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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Hochman.

ORAL ARGUMENT OF ROBERT N. HOCHMAN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: But suppose it were shown

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

5 MR. HOCHMAN: This case?

6 JUSTICE KENNEDY: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 JUSTICE ALITO: Well --

15 MR. HOCHMAN: Please, continue.

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

1 cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: I mean, burglary by its

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

4 MR. HOCHMAN: I assume that --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 Failing to report --

25 CHIEF JUSTICE ROBERTS: So invading

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

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

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

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

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

25 If there are no further questions, I'll

1 reserve the remainder of my time.

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

4 ORAL ARGUMENT OF MATTHEW D. ROBERTS
5 ON BEHALF OF THE RESPONDENT

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

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

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

22 MR. ROBERTS: Yes, Your Honor. Two points
23 on that. First, escape and failure-to-report escape,
24 other types of escape and recapture, are linked ed in a
25 way that arrest and the typical crime aren't, because

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

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

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

15 JUSTICE SOUTER: What's that got to do with
16 increasing the risk of violence? I mean, I see -- I see
17 your kind of elements argument, but it seems to be
18 beside the point that --

19 MR. ROBERTS: It shows the close connection
20 between the two. And so when you're -- when the
21 offender is committing the crime, it's appropriate to
22 hold him accountable for what he can see is so highly,
23 closely connected to the crime and which, in fact, has
24 to happen in order to end the crime; whereas --

25 JUSTICE SOUTER: Yes, but the crime is still

1 -- the crime that we are concerned with here is still
2 essentially a passive crime. He just doesn't show up.

3 MR. ROBERTS: Well --

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

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

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

20 MR. ROBERTS: It's purposefully inviting the
21 violent confrontation when the law enforcement officers
22 come to terminate --

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

25 MR. ROBERTS: No. Because in -- in failure

1 to respond to the traffic ticket the -- first of all,
2 it's not clear that somebody is going to come after you
3 and try to physically bring you in.

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

6 Third, he hasn't demonstrated already that
7 he is unwilling to submit to custody. And the fact that
8 --

9 CHIEF JUSTICE ROBERTS: The offender is
10 prone to react violently if he doesn't respond to a
11 traffic ticket?

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

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

22 MR. ROBERTS: This --

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

25 MR. ROBERTS: This offense that he was

1 convicted of is failure to report to a penal
2 institution, failure to report to prison.

3 CHIEF JUSTICE ROBERTS: And you concede the
4 probation or parole situation?

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

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

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

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

25 MR. ROBERTS: Well --

1 JUSTICE SCALIA: But did he get additional
2 time, by the way, when -- when they finally brought him
3 back?

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

9 JUSTICE SCALIA: So he just -- he just had
10 to make up the weekends that he had lost?

11 MR. ROBERTS: No. He didn't just have to
12 make up the weekends that he had lost.

13 JUSTICE GINSBURG: That's what Mr. Hochman
14 told us --

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

16 JUSTICE GINSBURG: -- when I asked that
17 question.

18 MR. ROBERTS: But I don't think that's
19 accurate for the sentence for escape. On page 113 to
20 114 of this JA, Your Honor, which is the -- the PSR
21 describing what happened for this offense, it says that
22 he has 30 months probation. It's in the second volume,
23 the volume under seal.

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

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

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

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

25 JUSTICE KENNEDY: Can you -- can you tell

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

7 MR. ROBERTS: I think generally the policy
8 --

9 JUSTICE KENNEDY: What goes through the mind
10 of -- of a prosecutor? He says, because this fellow
11 failed to report earlier for this offense, I'm going to
12 give him 15 extra years in jail.

13 MR. ROBERTS: Well, Your Honor, he is -- he
14 is looking at his whole --

15 JUSTICE KENNEDY: What -- what does a -- are
16 there many instances where you think in a case like this
17 a U.S. attorney would just elect not to file that
18 charge?

19 MR. ROBERTS: I --

20 JUSTICE KENNEDY: Or do you think they
21 automatically file it every time; and if not, how do
22 they define it?

23 MR. ROBERTS: I think generally that -- that
24 they look at the conduct that's been committed and they
25 -- that the policy is to charge the -- the maximum

1 charges that are supported by what the -- what the
2 defendant has done. But here you don't have --

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

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

18 CHIEF JUSTICE ROBERTS: I understood your
19 friend -- excuse me. I understood your friend to say
20 that you don't have a single example of failure to
21 report leading to a violent confrontation.

22 MR. ROBERTS: That's -- that's also
23 incorrect, Your Honor. Two of the four cases that we
24 cited in our -- in our brief, in our anecdotes, involved
25 injury to innocent bystanders. It's true we didn't

1 highlight that in the parentheticals to those cases, but
2 it's on page 19, the -- we cite various cases, and we
3 also then go on to cite some articles just as an
4 example.

5 CHIEF JUSTICE ROBERTS: So you have -- so
6 you have two examples.

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

10 CHIEF JUSTICE ROBERTS: You haven't gone out
11 and looked for other -- I'm sorry. You haven't gone out
12 and looked for other cases? I thought you --

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

19 JUSTICE STEVENS: Mr. Roberts --

20 MR. ROBERTS: But it's 11 percent of the
21 people violently resisted, and they were charged with
22 assault and battery on a police officer. I think that
23 that's indicative of possible injury. And in any case
24 the question is --

25 JUSTICE STEVENS: Mr. Roberts, have you had

1 occasion to look at the -- the recent figures compiled
2 by the Sentencing Commission?

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

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

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

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

21 MR. ROBERTS: What James says is that you
22 try to assess whether the degree of risk is comparable
23 to the degree of risk presented by one of the enumerated
24 offenses. And, as you did in James --

25 JUSTICE KENNEDY: But isn't that's based on

1 our experience because we have these cases; we've been
2 lawyers; we know what they usually involve. We have
3 some sort of a --

4 MR. ROBERTS: Yes.

5 JUSTICE KENNEDY: -- an instinct or a basis
6 for making a judgment.

7 MR. ROBERTS: Yes.

8 JUSTICE KENNEDY: If statistics can inform
9 that, why ignore the statistics?

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

16 JUSTICE SOUTER: But your argument goes
17 simply to whether there is potential and the statute
18 says "serious potential." Which gets us, it seems to
19 me, to the point that Justice Kennedy is making, and
20 that is, we've got to have something more than an
21 instinctive belief that something bad might happen.

22 MR. ROBERTS: Well, I think James addresses
23 that, Your Honor. And James says that in deciding
24 whether you have a serious potential, you look to the
25 enumerated offenses and you determine if they can be

1 comparable.

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

6 MR. ROBERTS: It has -- it has to be more
7 than a potential. It has to be serious in the sense
8 that it's similar in degree, comparable in degree, to
9 one of the enumerated offenses.

10 JUSTICE BREYER: What one are we to do
11 with -- Justice Stevens -- I think you should address
12 the statistics in the sentencing report.

13 MR. ROBERTS: Okay.

14 JUSTICE BREYER: As I read them, they put
15 together -- if you put together failing to report and
16 failing to return, you get 160 cases in their sample.
17 And the number of those cases, whether you looked at the
18 time when he had left or whether you looked at the time
19 he was apprehended, in which force was involved is zero.
20 The number of cases in which injury was involved is
21 zero. The number of cases where he had a dangerous
22 weapon is five.

23 MR. ROBERTS: That's right. And --

24 JUSTICE BREYER: All right. So now there we
25 are.

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

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

17 JUSTICE BREYER: You had every opportunity,
18 when we have 160 cases out of the universe -- I guess I
19 don't know what the universe is, but sampling proceeds
20 through a small amount of cases. And you could, of
21 course, criticize the Sentencing Commission effort if
22 you have the statistician or someone who will tell us
23 that that sampling was not an appropriate method to
24 proceed. Is there any such person?

25 MR. ROBERTS: Well, no, Your Honor. And I'm

1 not criticizing it. I'm saying that you have to take
2 into account the sample size and you have to take into
3 account that there are --

4 JUSTICE BREYER: No. Why -- that was my
5 question. Why take into account the sample size in the
6 absence of a statistician who would tell us that the
7 sample size is too small to reach the conclusion that
8 the commission reaches?

9 MR. ROBERTS: Because my point is that --
10 take the 42 failure-to-report people, which is the
11 offense here, okay. Three of them -- three of those 42,
12 had guns. If one of those three had used the gun, that
13 would have been a use of force, an instance of actual
14 violence.

15 That percentage -- I'm not -- I'm not
16 questioning the statistical validity of anything. I'm
17 taking it on its terms. That's a 2.4 percent statistic
18 there.

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

20 MR. ROBERTS: 3.8 percent in -- in household
21 burglary. So I just think that -- that the statistics
22 are -- are very low, the risk of actual violence in
23 burglary as well.

24 CHIEF JUSTICE ROBERTS: I'm sorry, counsel.
25 One of my colleagues was trying to ask a question.

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

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

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

13 MR. ROBERTS: No. But I think the drunk
14 driving -- that what concerned the Court about drunk
15 driving was that the crime is a strict liability crime.
16 It didn't involve deliberate conduct. This conduct is
17 purposeful. Petitioner doesn't -- doesn't contest that.
18 And the situation here is a different kind of risk.
19 It's like the risk in burglary. It's the deliberate
20 commission of the crime despite the clear risk of an
21 ensuing violent confrontation.

22 And so, the parallel, there really isn't a
23 parallel to the strict liability crime there, where the
24 injury -- the Court said in Begay there is a serious
25 risk of injury. The problem is that the crime is just

1 not purposeful, so it doesn't show this willingness to
2 harm others.

3 JUSTICE KENNEDY: Well, of course, that's
4 the point. Begay talked about purposeful violent
5 conduct, not just purposeful conduct.

6 MR. ROBERTS: Yes, Your Honor. But you have
7 to -- you have to talk about the violent conduct in
8 context. And what it said is that all these enumerated
9 crimes are violent crimes. But burglary is violent not
10 because the violence is some element of the offense.

11 There is nothing about the elements of the offense
12 that's violent. What makes burglary violent is the fact
13 that the offender deliberately commits it, even though
14 he knows it could trigger this violent confrontation.

15 JUSTICE GINSBURG: The distinction between
16 this crime and crimes in general is that this person has
17 shown that he or she doesn't want to go back into
18 custody, is that --

19 MR. ROBERTS: I think it's -- it's numerous
20 things, but the avoidance of custody is sort of a
21 categorical difference between this and all the other
22 crimes, Your Honor. It's an element of this crime that
23 he is doing that.

24 That also factors into the fact that the
25 risk of violence during recapture is going to be greater

1 than the risk of violence in apprehending an ordinary
2 criminal for several different related reasons. One --

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

5 MR. ROBERTS: Yes.

6 JUSTICE GINSBURG: And am I correct in
7 understanding that since this case was decided, the
8 Seventh Circuit has changed its position and has gone
9 the other way?

10 MR. ROBERTS: Yes. The Seventh Circuit
11 thought that applying the purposeful, violent and
12 aggressive requirement of Begay required a different
13 result because it -- it thought that it meant that the
14 crime had to involve violent conduct itself; and it
15 didn't appreciate the point I was making before, that
16 burglary doesn't involve that violent conduct itself,
17 and that burglary is violent because of the prospect of
18 the violent confrontation.

19 And so, that's the -- that's what led the
20 Seventh Circuit astray the second time around. But it
21 --

22 JUSTICE GINSBURG: The first time around,
23 didn't one of the judges suggest that there ought to be
24 a study comparing the frequency of violence in escapes
25 from custody to the frequency of violence in failure to

1 report, and isn't that what we now have from the
2 Sentencing Commission?

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

9 Two, because these data are just generally
10 not going to be available. And you don't have even the
11 baseline for the other crimes, the enumerated crimes,
12 really to compare it to. And so the result, if you
13 start looking around for statistics and saying we need
14 these statistics to do it, is that virtually no crimes
15 are going to qualify under the residual clause.

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

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

23 I think I would probably agree that
24 white-collar crimes are not likely to -- to carry a very
25 high risk of violence on arrest. So I -- there's one

1 category. Can you think of others, other categories
2 outside of white-collar crime, that are going to have a
3 lower risk of arrest than, say, the failure-to-report
4 category?

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

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

20 JUSTICE SOUTER: They are going to be in
21 category one.

22 MR. ROBERTS: Right. They are going to be
23 covered already.

24 JUSTICE SOUTER: Yes.

25 MR. ROBERTS: So you know, one, we think

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

17 JUSTICE ALITO: Do you happen to know how
18 many additional crimes are likely to raise issues like
19 this under the residual clause?

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

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

25 MR. ROBERTS: Well I'm hopeful that the

1 Court won't have to decide too many other cases with the
2 guidance that will be given by Begay and James and
3 now -- and now this case.

4 So, you know, it has been -- this case, the
5 Court took; it had been holding the case for Begay and
6 it took it rather than vacating and remanding. So it's
7 not as if this is a case where some conflict has
8 developed after the Court was taken to resolve. We
9 think --

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

12 MR. ROBERTS: I think a soldier that goes
13 AWOL -- I mean, the soldier that goes AWOL does probably
14 invite somebody to come after them. It's a little bit
15 harder case here because he is not somebody who is a
16 recidivist felon.

17 JUSTICE STEVENS: Well, he has to be a
18 recidivist. This is one of three offenses for an
19 aggravated sentence. You never have the isolated
20 question.

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

25 JUSTICE STEVENS: It would only be a crime

1 if it's his third crime and not if it's his first.

2 MR. ROBERTS: Well, you don't look to the
3 individual person; we're looking to the ordinary case
4 and we know from the elements here that you have a
5 recidivist -- you have a recidivist felon. I do think
6 that there is a risk of -- you know, there is a risk of
7 violent confrontation when a soldier goes AWOL, Your
8 Honor.

9 JUSTICE STEVENS: Sure.

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

13 The -- if I could just address something
14 that Justice Kennedy had raised before about statutes
15 unlike Illinois's statute that has a -- that generally
16 prohibit escape. One -- one possible problem that could
17 arise from a holding that offenses like failure to
18 report are not violent felonies is that a statute that
19 broadly covered escape, the result would be that jail
20 break escapes would not be violent felonies under that
21 statute, because the statistics that are out there
22 suggest that 89 percent of all escapes are either
23 walkaways or failure to report.

24 And so unless the charging document
25 specifically charged it as a jail break escape, then the

1 general -- something that was charged under the general
2 escape statute would not qualify for coverage under the
3 ACCA.

4 And aside from that, if the Court has no
5 further questions, we could ask that the judgment of the
6 Court of Appeals be affirmed.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Hochman, you have 11 minutes remaining.

9 REBUTTAL ARGUMENT OF ROBERT N. HOCHMAN

10 ON BEHALF OF THE PETITIONER

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

12 Just to begin with where Mr. Roberts left
13 off, most states in fact do distinguish in their
14 statutes between failure to report and prison break
15 escapes. These are cited by both parties in the briefs
16 and you can review them, but there are clear
17 distinctions in the law. So the risk that prison break
18 escape is somehow going to escape -- escape, if you
19 will, from the scope of the statute as a result of a
20 reversal is -- is unfounded.

21 Just to make a couple of things clear.
22 First of all with respect to the sentence, Justice
23 Ginsburg, the -- he was sentenced to six additional
24 months but it was stayed as -- as was mentioned; and so
25 when I was answering that question he did not serve

1 additional time as a result of that, and that's what I
2 was referring to.

3 If you look at the sentencing transcript,
4 that's where the indication is that he did in fact serve
5 out four additional weekends. It's not noted in the --
6 it's not noted as an additional sentence, punishment for
7 it.

8 JUSTICE SCALIA: What was he serving those
9 weekends for? What was the crime?

10 MR. HOCHMAN: That was the armed robbery --
11 the robbery crime, not armed robbery, the robbery crime.
12 That's the first predicate offense here.

13 JUSTICE SCALIA: He just gets weekends for
14 that? How many weekends?

15 MR. HOCHMAN: 11.

16 JUSTICE SCALIA: Pretty good deal.

17 (Laughter.)

18 MR. HOCHMAN: Second, with respect to the
19 anecdotal cases, you know, we looked at them; you could
20 look at them. If there are two instances where there
21 are injury -- there are two instances where there are
22 injury, I didn't catch that, and I apologize if I
23 misspoke.

24 But it doesn't change the core of the
25 problem, which is that the anecdotal evidence

1 produced -- and that dates back all the way to 1977,
2 they looked back at cases -- they are covering on
3 extraordinary broad period of time in looking for this
4 stuff, and there is just not -- there is not a lot
5 there, if there is anything there at all, with respect
6 to injury associated with failure to report.

7 On the core substance of their argument,
8 Mr. Roberts emphasized that failing to report has as an
9 element avoiding arrest, avoiding confinement. I don't
10 actually think that's right. There is nothing about
11 concealment. There is nothing about hiding. There is
12 nothing about seeking to escape from a police officer
13 who comes to bring you back. He just didn't go; and in
14 fact we don't -- the record doesn't explain why; but you
15 know, it was the November to December period. It's the
16 holiday period of time for people when they, obviously,
17 for a variety of reasons might prefer to spend time with
18 their families. Whatever the reason was --

19 CHIEF JUSTICE ROBERTS: Statistics show that
20 the number of robberies increases during the holiday
21 season. He just needed to get --

22 (Laughter.)

23 JUSTICE GINSBURG: I thought he did this
24 four times. I thought there were four.

25 MR. HOCHMAN: There were four periods from

1 the end of November, four consecutive weekends from the
2 end of November into December. There is no indication,
3 Mr. Chief Justice, that any further robberies were
4 committed during that period. But the point is --

5 CHIEF JUSTICE ROBERTS: Well, there is no
6 indication he meant to spend time with his family over
7 the holidays.

8 (Laughter.)

9 MR. HOCHMAN: Not in the record. It's
10 absolutely not in the record, Your Honor. No doubt.
11 But the point is that while Mr. Roberts stood up and
12 said it's about avoiding arrest; it's about concealing
13 yourself; it's the sort of person that's prone to react
14 violently; the fact is, that's speculation; and
15 everything we know from the sentencing commission and
16 from their own efforts suggests the contrary. And
17 indeed even the dangerous weapon findings of the
18 sentencing commission, I think, should be excluded,
19 because under the guidelines, the mere possession of a
20 weapon is not a violent felony.

21 A felon in possession is not -- cannot be a
22 predicate offense under the guidelines. And so the mere
23 possession of a weapon, which is all you have on those
24 five instances -- by the way, the fact that they did not
25 double-count them as also including four suggests they

1 weren't used in any way, they weren't brandished in any
2 way. It's just not there. There is really nothing
3 there to support the Government's speculation. If there
4 is no further questions, thank you, Your Honors.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 The case is submitted.

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

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