

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: CURTIS DARNELL JOHNSON, Petitioner, v. UNITED
STATES.
CASE NO: No. 08-6925
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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-6925, Johnson v. United States. Ms. Call.

ORAL ARGUMENT OF LISA CALL
ON BEHALF OF THE PETITIONER

MS. CALL: Mr. Chief Justice, and may it please the Court:

Mr. Johnson's conviction for battery in the State of Florida can be sustained by the slightest contact. Such a conviction does not qualify as a violent felony under the Armed Career Criminal Act. A violent felony means one that has as an element the use, attempted use, or threatened use of physical force against the person of another. Physical contact is not the same as physical force.

Physical force in this context means something more than a mere quantum of physical contact, and it requires violent aggression that is likely to cause physical injury. This conclusion is guided by the rules of statutory construction in this Court's precedents. The better-reasoned circuits have applied these principles to find that physical force means something more than de minimis contact.

1 JUSTICE GINSBURG: And that's -- you say
2 that's Federal law. Would it make a difference if,
3 contra what Florida held in the Hearn case, a State had
4 typed a battery statute as a crime of violence?

5 MS. CALL: Yes, Your Honor. If the State
6 statute required that the offender admit the use of
7 force as part of the elements of his prior offense --

8 JUSTICE GINSBURG: No, no, no. It's exactly
9 the -- it's exactly the statute Florida has. And
10 somebody has a plea, and we don't know from the record
11 what the conduct was. But the State, unlike Florida,
12 says, our battery statute for our State law purposes is
13 a crime of violence; therefore, for our State law
14 enhancements, the person who pleads guilty to a battery
15 offense will be deemed one who has committed a crime of
16 violence, if that's the State law.

17 MS. CALL: Then -- no, Your Honor, I'm
18 sorry. Then the mere fact that the State found that it
19 qualified under its own recidivist statute would not
20 bind the Federal court. Why we say that Hearn is
21 binding is the proposition that it found the elements of
22 a battery offense and the -- the ACC looks to those
23 elements to determine whether it is a violent felony.
24 Congress didn't say that it -- the offender had to have
25 conduct that involved the use of physical force, but a

1 prior that had as an element the use.

2 So the fact that the State statute may
3 qualify under its State recidivism wouldn't be the same
4 determination that it didn't have as an element the use
5 of force. Here --

6 JUSTICE BREYER: But what -- what -- before
7 we can even get into this, I think we have to decide if
8 those words "striking or touching" describe one crime or
9 two. And what we said in -- what was it -- in Chambers is
10 that the nature of the behavior that likely underlies a
11 statutory phrase matters in this respect. So if you think
12 of the seven different things covered by one statute in
13 James or Chambers, two of them, failing to return from a
14 furlough and failing to return from work in day release,
15 seem to me quite possible to describe one thing, not two.

16 Now, how do we know that "striking or
17 Touching" describes two things? I couldn't find any
18 instance, and we had the library looking. I couldn't
19 find any instance in Florida where those two things have
20 ever been charged separately. And they looked at
21 hundreds.

22 So -- so why do we think it's two crimes,
23 rather than just one called "striking or touching"?

24 MS. CALL: Your Honor, two reasons: First,
25 the face of the statute itself has "or," so it doesn't

1 require --

2 JUSTICE BREYER: It does, too, in Chambers.
3 It's "not returning from furlough or not returning from
4 work release." You know, and I'd -- I'd say the
5 behavior was the same. It's not like burglary of a
6 dwelling versus burglary of a boat. Those are two
7 separate things.

8 MS. CALL: Yes, Your Honor.

9 JUSTICE BREYER: Here, why do you think they
10 are two separate things?

11 MS. CALL: Your Honor, because Hearn, the
12 Florida State Supreme Court decision, described them as
13 three separate offenses and spelled out that this
14 statute could be violated and it said by, first,
15 touching someone intentionally and against their will;
16 second, by striking; or third, by causing bodily harm.

17 JUSTICE BREYER: Okay. If they are separate
18 things, what is the evidence? There's a legal
19 question. You say the touching. Spitting, is that
20 enough to rise under the -- to fall within the Federal
21 statute? Suppose I agree with you on that; the answer is
22 no.

23 How do I know whether touching as applied in
24 Florida as a separate matter in the mine run of cases,
25 involves spitting or involves something that causes far

1 more serious harm? How do I know?

2 MS. CALL: Your Honor, you would apply first
3 the plain language of the statute, and "to touch" means
4 the slightest contact, as the courts have held. At
5 pages 41 and 42, we spelled out the offenses of spitting,
6 making slight contact, that justified a battery
7 conviction. "Strike" obviously has to mean something
8 else or the legislature wouldn't have included both
9 types of conduct within the battery provision.

10 JUSTICE SCALIA: This -- this statute is a
11 misdemeanor statute, isn't it?

12 MS. CALL: For a first offense, yes, Your
13 Honor.

14 JUSTICE SCALIA: Yes. And the only reason
15 what happened here was elevated to a felony was that he
16 had a prior offense.

17 MS. CALL: Yes, Your Honor.

18 JUSTICE SCALIA: So it's understandable that
19 the slightest touch could -- could constitute a
20 misdemeanor.

21 MS. CALL: Your Honor, the problem with
22 saying that just because it's a felony, therefore it
23 can't be considered is that the statute first describes
24 the prohibited conduct and says that -- the conduct is in
25 the first subparagraph, the penalty is in the second.

1 So the very same conduct is necessary for either a
2 felony or a misdemeanor, and essentially no force times
3 two is still zero.

4 JUSTICE ALITO: Well, ACCA uses the word
5 "physical force," and any touching involves some
6 physical force. Now, how do we determine how much more
7 than the minimum physical force is necessary in order to
8 fall within the Federal statute?

9 MS. CALL: Your Honor, it is a qualitative
10 line that sentencing judges would have to make, like all
11 of the other difficult decisions that they're called on
12 to make in the Sentencing Guidelines in these 3553
13 factors. We've asserted as a proposed test that it be
14 conduct just like the Begay test, that it would be
15 physical force of a kind that is violent and aggressive
16 and likely to cause injury.

17 JUSTICE BREYER: Well, there -- most -- this
18 statute actually -- we looked into it and it seems to be
19 used, particularly the touching part, also to cover
20 unwelcome physical, sexual advances. And it's not hard
21 to consider such matters to have involved force of
22 exactly the kind that the Federal statute is aimed at.
23 And there was no striking, but there was in fact use of
24 harmful force, touching. That was serious.

25 Now, how do we know which is more normally

1 the case when this statute is used in its touching
2 respect?

3 MS. CALL: Your Honor, the government had
4 cited a footnote of 6,000 convictions, and there is no
5 way to know of those convictions whether they were
6 charged as to touch, to strike, or to cause bodily harm.

7 JUSTICE SCALIA: But we don't have to know
8 what's more normal anyway, do we?

9 MS. CALL: No, Your Honor.

10 JUSTICE SCALIA: If -- if any conviction is
11 possible under the element of the crime to touch, when
12 there is simply slight physical force, your argument
13 still stands, right?

14 MS. CALL: Yes, Your Honor.

15 JUSTICE BREYER: I would think that's
16 certainly wrong under our cases. I mean, I would have
17 thought that the reason that burglary, for example, is a
18 violent crime is not because in every instance there is
19 a risk of physical harm, but because in the mine run of
20 instances there is a risk of physical harm, and I
21 thought we said that in at least three cases.

22 MS. CALL: Yes, Your Honor, as to looking to
23 both the enumerated offenses and those that fall in the
24 otherwise. The first prong of the ACC, though, does not
25 talk about conduct, and it does not refer to an ordinary

1 case. It says an offense that has as an element. And
2 therefore it's directed to looking at a particular
3 Florida State statute rather than a generic battery or
4 how battery might ordinarily --

5 JUSTICE BREYER: I know, but an element --
6 you mean we should interpret "element" in the first part
7 of this in a radically different way than we have
8 interpreted equivalent words in the second part, and we
9 should say as burglary -- in other words, assault
10 or -- or -- in other words, unless in every case of
11 prosecution there is going to be force actually applied
12 or something like that, that it doesn't fall within (i)?
13 I'm surprised at that. I mean, I guess it's possible.
14 What would be the argument for doing that, which would
15 be totally different than we have handled the other one?

16 MS. CALL: Your Honor, the reason why is
17 that Congress was directing in the first prong those
18 crimes that were directed against persons and would be
19 defined by their elements. In the second prong, Congress
20 did list out four enumerated offenses that they thought
21 were committed (a) by career criminals, and (b) that
22 created that substantial risk. In the first part, it
23 does not talk about risk to others. It's that
24 offender's conduct and an elements-based test.

25 JUSTICE ALITO: If there were a State

1 statute that made it a battery to engage in offensive
2 and unwelcome sexual touching, your argument would be
3 that that would not fall within the first prong of ACCA,
4 because there is not a -- it's not likely to cause a
5 physical injury?

6 MS. CALL: Yes, Your Honor.

7 JUSTICE ALITO: Is that right?

8 MS. CALL: Yes, Your Honor. Because --

9 JUSTICE ALITO: If there were a statute that
10 said -- I mean, in the old days I'm told people used to
11 throw the contents of chamber pots out the window. If
12 there were a -- a State statute that said it is a crime to
13 dump the contents of a chamber pot on somebody's head,
14 you would say that's -- that doesn't fall within the
15 first prong of ACCA?

16 MS. CALL: Yes, Your Honor, I would -- I would
17 say that that does not qualify under the first prong.

18 JUSTICE ALITO: Even though those are classic
19 batteries --

20 MS. CALL: Yes, Your Honor.

21 JUSTICE ALITO: -- and the language of the
22 first prong of ACCA really tracks the language of the
23 common law crime of battery.

24 MS. CALL: Your Honor, it does because it
25 talks about in Florida the element is the slightest

1 contact. And we're not arguing that that offender who
2 spits or touches or does these other disrespectful acts
3 doesn't deserve to be charged and can't be charged with
4 battery under Florida State law.

5 JUSTICE BREYER: So -- so what about an
6 assault? I guess, using a law school hypothetical, I
7 mean, statutes for assault -- I guess you could assault
8 somebody by threatening to throw a marshmallow at them.

9 MS. CALL: Yes, Your Honor.

10 JUSTICE BREYER: Okay. Now, assault is out
11 of the statute.

12 MS. CALL: Your Honor, again, it depends on
13 each particular statute and its elements.

14 JUSTICE BREYER: No, no. But I mean, on
15 your definition, as you and Justice Scalia were
16 suggesting, because it's conceivable that you could
17 assault somebody by threatening to throw a marshmallow,
18 that means assault is no longer a crime of violence, and
19 that can't be right.

20 MS. CALL: Well, Your Honor --

21 JUSTICE SCALIA: Well, of course it's right.
22 You don't have to touch somebody for an assault.

23 MS. CALL: Correct.

24 JUSTICE SCALIA: You can just threaten
25 somebody.

1 MS. CALL: Yes, Your Honor --

2 JUSTICE SCALIA: That's not a crime of
3 violence.

4 Ms. Call: And that would be --

5 JUSTICE SCALIA: Of course it's right.

6 JUSTICE BREYER: Assault is not a crime of
7 violence; it's not a use of force.

8 JUSTICE SCALIA: Certainly not.

9 JUSTICE BREYER: Okay.

10 MS. CALL: Two responses to that, Your
11 Honor. First is looking at the underlying fact
12 would violate the categorical approach of saying we're
13 not looking at what each offender might have done in any
14 particular case, but what are the elements that he
15 necessarily admitted. And under the Florida statute, it
16 would qualify as a violent felony because the Florida
17 statute defines it as an offer to do violence coupled
18 with the apparent --

19 JUSTICE BREYER: Well, what about attempted
20 murder?

21 MS. CALL: It -- Your Honor, yes, if it has as
22 an element the use of force. And that --

23 JUSTICE BREYER: But, wait, I mean, it didn't
24 succeed.

25 MS. CALL: Yes, but under the ACCA, which is

1 one of the phrases that the government elides out of its
2 analysis, it's not simply the actual use of force, but
3 an attempted or threatened use of force.

4 JUSTICE SOTOMAYOR: Can I ask you something?
5 In your definition, you appear to hinge it on the fact
6 that the force used has to cause injury of some type.
7 That -- that appears to be the only definition you can
8 give. But the use of physical force means just the use
9 of force, strong force, violent force, aggressive force,
10 but it doesn't mean that it necessarily has to cause
11 injury.

12 Would my rearing back and slapping you? In
13 those instances slapping doesn't cause physical injury
14 as that term is defined in the common law, which is an
15 injury of lasting effect. You might have some redness for
16 a second, but that's all. Would that qualify as a crime
17 of violence?

18 MS. CALL: Your Honor, some of these
19 questions will be difficult lines for the court -- a
20 sentencing court to draw. We have offered the
21 definition that violent felony -- the word "violence"
22 encompasses sort of a rough use of force that could lead
23 to injury or is likely to lead to injury, not --

24 JUSTICE SOTOMAYOR: Well, but "violent" has a
25 broader meaning. Generally, it means a strong force or a

1 strong -- physical force generally has some relative
2 degree of -- of impact. I agree with you, the common
3 definition talks that way. Why should we read something
4 more into it, like physical injury?

5 MS. CALL: Your Honor, the Court wouldn't
6 have to, and part of where we drew this from is the
7 Court's language in Begay that indicated that crimes
8 within clause (i) of ACCA are those crimes, are
9 also likely to present a serious risk of potential
10 injury to others.

11 JUSTICE SOTOMAYOR: Many will, but don't --
12 serious use of force doesn't necessarily always.

13 MS. CALL: Yes, Your Honor, and that's why
14 the qualitative line falls somewhere higher than mere
15 contact, which would simply be the standard for Florida
16 battery conviction.

17 JUSTICE GINSBURG: Suppose we knew -- knew
18 what happened. It's the same statute, and it would be
19 possible to have a conviction for a rude touching under
20 it. But this man, instead of pleading guilty, in fact
21 went to trial, and you know that he beat somebody badly.
22 If -- if that were the case, if we knew what the facts
23 were, then would the ACCA enhancement be in order?

24 The statute covers the waterfront from a
25 rude touching to beating somebody to a bloody pulp. But

1 we know, because there's been a trial, exactly what this
2 person does, and what he does would fall under the
3 aggressive, violent, capable of doing physical injury to
4 another.

5 MS. CALL: No, Your Honor. Knowing the
6 added fact of the actual conduct would not answer the
7 question because it is based on the elements. However,
8 if the prosecutor charged it as to strike, or there was
9 a division -- for example, at page 19 of our reply brief
10 we showed the Fifth Circuit case in Robledo. It tracked
11 the exact same Florida statute that is at issue here and
12 said the offender did "touch or strike the victim," comma,
13 "by striking him with a vehicle." And the Fifth Circuit
14 said under the modified categorical approach to look at the
15 charging document and the offender's necessary admissions
16 showed that was, in fact, a crime of violence.

17 JUSTICE SCALIA: Isn't there a separate -- a
18 separate battery crime, aggravated battery, in -- in
19 Florida, which --

20 MS. CALL: Yes, Your Honor. There are two
21 other felony battery statutes, apart from this one, that
22 do --

23 JUSTICE SCALIA: Well, this isn't -- this
24 isn't a felony battery statute. This is a misdemeanor
25 battery statute, which has been elevated to a felony in

1 this case only because the fellow had a prior.

2 MS. CALL: Yes, Your Honor.

3 JUSTICE SCALIA: But, besides the
4 misdemeanor battery statute, there are two felony
5 battery statutes in Florida, right?

6 MS. CALL: There are. Two other separate --

7 JUSTICE SCALIA: And how -- how are they
8 defined?

9 MS. CALL: Your Honor, they add the mens rea
10 of whether or not the battery was intended to cause
11 great bodily harm, permanent disfigurement, or permanent
12 disability; and the other says simply that you committed
13 a battery and did cause those -- higher standard. But --
14 and, in addition, the misdemeanor battery includes the
15 element of causing bodily harm, and offenders can be
16 charged simply with that provision.

17 JUSTICE SCALIA: Misdemeanor does?

18 MS. CALL: Yes. Yes, Your Honor. The
19 felony version is to cause great -- great bodily harm.

20 JUSTICE SCALIA: Right.

21 MS. CALL: And the misdemeanor is to cause
22 bodily harm, which Florida law defines as low as causing
23 a bruise or mark like that.

24 So, if someone were charged with, in the
25 State court, a predicate that involved that kind of
26 injury, a prosecutor using his or her discretion could

1 charge under causing bodily harm and -- which showed
2 facts that could support the finding of a violent
3 felony.

4 CHIEF JUSTICE ROBERTS: What -- what about
5 the government's argument that your interpretation would
6 dramatically limit the reach of this provision of ACCA
7 because of the number of States that define battery in
8 the same way Florida does?

9 MS. CALL: Your Honor, I think that the
10 government exaggerates the concerns of that because
11 there are statutes that both require an admission of the
12 use of force or have that as an alternative that could
13 be prosecuted in the appropriate case.

14 JUSTICE BREYER: Well, what --

15 CHIEF JUSTICE ROBERTS: Yes, but it's --
16 it's usually easier just to charge the lowest common
17 denominator, the battery that doesn't necessarily
18 require violent force, and the point -- this was the
19 argument that was accepted in -- in Hayes, that the
20 interpretation, say, advanced by the dissent in that
21 case, would mean that there be a vast number of States
22 that weren't covered.

23 I mean, presumably, Congress meant to cover
24 all the States.

25 MS. CALL: Yes, Your Honor. However,

1 because the -- in Hayes, the Court was looking at the
2 "committed by" and whether that was the -- the necessary
3 part of the prior conviction.

4 Here, given the fact that the statute can be
5 charged both in Florida and many other statutes to be
6 included, shows that those cases would -- it would only
7 be a small number of cases that are likely to be
8 affected where --

9 JUSTICE SCALIA: You -- you would have to
10 have other States which only have a battery statute that
11 is defined as broadly as this misdemeanor battery
12 statute in Florida.

13 If they have a higher degree of battery,
14 just as Florida does, which is a felony, then if the --
15 if the prosecutor wants this fellow to be convicted of a
16 violent crime, he -- he could charge him with that --
17 with that higher degree.

18 MS. CALL: Yes, Your Honor.

19 JUSTICE SCALIA: Are there any States that
20 have only this simple battery statute, which is -- which
21 is met by a simple touching?

22 MS. CALL: According to LaFave, only Florida
23 and I believe one other State has such a broad
24 definition --

25 JUSTICE SCALIA: No, no. You mistook my

1 question.

2 MS. CALL: I'm sorry.

3 JUSTICE SCALIA: Are there any States in
4 which the only prosecution for battery that can be
5 brought is under a statute as broad as this one, which
6 is -- is covered by even a touching?

7 MS. CALL: No, Your Honor.

8 JUSTICE SCALIA: Don't all of the other
9 States that have a touching statute also have higher
10 degree of battery statutes?

11 MS. CALL: Yes, Your Honor, according to
12 LaFave, all States have aggravated battery statutes that
13 include either the use of a deadly weapon or other use of
14 force.

15 CHIEF JUSTICE ROBERTS: But I thought the
16 evidence was pretty clear that Congress was adopting the
17 common law definition of battery here, which doesn't
18 require that higher degree of force or violence.

19 MS. CALL: Your Honor, in the legislative
20 history, the only time that they talked about battery --
21 in one House report it references battery and assault,
22 simply by those descriptions.

23 Every other time, they talked about assault
24 and battery with a deadly weapon and something more than
25 a simple touching.

1 JUSTICE SCALIA: Do they use battery in the
2 statute here? I am looking for it. I don't -- I don't
3 see the word "battery" at all.

4 MS. CALL: No, Your Honor. There's no
5 enumerated offenses in the first prong.

6 JUSTICE BREYER: Well, what worries me more
7 than -- than your application to battery is the
8 methodology, because, if it's true that in section (i),
9 unlike section (ii), a single instance of where you could
10 commit the crime without using force is sufficient to
11 take it out of the statute, then just looking through
12 this, generally, you would take out assault, probably
13 have to take out kidnapping. You would probably have to
14 take out domestic violence. You would have to take out
15 extortion, certainly, explosives laws.

16 I mean, the very -- laws that I would think
17 Congress certainly intended to include in that first
18 definition.

19 MS. CALL: Your Honor, when they --

20 JUSTICE BREYER: So that's very worrying,
21 and why I don't think it's the right methodology.

22 MS. CALL: Well, Your Honor, they did use
23 the word "element," and an element is a constituent --

24 JUSTICE BREYER: Yes, but an element could
25 be an element that is a -- the word is "element," the

1 use or threatened use of physical force. Now, an
2 element, say like abduction, could be an element that
3 uses physical force if in the mine run of cases it uses
4 physical force, even though one can sometimes think of
5 an exception. That's how we have interpreted (ii).

6 So if we interpret (i) a different way, we are going to
7 take outside the statute the very things that Congress
8 wanted inside; and, if we interpret it the same way, I
9 think we would get to the right result.

10 MS. CALL: Your Honor, I would have two
11 responses to that: The first is, in the second prong,
12 Congress used the word "conduct." And if they had meant
13 conduct to be included in (i) rather than the elemental
14 definition, that would have been a very easy definition.

15 Second, when they talked about the crimes
16 intended for category (i), they gave the examples of
17 someone with murder convictions, rape convictions, a
18 gangland enforcer.

19 JUSTICE BREYER: Rape can be convicted
20 without -- rape can be conducted without force.

21 MS. CALL: Yes, Your Honor.

22 JUSTICE BREYER: All right. So now rape is
23 out.

24 MS. CALL: Your Honor, it depends on the
25 element of the offense.

1 JUSTICE BREYER: Well, the element of the
2 offense of rape is not force; it's lack of consent.

3 JUSTICE SCALIA: Excuse me. Under (i), it
4 depends upon the elements, but what about (ii) and
5 especially the residual provision of (ii), any other
6 "conduct that presents a serious potential risk of
7 physical injury to another"? I would think rape
8 qualifies under that.

9 MS. CALL: And, certainly, if the government
10 believes --

11 JUSTICE SCALIA: And many of the other
12 crimes that Justice Breyer has been talking about.

13 MS. CALL: Yes, Your Honor. I certainly
14 agree that it --

15 JUSTICE BREYER: You do? You agree that,
16 then -- in other words, section (ii) is not about property
17 crimes that involve force, which is what Congress
18 happened to say nonstop in the legislative history,
19 which I know isn't read by everyone. But it seemed to
20 me reading that history, the first part is dealing with
21 those things that aren't property crimes. The second
22 part, like arson, extortion, which they had in mind of a
23 certain kind, and whatever, the explosives-related
24 things, were things that they thought didn't -- could be
25 property crimes that also involved harm to people.

1 MS. CALL: Yes, Your Honor, and --

2 JUSTICE BREYER: Well, you can't say yes to
3 both of us.

4 MS. CALL: Well -- I agree with Your Honor
5 that the legislative history certainly indicates that (i)
6 and (ii) had different purposes, but this Court didn't find
7 Begay and Chambers on the easy test, to say simply that DUI
8 is not a property crime, therefore it doesn't
9 qualify. So I hesitate to offer that as a solution to
10 the Court, but keeping in mind that the government --

11 JUSTICE SCALIA: I dare say that the next
12 time somebody comes to argue before this Court that a
13 crime is not included within section (ii) because it's not
14 a property crime, I don't think that person is going to
15 get one vote.

16 JUSTICE BREYER: They wouldn't have to say
17 that. They would have to say that it is not a crime
18 like the three that are mentioned, which I can't
19 remember -- it's arson, extortion -- and what's the
20 third? Using explosives.

21 MS. CALL: It is burglary, arson, extortion,
22 or involves --

23 JUSTICE BREYER: Yes, burglary, arson,
24 extortion -- all right. You would say it's not like
25 that. It's DUI; it was not like that.

1 MS. CALL: Yes, Your Honor.

2 JUSTICE BREYER: And I guess --

3 MS. CALL: But if the government failed to
4 prove that a predicate qualified under the first prong,
5 it could offer argument and evidence to the sentencing
6 judge to show that it met the Begay test and was, in
7 fact a serious risk of injury, that -- purposeful
8 violence, et cetera. It's simply not that battery by
9 touching qualifies.

10 And, Your Honor, if I may reserve the
11 remainder --

12 JUSTICE GINSBURG: Would you just clarify an
13 answer that you gave? You -- you described Florida as
14 unique, but I thought there were many States that had a
15 codification of common law battery that would include
16 both touching and more aggressive behavior. I thought
17 Florida was not alone in having that kind of statute.

18 MS. CALL: There are other States, Your
19 Honor, that have the common law definition, but they
20 also have alternative versions. Many of the States also
21 have alternative versions that require either the use of
22 force or the aggravated if the underlying conduct or the
23 underlying charge was that serious matter of involving
24 physical force to qualify under a violent felony.

25 JUSTICE SCALIA: I thought you said they all

1 had such -- such aggravated statutes in your answer to
2 me. Now you just said many of them do. Which is it?

3 MS. CALL: Well, many have alternative
4 versions that require admission of use of force, not
5 simply, say, touching or striking like Florida. But all
6 do have felony versions of aggravated felonies.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Ms. Kruger.

9 ORAL ARGUMENT OF LEONDR A R. KRUGER

10 ON BEHALF OF THE RESPONDENT

11 MS. KRUGER: Mr. Chief Justice, and may it
12 please the Court:

13 The primary definition of violent felony in
14 the Armed Career Criminal Act, as, Justice Alito, you
15 have noted and, Mr. Chief Justice, as you have noted,
16 almost precisely tracks the general definition of the
17 crime of battery; that is, the unlawful application of
18 physical force to the person of another.

19 Petitioner's primary submission to this Court -
20 -

21 CHIEF JUSTICE ROBERTS: Well, then why
22 didn't they say -- why didn't they just say "battery" if
23 that's what they meant? It's a lot simpler and also
24 clearer than to say "physical force against the person."

25 MS. KRUGER: I think it's certainly true,

1 Mr. Chief Justice, that Congress could have defined the
2 category of predicates for the ACCA in that way by
3 listing certain offenses, which would then require the
4 courts to determine what the generic elements of those
5 offenses were, as this Court did with respect to
6 burglary in Taylor.

7 But Congress instead decided to list in its
8 primary definition of violent felony the common element
9 that it thought as a categorical matter indicated a
10 sufficient potential for harm that the crime ought to be
11 singled out as a predicate for ACCA enhancement. And
12 that single element was the use of physical force
13 against the person of another.

14 JUSTICE SCALIA: You -- you -- you would
15 have us believe that by "violent felony" in this -- in
16 this statute, Congress meant the threat -- the threat?
17 It doesn't even have to be the act. You know, if you
18 don't shut up, I am going to come over and thwunk you on
19 your shoulder with my index finger. I'm going to
20 (snap). This is a violent felony under this statute
21 which gets him how many more years?

22 MS. KRUGER: It creates a mandatory minimum
23 of 15 years.

24 JUSTICE SCALIA: Fifteen years for (snap).
25 (Laughter.)

1 MS. KRUGER: Justice Scalia, I think that
2 there are a few responses to that question. The first
3 is that a threatened use of force is normally considered
4 and normally punished under the criminal law as a crime
5 of assault. And for the reasons that Justice Breyer has
6 noted already in the argument, it seems awfully
7 unlikely, particularly in light of legislative history
8 of this provision, for those Justices who consider such
9 considerations relevant, that Congress meant to exclude
10 the crime of assault.

11 JUSTICE SCALIA: But that's all he's
12 necessarily been convicted of.

13 MS. KRUGER: Well, I think --

14 JUSTICE SCALIA: When a verdict is
15 brought in, in Florida under this misdemeanor statute,
16 all you know for sure is that he threatened to go
17 (snap). That's all you know for sure that he has been
18 convicted of, and you are going to give him 15 years.

19 MS. KRUGER: And, again, two responses: The
20 first is as a practical matter that is not a crime.
21 Normally, the law of assault, in order to constitute a
22 criminal threat, there has to be more than simply the
23 use of words. There has to -- the defendant has to
24 manifest by conduct.

25 JUSTICE GINSBURG: But there have been rude

1 touchings where there was no danger of physical injury
2 to the person. There have been prosecutions in Florida,
3 I understand, for what would be considered a rude
4 touching as opposed to an aggressive use of force that
5 would risk physical injury.

6 MS. KRUGER: That's correct. There have
7 been a handful of cases that are cited in Petitioner's
8 brief, in which the Florida statute has been
9 used to criminalize rude touchings. We think that those
10 rude touchings, as a matter of general usage in the
11 common law and in the general definition of battery, do
12 in fact have as an element the use of physical force.
13 That is a usage that has been in force in the majority
14 of States for quite some time. And we think that it
15 does no particular violence, if you will pardon the
16 expression, to the statute to interpret it to encompass
17 the full range of common law batteries, batteries as
18 they are prosecuted --

19 JUSTICE KENNEDY: How about pick-pocketing?
20 Would pick-pocketing be a violent crime if it involves a
21 touching necessarily?

22 MS. KRUGER: Pick-pocketing actually doesn't
23 involve a touching necessarily, which is normally the crime
24 of pick-pocketing and robbery --

25 JUSTICE KENNEDY: I guess a very good

1 pickpocket could get -- could get just the wallet and not
2 touch the person, I'm not sure.

3 MS. KRUGER: Well, pick-pocketing, normally
4 as it's criminalized in most States, doesn't, in fact,
5 require as an element that the prosecution prove that
6 the -- the defendant touched the victim.

7 JUSTICE SCALIA: No, but you don't prosecute
8 them for pick-pocketing. You have a clumsy pickpocket
9 and you prosecute him for battery, right? And he gets
10 15 years.

11 MS. KRUGER: Well, the clumsy pickpocket
12 would, in fact, be in most jurisdictions a robber. And
13 robbery is precisely the kind of offense that we know
14 that Congress was intending to cover in subsection (i) of
15 the ACCA. It was one of the first ACCA predicates, and
16 it remains, I think, a paradigmatic example of a crime
17 that has as an element the use of force and is,
18 therefore, covered under the plain statutory language.
19 But I think this --

20 JUSTICE SOTOMAYOR: Counsel -- I'm sorry.
21 Please finish and then I will --

22 MS. KRUGER: But I think that the essential
23 thrust of the argument so far has been that if it's
24 possible to commit battery under the common law under
25 the laws of 27 States, including Florida, under Federal

1 law in the way that in individual instances doesn't seem to
2 present a serious risk of injury, then it can't possibly
3 be a violent felony. And I think that we know from the
4 way that the Court has interpreted the statute to date that
5 that is simply not the case.

6 This Court addressed a very similar argument
7 in Taylor --

8 JUSTICE SOTOMAYOR: Counsel -- but you see that
9 you don't have the inquiry. The issue is not whether it
10 causes serious injury or not; the issue is whether the
11 nature of the force used is physical force. And, so, if
12 you look at the common definition of "physical force" in
13 the dictionary, which your adversaries did very well in
14 their brief, physical force has in its ordinary meaning
15 the use of some strength, of some power, and generally
16 kissing doesn't require that strength or power, touching
17 someone on the shoulder doesn't. All of these
18 activities are prohibited by this statute if they are
19 unwanted.

20 So the question is not whether or not they
21 present the risk of physical injury; the issue is
22 whether in all applications or in a substantial number
23 they don't require the use of strength to -- in its
24 application. That's a different question.

25 MS. KRUGER: Justice Sotomayor, I think that

1 you are exactly right, that the inquiry that is set out
2 in subsection (i) is simply, does this crime have as an
3 element the use of physical force?

4 Our submission is that every battery under
5 Florida law, under common law, and under the laws of 27
6 States and the Federal Government does have an -- as an
7 element the use of physical force.

8 JUSTICE SOTOMAYOR: Mainly because -- now we
9 are getting to Judge Easterbrook's argument about the
10 dime -- you know, if I touch myself, I have now used
11 force.

12 MS. KRUGER: Right. There is some
13 suggestion in Judge Easterbrook's opinion that that
14 usage is somehow peculiar to Newtonian physics. The
15 fact of the matter is, it is actually a very common
16 usage in the criminal law. There are a number of
17 judicial opinions, for example, that instead of using
18 the formulation that we see in Florida's battery
19 statute, instead use the formulation use of force of the
20 slightest degree.

21 JUSTICE BREYER: All right. Suppose we
22 interpret the statute, the ACCA statute, as
23 requiring more force than that, as requiring something
24 more than spitting. Now, suppose that sometimes, as
25 they have made a strong case, that touching is a

1 separate thing under this statute because that's what
2 the Florida Supreme Court said, and moreover, there are
3 prosecutions that seem not to fit within striking. How
4 do we know whether by and large this word "touching" as
5 used in Florida covers things with mostly minimal
6 touching, minimal force, or enough force to get within
7 the statute?

8 MS. KRUGER: Well, Justice Breyer, I think
9 that that's precisely the problem with the Petitioner's
10 submission. It creates a kind of required element under
11 the ACCA that has no clear parallels in the substantive
12 criminal law. And it would require Federal sentencing
13 courts to ask precisely the kinds of questions the law
14 of battery has historically sought to avoid, just how
15 much physical force is enough.

16 The reason why a statute like Florida's has
17 reached the least touching of another in anger is, as
18 Blackstone told us, that too is a form of violence. It
19 has so been considered for centuries.

20 And, Justice Ginsburg, to return to your
21 question earlier, Florida itself actually does classify
22 the crime of battery as defined under its statute as a
23 crime of violence for certain purposes. The ordinary
24 understanding of the crime of battery --

25 JUSTICE GINSBURG: Not for --

1 JUSTICE BREYER: That's the --

2 JUSTICE GINSBURG: Not for recidivism. Not for
3 recidivism purposes.

4 MS. KRUGER: It --

5 JUSTICE GINSBURG: But are you saying that
6 suppose Florida split this statute -- and some States
7 do -- so one crime is a rude touching crime and the other
8 is the use of physical -- aggressive physical force that
9 endangers the physical safety of another. If you have
10 both of those statutes, I take it that you would say
11 either one of them would fit under ACCA as a crime that
12 has the use of physical force, because you are saying
13 the rude touching is physical force. It wouldn't -- even
14 if you split off the touching from the striking, you would
15 say the touching falls under ACCA?

16 MS. KRUGER: That's correct, Justice
17 Ginsburg. We think that both variants of that offense
18 in your hypothetical would have as an element the use of
19 physical force.

20 JUSTICE GINSBURG: And that --

21 JUSTICE STEVENS: But only if it's a felony.

22 JUSTICE GINSBURG: And what Congress was
23 trying to get at the worst of the worst in ACCA, the
24 Armed Career, whatever -- that they meant to get after
25 people who go around poking other people in a rude

1 manner?

2 MS. KRUGER: Well, Justice Ginsburg, I
3 think, first of all, it would be a mistake to think that
4 Congress defines the range of ACCA predicates with
5 particular consideration to the ways that hypothetical
6 defendants might -- might commit even quintessentially
7 violent crimes in particular cases.

8 This Court, for example, considered in
9 Taylor v. United States a very similar argument, which
10 was that the statutory reference to burglary ought to be
11 interpreted in a way that would limit it to aggravated
12 burglaries of a certain sort, armed burglaries or
13 burglaries of occupied buildings, in order to make sure
14 that that reference to burglary better fit with
15 Congress's purposes in selecting the worst of the worst.

16 This Court declined that invitation because
17 it decided that Congress's unmodified use of the word
18 "burglary" indicated that Congress meant for that word
19 to take on its ordinary meaning as it was used in the
20 laws of the many States. It said that Congress would
21 have recognized that ordinary burglaries can be
22 committed in individual instances in ways that don't
23 seem particularly harmful, by unarmed defenders of
24 unoccupied buildings in remote locations, but that
25 Congress nevertheless made a categorical judgment that

1 burglaries as a whole present sufficient potential for
2 harm that they ought to be covered as ACCA predicates.

3 And I think a similar analysis applies here.
4 Congress probably wasn't focused on the least amount of
5 force that it takes to commit the crime of battery, but
6 it was entitled to make a judgment that any battery, any
7 unlawful use of force against another person,
8 categorically presents sufficient potential for harm
9 that --

10 JUSTICE BREYER: It might have, but battery
11 by touching does seem a separate category. And at that
12 point, you have to decide, is there an element there of
13 force? And I think it requires more force than just the
14 simplest touching.

15 Now, on Justice Scalia's approach, the fact
16 that there is one conviction for spitting is sufficient
17 to take it outside the statute. That's not my approach.
18 I would say, in the mine run of cases, does there have
19 to be more force than just spitting? And now I don't
20 know how it's prosecuted. So why don't I say in this
21 case, from my perspective, very well, I don't know? No
22 one knows. No one has told me. No one has looked into
23 it. It's very hard to look into, but not impossible.

24 It's the government's job, faced with a
25 15-year statute, to do the looking. They have the

1 resources, more than a defense attorney. Therefore,
2 uncertain as I am, I must decide this in favor of the
3 defendant. What's the response to that?

4 MS. KRUGER: Well, I think the response is,
5 first, we think that the proper approach is one that
6 pays respect to the words that Congress used to define
7 the crime. In ordinary criminal law, despite what some
8 intuitions seem to be, the least touching of another in
9 anger is a form of violence. It is a use of physical
10 force.

11 I think to the extent that, Your Honor, you
12 are inclined to look to the purposes of the statute,
13 what Congress would have thought the mine run of cases
14 that would fall under subsection (i)'s use of force
15 provision would cover, I think there if you look at the
16 reported cases in Florida. We see that the kinds of
17 crimes that are prosecuted under the touching or
18 striking prong of that statute are, in fact, quite
19 harmful. It's not at all difficult to see why Congress
20 would have been concerned about these types of crimes,
21 both because in many instances they involve conduct that
22 is probably better described as touching or striking but
23 has nevertheless risked substantial harm to the
24 victim, like choking, like beating the victim's head
25 against the car window, to use an example from one of

1 those cases cited in our brief.

2 JUSTICE SCALIA: You know, I guess it comes
3 down to whether we think that in -- in (B)(i), Congress was
4 using technical language or Congress was using simply
5 ordinary language, because you are quite right that the
6 definition of -- of battery covers even the slightest
7 touching, the use of physical force, which would
8 include the slightest touching.

9 But in using that definition to define the
10 term "violent felony," I find it hard to believe that
11 Congress was using the term in a technical sense, and
12 was not using the term "physical force," "the use of
13 physical force" to mean something more than a -- than a
14 mere touching.

15 But that's -- that's basically what we are
16 arguing, isn't it? Whether that -- whether that phrase
17 there, "threatened use of physical" -- "use or
18 threatened use of physical force," is technical language
19 which is the definition of battery or rather more
20 common usage.

21 You -- you would acknowledge that in
22 more common usage, no one -- no one would think that if
23 you go over to somebody and point your finger at him on
24 his lapel and say, "Now, you listen to me," that that
25 would be considered the use or threatened use of

1 physical force?

2 MS. KRUGER: I think it probably is not the
3 way that we ordinarily talk in day-to-day conversation,
4 but it certainly is the way that the law has talked
5 about it for centuries, and I think there is a reason to
6 think that Congress had in mind the technical definition of
7 battery rather than ordinary parlance, if for no other
8 reason because it tracked so closely the general
9 definition, that technical definition of "battery," when
10 it defines "violent felony" in subsection (i). And also --

11 JUSTICE STEVENS: Ms. Kruger, may I ask --

12 MS. KRUGER: -- because we know that the --

13 JUSTICE STEVENS: May I ask this, following up
14 on Justice Scalia's point? Are there any other crimes
15 other than battery that -- that create the same situation
16 where in -- in the first time it is committed, it's a
17 misdemeanor, but then it becomes a felony because it's
18 committed twice? So what we have here is conduct that the
19 first time is misdemeanor, second time is a felony. Are
20 there any other examples of crimes that fit that category,
21 that come within subparagraph (i)?

22 MS. KRUGER: I am not sure of the answer to
23 that, Justice Stevens. I do think that one reason why
24 the misdemeanor versus felony distinction is somewhat
25 unimportant to the interpretation of the "use of

1 physical force" language in this case is that it -- the
2 same language was deployed first in the "crime of
3 violence" definition of 18 U.S.C. 16, which by its
4 terms, applies both to misdemeanors and felonies, and
5 Congress has of course subsequently used that very same
6 language to define a class of misdemeanor crimes of
7 domestic violence in section 922(g)(9). We think to the
8 extent that this Court is inclined to interpret the
9 same -- similar language of the similar statutes
10 in a similar manner, the "use of physical force" language
11 should remain consistent across them.

12 One of the principal vices of Petitioner's
13 arguments is also that it would leave the Federal
14 domestic violence provisions like section 922(g)(9) with
15 relatively patchwork and haphazard application, which is
16 precisely one of the considerations that motivated this
17 Court's decision just last term in *United States v.*
18 *Hayes*. As this Court --

19 JUSTICE GINSBURG: But there are other
20 provisions that would -- that would include domestic
21 violence and the gun possession provision?

22 MS. KRUGER: There -- the range of
23 predicate offenses that could be used for the section
24 922(g)(9) domestic violence gun prohibition ordinarily,
25 as this Court recognized in *Hayes*, encompasses the

1 general assault and battery statutes of the United
2 States. Twenty-seven of these States define battery in
3 more or less the way that Florida does, to include a
4 range of uses of physical force from the least degree of
5 physical force to very severe beatings. So, under
6 Petitioner's reading, it would be impossible to say for
7 sure in more than half of the country that a domestic
8 violence conviction, even a battery conviction that is
9 specifically denominated as a domestic violence battery
10 conviction in many States, would qualify under section
11 922(g)(9).

12 It seems unlikely that Congress, in enacting
13 that statute, which was designed to create a nationwide
14 solution to a nationwide problem of the combination of
15 guns and domestic strife, would have intended for that
16 statute to have such a haphazard impact. And yet that
17 is precisely what the effect of Petitioner's reading
18 would be.

19 JUSTICE SCALIA: Where is the provision?
20 922(g)(9), is that in your brief somewhere?

21 MS. KRUGER: It is. It's in the statutory
22 appendix to the gray brief.

23 JUSTICE SCALIA: I am looking for it. I
24 don't see it. 922(g)(9).

25 MS. KRUGER: The --

1 JUSTICE SCALIA: I hate people talking about
2 statutes that I don't have in front of me.

3 MS. KRUGER: It's on page 3A of the
4 statutory appendix.

5 JUSTICE SCALIA: 3A.

6 MS. KRUGER: It contains the -- it contains
7 section 921(a)(33)(A), which provides the definition of
8 "misdemeanor crime of domestic violence."

9 JUSTICE SCALIA: I thought you said 922.
10 That's what I thought you said.

11 MS. KRUGER: That's correct. The
12 substantive prohibition is in section 922(g)(9), and the
13 definitional provision is reprinted on page 3A.

14 JUSTICE KENNEDY: It's really a question for
15 Petitioner's counsel, and I didn't have time to ask because
16 her white light was on. I take it your position is
17 that if you do not prevail on your argument that this
18 is under Roman -- small Roman i, that you have to
19 remand for small Roman ii?

20 MS. KRUGER: That's correct.

21 JUSTICE KENNEDY: Is there an argument that
22 you anticipate objecting to that remand? Or is this
23 absolutely clear-cut that we must remand?

24 MS. KRUGER: I think it's within the Court's
25 discretion to decide how to dispose properly of the

1 case. I think that the section -- the subsection (ii)
2 issue was preserved in the courts below. The district
3 court rested its decision on both subsections (i) and (ii),
4 and the court of appeals addressed only subsection (i).

5 We think that if the Court decides that the
6 court of appeals was wrong in its interpretation of
7 subsection (i), then the appropriate thing in order to
8 determine what Petitioner's correct sentence should be
9 would be to remand to allow the court of appeals to
10 address the alternative argument about subsection (ii).
11 But the reason why the subsection (i) inquiry is so --

12 JUSTICE SOTOMAYOR: How -- I'm sorry.
13 Before you go on, your adversary claims you waived by
14 not raising this as an -- alternative in the cert
15 stage. Could you fold that into your continuation of
16 this answer?

17 MS. KRUGER: Certainly. I think that rule
18 15.2 of the rules of this Court requires us in a brief
19 in opposition to raise any material matters that relate
20 to the question presented.

21 The question presented in this case concerns
22 just the basis for the court of appeals' decision in this
23 case, which was subsection (i) of the statute. We think
24 it's not at all unusual for this Court to decide that a
25 court of appeals' judgment is in error and then remand to

1 allow the court of appeals to address --

2 JUSTICE BREYER: Here are what they said, what
3 the Eleventh Circuit said: It said that if battery under
4 Florida law fits within the description of (i), then it is
5 a violent crime for ACCA purposes. And then it said
6 if not, then not. And as long as the issue was in front
7 of them, I would think those last four words are a
8 holding.

9 MS. KRUGER: I think it's difficult to read
10 those four words in that manner, Justice Breyer.

11 JUSTICE BREYER: Why?

12 MS. KRUGER: If for no other reason, because
13 the court of appeals didn't so much as acknowledge the
14 existence of --

15 JUSTICE BREYER: Was it argued?

16 MS. KRUGER: -- subsection (ii). It was
17 argued. It was -- it was briefed in the court of appeals,
18 and the court of appeals --

19 JUSTICE BREYER: It's pretty hard to see,
20 given Begay, how this is like arson or, you know, the
21 other three there, burglary, arson --

22 JUSTICE SCALIA: Explosives.

23 JUSTICE BREYER: -- explosives.

24 MS. KRUGER: Well --

25 JUSTICE BREYER: So, I mean, I don't know.

1 Maybe the court of appeals felt -- what they said was,
2 "if not, then not." And it was raised in argument.

3 MS. KRUGER: Well, I think it's -- again,
4 it's difficult to read that piece of loose language in
5 the court's opinion as a direct holding, particularly
6 considering that the court of appeals didn't so much as
7 cite the language or even the code provision that
8 relates to the argument.

9 But I think to the extent that
10 the Court questions whether it would qualify under
11 subsection (ii), I think the answer is yes. Battery
12 is -- qualifies under this Court's interpretations of
13 that subsection in Chambers and Begay and James. It is
14 a crime that is typically purposeful, violent, and
15 aggressive. And --

16 JUSTICE BREYER: Yes, but I -- I thought --
17 you know, it's -- it's like the other four listed out.

18 MS. KRUGER: Well, it is like them in that
19 it poses risks that are similar in degree and kind.

20 JUSTICE BREYER: But then we'd be reading
21 those three other examples out because then "other"
22 covers any crime that poses a risk of violence, or
23 whatever the words are there -- I forget the words.
24 Poses a risk.

25 MS. KRUGER: No, I think it would still be

1 consistent with this Court's analysis of subsection (ii)
2 in Begay in that battery by touching, if you consider it
3 to be a separate crime, which, again, I think is a highly
4 contested matter --

5 JUSTICE BREYER: And you think drunk driving
6 doesn't present a serious potential risk of physical
7 injury?

8 MS. KRUGER: No, but what this Court said in
9 Begay was that it doesn't present risks that are similar
10 in degree and kind to the risks that are presented by
11 the enumerated offenses. And battery, including battery
12 by touching or striking under Florida law, presents
13 risks that are quite similar in degree and kind to the
14 enumerated offenses, particularly burglary. It is --

15 CHIEF JUSTICE ROBERTS: Wait, I don't follow
16 that at all. I mean, I understand your argument that
17 physical force means the slightest touching, but I don't
18 understand the argument that the slightest touching
19 presents a serious risk of potential physical injury.

20 MS. KRUGER: Well, I think -- first of all,
21 to clear up a misconception, simply because the
22 statutory text covers the slightest touching doesn't
23 mean that it covers only the slightest touching. It
24 covers a wide range of degrees of physical force
25 beginning with the slightest touching and including --

1 CHIEF JUSTICE ROBERTS: Yes, but your
2 argument is to try -- is asserting that the slightest
3 physical touching is covered by the statute.

4 MS. KRUGER: Right. And the question before
5 the Court in this case concerns only that question. It
6 concerns the proper interpretation of subsection (i),
7 whether the crime is one that has as an element the use
8 of physical force.

9 CHIEF JUSTICE ROBERTS: You look --

10 JUSTICE STEVENS: The district court thought
11 that the two were related. The district court, if it
12 thought a slightest touching was qualified under (i), it
13 was not unreasonable to say that it would also qualify
14 under (ii). But if that argument is rejected under
15 (i), it seems to me it would follow necessarily that it
16 would also be rejected under (ii).

17 MS. KRUGER: I'm not entirely sure why that
18 would be true. But I do think that it's right as a
19 descriptive matter that most of the crimes that are
20 encompassed by subsection (i) would also qualify under
21 subsection (ii). And --

22 JUSTICE SCALIA: But (ii) -- (ii) looks to the
23 conduct; it doesn't look to the element of the crime.
24 So you could actually look to the conduct of which the
25 person was convicted, no?

1 MS. KRUGER: Well, you'd have to look to the
2 conduct that the person was convicted of with respect to
3 the elements of the crime, that is the nature of the
4 category --

5 JUSTICE SCALIA: No, no, no. You look to
6 the crime -- under (i), you look to the crime he was
7 convicted of, and if -- if -- if none of its elements
8 require serious physical force, you can say it doesn't
9 qualify under (i), but under (ii), if in fact you see that
10 the misdemeanor he was convicted of was really whacking
11 somebody really hard, then -- then it could possibly come
12 within -- come under (ii).

13 MS. KRUGER: With respect, Justice Scalia, I
14 think that is incorrect. This Court has made clear that
15 subsection (ii) like subsection (i) proceeds by looking
16 at the elements of the offense --

17 JUSTICE SCALIA: Just at the elements.

18 MS. KRUGER: Just at the elements of the
19 offense of which the defendant was convicted.

20 JUSTICE SCALIA: Can I ask you about --
21 about 922? You point to the -- the definition there,
22 the definition in 921. But that is a definition of the
23 term "misdemeanor crime of domestic violence." And in
24 the context of defining that term, I'm perfectly willing
25 to believe that the use or attempted use of physical

1 force means even the slightest touching, as -- as
2 battery does. You're talking about a misdemeanor crime
3 of domestic violence.

4 But what we have before us here is a term --
5 a different term that is being defined and that term is
6 "violent felony." And I find it a lot harder to swallow
7 that -- that that definition embraces merely the
8 slightest touching.

9 MS. KRUGER: Well, Justice Scalia, I would
10 certainly be inclined to agree with you that it's
11 particularly clear given both the text and the context
12 and purposes of section 922(g)(9), that battery ought
13 to be covered by that definition "misdemeanor crime of
14 domestic violence." But we think that the reason why it
15 is also clear under subsection (i) of the ACCA is that
16 the use of force element of the definitional provision
17 is separate from the degree of seriousness with which
18 the State chooses to treat the crime. If the crime is
19 punished as a felony and if has as an element the use
20 of physical force, then it qualifies as a violent felony
21 under the ACCA, just as if it is punished as a
22 misdemeanor, it qualifies as a misdemeanor crime of
23 domestic violence under section 922(g)(9).

24 JUSTICE SCALIA: I dare say that Congress, in
25 my view, probably didn't even contemplate that something

1 which is a misdemeanor could become a violent felony if
2 you did it the second time.

3 MS. KRUGER: Well, it was certainly true --

4 JUSTICE SCALIA: Have we ever approved that,
5 by the way, kicking it up into the felony category simply
6 because of recidivism?

7 MS. KRUGER: Well, this Court in United
8 States v. Rodriguez, in analyzing the coordinate
9 provision of the ACCA that covers serious drug offenses,
10 said that the felony aspect of that definition is
11 satisfied by a recidivist enhancement. And we think
12 that the conclusion in that case -- and it is not disputed
13 among the parties -- applies with equal force in this case
14 to the proper interpretation of violent felony.

15 But it was certainly true by the time that
16 Congress enacted the ACCA, which the legislative history
17 indicates Congress understood would cover assault
18 crimes, for example, that there were certain kinds of
19 batteries and assaults that, although otherwise may be
20 punished as simple batteries and assaults, as
21 misdemeanors, could be elevated to a felony if for
22 example they were committed against a law enforcement
23 officer.

24 It simply was not unheard of for simple
25 battery to be elevated to a felony under certain

1 circumstances in 1986 when Congress enacted the present
2 version of the ACCA.

3 At the end of the day, we think that
4 Congress -- every indication we have, in both the
5 text, the context, the purpose of the statute and its
6 background, suggests that Congress was in fact
7 deliberately tracking the definition of battery when it
8 enacted the primary definition of violent felony in
9 subsection (i).

10 CHIEF JUSTICE ROBERTS: Well, every
11 indication except for the fact that they didn't use the
12 word "battery."

13 MS. KRUGER: Aside from the fact that they
14 didn't use the word "battery." Instead, they chose to
15 incorporate the general definition of the crime of
16 battery. That's correct, Mr. Chief Justice.

17 We think to the extent that the Court
18 is inclined to restrict the terms of -- that Congress
19 chose to use itself -- to physical force as only exceeding
20 a certain threshold, to include some batteries and not
21 other batteries, the Court would be setting up a very
22 difficult test for Federal sentencing courts to apply in
23 the real world. Essentially --

24 JUSTICE SCALIA: States do it all the time
25 when they have different degrees of battery.

1 Misdemeanor -- felony battery -- they do it all the
2 time.

3 MS. KRUGER: Well, as the Chief Justice has
4 noted, States don't have quite the same compulsion to
5 sort different factual offenses into different boxes.
6 Prosecutors, as the prosecutor did in this case, can use
7 either of the two alternative prongs of Florida's
8 battery definition to punish what is essentially the
9 same offense, which is the crime of battery, that
10 deserves the same punishment regardless of which prong
11 the prosecutor proceeds under, whether the bodily injury
12 prong or the touching or striking prong.

13 And Petitioner's concession that at least
14 Federal sentencing courts could draw distinctions
15 between touches and strikes, may have some resonance in
16 the State of Florida, but has very little resonance for the
17 rest of the country. Most State assault and battery
18 statutes don't contain explicit references to striking, but
19 subsume striking within the range of conduct that's
20 prescribed by their offensive touching prongs.

21 So it simply wouldn't be possible, in most
22 cases, for a court to look at the cold record of the
23 underlying State conviction and try to discern exactly
24 how much force was involved in the offense and whether
25 that force satisfied the Petitioner's proposed

1 threshold, whatever it means.

2 At the end of the day, the principal
3 question before the Court is one that is, primarily,
4 relevant to the section 922(g)(9) provision and other
5 federal misdemeanor domestic violence provisions, and one
6 that we think, in considering the purposes of those
7 statutes and the very serious dangers that they address,
8 the Court ought to interpret the plain text of the
9 statutes in light of their plain meaning.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Ms. Call, you have 4 minutes remaining.

12 REBUTTAL ARGUMENT OF LISA CALL

13 ON BEHALF OF THE PETITIONER

14 MS. CALL: Thank you, Your Honor.

15 JUSTICE KENNEDY: I -- I don't want to waste
16 too much of your time on the remand, but I can't really
17 fault the government for waiving a right to raise a
18 claim under clause (ii), which is your second reason for
19 not -- not remanding, and it -- it does seem, to me,
20 that the Eleventh Circuit -- one permissible reading is
21 to say it was just looking at (i), so that we would have
22 to remand.

23 MS. CALL: Justice Kennedy, I do disagree with
24 that because it was fully briefed, fully argued at the oral
25 argument.

1 JUSTICE KENNEDY: I understand that.

2 MS. CALL: And I take a -- the provision
3 that when they indicated that the test was exclusively
4 under the first prong.

5 Second, Your Honor, I believe that it would
6 simply be a waste of judicial resources. If the Court
7 finds that this battery by touching doesn't have, as an
8 element, the use of force, the test would be to remand
9 it to decide whether it meets the Begay standard, which
10 is purposeful, violent, aggressive, and all of those
11 tests.

12 JUSTICE KENNEDY: Yes. Except in this area,
13 I am a little reluctant when it hasn't been argued
14 before as to make a definitive holding under (ii), but I
15 will look at the Eleventh Circuit opinion again.

16 MS. CALL: Yes, Your Honor, and the other
17 note I would make is, factually, at page 40 of the joint
18 appendix, they indicated there were no other Shepard
19 documents to offer to the Court, so the entire record
20 that's available for reconsideration is available to this
21 Court.

22 JUSTICE KENNEDY: Thank you.

23 MS. CALL: And, Your Honor, I wanted to note
24 this is not just an academic exercise on noticing what
25 "physical force" means. Absent this one finding of

1 Mr. Johnson's prior conviction was a violent felony, it
2 raised his guideline range, from 27 to 33 months, to a
3 mandatory minimum sentence of 15 years.

4 So the danger of including this crime, when
5 the Armed Career Criminal Act was not designed to include
6 all crimes or all offenders, means that it took all
7 discretion away from the sentencing judge.

8 In ACCA, Congress set a very high
9 standard requiring three priors on three -- that
10 occurred on separate occasions, and so looking at
11 this decision, when Mr. Johnson was put inside the box,
12 that tied the judge's hands.

13 If this were not considered a violent
14 felony, the sentencing judge could consider that under
15 the guidelines and the 3553 factors. But to read
16 physical force so broadly is to, in essence, collapse
17 the distinction between those violent offenses that are
18 meant to be included in the Armed Career Criminal Act
19 and those that are not.

20 Your Honors, I would also note one matter,
21 that physical contact is used in the assault statutes
22 under the Federal Code, so there is a different
23 provision -- a different meaning to physical contact
24 than to physical force, and the physical force, in this
25 definition, is looking at what level and what sort of

1 force Congress intended to require to impose this very
2 high sentencing standard.

3 And this Court had rejected, in Shepard, the
4 government's same happenstance argument that
5 prosecutions would depend on recordkeeping and charging
6 decisions, and so, for all of the reasons argued,
7 Mr. Johnson would ask that this Court vacate the lower
8 decision and remand for resentencing.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.

12 (Whereupon, at 12:07 p.m., the case in the
13 above-entitled matter was submitted.)

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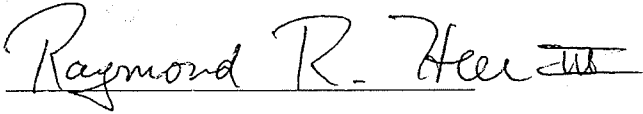
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; CURTIS DARNELL JOHNSON, Petitioner, v. UNITED STATES.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, written over a horizontal line.

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