IN THE SUPREME COURT OF THE UNITED STATES

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ALPHONSO JAMES, JR., :

Petitioner :

v. : No. 05-9264

UNITED STATES. :

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Washington, D.C.

Tuesday, November 7, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

CRAIG L. CRAWFORD, ESQ., Assistant Federal Public Defender, Orlando, Fla; on behalf of the Petitioner.

JONATHAN L. MARCUS, 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

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in James versus United States. Mr. Crawford?

ORAL ARGUMENT OF CRAIG L. CRAWFORD, ESQ.

ON BEHALF OF THE PETITIONER

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

We confront today the Eleventh Circuit's troubling interpretation of the otherwise clause of the Armed Career Criminal Act. Under the text and structure of the act, as well as the categorical approach that this Court recognized in Shepard and Taylor, Florida attempted burglary convictions should not qualify as they -- these types of convictions do not involve explicitly, implicitly or even inherently, a serious potential risk of physical injury to another.

The Respondent in their brief has enunciated a test to determine whether a conviction should qualify, and that test that they enunciate is basically a district court judge or a sentencing judge uses their common sense and experience to determine whether an offense should qualify. That type of test is not the kind of test that this Court enunciated in Taylor and

Shepard when it looked at the very elemental approach at determining whether convictions should qualify.

The categorical approach that this Court enunciated refers to predicate offenses in terms not of prior conduct but of prior convictions and the elements of those crimes.

As such, the Government's argument would open up a -- is a broad mandate that courts could use to bring in almost any type of crime, any kind of felony to be included within the Armed Career Criminal Act. For instance, simple possession of cocaine is a third-degree felony in Florida. It's a five-year statutory maximum. Under the serious drug offense that Congress enumerated, it would only qualify if it had a 10-year statutory maximum and it involved the distribution of drugs. Yet, if the Government's approach to the interpretation of the otherwise clause is to be used, that simple possession of cocaine could qualify if a judge using their common sense and everyday experience determines it presents a serious potential risk of physical injury to another. Obviously --

JUSTICE ALITO: If we were looking at attempted generic burglary of a residence, wouldn't that involve conduct that presents the serious potential risk of physical injury to another?

MR. CRAWFORD: Your Honor, in Taylor, this Court was clear that under enumerated burglary or generic burglary, the offense becomes a -- has that serious potential risk when the person actually enters the dwelling or enters the structure; and under an attempted burglary, at least in Florida and in most other States, that act has not occurred. You haven't entered, the defendant has not entered the property.

JUSTICE ALITO: If the would-be burglar is climbing through the window or on a ladder with the intent to climb through the window, wouldn't that involve almost the same risk or maybe the same risk?

MR. CRAWFORD: If the conduct -- again, we're looking at, then, a fact-based inquiry. Obviously, some attempted burglaries could get that far. Other attempted burglaries are caught well before that actually occurs. But if you were to say that the attempted burglary was climbing up a ladder trying to get into the place and the person actually didn't get in, again, under Taylor, it says the risk is when the person enters. The risk is much less outside the dwelling than inside the dwelling.

CHIEF JUSTICE ROBERTS: But in Florida, that would be burglary itself, right, because it covers the curtilage around the house?

MR. CRAWFORD: The curtilage is a unique concept, I guess in Florida, in that the curtilage is the enclosed space around the house that has some kind of enclosure, whether by fence or whether by bushes. So if the place was enclosed and you had a ladder going up to the residence, that would actually be a burglary within the State of Florida. In other States, it may not.

CHIEF JUSTICE ROBERTS: Right. And we don't even have to ask whether that presents a serious potential risk under the statute, right? Because, if burglary is identified as -- a predicate offense without the need to resort to the definition?

MR. CRAWFORD: Well, it would be a burglary in the State of Florida, but under the test enunciated in Taylor, it wouldn't qualify because Taylor was very specific. It is the entering a dwelling or structure. And in Florida, you could be guilty of a burglary without entering a structure or dwelling, just like in a curtilage burglary.

JUSTICE SOUTER: Well, you could do it in a noncurtilage burglary State simply by putting the ladder up to the window and getting on the first rung of the ladder. I mean, you would have -- you would have taken a substantial step. You would have made an attempt. Now why would that not qualify under the words of the

statute that referred to a potential risk? Haven't you created the potential for the risk of harm that the statute is getting at when you take the substantial step?

MR. CRAWFORD: Well, trying to use the Court's words in Taylor, Taylor talked about that --

JUSTICE SOUTER: Well, how about my question first?

MR. CRAWFORD: Okay.

JUSTICE SOUTER: I mean, haven't you in the words of the statute, created the potential for the risk when you take that substantial step by starting up the ladder?

MR. CRAWFORD: If you started up the ladder and that's the way the attempted burglary conviction came down, it would be a lot closer call to say that would be a potential risk. Whether it's a serious potential risk under Taylor, it is not as clear.

JUSTICE SCALIA: But you wouldn't analyze it on the basis of whether this defendant started up the ladder. As I understand, you would -- you have to analyze it on the basis of whether generically attempted burglary as a whole presents a serious enough risk; isn't that the way it has to be done?

MR. CRAWFORD: That's the way that we submit

it has to be done, and you wouldn't be getting to those facts.

JUSTICE SOUTER: No, but I thought your argument was that that analysis would not lead to the result unfavorable to your client because the nature of starting up the ladder did not create or could not reasonably be seen as creating this kind of risk.

In other words, I thought you were saying -- maybe I misunderstood your argument -- that the reason the Taylor analysis favors you is that merely taking a substantial step -- which is what the indictment would charge -- could not be seen as creating the potential risk that the statute talks about.

Now if I'm not understanding your argument correctly, you know, straighten me out here.

MR. CRAWFORD: I think I understand. That substantial step in even taking a step up the ladder, Mr. James would submit based on the language of the statute, would not qualify and would not create that serious potential risk of physical injury.

JUSTICE SOUTER: And that's why simply charging attempted burglary will never satisfy the statute under a Taylor analysis as you understand it.

MR. CRAWFORD: That's correct.

JUSTICE SCALIA: But even if it would,

that's only one manner of attempt. And it seems to me, if you're going to do it generically, you have to look over the whole scope of possible attempts and say does the whole scope of possible attempts bear, I would say, a similar risk of the use of physical force as do the specifically mentioned crimes of burglary, arson or extortion? Indeed, I guess you have to use the least dangerous. Wouldn't you say extortion is probably, of those mentioned crimes, burglary, arson, extortion, or the use of explosives, or otherwise involves conduct. Now that "otherwise", that refers me back to the crimes already mentioned, and I would say that means that the unnamed crime has to have a similar risk, at least a risk as high as the least dangerous of the crimes mentioned, which I would take to be extortion.

Wouldn't you say?

MR. CRAWFORD: Of those four, extortion does seem to potentially have the least risk of all those crimes enumerated. But --

JUSTICE SCALIA: And what's a potential risk, by the way?

MR. CRAWFORD: A potential risk --

JUSTICE SCALIA: A potential potential? I mean, every risk is potential, isn't it?

MR. CRAWFORD: In the Government's -- in the

Respondent's brief, they talked about how risk and potential and serious, some of those worlds potentially knock each other out, and I apologize for using that very word, but --

JUSTICE SCALIA: You think potential risk is just risk really?

MR. CRAWFORD: I think it is a risk.

JUSTICE SOUTER: But isn't one way of looking at it -- I mean, I, when I read it, you know, I thought it's just redundant. But it may very well be that the word potential is in there in order to accommodate attempts.

MR. CRAWFORD: If that were true, I mean, Congress when they wrote the statute, and in 924(e)(2)(B)(ii), or (e)(2)(B)(ii)(1), they specifically enumerated attempted crimes to qualify under that violence. So it has an element, use of or attempted use of, or threatened use of physical force. But under prong two, they specifically deleted that word "attempt".

CHIEF JUSTICE ROBERTS: Specifically deleted or didn't --

MR. CRAWFORD: They did not include it, and under --

CHIEF JUSTICE ROBERTS: That's quite

different than specifically deleting it. In other words, it was never there in the proposal.

MR. CRAWFORD: In 1984 actually, there was a proposal where burglary would qualify and attempted burglary would qualify. That was passed by the Senate, never passed by the House, never enacted.

So later on when burglary was actually defined, burglary was defined as the type of burglary that Taylor came close to defining the same way.

CHIEF JUSTICE ROBERTS: So, do I understand your submission to be that putting a ladder against the side of a house to attempt burglary, starting up the ladder, that that generically does not pose a potential risk of physical injury?

MR. CRAWFORD: If that were the only way to prove an attempted burglary within a State, if that would be -- that would be the requirement, the legal requirement that you have to put the ladder against the house and that's an element of the offense, that to me would be a much closer call; but still, under the analysis that we have provided the Court with the Russello presumption, it should not qualify. But it is a closer case.

Whereas categorically when you look at attempted burglaries, the putting the ladder against the

side of the house is an element of the offense.

CHIEF JUSTICE ROBERTS: We understand from your friend on the other side that an overt act toward fulfilling the attempt is required under Florida law. In other words, it's not just enough to have burglary tools in your house.

MR. CRAWFORD: Correct.

CHIEF JUSTICE ROBERTS: You've got to take an affirmative step toward accomplishing the burglary.

MR. CRAWFORD: It is an overt act that is beyond mere thinking about it.

JUSTICE BREYER: Why doesn't anybody -- you know, count. It sounds to me if you're wondering about whether there's a specific serious risk of harm, you could find out. Look at the conviction that in Florida for attempted burglary, look at the convictions for burglary, and see if the harm involved, the number of cases in which people are harmed is roughly similar. We have all these law professors who like statistics. Now they like law in economics and everything. So why don't they go out there and count, and then we'd actually know, instead of sitting here and trying to figure out something I know nothing about. I've never been involved in a lot of burglaries. I don't know how the burglaries operate. I suspect some people are hurt, but rather than my

suspicion why don't we find out what the facts are?

JUSTICE GINSBURG: We're not going to be able to do that in time to decide this case.

JUSTICE BREYER: But wouldn't it be, as a method of approaching --

JUSTICE SCALIA: It would also keep the professors from other mischief.

(Laughter.)

JUSTICE GINSBURG: But what do we know about the dimensions of the Florida attempt crime? For example, you have said it doesn't mean that you possess burglary tools. Does it mean or does it exclude casing the house, walking up and down the street, around the block?

When is a step substantial enough to constitute an attempt under Florida law?

MR. CRAWFORD: Well, it's not really a step analysis, a substantial step analysis. It is an overt act. It's some overt act manifesting your intent to actually --

JUSTICE GINSBURG: What is that concretely? It's not possessing burglar's tools, it's not casing the place. What qualifies as an overt act that would make one guilty of the crime of attempted burglary?

MR. CRAWFORD: If you had a diagram of the

person's house and you had burglary tools in your car and you had maybe even called to make sure the business was closed and you were driving there and as you're driving there you're telling the person sitting beside you: I'm going to break into that, you know, business at 254 Main Street. That would be enough under Florida law to convict someone for attempted burglary of a structure.

JUSTICE SCALIA: I guess we have to decide how many attempts involve that kind of initial action, which doesn't seem very physical threatening, and how many of them involve putting a ladder up against the side of the house.

How do we possibly figure that out, to decide whether as a whole the degree of risk from attempted burglary is as high as at least the degree of risk from extortion?

MR. CRAWFORD: That may be -- that may be a very difficult question to answer, and maybe the Respondent had that obligation in the district court, because they have the obligation to prove that this enhancement has that substantial or that serious potential risk of physical injury to another and of course they didn't do that. But if you look back in this Court's decision in 1985 in Tennessee versus

Garner, this Court was talking about completed burglaries and it talked about physical violence to a person would only occur in a rare case, and it gave the percentage I think of 3.6 or 3.8 percent of the time.

But that's in a completed burglary. That's not even talking about an attempted burglary, what's the risk --

JUSTICE STEVENS: May I ask you this question: It seems to me there are two ways to read the burglary, arson or extortion examples: That they are clear examples of crimes that would involve harm to individuals, physical injury to another; or they are put in the statute to say, even though they don't involve serious risk, these specific crimes will be covered, because your statistic of 3 percent suggests that burglary itself probably would not qualify as a crime that presents a serious risk of physical injury, but the statute nevertheless defines it.

So do you read those terms as giving examples of crimes that would not involve that risk of injury or as examples of crimes that would?

MR. CRAWFORD: I think it can be read either way, although I think even the Government's brief in -- or the Respondent's brief in Taylor talks about extortion and burglary being crimes that can be

committed with no risk of physical injury to another person and yet Congress still specifically enumerated those --

JUSTICE SCALIA: Mr. Crawford, if you had that meaning in mind, you would not have used the word "otherwise". You would have simply said is burglary, arson or extortion, involves the use of explosives, or involves conduct that presents a serious potential risk. The other purpose of the "otherwise," which means in some other manner, some other manner -- other from what? Other from the preceding ones.

I don't think there is any sensible way to read it except, you know, in some other manner than these previously named crimes involves a physical risk; and that is what causes me to say, well, what's the least dangerous of the previously mentioned crimes, and any crime you want to get into this residual category has to be at least as dangerous as that. As I've said, I think that's extortion.

MR. CRAWFORD: Using that analysis, it's hard to figure out, but again the Government had this obligation or we submit the Government had this obligation, and they've not shown an attempted burglary to be any more dangerous.

CHIEF JUSTICE ROBERTS: Do you think that,

is conspiracy to commit burglary a crime that poses a serious potential risk as burglary does?

MR. CRAWFORD: In Florida, or in the Eleventh Circuit, they have determined that conspiracy to commit enumerated offenses do present that serious potential risk.

JUSTICE BREYER: Sorry, go ahead.

MR. CRAWFORD: So in the Eleventh Circuit they have determined that. But again, we submit under that Russello presumption or even the statute itself, Congress enumerated those four property crimes, primarily property crimes.

CHIEF JUSTICE ROBERTS: Doesn't that seem like a fine line? I mean, if you're sitting around with your coconspirator planning it you can be covered under this provision, planning a burglary. But if you actually get out there with the burglary tools, you put the ladder against the door and you start up the ladder, that somehow involves less of a potential risk of physical injury?

MR. CRAWFORD: They both present very little potential risk. They don't even really -- under a serious potential risk, they don't present that. A conspiracy shouldn't either. A conspiracy and attempt are not different things because a conspiracy doesn't

qualify --

CHIEF JUSTICE ROBERTS: You think the Eleventh Circuit is wrong?

MR. CRAWFORD: I believe the Eleventh Circuit is wrong with conspiracy as well.

JUSTICE BREYER: If we don't know and if I can't get too far with the language and I frankly could sit in my office looking at the computer screen I think for hours and I wouldn't be closer to knowing whether there is or is not a lot of injury that accompanies attempted burglary, but that is something that is possible to know. All we have to do, as I said before, is count and there are a lot of people who can do that. In fact, there are people who at least have a mandate to do it and that is the sentencing commission. So they have the tools. They have the ability. And so in the absence on a question like this of my being able to get anywhere by cogitating about the language and in a borderline case where it isn't obvious, why don't we as a Court simply follow a reasonable interpretation of what the sentencing commission did in the absence of better information from some other place?

MR. CRAWFORD: Well, the sentencing commission when they were interpreting the career offender statute, or guidelines, they were looking at a

guideline that is worded different than the --

JUSTICE BREYER: They're trying to find out the same answer to the same kind of question: How many of these attempted burglaries, how many burglaries, how many other crimes are accompanied by an individual being hurt? And as I say, I cannot imagine how to answer that question in a borderline case without trying to find the numbers, which I don't have here, and therefore since I don't have them, why don't I look to the best, second best alternative, which is at least they could get them, and I hope they did get them before coming to the conclusion they did.

MR. CRAWFORD: Well, they came to that conclusion dealing with whether a career offender provision should include attempted burglary not under the armed career criminal statute and they specifically recognized that.

Moreover, when they dealt with whether they wanted to include attempted burglary, they were dealing with career offender, which has, although it increases the guideline range a person can be sentenced to, it certainly doesn't increase the statutory maximum in zero to 10 year offense to a 15 years to life offense.

So for those reasons, even if the sentencing commission feels that the career offender statute or

guideline should include attempted burglary, that doesn't mean this Court should use that for the armed career criminal statute.

Moreover, the career offender statute says it's only a burglary of a dwelling, although the armed career criminal statute says a burglary qualifies if it's a dwelling or a structure.

JUSTICE SCALIA: Mr. Crawford, we've held that the named crimes have to be considered generically according to their elements, right? Burglary, arson. Have we ever held that the residual category or "otherwise involves conduct that presents a serious potential risk of physical injury," that that has to be decided generically? I mean, if we could apply that residual category, not generically but according to the crime that was actually tried and of which the defendant has been convicted, such as laying a ladder up against the house, that particular sort of burglary, it seems to me it would be a much easier, much easier case, wouldn't it? We'd be able to tell whether there was a serious risk of physical injury.

Is there any obstacle to doing that?

MR. CRAWFORD: Well, Taylor and Shepard both talk about that predicate offenses under 924(e) should be looked at in a -- using a categorical approach, and

the Court has talked about that being an approach looking to the elements of the offense.

JUSTICE SCALIA: Was it referring to the residual category?

MR. CRAWFORD: It didn't specifically refer to the residual category. But even in Shepard --

JUSTICE SCALIA: Maybe it's not too late to save ourselves from sending out legions of law professors to do studies.

MR. CRAWFORD: If the Court were to step back and say that the "otherwise" clause should be interpreted in a noncategorical manner and we're going to -- the Court decides it's a factual-based approach, in Mr. James' case there are no facts, so it may not make any difference for him because there's no facts to indicate what kind of burglary really occurred here.

JUSTICE KENNEDY: You mean no facts in the indictment or charging documents?

MR. CRAWFORD: Correct.

JUSTICE KENNEDY: But there is in the presentence report?

MR. CRAWFORD: That is correct. There were facts that were presented in the presentence report that came from police reports.

CHIEF JUSTICE ROBERTS: You don't have any

doubt that, at least with respect to two of the other named crimes, attempts would present a serious potential risk? In other words, attempted arson or attempted use of explosives? You concede those would be covered, don't you?

MR. CRAWFORD: Actually, no. Those crimes, attempted crimes, also should not come in unless there's something about an attempted arson statute that has as an element or something that presents a serious potential risk of physical injury to another, which at least in Florida that's not the case.

JUSTICE SCALIA: Don't you think attempted use of explosives is at least as dangerous as extortion? I mean as far as the risk of physical injury is concerned, I would think attempted use of explosives is much more dangerous to physical health than extortion.

MR. CRAWFORD: Getting back to your question, maybe this answers part of it: Although the Court -- you asked, Justice Scalia, you asked a question about why can't we make this basically maybe a fact-based inquiry. And if you were to do so, the whole categorical approach that we're dealing with in all the other sections would almost become irrelevant because if something doesn't apply categorically, then we'll go to a fact-based inquiry and that kind of defeats the whole

purpose of the categorical approach.

JUSTICE ALITO: Mr. Crawford, does the record show that the facts in the PSR came from police reports rather than from a plea colloquy or someplace in the court records?

MR. CRAWFORD: The plea colloquy was not ever presented or produced, and it does show that they came from police reports.

JUSTICE ALITO: Where is that in the record?

MR. CRAWFORD: I believe that is stated in the PSR regarding the facts that they alleged under the attempted burglary, which again were objected to. Specifically, the facts weren't necessarily objected to, but the use of the attempted burglary was objected to, and both the district court and the Eleventh Circuit took that as being an objection to using anything regarding the attempted burglary.

JUSTICE SOUTER: Mr. Crawford, may I ask you a question about the relationship between generic burglary and what Florida takes as sufficient to show an attempt? And what I'm getting at is the issue that at least was alluded to in the Jones case.

Do you understand Florida law on attempted burglary to be as follows: that there must be an overt act taken toward entering either a dwelling or a

structure, as distinct from an overt act taken to get within the curtilage?

MR. CRAWFORD: The evidence -- I see my time is up. Little me briefly answer this question. Or -- I want to remain, or let some remain for my rebuttal. Very quickly, the overt act has to refer to the attempting to enter the dwelling. And so --

JUSTICE SOUTER: So there's no such thing as attempted entry of the curtilage as an attempt offense under burglary under Florida law.

MR. CRAWFORD: Under Florida law attempting to enter the curtilage is an attempted burglary; it is the same thing. Dwelling is defined as the building or the curtilage.

JUSTICE SOUTER: Okay, so when you say dwelling you mean dwelling as defined to include curtilage.

MR. CRAWFORD: Correct.

JUSTICE SOUTER: Okay.

MR. CRAWFORD: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Crawford.

Mr. Marcus?

ORAL ARGUMENT OF JONATHAN L. MARCUS,

ON BEHALF OF THE RESPONDENT

MR. MARCUS: Thank you, Mr. Chief Justice, and may it please the Court.

Petitioner's conviction for attempted burglary of a dwelling under Florida law is a violent felony under the Armed Career Criminal Act because like the crime of burglary Petitioner's crime categorically involves conduct that presents a serious potential risk of physical injury to another.

JUSTICE SOUTER: Mr. Marcus, do you agree with your brother's answer to my last question that there would be an attempt -- could be an attempt under Florida law simply to take an overt -- to commit an overt act toward entering the curtilage as distinct from entering a physical dwelling or a physical structure?

MR. MARCUS: Yes, while I would disagree with that, but while there are -- with your characterization. But there are no -- the number of reported cases involving an attempted burglary that involved an attempt to get on to the curtilage, if -- I think -- based on --

JUSTICE SOUTER: We don't know basically what Florida law is? I mean, is that the best answer?

MR. MARCUS: Yes. I don't, I don't think you could conclude, they have -- there is no decision telling you whether that would suffice. But we're not

taking the position that it could not involve an attempted entry into the curtilage.

JUSTICE SOUTER: So that literally, I take it then if someone did have a fence around the house, and I, I -- I walked from the sidewalk onto the lawn toward the fence, with the intent of getting over the fence, that would qualify then, as you understand it, as an attempted burglary under Florida law?

MR. MARCUS: Yes -- it could. It could --

JUSTICE SOUTER: Would that be true if I simply wanted to get into the -- if my intent was to get on the other side of the fence but not into the dwelling? For example, you know, I wanted to steal the apples on the tree?

MR. MARCUS: Well, I think --

JUSTICE SOUTER: Would that qualify as attempted burglary?

MR. MARCUS: I think it could. I think -- but I think you --

JUSTICE SOUTER: Doesn't that give you a pretty tough row to hoe, in saying that there is a sufficient potential risk of the sort of harm that qualifies under the act?

MR. MARCUS: I don't think so, Your Honor. I mean Florida, in the State versus Hamilton case, we

discussed in our brief, Florida has defined curtilage narrowly, strictly construed the word curtilage narrowly, to limit that concept to an enclosed area that immediately surrounds the dwelling. And the case discusses a couple of cases from various Florida courts of appeals where the courts construed the concept of curtilage and held that in one case it was marijuana that was quite a distance away from the, from a dwelling house, in another case a whiskey still that was a distance about 50 yards away from the dwelling house, that those were too far out to be considered part of the curtilage, part of that area that immediately surrounds the dwelling that's associated with the intimate activities of the dwelling. So Florida -- and Florida -- and I think the Court should take the Florida Supreme Court at its word when it said it's going to strictly construe that concept, and when it said it's not going to construe it to produce absurd, harsh or unreasonable results, keeping in mind how serious the offense of burglary is.

So I think the -- so the first step, I think, if you don't -- if you don't believe that the way Florida defines burglary is generic in the way Congress had in mind, I don't think you could conclude that it presents a categorically different set of risks such that it

would even fall outside the otherwise clause.

JUSTICE ALITO: There are a number of Florida cases that involve open carports. How would you apply it there? Somebody, if you had a carport that's not fenced off at all, just 20 feet let's say from the street, somebody walks into the carport and steals a garden rake?

MR. MARCUS: Well, I think under the current, I think under the current statute, it has been amended since, since 1993 and '94, and -- which is relevant, the statute is relevant to this case. I think now carports are considered part of the dwelling itself, the structure itself but under -- but if it -- but under the Florida's concept of curtilage if the area was not enclosed, it was not enclosed by a fence or other structure it would not be considered part of the curtilage. And in fact, the State versus Hamilton case, it cited a case that cast a doubt on a prior case that had found a burglary that took place on a driveway, and noted that the court in that case hadn't determined whether the area, whether the driveway was enclosed.

So it does -- the statute does -- the concept does require an enclosure and the area immediately surrounding the dwelling and I think it is very difficult to conclude that that, that defined in

that way, in that limited way, that someone who's intending to get on to a residence into the area either in or right around the dwelling, that that person is not sort of categorically dangerous kind of person that Congress had in mind when it set out burglary as one of the paradigmatic offenses in the statute.

JUSTICE BREYER: So in an ordinary city street in Miami walking along the street, there are a lot of houses, and there's a little bit of lawn or bushes in front, and there's not a fence, because there isn't, or there aren't fences in many city blocks, a person goes up to the house and starts to monkey around with the window to raise it or whatever, that's attempted burglary, not burglary, in Florida?

MR. MARCUS: That -- yes. That is my understanding. If it was not enclosed.

JUSTICE BREYER: All right. So then I doubt -- then again I'm left at sea. I don't know how often that happens or is dangerous. So if I think that this is really a statistical question, and I think maybe it is -- and the Government is in the best position, they have all the statistics, they have whole bureaus over there. So what about a presumption against the Government? In a case where it seems to be a close case and it is a statistical question, and the Government doesn't have

any statistics?

MR. MARCUS: Well, I think -- I don't think when Congress enacted this law that it expected the courts would have statistics available to --

JUSTICE BREYER: How are you supposed to decide it if there's a question as there is this instance I think? I just don't know how dangerous attempted burglaries are. I mean, maybe I'm not supposed to admit there are a lot of things I don't know but there are. And this is one of them.

MR. MARCUS: Well, there are several things you can do. First you can look at the text of the statute.

JUSTICE BREYER: I read the text several times.

MR. MARCUS: Congress provided some guidance by setting out four examples of crimes that do present the type of risk they had in mind.

JUSTICE BREYER: Correct. And here I think it might be less than burglary. And extortion, though one thinks of somebody writing a poison pen letter or something and revealing a secret from the past -- many such crimes are threats of violence. I mean, and that just read through the statutes, and that's what they are aiming at. So I would say extortion is something that

quite often could involve violence.

But again that's cogitating. So I get to attempted burglary. I don't know. Now what do I do?

MR. MARCUS: Well, I think -- I think you have to consider what Congress's purpose -- in enacting the statute, Congress directed your attention to the serious potential risk that an offense presents. I think that just -- and criminal law requires courts and juries all the time to take into account and to use their common sense and experience to judge the risks that are presented by a particular crime. I mean, the very concept of recklessness itself refers to a substantial disregard of --

JUSTICE SCALIA: Mr. Marcus, it is a lot easier to do that with respect to the facts and circumstances of a particular crime than it is to do it generically -- you know -- picking out attempted burglary. It is very hard to do that. Why shouldn't we read this, this residual category to refer to the facts and circumstances of the particular crime of which the defendant has been convicted? The language enables you to do that. The term violent felony means any crime punishable by imprisonment for a term exceeding one year that involves conduct that presents a serious potential risk of injury, physical injury to another.

Why can't we not, not interpret that to mean generic crime, but rather the particular crime of which this defendant stands convicted?

MR. MARCUS: Well, all that -- this law has been interpreted for many years. No courts of appeals have, have construed that it way. They have construed it to require a categorical approach. And then if you look at the structure of the provision, Congress clearly with respect to the listed offenses had in mind a sort of a categorical approach that, while these courts had, sort of looking at one of these crimes on an ex post basis, it might not present any risk, the idea that these crimes categorically present a potential -- a serious potential risk of physical injury.

JUSTICE GINSBURG: And would you agree, Mr. Marcus, that this Court's decision in Shepard excludes that interpretation? If you look at the particular crime?

MR. MARCUS: Well, I think the Court referred both in Taylor and Shepard to the -- to Congress's approach. And under the statute, that sort of that it wants you to take a categorical approach to crimes that are inherently presented --

JUSTICE SOUTER: Didn't we -- didn't we also go further and say one reason to construe it that way is

we don't want courts to have to be, in effect, having sort of subsidiary collateral trials after the fact, to establish -- you know -- the facts of old trials. There was an administrability analysis involved. I think there was. Yeah, I wrote Shepard. And I think that's what --

MR. MARCUS: There was that as well. And I don't think it is beyond the ability of courts to take a crime, look at the elements of the crime, figure out what conduct is necessary to satisfy those elements and then use common sense and experience to make a judgment about how that -- the risks that are posed by that conduct. Looking at the situation --

JUSTICE STEVENS: Mr. Marcus, isn't there this -- this linguistic problem with the statute anyway? Because this language if it said -- that sometimes presents a serious risk, then the answer would be obvious. If otherwise it said that characteristically presents a serious risk, then it might be closer. And which do you think is the more normal reading of it?

I think either is -- certainly fits the language.

MR. MARCUS: And either --

JUSTICE STEVENS: Either means sometimes presents a potential risk of physical injury, then

obviously they're all covered. Or if it says characteristically presents the risk, potential risk, then do you have to decide whether that, it is a characteristic of potential burglary that it -- that it does present this risk or that just once in a while it does.

MR. MARCUS: No. I think it's not -- no I think it has to, characteristically taken at a general level, the conduct required to commit a burglary, of getting --

JUSTICE STEVENS: If that were true, and if as your opponent said, that in actual burglaries there's only three percent of them actually involve risk to -- of physical injury to another, then attempted burglary must necessarily be somewhat less than three percent. I would think that. Would that satisfy the characteristic requirement?

MR. MARCUS: I think it would. First of all, Congress --

JUSTICE STEVENS: Why is it two or three percent?

MR. MARCUS: The statistics he is referring to came out before Congress amended the statute in 1986 and expanded it and specifically enumerated burglary as one of the crimes that it thought paradigmatically

presented a serious potential risk of injury.

JUSTICE STEVENS: Well, I don't think that's perfectly clear. The "otherwise" language does suggest that you are right. But if the statute instead of saying "otherwise" had said, "or involves other conduct that presents a serious risk," which I think is a permissible reading, perhaps not the best reading, but if it said that, then it is not -- you are not taking as a given the fact that the others satisfy the violent requirement but rather that they are eligible, whether or not they do.

MR. MARCUS: Well, this Court interpreted the statute that way in Taylor -- I mean, I'm sorry, on page -- on page 597 of Taylor. I mean this Court said that Congress's choice of language indicates that Congress thought ordinary burglaries as well as burglaries involving some aspect making them especially dangerous, presented a sufficiently serious potential risk to count toward enhancement. I mean, that's right in the Taylor decision, and I think that has got to be the correct reading of the statute. Because why did Congress identify -- they created two categories of violent felonies. The first is with respect to an element of the offense that goes to targeting a person for physical harm. The second category are those crimes

that don't necessarily target a person for physical harm but necessarily present, inherently present a risk of physical injury to a person.

JUSTICE SCALIA: That would be fine if burglary were the only thing that Congress said there, but it also said extortion. And I think it absolutely fanciful to believe that extortion characteristically -- characteristically -- involves a risk of physical harm. I just don't think it does.

MR. MARCUS: Well, Congress identified it as a violent felony presumably because it believed it had -- it had the criteria.

JUSTICE SCALIA: Yes, but is the criterion "characteristically," or is the criterion whatever minimal risk of harm there is in extortion?

MR. MARCUS: Well, that it carries the potential risk, because when any -- when someone commits extortion there might be a tendency to -- if there --

JUSTICE SCALIA: Is the level of potential risk the level that exists in extortion? Right? That's what the otherwise refers you to.

MR. MARCUS: Yes. To the level of risk that's presented by any of the preceding examples. That's correct.

JUSTICE SOUTER: Maybe, the same point, isn't it reasonable to assume that the risk of harm in these attempt cases is characteristically going to be pretty close to zero? I mean, they're not in the house. They're just on the ladder, in the kind of examples we've been talking about.

MR. MARCUS: I don't agree, Your Honor. The statute directs you to consider the serious potential risk.

JUSTICE SOUTER: One way to do that is to say the potential risk is the potential for the risk of the harm that comes from the commission of the crime itself.

I mean, there is -- I don't want to overdo it, but the risk of harm to others from the -- from the step on the ladder is zero, if you consider simply the act itself of putting the ladder up against the building and taking the step. It's only because that creates the potential for getting inside where the risk, in fact, is measurable. I mean, we know there are cases in which victims get shot when they appear in the course of burglaries, but the risk associated with the mere attempt in isolation is going to be minuscule.

MR. MARCUS: When you're assessing the risk presented by particular conduct, I think you have to

take into account the intent that goes along with that conduct.

JUSTICE SOUTER: Oh, I agree with you. But the act that involved -- the act that constitutes the -- that qualifies for the attempt doesn't involve it. I'm trying to help you here. I mean --

CHIEF JUSTICE ROBERTS: Don't believe it for a minute.

(Laughter.)

CHIEF JUSTICE ROBERTS: Why do you look at the risk of burglary and then view attempt as a sort of lesser included offense? I mean, attempts themselves have their own independent risk of physical injury. Obviously, if you've got a ladder up against the side of my house and you're halfway up and I come home, there's a risk of injury there, even though there's no -- regardless of whether the person gets into the house or not.

And I think perhaps there's even a greater risk of potential -- greater potential risk of injury with respect to attempts because they don't succeed. Why don't they succeed? Because something interrupts them. And what interrupts them, it may well be the home owner. So I don't know that you have to look to sort of attempt as a lesser risk than the burglary itself.

MR. MARCUS: Well, Congress doesn't look to attempt as a lesser offense. We pointed out in our brief that the vast majority of provisions in the U.S. Criminal Code punish the attempt the same as for the completed offense. And if you think about the purpose of the ACCA, and the ACCA is not focused on the results of the prior crimes of the armed felon committed, it is focused on the risk, the propensity that somebody has, has demonstrated by engaging in at least three prior violent felonies or serious drug offenses to engage in behavior that is dangerous, that presents dangers to public safety. So if you think about the attempt and the whole concept of attempt, I mean, someone who has committed attempt by definition has intended to commit the offense and as you said, Mr. Chief Justice, has only failed by reason of an unforeseen event. Why would Congress in this statute want to differentiate between the frustrated burglar whose only -- who hasn't succeeded only by virtue of an unforeseen event, and the successful burglar? I think the serious potential risk language allows you to sort of look at the attempt as you said, Mr. Chief Justice, as virtually the equivalent --

CHIEF JUSTICE ROBERTS: I would suppose the unsuccessful burglar poses a greater risk of physical

injury than the successful burglar.

MR. MARCUS: Arguably. I mean, if you look at the case law, the vast majority of cases, the furthest out, the furthest case the Petitioner can find, the most extreme case that he's found involves someone who's in the backyard of a dwelling reconnoitering or casing the dwelling, and that was the most extreme example. So even with attempts, you find in all the case law, you do find the physical proximity to the premises.

And one of the main reasons it wouldn't succeed is because somebody, there's the presence of someone who frustrates the entry. So that even on that level, at that level, it is hard to say that there's any lower risk presented by the attempt.

JUSTICE SOUTER: Well, what do you say about your brother's argument that the statistics show there's a 3 percent chance, I think it was a 3 percent chance of violence in the course of committing the burglary? I take it there isn't any statistic available, if we want to take Justice Breyer's approach, about the potential -- the actual proven potential for violence at the near attempt stage.

MR. MARCUS: But again, I think -- I don't think you need to have those statistics.

JUSTICE SOUTER: No, I don't think you do either, but I mean, I think your whole argument has got to rest really on the potential for harm in the commission of the offense.

MR. MARCUS: That's the very reason that attempts are prohibited, because they present the serious potential to produce the harms that the completed offense presents.

JUSTICE STEVENS: Do I correctly understand, we don't need the statistics, I guess they're not available, but in your view if we did have statistics and they showed that in 1/10 of 1 percent of the category of crimes across the nation, there was this risk, that would be enough?

MR. MARCUS: For attempts?

JUSTICE STEVENS: Yes. Well, for attempts or complete -- I mean, just say the standard of what presents a serious potential risk of physical injury, if 1/10 of 1 percent of the crimes -- whatever the category, did present such a risk, that would be sufficient under your view.

MR. MARCUS: Yes, I think Congress wanted to treat a frustrated burglar the same --

JUSTICE STEVENS: The answer is yes?

MR. MARCUS: Yes. They've shown the same

propensity to engage in the conduct that Congress was concerned about that falls at the heart of the statute.

JUSTICE STEVENS: So then it's a really easy case, because really there is some risk in every case. There's some risk that somebody will, you know, bump into somebody or give them a punch in the nose at least.

MR. MARCUS: But that's not what we're asking the Court here. We're asking the Court to look at the elements of the offense, and to look at the elements of the offense to see whether that creates a situation in which violence is likely to arise. Here you're talking about, this is attempted burglary of a dwelling where you have --

JUSTICE STEVENS: Yes, but none of the elements of the offense satisfy the risk of physical injury in the burglary case. You can have unarmed burglars.

MR. MARCUS: But in considering the conduct involved in the offense, the attempting to get, the attempt to enter a dwelling, enter someone's home, someone's residence, that creates a dynamic situation in which violence could occur --

JUSTICE STEVENS: Right. And as I understand your view --

MR. MARCUS: That doesn't --

JUSTICE STEVENS: If in 1/10 of 1 percent of the cases, there is in fact a physical confrontation, that's enough, which makes it a pretty easy case.

MR. MARCUS: Yes. But again, first of all, I don't think the statistics would show that. I don't think logically they would show that in light of the numbers that are shown for completed burglary. But again, I don't see -- with respect to the offenses that are covered that are at the core of the statute, I don't see why you would distinguish between the person who tried to get in but was frustrated by some unforeseen event. They have created the same set of risks, they've triggered the same set of risks that the successful burglar has.

JUSTICE ALITO: So in other words, you're saying that in measuring the risk, you should consider not just what this particular defendant succeeded in accomplishing, but what the defendant was attempting to accomplish?

MR. MARCUS: That's correct. I think the statute permits you to do that with its plain language of focusing on the potential risk of the conduct, the serious potential risk. And that -- and also in looking at the rationale for attempts and why we punish attempts, in terms of the person is, you get punished

for attempts because you sufficiently manifested your dangerousness in the same way as someone who's completed the offense. Again, the State codes, the vast majority of State codes demonstrate the riskiness of attempt behavior. They predicate felony murder convictions on attempted burglary as well as burglary. And as I said --

JUSTICE BREYER: What about attempted assault? I bet nobody has ever been hurt in an attempted assault.

MR. MARCUS: Well, I think, my understanding would be that would be covered under the first subsection for the use -- attempted use or threat, threatened use of force.

JUSTICE BREYER: All right. But it wouldn't fit within your -- I mean, I just wonder what happens when you try to get away from numbers. Maybe there are a certain number of people injured during mail fraud or embezzlement, you know, some people get annoyed during an embezzlement and start hitting each other.

I can't get away from the numbers.

MR. MARCUS: But there in those type offenses, if you look at the elements of the offense, there's no nexus between those elements and the -- a reaction that someone might have just to being

prosecuted. I mean, that's not --

JUSTICE BREYER: So what's the test? The test is either a high statistical number of injuries or if not, a nexus to a crime that does have a high statistical number of injuries? I like the word nexus because whenever I see it in an opinion, I have no idea what it means.

(Laughter.)

MR. MARCUS: Well, in this statute you're talking about career criminals, people who have committed a number of crimes and have recently just been convicted of being an armed felon. And I think that's -- when you look at -- that can be your starting point, and take -- so this case doesn't present questions about other cases that might present -- arguably present, or present a serious risk of physical injury, but don't necessarily seem to fit with the crimes that are listed and what the crimes that Congress had in mind. I think that's another case. This case falls at the core of the statute; we're talking about someone who intends to commit the core crime Congress was talking about.

JUSTICE SOUTER: Mr. Marcus, assuming we accept your view about the way the statute should be read, I take it you agree that because of the curtilage

possibility under Florida law, that Florida law, that burglary in Florida is not a generic burglary?

MR. MARCUS: We haven't argued that it is generic burglary. That's correct.

JUSTICE SOUTER: I guess my -- so that leads me to this question, because -- I mean, I, my understanding is it's not a generic burglary.

Therefore, even on your reading of the statute, an attempted burglary in Florida doesn't necessarily satisfy the prong, and it's got to come in under the residuary clause, of course. And because there is a possibility that the only burglary charged was a burglary of the curtilage, we've got to -- don't we have to send the thing back to find out either from court records whether something more than a mere penetration of curtilage was involved here? And if so, whether -- whether that penetration carried with it the potential for harm?

MR. MARCUS: I mean, no. That's why you have the otherwise clause, to cover offenses just as this Court said in Taylor, that they weren't --

JUSTICE SOUTER: No, but the only thing we know under the otherwise clause, is that this was an attempt at burglary. If the burglary were a generic burglary, your analysis, if we accept it, would be the

end of the case.

MR. MARCUS: Yes.

JUSTICE SOUTER: But this is not a generic burglary. Therefore, we have to assume that the attempt in this case could have been nothing more than stepping across the grass, moving toward the fence, to lean over to take the apple. And therefore, don't we have to go to court records? In other words, don't we have to take advantage of the qualification in Shepard and Taylor before this case can finally be decided?

MR. MARCUS: No. I mean, you've identified an additional step that the Court has to consider in deciding the question in this case, but that step doesn't necessarily require you to go to court records. I mean, it's our position that even including the curtilage, the area, enclosed area immediately surrounding the dwelling presents a serious potential risk of physical injury

JUSTICE KENNEDY: Well, could you tell us what your position is if we choose to use the noncategorical or the modified categorical approach? Is there a nexus between what's in the presentence report and some other charging documents, or is it just in the presentencing report?

MR. MARCUS: Yes. The charging documents are not part of the record in this case. The record

right now is solely comprised of the presentence report.

JUSTICE SOUTER: And we don't have any transcript of colloquies with the court or anything like that?

MR. MARCUS: No.

JUSTICE STEVENS: Well, what about -- do you think the facts in the presentence report are admitted by your opponent or not?

MR. MARCUS: He didn't object to the facts in the presentence report. He also did not object --

JUSTICE STEVENS: Therefore, can we consider them?

MR. MARCUS: Yes.

JUSTICE STEVENS: So therefore, then the question is whether throwing the hammer through the window is sufficient; is that right?

MR. MARCUS: Well, that would resolve Justice Souter's question about whether it would involve the curtilage at all, which would show that there was an attempted physical entry into the residence.

JUSTICE STEVENS: Would you think that the hammer through the window is a decisive fact if we do look at the individual case?

MR. MARCUS: Well, we don't -- yes, certainly we think that any attempted burglary of a

dwelling presents a serious potential risk categorically. But if you didn't agree with that, then, and you thought that only a subset of attempted burglaries of dwellings would present serious potential risk, then clearly this offense here that would certainly satisfy any conception of that.

JUSTICE STEVENS: Because the hammer is thrown through the window, is that -- I just want to be sure I understand your view of the importance of the hammer.

MR. MARCUS: Because there was an attempted physical entry into the residence. The person was right on the threshold of the dwelling.

JUSTICE STEVENS: I'm still a little unclear as to how much significance we pay to that hammer.

MR. MARCUS: Again, we don't think you have to attribute any particular significance to that. I mean, it's our position that categorically this crime is covered. And again, the case law shows that there's -- that with attempted burglary cases, there is a physical proximity to the dwelling, but even if there was --

JUSTICE GINSBURG: Even though there's some cases in this large category that clearly wouldn't involve any risk to anybody. Say the enterprising but careful burglar who keeps watch for several days to see

when no one is in the house, that that's when he chooses to make his entry.

MR. MARCUS: That's correct. You can always posit, under the categorical risk, you could always posit a specific nonthreatening hypothetical that equally applies to burglary as it does to attempted burglary. And so while you could posit a hypothetical where someone trying to get onto the curtilage might seem like it wouldn't present any injuries, if you think categorically about people who are trying to surmount, get over fences and walls to commit offenses in the dwelling or immediately around the dwelling, they're presenting the same sort of risk, and therefore the Court can conclude that it also -- within the otherwise clause, the burglary under Florida law is not so different from the kind of burglary that Congress had in mind that it would just drop out of the picture entirely. Armed felons who have the propensity to go into the curtilage of someone's home, to either go in the house or right around the house, present the very kind of risk that Congress was concerned about.

JUSTICE KENNEDY: Do you agree that this presentence report cannot be consulted under the reasoning of Shepard, we need more?

MR. MARCUS: Well, under Shepard, the

defendant in Shepard had objected to the use of police reports. My understanding is he also submitted an affidavit saying he didn't acknowledge the truth of anything in the police report. So I think this case is distinguishable in that there was no objection to the facts in the PSR and there was no objection specifically to using the police report as the source for those facts.

JUSTICE KENNEDY: You don't think the PSR has some kind of significance that the police report did not?

MR. MARCUS: It wouldn't, no. I don't think it would. But -- no.

JUSTICE SOUTER: Is the following sort of summary fair: Because Florida is not a generic burglary State, the mere conviction of burglary would not satisfy the burglary prong in subsection 2? But on your argument, even though Florida is not a generic burglary State, an attempted burglary will always satisfy the "otherwise" prong; is that correct?

MR. MARCUS: Argument --

JUSTICE SOUTER: Is that a fair statement of your argument?

MR. MARCUS: Yes. If the completed offense is a violent felony, the attempt to commit that offense

is also a violent felony. That's a fair statement of our position.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Marcus.

MR. MARCUS: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Crawford, you have four minutes.

REBUTTAL ARGUMENT OF CRAIG L. CRAWFORD
ON BEHALF OF THE PETITIONER

MR. CRAWFORD: It seems to me that Respondent's position is taking the "otherwise" clause to trump the entire rest of the statute. Any crime, any felony, has a potential of violence. In fact, in footnote 9 of the reply brief we cited the Golden opinion from the Seventh Circuit and in that particular opinion the court found that serious potential risk for someone who failed to report to a jail because they speculate, you know, law enforcement might have to go and arrest them and there could be violence in that situation. Well, that happens in all crimes, the potential for law enforcement to arrest somebody. There's always a potential for violence.

So the Government's position --

CHIEF JUSTICE ROBERTS: It's different when you're dealing with an escapee or someone who has

visitation right and then doesn't report back and qualifies as a escaped felon from prison. That's quite a bit different from an arrest in a normal situation.

MR. CRAWFORD: But there's still the same potential for violence in either one of those.

CHIEF JUSTICE ROBERTS: No. There's a greater -- I had this case in the D.C. Circuit. There's a greater degree of potential when you're dealing with someone who's escaped from prison than with someone else who's being arrested. Of course there's always the potential, but the judgment was that there's a greater degree of potential when you're trying to apprehend someone who's escaped.

MR. CRAWFORD: For someone who's escaped. Golden wasn't dealing with that. Golden was dealing with someone who failed to report to a facility after being sentenced to do so. The same could be said for someone failing to report to a court for a hearing. A bench warrant is issued. The same type of risk would be inherent in that type of -- for that person as for someone who fails to report to a jail upon being sentenced.

All of those potential crimes, basically that would leave open any potential felony to qualify under the "otherwise" prong. Congress obviously

couldn't have intended that.

Moreover, there's still an issue that was brought up in Shepard on the constitutional avoidance. How do we actually make these determinations and are these necessarily determinations that were found by the Florida court or by the Florida system for a Florida attempted burglary conviction? We submit it's not.

And you're going beyond the mere fact of the prior conviction. You're looking at many other components, the risk of the conviction, which is not the same thing as the mere fact of the prior conviction.

If there are no further questions --

CHIEF JUSTICE ROBERTS: Thank you, Mr. Crawford.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)