IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - x

CURTIS DARNELL JOHNSON, :

Petitioner :

v. : No. 08-6925

UNITED STATES. :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Tuesday, October 6, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

LISA CALL, ESQ., Assistant Federal Public Defender, Jacksonville, Fla.; on behalf of the Petitioner.

LEONDRA R. KRUGER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

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.

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

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

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

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

prior that had as an element the use.

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

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

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

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

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

require --

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

MS. CALL: Yes.

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

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

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

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

more serious harm? How do I know?

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

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

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

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

MS. CALL: Yes, Your Honor.

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

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

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

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

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

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

Now, how do we know which is more normally

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

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

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

MS. CALL: No, Your Honor.

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

MS. CALL: Yes, Your Honor.

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

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

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

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

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

JUSTICE ALITO: If there were a State

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

MS. CALL: Yes, Your Honor.

JUSTICE ALITO: Is that right?

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

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

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

JUSTICE ALITO: Even -- those are classic batteries --

MS. CALL: Yes, Your Honor.

JUSTICE ALITO: -- and the language of the first prong of ACCA really tracks the language of the common law crime of battery?

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

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

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

MS. CALL: Yes, Your Honor.

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

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

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

MS. CALL: Well, Your Honor --

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

MS. CALL: Correct.

JUSTICE SCALIA: You can just threaten somebody.

MS. CALL: Yes.
JUSTICE SCALIA: That's not a crime of violence.
Ms. Call: And that would be --
JUSTICE SCALIA: Of course it's right.
JUSTICE BREYER: Assault is not a crime of violence; it's not a use of force.
JUSTICE SCALIA: Certainly not.
MS. CALL: Two responses to that, Your Honor. The first is, looking at the underlying facts would violate the categorical approach of saying we're not looking at what each offender might have done in any particular case, but what are the elements that he necessarily admitted. And under the Florida statute it would qualify as a violent felony because the Florida statute defines it as an offer to do violence coupled with the --
JUSTICE BREYER: What about attempted murder?
MS. CALL: Your Honor, yes, if it has as an element the use of force. And that --
JUSTICE BREYER: But it didn't --
MS. CALL: Yes, but under the ACCA, which is one of the phrases that the government elides out of its analysis, it's not simply the actual use of force, but

an attempted or threatened use of force.

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

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

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

JUSTICE SOTOMAYOR: Well, but violence has a broader meaning. It generally means a strong force or a strong -- physical force generally has some relative degree of -- of impact. I agree with you, the common

definition talks that way. Why should we read something more into it, like physical injury?

MS. CALL: Your Honor, the Court wouldn't have to, and part of where we drew this from is the Court's language in Begay that indicated that crimes within clause (1) of ACCA are those crimes which are also likely to present a serious risk of potential injury to others.

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

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

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

The statute covers the waterfront from a rude touching to beating somebody to a bloody pulp. But we know, because there's been a trial, exactly what this person does, and what he does would fall under the

aggressive violence, capable of doing physical injury to another.

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

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

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

JUSTICE SCALIA: Well, this isn't -- this isn't a felony battery statute. This is a misdemeanor battery statute, which has been elevated to a felony in this case only because the fellow had a prior.

MS. CALL: Yes, Your Honor.

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

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

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

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

JUSTICE SCALIA: Misdemeanor does?

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

JUSTICE SCALIA: Right.

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

So, if someone were charged with, in State court, a predicate that involved that kind of injury, a prosecutor using his or her discretion could charge under causing bodily harm and -- which showed facts that

could support the finding of a violent felony.

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

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

JUSTICE BREYER: Well, but --

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

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

MS. CALL: Yes, Your Honor. However, because the -- in Hayes, the Court was looking at the "committed by" and whether that was the -- the necessary

part of the prior conviction.

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

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

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

MS. CALL: Yes, Your Honor.

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

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

JUSTICE SCALIA: No. No. You mistook my question.

MS. CALL: I'm sorry.

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

MS. CALL: No, Your Honor.

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

MS. CALL: Yes, Your Honor, according to LaFave, all States have aggravated battery statutes that include either the use of a deadly weapon or --

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

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

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

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

MS. CALL: No, Your Honor. There is no enumerated offenses in the first prong.

JUSTICE BREYER: Well, what worries me more than -- than your application to battery is the methodology, because, if it's true that in Section 1, unlike Section 2, a single instance of where you could commit the crime without using force is sufficient to take it out of the statute, then, just looking through this, generally, you would take out assault, probably have to take out kidnapping. You would probably have to take out domestic violence. You would have to take out extortion, certainly, explosives laws.

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

MS. CALL: Your Honor, when they --

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

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

JUSTICE BREYER: Yes, but an element could be an element that is a -- the word is "element," the use or threatened use of physical force. Now, an element, say like abduction, could be an element that uses physical force if in the mine run of cases it uses

physical force, even though one can sometimes think of an exception. That's how we have interpreted 2.

So if we interpret 1 a different way, we are going to take outside the statute the very things that Congress wanted inside; and, if we interpret it the same way, I think we would get to the right result.

MS. CALL: Your Honor, I would have two responses to that. The first is, in the second prong, Congress used the word "conduct." And if they had meant conduct to be included in 1 rather than the elemental definition, that would have been a very easy definition.

Second, when they talked about the crimes intended for category 1, they gave the examples of someone with murder convictions, rape convictions, a gangland enforcer.

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

MS. CALL: Yes, Your Honor.

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

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

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

JUSTICE SCALIA: Excuse me. Under 1 it

depends upon the elements, but what about 2 and especially the residual provision of 2, "any other conduct that presents a serious potential risk of physical injury to another"? I would think rape qualifies under that.

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

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

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

JUSTICE BREYER: You do? You agree that, then -- in other words, Section 2 is not about property crimes that involve force, which is what Congress happened to say nonstop in the legislative history, which I know isn't read by everyone. But it seemed to me reading that history, the first part is dealing with those things that aren't property crimes. The second part, like arson, extortion, which they had in mind of a certain kind, and whatever, the explosives-related things, were things that they thought didn't -- could be property crimes that also involved harm to people.

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

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

MS. CALL: Well -- I agree with Your Honor that the legislative history certainly indicates that 1 and 2 had different purposes, but this Court didn't find Begay and Chambers on the easy test, to say simply that DUI is not a property crime, therefore it doesn't qualify. So I hesitate to offer that as a solution to the Court, but keeping in mind that the government --

JUSTICE SCALIA: I dare say that the next time somebody comes to argue before this Court that a crime is not included within Section 2 because it's not a property crime, I don't think that person is going to get one vote.

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

MS. CALL: It is burglary, arson, extortion, and --

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

MS. CALL: Yes, Your Honor.

JUSTICE BREYER: And I get --

MS. CALL: But if the government failed to

prove that a predicate qualified under the first prong, it could offer argument in evidence to the sentencing judge to show that it met the Begay test and was, in fact a serious risk of injury, that -- purposeful violence, et cetera. It's simply not that battery by touching qualifies.

And, Your Honor, if I may reserve the remainder.

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

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

JUSTICE SCALIA: I thought you said they all had such -- such aggravated statutes in your answer to me. Now you just said many of them do. Which is it?

MS. CALL: Well, many have alternative

versions that require admission of use of force, not simply, say, touching or striking like Florida. But all do have felony versions of aggravated felony.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Kruger.

ORAL ARGUMENT OF LEONDRA R. KRUGER

ON BEHALF OF THE RESPONDENT

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

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

Petitioner's primary submission --

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

MS. KRUGER: I think it's certainly true, Mr. Chief Justice, that Congress could have defined the category of predicates for the ACCA in that way by listing certain offenses, which would then require the courts to determine what the generic elements of those

offenses were, as this Court did with respect to burglary in Taylor.

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

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

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

JUSTICE SCALIA: Fifteen years for (snap).

(Laughter.)

MS. KRUGER: Justice Scalia, I think that there are a few responses to that question. The first is that a threatened use of force is normally considered and normally punished under the criminal law as a crime

of assault. And for the reasons that Justice Breyer has noted already in the arguments, it seems awfully unlikely, particularly in light of legislative history of this provision for those Justices who consider such considerations relevant, that Congress meant to exclude the crime of assault.

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

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

JUSTICE GINSBURG: But there have been rude touchings where there is no danger of physical injuries to the person. There have been prosecutions in Florida, I understand, for what would be considered a rude touching as opposed to an aggressive use of force that would risk physical injury.

MS. KRUGER: That's correct. There have

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

JUSTICE KENNEDY: How about pick pocketing, would pick pocketing be a violent crime if it involves a touching necessarily?

MS. KRUGER: Pick pocketing actually doesn't involve a touching necessarily. Normally if you --

JUSTICE KENNEDY: I guess a very good pick pocket could get -- could get just the wallet and not touch the person, I'm not sure.

MS. KRUGER: Well, pick pocketing, normally as it is criminalized in most states, does not, in fact, require as an element that the prosecution prove that the -- the defendant touched the victim.

JUSTICE SCALIA: No, but you don't prosecute

them for pick pocketing. You have a clumsy pick pocket and you prosecute him for battery, right? And he gets 15 years.

MS. KRUGER: Well, the clumsy pick pocket would, in fact, be in most jurisdictions a robber. And robbery is precisely the kind of offense that we know that Congress was intending to cover in subsection 1 of the ACCA. It was one of the first ACCA predicates, and it remains, I think, a paradigmatic example of a crime that has as an element the use of force and is, therefore, covered under the plain statutory language. But I think that --

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

MS. KRUGER: But I think that the essential thrust of the argument so far has been that if it's possible to commit battery under the common law under the laws of 27 states, including Florida, under Federal law in the way that individual instances doesn't seem to present a serious risk of injury, then it can't possibly be a violent felony. And I think that we know from the way the Court has interpreted the statute to date that that is simply not the case.

This Court addressed a very similar argument in Taylor --

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

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

MS. KRUGER: Justice Sotomayor, I think that you are exactly right, that the inquiry that is set out in subsection 1 is simply, does this crime have as an element the use of physical force?

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

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

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

JUSTICE BREYER: All right. Suppose we interpret the statute, the act of the statute as requiring more force than that, as requiring something more than spitting. Now, suppose that sometimes, as they have made a strong case, that touching is a separate thing under this statute because that's what the Florida Supreme Court said, and moreover, there are prosecutions that seem not to fit within striking. How do we know whether by and large this were a touching as used in Florida, covers things with mostly minimal touching, minimal force or enough force to get within the statute?

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

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

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

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

MS. KRUGER: It --

JUSTICE GINSBURG: But are you saying that suppose to Florida split this statute, and some states do, so one crime is a rude touching crime, and the other is the use of physical -- aggressive physical force that endangers the physical safety of another. If you have

both of those statutes, I take it that you would say either one of them would fit under ACCA as a crime that has the use of physical force, because you are saying the rude touching is physical force? Even if you split off the touching from the striking, you would say that the touching falls under ACCA?

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

JUSTICE STEVENS: But only as a felony.

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

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

This Court, for example, considered in Taylor v. United States a very similar argument, which was that the statutory reference to burglary ought to be

interpreted in a way that would limit it to aggravated burglaries of a certain sort, armed burglaries or burglaries of occupied buildings, in order to make sure that that reference to burglary better fit with Congress's purposes in selecting the worst of the worst.

This Court declined that invitation because it decided that Congress's unmodified views of the word "burglary" indicated that Congress meant for that word to take on its ordinary meaning as it was used in the laws of the many states. It said that Congress would have recognized that ordinary burglaries can be committed in individual instances in ways that don't seem particularly harmful, by unarmed defenders of unoccupied buildings in remote locations, but that Congress nevertheless made a categorical judgment that burglaries as a whole present sufficient potential for harm that they ought to be covered as ACCA predicates.

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

JUSTICE BREYER: It might have, but battery

by touching does seem a separate category. And at that point, you have to decide, is there an element there of force? And I think it requires more force than just the simplest touching.

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

It's the Government's job, faced with a 15-year statute, to do the looking. They have the resources. More than a defense attorney. Therefore, uncertain as I am, I must decide this in favor of the defendant. What's the response to that?

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

I think to the extent that, Your Honor, you are inclined to look to the purposes of this statute, what Congress would have thought the mind run of cases that would fall under Subsection 1's use of force provision would cover, I think there you look at the reported cases in Florida, we see that the kinds of crimes that are prosecuted under the touching or striking prong of that statute are, in fact, quite harmful. It's not at all difficult to see why Congress would have been concerned about these types of crimes, both because in many instances they involve conduct that is probably better described as touching or striking but it is -- nevertheless risks substantial harm to the victim, like choking, like beating the victim's head against the car window, to use an example from one of those cases cited in our brief.

JUSTICE SCALIA: You know, I guess it comes down to whether we think that in -- in B1, Congress was using technical language or Congress was using simply ordinary language, because you are quite right that the definition of -- of battery covers even the slightest touching. The use of physical force, which would include the slightest touching.

But in using that definition to define the term "violent felony," I find it hard to believe that

Congress was using the term in a technical sense, and was not using the term "physical force," "the use of physical force" to mean something more than a mere touching.

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

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

MS. KRUGER: I think it probably is not the way that we ordinarily talk in day-to-day conversation, but it certainly is the way that the law has talked about it for centuries, and I think there is a reason that Congress had in mind the technical definition of battery rather than ordinary parlance, if for no other reason because it tracked so closely the general definition, that technical definition of "battery," when it defines "violent felony" in Subsection 1. And also

because now that the --

JUSTICE STEVENS: May I ask -- may I ask this, following up on Justice Scalia's point? Are there any other crimes other than battery that -- that create the same situation where in the first time it is committed it's a misdemeanor, but then it becomes a felony because it's committed twice? So what we have here is conduct that first time is misdemeanor, second time is a felony. Are there any other examples of crimes that fit that category that come within Subparagraph 1?

MS. KRUGER: I am not sure of the answer to that, Justice Stevens. I do think that one reason why the misdemeanor versus felony distinction is somewhat unimportant to the interpretation of the "use of physical force" language in this case is that if the same language was deployed first in the "crime of violence" definition of 18 U.S.C. 16, which by its terms, applies to both misdemeanors and felonies, and Congress has of course subsequently used that very same language to define a class of misdemeanor crimes of domestic violence in Section 922(g)(9), we think to the extent that this Court is inclined to interpret the extent of the similar language in the similar statutes in a similar manner, the use of physical force language

should remain consistent across them.

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

JUSTICE GINSBURG: But there are no provisions that would include domestic violence and the gun possession provision.

MS. KRUGER: There are -- the range of predicate offenses that can be used for the Section 922(g)(9) domestic gun violence prohibition, ordinarily, as this Court recognized in Hayes, encompasses the general assault and battery statutes of the United States. Twenty-seven of these states define battery in more or less the way that Florida does, to include a range of uses of physical force from the least degree of physical force to very severe beatings, so under Petitioner's reading, it would be impossible to say for sure in more than half of the country that a domestic violence conviction, even a battery conviction that is specifically denominated as a domestic violence battery conviction in many a state, would qualify under Section

922(g)(9).

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

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

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

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

MS. KRUGER: The --

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

MS. KRUGER: It's on page 3(a) of the statutory appendix.

JUSTICE SCALIA: 3(a).

MS. KRUGER: It contains Section 921(a)(33)(a), which provides the definition of "misdemeanor crime of domestic violence."

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

MS. KRUGER: That's correct. The substantive prohibition is in Section 922(g)(9), and the definitional provision is reprinted on page 3(a).

JUSTICE KENNEDY: It's really a question for Petitioner's counsel, and I didn't have time to ask as your white light goes on. I take it your position is that if you do not prevail on your argument, that this is under Roman -- small Roman 1, that if -- you have to remand for small Roman 2?

MS. KRUGER: That's correct.

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

MS. KRUGER: I think it's within the Court's discretion to decide how to dispose properly of the case. I think that the Section -- the Subsection 2 issue was preserved in the courts below. The district court rested its decision on both Subsections 1 and 2, and the court of appeals addressed only Subsection 1.

We think that if the Court decides that the court of appeals is wrong in its interpretation of Subsection 1, then the appropriate thing in order to determine what Petitioner's correct sentencing should be would be to remand to allow the court of appeals to address the alternative argument about Subsection 2.

But the reason why the Subsection 1 inquiry is so --

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

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

The question presented in this case concerns just the basis for the court of appeals decision in this case which was subsection (1) of the statute. We think it's not at all unusual for this Court to decide that a court of appeals judgment is in error and then remand to allow the court of appeals to address --

JUSTICE BREYER: Hear what they said, what the Eleventh Circuit said, it said that if battery under Florida law fits within the description of (1), then it is a violent crime for ACCA purposes. And then it says if not, then not. And as long as the issue was in front of them I would think that those last four words are a holding.

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

JUSTICE BREYER: Why?
MS. KRUGER: If for no reason because the court of appeals didn't so much as acknowledge the existence --
JUSTICE BREYER: Was it argued?
MS. KRUGER: It was argued. It was -- it was briefed in the court of appeals, and the court of appeals --
JUSTICE BREYER: It is pretty hard to see it given Begay, how this is like arson or, you know, the other three there, burglary, arson --
JUSTICE SCALIA: Explosives.
JUSTICE BREYER: -- explosives.
MS. KRUGER: Well --
JUSTICE BREYER: So, I mean, I don't know. Maybe the court of appeals felt -- what they said was, "if not, then not." And it was raised in argument.
MS. KRUGER: Well, I think it's -- again, it's difficult to read that piece of loose language in the Court's opinion as a direct holding, particularly considering that the court of appeals didn't so much as cite the language or even the code provision that relates to the argument. But I think to the extent that the Court questions whether it would qualify under subsection (2), I think the answer is yes. Battery

is -- qualifies under this Court's interpretations of that subsection in Chambers and Begay and James. It is a crime that is typically purposeful, violent and aggressive.

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

MS. KRUGER: Well, it is like them in that it poses risks that are similar in --

JUSTICE BREYER: But then we are rereading these three other examples out because then "other" covers any crime that poses a risk of violence, or whatever the words are there -- I forget the words. Poses a risk.

MS. KRUGER: No, I think it would still be consistent with this Court's analysis of subsection (2) in Begay in that battery by touching, if you consider it to be a separate crime, which again I think is a highly contested --

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

MS. KRUGER: No, but what this Court said in Begay was that it doesn't present risks that are similar in degree and kind to the risks that are presented by the enumerated offenses. And battery, including battery

by touching or striking under Florida law, presents risks that are quite similar in degree and kind to the enumerated offenses, particularly burglary. It is --

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

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

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

MS. KRUGER: Right. And the question before the Court in this case concerns only that question. It concerns the proper interpretation of subsection (1). Whether the crime is one that has as an element the use of physical force.

JUSTICE STEVENS: The district court thought that the two were related. The district court, if it thought a slightest touching was qualified under (1) it

was not unreasonable to say that it would also qualify under (2). But if that argue ment is rejected under (1), it seems to me it would follow necessarily that it would also be rejected under (2).

MS. KRUGER: I'm not entirely sure why that would be true. But I do think that it's right as a descriptive matter that most of the crimes that are encompassed by subsection (1) would also qualify under subsection (2).

JUSTICE SCALIA: But (2) -- (2) looks to the conduct, it doesn't look to the element of the crime. So you could actually look to the conduct of which the person was convicted, no?

MS. KRUGER: Well, you have to look at the contact that the person was convicted of with respect to the elements of the crime, that is the nature of the category --

JUSTICE SCALIA: No, no, no. You look to the crime -- under (1), you look to the crime he was convicted of, and if -- if -- if none of its elements require serious physical force, you can say it doesn't qualify under (1), but under (2) if in fact you see the misdemeanor he was convicted of was really whacking somebody really hard, then -- then it could possibly come within -- come under (2).

MS. KRUGER: With respect, Justice Scalia, I think that is incorrect. This Court has made clear that subsection (2) like subsection (1) proceeds by looking at the elements of the offense --

JUSTICE SCALIA: Just at the elements.

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

JUSTICE SCALIA: Can I ask you about -- about 922? You point to the -- the definition there, the definition in 921. But that is a definition of the term, misdemeanor crime of domestic violence. And in the context of defining that term, I'm perfectly willing to believe that the use or attempted use of physical force means even the slightest touching, as -- as battery does. You are talking about a misdemeanor crime of domestic violence.

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

MS. KRUGER: Well, Justice Scalia, I would certainly be inclined to agree with you but it's particularly clear given the text and context of the purposes of section 922(g)(9) that battery ought to be

covered by that definition, misdemeanor crime of domestic violence. But we think that the reason why it is also clear under subsection (1) of the ACCA is that the use of force element of the definitional provision is separate from the degree of seriousness with which the State chooses to treat the crime, yet the crime is punished as a felony, and if has as an element the use of physical force, then it qualifies as a violent felony under the ACCA, just as if it is punished as a misdemeanor, it qualifies as a misdemeanor crime of domestic violence under section 922(g)(9).

JUSTICE SCALIA: I dare say that Congress in my view probably didn't even contemplate that something which is a misdemeanor could become a violent felony if you did it the second time.

MS. KRUGER: Well --

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

MS. KRUGER: Well, the Court in United States v. Rodriguez in analyzing the coordinate provision of the ACCA that covers serious drug offenses said that the felony aspect of that definition is satisfied by a recidivist enhancement. And we think that the conclusion in that case, and it is not disputed

among the parties, applies with equal force in this case to the proper interpretation of violent felony.

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

It simply was not unheard of for simple battery to be elevated to a felony under certain circumstances in 1986 Congress enacted the present version of ACCA. At the end of the day, we think that Congress -- every indication that we have in both the text, the context, the purpose of the statute and its background suggests that Congress was in fact deliberately tracking the definition of battery when it enacted the primary definition of violent felony in subsection (1).

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

MS. KRUGER: Aside from the fact that they

didn't use the word battery. Instead they chose to incorporate the general definition of the crime of battery; that is correct, Mr. Chief Justice.

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

JUSTICE SCALIA: States do it all the time when they have different degrees of battery. Misdemeanor -- felony battery -- they do it all the time.

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

And Petitioner's concession that at least

Federal sentencing courts could draw distinctions between touches and strikes, may have some resonance in the State of Florida, but has resonance for the rest of the country. Most State assault and battery statutes don't contain explicit references to striking, but subsume striking within the range of conduct prescribed by their offensive touching prong.

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

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

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Ms. Call, you have four minutes remaining.

REBUTTAL ARGUMENT OF LISA CALL

ON BEHALF OF THE PETITIONER

MS. CALL: Thank you, Your Honor.

JUSTICE KENNEDY: I -- I don't want to waste too much of your time on the remand, but I can't really fault the government for waiving a right to raise a claim under Clause 2, which is your second reason for not -- not remanding, and it -- it does seem, to, me that the Eleventh Circuit -- one permissible reading was that they were just looking at 1, so that we would have to remand.

MS. CALL: Justice Kennedy, I would have to disagree with that because it was fully briefed, fully argued --

JUSTICE KENNEDY: I understand that.

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

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

JUSTICE KENNEDY: Yes. Except in this area, I am a little reluctant when it hasn't been argued

before as to make a definitive holding, but I will look at the Eleventh Circuit opinion again.

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

JUSTICE KENNEDY: Thank you.

MS. CALL: And, Your Honor, I wanted to note this is not just an academic exercise on noticing what physical force means. Absent this one finding of Mr. Johnson's prior conviction was a violent felony, it raised his guideline range, from 27 to 33 months, to a mandatory minimum sentence of 15 years.

So the danger of including this crime, when the art or criminal act was not designed to include all crimes or all offenders, means that it took all discretion away from the sentencing judge.

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

If this were not considered a violent

felony, the sentencing judge could consider that under the guidelines in the 3553 factors. But to read physical force so broadly is to, in essence, collapse the distinction between those violent offenses that are meant to be included in the Armed Career Criminal Act and those that are not.

Your Honors, I would also note one matter, that physical contact is used in the assault statutes under the Federal Code, so there is a different provision -- a different meaning to physical contact than to physical force, and the physical force, in this definition, is looking at what level and what sort of force Congress intended to require to impose this very high sentencing standard.

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

The case is submitted.

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