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yeah 6:21 50:6 years 38:6 49:20 50:14 51:13 53:9 60:16 61:18 64:7,17 65:6</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zillion 31:16 zoo 5:17</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1,000 57:18 10:08 1:13 3:2 11:09 65:16 123 25:4 15-6092 1:4 3:4 1984 63:24</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 12:16 35:2,8 35:11,12,21,24 37:23 57:5,11 20 38:6 20-plus 60:15 2016 1:9 2287 56:7 25 49:20 50:14 51:13 53:9 61:18 64:7,17 65:6 26 1:9</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 30 2:7</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 45:6</p> <hr/> <p style="text-align: center;">6</p> <hr/>	<p>61 2:10</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>713.1 23:7</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>95 41:9 99 39:10</p>
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