IN THE SUPREME COURT OF THE UNITED STATES

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MATTHEW ROBERT DESCAMPS, :

Petitioner : No. 11-9540

v. :

UNITED STATES :

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Washington, D.C.

Monday, January 7, 2013

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

APPEARANCES:

DAN B. JOHNSON, ESQ., Spokane, Washington; appointed by this Court; on behalf of Petitioner.

BENJAMIN J. HORWICH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of 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 will hear argument first this morning in Case 11-9540, Descamps v. United States.

Mr. Johnson.

ORAL ARGUMENT OF DAN B. JOHNSON

ON BEHALF OF THE PETITIONER

MR. JOHNSON: May it -- Mr. Chief Justice, may it please the Court:

In this case -- it doesn't matter what my client was convicted of in 1978, in the State of California. What's important for the Armed Career Criminal Act is what he's convicted of. And as we all know, when you're -- to be convicted of a crime, elements have to be proven beyond a reasonable doubt or agreed to by a defendant after waiving his constitutional rights.

In California, burglary -- unlawful entry as defined by the Court in Taylor on what a generic burglary consists of, is not an element of California burglary. Any entry with the intent to commit a crime, a theft, or a felony will do. A California jury is never required to actually find unlawful entry in the Taylor sense.

Regardless of the defendant's conduct, a California burglary conviction is not, by its elements, Taylor burglary for Armed Career Criminal Act.

JUSTICE GINSBURG: You don't take issue, do you, with the argument that in -- in determining what the State law is you can take account not only of the words of the statute, but how the State Supreme Court interprets those words?

MR. JOHNSON: I -- I don't take issue with that, Your Honor. I think if the State's -- State courts clearly state something is an element of a crime, I -- you know, I agree with that.

JUSTICE ALITO: Well, the California Supreme Court has said that an element of the burglary statute is the violation of some possessory interest. Now, I know there is some disagreement between you and the government about that. But assuming for the sake of argument that that is an element, one way for the California court to express that is to say simply, as it has, that an element is the violation of the possessory interest.

Another way of saying exactly the same thing would be to say that the term "enters" under the California burglary statute means either breaking into a structure or the violation of the possessory interest in

some other way.

MR. JOHNSON: Okay.

JUSTICE ALITO: Those are exactly equivalent. Now, if they were to say the latter, would a conviction under this statute potentially qualify under the Armed Career Criminal Act?

MR. JOHNSON: Well, I don't believe it would, because I don't believe possessory interest equates to Taylor definition.

JUSTICE ALITO: No, but they -- they set out alternative elements, either breaking into the structure or the violation of the possessory interest in some other way.

MR. JOHNSON: Well, if -- if the elements are shown, and if that's the definition, then yes. But I don't think California possessory interest is the same thing.

JUSTICE ALITO: No, but they have said -- do you dispute the fact that saying A, an element is the violation of the possessory interest, and B, the elements are breaking or the violation of the possessory interest in same other way, are exactly the same substantively?

MR. JOHNSON: I -- I don't, Your Honor, because in the Taylor sense you have to have an --

unlawful -- trespass, actually a trespass, or an invasion of a person's -- well, unlawful trespass. In California you don't have to have a trespass. And as the Court indicated in the Taylor decision, it talked about shoplifting in the State of California. So is a shoplifter someone who should be subject to an Armed Career Criminal Act enhancement?

JUSTICE ALITO: I thought your argument was that if the terms of the statute set out alternative ways of satisfying an element, you have alternative elements in essence, that then, even if some of those alternatives don't fall within generic burglary, if one does, then a conviction under that statute potentially can qualify.

MR. JOHNSON: Well, I --

JUSTICE ALITO: Isn't that -- do you not --

MR. JOHNSON: -- I have no argument with that.

JUSTICE ALITO: Okay.

MR. JOHNSON: That's the modified categorical approach, I believe.

JUSTICE ALITO: Alright. Now, what if the State Supreme Court says exactly the same thing? Your answer to Justice Ginsburg was it doesn't matter whether the elements are set out in the statute or whether they

are defined by the State court.

MR. JOHNSON: Well, I -- as I said, if -- if the element is set forth and it's an element that meets the definition of the generic definition in Taylor, then I agree with you. But I don't believe California burglary does that, because the entry with intent to commit a crime is burglary in California.

JUSTICE ALITO: Well, I'll ask the question one more time. Is there a difference -- what the California court has said is that an element is the violation of a possessory interest. Assuming for the sake of argument that is correct, that is a correct statement of California law, is there any substantive difference between saying that and saying the element is breaking or, in the alternative, the violation of a possessory interest in some other way? Is there some substantive difference between those two things?

MR. JOHNSON: Well, there may not be a substantive difference, but in California breaking is not required at any time. It's not an element of the crime.

JUSTICE KAGAN: Mr. Johnson, can I try what Justice Alito is getting at maybe in a slightly a different way? And it's really the argument that the Ninth Circuit made, which is that you can take any

indivisible statute -- indivisible statute, and you can reimagine it as a statute with divisible elements, and Justice Alito gave one example of that. And the question to the Ninth Circuit says, is, once we've said that we can look to Shepard documents when we have a divisible statute, why not apply the same reasoning when we have an indivisible statute, given that any indivisible statute can kind of be reframed in our heads as a divisible one?

MR. JOHNSON: Well, because in -- in that case, the jury -- if a statute is made where the question is, is a weapon involved, and you can commit that with an ax, a gun, or a knife, but the element is weapon, the jury is only required to find weapon. And if gun is -- is the fact that needs to be shown for an active -- predicate, you don't get there.

Again, you go back to the element, what's the person convicted of. They'd be convicted of a weapon violation, not a gun violation. And so, I -- I suggest it's the same thing here.

JUSTICE SCALIA: But I thought our cases held that when you have a conviction for a weapons violation, you can look to the Shepard materials to decide whether, in fact, the weapon violation was a gun, a knife or an ax, can't you? No?

MR. JOHNSON: If the State's statute sets off those as an alternative element, I would agree with that. If they are not set out in an alternative element, then I don't think they are -- I think they are a manner and means of committing the crime. I don't think they are an element of the crime.

JUSTICE SCALIA: Or if -- you acknowledge if the State supreme court says "weapon" could mean a -- a gun, a knife or a hatchet, that would -- that would suffice, right? But if the supreme court doesn't say that, we cannot imagine it?

MR. JOHNSON: Well, I -- if it's spelled out as an element, I think you can, but if it's not an element --

JUSTICE SCALIA: It's not spelled out as an element, but the State supreme court says, our statute says weapon. Of course, a weapon could be a gun, a knife, or a hatchet, and then we look to the Shepard documents and we find that this conviction of a weapons violation was in fact based on the possession of a gun.

MR. JOHNSON: Again, I think it would go back to the element of -- of weapon --

JUSTICE BREYER: The problem is there's no way. This is purely conceptual. A State supreme court that says the word "weapon" in the statute means

knife, ax, or gun. Now, are those three ways of committing the crime? Or are they three crimes, each with a separate element? That is -- we'd need not only St. Thomas Aquinas, but I mean, we'd need those angels dancing on the head of a pin.

There is no difference that I can imagine. And therefore you are saying, look to the point of this statute; it is not to look to the individual way in which it was committed, and therefore go to the statute to see whether you have a single crime or separate crimes, okay? That's that's what I think your argument is.

MR. JOHNSON: It -- it is.

JUSTICE BREYER: Do you think I understand your argument?

MR. JOHNSON: I think you do.

JUSTICE BREYER: Fine. If I understand your argument -- it's not as friendly a question as you might hope--

(Laughter.)

JUSTICE BREYER: -- because what I want to do next is say, why are we debating this point, because the only difference I can see under the California statute is shoplifting and even that one is sort of debatable. And the very next clause of this statute

says "or otherwise," "or otherwise involves conduct that presents a serious potential risk of physical injury."

So, why not forget about this metaphysical point and say, look, even if you are totally right, you've still got a statute for 430,000 convictions and as far as we can tell there must have been fewer than 500 that involved shoplifting, so this is so much like burglary, that whatever risks were presented by burglary are surely present here. So let's forget the metaphysics and just go on to clause 2. Now, why hasn't anybody done that? It's a mystery to me, because you haven't and they haven't. So why not?

MR. JOHNSON: Well, it's not my burden to do that. And -- I expected that question, but I think even under -- under the residual clause we win the case.

JUSTICE BREYER: Why?

MR. JOHNSON: Because in California a shoplifter is not -- but I would think --

JUSTICE BREYER: No, no, no. But I mean, what I would do -- I've said this and nobody pays any attention. I think Justice Scalia's said it; nobody pays any attention. I think Justice Posner said it. He said, look, under clause 2, these are really empirical questions, is this dangerous or not. Let's do a little sampling and what we'll do is we'll sample the kinds of

people that this particular State statute X get convicted under and where a whole lot of them are dangerous it's a dangerous statute; and where not, not. And so nobody's done that sampling, but we do have some numbers here and the numbers here suggest that this is really a burglary statute.

MR. JOHNSON: Well, there's -- there's other ways other than just shoplifting. There -- for example, a mortgage broker going into a home with an invitation.

JUSTICE BREYER: Yes, you could. I just don't think there are that many people who burgle their own names or who go into the home of somebody else with an invitation and then sneak into the cupboard and stay overnight and burgle everything. I mean, there are some such, but --

MR. JOHNSON: Doesn't it come back to the test that this Court thought Congress meant when you made the ruling in Taylor that we're not going to look to the manner and means of commission, we're going to look at the elements --

JUSTICE BREYER: No, no, no. It doesn't have to do with that. It has to do with the crime and the crime is the crime that the statute defines. And the question is, is that crime otherwise -- present a serious potential risk of physical injury? And if 4,000

manifestations of that crime it does, and 3 manifestations of that crime it doesn't, you would say the overall judgment here is this is a crime that does present that dangerous risk. That's because in almost all cases it's there.

MR. JOHNSON: Well, if the Taylor definition -- after the Court worked that through, I think the Taylor went with the categorical elements approach. I think what you're talking, Your Honor, is -- is a different approach.

JUSTICE BREYER: No, no. It's exactly pure categorical. You have a crime in a statute. You don't know how dangerous it is. It is not burglary, arson or explosives. So to find out if it presents the same kind of danger you do a little empirical research. That's all I'm saying. It has nothing to do with categorical.

MR. JOHNSON: But then why do we have the "is burglary" language and the other sentences? Don't they get eaten up by that?

JUSTICE BREYER: "Is burglary or otherwise," "or otherwise," "burglary or otherwise," and the reason we have "or otherwise" is because Congress does know that the number of State statutes that are sort of like something, but not completely like something is in the thousands. And so that's why they put in "or

otherwise."

MR. JOHNSON: I think in this case one of the -- one of the considerations that drives our argument is that if you get into that factfinding mode of manner and means in order to establish an element that is not in the State statute, which is in the case we're looking at here, I think you got an Apprendi problem, and I think under the Sixth Amendment my client should have had a right to a jury trial and proof beyond a reasonable doubt.

He went from a max 10 to a max of life and a mandatory min of 15 years, based on what I -- we contend is factfinding in violation of Apprendi.

JUSTICE KENNEDY: Suppose the Court were to say, we now hold that the modified categorical approach applies to this statute and to these facts. Would the plea colloquy suffice to show that under the modified categorical approach the defendant necessarily was convicted of a crime that's equivalent to the generic crime of burglary?

MR. JOHNSON: Well, I think the breaking under the -- under the California statute is a manner and means of committing the crime. It's not an element of the crime, because you don't have to --

JUSTICE KENNEDY: But if he necessarily --

MR. JOHNSON: -- do that.
JUSTICE KENNEDY: -- the defendant necessarily was convicted of an offense that had the elements of a generic crime, if he necessarily was convicted of that, would that suffice? And if it would, does the -- plea colloquy suffice to show that?
MR. JOHNSON: That's kind of a two-part question.
JUSTICE KENNEDY: It is a two-part question. I hope I can get an answer to each.
MR. JOHNSON: Well, the first question is, because the breaking is not part of California requirement, a jury's never required to find that as an element. Nor does a judge when he's taking a plea have to -- to find that having taken place.
JUSTICE KENNEDY: But if under the modified categorical approach we -- we insist that in the particular case before us the generic components of the crime must necessarily have been found by the jury, and if we say that that's the rule, that's inconsistent with your view of what the law ought to be?
MR. JOHNSON: I think -- I think it would be, because I think unless it -- unless it -- there are alternatives in the statute, some of which constitute the generic crime and some of which don't, I don't think

you can use a modified categorical approach.

JUSTICE SCALIA: I think what you're saying is, it -- it could necessarily have been found by the jury, but he would nevertheless not have been convicted of that particular crime.

MR. JOHNSON: That's obviously a more --

JUSTICE SCALIA: The jury in finding him guilty of the generic offense could only have found that this mode of committing the offense was what he used. Nonetheless, he has not been convicted of using that mode; he has been convicted of the generic offense. Isn't that your point.

MR. JOHNSON: Exactly true. Just like an example would be in a plea bargain context the prosecutor charges a person with delivery of a controlled substance, maybe there is a problem with the search or something and they come up with a plea bargain of possession of a controlled substance. Are we going to 30 years later go back and say, well, the colloquy said this person did do a delivery, so we are going to punish him as if he did?

JUSTICE KENNEDY: But under the modified categorical approach the whole point is that we do look to the plea colloquy.

MR. JOHNSON: You look to the plea

colloquy --

JUSTICE KENNEDY: Of course, which is why you say you don't think the modified categorical approach should apply. But I'm saying suppose we say that it does and we look at the plea colloquy. What do you want us to conclude from that?

MR. JOHNSON: Even if you say it does, it still doesn't -- it's not an element of the crime.

JUSTICE SOTOMAYOR: Could you simplify that? Could you simplify that? What do you think the elements of -- just going back to what Justice Scalia said, as I understand your position the elements of a burglary in California law is being in a place with the intent to commit a crime. Whether you got there with permission or without permission, unlawfully or not, is irrelevant. So what you are saying is what he pled guilty to was being in that garage with the intent to commit a crime, correct?

MR. JOHNSON: Yes. In California you -- just entry with intent is all you need, with intent to commit.

JUSTICE SOTOMAYOR: But the unlawfulness is not necessary.

MR. JOHNSON: It's not necessary and that's the point --

JUSTICE SOTOMAYOR: No matter what he said, he wasn't convicted of a generic crime because all he was convicted of under California law was entering and --

MR. JOHNSON: Exactly.

JUSTICE SOTOMAYOR: -- with intent. That's your point.

MR. JOHNSON: And the manner and means of -- of committing it isn't the point. It's what are you convicted of. And again, I think unless the Court decides to change that approach, I think we're going to have an Apprendi problem.

JUSTICE ALITO: But your argument comes back to how the elements are defined. It comes back -- so in your view, what is critical is in a case of a broad statute -- whether the statute simply sets out a broad category or whether it sets out lots of subcategories, that's what your argument comes down to.

If the court says -- if the California legislature or the California court says, the element is entry, period, that's one thing. If they say the element is breaking or entering in some other way, that's something entirely different. It all comes down to that, in your view.

MR. JOHNSON: Well, it may -- it may come

down to what -- what the Court thinks California means by invasion of a possessory interest. But again, I just -- I don't see invasion of a possessory interest as the equivalent of Taylor entry.

JUSTICE BREYER: Because it's like the old joke. I mean, it's in the statute, you are looking back to see whether he was charged with possession of a gun, which is one word in the statute, or an ax, or a knife. That's what we're looking for under the categorical -- modified categorical. But if all it says in the statute is weapon, even if the supreme court says it's a gun, a knife, or an ax, you still have nothing to look for. Because the charge to the jury could have been, did he have a gun, a knife, or an ax, and the answer to that question, when the jury comes back, would be yes. You see?

All they have to say is yes. They don't have to say which. And therefore, Apprendi would be violated, in your view.

MR. JOHNSON: That's correct. I think that sums it up.

JUSTICE ALITO: Well, if that's your argument, then you're really asking for us to modify our prior cases. Because I thought it was clear, that if the element -- if the statute requires -- if to qualify

under ACCA, you have to have a gun. And the statute says that you have to have a weapon, and a weapon is defined as a gun, a knife, or a hatchet, that would be okay. Is that wrong? Isn't that your -- don't you agree with that?

MR. JOHNSON: If the predicate element is included in the -- in the statute or the decision, I agree with that. But again, I don't think I have to --

JUSTICE ALITO: So your answer to Justice Breyer was not yes; it was no.

MR. JOHNSON: Maybe I misunderstood the question. But I think the --

JUSTICE BREYER: You didn't.

JUSTICE GINSBURG: Let's -- let's get back to this case. I think what you're saying about the plea colloquy is, even if he had said to the judge, yes, I broke and entered the Metro Mart, even if he had said that, the conviction still would not be for burglary.

MR. JOHNSON: The conviction is just for entry, and for the entry with intent, which again isn't how this Court defined burglary in Taylor. And so --

JUSTICE KAGAN: And so your principal argument isn't that -- is that what we've said in the modified categorical cases is that you look to these Shepard documents to help you define the elements of the

offense. So if you're not sure which offense the person has been convicted of, you look to the Shepard documents to do that. But you don't look to the Shepard documents for a different purpose, which is, we know what the elements of the offense are, but we want to know whether this person also committed the generic offense.

MR. JOHNSON: Yes. Yes. I agree with that. And -- but the government wants you to use the Shepard documents to go beyond that.

JUSTICE KAGAN: Yes, I think -- here's, I guess, the rub, which is -- you know, I take the point that what the Ninth Circuit has said does not seem very categorical. It doesn't seem categorical, it doesn't seem modified categorical. But there is something a little bit insane about your position. I don't see -- you take the most populous State in the country and everybody who's convicted of burglary, in the most populous State in the country, is not going to have committed an ACCA offense, even though, as Justice Breyer suggested, 98 percent of them really have.

MR. JOHNSON: There's an -- there's an easy way to fix that. A State legislature can change their law, if they want to. The Congress can change the approach they want to take, and that would -- that would solve that problem. But I don't think it's up to the

Court to change 22 years of jurisprudence to do that. California has known this for over 22 years. These problems have been -- have been around and percolating, and the right to a jury on -- on issues of fact --

CHIEF JUSTICE ROBERTS: But it's not California's problem, right? We're talking about Federal legislation and how that operates.

MR. JOHNSON: I agree. So Congress can amend the statute if they wish, as many members of the Court have talked to the Court and asked the Court to do. But in light of how I believe this Court interprets the law, and the categorical approach, and the idea was that using the modified categorical approach would only apply in a narrow set of circumstances, the California -- or the Ninth Circuit's version is not a narrow set of circumstances.

Arguably, it's just about any crime that comes in -- later on, sometimes decades later, they're going to be doing fact-finding on issues, some of the participants might have passed away. I mean, all kinds of things like that. It's not fair to the -- to a defendant under those circumstances that that kind of fact-finding is going to take place and result in the egregious extra penalties he's looking at unless he has a jury trial.

Those aren't facts of the conviction. They are facts about the conviction. I think that's the difference between the Ninth Circuit's approach and what all the other circuits have. I think the other circuits get it. They get the idea modified categorical should be narrow.

JUSTICE GINSBURG: There's -- there's probably an obvious answer to this, but the Taylor definition of generic burglary is unlawful entry into or remaining in a building with intent to commit a crime. Why doesn't this, the crime of which the defendant was convicted, satisfy the remaining, the remaining in the building with intent to commit a crime?

MR. JOHNSON: Well, California burglary is -- I believe, in my reading of the case law, it's -- the -- the intent is formed as you enter the premises. And that's when the burglary's been committed. If -- for example, that's the way I read the case law.

JUSTICE GINSBURG: That -- that intent would continue while the person remains in the building.

MR. JOHNSON: Well, except the -- again, is it the intent in the generic sense, or is it the intent in the California sense? And I suggest there's a difference, because again, I don't believe -- invading a possessory interest, I think that came up when someone

was convicted, or they tried to convict them of burglarizing their own home, and the person had a possessory interest so they said oh, you can't be guilty of that. I just -- I don't think possessory interest equates to the generic Taylor element.

And I would like to reserve my time, if I might.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Horwich.

ORAL ARGUMENT OF BENJAMIN J. HORWICH

ON BEHALF OF THE RESPONDENT

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

I would like to start maybe at a point in a colloquy that my friend was having with Justice Breyer, which brought out the point that Petitioner's position here is that there's a difference between alternative elements in State crimes and alternative means; and from the point of view of a guilty plea, which is what we're dealing with here, I don't see how you're going to make that sort of distinction.

It's an unworkable distinction, because, from -- from the point of view of the defendant pleading guilty, whether it's an alternative element or an alternative means, it's just an alternative way of

offering the factual basis for the crime. And the sentencing court ought to look, as the Court, as this Court said in Shepard, to the factual basis that's offered for pleading guilty.

JUSTICE BREYER: But you're not -- but you're not looking at the factual basis for the purpose of deciding the manner in which the defendant committed the crime. You're looking to the factual basis or you look to these other documents in order to decide which crime it was that the offender committed.

And the reason that you have to sometimes do that is because there are many State statutes which under a single section number list several different crimes, where "crime" here does not refer to a thing that happened at a particular day at a particular time, but refers to the kind of thing that a statute defines; i.e., a general category.

Now, every case that we've written it seems to me says that or is consistent with that. And that is certainly consistent with the idea of the crimes being burglary, arson, explosives, or other dangerous crimes. So the guilty plea is beside the point. It may just say, guilty of 828 376 Section 42-BC, end of the matter.

And we don't know which of those three things: House, car, boat, which are there in that

section, was the crime committed. And he's saying that's the end of that. And so he says, then, look, this is a California State statute and it isn't divided into three parts. It just has one part. And that one part is not the equivalent --

MR. HORWICH: I think that --

JUSTICE BREYER: -- of Federal burglary as defined by Justice Blackmun and the Court in this case, end of matter, QED.

MR. HORWICH: I -- I do think you've accurately described what Petitioner -- the dividing line the Petitioner would advocate is. But I would urge the Court to look at the experience of the court of appeals with trying to apply that dividing line, and that will reveal to the Court very clearly why it becomes unworkable. Because we've got several courts of appeals -- as the Court's aware there's a division of authority on this -- that have said, well, look, we want to look for statutes that are phrased in the disjunctive or that have these separately numbered subsection headings or something.

Now, setting aside whether that's really principled or not to focus on the text versus the judicial decision, let's accept for the sake of argument that that's the line. The problem is that then the next

case that those courts confront, that applying that rule rigidly produces really strange results.

JUSTICE BREYER: That's exactly right. So therefore, that was my question basically.

MR. HORWICH: Yes.

JUSTICE BREYER: And of course Congress knew that there are hundreds or thousands of State statutes with several different words and they -- you know, different ways of getting at the same thing, and therefore they wrote the next phrase of their Federal statute, which is it's burglary, arson, explosives or otherwise, or otherwise involves conduct that presents a serious potential risk of physical injury.

And so if you have a slight variation on the burglary theme, it doesn't fit within generic burglary, but it's pretty hard to imagine it wouldn't otherwise present the same risks, at least if it's only a slight variation.

MR. HORWICH: Well, I -- the parties have not briefed here and I wouldn't want to speculate on what the Court would --

JUSTICE BREYER: I know and that was my question. Why not?

MR. HORWICH: Well, this case has been argued as -- because this is a conviction under

California burglary, it's been argued under the -- the premise that it should be classified as generic burglary. But let me offer --

JUSTICE SCALIA: Maybe -- maybe they haven't argued it because there's some serious constitutional doubt about whether the statute which makes it a crime to engage in conduct which creates a serious risk of physical injury is constitutional. That's such a vague standard, you go to prison for 30 years if you engage in conduct, quote, "that creates a serious risk of physical injury." I'm not about to buy into that one.

MR. HORWICH: That -- that's -- I understand Your Honor's view on that, on that subject.

JUSTICE KAGAN: Mr. Horwich --

MR. HORWICH: If I can try to --

JUSTICE KAGAN: I'm going to ask you about an argument you did make.

MR. HORWICH: Yes.

JUSTICE KAGAN: As I understand your argument, your argument is not the Ninth Circuit's argument, because you very carefully distinguish what are what you call missing elements cases from this case.

MR. HORWICH: Yes.

JUSTICE KAGAN: So do you reject the Ninth Circuit's view that the categorical approach should

apply even where there is a missing element, as you -- as you call it?

MR. HORWICH: Well, I want to be very careful that we're talking about the same thing, when we say "missing element." And so maybe I can give -- give an example of what I think is a missing element case and one to which we do not think the modified categorical approach can be applied.

And -- and the good way to think about the exercise that we think a sentencing court should be engaged in here is to say, imagine there's a set of boxes on one side that correspond to the elements of the generic offense -- excuse me -- of the State offense, and then on the other side a set of boxes that correspond to the elements et of the generic offense.

And the exercise is to go through the Shepard materials and figure out what goes into those boxes or what went into those boxes on the State side to establish a basis for the previous conviction. And then you take whatever was put in those boxes, be it specific or general or whatever it is, and then see if those things give you enough to fill in the elements of the generic offense.

Now, in a case that we would call a missing element case, let's take, for example, because we're

talking about burglary, let's talk about criminal trespass. So criminal trespass let's assume is defined as the unlawful entry of a building or structure, period. And there's no provision that you have to have intent to commit a crime. Now, it doesn't matter what's in the Shepard materials for someone who pleads guilty to criminal trespass, because there's no way you're ever going to get something in one of those boxes about unlawful entry or structure that's going to let you fill in the generic box.

JUSTICE KAGAN: Let me give you a -- let me give you a different kind of example. Let's suppose you have a statute that's made it illegal to interfere with a law enforcement investigation. And you're prosecuting somebody, maybe the person is pleading, maybe he goes to trial; it doesn't matter. The theory of the case is that the defendant violated this statute, interference with a law enforcement investigation, by assaulting a police officer, okay? Is that a missing elements case or is that what you think is going on here, which is just -- it's just an overbroad statute?

MR. HORWICH: Well, we would need to know -- I guess I would need to know in your hypothetical what -- what we're trying to classify that conviction as, because --

JUSTICE KAGAN: The conviction is interference with a law enforcement investigation. That's the statute. But interference with a law enforcement investigation can be done in extremely -- it can be done in an extremely violent way, which would be an ACCA offense or not.

MR. HORWICH: Well --

JUSTICE KAGAN: And it's overbroad. There are ACCA offenses in it, but there are also non-ACCA offenses in it.

MR. HORWICH: Well, I'm sorry. I guess my -- my -- my concern is -- is that I would need to know what generic enumerated crime we're trying to fit that into, because although perhaps that could be classified under the residual clause --

JUSTICE KAGAN: Sure.

MR. HORWICH: Well, that might raise a -- I think that raises a different set of questions. I want to be clear that our argument here at this point is only that the Court should accept this for purposes of dealing with the enumerated -- with enumerated offenses.

JUSTICE KAGAN: Well, why would there be any difference between those two? Why would you take your argument differently from the residual clause than in the enumerated crimes?

MR. HORWICH: Well, I think because the way this Court's clause jurisprudence has evolved, it requires the Court to make some assessment of the degree of risk of some set of conduct that's not too much more serious than what the defendant engaged in, but not too much less serious and so I don't know what that reference point is. I mean, there's something of that, I think in -- in -- in Your Honor's disagreement with the majority in the Sykes case, I think of, trying to figure out what the right frame of reference to draw is.

So I think residual clause cases are a very difficult context in which to -- to talk about hypotheticals here, and for that reason, I -- I would -- I would -- I think it's more productive to try to assign them to burglary or one of the other generic offenses.

If I can give an example --

JUSTICE KAGAN: Okay. Well, let me -- let's talk about this case, then. I mean, I'm not sure I understand that quite. But let's talk about the burglary. Suppose that there was a State that just said entry. In other words, this State says unlawful entry and you say that's overbroad, but we're still in sort of the same universe of an element. Suppose the State just said entry. Would we be in a missing element world or in an overbroad world?

MR. HORWICH: If the State statute provided that all entries qualified, which is what I understand your hypothetical to be, then I think that probably amounts to a missing elements situation, because -- and I'm taking the Court's test from Shepard here. The question is what did the defendant necessarily admit in the plea colloquy. And there may be -- I want to be clear -- there may be any number of things that are in the Shepard materials that are noted in the plea colloquy, but if they are not offered as the legal basis for the defendant's conviction, then they don't make it into those boxes that I was talking about and they don't make it into being a basis for the generic offense.

JUSTICE SOTOMAYOR: But that's my problem, which is you say that, but how to define a missing element from an alternative element is -- overbroad element, doesn't make any sense to me. As I read the California statute, all it says is you have to enter a number of defined things with the intent to commit a crime. It doesn't talk about whether the entry itself is unlawful. That's your colleague's -- your opponent's argument. But you're trying to read into the method of entering that it could be legal or illegal, and so you look at the documents to add that.

MR. HORWICH: Well, I don't think -- no, I

don't think we're trying to add that. I agree that if -- if -- if, for example, the California Supreme Court's decision in Gauze had come out the other way and said, yep, it's your own home -- you know, so what. As long as you're entering, the statute literally says "entry," there's no -- there's nothing further we need to examine, then I agree this would be -- you could call it a missing element case.

But the problem with Petitioner's position about California law is that that's not California law. Petitioner says -- I wrote this down, any -- he says, "Any entry with intent to commit a crime will do." That is not true. You can enter your own house with the intent to commit a crime. That is not burglary in California. You can enter somebody else's house with the intent to commit a crime and that's not burglary if they know you intend to do that.

JUSTICE BREYER: True. But what they said in Gauze is that the entry must invade a possessory right in a building. And that cuts in your favor, because that's not having different ways of committing a crime, that's what the word in the statute means.

MR. HORWICH: Yes.

JUSTICE BREYER: Yes. So now you're ahead. But the difficulty I think is, as I understand it, that

invading a possessory interest includes -- includes going into a shop with an intent to steal something, a shoplifter. Now, you could go back to the Blackmun opinion and you can say, ah, that falls right within it, because generic burglary is defined in part there to include generic, an unprivileged remaining in the building. And you say, you see, these are the same.

Were it not for two facts. The first fact is in Shepard it seems as if the Court says shoplifting is not burglary. And then you look to the treatise that they cite for that, which is LaFave, and LaFave makes that even more clear. And says, no, when you talk about remaining, what we're thinking of is hiding in a bank and not going into what used to be Jordan Marsh and staying overnight, or not even staying overnight, but just putting a few toothbrushes in there.

MR. HORWICH: We certainly agree that --

JUSTICE BREYER: So that's where the problem is.

MR. HORWICH: We absolutely agree that -- that the shoplifting basis for California burglary does not correspond to generic burglary. But by the same token we also agree that the burglary of an automobile version of California burglary --

JUSTICE BREYER: Ah. But now, once you

conflate those you are back to Justice Sotomayor's problem.

MR. HORWICH: Well, I don't think we're back to -- I don't think we're back to -- I don't think we're back to any real problem here, because the -- the Court should not be seeking a rule here that turns on some idiosyncrasy of how State law is phrased or announced. The Court should be looking --

JUSTICE SOTOMAYOR: So how do you take that position and advocate the answer you're giving here? Because you are asking us to determine or to have courts below determine what are or are not definitions that the judiciary is applying to means versus mode, et cetera?

MR. HORWICH: Well, we're not asking the Court to draw any distinctions among those. I guess what -- what I'm saying is the government's test is -- is that in applying the modified categorical approach to a conviction entered upon a guilty plea, the Court should be looking at what the -- what the legal basis for the prior conviction was, which is, in the words of Shepard, "the matters" -- "the factual matters the defendant necessarily admitted." That's -- that's what Shepard says. And Shepard -- Shepard draws an analogy --

JUSTICE KAGAN: But this reading creates its

own idiosyncrasies. I mean, suppose the same plea colloquy had taken place and the prosecutor, instead of saying -- you know, the defendant broke and entered, he had said, the defendant unlawfully entered, right? Completely different result under your theory; isn't that right?

MR. HORWICH: Yes, it is a different result. But let me explain why that is -- that's not actually germane to the dispute that we're having here, because the prosecutor equally could have said, he broke and entered one of the places enumerated in the statute. And that too would have been vague and that wouldn't have allowed the sentencing court to classify it as generic burglary.

That -- the possibility that the Shepard records are insufficiently precise or they're too opaque or that they just don't exist because they've been lost is something that can frustrate the application of the modified categorical approach regardless of whether we are talking about cars versus --

JUSTICE KAGAN: I think it's -- I think it's a deeper problem than that, because the defendant is standing there and he doesn't care at all whether the prosecutor says unlawfully entered or broke and entered. It doesn't matter a whit to him. And so -- and so

something is -- is --

MR. HORWICH: But --

JUSTICE KAGAN: -- the difference between an enhanced sentence and not an enhanced sentence that is not likely to be thought about, let alone adjudicated.

MR. HORWICH: Well, by the same token, the defendant would not care a whit whether it really was a grocery store or it was a car, because those two would also cause him to be convicted of the same -- of the same burglary offense under California. But they would lead to different results for classifying the prior conviction. The point --

CHIEF JUSTICE ROBERTS: The point would expand -- this would expand the problem that you've identified, that the Shepard approach, the existence of the documents, how carefully they've been developed, it would expand that fortuity to a far greater number of cases.

MR. HORWICH: I guess I am not prepared to make a confident prediction about the relative number of cases. It certainly would be more cases, but I think that we would be expanding it that way in an effort to assure greater sentencing equity. It seems very strange to me that you could have had someone engage in exactly the conduct the Petitioner did, but in another State,

come into court, have exactly the same guilty plea colloquy, be convicted of that State's version of burglary, and then it does count, but it doesn't count in California. For some reason -- for a reason that it has --

CHIEF JUSTICE ROBERTS: The -- I'm not sure that it achieves greater sentencing equity when you have two defendants who have done exactly the same thing in California, and because of the fortuity of what the plea colloquy looked like in one case as opposed to another, when it really didn't matter one way or another in that situation, one person qualifies under ACCA and the other doesn't.

MR. HORWICH: That -- that --

CHIEF JUSTICE ROBERTS: And presumably I agree that you don't have -- you don't have empirical evidence. But given how -- it does seem to me that it's a broad expansion of the category of cases to which you would apply the modified categorical approach under your position.

MR. HORWICH: Well, in part I'm not -- well, in part I'm not even sure of that. If I can return to the experience of the courts of appeals in this and give some examples where the courts of appeals that might have preferred to stick to these rules about looking for

the word "or" in the statute or looking for separately numbered subsections and then they confront cases like the statutory rape example in our brief, where the State statute of conviction provides that the victim of a statutory rape has to be under the age of 18, but maybe the generic offense says that the victim has to be under the age of 16.

Now, that element of age isn't phrased in the disjunctive, but it seems very strange that if the defendant admits to his victim being under -- age 14, that we wouldn't recognize that.

Or you have the situation in the Seventh Circuit, that just about a year after it decides the Woods case in which --

JUSTICE SCALIA: It seems strange to me at all. He hasn't been convicted of raping or having intercourse with somebody under -- under 14 or under 15.

MR. HORWICH: Well, the question --

JUSTICE SCALIA: He's only been convicted of having that with someone under 18.

MR. HORWICH: Well, let's imagine for the moment that his case had been tried to a jury. Now, the instructions might have said, do you find that the victim is under the age 18 -- under the age of 18? But let's for the sake of argument say that the instructions

-- the instructions provided: Was the victim age -- do you find that the victim was age 14?

Those would be perfectly valid instructions, and if that was what the jury found then we would say in the Taylor sense that that was what the jury was actually required to find.

JUSTICE SCALIA: Not everything the jury finds constitutes a conviction. They have to find something that is an element of the charged offense.

MR. HORWICH: Well, the text --

JUSTICE SCALIA: If being -- being under 16 is not -- or 14, whatever it is, is not an element of the charged offense, I don't care what the jury finds.

MR. HORWICH: Well, with respect, Your Honor, the text of the statute in this part of it does not refer to elements. There is a part that refers to has as an element the use of force or that sort of thing. But here the relevant text of the statute asks the Court to determine does the defendant have a previous conviction for a crime that is burglary. Here the defendant has a previous conviction for breaking and entering a grocery store, that's the basis on which he was convicted, and breaking and entering a grocery store is generic burglary.

JUSTICE GINSBURG: But breaking and

entering -- in your brief as I understand it you are not relying on the prosecutor's charge that there was breaking and entering. You're relying entirely on the plea colloquy. And in this plea colloquy, the prosecutor said, he broke and entered a grocery store. He says nothing. In the typical Rule 11 setting, when the judge goes through the series of questions, the judge doesn't take the defendant's silence. The defendant has to positively affirm. And here we have a plea colloquy where the prosecutor says something and the defendant doesn't respond.

Why is that any kind of a necessary admission when he said nothing, which he might have done under the impression that it doesn't matter because he had the intent to commit a crime?

MR. HORWICH: Well, the -- the defendant's statement -- well, in the context of this plea, it is true that the words didn't come out of the defendant's mouth. Of course, at a proceeding like this one can fairly understand, as the Ninth Circuit has and other circuits do, understand that those factual bases are adopted by the Court precisely because the defendant does not say anything contrary to -- and of course --

JUSTICE GINSBURG: Why should it be different than in the Rule 11 colloquy? Why shouldn't

there be -- if -- if this is going to determine whether there's a crime qualifying under ACCA, why should it be enough that the prosecutor said something? Why shouldn't the defendant have to say, yes, I broke and entered the grocery store?

MR. HORWICH: Because we can treat -- because we can treat the proceeding in this colloquy as the defendant adopting that factual basis offered by the prosecutor, accepted by the court.

JUSTICE SCALIA: Qui tacet consentire videtur. Why don't you quote the maxim?

(Laughter.)

MR. HORWICH: Because your Latin is better than mine. But, I expect --

(Laughter.)

JUSTICE SCALIA: He who remains silent appears to consent.

MR. HORWICH: Yes. This is at the most -- this is -- this of course is at -- at one of the most important moments in the criminal process here. This is essentially the defendant confessing his guilt and accepting punishment from the court. So it -- it seems that it's fair to accept that when a basis is offered for his conviction -- and he is silent --

JUSTICE KAGAN: I guess it depends on

whether the basis has any relevance to the punishment he's going to receive, which in this case it doesn't, but put that aside.

Here's one thing that strikes me as odd about your position. You said before in response to a question -- you said if the California Supreme Court had not decided Gauze, then you would not be up here arguing what you're arguing.

MR. HORWICH: Well, at least if it was different, yes.

JUSTICE KAGAN: Yes, if there were -- if there were no unlawful entry that counted under California law --

MR. HORWICH: Yes.

JUSTICE KAGAN: -- but -- you know, the fact that there is a strange Gauze case which says that you can't burglarize your own home -- right -- the fact that the Court happens to come across that case and happens to decide -- it seems completely irrelevant as to this matter whether or not the California court once decided that you can't burglarize your own home. What does that have to do with anything in this case?

MR. HORWICH: Here's -- here's the relevance of it. It's because at common law, of course, there was a strict breaking requirement, and as this Court

recognized in Taylor, and in going back to the LaFave treatise in -- in Taylor, that requirement had over the years and into modern statutes been relaxed to include not only strict breakings, but also entries by fraud, entries by threat and so forth.

Gauze -- and the reasoning in Gauze explains that the California legislature's codification of burglary simply does that relaxation a little bit better, by adding essentially one more category of Gauze -- taken with subsequent decisions about shoplifting and such -- explains California just did that one better by adding another category, which is entries that exceed the implied consent to enter public places for lawful purposes.

So what you're left with here is, this case exists at the -- the common law core that both California and generic burglary retain, which is an entry by break -- an entry by breaking. And it is true that both generic burglary is dispensed with that requirement, in the sense that it allows other thing to qualify, and so, too, California has dispensed with that requirement, but it hasn't completely eliminated the relevance entirely of the lawfulness of the entry. There's still a question there. It's simply easier to satisfy it --

JUSTICE BREYER: Let me quickly ask you this then, you say look at Gauze for this reason, it makes clear that in these words of the California statute, there must be an interference with possessory interest. Now, I go back and read the Blackmun opinion, and it says the element of generic burglary includes an unprivileged entry or remaining into a building. You say now, between those two forms of words, there is virtually no difference.

MR. HORWICH: Yes.

JUSTICE BREYER: The one possible difference is shoplifting.

MR. HORWICH: Exactly.

JUSTICE BREYER: And as to shoplifting, here is what I would like to say. This is you, okay? Not me.

Shoplifting just is not a factor under California code section 459. Now, you have not added those last words; and therefore, I begin to think maybe it is a factor. And if it is a factor, then I'm afraid I'm then leaning in favor of saying there is a big difference in the California statute in generic burglary.

But if you could tell me, no, there are other shoplifting statutes, this is never or hardly ever

used for shoplifting, then maybe I would feel differently about it, and say, oh, it's close enough.

MR. HORWICH: Well, I can't --

JUSTICE BREYER: You see why I turn back to the empirical question and keep wondering, why is it not possible to get, say, a law professor; they have spare time -- get the sentencing committee, get someone to look and see what are the real behaviors that are convicted under section 459.

MR. HORWICH: I can --

JUSTICE SCALIA: And then advise defendants who -- who anticipate committing these crimes, so that they will know which crimes carry another 30 years.

(Laughter.)

JUSTICE BREYER: Well --

MR. HORWICH: Well -- Justice Breyer, I don't think I can give you a statistical survey. The only thing I can offer, and I offer it with some hesitation, is my conversations with California prosecutors suggest that they are, at least today, generally disinclined to charge shoplifting as burglary, because it's a lot easier, and effectively gets them the same result in those cases, to charge it as larceny. Now --

JUSTICE GINSBURG: Is that --

MR. HORWICH: -- but that's -- that's anecdotal, at best. I don't have anything better.

JUSTICE GINSBURG: -- to charge it as what? What's shoplifting?

MR. HORWICH: To charge it as larceny, because very often, it will be the completed shoplifting is very hard to prove they had the intent when they went into the store.

JUSTICE GINSBURG: But it -- but it does come under this section 459.

MR. HORWICH: It does, but it -- in exactly the same way that automobile burglaries come under this statute. The statute is broader as to the place burgled, it's broader as to the types -- types of unlawfulness of entry.

That's not a reason not to recognize that when the defendant, as Petitioner did here, says my crime was breaking and entering -- to recognize it as breaking and entering, which is all we think Shepard asks for.

And I want to be clear that you wouldn't go beyond that. We're not saying that a defendant who's pleading guilty to criminal trespass who says it was breaking and entering and I intended to go steal something in there, you can't then call that burglary,

because the additional admission to intent is not germane to the conviction for criminal trespass. So you can't use that and turn that into generic burglary.

That answers the hypothetical that was raised about someone who enters a plea bargain to possession of controlled substances instead of distribution. That -- that answers a great many of the parade of horribles that Petitioner is offering. And that's --

JUSTICE SOTOMAYOR: Could you tell me what the difference is between entering the garage with permission and taking a wrench and walking out, and entering a store with permission and taking an article of clothing. Are they both shoplifting?

MR. HORWICH: I -- if in your hypothetical the garage is a -- is not your own garage and you don't have the consent of the garage's owner to -- who knows that you're going to take the wrench, no, they are the same. Those are the same thing.

JUSTICE SOTOMAYOR: They are the same thing. So in answer to Justice Breyer's question, you do admit that under the California definition of burglary, shoplifting could be charged.

MR. HORWICH: Shoplifting could be charged, and someone could plead guilty to shoplifting, and that

wouldn't count. The problem here is that --

JUSTICE SOTOMAYOR: I think your adversary can speak for himself, and his brief did point to some convictions for shoplifting under the statute.

MR. HORWICH: Yes, we agree.

JUSTICE SOTOMAYOR: There are some.

MR. HORWICH: Absolutely. You can be convicted of shoplifting. We don't disagree with that. But what we're saying is that the approach that Taylor and Shepard suggests is one that focuses on what the defendant necessarily admitted in offering the legal basis for his conviction rather than on hypotheticals about other conduct he might have committed that would have resulted in the same conviction.

JUSTICE ALITO: What seems to me perhaps clearest about this case and others is that this modified categorical approach has turned out to be extremely complicated, and occasionally produces results that seem to make no sense whatsoever. Is this inevitable? Is this really what Congress intended, or did the Court create this problem by the way it has interpreted ACCA?

MR. HORWICH: If I may, briefly.

CHIEF JUSTICE ROBERTS: You can.

MR. HORWICH: My sense -- my sense is that

this problem is largely the product of lower courts trying to draw very fine formalized angels-on-the-head-of-a-pin distinctions about the statutes, rather than simply focusing on the conduct that was necessarily admitted. And if they would do that, I actually think this would go significantly more smoothly.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Johnson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DAN B. JOHNSON

ON BEHALF OF THE PETITIONER

MR. JOHNSON: Thank you, Mr. Chief Justice.

One thing I would like to point. There is a lot of discussion about shoplifting, as if that's one of the only problem areas we have. On page 9 of our reply memorandum, footnote 5 contains a number of examples of other -- California burglaries. And I don't -- it's page 9 of the reply memorandum, footnote 5.

California burglary, it's -- those examples are just a few examples how a burglary is consensual entry into homes. That is not an unprivileged entry, and it's not a trespass.

I think -- I think that -- limiting it to just saying that -- that shoplifting is the only problem we have, I don't believe that's the case.

JUSTICE SOTOMAYOR: Mr. Johnson, the last answer by Mr. Horwich to the last question was, it would be simpler if we hadn't done the modified categorical approach; but the reality is we have a statute. The active statute that defines violent felony not with respect to a felony that involved dangerous conduct, but as any crime punishable by imprisonment that has an element that threatened use of physical force. So it's not what the Court created, it's what the statute created.

MR. JOHNSON: I agree with that, and I think that -- I -- I don't think anything has changed in -- since -- in the last 22 years for the Court to step away from Taylor. In fact, I think the recent developments and constitutional law six memo rights to trials on factfinding.

JUSTICE ALITO: Well, does the offense of burglary have the element of using force or threatening to use of force?

MR. JOHNSON: I don't believe it does. I think the theory is that --

JUSTICE ALITO: So the element doesn't -- the element language doesn't apply to burglary.

MR. JOHNSON: I think it does.

JUSTICE SCALIA: Well, you don't have to

prove -- I mean, burglary is specifically named. It's not -- it's not the residual --

MR. JOHNSON: Clause.

JUSTICE SCALIA: It's not the residual. The -- the use or threatened use of force is the residual. If you're convicted of burglary, it doesn't matter whether -- whether you threaten force, right?

MR. JOHNSON: Well, again, I think if we get into the residual, it's going to require the evaluations the Court have done on that. But modified -- if you -- if you look --

JUSTICE SCALIA: Do you think only -- only those burglaries that -- that threaten force are covered by the statute? Certainly not. It's all burglaries, as long as you meet the generic definition of burglary, right?

MR. JOHNSON: I agree with that. Unless there's other questions, I'd yield the rest of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)