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

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 09-11311, Sykes v. United
5 States.

6 Justice Ginsburg is not on the bench, but
7 will participate in the argument through the transcripts
8 and -- and the tapes.

9 Mr. Marsh.

10 ORAL ARGUMENT OF WILLIAM E. MARSH

11 ON BEHALF OF THE PETITIONER

12 MR. MARSH: Mr. Chief Justice, and may it
13 please the Court:

14 The Armed Career Criminal Act enhances the
15 punishment for possession of a firearm or ammunition for
16 a person who has three previous convictions for a
17 violent felony. This case involves, as you know,
18 vehicular fleeing, which Indiana has divided into five
19 categories. Indiana statute treats vehicular fleeing as
20 a continuum of behavior ranging from merely failing to
21 stop, on the low end, which is the crime Mr. Sykes was
22 convicted of violating, all the way to fleeing which
23 results in the death of a police officer, on the high
24 end, which in Indiana is a class A felony.

25 JUSTICE SCALIA: What's in between?

1 MR. MARSH: The second tier up is what we
2 refer to as (b)(1)(B), which is fleeing which either
3 causes bodily injury or creates a substantial risk of
4 bodily injury. The next category up is fleeing which
5 causes serious bodily injury. The fourth category is
6 fleeing which causes a death.

7 This Court recognizes --

8 JUSTICE SCALIA: So we can assume that the
9 conviction here did not involve any risk of bodily
10 injury to anybody?

11 MR. MARSH: That's our position, Your Honor.
12 When the court considers the conduct encompassed by the
13 elements of the offense --

14 JUSTICE SCALIA: Right.

15 MR. MARSH: -- then that conduct does not
16 involve conduct which creates a risk of bodily injury.

17 JUSTICE ALITO: Why is that --

18 JUSTICE KENNEDY: I'm sure you'll do so in
19 the course of your argument, but at some point give us
20 some examples of violations of -- of this -- this
21 statute which from a commonsense standpoint don't
22 involve a serious risk. There was something in the
23 brief about, oh, well, the defendant might want to just
24 find a safe place to pull over. I -- I didn't follow
25 that because it's an intent crime. I just don't see how

1 that would be a violation. But if at some point in your
2 argument you could address those points.

3 MR. MARSH: Well, I'd be happy to respond
4 now, Justice Kennedy. The court -- the case that you
5 referred to is the Indiana case of Woodward, from the
6 Indiana Court of Appeals, in which the court held that
7 exactly that conduct did violate this statute because
8 the -- knowingly or intentionally, the mens rea element,
9 goes only to fleeing and using a vehicle. So that was
10 one example --

11 CHIEF JUSTICE ROBERTS: Looking --

12 MR. MARSH: -- of merely failing to stop.

13 CHIEF JUSTICE ROBERTS: I'm sorry. Looking
14 -- looking -- I don't mean to interrupt your answer, but
15 looking for a safe place to stop violates the statute?

16 MR. MARSH: That was the holding of the
17 Indiana Court of Appeals, yes.

18 JUSTICE KENNEDY: You're supposed to stop
19 dead in your tracks and not pull off on the shoulder? I
20 mean, I don't -- I just don't understand this. I'll go
21 read the case, but --

22 MR. MARSH: Well, the court didn't --

23 JUSTICE SCALIA: I don't drive in Indiana.
24 I think that's pretty tough.

25 MR. MARSH: The court did not elaborate,
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1 Your Honor, on where the line is, but --

2 JUSTICE KENNEDY: Maybe that's why -- why
3 it's a risk. You stop in the middle of the road and
4 then everybody --

5 (Laughter.)

6 MR. MARSH: That would be more likely to
7 create a risk, but the whole --

8 JUSTICE SCALIA: How can you say somebody is
9 fleeing? I mean, doesn't fleeing mean you're trying to
10 escape the -- the officer?

11 MR. MARSH: Justice Scalia, the holding of
12 the Indiana Court of Appeals was in response to a
13 position taken by the defendant, sort of along the lines
14 of the two lines of questioning, which is surely the
15 statute requires something more than merely failing to
16 stop, but the Indiana Court of Appeals used precisely
17 that language. It --

18 JUSTICE ALITO: I think the problem with
19 your argument is that the prosecution is not under any
20 obligation to charge any offense greater than the
21 offense for which your client was convicted in a case in
22 which there is a very grave risk created by a flight.
23 Isn't that true?

24 MR. MARSH: The prosecutor is not under any
25 obligation; was that the question, Justice Alito?

1 JUSTICE ALITO: Yes.

2 MR. MARSH: Yes, I think that's -- I think
3 that's correct. The prosecutor --

4 JUSTICE ALITO: So you -- the fact that
5 someone is convicted of this offense does not show that
6 a broad category of offenses within this crime lack the
7 risk that's necessary under the Armed Career Criminal
8 Act.

9 MR. MARSH: Well, I suggest that it does,
10 Your Honor, because the -- the James case makes clear
11 that the court will determine whether the crime creates
12 a serious potential risk of physical injury to another
13 by looking at the conduct encompassed by the elements of
14 the offense. Now, the fact that some other offense
15 maybe could have been charged or was charged, I suggest,
16 on the categorical approach is not relevant.

17 JUSTICE ALITO: Are you familiar with the
18 case called Hape v. State, Indiana Court of Appeals
19 2009?

20 MR. MARSH: Tate versus --

21 JUSTICE ALITO: Hape. H-a-p-e.

22 MR. MARSH: I'm not, Your Honor.

23 JUSTICE ALITO: During a 45 -- and this
24 involved the offense at issue here. During a 45-minute
25 high-speed chase, officers shot at the defendant's truck

1 at least 20 times. The State's facts showed that the
2 defendant drove over 100 miles an hour and at times
3 drove into the oncoming traffic lane.

4 Do you think that creates a -- a serious
5 potential risk of -- of harm?

6 MR. MARSH: Well, those, of course, aren't
7 the facts here. And I would have to know what the
8 individual was convicted of, because, of course, under
9 the categorical --

10 JUSTICE ALITO: I believe he was convicted
11 of the same offense as -- as Mr. Sykes.

12 MR. MARSH: But, of course, under the
13 categorical approach established by Taylor and followed
14 consistently by this Court since that time, the court
15 doesn't look at the facts of the individual case. The
16 court looks at it categorically. So if the --

17 JUSTICE BREYER: But looking at it
18 categorically, I've always thought, means you look to
19 see not just what the elements are on paper, but whether
20 the elements as -- as used in reality in the State are
21 applied to cases that do present -- in general, you
22 apply it to cases that do present a serious risk of
23 physical injury. And you'd think the answer is we don't
24 know because no one's gone and looked. You could do it
25 through sampling, but no one's gone and looked. I've

1 just said that's my view of it.

2 The -- the -- so what do we do? I mean, I
3 can deal with a lot of other States, but Arizona has
4 exactly the same classification of felony when you use a
5 vehicle and when you use a vehicle creating a serious
6 risk of physical harm to others. It's in the same
7 provision, same statute, same category. How do we work
8 with that, in your opinion?

9 MR. MARSH: If the --

10 JUSTICE BREYER: Are you following what I'm
11 doing? You understand the difference between Arizona
12 and 46 other States?

13 MR. MARSH: Yes.

14 JUSTICE BREYER: In the other States, they
15 grade it. But here they don't.

16 MR. MARSH: Right. Well, Indiana, of
17 course, does grade it, Your Honor.

18 JUSTICE BREYER: Indiana -- I'm sorry.

19 MR. MARSH: And it is significant that the
20 second most serious category is where the conduct does
21 present a substantial risk of bodily injury.

22 JUSTICE SCALIA: And I -- I don't know how
23 we could proceed by looking at, you know, whether in
24 fact a majority of the cases that come into this first
25 relatively harmless category did indeed involve

1 situations that involved physical risk because, as
2 everybody knows, prosecutors plea bargain, and it's
3 probably very often the case that the defendant is
4 charged only under -- under category 1, where, you know,
5 if he went to trial, they'd charge him under 3; isn't
6 that so?

7 MR. MARSH: But, of course, Your Honor --

8 JUSTICE SCALIA: Yes, yes. You want to say
9 "yes."

10 (Laughter.)

11 MR. MARSH: Thank you. Yes.

12 JUSTICE BREYER: Well, I still -- look, what
13 I'm thinking of -- and I need a little explanation -- we
14 look to see in (b), and it says it's a class D felony if
15 a vehicle is used. That's (A) under (1). Am I right?

16 MR. MARSH: Yes.

17 JUSTICE BREYER: Okay. Then we look to (B)
18 under (1), and it's also a class D felony -- in other
19 words, the same -- if a vehicle is operated in a manner
20 that creates a substantial risk of bodily injury.

21 MR. MARSH: Yes.

22 JUSTICE BREYER: So a prosecutor looking at
23 that will say: Why don't I just charge (A); what's the
24 point of charging (B)?

25 I mean, it makes no difference apparently.

1 It's simpler to prove (A).

2 MR. MARSH: Justice Breyer, in 2003, when
3 Mr. Sykes was convicted of this offense, what you said
4 is exactly right. Of course, we have no way of knowing
5 the motivation of prosecutors generally, let alone in
6 this case. And it wouldn't really matter what it was in
7 this case, what it is generally. But I think it's
8 significant that in 2006 the Indiana General Assembly
9 amended that statute so now the (B) violation carries
10 with it a mandatory jail sentence, 60 days.

11 JUSTICE BREYER: I can deal with it more
12 easily then, at least I have -- but what's worrying me
13 now is what we're supposed to do is: Is the offense an
14 offense that presents a serious risk of physical injury
15 to another?

16 MR. MARSH: Yes.

17 JUSTICE BREYER: So we're here trying to
18 decide whether the (A) one does.

19 MR. MARSH: Yes.

20 JUSTICE BREYER: And the answer is I don't
21 know, and the reason I don't know is I don't know how
22 that offense language of (A) is applied in Indiana.

23 MR. MARSH: If the --

24 JUSTICE SOTOMAYOR: Counsel, do you know if
25 Indiana has an enhancement for convictions, sentencing

1 enhancement of any kind, for convictions that have an
2 element of -- of risk of harm to others?

3 MR. MARSH: Your Honor, there are a number
4 of habitual sentencing enhancements, one of which
5 specifically relates to driving. I can't say that it is
6 based on substantial --

7 JUSTICE SOTOMAYOR: So it's possible that
8 there is a -- there's a use of the difference between
9 the two categories that might not be implicated in this
10 case but may lay the foundation for an enhancement
11 later?

12 MR. MARSH: Yes. Now, that's a good point,
13 Justice Sotomayor. The -- the enhancements generally in
14 Indiana relate to previous convictions, and so I can't
15 say for sure, but it's entirely possible that (B),
16 (b)(1)(B), would be a predicate crime for a habitual
17 traffic offender, which is what it's called.

18 JUSTICE SOTOMAYOR: In your brief, you take
19 issue with the Government's definition of "aggressive,"
20 but would you give us yours?

21 MR. MARSH: Well, Your Honor --

22 JUSTICE SOTOMAYOR: How would you define it
23 and on what basis?

24 MR. MARSH: Your Honor, the best definition
25 of "aggressive" that I've seen was in the First Circuit

1 opinion in the Herrick case, which is cited in our
2 brief, which the First Circuit refers to as forceful
3 action, especially where intended to dominate or master.

4 But on general everyday language, it strikes
5 me that when a law enforcement officer wants somebody to
6 stop, whether they're in a vehicle or not, the fight or
7 flee sort of comes into play. And the person who
8 responds by going toward the police officer and
9 resisting in that way, which is the first part of this
10 Indiana statute, would be acting in an aggressive way.
11 The person who flees is not acting in an aggressive way.
12 They're trying to avoid the confrontation. They're
13 trying to get away from the law enforcement.

14 JUSTICE KAGAN: Mr. Marsh, I take it that
15 you would agree that (b)(1)(B) is a violent felony
16 under -- under ACCA; is that right?

17 MR. MARSH: Your Honor, it may very well be.
18 It certainly would satisfy the risk element, similar in
19 risk to the -- to the Begay case. I think it would
20 still have to be decided whether it's violent and
21 aggressive, but it may very well be.

22 JUSTICE KAGAN: Well, if we think that
23 (b)(1)(B) is a violent felony under ACCA, and we know
24 that (b)(1)(A) and (b)(1)(B) can receive the same
25 punishment, that they're both classed as a class D

1 felony, why should we make the distinction between the
2 two under ACCA?

3 MR. MARSH: Your Honor, I would suggest
4 because the Indiana General Assembly has decided in
5 enacting this legislation that some vehicular fleeing
6 presents a substantial risk of bodily injury to another
7 and some doesn't, and they've drawn this distinction.

8 JUSTICE SCALIA: I presume that if --

9 JUSTICE KAGAN: But these are not nested
10 offenses. These are not --

11 MR. MARSH: I'm sorry?

12 JUSTICE KAGAN: These are not lesser
13 included offenses. Each has an element that the other
14 lacks, and both are classed with -- apparently that the
15 -- that the State thinks of them as equally severe. And
16 if one is a violent felony under ACCA, there's an
17 argument that the other should be treated in the exact
18 same way.

19 MR. MARSH: Your Honor, I would suggest that
20 the State doesn't treat them as equally severe. The
21 range of punishment for a class D felony, which both of
22 those crimes are, is all the way from zero to 3 years in
23 prison, and the actual conduct undoubtedly is a factor
24 in what the person's ultimate sentence will be.

25 JUSTICE SCALIA: And it may well be that in
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1 deciding whether to accept a plea bargain of being
2 guilty of (A) rather than going to trial on (B), if your
3 client has two violent felonies already on the book, you
4 might take -- take the plea bargain under (A) lest you
5 run afoul of the violent felony act.

6 MR. MARSH: Yes, Your Honor, that's, of
7 course, entirely possible. But, again, just as with the
8 categorical approach the court cannot take into account
9 the motives of prosecutors, I would suggest the motives
10 of defendants and defense lawyers can't be taken into
11 account, either. Further, I think it's more important
12 that when Indiana enacted this statute, it was not
13 thinking of ACCA and predicate crimes, I -- I assume. I
14 don't think the legislature takes those kind of things
15 into account.

16 JUSTICE ALITO: Suppose the legislature were
17 to repeal (b)(1)(B). Would the offense for which Mr.
18 Sykes was convicted then become an ACCA offense?

19 MR. MARSH: Your Honor, I -- that would be a
20 question that would have to be decided on the basis of
21 whether there's some basis to -- well, first of all,
22 determine whether it's violent and aggressive. And my
23 position would remain it's still not violent and
24 aggressive. But even on the second part of the Begay
25 approach, this Court has not seen anything that gives

1 you any basis for knowing what the risk of injury is.

2 JUSTICE SCALIA: I don't understand your
3 answer to that question. I would have thought that your
4 answer, if you're insisting on a categorical approach,
5 would be "no," that there's nothing in -- in (3) that
6 requires any violence at all. Just fleeing by visible
7 or audible means, just -- just flees. That's all it
8 says.

9 MR. MARSH: I'm sorry. I understood the
10 question to be that (A) is repealed and (B) is left in
11 place; was that --

12 JUSTICE ALITO: No, it's the opposite. If
13 the aggravated offense -- you rely on the aggravated
14 offense --

15 MR. MARSH: Right.

16 JUSTICE ALITO: -- in large part as a basis
17 for your argument.

18 MR. MARSH: Right.

19 JUSTICE ALITO: Your argument -- one of your
20 main arguments, as I understand it, is that -- what I'll
21 call the simple offense doesn't qualify under ACCA
22 because cases involving a serious risk of bodily injury
23 fall under the aggravated category. And my question is
24 whether a repeal of the aggravated offense would change
25 -- would then convert the simple offense from a non-ACCA

1 offense to an ACCA offense. Or you could ask it a
2 different way. If State 1 has the simple offense and
3 the aggravated offense, State 2 has just the simple
4 offense, is the simple offense an ACCA offense in one
5 State and not in the other State even though the
6 elements are exactly the same?

7 JUSTICE SCALIA: That's a good question.

8 MR. MARSH: Your Honor, the equation would
9 be different because of the significance of the (B)
10 offense. So that's not exactly our case. But I will
11 adopt Justice Scalia's answer, which I think is exactly
12 right. I -- it still would not be something that's
13 violent or aggressive.

14 JUSTICE ALITO: But you're -- you're
15 answering my question by making a totally different
16 argument. Insofar as you're relying on the aggravated
17 offense, the presence of the aggravated offense, I would
18 appreciate an answer to it.

19 MR. MARSH: Justice Alito, the --

20 JUSTICE ALITO: In other words, you're
21 saying -- maybe I haven't made myself clear. You're --
22 Justice Scalia's answer, which you have adopted, is that
23 if you look at (A) by itself, forget about the
24 aggravated offense completely; it doesn't qualify under
25 ACCA. And that's -- that's one argument.

1 But your -- your other argument is that (A),
2 the simple offense, doesn't qualify because of the
3 presence of (B). And I'm trying to see whether that
4 makes sense.

5 MR. MARSH: Yes, Justice Alito, I think it
6 breaks down to the two parts of the Begay test. In
7 order to be a violent felony, it has to be similar in
8 kind and similar in degree of risk.

9 The existence of (B) makes clear that the
10 degree of risk for violating (A) is not the same,
11 because if you accept the continuum of behavior as
12 created by the Indiana General Assembly, the person
13 who's convicted of (A) has not created a substantial
14 risk of bodily injury. It's --

15 JUSTICE SOTOMAYOR: Counsel, have you done
16 or looked at -- not every burglary has a risk of harm to
17 another or results in harm to another. The general
18 definition of burglary is entering without permission
19 and intent to commit a crime, and generically the crime
20 doesn't have to be physical injury to others.

21 MR. MARSH: Right.

22 JUSTICE SOTOMAYOR: Yet, ACCA defines
23 burglary as a qualifying crime of violence. It's
24 measuring risk, not by the elements of that crime, but
25 by something else, by some measure of incidents in which

1 violence might occur.

2 So how is that different than the
3 Government's argument here and the question that Justice
4 Breyer asked you, which was: It is true, potentially
5 there's some forms of fleeing that might not pose a risk
6 of injury, but statistically there's a large number of
7 incidents in which violence follows.

8 So, how is that different than burglary?
9 That's really my question. What -- it can't be that the
10 elements have to pose a risk of injury, because burglary
11 doesn't do that. So, what -- how do we measure it?

12 MR. MARSH: Your Honor, the inquiry, as the
13 Court said in James, is whether the conduct encompassed
14 by the elements of the offense presents the risk. And
15 that's the -- the determination that the court has to
16 consider.

17 It's not -- it is not necessary, and I'm not
18 contending, that this crime is a violent felony only if
19 every conceivable violation of the statute constitutes a
20 risk of danger. That --

21 JUSTICE SOTOMAYOR: So if you're not doing
22 that, that's my question: Where do we draw the line?

23 MR. MARSH: You draw it -- I'm sorry.

24 JUSTICE SOTOMAYOR: Where do we draw the
25 line?

1 MR. MARSH: You draw the line --

2 JUSTICE SOTOMAYOR: I think that was what
3 Justice Breyer was trying to ask you earlier, which is:
4 When do we say that, as in burglary, that some risk is
5 more likely to follow than not in a particular type of
6 crime?

7 MR. MARSH: Well, the line is defined by the
8 statute: Serious potential risk of physical injury to
9 another.

10 Now, how do you make that determination?
11 Well, the Court made clear in Chambers that empirical
12 data is one way to do it. There isn't any here because
13 of all the empirical data presented by the Government.
14 It relates to vehicular fleeing as if there was one
15 crime of vehicular fleeing, and most of it is -- is
16 calculated based on death or injury, and that, of
17 course, is not the category that we have here. If --

18 JUSTICE SCALIA: I suppose that if we agreed
19 with you that whether it is a violent crime depends upon
20 what other prosecutions for fleeing could have been
21 brought. If we agree with you that (1)(A) is negligible
22 because there are other bigger ones for which he wasn't
23 charged, we could leave open the question of what --
24 what happens in a State that has only one crime for
25 fleeing, and we would -- then we would have to confront

1 the question that Justice Sotomayor has asked.

2 But if we accept your notion that -- where
3 you have a gradation that is adopted by the State, the
4 lowest gradation cannot be determined to have a high
5 percentage of bodily risk, right?

6 MR. MARSH: Yes, that's correct, Justice
7 Scalia.

8 JUSTICE BREYER: My problem is there is
9 arguably not here a gradation.

10 Suppose it only had (A). If it only had
11 (A), for me -- I'm not saying for you -- this wouldn't
12 be a tough case. That is to say, I can't imagine a
13 person running away from a police in a car where there
14 isn't a real risk to other people. He's speeding, you
15 know. I would think -- I don't see how you get away
16 from the policeman unless you speed, and there are going
17 to be pedestrians. Who knows? But I think that was
18 pretty -- at least as bad -- at least as much of a risk
19 as burglary. So that would be the end of the case. It
20 would be simple. At least assume that.

21 Now, then, however, suppose we have a State
22 which says: But it's a worse thing to run away and
23 create a risk. In a separate provision. It's a worse
24 thing. All right? Then I'd say, huh, now I'm not so
25 sure. Why didn't they charge the worse thing? This

1 must be reserved for cases where it isn't.

2 So here we have a rather weird situation.

3 They're saying it's a different thing but not a worse

4 thing. So now I say: Well, why didn't they charge --

5 Huh? Now I don't know. I don't know why they didn't

6 charge the separate special one. I don't know what the

7 facts are. I'm puzzled.

8 Now, that's your case. That's where I

9 needed the enlightenment. So, what's the enlightenment?

10 MR. MARSH: Your Honor, it's not a weird

11 situation, because the Indiana definition of the crime

12 of vehicular fleeing is not one all-encompassing crime.

13 It's -- they took the all-encompassing generic vehicular

14 fleeing and divided it into five subparts, which I

15 suggest makes it much easier to resolve the (b)(1)(A)

16 question.

17 If there is no other categories, that would

18 be Justice Scalia's point, I think, and then it would be

19 a much harder question. And it may very well be that it

20 would be considered a violent felony. For one thing --

21 JUSTICE ALITO: But isn't it still -- isn't

22 it still an empirical question? If we were to look at

23 all of the cases that are prosecuted under what I'll

24 call the simple offense, we might discover that those

25 are all cases in which there is no serious potential

1 risk of physical injury created because all of the risky
2 cases are prosecuted under the aggravated label.

3 We might also find that there are still a
4 great many cases that involve a serious potential risk
5 that are prosecuted under the simple category. So the
6 fact that there's a gradation doesn't allow us to escape
7 the empirical issue, does it?

8 MR. MARSH: No, I think you're exactly
9 right, Justice Alito. That would be possible.
10 Empirical data could show what you have just suggested.
11 Of course, that would be indicating that the Indiana
12 General Assembly didn't have any rational basis for
13 dividing the two, but the important thing here is --

14 JUSTICE ALITO: I wouldn't say that they
15 didn't have a rational basis for dividing it. It would
16 just show a pattern of prosecution and -- and plea
17 bargaining. That's what it would show.

18 MR. MARSH: But the important thing here,
19 Your Honor, is there simply is no such data before this
20 Court. There -- there is no empirical data regarding
21 (b)(1)(A).

22 JUSTICE ALITO: There never is really
23 reliable empirical data, almost never, for any of the
24 issues that have to be decided under the -- the
25 catch-all, the residual clause, of ACCA. It has to be

1 based on basically common sense and experience, doesn't
2 it?

3 MR. MARSH: Your Honor, I suggest that
4 common sense and experience is not a reliable,
5 predictable way of deciding these cases. You're right,
6 there frequently is not empirical data. If there's not
7 either empirical data that demonstrates the danger
8 involved or a crime that -- where the danger is pretty
9 obvious so that there would be widespread general
10 agreement -- common sense is what has led to a lot of
11 the conflicts in the circuits, I would suggest.

12 May I reserve my time, Your Honor?

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

15 Mr. Wall.

16 ORAL ARGUMENT OF JEFFREY B. WALL

17 ON BEHALF OF THE RESPONDENT

18 MR. WALL: Mr. Chief Justice, and may it
19 please the Court:

20 Just a very quick moment of history, I
21 think, provides some useful background, and I'm on
22 page 3a of the appendix to the Government's brief.
23 Until 1998, subsection (B), which we've been talking
24 about, was the only class D felony that involved
25 vehicular flight in Indiana law. In 1998, the Indiana

1 General Assembly broke out and enacted subsection (A) so
2 that in cases of vehicular flight prosecutors would not
3 have to prove risk; they would just have to prove that
4 defendant used a vehicle.

5 Since 1998, I have found 14 cases in the
6 Indiana Court of Appeals, one of which is the Hape case
7 that Justice Alito cited earlier. All of them, so far
8 as I can tell, proceeded under (A) and not under (B).
9 Of those 14 cases, 13 have enough facts to tell what the
10 flight was -- of what kind; 10 involved speeding,
11 disregarding traffic laws, or striking an officer with a
12 vehicle. Of the other three, only one involved
13 non-risky behavior, and even that was not a defendant
14 who drove a short distance and then pulled over. It was
15 a --

16 JUSTICE SCALIA: These were all litigated
17 cases?

18 MR. WALL: Yes, Justice Scalia, these were
19 all litigated to conviction and taken up on appeal, and
20 the Indiana Court of Appeals addressed various legal
21 issues --

22 CHIEF JUSTICE ROBERTS: Well, but that's not
23 -- 14 isn't very many. And I assume the vast majority
24 of these cases aren't litigated.

25 MR. WALL: I think that's right, Mr. Chief
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1 Justice. The Government's point is that here we have
2 extensive data, both empirical and otherwise, that
3 indicates that flight as a basic offense is very
4 dangerous. In --

5 CHIEF JUSTICE ROBERTS: Well, I read your
6 brief, and I was -- I read your brief and was surprised
7 that when you're -- the list -- one of the things you
8 talk about to show that is media reports. You usually
9 have a more concrete basis for -- for speculation than
10 media reports.

11 MR. WALL: Mr. Chief Justice, if that is all
12 we had put forward, I might agree with you, but we also
13 put forward extensive statistical data.

14 My point is just that Indiana is typical.
15 It's dangerous everywhere else. It's four times as
16 dangerous as arson. It's more dangerous than household
17 burglary. There's nothing different about Indiana. If
18 one looks through these cases, these flights in Indiana
19 are typically quite dangerous.

20 JUSTICE SCALIA: Suppose you have a State
21 that has a separate crime for trespassing, criminal
22 trespass. And you're saying that if -- if you could
23 show that a large number of cases that were brought
24 under criminal trespass in fact could have been
25 prosecuted under burglary, then criminal trespass would

1 qualify as a -- as a violent felony. That doesn't seem
2 -- that doesn't seem to me right.

3 MR. WALL: Justice Scalia, I thought --

4 JUSTICE SCALIA: Just because prosecutors
5 make that choice, that doesn't establish that the
6 elements of the crime, which is what we focus on in
7 deciding whether it's a violent felony, fill the bill.

8 MR. WALL: That's right. This Court looks
9 at the conduct encompassed by the elements in a typical
10 case. And in a typical case of vehicular flight, what
11 we have, according to the data, is someone fleeing
12 police at an average of 25 miles an hour over the speed
13 limit; someone who is, in a typical case, young, male,
14 unlicensed, under the influence of alcohol; and who
15 places the lives of other motorists, pedestrians, and
16 police in harm's way.

17 Your approach to ACCA, Justice Scalia, has
18 been to look at the conduct encompassed by the elements
19 and ask whether the risk from that conduct is at least
20 as great as the -- the least risky enumerated offense.
21 And here --

22 JUSTICE SOTOMAYOR: That ignores the in-kind
23 requirement of Begay, because you seem to be confusing
24 the risk of violence with the in-kind inquiry, and
25 that's where I'm trying -- I'd like you to concentrate a

1 little bit on, which is in burglary the defendant is
2 breaking into, generally, a place and going without
3 permission, and -- with an intent to commit a crime.

4 How is that comparable to merely not
5 stopping when a police officer tells you not to stop?
6 How is that an in-kind --

7 MR. WALL: Justice Sotomayor, it's
8 absolutely true, there are two parts to the test, and
9 we've been talking about the first risk. On the second
10 prong, the purposeful, violent, or aggressive character
11 of the conduct -- here I think there are three distinct
12 things that make it purposeful, violent, and aggressive.

13 First, you have the defiance of the
14 officer's order, which can cause injury at the scene.
15 It has in some Indiana cases, but at least called the
16 officer to give chase.

17 Second, you have the very real prospect --

18 JUSTICE SOTOMAYOR: What you're doing is
19 saying I'm not -- you're not even saying I'm not
20 stopping; you're just driving away.

21 MR. WALL: Well, yes, but you are driving --

22 JUSTICE SOTOMAYOR: Now, how is that
23 aggressive --

24 MR. WALL: You're driving away in response
25 to an officer's command to stop. You're calling the

1 officer to give chase. You're -- you're -- pursuit is
2 likely. And even when there isn't pursuit, these
3 offenders drive typically very recklessly, and then
4 you've got the confrontation when the officers have
5 to --

6 JUSTICE SOTOMAYOR: But that's the risk
7 of --

8 MR. WALL: -- terminate.

9 JUSTICE SOTOMAYOR: That -- that is all the
10 risk question, and you're confusing the police actions
11 with the defendant's, because you're talking about the
12 defendant responding to a police pursuit. So what --
13 what is in the act of the crime that makes it in-kind to
14 burglary?

15 MR. WALL: So, let me analogize --

16 JUSTICE SOTOMAYOR: I concentrate on
17 burglary because the others don't fit.

18 MR. WALL: No, let me concentrate on
19 burglary, then, and analogize it to what this Court said
20 in James. It said the risk of attempted burglary --

21 JUSTICE SOTOMAYOR: James -- James predated
22 Begay. So you've got --

23 MR. WALL: That's right, but I -- the Court
24 has talked about -- even in Chambers, about the risk of
25 a violent confrontation with law enforcement officials,

1 and it's done that under the Begay part of the test.
2 And whereas that confrontation is only possible with
3 burglary, it's necessary with this crime. It requires
4 that an officer order you to stop and that you flee.

5 So that -- that confrontation, which is only
6 a possibility with burglary or attempted burglary, is
7 elevated to a certainty with this offense.

8 JUSTICE KAGAN: Well, Mr. Wall, wouldn't
9 that suggest that if I just ran from a police officer,
10 it would be a violent felony under ACCA?

11 MR. WALL: I think it -- it would suggest
12 that, Justice Kagan, but I think flight on foot is
13 unlikely to satisfy the risk part of the test. I think
14 certainly this case is much easier on the -- the James
15 part of this test. I think the -- the flight in a
16 vehicle poses risks, very real risks, to other motorists
17 and pedestrians and police that flight on foot doesn't
18 pose, although you'd still have the confrontation when
19 the flight on foot was terminated. So I think some of
20 the arguments would translate. You're right. I think
21 there would be more difficult questions, though, on the
22 risk prong. This is a much easier case.

23 JUSTICE SCALIA: Do -- do words mean
24 nothing? I mean, we're talking about a violent felony.
25 That's what the Federal law requires. And -- and you

1 want us to hold that failing to stop when a police
2 officer tells you to stop is a violent felony. That --
3 that seems to me a -- a big leap. I mean, words have
4 some meaning, and Congress focused on violent felonies.

5 MR. WALL: Justice Scalia, words do have
6 meaning, but the words here are very broad: "serious
7 potential risk of physical injury to others." And as
8 you yourself have recognized in -- in multiple opinions,
9 what those words call for is a comparison of risk
10 between an offense and ACCA's enumerated crimes.

11 This offense, simply put, is more risky.
12 It's four times as risky as arson in terms of injuries
13 and fatalities.

14 CHIEF JUSTICE ROBERTS: Well, one of the --

15 MR. WALL: It's more risky than household
16 burglary.

17 CHIEF JUSTICE ROBERTS: Another word is
18 "aggressive" in Begay, and that's where I have a little
19 difficulty with your argument. It seems to me, this is
20 the exact opposite of aggressive. He's running away.
21 Certainly, the other option is to turn and confront, and
22 he doesn't want to. There's nothing aggressive about
23 running away.

24 MR. WALL: Well, there is, Mr. Chief
25 Justice, when you're doing it in a vehicle, and

1 typically at high speeds. So, in Chambers --

2 CHIEF JUSTICE ROBERTS: Well, that's the
3 risk of violence, I understand that, and purposeful,
4 which I guess everything is. But those are the three
5 words: "purposeful, violent, and aggressive." I'll
6 give you purposeful, I'll give you violent, but
7 aggressive?

8 MR. WALL: Mr. Chief Justice, if you give me
9 those two, I think we're home free, because this Court
10 said --

11 (Laughter.)

12 MR. WALL: -- in Chambers --

13 CHIEF JUSTICE ROBERTS: I think you're
14 two-thirds of the way home free.

15 (Laughter.)

16 MR. WALL: I'll take it, and let's work on
17 the last third. So the -- what this Court said in
18 Chambers is not all attempts to evade authorities are of
19 the same stripe. So, it contrasted escape from prison
20 with failure to report. Failure to report, you could do
21 at home on your couch; you could just fail to show up.
22 And the Court said: Look, that's passive; it's a crime
23 of inaction.

24 This is not that. It's not sitting at home
25 on one's couch. This is quintessentially a crime of

1 action.

2 CHIEF JUSTICE ROBERTS: There's a
3 difference. The opposite of passive is active. It's
4 not aggressive.

5 MR. WALL: Well, but --

6 CHIEF JUSTICE ROBERTS: This is active.
7 He's running away, but --

8 MR. WALL: I think --

9 CHIEF JUSTICE ROBERTS: What's the
10 aggression?

11 MR. WALL: But it's very -- it's hard to see
12 what the difference would be between this and escape
13 from custody. And this Court clearly indicated in -- in
14 Chambers that escape from custody was different from
15 failure to report under the statute in front of it. And
16 I think this is as dangerous, maybe even more dangerous
17 than escape from custody.

18 If the Court were going to say that all
19 running away could not be aggressive within the meaning
20 of that word for Begay purposes, so too escape from a
21 maximum security Federal prison, which in some sense is
22 just running away, but it is extremely aggressive, and
23 it's extremely risky to others.

24 JUSTICE KAGAN: Mr. Wall, do you think that
25 speeding or drag racing qualifies under your

1 understanding of the test?

2 MR. WALL: Justice Kagan, that's a difficult
3 question. I don't know that I've seen any attempt to
4 fit that offense in under the ACCA. I think that drag
5 racing, where you're talking about speeds of 150, 160,
6 170 miles an hour, might qualify, but I haven't seen any
7 cases like that.

8 JUSTICE SCALIA: What about speeding, just
9 -- you know, you're going 15 miles over the speed limit?

10 MR. WALL: I -- again, I --

11 JUSTICE SCALIA: Is that a violent felony?

12 MR. WALL: Justice Scalia, I think then we'd
13 have a serious question about the first part of the
14 analysis and the -- the risk test. I mean, 10, 15 miles
15 over -- I mean, speeding as a generic offense is likely
16 to -- I mean, it encompasses categorically all speeding
17 offenses, many of which are, you know, not that -- not
18 likely to pose a serious risk to others. So I -- I --
19 we'd have to look at the -- the data. What we do have
20 here is data that says this offense is four times as
21 risky as the enumerated offense of arson. So I -- I --
22 speeding would be a difficult case. So far as I know,
23 we -- the Government's never tried to make the case.

24 JUSTICE ALITO: Is speeding a felony?

25 MR. WALL: Not as far as I know, not the
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1 basic offense. Now, whether in a Begay-type sense you
2 might have some recidivism enhancement under State law
3 that would get you there, I don't know. But I -- again,
4 I haven't seen any case that involved that.

5 JUSTICE BREYER: Am I right about -- when
6 you replied to Justice Scalia, I thought that he had
7 said that we were dealing with a statute, and you seemed
8 to agree, that said it is a crime to flee a policeman
9 after being ordered to stop. But I thought we were
10 dealing with a statute that says it is a crime to flee a
11 policeman after being ordered to stop, in a vehicle.

12 MR. WALL: That's right. That's right.
13 That's the offense here.

14 JUSTICE BREYER: And so you're -- okay.

15 MR. WALL: It's the vehicular flight
16 offense. And one -- you know, I will take one issue
17 with -- with -- you know, what my friend on the other
18 side has said, which is (A) and (B) are not tiered.
19 They're not greater and lesser offenses under State law.

20 JUSTICE KAGAN: But, Mr. Wall, suppose they
21 were. I understand your point that they're not, and you
22 might be right about that. But let's suppose that they
23 were. Let's suppose you had a three-tier set-up. One
24 was simple flight; one was flight that causes risk of
25 injury; one that is a flight that causes injury. And

1 let's even say that the simple flight -- no, let's --
2 let's call them all felonies but different classes of
3 felonies.

4 What would happen in that case? Would you
5 still be here saying that the simple flight felony is a
6 violent crime?

7 MR. WALL: Yes. It's a tougher case, but we
8 would be here saying that, because when you're looking
9 at an offense categorically -- for instance, arson --
10 you've got to look at all fires, all intentionally set
11 fires, the ones that don't hurt anybody, the ones that
12 do, and the ones that kill people, even though the fires
13 that kill people will be prosecutable in most
14 jurisdictions as a greater offense, like felony murder.
15 And so when you're looking at it categorically, you've
16 got to look at all of the conduct in that category, even
17 conduct that may be prosecutable under some greater
18 offense.

19 I think, you know, the other side sort of
20 relies on this assumption that all conduct which might
21 satisfy the greater will necessarily be prosecuted under
22 the greater. And as a legal matter, it's included
23 within the lesser, and as a factual matter, it's just
24 not true that it always gets prosecuted under that
25 greater offense.

1 So it's -- it would be a tougher case. It
2 would make our case more difficult, but I think legally
3 and factually the Government's answer would be the same.

4 JUSTICE KAGAN: I -- I asked my clerk to
5 just do a survey of the States, and he came up with --
6 and I'm sure that this is rough -- but that 46 of the
7 States have these tiered systems. Now, there may be
8 some questions as to some of them, like you've raised
9 some questions about Indiana's, but that 46 States
10 essentially conceive of this as two different kinds of
11 conduct, one which is the violent kind and the other
12 which is the not violent crime.

13 MR. WALL: Well, my State law research is a
14 little different from your clerk's. I've got 37 States
15 and D.C. But the -- the point is that under the nested
16 statutes, the aggravator isn't always like this one,
17 risk. Sometimes it's, as in Indiana, injury or death.
18 And where you're talking about actual injury or death,
19 those aggravators far outstrip the level of potential
20 risk that ACCA requires.

21 So I don't think in those States Petitioner
22 would give an argument that those aggravators would
23 affect at all the analysis of the basic offense. There
24 are a handful of States that, unlike Indiana, have as an
25 aggravator risk, though even some of those States treat

1 the basic offense as a felony, which is I think a
2 judgment by the State that, even in the basic case, this
3 is risky conduct, deserving of severe punishment under
4 State law. So, you know, there are nested statutes,
5 but --

6 JUSTICE SCALIA: Not necessarily risky.
7 Conduct that shows disrespect for the law.

8 MR. WALL: Justice Scalia, I mean I --
9 again, I think it is significant that in 1998 the
10 General Assembly broke this out as a separate subsection
11 and said: We're not even going to require prosecutors
12 to prove risk. I think that represents a judgment by
13 the State that the conduct is risky on a typical basis:
14 We just want the State to prove you used a vehicle.

15 JUSTICE SCALIA: Or even if it isn't risky,
16 you should not thumb your nose at the police when they
17 tell you to stop.

18 MR. WALL: Well, that's right, and the
19 reason --

20 JUSTICE SCALIA: Risky or not.

21 MR. WALL: The reason you shouldn't, Justice
22 Scalia, is because that's the kind of purposeful,
23 violent, and aggressive conduct the State wants to deter
24 by treating it as a felony. But I -- I mean, I --
25 whether one looks at the risk prong and the data and the

1 cases in Indiana or elsewhere, or whether one looks at
2 the character of the conduct, this offense is just
3 different in both degree and kind from the offenses that
4 this Court has said fall outside of ACCA's residual
5 clause.

6 It's much more like escape from custody.
7 It's much more like the enumerated offenses. Indeed,
8 the risk of confrontation is certain. I mean, I -- it's
9 important, I think, that -- I mean, I -- these flights
10 are not calm affairs. They're dangerous events. The
11 average speed that the offender is traveling nationwide
12 is 25 miles an hour over the speed limit. This is
13 someone who on average is young, unlicensed, influenced
14 by alcohol --

15 CHIEF JUSTICE ROBERTS: I thought there was
16 -- I don't know where -- I don't remember where it was
17 from. I thought there was a development of best police
18 practices that you don't just chase people. You know,
19 if they're going 30 miles an hour over the speed limit
20 through a school zone, that doesn't mean the police
21 officer should do that. You know, you call ahead, they
22 put these strips on the road, whatever.

23 MR. WALL: Mr. Chief Justice, that's right.
24 I think police agencies have been struggling with this
25 question, which is why there's a lot of data on police

1 pursuits, frankly, especially in the last 10 or 15
2 years. I think some of them are becoming more
3 restrictive, and so the data picks up pursuits. It
4 doesn't pick up all flights. And I think if there were
5 sound evidence that when people were not pursued, they
6 were actually driving at low speeds and safely, that
7 would affect the data, though not so much that it would
8 move it outside of similarity to the enumerated
9 offenses.

10 But I think the -- the data is pretty good
11 in indicating that the typical flight is -- really does
12 pose a serious potential risk of physical injury to
13 others, a risk that materializes more often than with
14 other crimes that Congress clearly intended to fall
15 within the ACCA.

16 JUSTICE ALITO: Could I ask you this: If a
17 person is convicted of vehicular flight that causes
18 death, is that aggressive conduct?

19 MR. WALL: Yes, the Government would say it
20 is, Justice Alito.

21 JUSTICE ALITO: Is the conduct there any
22 different from the conduct when death doesn't result?

23 MR. WALL: No, Justice Alito. The
24 Government's answer is that categorically the behavior
25 is aggressive and that in some cases it will result in

1 injury or death and in some it will not, but in all
2 cases it carries that potential.

3 CHIEF JUSTICE ROBERTS: Doesn't whether it's
4 aggressive or not depend upon how it happened? I mean,
5 it could be -- I mean, the flight puts in place the
6 potential for -- for violence, I agree with that; but if
7 somebody just, you know, jumps out between two cars
8 while the fellow's fleeing, how has his conduct changed
9 to aggressive?

10 MR. WALL: Mr. Chief --

11 CHIEF JUSTICE ROBERTS: It's not like he --
12 it's not like he's aiming for the guy. I mean, it's
13 putting it in a dangerous situation. It's purposeful.
14 Again, I'll give you violent in the sense that it has
15 that potential. But he didn't want to hit the -- the
16 person.

17 MR. WALL: Mr. Chief Justice --

18 CHIEF JUSTICE ROBERTS: It's not aggression
19 against the person.

20 MR. WALL: There's no question that, on a
21 case by case basis, you could flee in a way that was not
22 very risky, that was not very violent, or not very
23 aggressive. And if this Court went on a case-by-case
24 basis, then we'd look at the conduct here, and the
25 Government would still win, because this is the typical

1 case.

2 JUSTICE SCALIA: But he's saying even when
3 it's risky, it's not aggressive.

4 MR. WALL: And I -- my --

5 JUSTICE SCALIA: You can be risky and not
6 aggressive, can't you?

7 MR. WALL: Yes, on a case-by-case basis.
8 But, categorically, which is what this Court looks at,
9 the conduct encompassed by the elements in the ordinary
10 case -- in the ordinary case -- the character of the
11 conduct is aggressive.

12 CHIEF JUSTICE ROBERTS: Who's he aggressing
13 against? When someone sees the police and says I'm
14 getting out of here and drives down the highway, say, at
15 80 miles an hour, you know, 25 miles above the speed
16 limit, who is he -- I'm sure it's not the right verb,
17 but who is he aggressing against?

18 MR. WALL: Well, I don't know that he is
19 aggressing against anyone, in the same way that if I
20 recklessly I fire a gun into a large crowd of people,
21 you know, I haven't aggressed against anyone in
22 particular. He's aggressed against anyone who strays
23 into his field of flight and who could be injured by
24 what is typically a high-speed flight and pursuit. So I
25 don't -- there is no specific target, but that will be

1 true of many of the crimes that are violent felonies,
2 that the -- the aggressive nature --

3 CHIEF JUSTICE ROBERTS: Well, no. It's not
4 that --

5 MR. WALL: -- of the conduct is directed
6 generally.

7 CHIEF JUSTICE ROBERTS: -- there's no
8 specific target. There's no target. What this guy
9 hopes is that nobody gets in his way.

10 MR. WALL: Well, so, too, with the burglar,
11 who hopes that no one will come home; maybe even the
12 arsonist, who hopes no one is in the house; or the
13 extortionist, who hopes someone will pay, so he won't
14 have to use violence.

15 JUSTICE SCALIA: But they're mentioned;
16 they're mentioned. They're mentioned, and you're trying
17 to get this in under the residual clause.

18 MR. WALL: That's right, Justice Scalia, a
19 residual clause that, as you yourself have recognized,
20 is extremely broadly worded. It -- it abstracts out as
21 the quality of the enumerated offenses that they create
22 a serious potential risk of physical injury to others.
23 And I can't find any metric along which flight doesn't
24 do that, whether one looks through the cases, media
25 reports, the statistical data, whatever one -- Indiana,

1 nationally -- whatever standard or metric one uses, this
2 is an extremely risky offense to others.

3 And I, you know -- so it's very difficult to
4 figure out what test, what interpretation of that
5 language would exclude this from -- from ACCA.

6 JUSTICE BREYER: Suppose you have one of 36
7 States which treat this -- treat the general offense as
8 a misdemeanor and then make it a felony if you put
9 somebody at risk. Just reading that statute, you'd
10 think those 36 States, when they have the general
11 offense, do something where the guy acted pretty
12 trivially; and where it's a felony, he actually put
13 somebody at risk, sped off -- wouldn't that be your
14 normal instinct in just guessing from the -- from the
15 language?

16 MR. WALL: Justice Breyer, the States --

17 JUSTICE BREYER: How are we supposed to
18 treat those, where there's a misdemeanor --

19 MR. WALL: The States --

20 JUSTICE BREYER: In your opinion, it's just
21 a misdemeanor, we also treat it the same way; say it's a
22 violent felony?

23 MR. WALL: The States treat it differently.
24 Some, as Indiana --

25 JUSTICE BREYER: All right. Then that's
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1 actually my question. Are we supposed to, in this
2 Federal statute, try to track whether it's a
3 misdemeanor, what the language is? We're going to have
4 a nightmare of a Federal law for States to -- for judges
5 to figure this out. I mean, every little variation in
6 thousands and thousands of possible variations could
7 make a difference as to whether it's violent or not,
8 depending on data which no one will have.

9 MR. WALL: Justice Breyer, I don't think so.
10 If the Court were to affirm here, what that would mean
11 is that the offense of flight is a violent felony
12 insofar as you have a predicate conviction under a State
13 statute where it's been punishable by up to a year, and
14 so it could qualify for ACCA coverage.

15 Now, some State convictions will have been
16 treated as misdemeanors and won't be eligible for ACCA,
17 but to the extent a State treats it as a felony, it's
18 risky enough to satisfy the residual clause. Now, if
19 the Court treats (A) and (B) as what they are not, which
20 is greater or lesser, then, yes, I think there will be
21 problems with various State statutes, as Justice Kagan
22 pointed out, and this Court may have to clear it up down
23 the road.

24 But if it treats this basic offense as what
25 it is, not a greater or lesser, but alternative means of

1 proving a single offense that is risky, that would, I
2 think, take care of all flight cases going forward.

3 JUSTICE KAGAN: Well, on this question of
4 whether this statute is greater or lesser, it's greater
5 or lesser if you just understand (b)(1)(A) as confined
6 to vehicular flight. In other words, if one looks only
7 at vehicular flight, then (b)(1)(A) and (b)(1)(B) are
8 indeed greater or lesser offenses.

9 MR. WALL: Yes, Justice Kagan, if you're
10 looking only -- I take it you're looking only at the
11 vehicle prong of (B), but the test in Schmuck is whether
12 it's impossible to -- to commit the greater without
13 committing the lesser. It's not impossible to commit
14 (B), because it does have the two other prongs, and I
15 think --

16 JUSTICE KAGAN: Well, do you think that if I
17 flee in a vehicle, I could be prosecuted under both and
18 receive sentences under both?

19 MR. WALL: No, I don't think so, because I
20 think the -- there is no evidence -- no case in Indiana
21 that I'm aware of. There's no evidence that the General
22 Assembly intended these to be multiple punishments for a
23 single incident. They're alternative means of proving a
24 single offense. The State has always treated them that
25 way, so far as I can tell. I have not seen -- I've seen

1 prosecutions since 1998 that were all under (A). I
2 haven't seen anything that went under (A) and (B) and
3 tried to get multiple punishments --

4 JUSTICE SOTOMAYOR: Wait a minute.

5 MR. WALL: -- and I think that would be a
6 serious problem.

7 JUSTICE SOTOMAYOR: I'm a little confused by
8 what you said and what point you're making. You don't
9 think that (B) is a lesser included of (A)? Is that --
10 no, that (A) is a lesser included of (B)?

11 MR. WALL: Your Honor, the Government does
12 not think that (A) is a lesser included of (B).

13 JUSTICE SOTOMAYOR: You can't commit (B)
14 without committing (A) first. (B) has just one
15 additional element, but all of the elements of (A) are
16 part of the elements of (B). So, how can it not be a
17 lesser included?

18 MR. WALL: Well, the element of (B) that's
19 different, Justice Sotomayor, is the "while committing
20 any offense described in subsection (a)." So you can be
21 resisting an officer or you can be obstructing the
22 service of process and you can endanger someone in
23 various ways, including with a vehicle, and you will
24 have violated (B), and you can be prosecuted for that,
25 and there are cases in Indiana like that. And you have

1 not -- you have not been fleeing in a vehicle from an
2 officer at any point, so you haven't violated (A).

3 So the existence of the other prong there --
4 that's what I was trying to get into with Justice
5 Kagan -- means that this is not a greater or lesser
6 under Schmuck.

7 JUSTICE KAGAN: But as a vehicular flight
8 only, it would be greater or lesser.

9 MR. WALL: If you divided up the prongs
10 under Schmuck, but I think the Schmuck -- what follows
11 logically from that test is that you look at the entire
12 offense and ask whether it's possible to commit it
13 without committing the lesser, and that test is not
14 satisfied here. I don't think you carve it up prong by
15 prong.

16 JUSTICE SCALIA: I'm -- this is greater or
17 lesser for purposes of what? Double jeopardy?

18 MR. WALL: No, it's greater or lesser for
19 purposes of Petitioner's argument that you should assume
20 that every risky flight gets prosecuted under (B), and
21 hence (A) is a non-risky offense. And that argument
22 fails for multiple reasons, one of which I was trying to
23 spin out. It's not even true that this is greater or
24 lesser.

25 JUSTICE SCALIA: I just don't follow that
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1 argument. I mean, it -- it seems to me that, yes, you
2 could -- you could run afoul of (B) by committing an
3 offense under subsection little (a) in some other ways,
4 but if you run afoul of (B) by committing the offense
5 of -- of flight from a law enforcement officer, it seems
6 to me that that automatically includes (A).

7 MR. WALL: Well, except that there are two
8 alternative means of proving the same offense under
9 State law. They have the same State law penalties, so
10 the prosecutors can go under (A) or they can go under
11 (B). And as far as I can tell, for the last, say, 13
12 years, they've been going under -- they've been going
13 under (A).

14 So it's not -- Justice Scalia, it's not --
15 there are aggravators in this statute for injury or
16 death. They're the ones that are in (2) and (3), the
17 class C and class B felonies. But this is not a greater
18 or lesser. It's -- they're alternative means. I think
19 only if you got -- set that aside would you get to the
20 sort of Schmuck analysis that I was going through with
21 -- with Justice Kagan.

22 And I think one of the important things to
23 recognize about this offense is that, you know, in
24 the -- 50 percent of these offenders are ultimately
25 charged with a violation that's unrelated to their

1 flight, a serious felony unrelated to their flight.

2 And the reason I think that's important is
3 because what you will look -- the reason that they're
4 traveling at such high speeds, the reason they're
5 evading officers, the reason the typical case is not
6 someone just going a couple blocks and stopping, is
7 because they've got drugs in the car or guns, they have
8 parole violations or outstanding warrants. It is the
9 background against which I think you have to assess the
10 character of the -- of the conduct here. And whether
11 you're looking at it under risk or under the character
12 of the conduct, the Government submits that it easily
13 satisfies the residual clause.

14 If there are no further questions, thank
15 you.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr. Wall.

17 Mr. Marsh, you have 4 minutes remaining.

18 REBUTTAL ARGUMENT OF WILLIAM E. MARSH

19 ON BEHALF OF THE PETITIONER

20 MR. MARSH: Thank you, Mr. Chief Justice.

21 I would suggest that it's helpful to start
22 to look at the in-kind part of the Begay test on a more
23 general level than we've been discussing.

24 JUSTICE SOTOMAYOR: Could you succinctly
25 tell me how this is any less purposeful, aggressive, or

1 violent than escape from custody? What's your best
2 answer to why this is just not identical to escape,
3 which is a fleeing-from situation just as this is.

4 MR. MARSH: Justice Sotomayor, the basic
5 distinction is that the person who's charged with
6 escape, assuming that escape means escape from a secure
7 institution or from a person, is that the person is in
8 custody, and it takes, in the ordinary case, aggression
9 and violence to get out of the custody of that person.
10 The person who is fleeing is trying to avoid being
11 taken.

12 JUSTICE SOTOMAYOR: Well, here an officer
13 has told you to stop. They're trying to effect custody.
14 And I don't know what the aggression or violence is,
15 other than, you know, breaking a window, doing
16 something. It doesn't require the escape -- that you
17 actually injure someone to get out. It's just that you
18 run away.

19 MR. MARSH: I think the phrase that you just
20 used is the distinction that I was referring to. The
21 person who is fleeing is trying to avoid being in
22 custody. They're acting in a -- instead of going toward
23 the officer and resisting, they're going away from the
24 officer. The person who is in custody has to use some
25 kind of force, and in Johnson, of course the -- this

1 Court referred to violent as the --

2 JUSTICE ALITO: That's not true. There are
3 a lot -- you can -- there are prison escapes all the
4 time where it's done through subterfuge.

5 MR. MARSH: That's -- that's true, Justice
6 Alito, but as the Court held in James, finding an
7 example of a case that would not be violent does not
8 solve the ordinary case. The ordinary case, I would
9 suggest, requires something more than that.

10 CHIEF JUSTICE ROBERTS: Well, it's, for me,
11 anyway, an important question. I'll -- I'm not sure the
12 ordinary case does. I assume the ordinary prison escape
13 is -- I don't know -- over the wall, under the tunnel
14 or, you know, while the guard's looking a different way,
15 or some -- I don't know that it's typical that when the
16 guard is there, you say now's my chance. The typical
17 case doesn't involve aggression.

18 MR. MARSH: Of course, the ordinary case or
19 the typical case, Mr. Chief Justice, is that the court
20 needs to look at the conduct encompassed by the elements
21 of the statute, and so we would have to look at exactly
22 what the statute requires.

23 The circuit courts have been very divided on
24 escape. In my circuit, the Seventh Circuit, the Federal
25 statute, 751, has been held not to be -- which is a

1 general escape statute -- not to be a violent felony.
2 But, again, the Court talks about the ordinary case in
3 the James case for the purpose of disabusing the idea
4 that one can't get out from under the violent felony
5 designation just by coming up with a hypothetical case
6 or an example where it can be done without -- without
7 violence.

8 Here, I would suggest that counsel has just
9 created for the Court some kind of a hypothetical case
10 to define the typical or ordinary case. This Court has
11 never done that, and this Court said in James that it's
12 important to stick to the conduct encompassed by the
13 elements of the offense, because if we start factoring
14 in other kinds of conduct, as several of the things
15 which have been mentioned by counsel for the Government,
16 that begins to raise Apprendi problems, which is another
17 whole issue. But the Court said in James -- and I would
18 acknowledge is the law -- that so long as the
19 determination as to whether there's a serious potential
20 risk of physical injury is made by focusing on the
21 conduct encompassed by the elements of the offense, then
22 there's not an Apprendi problem.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 The case is submitted.

25 MR. MARSH: Thank you.

1 (Whereupon, at 10:58 a.m., the case in the
2 above-entitled matter was submitted.)

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