

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM DALE WOODEN, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 20-5279  
 )  
 UNITED STATES, )  
 )  
 Respondent. )  
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Pages: 1 through 78  
Place: Washington, D.C.  
Date: October 4, 2021

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WILLIAM DALE WOODEN, )

Petitioner, )

v. ) No. 20-5279

UNITED STATES, )

Respondent. )

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Washington, D.C.

Monday, October 4, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

ALLON KEDEM, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

ERICA L. ROSS, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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

2 (11:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 20-5279, Wooden versus  
5 United States.

6 Mr. Kedem.

7 ORAL ARGUMENT OF ALLON KEDEM

8 ON BEHALF OF THE PETITIONER

9 MR. KEDEM: Mr. Chief Justice, and may  
10 it please the Court:

11 As its name suggests, the Armed Career  
12 Criminal Act singles out the most intractable  
13 offenders for the harshest punishments by  
14 requiring three qualifying offenses "committed  
15 on occasions different from one another."

16 That phrase does not apply to  
17 defendants like Mr. Wooden, who commit their  
18 crimes in a single criminal episode.

19 Some courts have treated crimes as  
20 distinct occasions whenever they're committed  
21 sequentially rather than simultaneously. But  
22 the government does not defend that rule.

23 Instead, the government would ask  
24 whether the final element of each offense was  
25 satisfied at the same instant, creating a

1 simultaneity test on steroids. Even the  
2 robberies in Petty would flunk that test.

3 And the government would tack on yet  
4 another requirement, that crimes must be  
5 factually congruent or intertwined, as well as  
6 simultaneous.

7 Rather than adopt the government's  
8 untested hypertechnical approach, this Court  
9 should read the occasions clause as it would be  
10 understood in plain English. Mr. Wooden's  
11 mini-storage break-in was a single occasion  
12 involving ten burglaries.

13 I would welcome the Court's questions.

14 JUSTICE THOMAS: You seem to define  
15 the occasion as a distinct criminal opportunity.  
16 How would you -- how are we to analyze that?

17 MR. KEDEM: Sure. So I think the  
18 question is whether it's its own criminal  
19 episode, meaning that in order to show that  
20 there are different occasions, the government  
21 would have to establish some sort of  
22 discontinuity or clean break between them.

23 Now, for purposes of this case, it  
24 suffice -- it suffices to note that an occasion  
25 is not an instant. The fact that Samuel Petty

1 and his associates paused for moments in between  
2 grabbing the goods of their six different  
3 victims did not mean that the robbery in the  
4 diner was six occasions.

5 JUSTICE THOMAS: Well, how much time  
6 would have to pass or what would have to happen  
7 in -- in -- in -- to break the occasions up to  
8 satisfy you?

9 MR. KEDEM: Sure. So it's not solely  
10 a matter of time or even preliminary --  
11 primarily a matter of timing. Really, it's a  
12 qualitative assessment where, at a minimum, you  
13 know that if all you have is a continuous stream  
14 of criminal activity, as in Petty and as in this  
15 case, you know that you have the same occasion.

16 For instance, there was never a moment  
17 when Mr. Wooden and his associates were not  
18 committing burglary once they entered the  
19 structure until they left it, in the same way  
20 that there was never a moment that Samuel Petty  
21 and his associates were not committing robbery  
22 until --

23 JUSTICE THOMAS: Well, I mean --

24 MR. KEDEM: -- they left the diner.

25 JUSTICE THOMAS: -- but you're still

1 not getting to the point. What if they took a  
2 smoke break? What if they decided to have  
3 lunch? What if they said, look, it's time -- we  
4 -- we've got lots of time; we can go to  
5 Starbucks, grab a -- a -- a -- a -- a cup of  
6 coffee or something like that, actually, Dunkin'  
7 Donut and get a cup of coffee or something? I  
8 mean -- and they stay for an hour or two. Is  
9 that enough of a break?

10 I'm just trying to figure out what you  
11 think a break would be to -- to -- to break up  
12 the continuity.

13 MR. KEDEM: Sure. And -- and just to  
14 be clear, break is perhaps one way that you  
15 could have an intervening event. It's not the  
16 only one. I think the question is whether,  
17 taking into account -- account all the  
18 circumstances in the context, you have the sort  
19 of discontinuity where the underlying  
20 circumstances has changed.

21 And if you're talking about an  
22 activity, for instance, that lasts a matter of  
23 hours, a few seconds or minutes in between is  
24 almost never going to be described as a new  
25 occasion.

1 JUSTICE KAGAN: But, Mr. Kedem, you  
2 answered Justice Thomas first by saying it's not  
3 only or even primarily a matter of time, and  
4 then, within two sentences, you said the  
5 question is whether there's a continuous stream  
6 of activity, which does seem like it's a matter  
7 of time. So isn't it at least primarily a  
8 matter of time?

9 MR. KEDEM: No, Justice Kagan. And --  
10 and just to be clear, what I'm saying is that if  
11 it is a continuous stream of activity, then you  
12 know there's no discontinuity almost by  
13 definition. That is not to say that the thing  
14 you were looking for is whether it's continuous  
15 solely.

16 You could, for instance, be looking  
17 for an intervening event of a certain type to  
18 change the circumstances, an arrest, something  
19 like that. So timing does play a role, but it's  
20 not necessarily the prime -- primary role.

21 JUSTICE KAGAN: I think what Justice  
22 Thomas might have been responding to is just a  
23 feeling that this is a very loosey-goosey test,  
24 you know, that it's an all things considered,  
25 totality of the circumstances. We don't even



1 really quite know what we're supposed to look at  
2 to decide whether something is an occasion or,  
3 take your synonym, an episode.

4           And so, you know, what would your  
5 response to that be, that it's just -- you know,  
6 the words you use in your brief, "a juncture of  
7 circumstances providing conditions that are  
8 favorable for related activities or events," I  
9 mean, how are we supposed to know when that  
10 happens?

11           MR. KEDEM: So, admittedly, it is a  
12 qualitative standard. I do think that the  
13 statute actually calls for a qualitative  
14 standard textually, and that's from the phrase  
15 "different from one another," which is just not  
16 a phrase you ever use to refer to things that  
17 are discrete, like times of day.

18           For instance, you would never say last  
19 month I drove into work on 20 days different  
20 from one another because all days are inherently  
21 distinct. You would just say on 20 days.

22           When you say "different from one  
23 another," you're referring to something that may  
24 or may not overlap in a qualitative sense like  
25 circumstances.

1                   To your question how do you figure it  
2 out, admittedly, it is going to be  
3 context-specific, which means that you're not  
4 going to be able to necessarily come up with the  
5 all-inclusive test that is going to resolve  
6 every case.

7                   I think it's notable, though, that the  
8 courts of appeals that apply a  
9 circumstance-based approach have come to  
10 relatively consistent results. The government  
11 doesn't identify any two cases on similar facts  
12 that come to different answers to the question.

13                   JUSTICE ALITO: This seems to me to be  
14 a nearly impossible question of statutory  
15 interpretation because the term "occasion" does  
16 not have a very precise meaning. It does seem  
17 to refer to events at -- that occur at different  
18 points in time. That, I think, has to be a  
19 minimum requirement. If three crimes are  
20 committed simultaneously, a bomb goes off and  
21 kills three people, that's one occasion, even  
22 though there are three murders.

23                   But, beyond that, I find it very  
24 difficult to determine what additional meaning  
25 the term has. And I don't fault you for your

1 efforts, but they leave me scratching my head.  
2 I don't know what they mean. You used the term  
3 "criminal opportunity." I have no idea what a  
4 "criminal opportunity" is.

5 I mean, let me give you some examples.  
6 A street light goes out, and a mugger says:  
7 Aha, this is a criminal opportunity, I can now  
8 mug people who walk by here at night. And he --  
9 and that person does that at 10:00 at night,  
10 11:00 at night, midnight. Is that one criminal  
11 opportunity or three?

12 MR. KEDEM: That sounds to me like the  
13 same episode and opportunity.

14 JUSTICE ALITO: Why? Why is it --

15 MR. KEDEM: The mugger is essentially  
16 --

17 JUSTICE ALITO: -- why is it the same  
18 episode and opportunity?

19 MR. KEDEM: So just taking the facts  
20 as you've stated them, I don't think that the  
21 government would be able to show, for instance,  
22 that the mugger wasn't just exploiting the  
23 opportunity to mug whoever was walking by.

24 JUSTICE ALITO: What --

25 MR. KEDEM: And --

1 JUSTICE ALITO: -- what if the mugger  
2 did it on Monday, Wednesday, and Friday?

3 MR. KEDEM: So -- so that really does  
4 sound like it's a different episode. You're  
5 talking about an activity that at last -- at  
6 most lasts a few minutes, separated by --

7 JUSTICE ALITO: What if it's Monday,  
8 Tuesday, and Wednesday?

9 MR. KEDEM: That still sounds like  
10 different episodes to me, not knowing anything  
11 additional about the case.

12 But, Justice Alito, you know, I think  
13 may I respectfully suggest that because this is  
14 the Court's first attempt to construe the  
15 occasions clause that you don't need to go too  
16 much further than to say in a case that is  
17 indistinguishable in all relevant respects from  
18 Petty, the one thing that we know that Congress  
19 was trying to ensure in such a case, you know  
20 that it's the same episode.

21 JUSTICE ALITO: Well, Petty -- Petty  
22 is the root of the problem -- or Congress's --  
23 the Solicitor General's confession of error in  
24 Petty, and then Congress's response is the --  
25 the root of the problem.

1                   Let me give you another example. A  
2 person goes for a job interview and is  
3 interviewed sequentially by three people, and  
4 later the applicant, after being denied  
5 employment, sues for disability discrimination  
6 and is questioned, and -- and the questioning  
7 goes like this: You were interviewed by three  
8 people, A, B, and C. On which occasion were you  
9 asked whether you had a disability?

10                   Would that be an improper use of -- of  
11 the English language?

12                   MR. KEDEM: No, because the way that  
13 you have phrased it, it's clear that you're just  
14 asking which of the three.

15                   Now let's put this in the words that  
16 the statute uses. So, if you were to say, you  
17 were interviewed three times, was that on the  
18 same occasion or on occasions different from one  
19 another? Assuming that it was the same inquiry,  
20 you would say that was the same occasion. And  
21 that's essentially what we're dealing with in  
22 this case.

23                   JUSTICE ALITO: I -- I -- I think that  
24 hits it on the head. So it depends on the  
25 purpose that the person has in mind in using the

1 term?

2 MR. KEDEM: So I would say that it  
3 depends on the precise phrasing that you use,  
4 and the phrase "different from one another," I  
5 think, hints at something that either may or may  
6 not overlap qualitatively.

7 Can I give you just another textual  
8 argument as to why I think we're looking for a  
9 qualitative standard here? And that's the fact  
10 that the same statute that enacted the Armed  
11 Career Criminal Act also created the Sentencing  
12 Commission and charged it with responsibility to  
13 identify guidelines for offenders who deserve  
14 higher sentences because they committed more  
15 than one crime "on different occasions."

16 And from the very first set of  
17 guidelines, the Sentencing Commission has always  
18 chosen a qualitative approach relying on things  
19 like intervening arrests, and --

20 JUSTICE ALITO: Well, qualitative  
21 what? What ultimately are we looking for? I  
22 think to say we're going to look at the -- the  
23 totality of the circumstances is meaningless  
24 unless we know what we are looking for in these  
25 totality of the circumstances.

1                   So what are we looking for?

2                   MR. KEDEM: So I think, to look for  
3 the same or different episode, you are looking  
4 for a discontinuity or clean break, and it's  
5 obviously the government's burden to establish  
6 that. And the context will tell you a little  
7 bit about what considerations are relevant.

8                   JUSTICE ALITO: Well, let me just ask  
9 one more question and -- and I'll stop. When  
10 you say a "clean break," why is a -- why is a  
11 clean break the -- the key?

12                   MR. KEDEM: I think the phrase  
13 "different from one another," it's a peculiar --

14                   JUSTICE ALITO: And what does it mean?  
15 What -- what is a "clean break"? How long does  
16 it have to last?

17                   MR. KEDEM: So, again, it's not solely  
18 a matter of timing or even necessarily  
19 primarily. I think it can depend on the  
20 circumstances. Someone who is arrested and then  
21 goes back out and commits a crime even 20  
22 minutes later, that is a clean break. That  
23 person has been incapacitated. There's the  
24 formal involvement of law enforcement.

25                   But that is very -- just a world away

1 from the vast majority of cases. And take, for  
2 instance, Mr. Wooden's '97 mini-storage break-in  
3 and his 2005 burglary. That is the typical way  
4 that this arise -- arises, where there's  
5 essentially no argument that there is a  
6 continuity between the two.

7 JUSTICE KAGAN: Is overnight always a  
8 clean break?

9 MR. KEDEM: So the courts of appeals  
10 -- so, candidly, the courts of appeals that  
11 apply a circumstance-based approach have said  
12 essentially that if there's a day's separation  
13 -- I don't know about overnight -- but a day's  
14 separation, they have generally treated that as  
15 enough of a -- of a clean break.

16 Now --

17 JUSTICE BARRETT: Go ahead.

18 MR. KEDEM: I was going to say I -- I  
19 don't want to necessarily endorse that, but that  
20 is the way that they've handled it.

21 JUSTICE BARRETT: So my question is  
22 this qualitative assessment is necessarily  
23 fact-laden, and that provokes a Sixth Amendment  
24 problem. So how should we think about the Sixth  
25 Amendment problem in interpreting the occasions



1 language?

2 MR. KEDEM: So any concerns under the  
3 Sixth Amendment come from a feature of the case  
4 that I think is common ground between us and the  
5 government, which is the fact that we're dealing  
6 here not with some hypothetical or generalized  
7 crime but the way that the defendant's crime  
8 actually unfolded.

9 And even on the government's test and  
10 certainly under the test applied by the courts  
11 of appeals, you're going to need to know things  
12 like what day, what time of day, who was  
13 involved, how did the crime unfold, was it in  
14 the same place or different places.

15 And, you know, our amici, I think, do  
16 a good job pointing out why this is in serious  
17 tension at -- at a minimum with the Court's  
18 Sixth Amendment jurisprudence.

19 We don't have a Sixth Amendment claim.  
20 And because Mr. Wooden's case is so clearly  
21 outside the scope of the statute, I would  
22 respectfully suggest that it's not necessary for  
23 the Court to get into that.

24 CHIEF JUSTICE ROBERTS: Counsel, going  
25 back to Justice Alito's hypothetical about the

1 street light, if I understood your answer right,  
2 you're saying, if the street light goes out and  
3 the individual thinks this is a great  
4 opportunity to mug people and he lies there and  
5 mugs person after person, you -- you call that  
6 one occasion, right?

7 MR. KEDEM: That's correct.

8 CHIEF JUSTICE ROBERTS: Okay. What if  
9 what makes it dark is that it's a moonless  
10 night? He says, the moon is not out tonight,  
11 it's dark, I can mug person after person. One  
12 occasion or multiple occasions?

13 MR. KEDEM: I'm sorry, you're saying  
14 on one evening?

15 CHIEF JUSTICE ROBERTS: Yeah, it's one  
16 evening, and his -- and he has an opportunity  
17 because the moon is -- is not out.

18 MR. KEDEM: That sounds like one  
19 occasion to me as well.

20 CHIEF JUSTICE ROBERTS: Uh-huh.

21 JUSTICE BARRETT: Counsel, I would --

22 JUSTICE GORSUCH: The --

23 JUSTICE BARRETT: Oh. Go ahead.

24 MR. KEDEM: And one -- I'm sorry.

25 JUSTICE BARRETT: Go ahead.

1           MR. KEDEM: One notable feature of  
2 this case which also makes it very like Petty is  
3 it's not just that the crimes were continuous.  
4 It's that the same activity went to all of the  
5 crimes. There was a single entry point into the  
6 mini-storage facility here in the same way that  
7 there was a single application of force in  
8 Petty, and I think that's another case where  
9 it's very clear that what you're dealing with is  
10 a single occasion.

11           JUSTICE BARRETT: I want to --

12           JUSTICE KAGAN: So suppose --

13           JUSTICE BARRETT: I want to resist the  
14 proposition that "occasion" is used to mean  
15 opportunity here. When "occasion" means  
16 opportunity, it's I had no occasion to consider  
17 that question. I think "occasion" in this  
18 statute gets closer to something else you've  
19 said, which is more like event, like a wedding  
20 was an occasion, that was a lovely occasion.

21           But I think it's difficult -- let's  
22 say it is a jury question -- to figure out how  
23 the jury instructions are worded to let the jury  
24 know when one -- when this event begins and when  
25 it ends because, if I talk about a wedding, if I

1 talk about an anniversary dinner, I mean, it --  
2 it's -- it's obvious because it's united by a  
3 particular purpose.

4 In the context of criminal activity,  
5 it's not so clear.

6 MR. KEDEM: So, admittedly, it's not  
7 always clear, but let me read to you an analogy  
8 in the RICO context because it's actually not  
9 that unusual to have this sort of relatedness  
10 standard in the criminal law.

11 So, under RICO, you need to point to a  
12 pattern of related criminal activity. And this  
13 Court has pointed among other things to  
14 "criminal acts that have the same or similar  
15 purposes, results, participants, victims, or  
16 methods of commission or otherwise are  
17 interrelated by distinguishing characteristics  
18 and are not isolated events."

19 Now, admittedly, that's not identical  
20 necessarily to what you would be talking about  
21 in the ACCA context, but it's qualitative and  
22 multifaceted in the same way.

23 Other states actually also have  
24 recidivist statutes where they charge juries  
25 with determining whether crimes were committed

1 on the same occasion, and they use pretty  
2 similar language. Arizona, for instance, has  
3 one of those.

4 JUSTICE KAGAN: Suppose that there was  
5 a -- a -- a -- a -- a crime boss and he was a  
6 good multitasking crime boss, and he had a few  
7 phones in front of him, he's sitting in his  
8 office one day, and on one phone he's arranging  
9 a sale of illegal drugs and on another phone  
10 he's ordering the killing of a -- a competing  
11 crime boss and on another phone he's involved in  
12 an illegal gambling operation, and they're all  
13 going on very close in time to each other.

14 Single occasion or three occasions?

15 MR. KEDEM: So I would say that that's  
16 a single occasion, but I can understand how if  
17 you decided that the thing that was important  
18 was that the crimes had essentially no  
19 relationship whatsoever to one another?

20 JUSTICE KAGAN: Yes. I mean, that's  
21 the -- supposed to be --

22 MR. KEDEM: Sure. Yeah.

23 -- JUSTICE KAGAN: -- the crimes have  
24 no relationship to each other.

25 MR. KEDEM: So -- so -- so I -- I

1 would grant you that a lot of people, I think,  
2 would look at that and say those are three  
3 different occasions. And that actually gets to  
4 a feature of the government's test that is a  
5 little bit underdescribed but I think  
6 problematic along the same dimension.

7 JUSTICE KAGAN: Well, before you do  
8 that --

9 MR. KEDEM: Sure.

10 JUSTICE KAGAN: -- I mean, isn't that  
11 to say then, I mean, your -- it -- it -- that  
12 what you are really saying, your test, is that  
13 there is this very important timing aspect,  
14 which is that a substantial break in time  
15 between offenses is pretty nearly dispositive,  
16 but when the offenses are close in time, then  
17 you have this more qualitative inquiry where  
18 you're looking at the nature of the crimes and  
19 who the victims are and, you know, things like  
20 that?

21 MR. KEDEM: So I think you could  
22 describe the test that way. I suppose I  
23 wouldn't put such emphasis on timing. I do  
24 think that in most cases, because offenses will  
25 be separated by years, like Mr. Wooden's 2005

1 burglary, that will probably be sufficient for  
2 the vast majority of cases.

3 I think, for this case, it suffices to  
4 say that the phrase "occasion" doesn't solely  
5 refer to things that overlap temporally and  
6 certainly doesn't refer solely to the instant at  
7 which the final offense element is satisfied,  
8 and that's really all you need to know in order  
9 to decide this case.

10 JUSTICE ALITO: What -- what would the  
11 -- the result be -- what would the result be in  
12 this case if the following happened? They --  
13 they -- Mr. Wooden breaks into the first unit  
14 and steals goods inside, breaks into the second  
15 unit and not only steals goods but then sets the  
16 unit on fire, and then, while breaking into the  
17 third unit, the owner shows up and Mr. Wooden  
18 kills him. Are -- are those -- is that one  
19 episode, one criminal opportunity, one occasion?

20 MR. KEDEM: That -- that would be one  
21 very serious criminal episode. And I think it's  
22 important to emphasize that the occasions  
23 question is not a question about how serious the  
24 offenses are. By hypothesis, all of these are  
25 violent felonies or serious drug offenses. And

1 you could have the most horrific crime that  
2 because it all happened at once, like a bombing,  
3 it is only a single occasion. But -- but --

4 JUSTICE ALITO: No, I understand that,  
5 but I think you were saying a few minutes ago  
6 that it matters whether the offenses -- the  
7 example of the crime boss, it matters whether  
8 the offenses are different -- whether they are  
9 separate -- different offenses or whether it's  
10 three offenses of the same kind.

11 MR. KEDEM: So I think that's correct,  
12 but, as I understood your hypothetical, you were  
13 talking about a situation where someone was  
14 essentially just going from room to room and  
15 committing additional crimes as they appeared to  
16 the person based on the fact that this was  
17 flowing from one to another. In other words,  
18 each crime was essentially facilitating the  
19 others, which is another feature both of this  
20 case and the Petty case.

21 JUSTICE SOTOMAYOR: Counsel, Justice  
22 Alito pointed to this earlier because, even in  
23 his example of simultaneous, I'm not even sure  
24 what that means because, if you have someone who  
25 throws a bomb and kills three people, you could



1 say that's simultaneous. But how about if  
2 they're in the room, throw a small bomb, kills  
3 three people, and then robs them?

4 MR. KEDEM: Right.

5 JUSTICE SOTOMAYOR: All right?

6 MR. KEDEM: And --

7 JUSTICE SOTOMAYOR: So I have a  
8 question. Have you given -- no one's actually  
9 addressed this at all or alluded to it. Is this  
10 so vague and so incapable of rational  
11 application? Because even the government's  
12 proposed test suffers from its own set of  
13 vagueness, what happens when things overlap,  
14 okay, and how do you determine when the last  
15 element was committed because a kidnapping lasts  
16 until someone flees. So does that mean if you  
17 kidnap someone and rape them and do all these  
18 other things, is that one episode or not? I  
19 think they would say not, but I'm not sure why.

20 MR. KEDEM: Yeah.

21 JUSTICE SOTOMAYOR: But having said  
22 that, is there any answer to my vagueness point?

23 MR. KEDEM: So I don't think the  
24 Court, certainly, at this juncture, having  
25 confronted this issue for the first time, should

1 be prepared to decide that it's vague. We  
2 haven't made an argument -- the government  
3 doesn't even make a constitutional avoidance  
4 argument.

5 I think what led the Court to decide  
6 that the residual clause of the ACCA was vague  
7 was largely the fact that you were trying to  
8 hypothesize a sort of generic version of a crime  
9 that just didn't exist. Here, we're dealing  
10 with a specific defendant's conduct.

11 Just to return to Petty for a moment,  
12 I think it's key for a couple reasons, one of  
13 which is the fact -- and not to put too fine a  
14 point on it, but the one thing we all agree that  
15 Congress was trying to do by enacting the  
16 occasions clause was to make sure that Samuel  
17 Petty and people like him would not be career  
18 criminals. And under the government's test,  
19 Samuel Petty would be a career criminal.

20 But I think the Solicitor General's  
21 confession of error contained an argument there  
22 that was inconsistent not just with the  
23 government's simultaneity test on steroids but  
24 even with the sort of more overlapping sense  
25 that the courts of appeals have been applying,

1 because the Solicitor General in that case  
2 pointed to state cases that rejected  
3 enhancements in situations no different from  
4 this one, including the Tavares case, which  
5 involved two burglaries on the same day.

6 There is no way that the Solicitor  
7 General would have pointed to those cases as a  
8 proper application of retrib- -- a proper  
9 application of enhancement statutes if the  
10 Solicitor General believed that the only thing  
11 that mattered was whether they overlapped.

12 JUSTICE BREYER: Did you get anywhere  
13 with episodes?

14 MR. KEDEM: Pardon?

15 JUSTICE BREYER: Did you get anywhere  
16 with episodes? I mean, suppose we tried to work  
17 with that.

18 MR. KEDEM: I think "episode" is a  
19 really intuitive way to put it. It's in our  
20 question presented. We use the phrase dozens of  
21 times in our briefs. I think, put in that term,  
22 it's even clearer that the mini-storage break-in  
23 was a single episode for the same reason that  
24 the diner robbery was.

25 JUSTICE BREYER: So, in -- in your

1 view, are we better off, assuming you win this  
2 case, just saying, look, they were the same  
3 episodes, it was one episode, it's like Jesse  
4 James robbing a single train, okay, and using  
5 words like that or "same occasion" --

6 MR. KEDEM: Yeah, I think --

7 JUSTICE BREYER: -- and not try to go  
8 further, or would it be better to try to go  
9 further and talk about the time and the  
10 simultaneous event and so forth?

11 MR. KEDEM: So I think it would be  
12 certainly appropriate to say what you're looking  
13 for is a single episode, and you're not focusing  
14 on whether crimes are simultaneous or  
15 overlapping and certainly not whether the final  
16 offense element is satisfied at the same moment.

17 And I don't think you need to go any  
18 further and just apply that to the obvious facts  
19 on this case and say this was a continuous  
20 stream of criminal activity, the same acts were  
21 making up various offenses, it's just like  
22 Petty, it's the same episode.

23 CHIEF JUSTICE ROBERTS: I want to go  
24 back to the dark night. You -- the -- the moon  
25 is not out and anything the guy does that night

1 is one episode?

2 MR. KEDEM: So I don't think  
3 necessarily. I think you could --

4 CHIEF JUSTICE ROBERTS: Well, anything  
5 he does outside, I guess.

6 MR. KEDEM: So knowing nothing else  
7 other than what you've said, I -- I don't think  
8 the government would have sustained its burden  
9 if all it can say is there were various  
10 activities outside at night on a moonless night.  
11 I think the government would have to point to  
12 some other discontinuity in addition to that.

13 CHIEF JUSTICE ROBERTS: So that  
14 qualifies the fact, I guess, how many -- what do  
15 you have, two moonless nights a month or what?  
16 That would be a juncture of circumstances giving  
17 rise to an opportunity?

18 MR. KEDEM: You know, it really  
19 depends on whether the crime was, in fact,  
20 facilitated by that moonless night or at least,  
21 you know --

22 CHIEF JUSTICE ROBERTS: It's -- it's  
23 -- it's --

24 MR. KEDEM: -- that is an element of  
25 the crime.

1 CHIEF JUSTICE ROBERTS: -- it's dark.  
2 Everything is outside. And he --

3 MR. KEDEM: Right.

4 CHIEF JUSTICE ROBERTS: -- you know,  
5 mugs somebody, you know, robs somebody else,  
6 right? Everything that's easier to get away  
7 with --

8 MR. KEDEM: Yeah.

9 CHIEF JUSTICE ROBERTS: -- in a dark  
10 night than during the day.

11 MR. KEDEM: So, to me, that seems like  
12 a single episode and a single juncture of  
13 circumstances. You don't have to agree with me  
14 --

15 CHIEF JUSTICE ROBERTS: What are the  
16 circumstances?

17 MR. KEDEM: Sure. So, I mean, it  
18 sounds like you are positing crimes that are  
19 facilitated by -- both by being outside and  
20 being outside on a moonless night. And --

21 CHIEF JUSTICE ROBERTS: So those are  
22 two -- the two, outside, moonless night?

23 MR. KEDEM: And -- and from what I  
24 took from your hypothetical, again, just going  
25 on what you've given me, is that the criminal is

1 lying in wait for whoever walks by. But, you  
2 know, again, you might posit additional facts  
3 that might change the circumstances.

4 This case, though, is the molten core  
5 of a single episode, and we would urge the Court  
6 to decide at least that much.

7 JUSTICE ALITO: What is the definition  
8 of an "episode"?

9 MR. KEDEM: So "episode" is related  
10 activities or events that are separated from  
11 others by a discontinuity or clean break.

12 JUSTICE KAGAN: What's the molten core  
13 of an episode?

14 (Laughter.)

15 MR. KEDEM: So the molten core of an  
16 episode, Justice Kagan, involves continuous  
17 criminal activity where literally the same acts  
18 are being used in furtherance of multiple  
19 crimes.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Thomas?

22 JUSTICE THOMAS: You criticize the  
23 government's test as being incompatible with the  
24 categorical test. How does -- how is yours  
25 compatible? And how would you use it?

1           MR. KEDEM: So I don't think the  
2 categorical approach applies to the occasions  
3 clause because you have to look not at some  
4 generic version of a crime but the way that the  
5 defendant actually committed their offense.

6           What we were -- if I can just add one  
7 more point?

8           JUSTICE THOMAS: Yeah.

9           MR. KEDEM: What we were arguing is  
10 that the government's test cannot be applied  
11 based solely on elements as far as we can tell  
12 to any crime. That's what we were arguing.

13           JUSTICE THOMAS: How would that work  
14 in one of these cases practically? Would they  
15 have to -- would -- would we have to have a  
16 separate hearing?

17           MR. KEDEM: So my understanding, if  
18 you're asking about the way things currently  
19 work --

20           JUSTICE THOMAS: Yes.

21           MR. KEDEM: -- is that sentencing  
22 judges do this -- sometimes there might be a  
23 hearing, but, in general, they do it as they do  
24 regular ACCA sentencing.

25           JUSTICE THOMAS: So you risk -- do you



1 risk running into a Sixth Amendment problem?

2 MR. KEDEM: As I understand this  
3 Court's Sixth Amendment jurisprudence, I think  
4 there is a concern, but it's not at -- directly  
5 at issue in this case.

6 JUSTICE THOMAS: That'll be your next  
7 case?

8 MR. KEDEM: I hope so.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Justice  
11 Breyer?

12 Justice Alito? No?

13 JUSTICE BREYER: Well, I do have,  
14 actually. I mean, the thing that's puzzled me  
15 in this is, see, it sort of works backwards in  
16 some instances. Imagine the drug lord that  
17 Justice Kagan was talking about or the  
18 equivalent, and he gets a plan that every third  
19 day he will sell drugs, and it's a unified plan  
20 of great complexity involving delivery and where  
21 you go and the car and all that kind of stuff,  
22 and he writes it all down on a single piece of  
23 paper. Now there we have what seems like a  
24 single plan.

25 But the assistant, all he gets are, on

1 Tuesday, go here and pick up the drugs, and on  
2 Thursday, you go here and pick up some others  
3 and so forth. So it looks like he's done a  
4 bunch of things.

5 So the worse guy gets the better  
6 sentencing treatment, and the better guy, a  
7 little better, gets the worse sentencing  
8 treatment. Hmm. But maybe that's what you say  
9 because you say this part of the sentencing law  
10 isn't concerned with that kind of worse or  
11 better?

12 MR. KEDEM: I --

13 JUSTICE BREYER: I'm just saying  
14 what's going around in my mind.

15 MR. KEDEM: Sure. I -- I -- I think  
16 you could say that, or you could say that each  
17 criminal associate is responsible for the  
18 behavior of the others. And so it doesn't  
19 really draw a distinction along those lines.

20 JUSTICE BREYER: No. All right.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Gorsuch?

23 JUSTICE GORSUCH: I do have a couple  
24 questions. Thanks, Chief.

25 So the dark and moonless night

1 hypotheticals are hard.

2 MR. KEDEM: They are.

3 JUSTICE GORSUCH: And you've -- you've  
4 done your best with your totality of  
5 circumstances, but -- but often I -- I think, if  
6 we're candid, we probably would all admit that  
7 it's going to run out at some point and -- and  
8 there's going to be some close cases beyond the  
9 molten core.

10 What role does lenity have to play in  
11 those circumstances in your view? Why should  
12 the tie go to one side or the other?

13 MR. KEDEM: So I -- I candidly  
14 acknowledge that members of this Court have  
15 different attitudes towards the role that  
16 lenity -- lenity should play. I think, at a  
17 minimum, it should incline you to choose a plain  
18 meaning over a hypertechnical meaning and  
19 especially so in a case involving mandatory  
20 minimums of 15 years to life.

21 JUSTICE GORSUCH: That's my -- that --  
22 that's my second -- so we have lenity as a  
23 tie-breaking rule. Does it have particular  
24 purchase in a case, for example, here, where  
25 mandatory minimums are sometimes invoked by the

1 government, in this case, it wasn't initially  
2 and then --

3 MR. KEDEM: I -- I -- I --

4 JUSTICE GORSUCH: -- and then later  
5 are or can be as a matter of policy? Does that  
6 raise, you know, fair notice, separation of  
7 powers concerns --

8 MR. KEDEM: I -- I agree --

9 JUSTICE GORSUCH: -- in your mind?

10 MR. KEDEM: I agree with all of that.  
11 And, you know, Justice Breyer has written and we  
12 quote from an opinion of his pointing out that  
13 when you're dealing with a mandatory minimum,  
14 you're dealing with a situation where, no matter  
15 what, the judge just has no ability to account  
16 for the circumstances.

17 And I think lenity should incline you  
18 against that sort of punishment, whereas there's  
19 a sort of asymmetry for a zero to ten, you know,  
20 an up-to-ten maximum sentence where the judge  
21 can take those things into account.

22 JUSTICE GORSUCH: Now does that have  
23 some relationship in your mind to the Major  
24 Questions Doctrine?

25 MR. KEDEM: I feel like this is a

1 law -- law school exam. You know, I think -- I  
2 think it -- we should be extraordinarily  
3 reluctant to think that Congress has decided to  
4 make so much time of -- of a person's life turn  
5 on something that is so hypertechnical or such  
6 small distinctions like small moments in time  
7 and -- and the distinctions between offenses.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Kavanaugh?

11 JUSTICE KAVANAUGH: No further  
12 questions.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Barrett?

15 JUSTICE BARRETT: No.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Ms. Ross?

19 ORAL ARGUMENT OF ERICA L. ROSS

20 ON BEHALF OF THE RESPONDENT

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

23 Contrary to Petitioner's suggestion,  
24 the government's rule is faithful to the text  
25 and it does not depend on synchronicity between

1 the final elements of different crimes.

2 Rather, two crimes are committed on  
3 occasions different from one another when their  
4 essential conduct elements are satisfied by  
5 different acts. That reflects the statute's  
6 text.

7 If the same act satisfies an element  
8 of two different crimes, then the commission of  
9 each offense is not a different occasion, that  
10 is, a different event, occurrence, or happening.

11 The government's test also furthers  
12 the statute's purpose because it separates  
13 defendants who have been held criminally  
14 responsible for multiple discrete acts from  
15 those who have been held responsible for a  
16 single act that resulted in several statutory  
17 violations.

18 Now I agree with my friend that in the  
19 vast majority of cases we can apply -- we can  
20 decide this question pretty easily. On our  
21 test, they can be resolved by a simple rule of  
22 thumb. If one offense is over before the next  
23 begins, then the two are committed on different  
24 occasions because their essential elements are  
25 necessarily accomplished through different acts.

1                   Two examples illustrate the point.  
2       First, if a defendant burglarizes ten houses on  
3       the same street, those are necessarily ten  
4       different occasions. He could not have  
5       unlawfully entered each home through one act,  
6       and he had the choice not to commit another  
7       crime between each one.

8                   Second, if a defendant robs ten people  
9       in one place with the same stick-up, as in  
10       Petty, that one act marks only one occasion.

11                   As I think has become clear this  
12       morning, Petitioner's freewheeling approach  
13       would be much more difficult to apply. He would  
14       require courts to seek to identify the juncture  
15       of circumstances that gave rise to the relevant  
16       criminal opportunity.

17                   But none of that language is in the  
18       text, and Petitioner's rule would require courts  
19       to examine granular facts that state court  
20       records often will not include.

21                   Petitioner's approach also would yield  
22       inconsistent results. Different judges will  
23       have different intuitions about what -- when one  
24       occasion ends and another begins.

25                   This Court should reject Petitioner's

1 invitation to uncertainty and inconsistency and  
2 affirm.

3 JUSTICE THOMAS: Ms. Ross, is there  
4 any way using either your test or Petitioner's  
5 test to avoid fact-finding that seems to run the  
6 risk of involving us with the Sixth Amendment?

7 MS. ROSS: Yes, Your Honor. I think  
8 that our test does avoid that, and I would  
9 appreciate the opportunity to explain why.

10 In this case, all you need to know is  
11 the elements of Petitioner's offense. There  
12 were ten burglaries. Burglary necessarily  
13 requires an unlawful entry or remaining in of a  
14 structure. If Petitioner had said, in fact,  
15 these were all one burglary, the Court would be  
16 able to look at the indictment and say, you  
17 know, yes or no based on are they different  
18 structures or, if it's one structure, are they  
19 different times?

20 So it's the same types of facts that  
21 we think, first of all, are inherent in this  
22 crime in the elements of burglary but also that  
23 courts could look at in a double jeopardy  
24 context, and I think no one thinks that that  
25 raises a Sixth Amendment issue.



1           I think, you know, burglary is perhaps  
2 the easy case because you do need this unlawful  
3 entry of separate structures, but I think the  
4 vast majority of these cases come up in the  
5 robbery or the burglary context. And if you  
6 look at robbery, for example, again, you might  
7 have a case like Petty where there are six  
8 victims in one place and you don't know from the  
9 face of the indictment or -- or the other  
10 Shepard documents whether the -- the -- the act  
11 was actually two -- two separate robberies  
12 where, you know, the gun was pointed at one  
13 person, then the gun was pointed at the other.

14           If that's the case, we're just going  
15 to lose that case on the face of the Shepard  
16 documents. So I don't think you're getting into  
17 the facts.

18           I think, by contrast, if the  
19 indictment says, you know, there were two  
20 robberies on June 20, we have Jones and we have  
21 Smith, but it also says Jones was at, you know,  
22 1030 Northern Boulevard and Smith was at 1050  
23 Northern Boulevard, we're going to know that  
24 those were two separate occasions. And, again,  
25 that's the kind of fact that I think judges can

1     rely on without contravening the Sixth  
2     Amendment.  It's the kind of fact, for example,  
3     that if it had changed between the indictment  
4     and the -- the jury trial or the conviction, you  
5     would think there would be a constructive  
6     amendment problem, for example.  So I think  
7     these are sort of the types of facts on our view  
8     that you can look at.

9                 Now, of course, if Petitioner were to  
10     prevail in this case, the government is not  
11     saying that there would necessarily be a Sixth  
12     Amendment problem, but I think, to the extent  
13     that you have Sixth Amendment concerns, our view  
14     mitigates those, whereas Petitioner's does, as  
15     various questions have revealed this morning,  
16     exacerbate those concerns.

17                 JUSTICE THOMAS:  Thank you.

18                 CHIEF JUSTICE ROBERTS:  So what we  
19     would do is look back, I'm not quite sure how  
20     far back, and just -- it's very simple, right --  
21     compare the elements of the two different crimes  
22     that are alleged to have occurred on the same  
23     occasion or a different one, and, apparently,  
24     each of the 50 states have different views of  
25     what constitutes an element of some particular

1 time or at least they're not uniform?

2 And, of course, we would have to look  
3 at each one to see if it's a different occasion.  
4 And I guess, at some point, we'd have to figure  
5 out what documents we look at in determining  
6 whether a particular element was -- was present,  
7 and that, you say, will avoid inconsistent  
8 results across the country.

9 Are you really sure that might be what  
10 happens?

11 MS. ROSS: So, Your Honor, a couple of  
12 points.

13 I think, first off, of course, these  
14 have to be sort of generic burglaries or generic  
15 -- or -- or have an element of the use of force  
16 or, you know, they have to fall within the ACCA  
17 to begin with.

18 So I don't think you're actually  
19 looking at the burglary elements per se because  
20 we know for generic burglary law that you need  
21 the unlawful entry or remaining in, and we know  
22 from a double jeopardy perspective that if you  
23 have, you know, one time, one structure, that's  
24 going to be one offense. So I think it's maybe  
25 not quite as complicated as you suggested.

1           I think, in terms of how consistent  
2 this will be, you know, I do think it's the  
3 government's burden and I think where the  
4 documents, in particular, we think most of these  
5 cases, again, because they tend to arise in  
6 these sequential robbery, sequential burglary  
7 contexts are going to be easily resolved on the  
8 indictment, I think, at a maximum, you would be  
9 looking at the other Shepherd documents, and so  
10 I don't think that the Court needs to recreate  
11 the wheel here.

12           I do think, again, that, you know, our  
13 approach has those benefits of administrability  
14 where I -- as I do think Petitioner's approach,  
15 you know, even if you get past what I think are  
16 the textual problems with it and the contextual  
17 problems with it, meaning that the ACCA is  
18 obviously a statute in which Congress did not  
19 want judges sort of sifting through a voluminous  
20 state court trial record trying to figure out  
21 exactly how a crime happened, much less the  
22 surrounding circumstances --

23           CHIEF JUSTICE ROBERTS: Well, we're  
24 talking about an extra 15 years based on, for  
25 example, conduct in this case, where they're in

1 the storage facility and they're just kicking  
2 down the walls to go from one to another.

3 I think it might require a more  
4 careful examination of the different elements  
5 than you suggest.

6 MS. ROSS: So, Mr. Chief Justice, you  
7 know, I respectfully disagree. I think the fact  
8 that state law treats these as separate  
9 locations, separate structures for purpose of --  
10 purposes of burglary, you know, Petitioner could  
11 have an argument that that's wrong as a -- as a  
12 generic burglary question.

13 This Court is certainly familiar with  
14 cases construing, you know, what is and isn't a  
15 structure for purposes of burglary. But that's  
16 not his argument. So his argument is that, yes,  
17 these are separate burglaries under state law  
18 and I just want them to be one occasion because  
19 these happen to be attached to each other.

20 I think judges' intuitions are going  
21 to differ on that, and if you imagine, you know,  
22 this hypothetical -- this case is not so  
23 different from, you know, the apartments that  
24 are next door to each other and are burglarized,  
25 the row homes that are next door to each other

1 and share an adjoining wall and they break  
2 through the wall. You know, then you have to  
3 distinguish the houses that are on the same  
4 street. You know, is it enough if you go to the  
5 next town? Where do you draw the line?

6 And I think what Congress would not  
7 have wanted in this area where, as you correctly  
8 note, there is a significant mandatory minimum  
9 sentence is it being entirely dependent on a  
10 judge's intuition about how far is enough or how  
11 long is enough.

12 JUSTICE KAGAN: Ms. Ross, could I make  
13 sure I understand your argument? Because --

14 MS. ROSS: Sure.

15 JUSTICE KAGAN: -- you know, to be  
16 frank, I read your brief in the way that  
17 Mr. Kedem read your brief, that the question is,  
18 when was the -- when did the commission of the  
19 crime take place? That is, when was the last  
20 element satisfied?

21 Now you're saying that that's not your  
22 test and that your test is some more -- some  
23 looser understanding of what sequential activity  
24 is. Is that -- is that right?

25 MS. ROSS: No, Justice Kagan. So we

1 are saying -- so, partially, yes, we are saying  
2 that it is not the final element. When we said  
3 the elements are completed, what we meant was  
4 you're looking at the period of time during  
5 which people are committing the elements of the  
6 offense, that that is how you know sort of what  
7 an occasion is. It is bounded in a time sense.

8 JUSTICE KAGAN: So, in Petty, when  
9 they go from person to person to person to  
10 person and they take each person's goods, you  
11 say that still counts as one occasion?

12 MS. ROSS: That's correct, Your Honor,  
13 and the reason -- --

14 JUSTICE KAGAN: And then the question  
15 is, when you don't go from person to person to  
16 person, but instead you go from storage unit to  
17 storage unit to storage unit in a single  
18 facility, why isn't the same true?

19 MS. ROSS: Sure, Your Honor. So I --  
20 I want to clarify our position with respect to  
21 Petty. I think the thing that makes Petty one  
22 event and one act is that there is an  
23 overlapping -- as I think I heard my friend say  
24 this morning, there's an overarching use of  
25 force there. When you go in as a robber and you

1 say -- you know, you put up your gun and you say  
2 give me all your money, they then subsequently  
3 maybe have to go person to person, but they are  
4 sort of already in. They've already committed  
5 part of the act of burglary --

6 JUSTICE KAGAN: Well --

7 MS. ROSS: -- or, excuse me, robbery,  
8 one of the essential elements.

9 JUSTICE KAGAN: -- didn't Mr. Wooden,  
10 basically, already commit to -- to going into  
11 the storage facility and then he goes to this  
12 box and this box and this box?

13 MS. ROSS: So -- so I don't think so,  
14 Your Honor, I think both as a matter of law but  
15 also as a matter of fact. So, as a matter of  
16 law, obviously, as we've talked about this  
17 morning, the state simply treats those as  
18 separate burglaries. That is a separate entry.

19 As a matter of fact, I think that  
20 makes significant sense. Every time Mr. Wooden  
21 and his confederates chose to break down another  
22 wall is another decision to break the law. It  
23 is another moment where they said, you know,  
24 that was fun, let's do this again, all the way  
25 up to ten. And I think that is very different



1 from the simultaneous robbery situation where a  
2 defendant raises his gun once and he's committed  
3 -- at least attempted --

4 JUSTICE BREYER: Well, how do you know  
5 this? How do you know this? I mean, what we  
6 have is a piece of paper 15 years old or 10  
7 years old, and it says on it pled guilty,  
8 charge, robbery. Okay? And -- and I have no  
9 idea what went on, nor the judge. And judges  
10 all the time have to decide things like this  
11 under the guidelines.

12 And -- and so what you're saying is  
13 that Jesse James, who -- I know what he did  
14 because I've seen movies, all right? So Jesse  
15 James gets on the train and he goes to one  
16 person and then the next person and then the  
17 next person and takes their stuff. You know, he  
18 takes --

19 JUSTICE KAGAN: And the next car and  
20 the next car and the next car.

21 JUSTICE BREYER: Yeah, correct.  
22 Correct.

23 MS. ROSS: Sure.

24 JUSTICE BREYER: And, moreover, you're  
25 going to put him in jail for 15 years, where

1 maybe he deserves it, but his cousin Harry James  
2 only robbed one car in one train once, but there  
3 were four people on it, and then he gave up his  
4 life of crime. And you're saying not just Harry  
5 but also -- not just Jesse but Harry too will  
6 spend 15 years in jail extra?

7 Now, if you can convince me Congress  
8 intended that at the same time that they passed  
9 this -- the sentencing guidelines, I -- I'd like  
10 to hear it.

11 MS. ROSS: Sure. So -- so two  
12 responses, Your Honor.

13 The first, to those particular  
14 hypotheticals, I think this points up a problem  
15 in -- any time you're looking at past  
16 convictions, and so I think what is going to  
17 happen is, if all you have is Your Honor's  
18 example of the indictment that says robbery X  
19 date, we're just going to lose that case. We're  
20 going to say --

21 JUSTICE BREYER: Why?

22 MS. ROSS: Because --

23 JUSTICE BREYER: Why are you going to  
24 lose it?

25 MS. ROSS: Because we don't think that

1 you go beyond basically the basic facts, the  
2 core elements of the offense.

3 JUSTICE BREYER: Oh, you say it just  
4 says one.

5 MS. ROSS: And so you're just --

6 JUSTICE BREYER: But this actually  
7 says, you know, you see the indictment and maybe  
8 you see that, maybe it says there were ten  
9 people. It says five people. It lists the  
10 things stolen, Joe Smith's watch, et cetera, et  
11 cetera.

12 MS. ROSS: Right. So, again, we're  
13 not going to know whether it was a Petty  
14 situation where they just had -- held up their  
15 gun all at once or whether they went person by  
16 person, and so we're going to lose that case.

17 JUSTICE BREYER: Why?

18 MS. ROSS: The second point -- because  
19 --

20 JUSTICE BREYER: Why?

21 MS. ROSS: -- because --

22 JUSTICE BREYER: Most robberies where  
23 you go through the train, you would assume -- it  
24 says train robbery. You would assume that the  
25 guy in Car 2 didn't see a gun in Car 1. He just

1 saw a guy with a mask.

2 MS. ROSS: So I'm not quite sure if  
3 I'm following --

4 JUSTICE BREYER: All right. Forget  
5 it.

6 MS. ROSS: -- why that would be  
7 different.

8 JUSTICE BREYER: Forget it. I'm going  
9 off too far.

10 MS. ROSS: But --

11 JUSTICE BREYER: Go ahead.

12 MS. ROSS: -- but, in terms of what  
13 Congress intended here, you know, I think that  
14 Congress very reasonably determined that the  
15 person who commits what state law has considered  
16 to be a full offense, a complete offense, and  
17 what Congress has in turn considered to be its  
18 own violent felony and turns and does that  
19 multiple occasions without -- you know, whether  
20 they take a smoke break or not in between is a  
21 more dangerous person --

22 JUSTICE SOTOMAYOR: Counsel --

23 MS. ROSS: -- than the person --

24 JUSTICE ALITO: Well, that was the law  
25 before it was amended, and it -- it was harsh,

1 but it was clear. So you commit three  
2 robberies, it's three strikes, okay? But then  
3 it was amended. They add the -- the term  
4 "occasions." I have no idea what an occasion is  
5 or what a criminal opportunity is or what a  
6 criminal episode is.

7 But you have a real problem, I think,  
8 with Petty. So let's say that there are three  
9 people in a car driving on a dark night out in  
10 the middle of nowhere and they see a hitchhiker.  
11 They're kindhearted people. They stop to pick  
12 up the hitchhiker. The hitchhiker pulls a gun,  
13 points the gun at the first person in the car  
14 and says give me your money. The person gives  
15 them the money. And then he says walk off. And  
16 so he's done with that person. Then he robs the  
17 second one, same thing, walk off. Robs the  
18 third one, walk off.

19 Is that one occasion or two occasions?  
20 Is that Petty, or is it this case?

21 MS. ROSS: So I think that that is  
22 this case, but I think it is very likely that  
23 you are not going to know from the record  
24 documents and that we would -- as I keep saying  
25 perhaps oddly, we are going to lose that case.

1                   Now, if I could go back to what  
2 Congress had in mind with Petty, I think it's --

3                   JUSTICE ALITO: Well, just -- let me  
4 just say that the difference between that  
5 situation and Petty seems to me utterly  
6 inconsequential. It can't -- how can it  
7 possibly be that you have different results in  
8 those two instances?

9                   MS. ROSS: So I think because Congress  
10 decided that somebody who, again, commits a full  
11 violent felony and then goes and does another  
12 one, no matter how close together they are, that  
13 -- that that is a different type of person.

14                   And, you know, when Congress amended  
15 the statute in light of Petty, it responded  
16 specifically to Petty. It did not respond to  
17 other cases. I would direct this Court to the  
18 Ninth Circuit's decision in Wicks, which was  
19 multiple burglaries on one night under the prior  
20 statute, held to be different convictions.  
21 Congress didn't respond to that. Congress  
22 didn't seem to think there was a problem with  
23 that. Congress instead tailored its response to  
24 the Petty situation.

25                   And I think this brings up an

1 important issue, which is even on Petitioner's  
2 side of the purported split, I think courts are  
3 drawing these distinctions very similarly to how  
4 we would do it here. So the Second Circuit's  
5 decision in Bordeaux, those were three robberies  
6 that occurred at 10, 10:15, and 10:55 p.m. The  
7 court held that those were separate occasions  
8 for purposes of the ACCA.

9           So I think, to the extent that the --  
10 the intuition is, you know, if it happens close  
11 in time, it just can't make a career criminal, I  
12 think because Congress didn't adopt language  
13 that required an intervening arrest or a certain  
14 amount of passage of time, no one's test really  
15 gets to that point. And the question is, you  
16 know, how can we do this in a clear and  
17 administrable way that distinguishes between the  
18 people who commit one violent felony and the  
19 people who commit one and then just keep going  
20 all the way up --

21           JUSTICE SOTOMAYOR: Counsel --

22           MS. ROSS: -- in this case, to ten?

23           JUSTICE SOTOMAYOR: -- if all there  
24 was was Justice Breyer's hypothetical, but I'll  
25 adapt it to this case, if the only criminal

1 activity by this defendant his entire life had  
2 been the burglary of this warehouse, the  
3 burglaries of this warehouse, and some time  
4 later, 20 years later, and I don't remember how  
5 many years separated these two crimes, he  
6 commits another criminal activity, do you think  
7 the layperson would believe that that was a  
8 career -- that this person was a career  
9 criminal?

10 MS. ROSS: So --

11 JUSTICE SOTOMAYOR: Under what  
12 understanding of "episode" or "occasion" would a  
13 common person walk away and say, no, those were  
14 different occasions, and so, yes, even though  
15 that person has only had one episode, one  
16 evening of burglary, he's now a career offender?

17 MS. ROSS: So, Justice Sotomayor --

18 JUSTICE SOTOMAYOR: That's the only  
19 background.

20 MS. ROSS: -- Justice Sotomayor, I  
21 think there are sort of two questions in there,  
22 and if I could tease them out. I think the  
23 first is, you know, would you call this person a  
24 career offender? And I think we know that  
25 Congress, for all of the reasons I was just



1 saying, thought of career in a different sense  
2 than a lifelong pursuit because, in response to  
3 Petty -- first of all, it was focused on Petty,  
4 and, second, in response to Petty, it didn't  
5 require intervening arrests, it didn't require  
6 intervening convictions, despite the fact that  
7 other statutes do have that type of language.

8 JUSTICE SOTOMAYOR: Well, that's true,  
9 but intervening arrest or conviction can let  
10 somebody live a crime-free life for years, and  
11 still -- they're still a career offender because  
12 they can commit a crime a month or a crime --  
13 even under your theory, a crime a year and they  
14 would be a career offender. They don't  
15 necessarily have to be arrested.

16 MS. ROSS: That's correct, Your Honor,  
17 but Congress also did not include, you know,  
18 three years between convictions, five years  
19 between convictions, anything of that nature.  
20 And so I think we know that Congress meant  
21 career criminal in a different way and in the  
22 way that is, in fact, explained in the text with  
23 respect to the different occasions clause.

24 I think the only clear way to  
25 understand the different occasions language --

1 and this goes to the second part of Your Honor's  
2 question -- is that an occasion is an event, a  
3 happening, or an occurrence. And if two events  
4 share one essential act, they are really one  
5 event. That is our position.

6 JUSTICE SOTOMAYOR: But why -- why  
7 aren't --

8 JUSTICE KAGAN: Well, but think about  
9 this -- this factual context, right? Let's say  
10 you're a newspaper reporter and you're trying to  
11 write a story about what happened here.

12 I mean, would you ever say something  
13 like the facility's storage units were  
14 burglarized on ten occasions?

15 MS. ROSS: So, Your Honor, you know, I  
16 think you could say -- you might well say they  
17 broke through drywall on ten occasions. I think  
18 it just -- you know, there are ways to think  
19 about this.

20 JUSTICE KAGAN: But -- but that's --  
21 breaking through drywall is not the relevant  
22 act. The relevant act is a crime.

23 MS. ROSS: So -- so, actually,  
24 respectfully, Your Honor, I think breaking  
25 through drywall is the relevant act because you

1 need under state law to have an unlawful entry  
2 into each of these separate facility -- or,  
3 excuse me, units --

4 JUSTICE KAGAN: Well, then, to use Mr.  
5 Kedem's words --

6 MS. ROSS: -- and that's how you do  
7 it.

8 JUSTICE KAGAN: -- it's just becoming  
9 very hypertechnical. In a normal sense, if you  
10 look at what this guy did, you would say he, you  
11 know, broke into the storage units on one  
12 occasion, whereas maybe if there had been ten  
13 separate -- separate meaning, you know, it  
14 happened on Monday and then it happened on  
15 Wednesday and then it happened on Friday -- then  
16 you would say the storage units were burglarized  
17 on ten occasions?

18 MS. ROSS: So -- so I disagree, Your  
19 Honor. I mean, I think even taking my friend's  
20 definition of "occasion" as a different juncture  
21 of circumstances giving rise to a different  
22 criminal opportunity, you know, every time Mr.  
23 Wooden decided to go into a different unit to  
24 steal different items from different victims, I  
25 would think of those as a different occasion.

1                   But, you know, if the point is  
2 ultimately --

3                   JUSTICE KAGAN: On one occasion,  
4 Wooden burglarized one storage unit, and on a  
5 second occasion, he burglarized another storage  
6 unit, and on a third occasion, he burglarized  
7 another storage unit.

8                   I mean, that's just not how anybody  
9 would talk about what happened here, is it?

10                  MS. ROSS: So -- so I think it -- it  
11 might well be, but if I could give you another  
12 example, Your Honor. I mean, I think if I said,  
13 you know, during my friend's argument he was  
14 asked difficult questions about line-drawing,  
15 you know, on several different occasions or on  
16 several occasions different from one another,  
17 even though those happened very close in time,  
18 that would be a perfectly natural use of  
19 language.

20                  By -- you know, at the same time, if  
21 Mr. Kedem stood up here during his rebuttal and  
22 said, you know, during her argument, Ms. Ross  
23 made -- committed errors on several different  
24 occasions, I would disagree but not because it's  
25 not a natural use of language. I think you can

1 use "occasion" in different ways, and what we're  
2 wondering about here or asking about here is how  
3 it is best used in the context of the ACCA.

4 JUSTICE GORSUCH: So --

5 MS. ROSS: And I think, in a statute,  
6 it -- I'm sorry.

7 JUSTICE GORSUCH: Sorry, Ms. Ross, I  
8 didn't mean to interrupt. Are -- are you  
9 finished with your answer to Justice Kagan?

10 MS. ROSS: I -- I -- I had one more  
11 sentence.

12 JUSTICE GORSUCH: Go for it, please.

13 MS. ROSS: All right. I was just  
14 going to say, in the context of the ACCA, where  
15 we know that Congress did not want as this Court  
16 said in Taylor, you know, if we thought that --  
17 that sentencing judges were supposed to be  
18 looking through facts and circumstances, we  
19 would see some indication of that, I don't think  
20 that this reading of "occasion" that my friend  
21 is offering is a natural fit in this context.

22 JUSTICE GORSUCH: Just I wanted to  
23 follow up on what Justice Kagan was pursuing,  
24 and Petty is still one occasion in the  
25 government's view today?

1 MS. ROSS: Yes.

2 JUSTICE GORSUCH: Okay. What if  
3 instead of in Petty, instead of robberies, we  
4 had murders, and a guy breaks in and shoots  
5 three people in a row? Is that three separate  
6 occasions on the government's view?

7 MS. ROSS: Yes, each of those offenses  
8 requires a different use of force.

9 JUSTICE GORSUCH: So the --

10 MS. ROSS: Different --

11 JUSTICE GORSUCH: -- exact same --  
12 so -- so a normal person wouldn't say that  
13 happened on one occasion, even though the three  
14 people were in the same room, but because they  
15 were murdered sequentially, that's not one  
16 occasion, that's three occasions?

17 MS. ROSS: I think, in the context of  
18 this statute, that is one -- those are three  
19 occasions.

20 JUSTICE GORSUCH: But, if they commit  
21 robbery one after the other in the same room,  
22 that is one occasion?

23 MS. ROSS: No, Your Honor, because the  
24 robberies -- so it might be true -- and I think  
25 this is --

1 JUSTICE GORSUCH: Because the robbery  
2 starts as soon as he shows his weapon to  
3 everybody in the room and, therefore, it's one  
4 occasion when it's robbery --

5 MS. ROSS: Yes.

6 JUSTICE GORSUCH: -- right, but three  
7 occasions when it's murder?

8 MS. ROSS: I think that is simply a  
9 consequence of the elements of robbery.

10 JUSTICE GORSUCH: Who thinks that, Ms.  
11 Ross, in the real world?

12 MS. ROSS: So, Your Honor, again, I  
13 think that there are multiple ways in which one  
14 could look at the way that we apply the ACCA --

15 JUSTICE GORSUCH: Ah. And if there  
16 are multiple ways --

17 MS. ROSS: -- and say --

18 JUSTICE GORSUCH: -- to look at it,  
19 why doesn't lenity play an important role here  
20 --

21 MS. ROSS: So --

22 JUSTICE GORSUCH: -- in determining  
23 whether the government should win or lose these  
24 cases?

25 If an ordinary person can't tell, if

1       there are multiple ways to read the statute, if  
2       an occasion might mean one thing if it's murder  
3       and another thing if it's robbery, why doesn't  
4       the tie go to the presumptively free individual  
5       rather than the prosecutor, especially when  
6       we're dealing with mandatory minimums that take  
7       a 21-month sentence, which was what the  
8       government initially sought in this case, to a  
9       15-year mandatory minimum when the government  
10      changed its mind?

11               MS. ROSS:  So there's a lot packed in  
12      there and I want to get to all of it.

13               JUSTICE GORSUCH:  There sure is.  Go  
14      for it.

15               MS. ROSS:  So -- so I disagree that --  
16      I was not trying to say that, you know,  
17      "occasion" might mean one thing in robbery and  
18      might in burglary -- a different thing in  
19      murder.  What I was trying to say --

20               JUSTICE GORSUCH:  But you -- but they  
21      are in -- in the hypothetical.

22               MS. ROSS:  No, Your Honor.  There --  
23      there --

24               JUSTICE GORSUCH:  Well, hold on.  I  
25      thought it was three -- three occasions with the



1 murder and one with a robbery in the  
2 hypothetical I posed to you.

3 MS. ROSS: Yes.

4 JUSTICE GORSUCH: Okay.

5 MS. ROSS: But, in either case, the  
6 reason why is because of the elements of the  
7 offense. And so I think it is entirely  
8 consistent to say that when you have -- just as  
9 if you had the murders of three people by a  
10 bomb, that would be one occasion.

11 What -- to -- to get to the lenity  
12 question, you know, I think that Congress was  
13 clear here, especially in the context that I was  
14 explaining, and I think, as you note, when we  
15 are applying a mandatory minimum, I think it's  
16 very important to have consistent results.

17 And as the questions this morning  
18 suggest, I don't think that Petitioner's test is  
19 going to get you consistent results. Again, I  
20 don't know if Petitioner agrees with the cases  
21 on his side of the split, but I'm not sure if  
22 having --

23 JUSTICE GORSUCH: But, if we don't  
24 think yours leads to consistent results either,  
25 for example, because of the hypothetical I gave

1 you, then what?

2 MS. ROSS: So, Justice Gorsuch, to be  
3 clear, I think in the -- so there's sort of the  
4 -- the theoretical and then there's the how is  
5 this going to play out in practice, and --

6 JUSTICE GORSUCH: No, no. No, no, no.  
7 If we think that there's ambiguity either way,  
8 okay, if we think that there's going to be  
9 confusion either way, then what?

10 MS. ROSS: So I don't think there is  
11 going to be confusion on our view.

12 JUSTICE GORSUCH: I understand that,  
13 counsel. I -- I -- I've been there. I -- I --  
14 I -- I've fought many a hypothetical too. But  
15 just suppose we think that. Then what?

16 MS. ROSS: So I think, if you thought  
17 there was going to be ambiguity either way, you  
18 would still need to look for the best reading of  
19 this statute. We think we've given that to you  
20 in context.

21 I think, if you got to the point where  
22 all of your tools of statutory construction ran  
23 out and you found grievous ambiguity, then, yes,  
24 there might be a lenity issue.

25 CHIEF JUSTICE ROBERTS: Counsel, has

1 any of the lower courts adopted your  
2 elements-based approach?

3 MS. ROSS: So, Your Honor, I don't  
4 think they've talked about it in terms of the  
5 elements. But our results are consistent across  
6 the board, I think, with the vast --

7 CHIEF JUSTICE ROBERTS: Well, if their  
8 test was, in fact, based on the elements,  
9 presumably, they would have talked about  
10 elements, right?

11 MS. ROSS: So I think the -- so, you  
12 know, I take the point. I don't want to fight  
13 that. You know, I do think that the difference  
14 is that these cases generally come up in these  
15 sequential robberies, sequential burglary  
16 contexts, and there it is enough to say one was  
17 over before the next began in the same way that  
18 I started this morning.

19 Without having to really go into, you  
20 know, what that tells you is that the elements  
21 were committed at different times and what that  
22 tells you is that they were all different acts  
23 that satisfied those elements.

24 So I think we have sort of provided  
25 more theory as to why that common-sense

1 intuition as to one is over before the next  
2 began makes sense, but, no, I mean, they haven't  
3 exactly mapped it on to the elements in the same  
4 way that we would.

5           You know, there are -- there are a  
6 couple of other things that I think it's  
7 important to get to here. You know, as -- as I  
8 think we've talked about a bunch this morning,  
9 we think Petitioner's test is not going to be  
10 very administrable in practice. Even if you get  
11 past the textual problems that we see with it  
12 and the contextual problems with we -- that we  
13 see with it, you're going to have three  
14 problems.

15           First, you're going to have judges  
16 looking for facts that are not often going to be  
17 in state court records not just about how a  
18 crime was committed but about all of the  
19 surrounding facts and circumstances.

20           Second, even if you had perfect  
21 information, you're going to then have to look  
22 at it at this granular level that, again, in the  
23 ACCA context, for many of the reasons various  
24 justices have raised this morning, we don't  
25 permit.

1                   And third, even then, I do think  
2                   you're going to have these very difficult  
3                   line-drawing questions between, you know, the  
4                   smoke break or the 10, 10:15, 10:55 robberies as  
5                   opposed to what Mr. Wooden was convicted of  
6                   doing here.

7                   I think what the law ultimately is  
8                   asking about in the ACCA is were you held  
9                   criminally responsible for discrete acts, and  
10                  that is the case here. It was not the case in  
11                  Petty, and so I think that our test is far more  
12                  administrable in practice.

13                  You know, I think there were a couple  
14                  of other small things. You know, I think the  
15                  crime boss hypothetical that Justice Kagan gave,  
16                  I think, explains why we think that, you know,  
17                  disparate timing is sufficient but not  
18                  necessary. I do think that intertwined  
19                  simultaneous offenses may be separate occasions.  
20                  I think I took my friend to agree with that.  
21                  Or, excuse me, non-intertwined simultaneous  
22                  offenses may be separate occasions. I think I  
23                  took my friend to agree with that.

24                  We also think that, you know, there  
25                  was some suggestion, I think, in some of the

1 questioning about accomplice liability. We --  
2 again, because we would just focus on the  
3 elements of the offense, we would not look to  
4 that, that further complication.

5 So I -- I'm happy to answer other  
6 questions.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Thomas?

9 JUSTICE KAVANAUGH: Ms. Ross, I have  
10 one question. If we conclude that someone who  
11 goes down the street and burglarizes different  
12 houses and different cars going down the street,  
13 that that's all one occasion, if that's our  
14 common-sense intuition to borrow your phrase,  
15 you would disagree with that, correct?

16 MS. ROSS: Yes, I would.

17 JUSTICE KAVANAUGH: Okay. Suppose  
18 that's what we think, though. Do you have a  
19 backup position on how you would articulate the  
20 test?

21 MS. ROSS: So, Justice Kavanaugh, you  
22 know, I think, once you go beyond, you know,  
23 the -- the timing of -- or -- or the acts that  
24 are required for particular elements to be  
25 completed, I think it gets very difficult to

1 articulate a clear test, as I think this morning  
2 has -- has sort of revealed.

3           You know, I think, obviously, larger  
4 periods of time are clear, but I don't know that  
5 you can really get that from the text. So, you  
6 know, I apologize. I -- I think we've given you  
7 the best and the most administrable reading of  
8 the test, and I do think, once you get to the --  
9 you know, if -- if you would sort of think that  
10 the guy down the street is a different occasion,  
11 I think it's very hard to understand why this  
12 would not also be a different occasion.

13           JUSTICE KAVANAUGH: Thank you.

14           CHIEF JUSTICE ROBERTS: Justice  
15 Thomas?

16           Justice Breyer?

17           Justice Sotomayor? No?

18           Yes?

19           JUSTICE GORSUCH: A quick question,  
20 Ms. Ross. So if we do disagree with you and --  
21 and -- and you indicated you thought it got  
22 pretty complicated pretty quickly, do we run  
23 into vagueness issues?

24           MS. ROSS: Sure, Your Honor. So, you  
25 know, we don't think that the statute ultimately

1 would be vague. We hope that what would happen  
2 is that the courts of appeals would continue to  
3 apply the types of factors that they have  
4 applied. We think we win under those factors,  
5 but I think, you know, if it were just a  
6 question of sort of tinkering with those  
7 factors, I don't think that there would be a  
8 constitutional vagueness problem.

9 I do think, to the extent that you  
10 have vagueness concerns, again, our approach,  
11 much as in the Sixth Amendment context,  
12 mitigates those concerns --

13 JUSTICE GORSUCH: Yeah, right.

14 MS. ROSS: -- whereas I think  
15 Petitioner's --

16 JUSTICE GORSUCH: Right.

17 MS. ROSS: -- you know, as -- as I  
18 think my friend --

19 JUSTICE GORSUCH: I -- I --

20 MS. ROSS: -- sort of sets up the next  
21 --

22 JUSTICE GORSUCH: -- understand.  
23 Counsel, I understand that point, but I have one  
24 more quick question. I don't want to monopolize  
25 the time here.



1                   On -- on the confrontation clause  
2 question, again, if we do disagree with you and  
3 we think that -- that "occasion" is -- is  
4 broader than you suggest, does that raise Sixth  
5 Amendment concerns?

6                   MS. ROSS: Justice Gorsuch, you know,  
7 I think it would again depend on exactly what  
8 the Court said. You know, we think that we --  
9 we could apply this in a way that is consistent  
10 with the Sixth Amendment. Again, I think it  
11 would just require sort of looking at a narrower  
12 set of facts and documents.

13                   JUSTICE GORSUCH: Thank you.

14                   CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh?

16                   JUSTICE KAVANAUGH: No further  
17 questions, Chief.

18                   CHIEF JUSTICE ROBERTS: Justice  
19 Barrett?

20                   JUSTICE BARRETT: No.

21                   CHIEF JUSTICE ROBERTS: Rebuttal?

22                   REBUTTAL ARGUMENT OF ALLON KEDEM  
23                   ON BEHALF OF THE PETITIONER

24                   MR. KEDEM: With the greatest respect  
25 to my friend from the government, the essential

1 elements test that you just heard Ms. Ross  
2 articulate strikes me as dramatically different  
3 both from what the courts of appeals are doing  
4 right now but also the way that the government  
5 described its own test in its brief.

6 First of all, Justice Kagan, I think  
7 the reason that you and I both read the  
8 government's brief as saying the question is  
9 whether the final element was satisfied at the  
10 same moment comes from sentences like this on  
11 page 15 of the government's brief: "In common  
12 legal parlance, an offense is generally  
13 committed when all elements of the offense are  
14 established, regardless of whether the defendant  
15 continues to engage in criminal conduct."

16 There were a number of such sentences,  
17 all of which seemed to point to the final  
18 element.

19 The question -- a -- a test described  
20 as an essential elements test raises for me a  
21 number of questions. First of all, are there  
22 elements of an offense which are not essential?  
23 For instance, mens rea?

24 Mr. Wooden and his associates may have  
25 formed the plan to break into the mini-storage

1 facility and to steal what was -- what was ever  
2 there, and it was a single intention that they  
3 formed with respect to all of the different  
4 units. Does that count as the same, or is that  
5 different?

6           What about inchoate crimes? Attempts  
7 are named by statute in the Armed Career  
8 Criminal Act. They are -- they are called out  
9 by name. But you never complete the crime. You  
10 need a substantial step. Are -- are all of the  
11 acts that go toward the substantial step part of  
12 it? What about crimes where you are simply  
13 facilitating crimes by other people? These are  
14 all questions that are entirely unanswered.

15           Now, with respect to the court of  
16 appeals' approach, my friend, Ms. Ross, said  
17 that she thinks that this is essentially what  
18 the courts of appeals are doing. That is not  
19 correct.

20           Under the courts of appeals' test,  
21 what needs to happen is the beginning and end of  
22 one crime have to be separate from the beginning  
23 and end of the next crime, regardless of whether  
24 the same acts go into multiple crimes.

25           And let me give you three examples

1 that come from our brief. There was the case  
2 Barbour about the robbery outside the mini-mart,  
3 and then some members of that robbery went  
4 inside to continue -- to -- to do a new robbery  
5 within the mini-mart. So there are two separate  
6 robberies.

7 But what the court of appeals said is,  
8 because the robbery outside continues --  
9 continued while the one inside the mini-mart was  
10 going on, they overlapped and, therefore, it was  
11 the same occasion. But, under the government's  
12 essential elements test, it would have come out  
13 differently.

14 So too for the case of Tucker, where  
15 there were two people who burgled two separate  
16 storage units. But, since the court didn't know  
17 whether they both walked into their storage  
18 units simultaneously or went from one together  
19 into the other, they didn't know whether the  
20 crimes overlapped, and, therefore, there were  
21 two different -- it was one occasion.

22 And, similarly, the Murphy case,  
23 involving a duplex, where some number of people  
24 stayed at the first unit while the others went  
25 to the second unit. That would have come out a

1 different way under the government's test.

2           The government's test would also mean  
3 that acts that are truly simultaneous can also  
4 sometimes be different occasions. For instance,  
5 if you and an associate decide that you will  
6 both walk into separate storage units at the  
7 same time, I think, under the government's test,  
8 that is two different occasions, whereas the  
9 courts of appeals would treat those as the same.

10           Now my friend also raised the  
11 possibility that their test would be more  
12 consistent with the Sixth Amendment because it  
13 is just a focus on elements. But assuming that  
14 the government agrees that you are always  
15 responsible for the conduct of accomplices,  
16 since we don't know how many accomplices are  
17 involved in any crime, it is never elemental as  
18 far as we're aware, and the government doesn't  
19 suggest otherwise, you will never know just  
20 based on the elements alone whether or not the  
21 crimes were committed at the same time.

22           The one textual point that my friend  
23 from the government made, at least as far as I  
24 recall, is that if you were to break through ten  
25 different units, the drywall connecting them,

1 you might describe that as ten different  
2 burglaries or you might say that you broke  
3 through the drywall on ten different occasions.  
4 But, again, she's loading the dice by phrasing  
5 it a different way than the statute.

6           What the statute says is we know there  
7 were multiple offenses. Now we ask the  
8 question, on how many occasions did that occur?  
9 Was it the same occasion or different occasions?

10           So to put her example in the phrase of  
11 the statute, what you would say is you broke  
12 through the drywall ten times. Did that happen  
13 on the same occasion or on occasions different  
14 from one another? And our simple submission is  
15 you would never describe that as ten occasions  
16 different from one another.

17           And, finally, let's talk about  
18 Congress's goals. It is unclear what the  
19 government's essential elements test has to do  
20 with any goal that Congress might have cared  
21 about. And one would think that if this was the  
22 test all along, someone at some point would have  
23 mentioned it. But, obviously, Congress -- no  
24 one in Congress said so, no court has ever  
25 articulated it this way, and the government

1 didn't even articulate it this way, at least as  
2 far as we're concerned, until oral argument.

3 If there are no further questions.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel. The case is submitted.

6 (Whereupon, at 12:20 p.m., the case  
7 was submitted.)

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## D

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