

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   ALPHONSO JAMES, JR.,                           :

4                   Petitioner                                 :

5                   v.   :   No. 05-9264

6   UNITED STATES.                                 :

7   - - - - - x

8   Washington, D.C.

9   Tuesday, November 7, 2006

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11                                 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 10:04 a.m.

14 APPEARANCES:

15 CRAIG L. CRAWFORD, ESQ., Assistant Federal Public  
16 Defender, Orlando, Fla; on behalf of the Petitioner.

17 JONATHAN L. MARCUS, ESQ., Assistant to the Solicitor  
18 General, Department of Justice, Washington, D.C.; on  
19 behalf of the Respondent.

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Official

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	CRAIG L. CRAWFORD, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JONATHAN L. MARCUS, ESQ.	
7	On behalf of the Respondent	24
8	REBUTTAL ARGUMENT OF	
9	CRAIG L. CRAWFORD, ESQ.	
10	On behalf of the Petitioner	52
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
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21  
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24  
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in James versus United States. Mr. Crawford?

ORAL ARGUMENT OF CRAIG L. CRAWFORD, ESQ.  
ON BEHALF OF THE PETITIONER

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

We confront today the Eleventh Circuit's troubling interpretation of the otherwise clause of the Armed Career Criminal Act. Under the text and structure of the act, as well as the categorical approach that this Court recognized in Shepard and Taylor, Florida attempted burglary convictions should not qualify as they -- these types of convictions do not involve explicitly, implicitly or even inherently, a serious potential risk of physical injury to another.

The Respondent in their brief has enunciated a test to determine whether a conviction should qualify, and that test that they enunciate is basically a district court judge or a sentencing judge uses their common sense and experience to determine whether an offense should qualify. That type of test is not the kind of test that this Court enunciated in Taylor and

1 Shepard when it looked at the very elemental approach at  
2 determining whether convictions should qualify.

3 The categorical approach that this Court  
4 enunciated refers to predicate offenses in terms not of  
5 prior conduct but of prior convictions and the elements  
6 of those crimes.

7 As such, the Government's argument would  
8 open up a -- is a broad mandate that courts could use to  
9 bring in almost any type of crime, any kind of felony to  
10 be included within the Armed Career Criminal Act. For  
11 instance, simple possession of cocaine is a third-degree  
12 felony in Florida. It's a five-year statutory maximum.  
13 Under the serious drug offense that Congress enumerated,  
14 it would only qualify if it had a 10-year statutory  
15 maximum and it involved the distribution of drugs. Yet,  
16 if the Government's approach to the interpretation of  
17 the otherwise clause is to be used, that simple  
18 possession of cocaine could qualify if a judge using  
19 their common sense and everyday experience determines it  
20 presents a serious potential risk of physical  
21 injury to another. Obviously --

22 JUSTICE ALITO: If we were looking at  
23 attempted generic burglary of a residence, wouldn't that  
24 involve conduct that presents the serious potential risk  
25 of physical injury to another?

1 MR. CRAWFORD: Your Honor, in Taylor, this  
2 Court was clear that under enumerated burglary or  
3 generic burglary, the offense becomes a -- has that  
4 serious potential risk when the person actually enters  
5 the dwelling or enters the structure; and under an  
6 attempted burglary, at least in Florida and in most  
7 other States, that act has not occurred. You haven't  
8 entered, the defendant has not entered the property.

9 JUSTICE ALITO: If the would-be burglar is  
10 climbing through the window or on a ladder with the  
11 intent to climb through the window, wouldn't that  
12 involve almost the same risk or maybe the same risk?

13 MR. CRAWFORD: If the conduct -- again,  
14 we're looking at, then, a fact-based inquiry.  
15 Obviously, some attempted burglaries could get that far.  
16 Other attempted burglaries are caught well before that  
17 actually occurs. But if you were to say that the  
18 attempted burglary was climbing up a ladder trying to  
19 get into the place and the person actually didn't get  
20 in, again, under Taylor, it says the risk is when the  
21 person enters. The risk is much less outside the  
22 dwelling than inside the dwelling.

23 CHIEF JUSTICE ROBERTS: But in Florida, that  
24 would be burglary itself, right, because it covers the  
25 curtilage around the house?

1           MR. CRAWFORD: The curtilage is a unique  
2 concept, I guess in Florida, in that the curtilage is the  
3 enclosed space around the house that has some kind of  
4 enclosure, whether by fence or whether by bushes. So if  
5 the place was enclosed and you had a ladder going up to  
6 the residence, that would actually be a burglary within  
7 the State of Florida. In other States, it may not.

8           CHIEF JUSTICE ROBERTS: Right. And we don't  
9 even have to ask whether that presents a serious  
10 potential risk under the statute, right? Because, if  
11 burglary is identified as -- a predicate offense without  
12 the need to resort to the definition?

13           MR. CRAWFORD: Well, it would be a burglary  
14 in the State of Florida, but under the test enunciated  
15 in Taylor, it wouldn't qualify because Taylor was very  
16 specific. It is the entering a dwelling or structure.  
17 And in Florida, you could be guilty of a burglary  
18 without entering a structure or dwelling, just like in a  
19 curtilage burglary.

20           JUSTICE SOUTER: Well, you could do it in a  
21 noncurtilage burglary State simply by putting the  
22 ladder up to the window and getting on the first rung of  
23 the ladder. I mean, you would have -- you would have taken  
24 a substantial step. You would have made an attempt. Now  
25 why would that not qualify under the words of the

1 statute that referred to a potential risk? Haven't you  
2 created the potential for the risk of harm that the  
3 statute is getting at when you take the substantial  
4 step?

5 MR. CRAWFORD: Well, trying to use the  
6 Court's words in Taylor, Taylor talked about that --

7 JUSTICE SOUTER: Well, how about my question  
8 first?

9 MR. CRAWFORD: Okay.

10 JUSTICE SOUTER: I mean, haven't you in the  
11 words of the statute, created the potential for the risk  
12 when you take that substantial step by starting up the  
13 ladder?

14 MR. CRAWFORD: If you started up the ladder  
15 and that's the way the attempted burglary conviction  
16 came down, it would be a lot closer call to say that  
17 would be a potential risk. Whether it's a serious  
18 potential risk under Taylor, it is not as clear.

19 JUSTICE SCALIA: But you wouldn't analyze it  
20 on the basis of whether this defendant started up the  
21 ladder. As I understand, you would -- you have to  
22 analyze it on the basis of whether generically attempted  
23 burglary as a whole presents a serious enough risk;  
24 isn't that the way it has to be done?

25 MR. CRAWFORD: That's the way that we submit

1 it has to be done, and you wouldn't be getting to those  
2 facts.

3 JUSTICE SOUTER: No, but I thought your  
4 argument was that that analysis would not lead to the  
5 result unfavorable to your client because the nature of  
6 starting up the ladder did not create or could not  
7 reasonably be seen as creating this kind of risk.

8 In other words, I thought you were saying --  
9 maybe I misunderstood your argument -- that the reason  
10 the Taylor analysis favors you is that merely taking a  
11 substantial step -- which is what the indictment would  
12 charge -- could not be seen as creating the potential  
13 risk that the statute talks about.

14 Now if I'm not understanding your argument  
15 correctly, you know, straighten me out here.

16 MR. CRAWFORD: I think I understand. That  
17 substantial step in even taking a step up the ladder,  
18 Mr. James would submit based on the language of the  
19 statute, would not qualify and would not create that  
20 serious potential risk of physical injury.

21 JUSTICE SOUTER: And that's why simply  
22 charging attempted burglary will never satisfy the  
23 statute under a Taylor analysis as you understand it.

24 MR. CRAWFORD: That's correct.

25 JUSTICE SCALIA: But even if it would,



1 that's only one manner of attempt. And it seems to me,  
2 if you're going to do it generically, you have to look  
3 over the whole scope of possible attempts and say does  
4 the whole scope of possible attempts bear, I would say,  
5 a similar risk of the use of physical force as do the  
6 specifically mentioned crimes of burglary, arson or  
7 extortion? Indeed, I guess you have to use the least  
8 dangerous. Wouldn't you say extortion is probably, of  
9 those mentioned crimes, burglary, arson, extortion, or  
10 the use of explosives, or otherwise involves conduct.  
11 Now that "otherwise", that refers me back to the crimes  
12 already mentioned, and I would say that means that the  
13 unnamed crime has to have a similar risk, at least a  
14 risk as high as the least dangerous of the crimes  
15 mentioned, which I would take to be extortion.

16                   Wouldn't you say?

17                   MR. CRAWFORD: Of those four, extortion does  
18 seem to potentially have the least risk of all those  
19 crimes enumerated. But --

20                   JUSTICE SCALIA: And what's a potential  
21 risk, by the way?

22                   MR. CRAWFORD: A potential risk --

23                   JUSTICE SCALIA: A potential potential? I  
24 mean, every risk is potential, isn't it?

25                   MR. CRAWFORD: In the Government's -- in the

1 Respondent's brief, they talked about how risk and  
2 potential and serious, some of those worlds potentially  
3 knock each other out, and I apologize for using that  
4 very word, but --

5 JUSTICE SCALIA: You think potential risk is  
6 just risk really?

7 MR. CRAWFORD: I think it is a risk.

8 JUSTICE SOUTER: But isn't one way of  
9 looking at it -- I mean, I, when I read it, you know, I  
10 thought it's just redundant. But it may very well be  
11 that the word potential is in there in order to  
12 accommodate attempts.

13 MR. CRAWFORD: If that were true, I mean,  
14 Congress when they wrote the statute, and in  
15 924(e) (2) (B) (ii), or (e) (2) (B) (ii) (1), they specifically  
16 enumerated attempted crimes to qualify under that  
17 violence. So it has an element, use of or attempted use  
18 of, or threatened use of physical force. But under  
19 prong two, they specifically deleted that word  
20 "attempt".

21 CHIEF JUSTICE ROBERTS: Specifically deleted  
22 or didn't --

23 MR. CRAWFORD: They did not include it, and  
24 under --

25 CHIEF JUSTICE ROBERTS: That's quite

1 different than specifically deleting it. In other  
2 words, it was never there in the proposal.

3 MR. CRAWFORD: In 1984 actually, there was a  
4 proposal where burglary would qualify and attempted  
5 burglary would qualify. That was passed by the Senate,  
6 never passed by the House, never enacted.

7 So later on when burglary was actually  
8 defined, burglary was defined as the type of burglary  
9 that Taylor came close to defining the same way.

10 CHIEF JUSTICE ROBERTS: So, do I understand  
11 your submission to be that putting a ladder against the  
12 side of a house to attempt burglary, starting up the  
13 ladder, that that generically does not pose a potential  
14 risk of physical injury?

15 MR. CRAWFORD: If that were the only way to  
16 prove an attempted burglary within a State, if that  
17 would be -- that would be the requirement, the legal  
18 requirement that you have to put the ladder against the  
19 house and that's an element of the offense, that to me  
20 would be a much closer call; but still, under the  
21 analysis that we have provided the Court with the  
22 Russello presumption, it should not qualify. But it is  
23 a closer case.

24 Whereas categorically when you look at  
25 attempted burglaries, the putting the ladder against the

1 side of the house is an element of the offense.

2 CHIEF JUSTICE ROBERTS: We understand from  
3 your friend on the other side that an overt act toward  
4 fulfilling the attempt is required under Florida law.  
5 In other words, it's not just enough to have burglary  
6 tools in your house.

7 MR. CRAWFORD: Correct.

8 CHIEF JUSTICE ROBERTS: You've got to take  
9 an affirmative step toward accomplishing the burglary.

10 MR. CRAWFORD: It is an overt act that is  
11 beyond mere thinking about it.

12 JUSTICE BREYER: Why doesn't anybody -- you  
13 know, count. It sounds to me if you're wondering about  
14 whether there's a specific serious risk of harm, you could  
15 find out. Look at the conviction that in Florida for  
16 attempted burglary, look at the convictions for burglary,  
17 and see if the harm involved, the number of cases in which  
18 people are harmed is roughly similar. We have all these  
19 law professors who like statistics. Now they like law in  
20 economics and everything. So why don't they go out  
21 there and count, and then we'd actually know, instead of  
22 sitting here and trying to figure out something I know  
23 nothing about. I've never been involved in a lot of  
24 burglaries. I don't know how the burglaries operate. I  
25 suspect some people are hurt, but rather than my

1 suspicion why don't we find out what the facts are?

2 JUSTICE GINSBURG: We're not going to be  
3 able to do that in time to decide this case.

4 JUSTICE BREYER: But wouldn't it be, as a  
5 method of approaching --

6 JUSTICE SCALIA: It would also keep the  
7 professors from other mischief.

8 (Laughter.)

9 JUSTICE GINSBURG: But what do we know about  
10 the dimensions of the Florida attempt crime? For  
11 example, you have said it doesn't mean that you possess  
12 burglary tools. Does it mean or does it exclude casing  
13 the house, walking up and down the street, around the  
14 block?

15 When is a step substantial enough to  
16 constitute an attempt under Florida law?

17 MR. CRAWFORD: Well, it's not really a step  
18 analysis, a substantial step analysis. It is an overt  
19 act. It's some overt act manifesting your intent to  
20 actually --

21 JUSTICE GINSBURG: What is that concretely?  
22 It's not possessing burglar's tools, it's not casing the  
23 place. What qualifies as an overt act that would make  
24 one guilty of the crime of attempted burglary?

25 MR. CRAWFORD: If you had a diagram of the

1 person's house and you had burglary tools in your car  
2 and you had maybe even called to make sure the business  
3 was closed and you were driving there and as you're  
4 driving there you're telling the person sitting beside  
5 you: I'm going to break into that, you know, business  
6 at 254 Main Street. That would be enough under Florida  
7 law to convict someone for attempted burglary of a  
8 structure.

9 JUSTICE SCALIA: I guess we have to decide  
10 how many attempts involve that kind of initial action,  
11 which doesn't seem very physical threatening, and how  
12 many of them involve putting a ladder up against the  
13 side of the house.

14 How do we possibly figure that out, to  
15 decide whether as a whole the degree of risk from  
16 attempted burglary is as high as at least the degree of  
17 risk from extortion?

18 MR. CRAWFORD: That may be -- that may be a  
19 very difficult question to answer, and maybe the  
20 Respondent had that obligation in the district court,  
21 because they have the obligation to prove that this  
22 enhancement has that substantial or that serious  
23 potential risk of physical injury to another and of  
24 course they didn't do that. But if you look back in  
25 this Court's decision in 1985 in Tennessee versus

1 Garner, this Court was talking about completed  
2 burglaries and it talked about physical violence to a  
3 person would only occur in a rare case, and it gave the  
4 percentage I think of 3.6 or 3.8 percent of the time.

5 But that's in a completed burglary. That's  
6 not even talking about an attempted burglary, what's the  
7 risk --

8 JUSTICE STEVENS: May I ask you this  
9 question: It seems to me there are two ways to read the  
10 burglary, arson or extortion examples: That they are  
11 clear examples of crimes that would involve harm to  
12 individuals, physical injury to another; or they are put  
13 in the statute to say, even though they don't involve  
14 serious risk, these specific crimes will be covered,  
15 because your statistic of 3 percent suggests that  
16 burglary itself probably would not qualify as a crime  
17 that presents a serious risk of physical injury, but the  
18 statute nevertheless defines it.

19 So do you read those terms as giving  
20 examples of crimes that would not involve that risk of  
21 injury or as examples of crimes that would?

22 MR. CRAWFORD: I think it can be read either  
23 way, although I think even the Government's brief in  
24 -- or the Respondent's brief in Taylor talks about  
25 extortion and burglary being crimes that can be

1 committed with no risk of physical injury to another  
2 person and yet Congress still specifically  
3 enumerated those --

4 JUSTICE SCALIA: Mr. Crawford, if you had  
5 that meaning in mind, you would not have used the word  
6 "otherwise". You would have simply said is burglary,  
7 arson or extortion, involves the use of explosives, or  
8 involves conduct that presents a serious potential risk.  
9 The other purpose of the "otherwise," which means in  
10 some other manner, some other manner -- other from what?  
11 Other from the preceding ones.

12 I don't think there is any sensible way to  
13 read it except, you know, in some other manner than  
14 these previously named crimes involves a physical risk;  
15 and that is what causes me to say, well, what's the  
16 least dangerous of the previously mentioned crimes, and  
17 any crime you want to get into this residual category  
18 has to be at least as dangerous as that. As I've said,  
19 I think that's extortion.

20 MR. CRAWFORD: Using that analysis, it's  
21 hard to figure out, but again the Government had this  
22 obligation or we submit the Government had this  
23 obligation, and they've not shown an attempted burglary  
24 to be any more dangerous.

25 CHIEF JUSTICE ROBERTS: Do you think that,



1 is conspiracy to commit burglary a crime that poses a  
2 serious potential risk as burglary does?

3 MR. CRAWFORD: In Florida, or in the  
4 Eleventh Circuit, they have determined that conspiracy  
5 to commit enumerated offenses do present that serious  
6 potential risk.

7 JUSTICE BREYER: Sorry, go ahead.

8 MR. CRAWFORD: So in the Eleventh Circuit  
9 they have determined that. But again, we submit under  
10 that Russello presumption or even the statute itself,  
11 Congress enumerated those four property crimes,  
12 primarily property crimes.

13 CHIEF JUSTICE ROBERTS: Doesn't that seem  
14 like a fine line? I mean, if you're sitting around with  
15 your coconspirator planning it you can be covered under  
16 this provision, planning a burglary. But if you  
17 actually get out there with the burglary tools, you put  
18 the ladder against the door and you start up the ladder,  
19 that somehow involves less of a potential risk of  
20 physical injury?

21 MR. CRAWFORD: They both present very little  
22 potential risk. They don't even really -- under a  
23 serious potential risk, they don't present that. A  
24 conspiracy shouldn't either. A conspiracy and attempt  
25 are not different things because a conspiracy doesn't

1 qualify --

2 CHIEF JUSTICE ROBERTS: You think the  
3 Eleventh Circuit is wrong?

4 MR. CRAWFORD: I believe the Eleventh  
5 Circuit is wrong with conspiracy as well.

6 JUSTICE BREYER: If we don't know and if I  
7 can't get too far with the language and I frankly could  
8 sit in my office looking at the computer screen I think  
9 for hours and I wouldn't be closer to knowing whether  
10 there is or is not a lot of injury that accompanies  
11 attempted burglary, but that is something that is  
12 possible to know. All we have to do, as I said before,  
13 is count and there are a lot of people who can do that.  
14 In fact, there are people who at least have a mandate to  
15 do it and that is the sentencing commission. So they  
16 have the tools. They have the ability. And so in the  
17 absence on a question like this of my being able to get  
18 anywhere by cogitating about the language and in a  
19 borderline case where it isn't obvious, why don't we as  
20 a Court simply follow a reasonable interpretation of  
21 what the sentencing commission did in the absence of  
22 better information from some other place?

23 MR. CRAWFORD: Well, the sentencing  
24 commission when they were interpreting the career  
25 offender statute, or guidelines, they were looking at a

1 guideline that is worded different than the --

2 JUSTICE BREYER: They're trying to find out  
3 the same answer to the same kind of question: How many  
4 of these attempted burglaries, how many burglaries, how  
5 many other crimes are accompanied by an individual being  
6 hurt? And as I say, I cannot imagine how to answer that  
7 question in a borderline case without trying to find the  
8 numbers, which I don't have here, and therefore since I  
9 don't have them, why don't I look to the best, second  
10 best alternative, which is at least they could get them,  
11 and I hope they did get them before coming to the  
12 conclusion they did.

13 MR. CRAWFORD: Well, they came to that  
14 conclusion dealing with whether a career offender  
15 provision should include attempted burglary not under  
16 the armed career criminal statute and they specifically  
17 recognized that.

18 Moreover, when they dealt with whether they  
19 wanted to include attempted burglary, they were dealing  
20 with career offender, which has, although it increases  
21 the guideline range a person can be sentenced to, it  
22 certainly doesn't increase the statutory maximum in zero  
23 to 10 year offense to a 15 years to life offense.

24 So for those reasons, even if the sentencing  
25 commission feels that the career offender statute or

1 guideline should include attempted burglary, that  
2 doesn't mean this Court should use that for the armed  
3 career criminal statute.

4           Moreover, the career offender statute says  
5 it's only a burglary of a dwelling, although the armed  
6 career criminal statute says a burglary qualifies if  
7 it's a dwelling or a structure.

8           JUSTICE SCALIA: Mr. Crawford, we've held  
9 that the named crimes have to be considered generically  
10 according to their elements, right? Burglary, arson.  
11 Have we ever held that the residual category or  
12 "otherwise involves conduct that presents a serious  
13 potential risk of physical injury," that that has to be  
14 decided generically? I mean, if we could apply that  
15 residual category, not generically but according to the  
16 crime that was actually tried and of which the defendant  
17 has been convicted, such as laying a ladder up against  
18 the house, that particular sort of burglary, it seems to  
19 me it would be a much easier, much easier case, wouldn't  
20 it? We'd be able to tell whether there was a serious  
21 risk of physical injury.

22           Is there any obstacle to doing that?

23           MR. CRAWFORD: Well, Taylor and Shepard both  
24 talk about that predicate offenses under 924(e) should  
25 be looked at in a -- using a categorical approach, and

1 the Court has talked about that being an approach looking  
2 to the elements of the offense.

3 JUSTICE SCALIA: Was it referring to the  
4 residual category?

5 MR. CRAWFORD: It didn't specifically refer  
6 to the residual category. But even in Shepard --

7 JUSTICE SCALIA: Maybe it's not too late to  
8 save ourselves from sending out legions of law  
9 professors to do studies.

10 MR. CRAWFORD: If the Court were to step  
11 back and say that the "otherwise" clause should be  
12 interpreted in a noncategorical manner and we're going  
13 to -- the Court decides it's a factual-based approach,  
14 in Mr. James' case there are no facts, so it may not  
15 make any difference for him because there's no facts to  
16 indicate what kind of burglary really occurred here.

17 JUSTICE KENNEDY: You mean no facts in the  
18 indictment or charging documents?

19 MR. CRAWFORD: Correct.

20 JUSTICE KENNEDY: But there is in the  
21 presentence report?

22 MR. CRAWFORD: That is correct. There were  
23 facts that were presented in the presentence report that  
24 came from police reports.

25 CHIEF JUSTICE ROBERTS: You don't have any

1 doubt that, at least with respect to two of the other  
2 named crimes, attempts would present a serious potential  
3 risk? In other words, attempted arson or attempted use  
4 of explosives? You concede those would be covered,  
5 don't you?

6 MR. CRAWFORD: Actually, no. Those crimes,  
7 attempted crimes, also should not come in unless there's  
8 something about an attempted arson statute that has as  
9 an element or something that presents a serious  
10 potential risk of physical injury to another, which at  
11 least in Florida that's not the case.

12 JUSTICE SCALIA: Don't you think attempted  
13 use of explosives is at least as dangerous as extortion?  
14 I mean as far as the risk of physical injury is  
15 concerned, I would think attempted use of explosives is  
16 much more dangerous to physical health than extortion.

17 MR. CRAWFORD: Getting back to your  
18 question, maybe this answers part of it: Although the  
19 Court -- you asked, Justice Scalia, you asked a question  
20 about why can't we make this basically maybe a  
21 fact-based inquiry. And if you were to do so, the whole  
22 categorical approach that we're dealing with in all the  
23 other sections would almost become irrelevant because if  
24 something doesn't apply categorically, then we'll go to  
25 a fact-based inquiry and that kind of defeats the whole

1 purpose of the categorical approach.

2 JUSTICE ALITO: Mr. Crawford, does the  
3 record show that the facts in the PSR came from police  
4 reports rather than from a plea colloquy or someplace in the  
5 court records?

6 MR. CRAWFORD: The plea colloquy was not  
7 ever presented or produced, and it does show that they  
8 came from police reports.

9 JUSTICE ALITO: Where is that in the record?

10 MR. CRAWFORD: I believe that is stated in  
11 the PSR regarding the facts that they alleged under the  
12 attempted burglary, which again were objected to.  
13 Specifically, the facts weren't necessarily objected to,  
14 but the use of the attempted burglary was objected to,  
15 and both the district court and the Eleventh Circuit  
16 took that as being an objection to using anything  
17 regarding the attempted burglary.

18 JUSTICE SOUTER: Mr. Crawford, may I ask you a  
19 question about the relationship between generic burglary  
20 and what Florida takes as sufficient to show an attempt?  
21 And what I'm getting at is the issue that at least was  
22 alluded to in the Jones case.

23 Do you understand Florida law on attempted  
24 burglary to be as follows: that there must be an overt  
25 act taken toward entering either a dwelling or a

1 structure, as distinct from an overt act taken to get  
2 within the curtilage?

3 MR. CRAWFORD: The evidence -- I see my time  
4 is up. Little me briefly answer this question. Or -- I  
5 want to remain, or let some remain for my rebuttal.  
6 Very quickly, the overt act has to refer to the  
7 attempting to enter the dwelling. And so --

8 JUSTICE SOUTER: So there's no such thing as  
9 attempted entry of the curtilage as an attempt offense  
10 under burglary under Florida law.

11 MR. CRAWFORD: Under Florida law attempting  
12 to enter the curtilage is an attempted burglary; it is  
13 the same thing. Dwelling is defined as the building or  
14 the curtilage.

15 JUSTICE SOUTER: Okay, so when you say  
16 dwelling you mean dwelling as defined to include  
17 curtilage.

18 MR. CRAWFORD: Correct.

19 JUSTICE SOUTER: Okay.

20 MR. CRAWFORD: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 Mr. Crawford.

23 Mr. Marcus?

24 ORAL ARGUMENT OF JONATHAN L. MARCUS,

25 ON BEHALF OF THE RESPONDENT



1           MR. MARCUS: Thank you, Mr. Chief Justice,  
2 and may it please the Court.

3           Petitioner's conviction for attempted  
4 burglary of a dwelling under Florida law is a violent  
5 felony under the Armed Career Criminal Act because like  
6 the crime of burglary Petitioner's crime categorically  
7 involves conduct that presents a serious potential risk  
8 of physical injury to another.

9           JUSTICE SOUTER: Mr. Marcus, do you agree  
10 with your brother's answer to my last question that  
11 there would be an attempt -- could be an attempt under  
12 Florida law simply to take an overt -- to commit an  
13 overt act toward entering the curtilage as distinct from  
14 entering a physical dwelling or a physical structure?

15           MR. MARCUS: Yes, while I would disagree  
16 with that, but while there are -- with your  
17 characterization. But there are no -- the number of  
18 reported cases involving an attempted burglary that  
19 involved an attempt to get on to the curtilage, if -- I  
20 think -- based on --

21           JUSTICE SOUTER: We don't know basically  
22 what Florida law is? I mean, is that the best answer?

23           MR. MARCUS: Yes. I don't, I don't think  
24 you could conclude, they have -- there is no decision  
25 telling you whether that would suffice. But we're not

1 taking the position that it could not involve an  
2 attempted entry into the curtilage.

3 JUSTICE SOUTER: So that literally, I take  
4 it then if someone did have a fence around the house,  
5 and I, I -- I walked from the sidewalk onto the lawn  
6 toward the fence, with the intent of getting over the  
7 fence, that would qualify then, as you understand it, as  
8 an attempted burglary under Florida law?

9 MR. MARCUS: Yes -- it could. It could --

10 JUSTICE SOUTER: Would that be true if I  
11 simply wanted to get into the -- if my intent was to get  
12 on the other side of the fence but not into the  
13 dwelling? For example, you know, I wanted to steal the  
14 apples on the tree?

15 MR. MARCUS: Well, I think --

16 JUSTICE SOUTER: Would that qualify as  
17 attempted burglary?

18 MR. MARCUS: I think it could. I think --  
19 but I think you --

20 JUSTICE SOUTER: Doesn't that give you a  
21 pretty tough row to hoe, in saying that there is a  
22 sufficient potential risk of the sort of harm that  
23 qualifies under the act?

24 MR. MARCUS: I don't think so, Your Honor.  
25 I mean Florida, in the State versus Hamilton case, we

1 discussed in our brief, Florida has defined curtilage  
2 narrowly, strictly construed the word curtilage  
3 narrowly, to limit that concept to an enclosed area that  
4 immediately surrounds the dwelling. And the case  
5 discusses a couple of cases from various Florida courts  
6 of appeals where the courts construed the concept of  
7 curtilage and held that in one case it was marijuana  
8 that was quite a distance away from the, from a dwelling  
9 house, in another case a whiskey still that was a  
10 distance about 50 yards away from the dwelling house,  
11 that those were too far out to be considered part of the  
12 curtilage, part of that area that immediately surrounds  
13 the dwelling that's associated with the intimate  
14 activities of the dwelling. So Florida -- and Florida  
15 -- and I think the Court should take the Florida Supreme  
16 Court at its word when it said it's going to strictly  
17 construe that concept, and when it said it's not going  
18 to construe it to produce absurd, harsh or unreasonable  
19 results, keeping in mind how serious the offense of  
20 burglary is.

21           So I think the -- so the first step, I  
22 think, if you don't -- if you don't believe that the way  
23 Florida defines burglary is generic in the way Congress  
24 had in mind, I don't think you could conclude that it  
25 presents a categorically different set of risks such that it

1 would even fall outside the otherwise clause.

2 JUSTICE ALITO: There are a number of  
3 Florida cases that involve open carports. How would you  
4 apply it there? Somebody, if you had a carport that's  
5 not fenced off at all, just 20 feet let's say from the  
6 street, somebody walks into the carport and steals a  
7 garden rake?

8 MR. MARCUS: Well, I think under the  
9 current, I think under the current statute, it has been  
10 amended since, since 1993 and '94, and -- which is  
11 relevant, the statute is relevant to this case. I think  
12 now carports are considered part of the dwelling itself,  
13 the structure itself but under -- but if it -- but under  
14 the Florida's concept of curtilage if the area was not  
15 enclosed, it was not enclosed by a fence or other  
16 structure it would not be considered part of the  
17 curtilage. And in fact, the State versus Hamilton case,  
18 it cited a case that cast a doubt on a prior case that  
19 had found a burglary that took place on a driveway, and  
20 noted that the court in that case hadn't determined  
21 whether the area, whether the driveway was enclosed.

22 So it does -- the statute does -- the  
23 concept does require an enclosure and the area  
24 immediately surrounding the dwelling and I think it is  
25 very difficult to conclude that that, that defined in

1 that way, in that limited way, that someone who's  
2 intending to get on to a residence into the area either  
3 in or right around the dwelling, that that person is not  
4 sort of categorically dangerous kind of person that  
5 Congress had in mind when it set out burglary as one of  
6 the paradigmatic offenses in the statute.

7 JUSTICE BREYER: So in an ordinary city street  
8 in Miami walking along the street, there are a lot of  
9 houses, and there's a little bit of lawn or bushes in  
10 front, and there's not a fence, because there isn't, or  
11 there aren't fences in many city blocks, a person goes  
12 up to the house and starts to monkey around with the  
13 window to raise it or whatever, that's attempted  
14 burglary, not burglary, in Florida?

15 MR. MARCUS: That -- yes. That is my  
16 understanding. If it was not enclosed.

17 JUSTICE BREYER: All right. So then I doubt  
18 -- then again I'm left at sea. I don't know how often  
19 that happens or is dangerous. So if I think that this  
20 is really a statistical question, and I think maybe it  
21 is -- and the Government is in the best position, they  
22 have all the statistics, they have whole bureaus over  
23 there. So what about a presumption against the Government?  
24 In a case where it seems to be a close case and it is a  
25 statistical question, and the Government doesn't have

1 any statistics?

2 MR. MARCUS: Well, I think -- I don't think  
3 when Congress enacted this law that it expected the  
4 courts would have statistics available to --

5 JUSTICE BREYER: How are you supposed to  
6 decide it if there's a question as there is this instance  
7 I think? I just don't know how dangerous attempted  
8 burglaries are. I mean, maybe I'm not supposed to admit  
9 there are a lot of things I don't know but there are.  
10 And this is one of them.

11 MR. MARCUS: Well, there are several things  
12 you can do. First you can look at the text of the  
13 statute.

14 JUSTICE BREYER: I read the text several  
15 times.

16 MR. MARCUS: Congress provided some guidance  
17 by setting out four examples of crimes that do present  
18 the type of risk they had in mind.

19 JUSTICE BREYER: Correct. And here I think  
20 it might be less than burglary. And extortion, though  
21 one thinks of somebody writing a poison pen letter or  
22 something and revealing a secret from the past -- many  
23 such crimes are threats of violence. I mean, and that  
24 just read through the statutes, and that's what they are  
25 aiming at. So I would say extortion is something that

1 quite often could involve violence.

2 But again that's cogitating. So I get  
3 to attempted burglary. I don't know. Now what do I do?

4 MR. MARCUS: Well, I think -- I think you  
5 have to consider what Congress's purpose -- in enacting  
6 the statute, Congress directed your attention to the  
7 serious potential risk that an offense presents. I  
8 think that just -- and criminal law requires courts and  
9 juries all the time to take into account and to use  
10 their common sense and experience to judge the risks  
11 that are presented by a particular crime. I mean, the  
12 very concept of recklessness itself refers to a  
13 substantial disregard of --

14 JUSTICE SCALIA: Mr. Marcus, it is a lot  
15 easier to do that with respect to the facts and  
16 circumstances of a particular crime than it is to do it  
17 generically -- you know -- picking out attempted  
18 burglary. It is very hard to do that. Why shouldn't we  
19 read this, this residual category to refer to the facts  
20 and circumstances of the particular crime of which the  
21 defendant has been convicted? The language enables you  
22 to do that. The term violent felony means any crime  
23 punishable by imprisonment for a term exceeding one year  
24 that involves conduct that presents a serious potential  
25 risk of injury, physical injury to another.

1           Why can't we not, not interpret that to mean  
2 generic crime, but rather the particular crime of which  
3 this defendant stands convicted?

4           MR. MARCUS: Well, all that -- this law has  
5 been interpreted for many years. No courts of appeals  
6 have, have construed that it way. They have construed  
7 it to require a categorical approach. And then if you  
8 look at the structure of the provision, Congress clearly  
9 with respect to the listed offenses had in mind a sort  
10 of a categorical approach that, while these courts had,  
11 sort of looking at one of these crimes on an ex post  
12 basis, it might not present any risk, the idea that  
13 these crimes categorically present a potential -- a  
14 serious potential risk of physical injury.

15           JUSTICE GINSBURG: And would you agree,  
16 Mr. Marcus, that this Court's decision in Shepard  
17 excludes that interpretation? If you look at the  
18 particular crime?

19           MR. MARCUS: Well, I think the Court  
20 referred both in Taylor and Shepard to the -- to  
21 Congress's approach. And under the statute, that sort  
22 of that it wants you to take a categorical approach to  
23 crimes that are inherently presented --

24           JUSTICE SOUTER: Didn't we -- didn't we also  
25 go further and say one reason to construe it that way is



1 we don't want courts to have to be, in effect, having  
2 sort of subsidiary collateral trials after the fact, to  
3 establish -- you know -- the facts of old trials. There  
4 was an administrability analysis involved. I think  
5 there was. Yeah, I wrote Shepard. And I think that's  
6 what --

7 MR. MARCUS: There was that as well. And I  
8 don't think it is beyond the ability of courts to  
9 take a crime, look at the elements of the crime, figure  
10 out what conduct is necessary to satisfy those elements  
11 and then use common sense and experience to make a  
12 judgment about how that -- the risks that are posed by  
13 that conduct. Looking at the situation --

14 JUSTICE STEVENS: Mr. Marcus, isn't there  
15 this -- this linguistic problem with the statute anyway?  
16 Because this language if it said -- that sometimes  
17 presents a serious risk, then the answer would be  
18 obvious. If otherwise it said that characteristically  
19 presents a serious risk, then it might be closer. And  
20 which do you think is the more normal reading of it?

21 I think either is -- certainly fits the  
22 language.

23 MR. MARCUS: And either --

24 JUSTICE STEVENS: Either means sometimes  
25 presents a potential risk of physical injury, then

1 obviously they're all covered. Or if it says  
2 characteristically presents the risk, potential risk,  
3 then do you have to decide whether that, it is a  
4 characteristic of potential burglary that it -- that it  
5 does present this risk or that just once in a while it  
6 does.

7 MR. MARCUS: No. I think it's not -- no I  
8 think it has to, characteristically taken at a general  
9 level, the conduct required to commit a burglary, of  
10 getting --

11 JUSTICE STEVENS: If that were true, and if  
12 as your opponent said, that in actual burglaries there's  
13 only three percent of them actually involve risk to --  
14 of physical injury to another, then attempted burglary  
15 must necessarily be somewhat less than three percent. I  
16 would think that. Would that satisfy the characteristic  
17 requirement?

18 MR. MARCUS: I think it would. First of  
19 all, Congress --

20 JUSTICE STEVENS: Why is it two or three  
21 percent?

22 MR. MARCUS: The statistics he is referring  
23 to came out before Congress amended the statute in 1986  
24 and expanded it and specifically enumerated burglary as  
25 one of the crimes that it thought paradigmatically

1 presented a serious potential risk of injury.

2 JUSTICE STEVENS: Well, I don't think that's  
3 perfectly clear. The "otherwise" language does suggest  
4 that you are right. But if the statute instead of  
5 saying "otherwise" had said, "or involves other conduct  
6 that presents a serious risk," which I think is a  
7 permissible reading, perhaps not the best reading, but  
8 if it said that, then it is not -- you are not taking as  
9 a given the fact that the others satisfy the violent  
10 requirement but rather that they are eligible, whether  
11 or not they do.

12 MR. MARCUS: Well, this Court interpreted  
13 the statute that way in Taylor -- I mean, I'm sorry, on  
14 page -- on page 597 of Taylor. I mean this Court said  
15 that Congress's choice of language indicates that  
16 Congress thought ordinary burglaries as well as  
17 burglaries involving some aspect making them especially  
18 dangerous, presented a sufficiently serious potential  
19 risk to count toward enhancement. I mean, that's right  
20 in the Taylor decision, and I think that has got to be  
21 the correct reading of the statute. Because why did  
22 Congress identify -- they created two categories of  
23 violent felonies. The first is with respect to an  
24 element of the offense that goes to targeting a person  
25 for physical harm. The second category are those crimes

1 that don't necessarily target a person for physical harm  
2 but necessarily present, inherently present a risk of  
3 physical injury to a person.

4 JUSTICE SCALIA: That would be fine if  
5 burglary were the only thing that Congress said there,  
6 but it also said extortion. And I think it absolutely  
7 fanciful to believe that extortion characteristically --  
8 characteristically -- involves a risk of physical harm.  
9 I just don't think it does.

10 MR. MARCUS: Well, Congress identified it as  
11 a violent felony presumably because it believed it had  
12 -- it had the criteria.

13 JUSTICE SCALIA: Yes, but is the criterion  
14 "characteristically," or is the criterion whatever  
15 minimal risk of harm there is in extortion?

16 MR. MARCUS: Well, that it carries the  
17 potential risk, because when any -- when someone  
18 commits extortion there might be a tendency to -- if  
19 there --

20 JUSTICE SCALIA: Is the level of potential  
21 risk the level that exists in extortion? Right? That's  
22 what the otherwise refers you to.

23 MR. MARCUS: Yes. To the level of risk  
24 that's presented by any of the preceding examples.  
25 That's correct.

1 JUSTICE SOUTER: Maybe, the same point,  
2 isn't it reasonable to assume that the risk of harm in  
3 these attempt cases is characteristically going to be  
4 pretty close to zero? I mean, they're not in the house.  
5 They're just on the ladder, in the kind of examples  
6 we've been talking about.

7 MR. MARCUS: I don't agree, Your Honor. The  
8 statute directs you to consider the serious potential  
9 risk.

10 JUSTICE SOUTER: One way to do that is to  
11 say the potential risk is the potential for the risk of  
12 the harm that comes from the commission of the crime  
13 itself.

14 I mean, there is -- I don't want to overdo  
15 it, but the risk of harm to others from the -- from the  
16 step on the ladder is zero, if you consider simply the  
17 act itself of putting the ladder up against the building  
18 and taking the step. It's only because that creates the  
19 potential for getting inside where the risk, in fact, is  
20 measurable. I mean, we know there are cases in which  
21 victims get shot when they appear in the course of  
22 burglaries, but the risk associated with the mere  
23 attempt in isolation is going to be minuscule.

24 MR. MARCUS: When you're assessing the risk  
25 presented by particular conduct, I think you have to

1 take into account the intent that goes along with that  
2 conduct.

3 JUSTICE SOUTER: Oh, I agree with you. But  
4 the act that involved -- the act that constitutes the --  
5 that qualifies for the attempt doesn't involve it. I'm  
6 trying to help you here. I mean --

7 CHIEF JUSTICE ROBERTS: Don't believe it for  
8 a minute.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Why do you look at  
11 the risk of burglary and then view attempt as a sort of  
12 lesser included offense? I mean, attempts themselves  
13 have their own independent risk of physical injury.  
14 Obviously, if you've got a ladder up against the side of  
15 my house and you're halfway up and I come home, there's  
16 a risk of injury there, even though there's no --  
17 regardless of whether the person gets into the house or  
18 not.

19 And I think perhaps there's even a greater  
20 risk of potential -- greater potential risk of injury  
21 with respect to attempts because they don't succeed.  
22 Why don't they succeed? Because something interrupts  
23 them. And what interrupts them, it may well be the home  
24 owner. So I don't know that you have to look to sort of  
25 attempt as a lesser risk than the burglary itself.

1           MR. MARCUS: Well, Congress doesn't look to  
2 attempt as a lesser offense. We pointed out in our  
3 brief that the vast majority of provisions in the U.S.  
4 Criminal Code punish the attempt the same as for the  
5 completed offense. And if you think about the purpose  
6 of the ACCA, and the ACCA is not focused on the results  
7 of the prior crimes of the armed felon committed, it is  
8 focused on the risk, the propensity that somebody has,  
9 has demonstrated by engaging in at least three prior  
10 violent felonies or serious drug offenses to engage  
11 in behavior that is dangerous, that presents  
12 dangers to public safety. So if you think about the  
13 attempt and the whole concept of attempt, I mean, someone  
14 who has committed attempt by definition has intended to  
15 commit the offense and as you said, Mr. Chief Justice,  
16 has only failed by reason of an unforeseen event.  
17 Why would Congress in this statute want to differentiate  
18 between the frustrated burglar whose only -- who hasn't  
19 succeeded only by virtue of an unforeseen event, and the  
20 successful burglar? I think the serious potential risk  
21 language allows you to sort of look at the attempt as  
22 you said, Mr. Chief Justice, as virtually the  
23 equivalent --

24           CHIEF JUSTICE ROBERTS: I would suppose the  
25 unsuccessful burglar poses a greater risk of physical

1 injury than the successful burglar.

2 MR. MARCUS: Arguably. I mean, if you look  
3 at the case law, the vast majority of cases, the  
4 furthest out, the furthest case the Petitioner can find,  
5 the most extreme case that he's found involves someone  
6 who's in the backyard of a dwelling reconnoitering or  
7 casing the dwelling, and that was the most extreme  
8 example. So even with attempts, you find in all the  
9 case law, you do find the physical proximity to the  
10 premises.

11 And one of the main reasons it wouldn't  
12 succeed is because somebody, there's the presence of  
13 someone who frustrates the entry. So that even on that  
14 level, at that level, it is hard to say that there's any  
15 lower risk presented by the attempt.

16 JUSTICE SOUTER: Well, what do you say about  
17 your brother's argument that the statistics show there's  
18 a 3 percent chance, I think it was a 3 percent chance of  
19 violence in the course of committing the burglary? I  
20 take it there isn't any statistic available, if we want  
21 to take Justice Breyer's approach, about the  
22 potential -- the actual proven potential for violence at  
23 the near attempt stage.

24 MR. MARCUS: But again, I think -- I don't  
25 think you need to have those statistics.



1 JUSTICE SOUTER: No, I don't think you do  
2 either, but I mean, I think your whole argument has got  
3 to rest really on the potential for harm in the  
4 commission of the offense.

5 MR. MARCUS: That's the very reason that  
6 attempts are prohibited, because they present the  
7 serious potential to produce the harms that the  
8 completed offense presents.

9 JUSTICE STEVENS: Do I correctly understand,  
10 we don't need the statistics, I guess they're not  
11 available, but in your view if we did have statistics  
12 and they showed that in 1/10 of 1 percent of the  
13 category of crimes across the nation, there was this  
14 risk, that would be enough?

15 MR. MARCUS: For attempts?

16 JUSTICE STEVENS: Yes. Well, for attempts  
17 or complete -- I mean, just say the standard of what  
18 presents a serious potential risk of physical injury, if  
19 1/10 of 1 percent of the crimes -- whatever the  
20 category, did present such a risk, that would be  
21 sufficient under your view.

22 MR. MARCUS: Yes, I think Congress wanted to  
23 treat a frustrated burglar the same --

24 JUSTICE STEVENS: The answer is yes?

25 MR. MARCUS: Yes. They've shown the same

1 propensity to engage in the conduct that Congress was  
2 concerned about that falls at the heart of the statute.

3 JUSTICE STEVENS: So then it's a really easy  
4 case, because really there is some risk in every case.  
5 There's some risk that somebody will, you know, bump  
6 into somebody or give them a punch in the nose at least.

7 MR. MARCUS: But that's not what we're  
8 asking the Court here. We're asking the Court to look  
9 at the elements of the offense, and to look at the  
10 elements of the offense to see whether that creates a  
11 situation in which violence is likely to arise. Here  
12 you're talking about, this is attempted burglary of a  
13 dwelling where you have --

14 JUSTICE STEVENS: Yes, but none of the  
15 elements of the offense satisfy the risk of physical  
16 injury in the burglary case. You can have unarmed  
17 burglars.

18 MR. MARCUS: But in considering the conduct  
19 involved in the offense, the attempting to get, the  
20 attempt to enter a dwelling, enter someone's home,  
21 someone's residence, that creates a dynamic situation in  
22 which violence could occur --

23 JUSTICE STEVENS: Right. And as I  
24 understand your view --

25 MR. MARCUS: That doesn't --

1 JUSTICE STEVENS: If in 1/10 of 1 percent of  
2 the cases, there is in fact a physical confrontation,  
3 that's enough, which makes it a pretty easy case.

4 MR. MARCUS: Yes. But again, first of all,  
5 I don't think the statistics would show that. I don't  
6 think logically they would show that in light of the  
7 numbers that are shown for completed burglary. But  
8 again, I don't see -- with respect to the offenses that  
9 are covered that are at the core of the statute, I don't  
10 see why you would distinguish between the person who  
11 tried to get in but was frustrated by some unforeseen  
12 event. They have created the same set of risks, they've  
13 triggered the same set of risks that the successful  
14 burglar has.

15 JUSTICE ALITO: So in other words, you're  
16 saying that in measuring the risk, you should consider  
17 not just what this particular defendant succeeded in  
18 accomplishing, but what the defendant was attempting to  
19 accomplish?

20 MR. MARCUS: That's correct. I think the  
21 statute permits you to do that with its plain language  
22 of focusing on the potential risk of the conduct, the  
23 serious potential risk. And that -- and also in looking  
24 at the rationale for attempts and why we punish  
25 attempts, in terms of the person is, you get punished

1 for attempts because you sufficiently manifested your  
2 dangerousness in the same way as someone who's completed  
3 the offense. Again, the State codes, the vast majority  
4 of State codes demonstrate the riskiness of attempt  
5 behavior. They predicate felony murder convictions on  
6 attempted burglary as well as burglary. And as I said  
7 --

8 JUSTICE BREYER: What about attempted  
9 assault? I bet nobody has ever been hurt in an  
10 attempted assault.

11 MR. MARCUS: Well, I think, my understanding  
12 would be that would be covered under the first subsection  
13 for the use -- attempted use or threat, threatened use of  
14 force.

15 JUSTICE BREYER: All right. But it wouldn't  
16 fit within your -- I mean, I just wonder what happens  
17 when you try to get away from numbers. Maybe there are  
18 a certain number of people injured during mail fraud or  
19 embezzlement, you know, some people get annoyed during  
20 an embezzlement and start hitting each other.

21 I can't get away from the numbers.

22 MR. MARCUS: But there in those type  
23 offenses, if you look at the elements of the offense,  
24 there's no nexus between those elements and the -- a  
25 reaction that someone might have just to being

1 prosecuted. I mean, that's not --

2 JUSTICE BREYER: So what's the test? The  
3 test is either a high statistical number of injuries or  
4 if not, a nexus to a crime that does have a high  
5 statistical number of injuries? I like the word nexus  
6 because whenever I see it in an opinion, I have no idea  
7 what it means.

8 (Laughter.)

9 MR. MARCUS: Well, in this statute you're  
10 talking about career criminals, people who have  
11 committed a number of crimes and have recently just been  
12 convicted of being an armed felon. And I think  
13 that's -- when you look at -- that can be your starting  
14 point, and take -- so this case doesn't present  
15 questions about other cases that might present --  
16 arguably present, or present a serious risk of physical  
17 injury, but don't necessarily seem to fit with the  
18 crimes that are listed and what the crimes that Congress  
19 had in mind. I think that's another case. This case  
20 falls at the core of the statute; we're talking about  
21 someone who intends to commit the core crime Congress  
22 was talking about.

23 JUSTICE SOUTER: Mr. Marcus, assuming we  
24 accept your view about the way the statute should be  
25 read, I take it you agree that because of the curtilage

1 possibility under Florida law, that Florida law, that  
2 burglary in Florida is not a generic burglary?

3 MR. MARCUS: We haven't argued that it is  
4 generic burglary. That's correct.

5 JUSTICE SOUTER: I guess my -- so that leads  
6 me to this question, because -- I mean, I, my  
7 understanding is it's not a generic burglary.

8 Therefore, even on your reading of the  
9 statute, an attempted burglary in Florida doesn't  
10 necessarily satisfy the prong, and it's got to come in  
11 under the residuary clause, of course. And because  
12 there is a possibility that the only burglary charged  
13 was a burglary of the curtilage, we've got to -- don't  
14 we have to send the thing back to find out either from  
15 court records whether something more than a mere  
16 penetration of curtilage was involved here? And if so,  
17 whether -- whether that penetration carried with it the  
18 potential for harm?

19 MR. MARCUS: I mean, no. That's why you  
20 have the otherwise clause, to cover offenses just as  
21 this Court said in Taylor, that they weren't --

22 JUSTICE SOUTER: No, but the only thing we  
23 know under the otherwise clause, is that this was an  
24 attempt at burglary. If the burglary were a generic  
25 burglary, your analysis, if we accept it, would be the

1 end of the case.

2 MR. MARCUS: Yes.

3 JUSTICE SOUTER: But this is not a generic  
4 burglary. Therefore, we have to assume that the attempt  
5 in this case could have been nothing more than stepping  
6 across the grass, moving toward the fence, to lean over  
7 to take the apple. And therefore, don't we have to go  
8 to court records? In other words, don't we have to take  
9 advantage of the qualification in Shepard and Taylor  
10 before this case can finally be decided?

11 MR. MARCUS: No. I mean, you've identified  
12 an additional step that the Court has to consider in  
13 deciding the question in this case, but that step doesn't  
14 necessarily require you to go to court records. I mean,  
15 it's our position that even including the curtilage, the  
16 area, enclosed area immediately surrounding the dwelling  
17 presents a serious potential risk of physical injury

18 JUSTICE KENNEDY: Well, could you tell us  
19 what your position is if we choose to use the  
20 noncategorical or the modified categorical approach?  
21 Is there a nexus between what's in the presentence  
22 report and some other charging documents, or is it just  
23 in the presentencing report?

24 MR. MARCUS: Yes. The charging documents  
25 are not part of the record in this case. The record

1 right now is solely comprised of the presentence report.

2 JUSTICE SOUTER: And we don't have any  
3 transcript of colloquies with the court or anything like  
4 that?

5 MR. MARCUS: No.

6 JUSTICE STEVENS: Well, what about -- do you  
7 think the facts in the presentence report are admitted  
8 by your opponent or not?

9 MR. MARCUS: He didn't object to the facts  
10 in the presentence report. He also did not object --

11 JUSTICE STEVENS: Therefore, can we consider  
12 them?

13 MR. MARCUS: Yes.

14 JUSTICE STEVENS: So therefore, then the  
15 question is whether throwing the hammer through the  
16 window is sufficient; is that right?

17 MR. MARCUS: Well, that would resolve  
18 Justice Souter's question about whether it would involve  
19 the curtilage at all, which would show that there was an  
20 attempted physical entry into the residence.

21 JUSTICE STEVENS: Would you think that the  
22 hammer through the window is a decisive fact if we do  
23 look at the individual case?

24 MR. MARCUS: Well, we don't -- yes,  
25 certainly we think that any attempted burglary of a



1 dwelling presents a serious potential risk  
2 categorically. But if you didn't agree with that, then,  
3 and you thought that only a subset of attempted  
4 burglaries of dwellings would present serious potential  
5 risk, then clearly this offense here that would certainly  
6 satisfy any conception of that.

7 JUSTICE STEVENS: Because the hammer is  
8 thrown through the window, is that -- I just want to be  
9 sure I understand your view of the importance of the  
10 hammer.

11 MR. MARCUS: Because there was an attempted  
12 physical entry into the residence. The person was right  
13 on the threshold of the dwelling.

14 JUSTICE STEVENS: I'm still a little unclear  
15 as to how much significance we pay to that hammer.

16 MR. MARCUS: Again, we don't think you have  
17 to attribute any particular significance to that. I  
18 mean, it's our position that categorically this crime is  
19 covered. And again, the case law shows that there's --  
20 that with attempted burglary cases, there is a physical  
21 proximity to the dwelling, but even if there was --

22 JUSTICE GINSBURG: Even though there's some  
23 cases in this large category that clearly wouldn't  
24 involve any risk to anybody. Say the enterprising but  
25 careful burglar who keeps watch for several days to see

1 when no one is in the house, that that's when he chooses  
2 to make his entry.

3 MR. MARCUS: That's correct. You can always  
4 posit, under the categorical risk, you could always  
5 posit a specific nonthreatening hypothetical that  
6 equally applies to burglary as it does to attempted  
7 burglary. And so while you could posit a hypothetical  
8 where someone trying to get onto the curtilage might  
9 seem like it wouldn't present any injuries, if you think  
10 categorically about people who are trying to surmount,  
11 get over fences and walls to commit offenses in the  
12 dwelling or immediately around the dwelling, they're  
13 presenting the same sort of risk, and therefore the  
14 Court can conclude that it also -- within the otherwise  
15 clause, the burglary under Florida law is not so  
16 different from the kind of burglary that Congress had in  
17 mind that it would just drop out of the picture  
18 entirely. Armed felons who have the propensity to go  
19 into the curtilage of someone's home, to either go in  
20 the house or right around the house, present the very  
21 kind of risk that Congress was concerned about.

22 JUSTICE KENNEDY: Do you agree that this  
23 presentence report cannot be consulted under the  
24 reasoning of Shepard, we need more?

25 MR. MARCUS: Well, under Shepard, the

1 defendant in Shepard had objected to the use of police  
2 reports. My understanding is he also submitted an  
3 affidavit saying he didn't acknowledge the truth of  
4 anything in the police report. So I think this case is  
5 distinguishable in that there was no objection to the  
6 facts in the PSR and there was no objection  
7 specifically to using the police report as the source  
8 for those facts.

9 JUSTICE KENNEDY: You don't think the PSR  
10 has some kind of significance that the police report did  
11 not?

12 MR. MARCUS: It wouldn't, no. I don't think  
13 it would. But -- no.

14 JUSTICE SOUTER: Is the following sort of  
15 summary fair: Because Florida is not a generic burglary  
16 State, the mere conviction of burglary would not satisfy  
17 the burglary prong in subsection 2? But on your  
18 argument, even though Florida is not a generic burglary  
19 State, an attempted burglary will always satisfy the  
20 "otherwise" prong; is that correct?

21 MR. MARCUS: Argument --

22 JUSTICE SOUTER: Is that a fair statement of  
23 your argument?

24 MR. MARCUS: Yes. If the completed offense  
25 is a violent felony, the attempt to commit that offense

1 is also a violent felony. That's a fair statement of  
2 our position.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
4 Marcus.

5 MR. MARCUS: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Crawford, you  
7 have four minutes.

8 REBUTTAL ARGUMENT OF CRAIG L. CRAWFORD

9 ON BEHALF OF THE PETITIONER

10 MR. CRAWFORD: It seems to me that  
11 Respondent's position is taking the "otherwise" clause  
12 to trump the entire rest of the statute. Any crime, any  
13 felony, has a potential of violence. In fact, in  
14 footnote 9 of the reply brief we cited the Golden opinion  
15 from the Seventh Circuit and in that particular opinion  
16 the court found that serious potential risk for someone  
17 who failed to report to a jail because they speculate,  
18 you know, law enforcement might have to go and arrest  
19 them and there could be violence in that situation.  
20 Well, that happens in all crimes, the potential for law  
21 enforcement to arrest somebody. There's always a  
22 potential for violence.

23 So the Government's position --

24 CHIEF JUSTICE ROBERTS: It's different when  
25 you're dealing with an escapee or someone who has

1 visitation right and then doesn't report back and  
2 qualifies as a escaped felon from prison. That's quite  
3 a bit different from an arrest in a normal situation.

4 MR. CRAWFORD: But there's still the same  
5 potential for violence in either one of those.

6 CHIEF JUSTICE ROBERTS: No. There's a  
7 greater -- I had this case in the D.C. Circuit. There's  
8 a greater degree of potential when you're dealing with  
9 someone who's escaped from prison than with someone  
10 else who's being arrested. Of course there's always the  
11 potential, but the judgment was that there's a greater  
12 degree of potential when you're trying to apprehend  
13 someone who's escaped.

14 MR. CRAWFORD: For someone who's escaped.  
15 Golden wasn't dealing with that. Golden was dealing  
16 with someone who failed to report to a facility after  
17 being sentenced to do so. The same could be said for  
18 someone failing to report to a court for a hearing. A  
19 bench warrant is issued. The same type of risk would be  
20 inherent in that type of -- for that person as for  
21 someone who fails to report to a jail upon being  
22 sentenced.

23 All of those potential crimes, basically  
24 that would leave open any potential felony to qualify  
25 under the "otherwise" prong. Congress obviously

1 couldn't have intended that.

2           Moreover, there's still an issue that was  
3 brought up in Shepard on the constitutional avoidance.  
4 How do we actually make these determinations and are  
5 these necessarily determinations that were found by the  
6 Florida court or by the Florida system for a Florida  
7 attempted burglary conviction? We submit it's not.

8           And you're going beyond the mere fact of the  
9 prior conviction. You're looking at many other  
10 components, the risk of the conviction, which is not the  
11 same thing as the mere fact of the prior conviction.

12           If there are no further questions --

13           CHIEF JUSTICE ROBERTS: Thank you,  
14 Mr. Crawford.

15           The case is submitted.

16           (Whereupon, at 11:02 a.m., the case in the  
17 above-entitled matter was submitted.)

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<b>A</b>				
<b>ability</b> 18:16 33:8	37:7 38:3 45:25 49:2 50:22	23:1 32:7,10 32:21,22 40:21 47:20	39:14,21 40:15 40:23 42:20 44:4 46:24 47:4 51:25	46:14 53:1 <b>backyard</b> 40:6 <b>based</b> 8:18 25:20
<b>able</b> 13:3 18:17 20:20	<b>ahead</b> 17:7 <b>aiming</b> 30:25 <b>ALITO</b> 4:22 5:9	<b>approaching</b> 13:5 <b>area</b> 27:3,12 28:14,21,23 29:2 47:16,16	<b>attempted</b> 3:15 4:23 5:6,15,16 5:18 7:15,22 8:22 10:16,17 11:4,16,25 12:16 13:24 14:7,16 15:6 16:23 18:11 19:4,15,19 20:1 22:3,3,7,8 22:12,15 23:12 23:14,17,23 24:9,12 25:3 25:18 26:2,8 26:17 29:13 30:7 31:3,17 34:14 42:12 44:6,8,10,13 46:9 48:20,25 49:3,11,20 50:6 51:19 54:7	<b>basically</b> 3:21 22:20 25:21 53:23 <b>basis</b> 7:20,22 32:12 <b>bear</b> 9:4 <b>behalf</b> 1:16,19 2:4,7,10 3:7 24:25 52:9 <b>behavior</b> 39:11 44:5 <b>believe</b> 18:4 23:10 27:22 36:7 38:7 <b>believed</b> 36:11 <b>bench</b> 53:19 <b>best</b> 19:9,10 25:22 29:21 35:7 <b>bet</b> 44:9 <b>better</b> 18:22 <b>beyond</b> 12:11 33:8 54:8 <b>bit</b> 29:9 53:3 <b>block</b> 13:14 <b>blocks</b> 29:11 <b>borderline</b> 18:19 19:7 <b>break</b> 14:5 <b>BREYER</b> 12:12 13:4 17:7 18:6 19:2 29:7,17 30:5,14,19 44:8,15 45:2 <b>Breyer's</b> 40:21 <b>brief</b> 3:19 10:1 15:23,24 27:1 39:3 52:14 <b>briefly</b> 24:4 <b>bring</b> 4:9 <b>broad</b> 4:8 <b>brother's</b> 25:10 40:17
<b>above-entitled</b> 1:11 54:17	23:2,9 28:2 43:15	<b>arguably</b> 40:2 45:16 <b>argued</b> 46:3 <b>argument</b> 1:12 2:2,5,8 3:3,6 4:7 8:4,9,14 24:24 40:17 41:2 51:18,21 51:23 52:8 <b>armed</b> 3:12 4:10 19:16 20:2,5 25:5 39:7 45:12 50:18 <b>arrest</b> 52:18,21 53:3 <b>arrested</b> 53:10 <b>arson</b> 9:6,9 15:10 16:7 20:10 22:3,8 <b>asked</b> 22:19,19 <b>asking</b> 42:8,8 <b>aspect</b> 35:17 <b>assault</b> 44:9,10 <b>assessing</b> 37:24 <b>Assistant</b> 1:15 1:17 <b>associated</b> 27:13 37:22 <b>assume</b> 37:2 47:4 <b>assuming</b> 45:23 <b>attempt</b> 6:24 9:1 10:20 11:12 12:4 13:10,16 17:24 23:20 24:9 25:11,11 25:19 37:3,23 38:5,11,25 39:2,4,13,13	<b>attempting</b> 24:7 24:11 42:19 43:18 <b>attempts</b> 9:3,4 10:12 14:10 22:2 38:12,21 40:8 41:6,15 41:16 43:24,25 44:1 <b>attention</b> 31:6 <b>attribute</b> 49:17 <b>available</b> 30:4 40:20 41:11 <b>avoidance</b> 54:3 <b>a.m</b> 1:13 3:2 54:16	<b>ALPHONSO</b> 1:3 <b>alternative</b> 19:10 <b>amended</b> 28:10 34:23 <b>analysis</b> 8:4,10 8:23 11:21 13:18,18 16:20 33:4 46:25 <b>analyze</b> 7:19,22 <b>annoyed</b> 44:19 <b>answer</b> 14:19 19:3,6 24:4 25:10,22 33:17 41:24 <b>answers</b> 22:18 <b>anybody</b> 12:12 49:24 <b>anyway</b> 33:15 <b>apologize</b> 10:3 <b>appeals</b> 27:6 32:5 <b>appear</b> 37:21 <b>APPEARAN...</b> 1:14 <b>apple</b> 47:7 <b>apples</b> 26:14 <b>applies</b> 50:6 <b>apply</b> 20:14 22:24 28:4 <b>apprehend</b> 53:12 <b>approach</b> 3:13 4:1,3,16 20:25 21:1,13 22:22
<b>absence</b> 18:17 18:21	<b>alleged</b> 23:11 <b>allows</b> 39:21 <b>alluded</b> 23:22			
<b>absolutely</b> 36:6 <b>absurd</b> 27:18				
<b>ACCA</b> 39:6,6				
<b>accept</b> 45:24 46:25				
<b>accommodate</b> 10:12				
<b>accompanied</b> 19:5				
<b>accompanies</b> 18:10				
<b>accomplish</b> 43:19				
<b>accomplishing</b> 12:9 43:18				
<b>account</b> 31:9 38:1				
<b>acknowledge</b> 51:3				
<b>act</b> 3:12,13 4:10 5:7 12:3,10 13:19,19,23 23:25 24:1,6 25:5,13 26:23 37:17 38:4,4				
<b>action</b> 14:10				
<b>activities</b> 27:14				
<b>actual</b> 34:12 40:22				
<b>additional</b> 47:12				
<b>administrabili...</b> 33:4				
<b>admit</b> 30:8				
<b>admitted</b> 48:7				
<b>advantage</b> 47:9				
<b>affidavit</b> 51:3				
<b>affirmative</b> 12:9				
<b>agree</b> 25:9 32:15				
			<b>B</b>	
			<b>B</b> 10:15 <b>back</b> 9:11 14:24 21:11 22:17	

<p><b>brought</b> 54:3  <b>building</b> 24:13  37:17  <b>bump</b> 42:5  <b>bureaus</b> 29:22  <b>burglar</b> 5:9  39:18,20,25  40:1 41:23  43:14 49:25  <b>burglaries</b> 5:15  5:16 11:25  12:24,24 15:2  19:4,4 30:8  34:12 35:16,17  37:22 49:4  <b>burglars</b> 42:17  <b>burglary</b> 3:15  4:23 5:2,3,6,18  5:24 6:6,11,13  6:17,19,21  7:15,23 8:22  9:6,9 11:4,5,7  11:8,8,12,16  12:5,9,16,16  13:12,24 14:1  14:7,16 15:5,6  15:10,16,25  16:6,23 17:1,2  17:16,17 18:11  19:15,19 20:1  20:5,6,10,18  21:16 23:12,14  23:17,19,24  24:10,12 25:4  25:6,18 26:8  26:17 27:20,23  28:19 29:5,14  29:14 30:20  31:3,18 34:4,9  34:14,24 36:5  38:11,25 40:19  42:12,16 43:7  44:6,6 46:2,2,4  46:7,9,12,13  46:24,24,25  47:4 48:25  49:20 50:6,7</p>	<p>50:15,16 51:15  51:16,17,18,19  54:7  <b>burglar's</b> 13:22  <b>bushes</b> 6:4 29:9  <b>business</b> 14:2,5</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C</b> 2:1 3:1  <b>call</b> 7:16 11:20  <b>called</b> 14:2  <b>car</b> 14:1  <b>career</b> 3:12 4:10  18:24 19:14,16  19:20,25 20:3  20:4,6 25:5  45:10  <b>careful</b> 49:25  <b>carport</b> 28:4,6  <b>carports</b> 28:3,12  <b>carried</b> 46:17  <b>carries</b> 36:16  <b>case</b> 11:23 13:3  15:3 18:19  19:7 20:19  21:14 22:11  23:22 26:25  27:4,7,9 28:11  28:17,18,18,20  29:24,24 40:3  40:4,5,9 42:4,4  42:16 43:3  45:14,19,19  47:1,5,10,13  47:25 48:23  49:19 51:4  53:7 54:15,16  <b>cases</b> 12:17  25:18 27:5  28:3 37:3,20  40:3 43:2  45:15 49:20,23  <b>casings</b> 13:12,22  40:7  <b>cast</b> 28:18  <b>categorical</b> 3:13  4:3 20:25</p>	<p>22:22 23:1  32:7,10,22  47:20 50:4  <b>categorically</b>  11:24 22:24  25:6 27:25  29:4 32:13  49:2,18 50:10  <b>categories</b> 35:22  <b>category</b> 16:17  20:11,15 21:4  21:6 31:19  35:25 41:13,20  49:23  <b>caught</b> 5:16  <b>causes</b> 16:15  <b>certain</b> 44:18  <b>certainly</b> 19:22  33:21 48:25  49:5  <b>chance</b> 40:18,18  <b>characteristic</b>  34:4,16  <b>characteristic...</b>  33:18 34:2,8  36:7,8,14 37:3  <b>characterizati...</b>  25:17  <b>charge</b> 8:12  <b>charged</b> 46:12  <b>charging</b> 8:22  21:18 47:22,24  <b>Chief</b> 3:3,8 5:23  6:8 10:21,25  11:10 12:2,8  16:25 17:13  18:2 21:25  24:21 25:1  38:7,10 39:15  39:22,24 52:3  52:6,24 53:6  54:13  <b>choice</b> 35:15  <b>choose</b> 47:19  <b>chooses</b> 50:1  <b>Circuit</b> 17:4,8  18:3,5 23:15</p>	<p>52:15 53:7  <b>Circuit's</b> 3:10  <b>circumstances</b>  31:16,20  <b>cited</b> 28:18  52:14  <b>city</b> 29:7,11  <b>clause</b> 3:11 4:17  21:11 28:1  46:11,20,23  50:15 52:11  <b>clear</b> 5:2 7:18  15:11 35:3  <b>clearly</b> 32:8 49:5  49:23  <b>client</b> 8:5  <b>climb</b> 5:11  <b>climbing</b> 5:10  5:18  <b>close</b> 11:9 29:24  37:4  <b>closed</b> 14:3  <b>closer</b> 7:16  11:20,23 18:9  33:19  <b>cocaine</b> 4:11,18  <b>coconspirator</b>  17:15  <b>Code</b> 39:4  <b>codes</b> 44:3,4  <b>cogitating</b> 18:18  31:2  <b>collateral</b> 33:2  <b>colloquies</b> 48:3  <b>colloquy</b> 23:4,6  <b>come</b> 22:7 38:15  46:10  <b>comes</b> 37:12  <b>coming</b> 19:11  <b>commission</b>  18:15,21,24  19:25 37:12  41:4  <b>commit</b> 17:1,5  25:12 34:9  39:15 45:21  50:11 51:25</p>	<p><b>commits</b> 36:18  <b>committed</b> 16:1  39:7,14 45:11  <b>committing</b>  40:19  <b>common</b> 3:23  4:19 31:10  33:11  <b>complete</b> 41:17  <b>completed</b> 15:1  15:5 39:5 41:8  43:7 44:2  51:24  <b>components</b>  54:10  <b>comprised</b> 48:1  <b>computer</b> 18:8  <b>concede</b> 22:4  <b>concept</b> 6:2 27:3  27:6,17 28:14  28:23 31:12  39:13  <b>conception</b> 49:6  <b>concerned</b> 22:15  42:2 50:21  <b>conclude</b> 25:24  27:24 28:25  50:14  <b>conclusion</b>  19:12,14  <b>concretely</b> 13:21  <b>conduct</b> 4:5,24  5:13 9:10 16:8  20:12 25:7  31:24 33:10,13  34:9 35:5  37:25 38:2  42:1,18 43:22  <b>confront</b> 3:10  <b>confrontation</b>  43:2  <b>Congress</b> 4:13  10:14 16:2  17:11 27:23  29:5 30:3,16  31:6 32:8  34:19,23 35:16</p>
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<p>35:22 36:5,10 39:1,17 41:22 42:1 45:18,21 50:16,21 53:25 <b>Congress's</b> 31:5 32:21 35:15 <b>consider</b> 31:5 37:8,16 43:16 47:12 48:11 <b>considered</b> 20:9 27:11 28:12,16 <b>considering</b> 42:18 <b>conspiracy</b> 17:1 17:4,24,24,25 18:5 <b>constitute</b> 13:16 <b>constitutes</b> 38:4 <b>constitutional</b> 54:3 <b>construe</b> 27:17 27:18 32:25 <b>construed</b> 27:2 27:6 32:6,6 <b>consulted</b> 50:23 <b>convict</b> 14:7 <b>convicted</b> 20:17 31:21 32:3 45:12 <b>conviction</b> 3:20 7:15 12:15 25:3 51:16 54:7,9,10,11 <b>convictions</b> 3:15 3:16 4:2,5 12:16 44:5 <b>core</b> 43:9 45:20 45:21 <b>correct</b> 8:24 12:7 21:19,22 24:18 30:19 35:21 36:25 43:20 46:4 50:3 51:20 <b>correctly</b> 8:15 41:9 <b>count</b> 12:13,21</p>	<p>18:13 35:19 <b>couple</b> 27:5 <b>course</b> 14:24 37:21 40:19 46:11 53:10 <b>court</b> 1:1,12 3:9 3:14,22,25 4:3 5:2 11:21 14:20 15:1 18:20 20:2 21:1,10,13 22:19 23:5,15 25:2 27:15,16 28:20 32:19 35:12,14 42:8 42:8 46:15,21 47:8,12,14 48:3 50:14 52:16 53:18 54:6 <b>courts</b> 4:8 27:5 27:6 30:4 31:8 32:5,10 33:1,8 <b>Court's</b> 7:6 14:25 32:16 <b>cover</b> 46:20 <b>covered</b> 15:14 17:15 22:4 34:1 43:9 44:12 49:19 <b>covers</b> 5:24 <b>CRAIG</b> 1:15 2:3 2:9 3:6 52:8 <b>Crawford</b> 1:15 2:3,9 3:5,6,8 5:1,13 6:1,13 7:5,9,14,25 8:16,24 9:17 9:22,25 10:7 10:13,23 11:3 11:15 12:7,10 13:17,25 14:18 15:22 16:4,20 17:3,8,21 18:4 18:23 19:13 20:8,23 21:5 21:10,19,22</p>	<p>22:6,17 23:2,6 23:10,18 24:3 24:11,18,20,22 52:6,8,10 53:4 53:14 54:14 <b>create</b> 8:6,19 <b>created</b> 7:2,11 35:22 43:12 <b>creates</b> 37:18 42:10,21 <b>creating</b> 8:7,12 <b>crime</b> 4:9 9:13 13:10,24 15:16 16:17 17:1 20:16 25:6,6 31:11,16,20,22 32:2,2,18 33:9 33:9 37:12 45:4,21 49:18 52:12 <b>crimes</b> 4:6 9:6,9 9:11,14,19 10:16 15:11,14 15:20,21,25 16:14,16 17:11 17:12 19:5 20:9 22:2,6,7 30:17,23 32:11 32:13,23 34:25 35:25 39:7 41:13,19 45:11 45:18,18 52:20 53:23 <b>criminal</b> 3:12 4:10 19:16 20:3,6 25:5 31:8 39:4 <b>criminals</b> 45:10 <b>criteria</b> 36:12 <b>criterion</b> 36:13 36:14 <b>current</b> 28:9,9 <b>curtilage</b> 5:25 6:1,2,19 24:2,9 24:12,14,17 25:13,19 26:2 27:1,2,7,12</p>	<p>28:14,17 45:25 46:13,16 47:15 48:19 50:8,19</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 3:1 <b>dangerous</b> 9:8 9:14 16:16,18 16:24 22:13,16 29:4,19 30:7 35:18 39:11 <b>dangerousness</b> 44:2 <b>dangers</b> 39:12 <b>days</b> 49:25 <b>dealing</b> 19:14,19 22:22 52:25 53:8,15,15 <b>dealt</b> 19:18 <b>decide</b> 13:3 14:9 14:15 30:6 34:3 <b>decided</b> 20:14 47:10 <b>decides</b> 21:13 <b>deciding</b> 47:13 <b>decision</b> 14:25 25:24 32:16 35:20 <b>decisive</b> 48:22 <b>defeats</b> 22:25 <b>defendant</b> 5:8 7:20 20:16 31:21 32:3 43:17,18 51:1 <b>Defender</b> 1:16 <b>defined</b> 11:8,8 24:13,16 27:1 28:25 <b>defines</b> 15:18 27:23 <b>defining</b> 11:9 <b>definition</b> 6:12 39:14 <b>degree</b> 14:15,16 53:8,12 <b>deleted</b> 10:19,21</p>	<p><b>deleting</b> 11:1 <b>demonstrate</b> 44:4 <b>demonstrated</b> 39:9 <b>Department</b> 1:18 <b>determinations</b> 54:4,5 <b>determine</b> 3:20 3:23 <b>determined</b> 17:4 17:9 28:20 <b>determines</b> 4:19 <b>determining</b> 4:2 <b>diagram</b> 13:25 <b>difference</b> 21:15 <b>different</b> 11:1 17:25 19:1 27:25 50:16 52:24 53:3 <b>differentiate</b> 39:17 <b>difficult</b> 14:19 28:25 <b>dimensions</b> 13:10 <b>directed</b> 31:6 <b>directs</b> 37:8 <b>disagree</b> 25:15 <b>discussed</b> 27:1 <b>discusses</b> 27:5 <b>disregard</b> 31:13 <b>distance</b> 27:8,10 <b>distinct</b> 24:1 25:13 <b>distinguish</b> 43:10 <b>distinguishable</b> 51:5 <b>distribution</b> 4:15 <b>district</b> 3:22 14:20 23:15 <b>documents</b> 21:18 47:22,24 <b>doing</b> 20:22</p>
--	---	--	---	---

<p><b>door</b> 17:18  <b>doubt</b> 22:1  28:18 29:17  <b>driveway</b> 28:19  28:21  <b>driving</b> 14:3,4  <b>drop</b> 50:17  <b>drug</b> 4:13 39:10  <b>drugs</b> 4:15  <b>dwelling</b> 5:5,22  5:22 6:16,18  20:5,7 23:25  24:7,13,16,16  25:4,14 26:13  27:4,8,10,13  27:14 28:12,24  29:3 40:6,7  42:13,20 47:16  49:1,13,21  50:12,12  <b>dwelling</b>s 49:4  <b>dynamic</b> 42:21  <b>D.C</b> 1:8,18 53:7</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>e</b> 2:1 3:1,1 10:15  <b>easier</b> 20:19,19  31:15  <b>easy</b> 42:3 43:3  <b>economics</b> 12:20  <b>effect</b> 33:1  <b>either</b> 15:22  17:24 23:25  29:2 33:21,23  33:24 41:2  45:3 46:14  50:19 53:5  <b>element</b> 10:17  11:19 12:1  22:9 35:24  <b>elemental</b> 4:1  <b>elements</b> 4:5  20:10 21:2  33:9,10 42:9  42:10,15 44:23  44:24  <b>Eleventh</b> 3:10</p>	<p>17:4,8 18:3,4  23:15  <b>eligible</b> 35:10  <b>embezzlement</b>  44:19,20  <b>enables</b> 31:21  <b>enacted</b> 11:6  30:3  <b>enacting</b> 31:5  <b>enclosed</b> 6:3,5  27:3 28:15,15  28:21 29:16  47:16  <b>enclosure</b> 6:4  28:23  <b>enforcement</b>  52:18,21  <b>engage</b> 39:10  42:1  <b>engaging</b> 39:9  <b>enhancement</b>  14:22 35:19  <b>enter</b> 24:7,12  42:20,20  <b>entered</b> 5:8,8  <b>entering</b> 6:16,18  23:25 25:13,14  <b>enterprising</b>  49:24  <b>enters</b> 5:4,5,21  <b>entire</b> 52:12  <b>entirely</b> 50:18  <b>entry</b> 24:9 26:2  40:13 48:20  49:12 50:2  <b>enumerated</b>  4:13 5:2 9:19  10:16 16:3  17:5,11 34:24  <b>enunciate</b> 3:21  <b>enunciated</b> 3:19  3:25 4:4 6:14  <b>equally</b> 50:6  <b>equivalent</b>  39:23  <b>escaped</b> 53:2,9  53:13,14</p>	<p><b>escapee</b> 52:25  <b>especially</b> 35:17  <b>ESQ</b> 1:15,17 2:3  2:6,9 3:6  <b>establish</b> 33:3  <b>event</b> 39:16,19  43:12  <b>everyday</b> 4:19  <b>evidence</b> 24:3  <b>ex</b> 32:11  <b>example</b> 13:11  26:13 40:8  <b>examples</b> 15:10  15:11,20,21  30:17 36:24  37:5  <b>exceeding</b> 31:23  <b>exclude</b> 13:12  <b>excludes</b> 32:17  <b>exists</b> 36:21  <b>expanded</b> 34:24  <b>expected</b> 30:3  <b>experience</b> 3:23  4:19 31:10  33:11  <b>explicitly</b> 3:17  <b>explosives</b> 9:10  16:7 22:4,13  22:15  <b>extortion</b> 9:7,8,9  9:15,17 14:17  15:10,25 16:7  16:19 22:13,16  30:20,25 36:6  36:7,15,18,21  <b>extreme</b> 40:5,7</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>facility</b> 53:16  <b>fact</b> 18:14 28:17  33:2 35:9  37:19 43:2  48:22 52:13  54:8,11  <b>facts</b> 8:2 13:1  21:14,15,17,23  23:3,11,13</p>	<p>31:15,19 33:3  48:7,9 51:6,8  <b>factual-based</b>  21:13  <b>fact-based</b> 5:14  22:21,25  <b>failed</b> 39:16  52:17 53:16  <b>failing</b> 53:18  <b>fails</b> 53:21  <b>fair</b> 51:15,22  52:1  <b>fall</b> 28:1  <b>falls</b> 42:2 45:20  <b>fanciful</b> 36:7  <b>far</b> 5:15 18:7  22:14 27:11  <b>favors</b> 8:10  <b>Federal</b> 1:15  <b>feels</b> 19:25  <b>feet</b> 28:5  <b>felon</b> 39:7 45:12  53:2  <b>felonies</b> 35:23  39:10  <b>felons</b> 50:18  <b>felony</b> 4:9,12  25:5 31:22  36:11 44:5  51:25 52:1,13  53:24  <b>fence</b> 6:4 26:4,6  26:7,12 28:15  29:10 47:6  <b>fenced</b> 28:5  <b>fences</b> 29:11  50:11  <b>figure</b> 12:22  14:14 16:21  33:9  <b>finally</b> 47:10  <b>find</b> 12:15 13:1  19:2,7 40:4,8,9  46:14  <b>fine</b> 17:14 36:4  <b>first</b> 3:4 6:22 7:8  27:21 30:12</p>	<p>34:18 35:23  43:4 44:12  <b>fit</b> 44:16 45:17  <b>fits</b> 33:21  <b>five-year</b> 4:12  <b>Fla</b> 1:16  <b>Florida</b> 3:14  4:12 5:6,23 6:2  6:7,14,17 12:4  12:15 13:10,16  14:6 17:3  22:11 23:20,23  24:10,11 25:4  25:12,22 26:8  26:25 27:1,5  27:14,14,15,23  28:3 29:14  46:1,1,2,9  50:15 51:15,18  54:6,6,6  <b>Florida's</b> 28:14  <b>focused</b> 39:6,8  <b>focusing</b> 43:22  <b>follow</b> 18:20  <b>following</b> 51:14  <b>follows</b> 23:24  <b>footnote</b> 52:14  <b>force</b> 9:5 10:18  44:14  <b>found</b> 28:19  40:5 52:16  54:5  <b>four</b> 9:17 17:11  30:17 52:7  <b>frankly</b> 18:7  <b>fraud</b> 44:18  <b>friend</b> 12:3  <b>front</b> 29:10  <b>frustrated</b> 39:18  41:23 43:11  <b>frustrates</b> 40:13  <b>fulfilling</b> 12:4  <b>further</b> 32:25  54:12  <b>furthest</b> 40:4,4</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/>
--	--	--	---	--

<p><b>G</b> 3:1  <b>garden</b> 28:7  <b>Garner</b> 15:1  <b>general</b> 1:18  34:8  <b>generic</b> 4:23 5:3  23:19 27:23  32:2 46:2,4,7  46:24 47:3  51:15,18  <b>generically</b> 7:22  9:2 11:13 20:9  20:14,15 31:17  <b>getting</b> 6:22 7:3  8:1 22:17  23:21 26:6  34:10 37:19  <b>GINSBURG</b>  13:2,9,21  32:15 49:22  <b>give</b> 26:20 42:6  <b>given</b> 35:9  <b>giving</b> 15:19  <b>go</b> 12:20 17:7  22:24 32:25  47:7,14 50:18  50:19 52:18  <b>goes</b> 29:11 35:24  38:1  <b>going</b> 6:5 9:2  13:2 14:5  21:12 27:16,17  37:3,23 54:8  <b>Golden</b> 52:14  53:15,15  <b>Government</b>  16:21,22 29:21  29:23,25  <b>Government's</b>  4:7,16 9:25  15:23 52:23  <b>grass</b> 47:6  <b>greater</b> 38:19,20  39:25 53:7,8  53:11  <b>guess</b> 6:2 9:7  14:9 41:10</p>	<p>46:5  <b>guidance</b> 30:16  <b>guideline</b> 19:1  19:21 20:1  <b>guidelines</b> 18:25  <b>guilty</b> 6:17  13:24</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>halfway</b> 38:15  <b>Hamilton</b> 26:25  28:17  <b>hammer</b> 48:15  48:22 49:7,10  49:15  <b>happens</b> 29:19  44:16 52:20  <b>hard</b> 16:21  31:18 40:14  <b>harm</b> 7:2 12:14  12:17 15:11  26:22 35:25  36:1,8,15 37:2  37:12,15 41:3  46:18  <b>harmed</b> 12:18  <b>harms</b> 41:7  <b>harsh</b> 27:18  <b>health</b> 22:16  <b>hear</b> 3:3  <b>hearing</b> 53:18  <b>heart</b> 42:2  <b>held</b> 20:8,11  27:7  <b>help</b> 38:6  <b>high</b> 9:14 14:16  45:3,4  <b>hitting</b> 44:20  <b>hoe</b> 26:21  <b>home</b> 38:15,23  42:20 50:19  <b>Honor</b> 5:1 26:24  37:7  <b>hope</b> 19:11  <b>hours</b> 18:9  <b>house</b> 5:25 6:3  11:6,12,19</p>	<p>12:1,6 13:13  14:1,13 20:18  26:4 27:9,10  29:12 37:4  38:15,17 50:1  50:20,20  <b>houses</b> 29:9  <b>hurt</b> 12:25 19:6  44:9  <b>hypothetical</b>  50:5,7</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> 32:12 45:6  <b>identified</b> 6:11  36:10 47:11  <b>identify</b> 35:22  <b>ii</b> 10:15  <b>imagine</b> 19:6  <b>immediately</b>  27:4,12 28:24  47:16 50:12  <b>implicitly</b> 3:17  <b>importance</b> 49:9  <b>imprisonment</b>  31:23  <b>include</b> 10:23  19:15,19 20:1  24:16  <b>included</b> 4:10  38:12  <b>including</b> 47:15  <b>increase</b> 19:22  <b>increases</b> 19:20  <b>independent</b>  38:13  <b>indicate</b> 21:16  <b>indicates</b> 35:15  <b>indictment</b> 8:11  21:18  <b>individual</b> 19:5  48:23  <b>individuals</b>  15:12  <b>information</b>  18:22  <b>inherent</b> 53:20</p>	<p><b>inherently</b> 3:17  32:23 36:2  <b>initial</b> 14:10  <b>injured</b> 44:18  <b>injuries</b> 45:3,5  50:9  <b>injury</b> 3:18 4:21  4:25 8:20  11:14 14:23  15:12,17,21  16:1 17:20  18:10 20:13,21  22:10,14 25:8  31:25,25 32:14  33:25 34:14  35:1 36:3  38:13,16,20  40:1 41:18  42:16 45:17  47:17  <b>inquiry</b> 5:14  22:21,25  <b>inside</b> 5:22  37:19  <b>instance</b> 4:11  30:6  <b>intended</b> 39:14  54:1  <b>intending</b> 29:2  <b>intends</b> 45:21  <b>intent</b> 5:11  13:19 26:6,11  38:1  <b>interpret</b> 32:1  <b>interpretation</b>  3:11 4:16  18:20 32:17  <b>interpreted</b>  21:12 32:5  35:12  <b>interpreting</b>  18:24  <b>interrupts</b> 38:22  38:23  <b>intimate</b> 27:13  <b>involve</b> 3:16  4:24 5:12</p>	<p>14:10,12 15:11  15:13,20 26:1  28:3 31:1  34:13 38:5  48:18 49:24  <b>involved</b> 4:15  12:17,23 25:19  33:4 38:4  42:19 46:16  <b>involves</b> 9:10  16:7,8,14  17:19 20:12  25:7 31:24  35:5 36:8 40:5  <b>involving</b> 25:18  35:17  <b>irrelevant</b> 22:23  <b>isolation</b> 37:23  <b>issue</b> 23:21 54:2  <b>issued</b> 53:19</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>jail</b> 52:17 53:21  <b>James</b> 1:3 3:4  8:18 21:14  <b>JONATHAN</b>  1:17 2:6 24:24  <b>Jones</b> 23:22  <b>JR</b> 1:3  <b>judge</b> 3:22,22  4:18 31:10  <b>judgment</b> 33:12  53:11  <b>juries</b> 31:9  <b>Justice</b> 1:18 3:3  3:8 4:22 5:9,23  6:8,20 7:7,10  7:19 8:3,21,25  9:20,23 10:5,8  10:21,25 11:10  12:2,8,12 13:2  13:4,6,9,21  14:9 15:8 16:4  16:25 17:7,13  18:2,6 19:2  20:8 21:3,7,17  21:20,25 22:12</p>
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<p>22:19 23:2,9 23:18 24:8,15 24:19,21 25:1 25:9,21 26:3 26:10,16,20 28:2 29:7,17 30:5,14,19 31:14 32:15,24 33:14,24 34:11 34:20 35:2 36:4,13,20 37:1,10 38:3,7 38:10 39:15,22 39:24 40:16,21 41:1,9,16,24 42:3,14,23 43:1,15 44:8 44:15 45:2,23 46:5,22 47:3 47:18 48:2,6 48:11,14,18,21 49:7,14,22 50:22 51:9,14 51:22 52:3,6 52:24 53:6 54:13</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>keep</b> 13:6 <b>keeping</b> 27:19 <b>keeps</b> 49:25 <b>KENNEDY</b> 21:17,20 47:18 50:22 51:9 <b>kind</b> 3:25 4:9 6:3 8:7 14:10 19:3 21:16 22:25 29:4 37:5 50:16,21 51:10 <b>knock</b> 10:3 <b>know</b> 8:15 10:9 12:13,21,22,24 13:9 14:5 16:13 18:6,12 25:21 26:13 29:18 30:7,9</p>	<p>31:3,17 33:3 37:20 38:24 42:5 44:19 46:23 52:18 <b>knowing</b> 18:9</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>L</b> 1:15,17 2:3,6 2:9 3:6 24:24 52:8 <b>ladder</b> 5:10,18 6:5,22,23 7:13 7:14,21 8:6,17 11:11,13,18,25 14:12 17:18,18 20:17 37:5,16 37:17 38:14 <b>language</b> 8:18 18:7,18 31:21 33:16,22 35:3 35:15 39:21 43:21 <b>large</b> 49:23 <b>late</b> 21:7 <b>Laughter</b> 13:8 38:9 45:8 <b>law</b> 12:4,19,19 13:16 14:7 21:8 23:23 24:10,11 25:4 25:12,22 26:8 30:3 31:8 32:4 40:3,9 46:1,1 49:19 50:15 52:18,20 <b>lawn</b> 26:5 29:9 <b>laying</b> 20:17 <b>lead</b> 8:4 <b>leads</b> 46:5 <b>lean</b> 47:6 <b>leave</b> 53:24 <b>left</b> 29:18 <b>legal</b> 11:17 <b>legions</b> 21:8 <b>lesser</b> 38:12,25 39:2 <b>letter</b> 30:21</p>	<p><b>let's</b> 28:5 <b>level</b> 34:9 36:20 36:21,23 40:14 40:14 <b>life</b> 19:23 <b>light</b> 43:6 <b>limit</b> 27:3 <b>limited</b> 29:1 <b>line</b> 17:14 <b>linguistic</b> 33:15 <b>listed</b> 32:9 45:18 <b>literally</b> 26:3 <b>little</b> 17:21 24:4 29:9 49:14 <b>logically</b> 43:6 <b>look</b> 9:2 11:24 12:15,16 14:24 19:9 30:12 32:8,17 33:9 38:10,24 39:1 39:21 40:2 42:8,9 44:23 45:13 48:23 <b>looked</b> 4:1 20:25 <b>looking</b> 4:22 5:14 10:9 18:8 18:25 21:1 32:11 33:13 43:23 54:9 <b>lot</b> 7:16 12:23 18:10,13 29:8 30:9 31:14 <b>lower</b> 40:15</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>mail</b> 44:18 <b>main</b> 14:6 40:11 <b>majority</b> 39:3 40:3 44:3 <b>making</b> 35:17 <b>mandate</b> 4:8 18:14 <b>manifested</b> 44:1 <b>manifesting</b> 13:19 <b>manner</b> 9:1 16:10,10,13</p>	<p>21:12 <b>Marcus</b> 1:17 2:6 24:23,24 25:1 25:9,15,23 26:9,15,18,24 28:8 29:15 30:2,11,16 31:4,14 32:4 32:16,19 33:7 33:14,23 34:7 34:18,22 35:12 36:10,16,23 37:7,24 39:1 40:2,24 41:5 41:15,22,25 42:7,18,25 43:4,20 44:11 44:22 45:9,23 46:3,19 47:2 47:11,24 48:5 48:9,13,17,24 49:11,16 50:3 50:25 51:12,21 51:24 52:4,5 <b>marijuana</b> 27:7 <b>matter</b> 1:11 54:17 <b>maximum</b> 4:12 4:15 19:22 <b>mean</b> 6:23 7:10 9:24 10:9,13 13:11,12 17:14 20:2,14 21:17 22:14 24:16 25:22 26:25 30:8,23 31:11 32:1 35:13,14 35:19 37:4,14 37:20 38:6,12 39:13 40:2 41:2,17 44:16 45:1 46:6,19 47:11,14 49:18 <b>meaning</b> 16:5 <b>means</b> 9:12 16:9 31:22 33:24 45:7</p>	<p><b>measurable</b> 37:20 <b>measuring</b> 43:16 <b>mentioned</b> 9:6,9 9:12,15 16:16 <b>mere</b> 12:11 37:22 46:15 51:16 54:8,11 <b>merely</b> 8:10 <b>method</b> 13:5 <b>Miami</b> 29:8 <b>mind</b> 16:5 27:19 27:24 29:5 30:18 32:9 45:19 50:17 <b>minimal</b> 36:15 <b>minuscule</b> 37:23 <b>minute</b> 38:8 <b>minutes</b> 52:7 <b>mischief</b> 13:7 <b>misunderstood</b> 8:9 <b>modified</b> 47:20 <b>monkey</b> 29:12 <b>morning</b> 3:4 <b>moving</b> 47:6 <b>murder</b> 44:5</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>N</b> 2:1,1 3:1 <b>named</b> 16:14 20:9 22:2 <b>narrowly</b> 27:2,3 <b>nation</b> 41:13 <b>nature</b> 8:5 <b>near</b> 40:23 <b>necessarily</b> 23:13 34:15 36:1,2 45:17 46:10 47:14 54:5 <b>necessary</b> 33:10 <b>need</b> 6:12 40:25 41:10 50:24 <b>never</b> 8:22 11:2 11:6,6 12:23</p>
--	--	--	---	--

<p><b>nevertheless</b> 15:18  <b>nexus</b> 44:24  45:4,5 47:21  <b>noncategorical</b> 21:12 47:20  <b>noncurtilage</b> 6:21  <b>nonthreatening</b> 50:5  <b>normal</b> 33:20  53:3  <b>nose</b> 42:6  <b>noted</b> 28:20  <b>November</b> 1:9  <b>number</b> 12:17  25:17 28:2  44:18 45:3,5  45:11  <b>numbers</b> 19:8  43:7 44:17,21</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>O</b> 2:1 3:1  <b>object</b> 48:9,10  <b>objected</b> 23:12  23:13,14 51:1  <b>objection</b> 23:16  51:5,6  <b>obligation</b> 14:20  14:21 16:22,23  <b>obstacle</b> 20:22  <b>obvious</b> 18:19  33:18  <b>obviously</b> 4:21  5:15 34:1  38:14 53:25  <b>occur</b> 15:3 42:22  <b>occurred</b> 5:7  21:16  <b>occurs</b> 5:17  <b>offender</b> 18:25  19:14,20,25  20:4  <b>offense</b> 3:24  4:13 5:3 6:11  11:19 12:1</p>	<p>19:23,23 21:2  24:9 27:19  31:7 35:24  38:12 39:2,5  39:15 41:4,8  42:9,10,15,19  44:3,23 49:5  51:24,25  <b>offenses</b> 4:4 17:5  20:24 29:6  32:9 39:10  43:8 44:23  46:20 50:11  <b>office</b> 18:8  <b>Oh</b> 38:3  <b>Okay</b> 7:9 24:15  24:19  <b>old</b> 33:3  <b>once</b> 34:5  <b>ones</b> 16:11  <b>open</b> 4:8 28:3  53:24  <b>operate</b> 12:24  <b>opinion</b> 45:6  52:14,15  <b>opponent</b> 34:12  48:8  <b>oral</b> 1:11 2:2,5  3:6 24:24  <b>order</b> 10:11  <b>ordinary</b> 29:7  35:16  <b>Orlando</b> 1:16  <b>outside</b> 5:21  28:1  <b>overdo</b> 37:14  <b>overt</b> 12:3,10  13:18,19,23  23:24 24:1,6  25:12,13  <b>owner</b> 38:24</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>P</b> 3:1  <b>page</b> 2:2 35:14  35:14  <b>paradigmatic</b></p>	<p>29:6  <b>paradigmatic...</b>  34:25  <b>part</b> 22:18 27:11  27:12 28:12,16  47:25  <b>particular</b> 20:18  31:11,16,20  32:2,18 37:25  43:17 49:17  52:15  <b>passed</b> 11:5,6  <b>pay</b> 49:15  <b>pen</b> 30:21  <b>penetration</b>  46:16,17  <b>people</b> 12:18,25  18:13,14 44:18  44:19 45:10  50:10  <b>percent</b> 15:4,15  34:13,15,21  40:18,18 41:12  41:19 43:1  <b>percentage</b> 15:4  <b>perfectly</b> 35:3  <b>permissible</b> 35:7  <b>permits</b> 43:21  <b>person</b> 5:4,19,21  14:4 15:3 16:2  19:21 29:3,4  29:11 35:24  36:1,3 38:17  43:10,25 49:12  53:20  <b>person's</b> 14:1  <b>Petitioner</b> 1:4  1:16 2:4,10 3:7  40:4 52:9  <b>Petitioner's</b> 25:3  25:6  <b>physical</b> 3:18  4:20,25 8:20  9:5 10:18  11:14 14:11,23  15:2,12,17  16:1,14 17:20</p>	<p>20:13,21 22:10  22:14,16 25:8  25:14,14 31:25  32:14 33:25  34:14 35:25  36:1,3,8 38:13  39:25 40:9  41:18 42:15  43:2 45:16  47:17 48:20  49:12,20  <b>picking</b> 31:17  <b>picture</b> 50:17  <b>place</b> 5:19 6:5  13:23 18:22  28:19  <b>plain</b> 43:21  <b>planning</b> 17:15  17:16  <b>plea</b> 23:4,6  <b>please</b> 3:9 25:2  <b>point</b> 37:1 45:14  <b>pointed</b> 39:2  <b>poison</b> 30:21  <b>police</b> 21:24  23:3,8 51:1,4,7  51:10  <b>pose</b> 11:13  <b>posed</b> 33:12  <b>poses</b> 17:1 39:25  <b>posit</b> 50:4,5,7  <b>position</b> 26:1  29:21 47:15,19  49:18 52:2,11  52:23  <b>possess</b> 13:11  <b>possessing</b> 13:22  <b>possession</b> 4:11  4:18  <b>possibility</b> 46:1  46:12  <b>possible</b> 9:3,4  18:12  <b>possibly</b> 14:14  <b>post</b> 32:11  <b>potential</b> 3:18  4:20,24 5:4</p>	<p>6:10 7:1,2,11  7:17,18 8:12  8:20 9:20,22  9:23,23,24  10:2,5,11  11:13 14:23  16:8 17:2,6,19  17:22,23 20:13  22:2,10 25:7  26:22 31:7,24  32:13,14 33:25  34:2,4 35:1,18  36:17,20 37:8  37:11,11,19  38:20,20 39:20  40:22,22 41:3  41:7,18 43:22  43:23 46:18  47:17 49:1,4  52:13,16,20,22  53:5,8,11,12  53:23,24  <b>potentially</b> 9:18  10:2  <b>preceding</b> 16:11  36:24  <b>predicate</b> 4:4  6:11 20:24  44:5  <b>premises</b> 40:10  <b>presence</b> 40:12  <b>present</b> 17:5,21  17:23 22:2  30:17 32:12,13  34:5 36:2,2  41:6,20 45:14  45:15,16,16  49:4 50:9,20  <b>presented</b> 21:23  23:7 31:11  32:23 35:1,18  36:24 37:25  40:15  <b>presentence</b>  21:21,23 47:21  48:1,7,10  50:23</p>
---	--	--	---	--

<b>presentencing</b> 47:23	<b>proven</b> 40:22	<b>questions</b> 45:15	31:19	1:19 2:7 3:19
<b>presenting</b> 50:13	<b>provided</b> 11:21 30:16	54:12	<b>referred</b> 7:1	14:20 24:25
<b>presents</b> 4:20,24 6:9 7:23 15:17 16:8 20:12 22:9 25:7 27:25 31:7,24 33:17,19,25 34:2 35:6 39:11 41:8,18 47:17 49:1	<b>provision</b> 17:16 19:15 32:8	<b>quickly</b> 24:6	32:20	<b>Respondent's</b> 10:1 15:24 52:11
<b>presumably</b> 36:11	<b>provisions</b> 39:3	<b>quite</b> 10:25 27:8 31:1 53:2	<b>referring</b> 21:3 34:22	<b>rest</b> 41:3 52:12
<b>presumption</b> 11:22 17:10 29:23	<b>proximity</b> 40:9 49:21	<b>R</b>	<b>refers</b> 4:4 9:11 31:12 36:22	<b>result</b> 8:5
<b>pretty</b> 26:21 37:4 43:3	<b>PSR</b> 23:3,11 51:6,9	<b>R</b> 3:1	<b>regarding</b> 23:11 23:17	<b>results</b> 27:19 39:6
<b>previously</b> 16:14,16	<b>public</b> 1:15 39:12	<b>raise</b> 29:13	<b>regardless</b> 38:17	<b>revealing</b> 30:22
<b>primarily</b> 17:12	<b>punch</b> 42:6	<b>rake</b> 28:7	<b>relationship</b> 23:19	<b>right</b> 5:24 6:8,10 20:10 29:3,17 35:4,19 36:21 42:23 44:15 48:1,16 49:12 50:20 53:1
<b>prior</b> 4:5,5 28:18 39:7,9 54:9,11	<b>punish</b> 39:4 43:24	<b>range</b> 19:21	<b>relevant</b> 28:11 28:11	<b>risk</b> 3:18 4:20 4:24 5:4,12,12 5:20,21 6:10 7:1,2,11,17,18 7:23 8:7,13,20 9:5,13,14,18 9:21,22,24 10:1,5,6,7 11:14 12:14 14:15,17,23 15:7,14,17,20 16:1,8,14 17:2 17:6,19,22,23 20:13,21 22:3 22:10,14 25:7 26:22 30:18 31:7,25 32:12 32:14 33:17,19 33:25 34:2,2,5 34:13 35:1,6 35:19 36:2,8 36:15,17,21,23 37:2,9,11,11 37:15,19,22,24 38:11,13,16,20 38:20,25 39:8 39:20,25 40:15 41:14,18,20 42:4,5,15 43:16,22,23 45:16 47:17
<b>prison</b> 53:2,9	<b>punishable</b> 31:23	<b>rare</b> 15:3	<b>remain</b> 24:5,5	
<b>probably</b> 9:8 15:16	<b>punished</b> 43:25	<b>rational</b> 43:24	<b>reply</b> 52:14	
<b>problem</b> 33:15	<b>purpose</b> 16:9 23:1 31:5 39:5	<b>reaction</b> 44:25	<b>report</b> 21:21,23 47:22,23 48:1 48:7,10 50:23 51:4,7,10 52:17 53:1,16 53:18,21	
<b>produce</b> 27:18 41:7	<b>put</b> 11:18 15:12 17:17	<b>read</b> 10:9 15:9 15:19,22 16:13 30:14,24 31:19 45:25	<b>reported</b> 25:18	
<b>produced</b> 23:7	<b>putting</b> 6:21 11:11,25 14:12 37:17	<b>reading</b> 33:20 35:7,7,21 46:8	<b>reports</b> 21:24 23:4,8 51:2	
<b>professors</b> 12:19 13:7 21:9	<b>Q</b>	<b>really</b> 10:6 13:17 17:22 21:16 29:20 41:3 42:3,4	<b>require</b> 28:23 32:7 47:14	
<b>prohibited</b> 41:6	<b>qualification</b> 47:9	<b>reason</b> 8:9 32:25 39:16 41:5	<b>required</b> 12:4 34:9	
<b>prong</b> 10:19 46:10 51:17,20 53:25	<b>qualifies</b> 13:23 20:6 26:23 38:5 53:2	<b>reasonable</b> 18:20 37:2	<b>requirement</b> 11:17,18 34:17 35:10	
<b>propensity</b> 39:8 42:1 50:18	<b>qualify</b> 3:15,20 3:24 4:2,14,18 6:15,25 8:19 10:16 11:4,5 11:22 15:16 18:1 26:7,16 53:24	<b>reasonably</b> 8:7	<b>requires</b> 31:8	
<b>property</b> 5:8 17:11,12	<b>question</b> 7:7 14:19 15:9 18:17 19:3,7 22:18,19 23:19 24:4 25:10 29:20,25 30:6 46:6 47:13 48:15,18	<b>reasoning</b> 50:24	<b>residence</b> 4:23 6:6 29:2 42:21 48:20 49:12	
<b>proposal</b> 11:2,4		<b>reasons</b> 19:24 40:11	<b>residual</b> 16:17 20:11,15 21:4 21:6 31:19	
<b>prosecuted</b> 45:1		<b>rebuttal</b> 2:8 24:5 52:8	<b>residuary</b> 46:11	
<b>prove</b> 11:16 14:21		<b>recklessness</b> 31:12	<b>resolve</b> 48:17	
		<b>recognized</b> 3:14 19:17	<b>resort</b> 6:12	
		<b>reconnoitering</b> 40:6	<b>respect</b> 22:1 31:15 32:9 35:23 38:21 43:8	
		<b>record</b> 23:3,9 47:25,25	<b>Respondent</b>	
		<b>records</b> 23:5 46:15 47:8,14		
		<b>redundant</b> 10:10		
		<b>refer</b> 21:5 24:6		

<p>49:1,5,24 50:4 50:13,21 52:16 53:19 54:10 <b>riskiness</b> 44:4 <b>risks</b> 27:25 31:10 33:12 43:12,13 <b>ROBERTS</b> 3:3 5:23 6:8 10:21 10:25 11:10 12:2,8 16:25 17:13 18:2 21:25 24:21 38:7,10 39:24 52:3,6,24 53:6 54:13 <b>roughly</b> 12:18 <b>row</b> 26:21 <b>rung</b> 6:22 <b>Russello</b> 11:22 17:10</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 2:1 3:1 <b>safety</b> 39:12 <b>satisfy</b> 8:22 33:10 34:16 35:9 42:15 46:10 49:6 51:16,19 <b>save</b> 21:8 <b>saying</b> 8:8 26:21 35:5 43:16 51:3 <b>says</b> 5:20 20:4,6 34:1 <b>Scalia</b> 7:19 8:25 9:20,23 10:5 13:6 14:9 16:4 20:8 21:3,7 22:12,19 31:14 36:4,13,20 <b>scope</b> 9:3,4 <b>screen</b> 18:8 <b>sea</b> 29:18 <b>second</b> 19:9 35:25</p>	<p><b>secret</b> 30:22 <b>sections</b> 22:23 <b>see</b> 12:17 24:3 42:10 43:8,10 45:6 49:25 <b>seen</b> 8:7,12 <b>Senate</b> 11:5 <b>send</b> 46:14 <b>sending</b> 21:8 <b>sense</b> 3:23 4:19 31:10 33:11 <b>sensible</b> 16:12 <b>sentenced</b> 19:21 53:17,22 <b>sentencing</b> 3:22 18:15,21,23 19:24 <b>serious</b> 3:17 4:13,20,24 5:4 6:9 7:17,23 8:20 10:2 12:14 14:22 15:14,17 16:8 17:2,5,23 20:12,20 22:2 22:9 25:7 27:19 31:7,24 32:14 33:17,19 35:1,6,18 37:8 39:10,20 41:7 41:18 43:23 45:16 47:17 49:1,4 52:16 <b>set</b> 27:25 29:5 43:12,13 <b>setting</b> 30:17 <b>Seventh</b> 52:15 <b>Shepard</b> 3:14 4:1 20:23 21:6 32:16,20 33:5 47:9 50:24,25 51:1 54:3 <b>shot</b> 37:21 <b>show</b> 23:3,7,20 40:17 43:5,6 48:19 <b>showed</b> 41:12</p>	<p><b>shown</b> 16:23 41:25 43:7 <b>shows</b> 49:19 <b>side</b> 11:12 12:1 12:3 14:13 26:12 38:14 <b>sidewalk</b> 26:5 <b>significance</b> 49:15,17 51:10 <b>similar</b> 9:5,13 12:18 <b>simple</b> 4:11,17 <b>simply</b> 6:21 8:21 16:6 18:20 25:12 26:11 37:16 <b>sit</b> 18:8 <b>sitting</b> 12:22 14:4 17:14 <b>situation</b> 33:13 42:11,21 52:19 53:3 <b>solely</b> 48:1 <b>Solicitor</b> 1:17 <b>somebody</b> 28:4 28:6 30:21 39:8 40:12 42:5,6 52:21 <b>someone's</b> 42:20 42:21 50:19 <b>someplace</b> 23:4 <b>somewhat</b> 34:15 <b>sorry</b> 17:7 35:13 <b>sort</b> 20:18 26:22 29:4 32:9,11 32:21 33:2 38:11,24 39:21 50:13 51:14 <b>sounds</b> 12:13 <b>source</b> 51:7 <b>SOUTER</b> 6:20 7:7,10 8:3,21 10:8 23:18 24:8,15,19 25:9,21 26:3 26:10,16,20 32:24 37:1,10</p>	<p>38:3 40:16 41:1 45:23 46:5,22 47:3 48:2 51:14,22 <b>Souter's</b> 48:18 <b>space</b> 6:3 <b>specific</b> 6:16 12:14 15:14 50:5 <b>specifically</b> 9:6 10:15,19,21 11:1 16:2 19:16 21:5 23:13 34:24 51:7 <b>speculate</b> 52:17 <b>stage</b> 40:23 <b>standard</b> 41:17 <b>stands</b> 32:3 <b>start</b> 17:18 44:20 <b>started</b> 7:14,20 <b>starting</b> 7:12 8:6 11:12 45:13 <b>starts</b> 29:12 <b>State</b> 6:7,14,21 11:16 26:25 28:17 44:3,4 51:16,19 <b>stated</b> 23:10 <b>statement</b> 51:22 52:1 <b>States</b> 1:1,6,12 3:4 5:7 6:7 <b>statistic</b> 15:15 40:20 <b>statistical</b> 29:20 29:25 45:3,5 <b>statistics</b> 12:19 29:22 30:1,4 34:22 40:17,25 41:10,11 43:5 <b>statute</b> 6:10 7:1 7:3,11 8:13,19 8:23 10:14 15:13,18 17:10 18:25 19:16,25</p>	<p>20:3,4,6 22:8 28:9,11,22 29:6 30:13 31:6 32:21 33:15 34:23 35:4,13,21 37:8 39:17 42:2 43:9,21 45:9,20,24 46:9 52:12 <b>statutes</b> 30:24 <b>statutory</b> 4:12 4:14 19:22 <b>steal</b> 26:13 <b>steals</b> 28:6 <b>step</b> 6:24 7:4,12 8:11,17,17 12:9 13:15,17 13:18 21:10 27:21 37:16,18 47:12,13 <b>stepping</b> 47:5 <b>STEVENS</b> 15:8 33:14,24 34:11 34:20 35:2 41:9,16,24 42:3,14,23 43:1 48:6,11 48:14,21 49:7 49:14 <b>straighten</b> 8:15 <b>street</b> 13:13 14:6 28:6 29:7,8 <b>strictly</b> 27:2,16 <b>structure</b> 3:12 5:5 6:16,18 14:8 20:7 24:1 25:14 28:13,16 32:8 <b>studies</b> 21:9 <b>submission</b> 11:11 <b>submit</b> 7:25 8:18 16:22 17:9 54:7 <b>submitted</b> 51:2 54:15,17</p>
---	--	---	---	--

<p><b>subsection</b> 44:12 51:17</p> <p><b>subset</b> 49:3</p> <p><b>subsidiary</b> 33:2</p> <p><b>substantial</b> 6:24 7:3,12 8:11,17 13:15,18 14:22 31:13</p> <p><b>succeed</b> 38:21 38:22 40:12</p> <p><b>succeeded</b> 39:19 43:17</p> <p><b>successful</b> 39:20 40:1 43:13</p> <p><b>suffice</b> 25:25</p> <p><b>sufficient</b> 23:20 26:22 41:21 48:16</p> <p><b>sufficiently</b> 35:18 44:1</p> <p><b>suggest</b> 35:3</p> <p><b>suggests</b> 15:15</p> <p><b>summary</b> 51:15</p> <p><b>suppose</b> 39:24</p> <p><b>supposed</b> 30:5,8</p> <p><b>Supreme</b> 1:1,12 27:15</p> <p><b>sure</b> 14:2 49:9</p> <p><b>surmount</b> 50:10</p> <p><b>surrounding</b> 28:24 47:16</p> <p><b>surrounds</b> 27:4 27:12</p> <p><b>suspect</b> 12:25</p> <p><b>suspicion</b> 13:1</p> <p><b>system</b> 54:6</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 2:1,1</p> <p><b>take</b> 7:3,12 9:15 12:8 25:12 26:3 27:15 31:9 32:22 33:9 38:1 40:20,21 45:14 45:25 47:7,8</p> <p><b>taken</b> 6:23 23:25</p>	<p>24:1 34:8</p> <p><b>takes</b> 23:20</p> <p><b>talk</b> 20:24</p> <p><b>talked</b> 7:6 10:1 15:2 21:1</p> <p><b>talking</b> 15:1,6 37:6 42:12 45:10,20,22</p> <p><b>talks</b> 8:13 15:24</p> <p><b>target</b> 36:1</p> <p><b>targeting</b> 35:24</p> <p><b>Taylor</b> 3:14,25 5:1,20 6:15,15 7:6,6,18 8:10 8:23 11:9 15:24 20:23 32:20 35:13,14 35:20 46:21 47:9</p> <p><b>tell</b> 20:20 47:18</p> <p><b>telling</b> 14:4 25:25</p> <p><b>tendency</b> 36:18</p> <p><b>Tennessee</b> 14:25</p> <p><b>term</b> 31:22,23</p> <p><b>terms</b> 4:4 15:19 43:25</p> <p><b>test</b> 3:20,21,24 3:25 6:14 45:2 45:3</p> <p><b>text</b> 3:12 30:12 30:14</p> <p><b>Thank</b> 24:20,21 25:1 52:3,5 54:13</p> <p><b>thing</b> 24:8,13 36:5 46:14,22 54:11</p> <p><b>things</b> 17:25 30:9,11</p> <p><b>think</b> 8:16 10:5 10:7 15:4,22 15:23 16:12,19 16:25 18:2,8 22:12,15 25:20 25:23 26:15,18 26:18,19,24</p>	<p>27:15,21,22,24 28:8,9,11,24 29:19,20 30:2 30:2,7,19 31:4 31:4,8 32:19 33:4,5,8,20,21 34:7,8,16,18 35:2,6,20 36:6 36:9 37:25 38:19 39:5,12 39:20 40:18,24 40:25 41:1,2 41:22 43:5,6 43:20 44:11 45:12,19 48:7 48:21,25 49:16 50:9 51:4,9,12</p> <p><b>thinking</b> 12:11</p> <p><b>thinks</b> 30:21</p> <p><b>third-degree</b> 4:11</p> <p><b>thought</b> 8:3,8 10:10 34:25 35:16 49:3</p> <p><b>threat</b> 44:13</p> <p><b>threatened</b> 10:18 44:13</p> <p><b>threatening</b> 14:11</p> <p><b>threats</b> 30:23</p> <p><b>three</b> 34:13,15 34:20 39:9</p> <p><b>threshold</b> 49:13</p> <p><b>throwing</b> 48:15</p> <p><b>thrown</b> 49:8</p> <p><b>time</b> 13:3 15:4 24:3 31:9</p> <p><b>times</b> 30:15</p> <p><b>today</b> 3:10</p> <p><b>tools</b> 12:6 13:12 13:22 14:1 17:17 18:16</p> <p><b>tough</b> 26:21</p> <p><b>transcript</b> 48:3</p> <p><b>treat</b> 41:23</p> <p><b>tree</b> 26:14</p> <p><b>trials</b> 33:2,3</p>	<p><b>tried</b> 20:16 43:11</p> <p><b>triggered</b> 43:13</p> <p><b>troubling</b> 3:11</p> <p><b>true</b> 10:13 26:10 34:11</p> <p><b>trump</b> 52:12</p> <p><b>truth</b> 51:3</p> <p><b>try</b> 44:17</p> <p><b>trying</b> 5:18 7:5 12:22 19:2,7 38:6 50:8,10 53:12</p> <p><b>Tuesday</b> 1:9</p> <p><b>two</b> 10:19 15:9 22:1 34:20 35:22</p> <p><b>type</b> 3:24 4:9 11:8 30:18 44:22 53:19,20</p> <p><b>types</b> 3:16</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>unarmed</b> 42:16</p> <p><b>unclear</b> 49:14</p> <p><b>understand</b> 7:21 8:16,23 11:10 12:2 23:23 26:7 41:9 42:24 49:9</p> <p><b>understanding</b> 8:14 29:16 44:11 46:7 51:2</p> <p><b>unfavorable</b> 8:5</p> <p><b>unforeseen</b> 39:16,19 43:11</p> <p><b>unique</b> 6:1</p> <p><b>United</b> 1:1,6,12 3:4</p> <p><b>unnamed</b> 9:13</p> <p><b>unreasonable</b> 27:18</p> <p><b>unsuccessful</b> 39:25</p> <p><b>use</b> 4:8 7:5 9:5,7 9:10 10:17,17</p>	<p>10:18 16:7 20:2 22:3,13 22:15 23:14 31:9 33:11 44:13,13,13 47:19 51:1</p> <p><b>uses</b> 3:22</p> <p><b>U.S</b> 39:3</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 1:5</p> <p><b>various</b> 27:5</p> <p><b>vast</b> 39:3 40:3 44:3</p> <p><b>versus</b> 3:4 14:25 26:25 28:17</p> <p><b>victims</b> 37:21</p> <p><b>view</b> 38:11 41:11,21 42:24 45:24 49:9</p> <p><b>violence</b> 10:17 15:2 30:23 31:1 40:19,22 42:11,22 52:13 52:19,22 53:5</p> <p><b>violent</b> 25:4 31:22 35:9,23 36:11 39:10 51:25 52:1</p> <p><b>virtually</b> 39:22</p> <p><b>virtue</b> 39:19</p> <p><b>visitation</b> 53:1</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>walked</b> 26:5</p> <p><b>walking</b> 13:13 29:8</p> <p><b>walks</b> 28:6</p> <p><b>walls</b> 50:11</p> <p><b>want</b> 16:17 24:5 33:1 37:14 39:17 40:20 49:8</p> <p><b>wanted</b> 19:19 26:11,13 41:22</p> <p><b>wants</b> 32:22</p> <p><b>warrant</b> 53:19</p> <p><b>Washington</b> 1:8</p>
--	--	--	--	---



1:18 <b>wasn't</b> 53:15 <b>watch</b> 49:25 <b>way</b> 7:15,24,25 9:21 10:8 11:9 11:15 15:23 16:12 27:22,23 29:1,1 32:6,25 35:13 37:10 44:2 45:24 <b>ways</b> 15:9 <b>weren't</b> 23:13 46:21 <b>we'll</b> 3:3 22:24 <b>we're</b> 5:14 13:2 21:12 22:22 25:25 42:7,8 45:20 <b>we've</b> 20:8 37:6 46:13 <b>whiskey</b> 27:9 <b>window</b> 5:10,11 6:22 29:13 48:16,22 49:8 <b>wonder</b> 44:16 <b>wondering</b> 12:13 <b>word</b> 10:4,11,19 16:5 27:2,16 45:5 <b>worded</b> 19:1 <b>words</b> 6:25 7:6 7:11 8:8 11:2 12:5 22:3 43:15 47:8 <b>worlds</b> 10:2 <b>wouldn't</b> 4:23 5:11 6:15 7:19 8:1 9:8,16 13:4 18:9 20:19 40:11 44:15 49:23 50:9 51:12 <b>would-be</b> 5:9 <b>writing</b> 30:21 <b>wrong</b> 18:3,5 <b>wrote</b> 10:14	33:5 <hr/> <b>X</b> <hr/> x 1:2,7 <hr/> <b>Y</b> <hr/> yards 27:10 <b>Yeah</b> 33:5 <b>year</b> 19:23 31:23 <b>years</b> 19:23 32:5 <hr/> <b>Z</b> <hr/> zero 19:22 37:4 37:16 <hr/> <b>0</b> <hr/> <b>05-9264</b> 1:5 <hr/> <b>1</b> <hr/> 1 10:15 41:12,19 43:1 <b>1/10</b> 41:12,19 43:1 <b>10</b> 19:23 <b>10-year</b> 4:14 <b>10:04</b> 1:13 3:2 <b>11:02</b> 54:16 <b>15</b> 19:23 <b>1984</b> 11:3 <b>1985</b> 14:25 <b>1986</b> 34:23 <b>1993</b> 28:10 <hr/> <b>2</b> <hr/> 2 10:15 51:17 <b>20</b> 28:5 <b>2006</b> 1:9 <b>24</b> 2:7 <b>254</b> 14:6 <hr/> <b>3</b> <hr/> 3 2:4 15:15 40:18,18 <b>3.6</b> 15:4 <b>3.8</b> 15:4 <hr/> <b>5</b> <hr/> <b>50</b> 27:10 <b>52</b> 2:10	<b>597</b> 35:14 <hr/> <b>7</b> <hr/> 7 1:9 <hr/> <b>9</b> <hr/> <b>9</b> 52:14 <b>924(e)</b> 20:24 <b>924(e)(2)(B)(ii)</b> 10:15 <b>94</b> 28:10		
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