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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-11543, Begay v. United States.

Ms. Katze.

ORAL ARGUMENT OF MARGARET A. KATZE

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether DWI is a violent felony for purposes of an Armed Career Criminal Act sentencing enhancement. Such an enhancement takes the statutory sentencing range from zero to 10 years and raises it to 15 years to life. The intent of the Armed Career Criminal Act is to punish most severely that category of recidivist violent offenders who are disproportionately responsible for the violent crimes and who, when they possess a weapon, are more dangerous.

The government is trying to expand the reach of the statute by so broadly reading the residual clause as to include any crime that presents a serious potential risk of injury to another.

Such a reading of that residual clause would swallow the entire statute. Congress had no intention of including DWI within the ambit of the Armed Career

1 Criminal Act. As Justice Breyer, writing for the First
2 Circuit in Doe, said, "there is no reason to believe
3 that Congress meant to enhance sentences pursuant to the
4 Armed Career Criminal Act based on convictions for
5 drunken driving --

6 JUSTICE BREYER: If you're quoting that,
7 then this is what's now bothering me. I'm not saying I
8 have an answer one way or the other.

9 Let's take two crimes and imagine that the
10 same number of people injured or killed is identical for
11 the two. One let's say is burglary and the other is
12 driving under the influence. Now, let's imagine exactly
13 the same number are put at risk, exactly the same number
14 hurt, exactly the same number killed.

15 When I wrote that opinion, it seemed to me
16 that there still is an important difference between the
17 two crimes that is controlling here. But if you look at
18 what I wrote, I didn't articulate that difference very
19 well. So, I would like you to tell me what I should have
20 said in order to have said very clearly just what that
21 intuitive difference was.

22 MS. KATZE: Your Honor, I think what you
23 said was sufficient, but you might have added that there
24 are other attributes to the -- the crimes in the -- the
25 enumerated crimes, those being burglary, arson,

1 extortion, use of explosives. There are certain
2 attributes that they share in common that DWI does not
3 share, and those would include those, as you stated, an
4 active violent crime. But in addition to that, they're
5 all property crimes, as this Court said in Taylor.

6 They are also all acts that have the intent
7 of causing harm. DWI does not have that. They are all
8 more dangerous when committed with a gun. And they're
9 all typical of crimes that would be committed by career
10 criminals.

11 JUSTICE ALITO: Some of those
12 characteristics don't seem to apply to all of the
13 specific crimes that are mentioned. Take somebody who
14 sends a series of letter bombs for the purpose of
15 injuring other people. Now, that would fall within a
16 crime involving use of explosives. But it's not really
17 a property crime and it's not a crime that's more
18 dangerous when done with a gun.

19 So how -- how can you say that those
20 characteristics apply to every crime in the list?

21 MS. KATZE: Your Honor, arguably they might
22 not apply to everyone every time. But I think the vast
23 majority of them do. And what we're looking at are the
24 ordinary cases. And the example that you gave of the
25 letter bomb, I believe that would be a property crime.

1 When we're talking about a property crime as with arson
2 or use of explosives, it's the destruction of property.

3 JUSTICE SCALIA: I think you can say that
4 all of the crimes that are listed require mens rea and
5 DUI doesn't, does it?

6 MS. KATZE: Absolutely. Absolutely.

7 JUSTICE SCALIA: That's a big different,
8 isn't it?

9 MS. KATZE: I think it's a huge difference.
10 DUI -- DUI in New Mexico is a strict liability crime.
11 It has no mens rea whatsoever. An individual doesn't
12 even have to have the intent to drive. And, in fact, we
13 have a case in New Mexico where a woman had taken Ambien
14 and was driving, and she didn't even know she was
15 driving, but she was still convicted because she merely
16 was in control of the vehicle. So in New Mexico, a
17 strict liability crime where you don't even have to know
18 you're driving, as opposed to the four enumerated
19 offenses, where there is clearly an intent to cause
20 some harm --

21 JUSTICE KENNEDY: Would you have the same
22 answer if you had a State statute which defined "felony
23 drunk driving," as many do, as felony drunk driving
24 which causes serious death or serious physical injury
25 to another?

1 MS. KATZE: I think it would -- the analysis
2 wouldn't be different. There would be an additional
3 element, an additional piece of harm. But the --

4 JUSTICE KENNEDY: You would still say that
5 that statute does not qualify?

6 MS. KATZE: Not unless there is a definition
7 of -- if there is an actual intent to cause harm. If
8 there is just merely harm that's caused --

9 JUSTICE KENNEDY: No, there isn't in the
10 usual felony drunk driving statute, there is --

11 MS. KATZE: And I agree. I think in that
12 case, then that also would not fall within the statute.
13 There is not the intent to cause harm.

14 JUSTICE ALITO: What if the crime is
15 vehicular homicide, defined as causing the death of
16 another person while driving intoxicated? Would that be
17 a crime that creates a serious potential risk of
18 physical injury to another?

19 MS. KATZE: That would not fall under
20 paragraph 2, because it would not meet any of the other
21 attributes of the enumerated crimes. Possibly could it
22 fall under paragraph 1, the use of force? It would
23 depend how the elements described and what the
24 definition of "use of force." This Court has
25 previously defined "use of force" with an

1 intentionality that I think normally in that type of
2 vehicular homicide would not be included.

3 CHIEF JUSTICE ROBERTS: You are assuming, of
4 course, that the canon of ejusdem generis applies to the
5 statute, as opposed to Congress just singling out a
6 couple of things it wanted to be sure were covered. And
7 we left that issue open in James, didn't we?

8 MS. KATZE: Yes, you did. In James, you were
9 dealing with a clearly analogous case, and DWI is not
10 analogous in any way, shape, or form with those four
11 enumerated crimes. And I think that it's pretty
12 clear --

13 JUSTICE GINSBURG: Well, in one way -- in
14 one way it is, in that like those other crimes it
15 presents a serious risk of potential injury to another.
16 That's what they all have in common. It's a residual --
17 one argument that was made was when the statute was
18 first drafted all it had was the residual, "presents a
19 serious risk of potential injury to another." So
20 that's, the argument is, that's what drives this
21 statute, and then these, these specific crimes, were
22 added just to be sure they would be covered.

23 MS. KATZE: Your Honor, in answer to your
24 question and the Chief Justice's question, I think it's
25 important to remember that the first version of this

1 statute came out in 1984, and that just involved
2 burglary and robbery. And then in 1986, we have the
3 version that we have now.

4 What we are discussing is the debate in
5 Congress that occurred between then and how the actual
6 wording was made up. But I submit that if Congress
7 wanted to use those four enumerated crimes merely as an
8 example, they would have structured the paragraph
9 differently. They would have made a third paragraph
10 under definition of violent felony and they didn't.

11 There are two paragraphs. The second
12 paragraph, the one that we're dealing with, clearly
13 there's a substantive connection between the four
14 enumerated crimes and it says, "or otherwise crimes that
15 present a serious potential risk of injury."

16 It seems clear to me if we look at this
17 under the rules of statutory interpretation -- and this
18 is a statutory interpretation case -- that Congress
19 added those four crimes as a means of limiting the
20 residual clause.

21 JUSTICE SOUTER: Then why did it use the
22 word "otherwise"? Why didn't it use the word
23 "likewise"?

24 MS. KATZE: I would agree, "likewise" would
25 have been a more artful way to have written it.

1 JUSTICE SOUTER: It would have meant
2 something different, wouldn't it?

3 MS. KATZE: I think, in fact --

4 JUSTICE SOUTER: "Otherwise" means in some
5 other way.

6 MS. KATZE: That's the dictionary
7 definition, Your Honor.

8 JUSTICE SOUTER: Well, yes.

9 (Laughter.)

10 JUSTICE SOUTER: That's usually the best way
11 to understand each other is by, you know, assuming that.

12 MS. KATZE: I would agree that's one thing
13 that we look at. But under -- this is a statutory
14 interpretation case, not a dictionary case, and we have
15 to look at the plain meaning. And that involves looking
16 at this term of the phrase in context, in the whole
17 text. What was -- what was the intent of this statute?
18 What's the term to be defined, "violent felony."

19 JUSTICE SCALIA: I don't know why you've
20 run away from me on "otherwise." I think the
21 "otherwise" ties the last paragraph to the -- to the
22 preceding four enumerated crimes. And if -- if it had
23 just gone on to say "or presents a serious risk of
24 injury" without the "otherwise," then I don't think
25 you'd have any argument that you have to somehow look

1 to the degree of injury, the -- the manner of injury
2 that the four enumerated crimes have. The "otherwise"
3 ties it together, "or otherwise presents a risk of
4 serious injury."

5 And I think the implication is that the --
6 that the -- the injury must be similar to the -- at
7 least in degree to the enumerated crimes beforehand. I
8 wouldn't run away from the "otherwise."

9 MS. KATZE: Your Honor, and I'm not running
10 away from the "otherwise." While I don't agree that
11 it's the dictionary meaning, I do agree with you, Your
12 Honor, that it is the substantive link. It's the
13 connection. It's a word and we have to give meaning to
14 every word in the statute --

15 JUSTICE SOUTER: But in -- in doing that,
16 you've got, in other words, to understand what
17 "otherwise" means. You've got to look at the language
18 that follows "otherwise." And that's -- that then
19 refers to "risk of serious injury to a person." And in
20 effect, it is saying the common element is risk of
21 injury to the person. How that risk is raised may be in
22 different ways from the way the risk is raised, say, in
23 a burglary case or what-not. And if that is the proper
24 analysis, then it seems to me you've got a tough row to
25 hoe here.

1 MS. KATZE: I believe the correct
2 analysis -- and I do believe that ejusdem generis does
3 apply here, because here we have a list of four specific
4 offenses followed by a general term, and we have to read
5 that general term narrowly so as not to give additional
6 breadth to acts of Congress. And we have to remember
7 that we're defining the term "violent felony." And
8 those four violent felonies that have the certain
9 attributes in common then are followed by "or
10 otherwise." And in looking at it all in context, there
11 has to be some --

12 CHIEF JUSTICE ROBERTS: Well, but then -- I
13 was wondering about that as well, the violent felony,
14 whether that gives you any traction. But extortion, you
15 don't normally think of that as a violent felony and yet
16 it's clearly included in the definition.

17 MS. KATZE: It's violent in the sense that
18 extortion is trying to get something from somebody of
19 value. It's the idea that --

20 CHIEF JUSTICE ROBERTS: Yes, but you don't
21 say, give me that or I'll break your legs all the time.
22 You may say, give me that or I'll release this
23 embarrassing letter. That's extortion. It's not
24 violent, though.

25 MS. KATZE: I think it is violent in the

1 sense of the terms that this Court used in Leocal and
2 that Justice Breyer used in Doe, the idea of some kind
3 of violent act or more closely related action.

4 CHIEF JUSTICE ROBERTS: No, no, releasing
5 the letter is not violent and it may cause embarrassment
6 rather than physical injury. Yet it would qualify as
7 extortion.

8 MS. KATZE: It absolutely would, and this
9 Court in Taylor said that the four crimes all have those
10 -- basically, in general, have those attributes.

11 But I think we have to look at the ordinary
12 case. I believe even in the hypothetical that you have
13 given, Your Honor, is that -- that that does involve an
14 act of violence against an individual's reputation, that
15 reputation in the common law sense --

16 JUSTICE SOUTER: No, but it says "person,"
17 not -- it says "person," not "reputation."

18 MS. KATZE: I'm sorry, Your Honor?

19 JUSTICE SOUTER: You're saying the violence
20 can be against the reputation. That's not what the
21 statute is talking about. I mean that is -- that's
22 inconsistent with the plain language of the statute.

23 MS. KATZE: But the statute does talk about
24 violence. If we look at the --

25 JUSTICE SOUTER: It doesn't talk about

1 violence in the abstract. It talks about physical force
2 against the person of another in number 1; and in number
3 2, where we are here, "a risk of physical injury to
4 another."

5 MS. KATZE: Yes, Your Honor. And in the
6 second paragraph it deals with property crimes. And the
7 whole -- it all comes under the rubric of violent
8 crimes. That's what Congress was concerned about. Even
9 the serious drug offenses, the reason those were added
10 to the statute is the concern about violence with drugs.
11 So it all has to do with the idea of violence, and so,
12 initially, it was --

13 JUSTICE SOUTER: Well, it has to do with the
14 idea of risk of violence. A burglar when he commits
15 burglary does not want violence. He wants to get the
16 silver out of the sideboard and get back down the
17 ladder. He doesn't want any violence with anybody.

18 MS. KATZE: I would agree with you, Your
19 Honor.

20 JUSTICE SOUTER: And the problem is that, by
21 being in the situation he's in, he creates a risk that
22 violence will occur. Somebody may show up.

23 And the person, likewise, who commits DWI
24 doesn't want to hurt anybody, but he has placed himself
25 in a situation in which, if somebody shows up driving

1 another car in front of him or walking across the street
2 or maybe even in apprehending him for his DWI, a risk of
3 violence is raised. The two cases in that respect are
4 parallel.

5 MS. KATZE: I would disagree, Your Honor,
6 and here's why I don't think they're parallel. In a
7 burglary, I agree with you, individual doesn't want
8 to get caught, but goes with the fear or the knowledge
9 that they may be apprehended. They may arm
10 themselves -- again, the concern with those violent
11 activities and being armed.

12 JUSTICE SOUTER: When the drunk leaves the
13 bar, doesn't he have the realization, unless he is just
14 blind at that point, that he may be apprehended?

15 MS. KATZE: It is just --

16 JUSTICE SOUTER: He's not going to throw
17 himself into the arms of the nearest cop.

18 MS. KATZE: Absolutely not, but here's the
19 big -- the big difference. If somebody is drunk and
20 gets in a car, at most their intention is to get from
21 Point A to Point B. They have no intention of hurting
22 an individual. They don't even have the intent of
23 driving.

24 JUSTICE SOUTER: Right, and when the guys
25 goes up the ladder for the silver in the sideboard, at

1 most what he wants is the silver.

2 MS. KATZE: But he intentionally goes to
3 somebody else's property to commit this act that will
4 cause harm.

5 JUSTICE KENNEDY: Well, the driver
6 intentionally drives the car knowing that there's a
7 risk.

8 MS. KATZE: With all due respect, Your
9 Honor, in DWI there is no intention to drive. It's a
10 strict liability offense, as the example I gave in --

11 JUSTICE KENNEDY: But that -- that is
12 because everybody knows there are -- there are two
13 conditions: One in which he just is reckless and he
14 doesn't care, in which case he has the intent; the other
15 one, he's so drunk he can't form the intent. Both of
16 them are covered, and the latter is simply because we
17 don't want an excuse to exonerate the more culpable of
18 the two.

19 MS. KATZE: Your Honor, in New Mexico, DWI
20 is a strict liability. There is no intent. There is
21 not even negligence. It's merely being in control of a
22 vehicle.

23 JUSTICE KENNEDY: That's true in almost
24 every State, for the reasons that I've indicated,
25 because many people have the intent, and those that

1 don't shouldn't be exonerated because they're more
2 drunk.

3 MS. KATZE: If I may just add as well, in
4 some of the discussions about the actions of DWI and
5 running into people, it's important to note, if we're
6 looking at this with a categorical analysis, just to
7 look at the elements of the offense. DWI in New Mexico
8 would necessarily -- there would have to be another
9 element. If somebody --

10 JUSTICE ALITO: The residual clause is a
11 difficult problem, but I still have not heard what
12 characteristic the enumerated offenses have in common,
13 all of them, that provides a basis for limiting the
14 residual clause.

15 They're not all property crimes. A lot of
16 crimes involving explosives: Illegal possession of
17 explosives, illegally manufacturing explosives,
18 obtaining explosives by making false statements. None
19 of those are property crimes and none of them involve
20 injury to a person -- I mean involve the threat of the
21 use of force against a person. So what is the
22 characteristic that all of the enumerated crimes have in
23 common that would provide a limitation on the residual
24 clause?

25 MS. KATZE: At their very least, they all

1 are acts that intend to cause harm. They all are
2 property crimes. This Court reiterated --

3 JUSTICE ALITO: No, they're not. In 18
4 U.S.C. 842, explosives, unlawful -- "It shall be
5 unlawful to engage in the business of importing,
6 manufacturing, or dealing in explosive materials without
7 a license issued under this chapter."

8 MS. KATZE: Your Honor --

9 JUSTICE ALITO: There's no intent to cause
10 harm there.

11 MS. KATZE: Your Honor, the term in the
12 Armed Career Criminal Act is the "use of explosives."
13 This Court has defined "use" as having an
14 intentionality, and intent -- and I think it's fair to
15 say that that intent to use those explosives -- and,
16 from a practical point of view, people who -- and we
17 could talk about the ordinary case. People who use
18 explosives, they blow up property. They blow up houses.
19 They blow up bridges. At the very least, they're
20 blowing up explosives. That certainly -- that certainly
21 is an act to cause some type of harm to property.

22 And, with respect to whether they are
23 property, I submit all four are property crimes. This
24 Court said in Taylor all four of them are property
25 crimes. This Court interpreted the congressional -- the

1 legislative history. Those were four property crimes
2 that Congress specifically wanted to add to the concern
3 about violence --

4 JUSTICE SCALIA: I don't -- I don't
5 understand this line of argument. You would exclude,
6 let's say, physical assault from -- from this, I mean
7 assault with intent to kill, because it's not a
8 property crime?

9 MS. KATZE: Yes.

10 JUSTICE SCALIA: That wouldn't be included
11 in the "otherwise involved"?

12 MS. KATZE: No, Your Honor, that would not
13 fit under paragraph 2. That would fit under paragraph
14 1, the use of force against an individual.

15 Congress carefully crafted this statute.
16 They dealt with serious drug offenses and they dealt
17 with offenses against people, and then they dealt with
18 offenses against property where there was --

19 CHIEF JUSTICE ROBERTS: It's kind of odd,
20 when the catch-all is phrased in terms of physical
21 injury to another, to say that it's concerned only with
22 property crimes.

23 MS. KATZE: Property crimes with the
24 potential for physical injury to another, not just
25 purely property crimes. The four enumerated crimes all

1 have the potential for physical injury to another.

2 JUSTICE KENNEDY: It seems to me that
3 your argument gives us greater reason to treat the last
4 clause as independent just so that we can be sure that
5 it doesn't include only property crimes, because, as the
6 Chief Justice just pointed out, "physical injury" is
7 really the term that does the work in the second clause.

8 So it seems to me that you're almost giving
9 us a reason to make that clause more independent, more
10 forceful, more significant.

11 MS. KATZE: Absolutely not, Your Honor. You
12 wouldn't be able to make that interpretation, which is
13 basically what the government is suggesting, which would
14 read "otherwise" out of the statute and therefore either
15 make it tantamount to a third paragraph, which there is
16 not a third paragraph, or would basically make the
17 residual clause so broad it would swallow the entire
18 statute. And we can't believe that Congress would have
19 so carefully delineated the different areas of violent
20 felonies and then eviscerate it all with this residual
21 clause.

22 JUSTICE STEVENS: May I ask this question
23 about your interpretation of the word "otherwise." Do
24 you think it is the equivalent of the statute that
25 omitted that word, but added in "conduct that presents

1 an equally serious potential risk of physical injury"?
2 Do you think -- in other words, do you think that the
3 four examples define the risk of physical injury that,
4 the risk of potential physical injury the statute
5 contemplates?

6 MS. KATZE: Your Honor, I don't know that I
7 would agree "equally serious" would be the exact correct
8 equivalent. I think that that would be in keeping with
9 Justice Scalia's, more or less, my impression of Justice
10 Scalia's dissent in James, because I would submit that
11 there has to be even more than just an equal balance of
12 risk. I do think that is an issue that needs to be
13 compared, as this Court did in James. The Court
14 compared the risk of attempted burglary to burglary and
15 found that they were similar.

16 I think in a non-analogous case there are
17 other attributes that we have to look at, and that's
18 why we suggest --

19 CHIEF JUSTICE ROBERTS: Well, doesn't that
20 suggest that "otherwise" in the statute is in fact used
21 to mean "likewise"? I mean, if we said "attempted
22 burglary" in James is obviously included because
23 burglary is -- attempted burglary doesn't present a risk
24 in a different fashion than burglary, it presents it in
25 the same fashion.

1 MS. KATZE: And that was this Court's
2 analysis in James, and I think that that's reasonable to
3 --

4 CHIEF JUSTICE ROBERTS: That was a helpful
5 question.

6 (Laughter.)

7 MS. KATZE: I think it's important not to
8 lose sight of the term that we are defining, "violent
9 felony," and that -- as well as the purpose or intent of
10 the statute was to punish a very small percentage, as
11 this -- as this Court said in Taylor, a very small
12 percentage of very serious offenders. This isn't a
13 statute that is written to say any individual who has
14 three felony convictions that may cause serious
15 potential risk of injury to an individual is going to
16 get 15 years. That simply wasn't the purpose. The --
17 the intent of the statute was to punish this small
18 population of individuals.

19 CHIEF JUSTICE ROBERTS: Well, particularly
20 when you look at subsection (i) in the broad reading of
21 serious potential risk of (ii), why would -- why would
22 Congress mean to exclude a particular category of
23 physical injury from the reach of the statute?

24 MS. KATZE: Because if it -- if it did
25 include absolutely everything, then it would swallow the

1 whole statute, because certainly --

2 CHIEF JUSTICE ROBERTS: No, not everything;
3 everything that presents a serious potential risk of
4 physical injury.

5 MS. KATZE: I think it -- if it -- for
6 example, if it could include DWI, it would be hard to
7 imagine what kind of crime wouldn't be included in
8 there. Under that type of reading, if we look at that
9 the structure could have been --

10 JUSTICE KENNEDY: Filling out a false income
11 tax return. I mean, I thought of one.

12 MS. KATZE: Other than maybe some
13 white-collar crime.

14 JUSTICE KENNEDY: Well, there is a whole
15 category of those. So --

16 MS. KATZE: But the -- the problem with that
17 analysis is that Congress was very clear who these --
18 who this statute was geared at; and as Judge McConnell
19 said in his dissent, the name of the statute, the Armed
20 Career Criminal Act, is not just window dressing.
21 There's a -- I mean, that just reinforces our
22 interpretation that there is this very small percentage
23 of individuals. It's not supposed to be a general catch
24 phrase. And --

25 CHIEF JUSTICE ROBERTS: What do you think

1 presents the most serious potential risk of injury to
2 all of us, that we are going to be a victim of arson or
3 that we are likely to get hit by a drunk driver?

4 MS. KATZE: Here's why it's hard to answer
5 that: I wouldn't argue with you that there are more
6 people driving drunk than there are people burglarizing
7 houses, but the relevant analysis is what's the risk in
8 an individual incident? And in that case statistically
9 there is a greater risk of injury in a burglary. Under
10 this Court -- in Tennessee versus Garner, it said 3.8
11 percent, as opposed to a quarter of a percent in an
12 individual episode of drunk driving. So we can't put
13 the cumulative drunk driving on the back of Mr. Begay.
14 We look at the individual incident, doing categorical
15 analysis, looking at the elements in that individual
16 incident.

17 Congress was very concerned about issues of
18 federalism. The reason for the Armed Career Criminal
19 Act was to support law enforcement efforts on the part
20 of States, not to federalize crime, not to federalize
21 criminal investigation and prosecution. We are
22 suggesting that keeping that in mind and looking at the
23 -- the plain meaning of the phrase that we were
24 discussing, and looking at the way the statute is
25 actually structured and the fact that there are not

1 three different paragraphs, as well as the fact that
2 Congress could have picked to just say "or" as opposed
3 to "or otherwise," and we have to give "otherwise" a
4 meaning; and we suggest that our meaning of "likewise"
5 is one that this Court has adopted previously.

6 Previously this Court has said "or otherwise
7 qualified for a position" and found that people were
8 qualified in a similar way than other people; "otherwise
9 qualified to vote," found that individuals were as
10 qualified or similarly qualified as individuals of
11 another race. One other example, bringing a -- by
12 certiorari "or otherwise" was found to mean to be
13 brought by similar means as certiorari.

14 And, Your Honor, if I may reserve the
15 remainder of my time?

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MS. KATZE: Thank you.

18 CHIEF JUSTICE ROBERTS: Ms. Kruger.

19 ORAL ARGUMENT OF LEONDR A R. KRUGER

20 ON BEHALF OF THE RESPONDENT

21 MS. KRUGER: Mr. Chief Justice, and may it
22 please the Court:

23 Drunk driving is an act that by its nature
24 endangers people's lives. It is precisely for that
25 reason that it is a crime under the laws of all 50

1 States. When a person is repeatedly convicted of that
2 offense and therefore becomes subject to punishment as a
3 felon, he has committed a violent felony as Congress
4 defined that term in the Armed Career Criminal Act, that
5 is because he has committed a crime that in the words of
6 the statute involves conduct that "presents a serious
7 potential risk of physical --

8 JUSTICE GINSBURG: How about a habitual
9 speeder?

10 MS. KRUGER: Well, speeding isn't a felony
11 offense under the laws of any State, to my knowledge.
12 And we have to recall that the ACCA contains two
13 requirements for treatment of a prior conviction as a
14 violent felony that would support enhanced sentencing
15 under that act. The felony requirement is not a trivial
16 requirement. It was in fact a focus of congressional
17 debate, and it was intended to capture only serious
18 crimes. As a general matter, crimes of ordinary
19 negligence, simple carelessness, or totally blameworthy
20 acts don't merit felony punishment.

21 As this Court recognized in *Staples*, to
22 label a criminal act as a felony is indeed a serious
23 thing and something that legislatures, by long
24 tradition, reserved for truly serious acts.

25 JUSTICE ALITO: And what if a -- if a

1 legislature made it a crime to send text messages on a
2 cell phone while driving, and the punishment were severe
3 enough to qualify here? Would that be treated the same
4 way?

5 MS. KRUGER: Well, it would present a harder
6 question, Justice Alito, and that's because, for one
7 thing, we don't have the uniform judgment of
8 legislatures that helps us know in this case that drunk
9 driving does in all cases present a serious risk of
10 injury. And also because the conduct that's defined by
11 the DUI statute of New Mexico, as well as other States,
12 by definition defines conduct that is unsafe. You only
13 violate the statute if you are impaired to such a degree
14 that your faculties and motor skills are such that you
15 are unable to drive a car safely. With text messaging
16 there isn't quite that categorical mapping on of the
17 risk to the conduct that's proscribed.

18 JUSTICE BREYER: So there is no State where
19 speeding -- even if maybe you hurt somebody or something
20 -- there is no State where speeding is under a statute
21 that you could be imprisoned for more than a year?

22 MS. KRUGER: To my knowledge, there is no
23 State in which speeding itself is a felony offense.

24 JUSTICE BREYER: Well, a felony as defined
25 here. I just wanted to be sure you're focusing -- it's

1 defined here as "subject to imprisonment for a term
2 exceeding one year." Now is --

3 MS. KRUGER: To my knowledge, at least,
4 Justice Breyer --

5 JUSTICE BREYER: Okay, I just want to be
6 sure we're on the same wavelength. Fine.

7 MS. KRUGER: Reckless driving, on the other
8 hand, when it does result in serious physical injury to
9 another, is often punished as a felony. But there is
10 obviously a difference between speeding by itself and
11 reckless driving.

12 JUSTICE SCALIA: Ms. Kruger, what I don't
13 understand about this statute as you're interpreting it
14 is why you need any of it except the last phrase? Once
15 you give the last phrase, "involves conduct that
16 presents a serious potential risk of physical injury to
17 another," all of the rest of it is automatically
18 included. "Has as an element the use, attempted use or
19 threatened use of physical force against the person of
20 another" -- that obviously presents a serious potential
21 risk of physical injury to another. Or is burglary,
22 arson, extortion, the use of explosives? Congress could
23 have saved itself a lot of trouble by simply erasing all
24 the rest of the statute and simply saying any conduct
25 that presents a serious potential risk of physical

1 injury or not. That can't be what they meant.

2 MS. KRUGER: Well, what this Court said
3 about the structure of the statute in Taylor is that
4 Congress's purpose was first to identify crimes that do
5 have as an element the use of force, but also to
6 capture a category of crimes that do not have as an
7 element the use force but nevertheless present a
8 potential harm to another human being.

9 JUSTICE SCALIA: Why -- why would Congress
10 go through that trouble, unless they wanted to suggest
11 what other kind of crimes they mean to include by this
12 residual category of "any conduct" that presents a
13 serious potential risk of physical injury?

14 MS. KRUGER: Well, indeed as the Court said
15 in Taylor and I think as the Court reiterated in James,
16 it included the examples of four enumerated offenses in
17 clause 2 to provide examples of the kinds of crimes that
18 they believed to present a serious --

19 JUSTICE SCALIA: The degree of risk -- the
20 degree of risk, for example?

21 MS. KRUGER: Yes.

22 JUSTICE SCALIA: So if it doesn't come up to
23 the degree of risk that any of those four would, it
24 would not be included?

25 MS. KRUGER: Well, I don't know that the --

1 JUSTICE SCALIA: No.

2 MS. KRUGER: -- that the enumerated crimes
3 set an absolute floor. Congress could have written a
4 statute that said that.

5 JUSTICE SCALIA: Well, then what does it do?
6 What does it do?

7 MS. KRUGER: They do provide examples of the
8 kinds of crimes that Congress thought did present a
9 serious risk.

10 JUSTICE SCALIA: How? How? How does it
11 limit the latter part? Is it because they are all
12 crimes that require mens rea, intent? So should we
13 limit it by saying it has to be a -- a conduct that's
14 intentional conduct that presents a serious risk?

15 MS. KRUGER: Well, I think, as the Court
16 said in James, all of these crimes are quite different
17 offenses that don't share very many characteristics in
18 common, including incidentally intent to cause harm.

19 JUSTICE SCALIA: But you say it does limit
20 it. So tell me how it limits it?

21 MS. KRUGER: Well, what it does is it
22 provides a useful benchmark against which to assess the
23 risks that are associated with any other crime. And in
24 this case --

25 JUSTICE SCALIA: That's nice. Benchmark of

1 what? Of intent, of degree of risk?

2 MS. KRUGER: Of degree -- it's degree and
3 kinds of risk. Yes.

4 JUSTICE SCALIA: Okay. So the degree of
5 risk has to be pretty much similar to those four?

6 MS. KRUGER: It has to be comparable, which
7 is what the Court said in James --

8 JUSTICE SCALIA: Comparable --

9 MS. KRUGER: And in this case we do think
10 that the risks associated with DUI are comparable to the
11 risks --

12 CHIEF JUSTICE ROBERTS: How do we know that?
13 I guess this is a question I asked your friend. I mean,
14 degree of risk. I mean what are the odds that we're
15 going to -- that if there's a burglary, some physical
16 injury might result as opposed to an episode of drunk
17 driving.

18 MS. KRUGER: Well, Your Honor --

19 CHIEF JUSTICE ROBERTS: In other words, I
20 guess -- do we really look at how -- what percentage of
21 drunk drivers are involved in accidents as opposed to
22 what percentage of burglars are involved in violent
23 confrontations?

24 MS. KRUGER: No, Your Honor. I don't think
25 that the answer to the question can turn on statistical

1 comparisons of the likelihood that harm will result in
2 any given episode of any of these crimes. I think that
3 that is a proposition that the Court underscored in
4 James, when it decided whether attempted burglary
5 qualified without reference to hard statistics. And the
6 fact of the matter is that hard statistics for most of
7 these crimes are simply unavailable. So to make the
8 answer in any case turn on the availability of
9 statistics would lead to fundamentally arbitrary
10 results.

11 JUSTICE GINSBURG: Ms. Kruger, one of the
12 anomalies about this, and we start out -- this is an
13 armed career criminal. And you can say, well,
14 burglary -- burglary and arson, if you're apprehended,
15 you're the career criminal; you commit these kinds of
16 crimes. Congress doesn't want you to have a gun, or
17 if you do, you're going to get the book thrown at you.
18 But there doesn't seem to be much of a connection. I
19 mean how -- how is it going to make the dangerous --
20 the drunk driver more or less dangerous that he happens
21 to have a gun in the glove compartment?

22 MS. KRUGER: Well, we think that it's clear
23 from the enumeration of the offenses in clause 2 in the
24 definition of "violent felony" that Congress wasn't
25 intending to capture only a set of crimes that are made

1 more dangerous when they're committed with a firearm.
2 It is, in fact, the kind of statute that Congress wrote
3 in 18 U.S.C. 942(c), which concerns the use or carrying
4 of a firearm during and in relation to a crime of
5 violence. But here what Congress was concerned about
6 was capturing a set of offenders who, by their criminal
7 history, have demonstrated an inherent disregard for the
8 value of human life and therefore should not only be
9 prohibited from possessing firearms but should face
10 particularly severe sanctions for failure to abide by
11 that prohibition. Our --

12 JUSTICE BREYER: Then they could have turned
13 it just on dangerousness. I'm back to Justice Scalia
14 and Justice Ginsburg's question, and I'm simply sort of
15 repeating those in a sense but making it quite specific.
16 Imagine a universe of crimes. Every member of that
17 universe we concede has precisely the same degree of
18 danger as arson, explosives, burglary. So there's no
19 argument about the risk to human life. It is identical.
20 And now we write a statute, and the statute's object is
21 to take people who are felons in possession of a gun and
22 those persons whom it is particularly bad that they have
23 a gun are going to go away for 15 years minimum. So
24 what we're looking are people who are particularly bad
25 that they have a gun. Now go back to our universe, and

1 in that universe we have some things on the one hand
2 like arson, but on the other hand -- I have to name a
3 few, environmental crimes committed by negligence or
4 recklessness, where somebody flushed a toxic substance
5 down the drain or -- here's a good one I found -- if you
6 are a steamboat captain or an executive of a steamboat
7 company and you fail through negligence or simple
8 inadvertence to stop somebody from not inspecting a
9 lifeboat, well, felony or worse. And there are quite a
10 few dozens of these things: Failing to stop at an
11 inspection station if you are a trucker. You know?
12 There are quite a few, where what's at issue is
13 negligence, thoughtlessness, and maybe even
14 recklessness, but it seems to have nothing -- and it's
15 dangerous -- but has nothing to do with whether, when
16 later on you want a gun, you are a greater risk for
17 having a gun, you're more likely to pull the trigger,
18 you're more likely to aim it at somebody and shoot him.
19 Now, that's I think what we are trying to drive at.

20 MS. KRUGER: Well, Your Honor, I think that
21 the initial response to that question is that the
22 statute that Congress wrote unequivocally focuses the
23 inquiry on the risk of harm to other human beings.
24 Congress could very well have written a statute that
25 required intent to harm. It could have written a

1 statute that required intentional use of force, as it
2 did in --

3 JUSTICE SCALIA: Oh, but it didn't mean that
4 -- you said it didn't mean that because they could have
5 said that and nothing else. If that's what they meant,
6 they could have eliminated everything else that they
7 said. They obviously meant to tie that to the preceding
8 portions. And when you tie it to the preceding
9 portions, you come up with some limitations of the sort
10 that Justice Breyer was suggesting.

11 MS. KRUGER: Well, I think you don't, Your
12 Honor, because I think the most obvious way to tie it to
13 the preceding sections is, again, to import a kind of
14 use-of-force requirement such as the 18 U.S.C. 16(b)
15 requirements that would look at the risk that force
16 intentionally will be used in the course of committing
17 the offense, and --

18 CHIEF JUSTICE ROBERTS: How much of a
19 limitation is the point Justice Breyer was making? I
20 mean, let's say you've got a habitual drunk driver.
21 Everybody in town says he always drives drunk. I mean,
22 how would they greet the news: Guess what? He's just
23 got a gun. I mean, that raises the level of risk
24 significantly, doesn't it?

25 MS. KRUGER: Well, indeed, I think that it

1 does, and I think the facts of this case bear out that
2 Congress's concern about possession of firearms by
3 people who have committed crimes of this character that
4 present a serious risk in a serial manner was indeed
5 well-founded.

6 JUSTICE KENNEDY: Can you tell me what test,
7 what conclusion, you want me to come to in your
8 argument? Drunk driving is within the last clause
9 because --

10 MS. KRUGER: It is because, first of all,
11 the risks of drunk driving are commonly understood.
12 They're supported by the uniform legislative judgment of
13 the 50 States. And also because those risks are
14 comparable in both kind and degree to the kinds of risks
15 that are associated with crimes that Congress
16 specifically enumerated in the statute as meeting the
17 test.

18 JUSTICE SCALIA: She says not at all. Your
19 friend on the other side says that it's something like,
20 what, two and a half percent for burglary and point
21 something for the chances of hurting somebody if you're
22 driving DUI?

23 MS. KRUGER: Well, I think, again, the
24 statistical inquiry, while it can be helpful and
25 relevant in individual cases, is not dispositive. I

1 think if you look at the statistics, the chances of
2 injury resulting from a given arson fire are also well
3 below 1 percent. What Congress wasn't concerned about
4 was the statistical likelihood of injury in any
5 particular episode --

6 JUSTICE KENNEDY: So, I'm suppose to say
7 most legislatures think this is dangerous. That's
8 enough?

9 MS. KRUGER: Well, I think that Congress was
10 entitled to look at --

11 JUSTICE KENNEDY: I'm not trying to be
12 captious, but I -- it's difficult to find out what the
13 standard is.

14 JUSTICE STEVENS: Isn't the significance of
15 Justice Breyer's point that each of the listed crimes is
16 more dangerous when a criminal is carrying a gun, but
17 driving drunk isn't made any more dangerous whether or
18 not there's a gun in the car?

19 MS. KRUGER: Well, Justice Stevens, it's
20 difficult to see how arson, for example, or explosives
21 use is made more dangerous when the criminal is carrying
22 a gun. Presumably in those cases the criminal's use --
23 weapon of choice is fire or explosives rather than a
24 gun. The only risk that would inhere would be the risk
25 that any criminal would pose when apprehended by the

1 authorities, and it's the same risk that a presumably a
2 drunk driver would pose to others when apprehended by an
3 officer who pulls them over.

4 JUSTICE BREYER: Isn't a person who
5 deliberately burns down buildings, is a person who if he
6 had a gun might pull the trigger? And I will suggest
7 that's a reasonable inference. I also will give you
8 this: That a person who's so careless as to go drunk
9 driving is a person whose gun might go off carelessly or
10 he might leave it around the house. So I'll give you
11 that one. But my instinct is that Congress, in this
12 Act, is not worried about guns going off carelessly
13 around the house. They are worried about a person being
14 the kind of person who will point a gun at somebody and
15 pull the trigger. Now, is there something you can say
16 that disabuses me of that instinct?

17 MS. KRUGER: Well, I think one way to start
18 to answer that question is by looking specifically at
19 what Congress likely meant when it referred to "arson"
20 in the statute. Under 18 U.S.C. 844(i), arson is
21 defined as "maliciously damaging property by means of
22 fire or explosives." But the way courts have interpreted
23 that language is not to require intent to damage
24 property in all instances. It also covers situations in
25 which the fire is set with willful disregard for the

1 likelihood that damage will occur; in other words, in
2 situations in which the fire has occurred and recklessly
3 poses harm. And we think that that is the kind of
4 injury that is at issue in this case; that is,
5 fundamentally the same kind of risk that DUI poses.

6 JUSTICE SCALIA: You don't think this is
7 just limited to intentional arson? You think negligent
8 arson? Wow.

9 MS. KRUGER: Well, it's certainly true that
10 --

11 JUSTICE SCALIA: Negligent extortion,
12 negligent use of explosives? I mean, it's in a list of
13 things that are talking about, you know, intentional
14 crimes that armed career criminals would be likely to
15 do.

16 MS. KRUGER: Well, I think that Congress was
17 more than likely aware of the fact that 18 U.S.C. 844
18 did treat arson in this manner, particularly considering
19 that --

20 JUSTICE SCALIA: I don't think Congress had
21 the slightest idea.

22 (Laughter.)

23 MS. KRUGER: Well, the definition of -- the
24 reach of the Federal arson statute came to encompass use
25 of fire in 1982, only shortly before the ACCA was

1 enacted. And certainly it's true that most State
2 legislatures have also defined arson offenses to include
3 similar kinds of intentional setting of fire with
4 reckless disregard to the likelihood of damage or injury
5 that would result.

6 JUSTICE STEVENS: Could you comment on one
7 other point that Judge McConnell made in his opinion?
8 Is there significance in the title of this statute?
9 "Armed Career Criminal Act." Does this statute intend
10 to identify career criminals?

11 MS. KRUGER: Well, I think it's difficult to
12 see how it would support a limitation to the kinds of
13 crimes that are normally committed as a means of
14 livelihood in that sense of "career." It certainly does
15 refer to career criminals in the sense that they are
16 habitual offenders, that they are recidivists. But
17 certainly not all the enumerated offenses, nor even the
18 offenses that are encompassed by the definition that's
19 contained in clause 1 of the statute, are normally
20 committed as a means of violent --

21 JUSTICE KENNEDY: Well, I'm not so sure. It
22 seems to me that the burglary, arson, extortion,
23 explosives involves at least the stereotype of the armed
24 career criminal that people see in movies and hear about in
25 organized crimes testimony and so forth. I don't -- I

1 don't think it's completely far of the mark.

2 MS. KRUGER: Well, it is certainly true that
3 the kind of --

4 JUSTICE KENNEDY: Obviously -- obviously
5 incomplete.

6 MS. KRUGER: Well, it's certainly true that
7 the kinds of crimes that are encompassed by clause 1 of
8 the definition, sort of traditional crimes of violence
9 like murder, assault, rape, are not ordinarily committed
10 as a means of livelihood. People rarely make a
11 profession of those types of careers.

12 And it's also true that ordinarily arson is
13 not committed for insurance fraud, but is committed for
14 a large number of other purposes that have nothing to do
15 with the profit motive, including covering up evidence
16 of other crimes, including simple vandalism.

17 So I think it's implausible to think that
18 Congress was really focused here on the kinds of crimes
19 that are ordinarily committed for profit as a means
20 of --

21 JUSTICE GINSBURG: What else -- what else
22 would be in this catalogue? You rejected my speeder,
23 but I think you said something about a reckless driver
24 might, habitually reckless driver. What else would fit
25 the description "conduct that presents a serious

1 potential risk of physical injury to another"?

2 MS. KRUGER: We think the category of crimes
3 of recklessness that pose an injury, reckless disregard
4 of the risk of injury to others, would qualify because
5 in those cases juries have necessarily found that there
6 was objectively a serious risk and that failures to
7 appreciate that risk and to act accordingly constitutes
8 a gross deviation from the ordinary standard of care
9 that a reasonable person would exercise.

10 JUSTICE GINSBURG: I'd like to know
11 specifically. You said reckless driving; and what else?

12 MS. KRUGER: Reckless driving that results
13 in serious bodily injury or death to another, which is a
14 felony under the laws of many States, would qualify.

15 JUSTICE GINSBURG: That has the potential
16 for doing that, not --

17 MS. KRUGER: Yes, but reckless driving,
18 simple, is ordinarily not punishable as a felony under
19 the traffic laws. We think, similarly, reckless
20 homicide would qualify.

21 JUSTICE GINSBURG: But wouldn't that come in
22 in the first, the violent crime, the first part?

23 MS. KRUGER: Well, presumably it wouldn't,
24 because by definition a reckless homicide does not
25 involve the intentional use of force, the threatened use

1 of force, or attempted use of force. And the definition
2 relates solely to the killing of another, whether or not
3 by intentional use of force, in situations that
4 disregard the great dangerousness to human life and
5 those actions.

6 The other things that would qualify would be
7 cases like DUI, where recklessness need not be proved as
8 such, but that are underscored by legislative
9 determinations that the conduct that is proscribed is by
10 definition reckless, by definition poses a serious risk
11 that a person should appreciate and should accordingly
12 conform their conduct to a different standard.

13 Petitioner's argument suffers from the
14 fundamental flaw that it describes a statute that
15 Congress didn't write. Congress did indeed consider
16 incorporating the definition of "crime of violence" that
17 is set forth at 18 U.S.C. 16 when it redrafted the
18 statute in 1986 and it decided against it, instead
19 making the inquiry turn on the potential for risk to
20 human life as opposed to the potential that -- the risk
21 that force would be used or on the intentional use of
22 force.

23 We think that that decision is one that
24 needs to be given effect in interpreting the statute.
25 As this Court recognized in *Leocal*, the risk of

1 intentional use of force is simply not the same thing
2 that a risk of -- the risk that an accident will occur
3 that will cause serious injury to another.

4 JUSTICE GINSBURG: May I ask about something
5 in your brief on page 37? You said: "Congress settled
6 on this language because it had two other proposals, one
7 that it considered too narrow and one that it considered
8 as potentially too broad." And the one that it
9 considered potentially too broad is "any felony that by
10 its nature involves a substantial risk that physical
11 force against a person or property of another may be
12 used in the course of committing an offense is the" --
13 this is on page 37 of your brief.

14 MS. KRUGER: Yes, Your Honor. That is the
15 definition of "crime of violence" that's contained at 18
16 U.S.C. 16. And it is, indeed, unquestionably broader
17 than the definition of "violent felony" at
18 924(e)(2)(B)(ii) in at least two respects. One is that
19 it would cover misdemeanors involving use of force as
20 well as felonies. And the second is that it would cover
21 crimes that involve a risk that force would be used
22 against property, rather than focusing exclusively on
23 the risk of harm to human beings, as the definition of
24 "violent felony" in the ACCA does.

25 JUSTICE KENNEDY: It would, in the case of

1 drunk driving, though, it seems this would be a better
2 case for the Petitioner if we were operating under this
3 statute.

4 MS. KRUGER: Well, indeed, I think that that
5 is the thrust of the Court's decision in Leocal.

6 JUSTICE KENNEDY: It's narrower in that
7 sense as applied to this case.

8 MS. KRUGER: That's correct.

9 JUSTICE KENNEDY: May I ask you this
10 question? If the government were not to prevail in the
11 first case, *Rodriquez*, should we remand in this case,
12 because -- because then he -- the fourth felony would
13 have been improperly found if we rule against the
14 government in *Rodriquez*?

15 MS. KRUGER: Well, if the Court decided to
16 reach that issue in this case, even though the issue was
17 not pressed or passed on in the court of appeals and
18 wasn't raised in the cert petition, we do think the
19 Court's analysis of the issue in that case applies
20 equally to its analysis of the issue of whether or not
21 the felony prong of the definition of "violent felony"
22 is meant in this case.

23 So were the Court to decide that the
24 applicable maximum term of imprisonment that applies to
25 a recidivist is the term of imprisonment that would

1 apply to a hypothetical first-time offender, then that
2 decision would control in this case as well. And the
3 Court should dispose of this case accordingly.

4 But it bears noting that that would not
5 dispose of this question entirely, because there are, of
6 course, other reasons why States treat drunk driving
7 offenses as felony offenses, particularly in situations
8 in which they result in serious bodily harm or death to
9 another, as Your Honor previously noted.

10 The issue in this case comes down to the
11 interpretation of the statute that Congress wrote, not a
12 hypothetical statute that Congress could have written.
13 And that statute identifies one criterion for
14 determining whether or not a felony offense qualifies as
15 a violent felony under the ACCA, and that is its
16 potential for harming other human beings.

17 Drunk driving is commonly understood to
18 present a serious potential risk of injury. The
19 potential risks of injury are the only reason why it's a
20 crime under the laws of 50 States. And the risks
21 associated with drunk driving are comparable in both
22 kind and degree to the risks associated with arson and
23 explosives use, two crimes that Congress specifically
24 identified in the statute as satisfying its definition.

25 For that reason, we think that the court of

1 appeals correctly determined that Mr. Begay was
2 sentenced properly under the Armed Career Criminal Act
3 and would urge the Court to affirm its determination.

4 If there are no further questions, thank
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you, Ms.
7 Kruger.

8 Ms. Katze, you have four minutes remaining.

9 REBUTTAL ARGUMENT OF MARGARET A. KATZE

10 ON BEHALF OF THE PETITIONER

11 MS. KATZE: The problem with the
12 government's interpretation is that it offers no
13 limiting principle whatsoever. It's merely open to say
14 absolutely any offense that would present a serious
15 potential risk of injury to another would fall within
16 the statute. And that clearly does not take Congress's
17 intent to heart.

18 And there has to be some other limiting
19 principle, something more than just the words in the
20 residual clause, especially when we are giving every
21 word in the statute meaning. We suggest that our test
22 of analyzing those four enumerated crimes which were
23 intentionally put there by Congress, to look at the
24 attributes of those four crimes. That they are active,
25 violent property crimes more typical of crimes committed

1 by career offenders, more dangerous when committed with
2 a gun --

3 JUSTICE ALITO: Why wouldn't drunk driving
4 be a property crime? Doesn't it cause an enormous
5 amount of property damage?

6 MS. KATZE: Under a categorical analysis,
7 there is no element that has anything to do with
8 property whatsoever in DWI, which brings me to my next
9 point that recidivism is not an element of DWI in New
10 Mexico.

11 The elements to commit DWI in the first
12 offense are exactly the same as the fourth offense.
13 There is no difference. And there is -- certainly,
14 Congress, intended that there would be a distinction
15 between violent, intentional felonies and accidental or,
16 at worst, negligent crimes.

17 CHIEF JUSTICE ROBERTS: Extortion doesn't
18 involve property as an element.

19 MS. KATZE: I believe it does. It's trying
20 to get something of value from another person. That
21 thing of value is property.

22 CHIEF JUSTICE ROBERTS: Something of value
23 -- something of value could be, you know, a confession
24 in a related case or something. It doesn't necessarily
25 have to be property.

1 MS. KATZE: In the ordinary case, it's
2 property even if we think of it as reputation; property
3 in the sense of the common law, life, liberty, and
4 property; that that includes more than just physical
5 property, I think. In addition, this Court has said
6 that those four offenses are --

7 CHIEF JUSTICE ROBERTS: I don't understand
8 that. Yes. Life, liberty, and property include more
9 than property, but --

10 MS. KATZE: "Property" includes more than
11 tangible, physical property. Reputation is considered
12 property under that definition. Merely stating that --

13 JUSTICE GINSBURG: I thought you said you
14 -- you look at the generality of cases. In most
15 extortion cases what they want is money.

16 MS. KATZE: That is correct, and money is
17 property. And that is exactly what -- in addition to
18 the fact that this Court said in Taylor that those four
19 offenses are property offenses. And, again, in James
20 this Court again referred to those four offenses as --

21 JUSTICE ALITO: Well, if you look at the
22 generality of drunk-driving offenses, those that result
23 in physical injury almost always involve, or in the
24 great majority of cases involve, property damage, too;
25 don't they?

1 MS. KATZE: But that's not an element of the
2 crime. We can --

3 JUSTICE ALITO: It's not an element of some
4 of these other crimes, either. Is it an element in
5 burglary? Is there a property element in burglary?

6 MS. KATZE: Yes, Your Honor. There is a
7 breaking and entering into a building, in some type
8 -- that's a property.

9 JUSTICE ALITO: That's an entering. An
10 unlawful entering --

11 MS. KATZE: Right.

12 JUSTICE ALITO: That's a property element?

13 MS. KATZE: Yes, sir.

14 CHIEF JUSTICE ROBERTS: What about --

15 MS. KATZE: You have to enter a property.
16 It's this something -- property --

17 CHIEF JUSTICE ROBERTS: But we know that
18 attempted burglary is covered, and you don't have to
19 enter the house in an attempted burglary.

20 MS. KATZE: I think that's exactly the
21 situation when there are analogous crimes. It's clear
22 to see that --

23 CHIEF JUSTICE ROBERTS: Yes. Well, you are
24 saying this is an analogous crime to the four that are
25 listed, or it is not an analogous crime to the four that

1 are listed?

2 MS. KATZE: That's correct, but this Court
3 has said that the four offenses that were enumerated by
4 Congress are, in fact, property crimes. This Court has
5 said that in Taylor and again referred to those four
6 crimes as property crimes in James.

7 But even if this Court doesn't believe they
8 are property crimes, the bottom line is DWI is so far
9 afield of the four enumerated crimes, the attributes
10 that they had, at the very least the intent to do crime,
11 that it's clearly outside the scope of what Congress
12 could ever have intended.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, Ms.
15 Katze. The case is submitted.

16 (Whereupon, at 12:04 p.m., the case in the
17 above-entitled matter was submitted.)

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