

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANDRE WALLACE, :

4 Petitioner :

5 v. : No. 05-1240

6 CHICAGO POLICE OFFICERS :

7 KRISTEN KATO AND EUGENE :

8 ROY. :

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Washington, D.C.

Monday, November 6, 2006

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:05 a.m.

15 APPEARANCES:

16 KENNETH N. FLAXMAN, ESQ., Chicago, Ill; on behalf of
17 the Petitioner.

18 BENNA RUTH SOLOMON, ESQ., Deputy Corporation Counsel;
19 Chicago, Ill.; on behalf of the Respondents.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	KENNETH N. FLAXMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	BENNA RUTH SOLOMON, ESQ.	
7	On behalf of the Respondents	27
8	REBUTTAL ARGUMENT OF	
9	KENNETH N. FLAXMAN, ESQ.	
10	On behalf of Petitioner	49
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Wallace versus Kato and Roy.

5 Mr. Flaxman.

6 ORAL ARGUMENT OF KENNETH N. FLAXMAN

7 ON BEHALF OF THE PETITIONER

8 MR. FLAXMAN: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 This case presents the Court with the
11 question it addressed in Heck versus Humphrey raised in
12 a slightly different context.

13 The context in Heck was of a prisoner whose
14 conviction had been affirmed who was in prison, who'd
15 filed a civil rights case that would have had the
16 practical effect of collaterally challenging his
17 criminal conviction. The context in this case is of a
18 civil rights plaintiff who has prevailed in his criminal
19 case, who was imprisoned for 8-1/2 years fighting the
20 criminal case and comes to Federal court with a section
21 1983 action saying, I now seek a remedy for my
22 unconstitutional incarceration, and files his lawsuit.

23 The Court in Heck held that this action, an
24 action to recover damages for unconstitutional
25 conviction or imprisonment, accrues when the conviction

1 is set aside. That's the principle that we asked the
2 court of appeals to apply and the court of appeals said:
3 We're not going to apply that because we will adopt a
4 categorical rule without any implied exceptions
5 whatsoever that says when you're arrested you have 2
6 years, which is the statute of limitations in 1983 cases
7 in Illinois, to file your claim for damages.

8 JUSTICE GINSBURG: Mr. Flaxman, one starting
9 point. You said that this case should be just like Heck,
10 but in Heck the core problem was the line between 1983
11 and habeas, right?

12 MR. FLAXMAN: Well, that was one view of the
13 core problem.

14 JUSTICE GINSBURG: But at least this case
15 involves no such concern about habeas.

16 MR. FLAXMAN: That's correct. In Heck the
17 Court solves the core problem by concluding -- by
18 denying the existence of a cause of action for damages
19 until the criminal case had been resolved in favor of
20 the civil rights claimant, which is the rule, the common
21 law rule for malicious prosecution. That's the solution
22 that the Court came up with in Heck, which is the
23 solution that Petitioner believes should be applied
24 in this case.

25 JUSTICE SCALIA: But only if -- only if the

1 challenged evidence, the challenge to the evidence, if
2 sustained, would necessarily -- and this is the crucial
3 language -- invalidate the criminal conviction.

4 MR. FLAXMAN: That's what would have
5 happened in this case, as the dissenting judge in the
6 petition for rehearing --

7 JUSTICE SCALIA: Would necessarily have?
8 You could have said that ex ante?

9 MR. FLAXMAN: Absolutely. In criminal cases
10 there's discovery and the criminal defendant knows what
11 the prosecution --

12 JUSTICE SCALIA: You don't know what other
13 evidence there might have been in the criminal case. Ex
14 ante you can't tell.

15 MR. FLAXMAN: You do know because it's
16 disclosed in discovery. We don't do trial by ambush any
17 more in criminal cases. The defendant knew that all the
18 evidence against him was the alleged --

19 CHIEF JUSTICE ROBERTS: Well, but he may
20 not know that for years later. I mean, they don't have
21 to bring a prosecution immediately. They can wait until
22 the day before the statute of limitations runs.

23 MR. FLAXMAN: Well, there is no statute of
24 limitations for murder in Illinois.

25 CHIEF JUSTICE ROBERTS: Well, then they can

1 wait a long time.

2 (Laughter.)

3 MR. FLAXMAN: If he's incarcerated that
4 whole time awaiting the filing of charges, then his
5 cause of action would not have accrued. But the more
6 likely scenario is that he would be arrested --

7 JUSTICE SOUTER: Well, is that -- I mean,
8 your friend on the other side says that the cause of
9 action would have accrued at the moment at which he was
10 bound over by the decision of an independent magistrate.
11 At that point the false arrest and the incarceration
12 incident to the false arrest is over and if there is
13 ever going to be a claim for what happens next, I gather
14 it's going to be a common law action for false
15 imprisonment, and that, I guess, would not accrue until
16 the imprisonment is over. But so far as the arrest
17 concerned, whatever wrong is done, that wrong is
18 completed at the point at which an independent
19 magistrate takes over.

20 MR. FLAXMAN: If the claim was solely
21 directed at the arrest, then Your Honor would be
22 absolutely correct. The claim in this case, the cause
23 of action, is not that he was taken off the street
24 without probable cause. The core of the cause of action
25 is that the Respondent police officers exploited that

1 arrest to get this untruthful confession that was used
2 to hold Mr. Wallace in custody for 8-1/2 years, to seize
3 him for 8-1/2 years. It's not just the arrest. It's
4 the arrest plus exploiting it.

5 JUSTICE SOUTER: No, but all of that occurred,
6 as I -- correct me if I'm wrong on the facts, but I
7 thought all of that occurred prior to -- and I don't know
8 what they call it in Illinois, but prior to a bind-over
9 hearing or prior to the point at which the judiciary
10 steps in, breaking the, as it were, the chain of
11 causation between what the police do and the subsequent
12 incarceration.

13 MR. FLAXMAN: Under Malley versus Briggs, it
14 doesn't break the chain of causation if we adhere --

15 JUSTICE SOUTER: No, but just as a factual
16 matter is it correct -- is it correct as a factual
17 matter that the confession that was given was a
18 confession that was given before there was any judicial
19 intervention, before he was brought before a magistrate?

20 MR. FLAXMAN: That's correct.

21 JUSTICE SOUTER: Okay.

22 MR. FLAXMAN: And the magistrate said there's
23 probable cause to hold Mr. Wallace because we have this
24 confession. There was no other evidence presented to
25 the magistrate or that could have been presented to the

1 magistrate other than the confession to show --

2 JUSTICE ALITO: Well, Mr. Flaxman, is your
3 argument limited to that situation, where there is no
4 evidence whatsoever against the criminal defendant other
5 than the illegally seized evidence? Or would it apply
6 in some situations in which there is some additional
7 evidence?

8 MR. FLAXMAN: If there's some additional
9 evidence, we could not say was necessarily -- would
10 necessarily imply the invalidity of the conviction. And
11 that would be -- that's not our situation.

12 JUSTICE ALITO: Any additional evidence,
13 even if it would be insufficient to support a
14 conviction, takes -- makes this -- would make this
15 a different case.

16 MR. FLAXMAN: I would not say -- well, it
17 would make it a different case. But if I was arguing in
18 a case where there was a little bit of evidence, but not
19 enough to say there's probable cause to accuse him of a
20 crime, I would say that suppressing or eliminating the
21 confession would necessarily imply the invalidity of any
22 conviction.

23 JUSTICE ALITO: What, what does necessarily
24 mean? Does it mean no additional evidence? Does it
25 mean no additional evidence that's insufficient to

1 support a conviction? Does it mean no additional
2 evidence that would be likely to persuade a trier of
3 fact?

4 MR. FLAXMAN: What I think it means is that
5 there's no conviction -- what I think it should mean --
6 and I'm not trying to debate the dictionary, what I
7 think it should mean is that if there is no evidence
8 other than after -- what's excluded, to base a
9 prosecution on, as in this case where the man is let go,
10 because there is no evidence to prosecute him, that that
11 has imply the invalidity of the conviction.

12 JUSTICE ALITO: Well, in this case, let me
13 just me more question on it. In this case, suppose
14 there had been a witness who said at about the time when
15 this murder took place, I saw somebody who was between,
16 I would judge as between the age of 15 and 25, average
17 height, average build, running away. And let's say that
18 your client fits that description. Now would that be
19 enough to take this case out of the rule that you're
20 arguing for?

21 MR. FLAXMAN: No. Unless that witness could
22 say and the man who I saw then is the defendant in
23 this -- is the criminal defendant, Mr. Wallace. There
24 was an eyewitness in this case. And he could not make
25 an in-court identification of Mr. Wallace. And the

1 prosecutor realized that that wasn't enough evidence on
2 which to base a criminal prosecution, and gave up.

3 JUSTICE SCALIA: Again, you didn't, you
4 didn't know that at the time the arrest was made, or at
5 the time the confession was extorted, or at the time he
6 was bound over. You really didn't know that until the
7 trial. For all you knew, they might have found in
8 addition to the confession, they might have found
9 eyewitnesses who would have identified your client. You
10 couldn't tell that until the trial.

11 MR. FLAXMAN: Well, that would have been
12 very unfair if they withheld -- they ambushed the
13 defendant with --

14 JUSTICE ALITO: No, well --

15 MR. FLAXMAN: Until the trial, until the
16 process of trial began.

17 Well, we didn't know that because there
18 weren't any, because this man didn't commit that
19 crime. We are talking -- in the hypothetical, I
20 think we should set, start with Mr. Wallace being an
21 innocent man, who was arrested unlawfully, who gives
22 an involuntarily -- an involuntary false confession.
23 And on the basis of that is held for eight and a half
24 years, finally wins the case, is set free, and then
25 sues the police officers --

1 JUSTICE KENNEDY: But, but you presume in
2 your last answer that other than that, there is an
3 absolutely fair prosecution.

4 MR. FLAXMAN: Other than the fact --

5 JUSTICE KENNEDY: I mean, why do we make
6 that assumption when we start out with the allegation of
7 a tort and a violation of the Constitution? I don't
8 understand.

9 MR. FLAXMAN: Well, the tort is against the
10 police officers who made an unlawful arrest and
11 exploited it to get the evidence that was used to hold
12 Mr. Wallace. The, the problem with saying that
13 Mr. Wallace has to sue, as soon as he files his motion
14 to suppress, he should have filed his section 1983
15 action, would produce a multitude of 1983 actions.

16 JUSTICE KENNEDY: What about the fact --
17 suppose there were even a more serious battery
18 here, a broken limb or something. Would he have to sue
19 for the damages for the battery right away? The police
20 officers injured --

21 MR. FLAXMAN: No. If excessive force was
22 used against somebody when they're being arrested,
23 that's a claim that everyone agrees accrues at the time
24 of the injury.

25 JUSTICE KENNEDY: Well, what about this

1 case?

2 MR. FLAXMAN: This case would necessarily
3 impair the invalidity of the conviction. If it was
4 allowed --

5 JUSTICE SCALIA: But the conviction in Heck
6 existed at the time of the alleged tort. And what Heck
7 said is where you have an outstanding conviction, and
8 you have a constitutional tort, you can't sue on that
9 constitutional -- and where -- you cannot sue on that
10 constitutional tort if the decision on the tort would
11 effectively contradict your conviction. Until the
12 conviction has been set aside.

13 Well, this is not that situation. There was
14 no outstanding conviction involved. So why did you have
15 to wait?

16 MR. FLAXMAN: Well, you had to wait because
17 it would -- because it would be a fruitless act to file
18 the case while the case -- file a Federal case while the
19 State criminal case was pending. But --

20 JUSTICE KENNEDY: I'm still -- I'm still
21 puzzled about my question. Suppose there's a battery
22 resulting in a serious injury to the defendant.

23 MR. FLAXMAN: That claim would --

24 JUSTICE KENNEDY: But there's other evidence
25 and so forth. Can you sue for the battery at once?

1 MR. FLAXMAN: You can sue and you have to
2 sue for the battery immediately.

3 JUSTICE KENNEDY: Why is that the situation?

4 MR. FLAXMAN: Why is that different?

5 Because this --

6 JUSTICE KENNEY: And -- or is it just
7 because of the assumption is that the conviction might
8 stand anyway.

9 MR. FLAXMAN: Well the conviction generally
10 does stand with -- the battery generally has nothing to
11 do with the conviction.

12 JUSTICE KENNEDY: But if does, then you
13 wait?

14 MR. FLAXMAN: If it is an element of the
15 offense, you wait. Or if it is an element of what could
16 be a defense in a criminal case.

17 But getting back to the Heck question, in
18 Heck the Court looked to the common law for the
19 appropriate rule to apply to the cause of action that
20 Mr. Heck was applying.

21 If we look to the common law for the
22 appropriate rule for Mr. Wallace, we don't come up with
23 the Seventh Circuit's rule of immediate accrual. We
24 come up with the rule --

25 CHIEF JUSTICE ROBERTS: But the whole point,

1 the whole point of Heck was to avoid 1983 becoming an end
2 run around habeas. But here you don't have that problem
3 because you don't have any available relief under habeas
4 under Stone versus Powell.

5 MR. FLAXMAN: Well, we don't know before the
6 criminal case starts whether Mr. Wallace will receive a
7 full and fair hearing on his Fourth Amendment claim.
8 And until we know that we can't say that Stone versus
9 Powell would bar a Fourth Amendment claim. We don't know
10 that the State will give Mr. Wallace an attorney who can
11 stay awake, who can file motions, who knows that there
12 is a Fourth Amendment, and Mr. Wallace might end up not
13 getting a full and fair hearing and might have a valid
14 claim cognizable with Federal habeas corpus to obtain
15 relief.

16 JUSTICE KENNEDY: Are there many cases in
17 which the rule of Stone versus Powell is inapplicable
18 for that reason?

19 MR. FLAXMAN: No. But there are some. It
20 is not a non-existent occurrence in --

21 JUSTICE BREYER: What happens -- I'm trying
22 to think of what the problem is for you. On January 1,
23 your client's arrested unlawfully. Now suppose the rule
24 was you have two years to file it, starting now. Then
25 what is the problem for you? The problem is maybe in a

1 year, or maybe less, the police start to prosecute him.
2 In the meantime, your trial is going forward because you
3 filed it on time. So when they start to prosecute him,
4 you don't yet know what's going to happen. And it could
5 happen that he's convicted and you think it's illegal
6 because of the arrest and necessarily so.

7 And therefore you have to stop the trial, I
8 guess, because of Heck.

9 MR. FLAXMAN: The civil trial will be stayed
10 pending the --

11 JUSTICE BREYER: That would work, I guess.
12 They'd stop it and then they'd have to bring it -- you'd
13 have to stop it and then you'd have to go through these
14 other remedies and then you'd have to go back to it.

15 MR. FLAXMAN: It would be on the district
16 court's docket for ten years waiting the final --

17 JUSTICE BREYER: But that would work.

18 MR. FLAXMAN: It would, well, it would be a
19 horrible --

20 JUSTICE BREYER: A mess.

21 MR. FLAXMAN: -- a horrible mess for the
22 district court.

23 JUSTICE BREYER: It would work.

24 MR. FLAXMAN: It would not work because --

25 JUSTICE BREYER: Suppose I modify it.

1 JUSTICE SOUTER: Why would it be a mess? I
2 mean, it seems to me that the district court, once it is
3 filed -- assuming it's filed within the two year statute,
4 the district court can tell virtually immediately
5 whether there are criminal proceedings that are yet to
6 be held, and the district court can simply, it can
7 simply stay further proceedings until those criminal
8 proceedings are over. If there's a possibility of
9 collateral attacks, the district court can simply say
10 hey, are you going to file a collateral attack? And if
11 the answer is yes, stay it further. If the answer is
12 no, go ahead with it then. What's tough about that?

13 MR. FLAXMAN: Well, the district judge will
14 not allow a civil case to go forward because it would
15 allow the criminal defendant --

16 JUSTICE SOUTER: That's the premise of my
17 question. But I mean it seems to me that it's fairly
18 easily administered.

19 MR. FLAXMAN: Well, I mean, I -- I shudder to
20 think of 20,000 cases on district court dockets being
21 stayed while criminal cases are being resolved.

22 JUSTICE SOUTER: 20,000 might make me
23 shudder. But we got one.

24 (Laughter.)

25 MR. FLAXMAN: We have one. The criminal

1 defendant will be disinclined to file his civil rights
2 case on time because it will be used against him in his
3 criminal case to impeach his bias.

4 JUSTICE SOUTER: Well how is that -- explain
5 that.

6 MR. FLAXMAN: It will impeach his bias. If
7 he, when he testifies in the criminal case, he will be
8 cross-examined, aren't you seeking money damage from the
9 police officers? Don't you want to make money from this
10 case? And the jury will consider that when they weigh
11 the truthfulness of the --

12 JUSTICE SOUTER: And don't you think that a
13 civil action which necessarily has to be stayed, might
14 be a basis for, for the court in the criminal case to
15 limit that kind of cross-examination?

16 MR. FLAXMAN: Not in the Circuit Court of
17 Cook County. That cross-examination will occur every
18 time a civil --

19 JUSTICE SOUTER: Are there appeals from the
20 Circuit Court of Cook County?

21 MR. FLAXMAN: There are appeals and --

22 JUSTICE SOUTER: Okay, don't you -- don't
23 you think ultimately you could get that issue resolved?

24 MR. FLAXMAN: No. I am absolutely confident
25 that the Illinois courts at the highest level will say

1 that is proper cross-examination.

2 JUSTICE SOUTER: Come -- come back here.

3 (Laughter.)

4 JUSTICE BREYER: Suppose it is complicated.

5 I want to suggest a modification with this suit. You
6 say you have to file within two years. But wait,
7 you have -- we tolled the statute. If the person is
8 arrested and charged, and convicted, for all the time
9 that is going on, it is tolled, equitably. And
10 after the conviction, if he's acquitted, by the way, or
11 he isn't arrested, the statute starts to run again.

12 Now if he's convicted, as long as you have
13 filed, proceeding to challenge the conviction, it is
14 tolled.

15 Now, would that -- that it seems to me would
16 help every problem you have, and it would be called
17 equitable tolling. And that's been suggested by judges
18 in different forums and many states have it.

19 And what's the problem? That just solves
20 the problem, doesn't it?

21 MR. FLAXMAN: Well, I have four answers. I
22 hope I can get them out.

23 If Heck instead of adopting a rule of
24 accrual and denying existence of a cause of action had
25 established the Federal tolling rule, saying that these

1 causes of action are tolled while you're in custody,
2 that would have solved the problem.

3 JUSTICE BREYER: All right, well, we could
4 do it in this case.

5 MR. FLAXMAN: Well, I, I -- the Court
6 certainly can do it. It would require carving a hole
7 into, into Tomiano with this --

8 CHIEF JUSTICE ROBERTS: Yeah, it would
9 require overruling our cases that say for tolling, your
10 borrow State law --

11 JUSTICE BREYER: What cases require
12 overruling?

13 MR. FLAXMAN: Unless State law is
14 inconsistent with Federal Board of Regents versus
15 Tomiano, I think the Court could say that. The other
16 thing that the Court could be aware of is that the
17 Seventh Circuit, and I think four other circuits follow
18 the common law rule that you can't have a 1983 action
19 about a false arrest if you have been convicted of a
20 charge on which you were arrested. So these cases would
21 not be brought in the Seventh Circuit and the --

22 JUSTICE BREYER: Well, I mean the same --
23 it seems to me identical to the rule you are advocating
24 but with one difference. The difference with the rule
25 you are advocating is a judge who is going to be judge at

1 time A with your first case, is going to have to guess
2 whether it is in this case or not in this case necessarily
3 related to some kind of challenge to conviction you're
4 going to bring later if you happen to get convicted.

5 MR. FLAXMAN: I think --

6 JUSTICE BREYER: There's no way to guess
7 that.

8 MR. FLAXMAN: I think tolling, a Federal
9 tolling rule for this cause of action, while someone's in
10 custody although a criminal conviction is, has not been
11 resolved in favor of the defendant, criminal defendant,
12 would be an excellent solution.

13 JUSTICE BREYER: And is there anything that
14 you are aware of that it would be contrary to? I know
15 there are cases that say you look to states but you've
16 only looked to states where the State law is, in fact,
17 consistent with the Federal right.

18 MR. FLAXMAN: No, I think the Court could
19 say without overruling anything that there, in this the
20 State law does not fully reflect or protect the Federal
21 rights at stake here.

22 CHIEF JUSTICE ROBERTS: So then you deny the
23 officers the purpose you have for the reason you have
24 statutes of limitation, which is repose. They are going
25 to wait ten years instead of the two years to find out

1 if they are going to have to answer any claim for
2 damages.

3 MR. FLAXMAN: Well, but the officers will
4 also get the benefit of not being sued if there is a
5 conviction based on the charge for which the person was
6 arrested. That case would not be brought, especially in
7 the Seventh Circuit where there is no cause of action --
8 and it wouldn't be brought anywhere because there's no
9 damages if you are arrested and properly convicted and
10 serving sentence. Those cases just are not going to
11 exist; the officers would have that benefit.

12 JUSTICE GINSBURG: I thought the Seventh
13 Circuit said in -- quickly in passing that the damages
14 would run only from the time of the allegedly unlawful
15 arrest until the time of arraignment. That would -- that
16 would be the -- be all of your damages because once there
17 is an arraignment, whatever happens is not attributed to
18 the seizure.

19 MR. FLAXMAN: That's the Seventh Circuit's
20 view about what the cause of action is, which goes back
21 to what is the cause of action and when does it accrue?
22 In the Seventh Circuit the cause of action starts when
23 you're arrested and ends -- either at the time of
24 arraignment or, as they said in a subsequent case, when
25 there's a Gerstein probable cause hearing. In I think

1 every other circuit, the cause of action doesn't end at
2 the time of arraignment. It continues until the time that
3 you're released from being in custody.

4 JUSTICE GINSBURG: You asked us to take that
5 case and we didn't.

6 MR. FLAXMAN: Well, I asked you to consider
7 damages but I think -- as a question of damages, and
8 there are many issues related to damages that would have
9 been presented in question to --

10 JUSTICE GINSBURG: But if that's the
11 boundaries of the false arrest claim, then why does what
12 happen later matter?

13 MR. FLAXMAN: Well, the common law false
14 arrest claim would allow damages up until the time you
15 were released from the imprisonment, which is not at the
16 time of --

17 JUSTICE SOUTER: If on the basis of
18 innocence?

19 MR. FLAXMAN: Not for a false arrest. As
20 long as you're not convicted. So malicious prosecution,
21 you would --

22 JUSTICE SOUTER: The common law would give
23 damages in a case like this in which the release was
24 basically governed by a suppression which has nothing to
25 do one way or the other with the innocence of that

1 person?

2 MR. FLAXMAN: That's correct. The common
3 law element -- malicious prosecution requires that the
4 innocence or grounds not consistent with guilt, but
5 there's no such element in the common law false
6 imprisonment, which would accrue when you are released
7 from being in prison, which would benefit Mr. Wallace in
8 this case. When the Seventh Circuit talked about there
9 are three alternatives that we have to choose from, it
10 accrues immediately, there's a case by case of when it
11 accrues, or it always accrues at the end of the case, they
12 didn't consider the fourth possibility of the common law
13 rule that it accrues when the imprisonment ends.

14 JUSTICE ALITO: What does somebody like
15 Mr. Wallace do under your rule if he's in a jurisdiction
16 where there's not a lot of discovery in criminal cases.
17 He isn't going to know until trial whether his cause of
18 action accrued sometime earlier or whether it waited.

19 MR. FLAXMAN: But he's not going to file his
20 civil rights claim until his criminal case is over,
21 because he knows and his lawyer will tell him, that's
22 going to hurt you in winning the criminal case, and you
23 should be concerned about that.

24 CHIEF JUSTICE ROBERTS: But he's never going
25 to know, in the case where there's no statute of

1 limitations, he's never going to know when his criminal
2 case is going to be over because he may never know when
3 it's going to start.

4 MR. FLAXMAN: Well, if Mr. Wallace had been
5 arrested and released, he would have had two years from
6 when he was released to bring a civil rights action,
7 that being false imprisonment.

8 CHIEF JUSTICE ROBERTS: So what happens if
9 he files a suit after one year and then after one year
10 and 350 days he's prosecuted? His action accrued but
11 then it didn't accrue?

12 MR. FLAXMAN: Well, I would suggest that it
13 would be the same as when someone is convicted of
14 battery, and then 10 years later, the victim of the
15 battery dies from the injury caused by the battery.
16 There would be a second prosecution for murder that
17 would not be barred by double jeopardy. I think
18 that's Diaz versus United States. I think --

19 CHIEF JUSTICE ROBERTS: So his action
20 accrued and maybe it's even over, but then it turns out
21 when they bring the prosecution, it should have never
22 have been brought because it never accrued.

23 MR. FLAXMAN: No, I think he would have two
24 actions. He'd have the action for being arrested and
25 then he'd have the action later when the -- when he was

1 seized because of the unlawful -- the fruits of the
2 unlawful arrest.

3 As a practical matter, though, those cases
4 are going to arise even less frequently than the Stone
5 versus Powell cases that are brought properly in Federal
6 habeas corpus.

7 JUSTICE BREYER: That problem is solved too
8 if you simply say bring it, day one, you are arrested,
9 and if in fact before the statute of limitations
10 expires, your client is brought to the court and is
11 going to be prosecuted. Tolloed. They don't need two
12 actions.

13 MR. FLAXMAN: A Federal tolling rule would
14 solve these problems.

15 JUSTICE STEVENS: I want to be sure I
16 understood your position with regard to Justice
17 Kennedy's hypothetical where the defendant is arrested
18 and excessive force is used by the police, they beat him
19 up or something like that. When does that cause of
20 action accrue?

21 MR. FLAXMAN: It accrues at the time they
22 beat him up, unless the beating up relates to an element
23 of the offense.

24 JUSTICE STEVENS: Well suppose that they had
25 beat him up two or three times. The first time it didn't

1 relate to it, but then they took him into the
2 interrogation room and they beat him up again. What
3 about that case?

4 MR. FLAXMAN: If the beating up is -- well if
5 the beating up is related to, used to extort a confession
6 and the confession is used against him, then there would
7 be a cause of action when the confession is used.

8 JUSTICE STEVENS: So there would be two
9 causes of action?

10 MR. FLAXMAN: Multiple causes, yes. There
11 could be at least two.

12 JUSTICE STEVENS: Would he have to sue on the
13 first one right away?

14 MR. FLAXMAN: If you want to get damages for
15 being beaten up, I would tell my client to sue right
16 away. I would also tell my client if he's being charged
17 with a serious criminal crime offense, to wait until the
18 criminal case is over, because it will hurt you.

19 JUSTICE SCALIA: Mr. Flaxman, before you
20 save your time, I didn't understand why you're content
21 with Justice Breyer's tolling situation, bearing in mind
22 that the way he put it is, so long as the -- as the
23 criminal case is commenced within the two-year statute
24 of limitations, how does that help you when the statute
25 of limitations has passed? Then there's no tolling.

1 MR. FLAXMAN: Well criminal cases are not
2 commenced many, many years after the unlawful arrest, as
3 a practical matter. And --

4 JUSTICE SCALIA: Two years doesn't seem
5 to me, heard of.

6 MR. FLAXMAN: Well, if we're talking about
7 complicated financial crimes, that's not unusual.

8 JUSTICE SCALIA: You're willing to let those
9 people go?

10 MR. FLAXMAN: If we're talking about the
11 kinds of crimes that are involved with this kind of,
12 with street crime, with murder, and armed robbery, and
13 rape, the defendant is not allowed to run loose for
14 two years.

15 JUSTICE SCALIA: Those are the only
16 defendants you are concerned about?

17 MR. FLAXMAN: Those are the defendants who
18 get unlawfully arrested and are forced to give
19 confessions.

20 If I may reserve my time?

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Flaxman. Ms. Solomon.

23 ORAL ARGUMENT OF BENNA RUTH SOLOMON

24 ON BEHALF OF THE RESPONDENTS

25 MS. SOLOMON: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 Our submission this morning rests on the
3 proposition that a victim of an unreasonable search or
4 seizure has the right to sue as soon as that Fourth
5 Amendment violation occurs. For purposes of accrual of
6 that claim, it does not matter whether the victim is
7 subsequently prosecuted or whether he is subsequently
8 convicted. Accordingly, Petitioner's Fourth Amendment
9 claim accrued for purposes of the two-year statute of
10 limitations as soon as his unlawful arrest and detention
11 occurred, and his lawsuit filed some nine years later is
12 time barred. A claim accrued --

13 JUSTICE STEVENS: May I ask, just to get it
14 straight at the beginning, what if the claim includes a
15 Fifth Amendment claim for extorting a confession and
16 it's mixed up with a Fourth Amendment claim? What about
17 that claim?

18 MS. SOLOMON: I believe that the rule for
19 the Fifth Amendment claim, I believe the Court's view in
20 Chavez is that a coerced confession claim has as an
21 element of the claim, the use of that claim at trial.
22 So it would be our view if that is an element of the
23 claim, that that claim would not accrue until trial.

24 A claim --

25 JUSTICE KENNEDY: What about the beating of

1 the defendant?

2 MS. SOLOMON: Exactly. A claim for
3 conscience shocking techniques to obtain the confession
4 or the excessive force to obtain the confession, both of
5 those claims, and use of the confession at trial is not
6 an element of those claims, and those claims would
7 accrue at the time of those acts, just like the Fourth
8 Amendment rule that we urge in this case.

9 Only where there is a trial right and use of
10 some evidence at trial, suppression of evidence at
11 trial, something of that order, if the trial right is
12 implicated, that claim would not accrue until the trial.
13 But that is different from the Fourth Amendment claim, of
14 course, because --

15 JUSTICE GINSBURG: Ms. Solomon, do I gather
16 from your response to Justice Stevens about the Fifth
17 Amendment claim, that under Chavez it wouldn't accrue
18 until it is used at trial, is this case therefore a
19 pleading slip on Petitioner's part? That is, if he had
20 alleged a Fifth Amendment claim based on the coerced
21 confession, then he wouldn't have a statute of
22 limitations problem?

23 MS. SOLOMON: He brought two claims in his
24 criminal case. He lost them both in the Illinois
25 Circuit Court at the time of his suppression motion. He

1 pursued only one of those on appeal to the Illinois
2 Appellate Court, and the circuit court had made findings
3 that the confession was voluntary. So at the outset,
4 there were problems with that claim going into Federal
5 court.

6 JUSTICE GINSBURG: That's a puzzling feature
7 of it, too, because I thought at the end that the second
8 time around, the Court of Appeals held that the confession
9 was no good.

10 MS. SOLOMON: The Illinois Appellate Court
11 overturned the conviction on the basis that it was
12 obtained through use of a confession in violation of the
13 Fourth Amendment only. The only findings that have ever
14 been made regarding Mr. Wallace's confession, the
15 voluntariness of the confession, were made in the
16 Illinois Circuit Court, and the finding was that the
17 confession was voluntary, that it was not coerced. That
18 finding has never been reviewed. Petitioner did file
19 both Fourth and Fifth Amendment claims in this civil
20 case, but we did not assert the statute of limitations to
21 the Fifth Amendment claim for precisely the reasons that
22 I indicated to Justice Stevens.

23 And for that reason, although the question
24 was presented in the petition, we did not acquiesce in
25 the Fifth Amendment portion of question 1 of the

1 petition, and the court did not grant the Fifth
2 Amendment claim. So I do not believe -- a short answer,
3 sorry -- I do not believe it was a pleading error. It
4 is simply that that claim as the litigation developed is
5 not before this Court now, but not through a simple
6 pleading error. It is a far more weighty problem than
7 that.

8 JUSTICE SOUTER: But if the Fifth Amendment
9 claim were before us, do I understand you to have said
10 before that the Fourth Amendment claim of false arrest
11 would also be subject to litigation as part of the Fifth
12 Amendment claim or under the umbrella of the Fifth
13 Amendment claim, so that the statute would not have run
14 on that?

15 MS. SOLOMON: I'm sorry. If I indicated
16 that, I definitely misspoke. In our view, all Fourth
17 Amendment claims except for those that do negate an
18 element of the offense, and those are described in
19 footnote 6 of Heck, with that exception, all Fourth
20 Amendment claims should be regarded as accruing at the
21 time that the act that actually violates the Fourth
22 Amendment occurs.

23 JUSTICE KENNEDY: Well but, my question is
24 going to be along the same lines. Suppose in the case
25 -- and I assume this is a rather frequent case -- the

1 confession is alleged to be the product of a beating.
2 The two are merged. If we have to wait for the Fifth
3 Amendment claim anyway, then as a matter of policy,
4 matter of convenience, why don't we wait for the Fourth
5 Amendment as well?

6 MS. SOLOMON: Because the rule of accrual is
7 that the act -- the claim accrues when the plaintiff
8 experiences an injury.

9 JUSTICE KENNEDY: Well, we're making up the
10 rule of accrual, so I'm asking, if we have to wait for
11 one, why not wait for the other?

12 MS. SOLOMON: Well, with respect, Justice
13 Kennedy, I don't believe the Court is making up a rule
14 of accrual. I think those rules are quite well settled.
15 Cases like Ricks and Chardon make clear, and the Fourth
16 Amendment cases make clear that a Fourth Amendment
17 violation, unlike the Fifth, where evidence is used at
18 trial, the Fourth Amendment claim violation is fully
19 accomplished at the time of the illegal search or
20 seizure. Anything --

21 JUSTICE SCALIA: Who is the defendant in a
22 Fifth Amendment claim? Is it the policemen who
23 extracted the confession or is it the prosecutor who
24 introduced it at trial, since that is the offense?

25 MS. SOLOMON: Well, the prosecutor would be

1 absolutely immune, of course.

2 JUSTICE SCALIA: Right.

3 MS. SOLOMON: And some of those cases are
4 brought against the police officer. But, the reasons
5 that would suggest a certain accrual date for the Fifth
6 Amendment claim are very different from the reasons that
7 dictate the accrual of the Fourth Amendment claim at the
8 time -- the only action the Petitioner alleges violated
9 the Fourth Amendment in this case was when his detention
10 at the police station, which was consensual at the
11 outset, became unconsensual, became involuntary at some
12 point before he confessed.

13 JUSTICE SOUTER: But if he had also brought
14 a Fifth Amendment claim, your view as I take it would be
15 as follows:

16 Number one, his Fourth Amendment claim, the
17 running of the statute, the Fourth Amendment claim would
18 be unaffected by that, so that would have to have been
19 brought within the two-year period.

20 MS. SOLOMON: That's correct.

21 JUSTICE SOUTER: Number two, I'm assuming,
22 and this is what I want you to tell me whether my
23 assumption is right -- I am assuming that if a Fifth
24 Amendment claim were brought by -- no, strike the
25 assumption.

1 You, I take it, would -- let me ask a
2 different question. I take it you would agree that so
3 long as a criminal case was pending, that it would be
4 sensible and maybe required for the court simply to
5 abstain from any proceedings on the Fourth Amendment
6 claim.

7 MS. SOLOMON: We do -- our position is that
8 they do occur when they happen and they must be filed
9 within the limitations, yes.

10 JUSTICE SOUTER: But you would agree that
11 the court, if there's a criminal case going on, I take
12 it you would agree that the court should not proceed to
13 trial in the 1983 action.

14 MS. SOLOMON: If there is a Fourth Amendment
15 claim being raised in the criminal case, and of course,
16 it might not be, but that is a very easy --

17 JUSTICE BREYER: But that's the problem. I
18 don't know if it is easy. It seems to me if you take
19 your point of view, now, on January 1, some, let's call
20 it an unconstitutional action allegedly. So, I don't
21 want to distinguish for the moment between Fourth and
22 Fifth. On January 1 the event occurs.

23 Then you say you have two years to file your
24 claim in the Federal court of a violation of 1983, for
25 example.

1 Then that happens. Let's say two months
2 later they file it. The defendant files it. A month
3 after that, there is a State criminal proceeding. Now,
4 you're the Federal judge. What's supposed to happen?
5 It sounds to me as if the judge sitting there, under
6 your theory, is going to have to make a decision. He's
7 going to have to say now, is the kind of claim that's
8 being argued in my court that the policemen did
9 something unconstitutional, if I say that's correct,
10 that the plaintiff wins, I have to go on to say does the
11 correctness of that, there was a violation, mean that
12 the conviction if there is a conviction in the State
13 court later, will necessarily be vitiated. If the
14 answer to that question is yes, he shouldn't go ahead;
15 is that right?

16 MS. SOLOMON: Justice Breyer, that is
17 correct.

18 JUSTICE BREYER: All right. If that's
19 correct, we're getting to exactly the same problem,
20 whether we do it through a set of abstention rules,
21 which we have to have Federal abstention rules or it
22 won't be worked out properly, or we have to have Federal
23 tolling rules.

24 I don't see any way to get to a sensible
25 result here without either having clear abstention

1 rules, just as you say, or having clear tolling rules,
2 as I suggested before. Am I right? If I'm wrong, let
3 me know why; and if I'm right, which do you prefer?

4 MS. SOLOMON: I think those are essentially
5 the two choices, with one caveat. We would call it an
6 accrual rule as opposed to a tolling rule, for the
7 reason that this Court has always respected the tolling
8 rules that states have whereas accrual is a Federal
9 question.

10 But with that slight caveat, I do believe
11 that those are the two main options. But I don't
12 believe the Court should be indifferent as between them.
13 There are very serious practical reasons weighing down
14 on our rule, which is a rule of immediate accrual and
15 filing not immediately, of course -- the case need only
16 be filed within the period of the statute of
17 limitations.

18 Thereafter it might well be that some cases,
19 maybe many cases, maybe nearly all cases, would need a
20 stay of some sort while the Federal -- excuse me --
21 while the criminal case is ongoing.

22 But that question, figuring out whether a
23 stay is warranted in order to avoid interference with a
24 ongoing State prosecution, is far easier to figure out
25 than whether the evidence is the only evidence, whether

1 it's critical evidence, whether there was other
2 evidence.

3 JUSTICE KENNEDY: I suppose -- correct me if
4 I'm wrong -- when the district court wants to determine
5 if he should hold something in abeyance, this is not
6 necessarily abstention; this is what courts always do
7 when there are multiple actions. Other action pending
8 is a general ground for a court to stay its hand.

9 MS. SOLOMON: That's exactly right, Justice
10 Kennedy, and it's also --

11 CHIEF JUSTICE ROBERTS: I suppose it would
12 make a difference to the officers, a principle of
13 equitable tolling. They don't know if they're going to
14 be sued for 10 years, 12 years, however long. Under an
15 accrual rule with a stay, they know whether they're
16 going to be facing a civil action or not.

17 MS. SOLOMON: That is the second major
18 advantage that we see to our rule, Chief Justice
19 Roberts.

20 JUSTICE BREYER: If you do it with a stay, I
21 mean, I see that disadvantage. If you do it with a
22 stay, the Federal judge is going to have to sit there
23 with the papers in front of him, look at that evidence,
24 think what's going to happen in the trial at the
25 criminal case which I'm not quite certain yet, and then

1 make a determination. It sounds like a very difficult
2 decision and it sounds like sometimes they'll get it
3 wrong, sometimes they'll get it right. The defendant
4 might be arguing two different things, you know, one in
5 the State court to try to get them to go ahead, and the
6 other to try to get them to go ahead in the Federal
7 court.

8 What do you --

9 MS. SOLOMON: Accepting your earlier
10 construct where there really are essentially two rules,
11 we either delay accrual or we --

12 JUSTICE BREYER: If you delay accrual by
13 tolling, you do have the disadvantage that in some
14 instances the policemen won't know for quite a while
15 whether the case is being brought. That's true; and in
16 the other instance, he won't know for quite a while how
17 the case is going to come out, which may be worse. But
18 you don't have any uncertainty. You have no
19 uncertainty. You would know once the man is released.
20 It's no tolling. Once he's convicted, it's tolled.
21 Then the conviction comes in. Not tolled until they
22 bring a proceeding.

23 MS. SOLOMON: The rule that we propose,
24 which is immediate accrual coupled with a stay of some
25 sort if the Fourth Amendment claim is being actively

1 litigated in the State court at that time, has two
2 advantages.

3 The first is that it does serve the purposes
4 that all statutes of limitations serve, which is it puts
5 the defendant on notice you are now the defendant in a
6 lawsuit, you should be marshalling your evidence, you
7 should be preserving your records, and you are not in
8 repose.

9 This Court has respected those as very
10 important interests. They are absolutely not served by
11 a rule of delayed accrual. At the same time, the rule
12 to allow a stay where necessary - as I indicated, it's
13 not going to be all of the cases, and it's far easier to
14 figure it out. The Federal district court figures it
15 out by having the defendant, the criminal defendant, who
16 is a plaintiff in his court, come in and is asked a
17 question: Are you currently --

18 CHIEF JUSTICE ROBERTS: They're not going to
19 waste a lot of time figuring out whether to grant a stay
20 or not when you have a criminal prosecution pending in
21 State court. I think in most cases -- I mean, it's not
22 like they're looking for cases. They're going to say in
23 most cases: Stay granted, come back when this is over.
24 They don't have to be -- unlike perhaps the situation
25 with an equitable tolling rule, it doesn't matter

1 whether they're precisely right or wrong. I mean, if
2 it's close enough just stay it, and it doesn't seem to
3 me there's much prejudice from that.

4 MS. SOLOMON: Well, that's correct, Your
5 Honor, and we wouldn't have any objection to a rule
6 that --

7 JUSTICE STEVENS: But isn't there this
8 practical problem? I think what you say fits together
9 beautifully with regard to the law, but isn't it true
10 that this will give an incentive in every criminal case
11 for the defendant to file a 1983 action. So we may
12 multiply the number of Federal cases which are filed and
13 then sit there while a criminal case proceeds.

14 MS. SOLOMON: I think the assumption, Your
15 Honor, should be that the number of cases is going to be
16 the same either way. It's just a question of when are
17 they filed and, moreover --

18 JUSTICE STEVENS: Well, if your opponent's
19 rule is adopted, that seems to me they wouldn't file
20 unless -- if they get convicted and the conviction stands
21 up, the case would never be filed.

22 MS. SOLOMON: Well, it's curious that they
23 make that argument, because of course every victim of a
24 Fourth Amendment violation has the right to damages for
25 at least the invasion of their privacy, for the

1 antecedent conduct between the time of arrest and
2 charging. At a minimum, Mr. Wallace had that coming to
3 him because he was, according to the Illinois appellate
4 court, illegally seized.

5 JUSTICE STEVENS: The thing I just want you
6 to comment on is, my thought is every person arrested
7 has a potential, and something follows and so forth, has
8 a potential Fourth Amendment claim, even though he may
9 not have one on the merits. It just seems to me that
10 there's a potential here of an awful lot of what may
11 turn out to be frivolous claims filed, but it would seem
12 to be routine procedure for defense lawyers who want to
13 make a suppression motion to say, well, I better file my
14 1983 case at the same time. So you might get literally
15 hundreds and hundreds of cases.

16 MS. SOLOMON: With respect, Your Honor,
17 we'll take that chance for the benefits that the statute
18 of limitations does bring to the officer. And as far as
19 the burden on the court, whether all cases are stayed or
20 some cases are stayed, of course, we're content to have
21 this Court or the district court handling the case
22 figure that out.

23 But the main point that I would make is that
24 a rule of delayed accrual wholly undermines the purposes
25 of the statute of limitations, and where the plaintiff's

1 interest, the claimant's interests, can be served, as I
2 indicated, at a minimum every victim of a Fourth
3 Amendment violation has the right to some damages. That
4 is actually precisely why we say that Fourth Amendment
5 claims do not necessarily imply the invalidity of the
6 conviction.

7 JUSTICE KENNEDY: I had missed Mr. Flaxman's
8 point that this would be an advantage to the prosecutor
9 to say, aren't you going to make a lot of money about
10 this case? My initial reaction as the defense counsel,
11 I would love that comment. I would tell the jury: Well
12 of course, it's our duty as counsel to point out that my
13 client was beaten, he was terrified, he was beaten
14 again, he had a false confession, and the damages we're
15 not interested in; we'll get much more damages if you
16 convict and we show this 15 years later because the
17 policemen lied as they always do. You know, you hear
18 it.

19 MS. SOLOMON: It may be not in a --

20 JUSTICE KENNEDY: But he has tried more of
21 these cases than I have and he indicates this is a
22 serious concern.

23 MS. SOLOMON: He has tried way more of them
24 than I have as well, and I can't speak to that
25 specifically. It's not an argument that was ever made

1 in the briefs. But again, I have no reason to believe
2 that the Federal district court can't take account of
3 whatever needs to take account of in order to
4 avoid --

5 JUSTICE KENNEDY: No, no. This is the Cook
6 County. This is the Cook County court.

7 MS. SOLOMON: Yes. Yes, I understand. But
8 all that has to happen, of course, is that the complaint
9 be put on file in the Federal case. It's notice
10 pleading. It can be a very, very long complaint.

11 JUSTICE KENNEDY: No, but he says the fact
12 of the complaint the prosecutor's going to use in order
13 to show that they're trying to profit from a false claim
14 of a beating.

15 MS. SOLOMON: Well, but as I indicated,
16 every victim of a Fourth Amendment rights, even those
17 who are guilty, even those who are convicted -- that's
18 the Herring against Procease case. Herring exactly
19 shows --

20 JUSTICE KENNEDY: No, but the point is if
21 the complaint is filed then the prosecution can makes
22 that point.

23 MS. SOLOMON: I would imagine that it would
24 cut both ways in many cases, Your Honor. I'm sorry, I
25 can't speak to it more specifically than that.

1 JUSTICE GINSBURG: Does your position in
2 this case leave any room at all for equitable tolling?

3 MS. SOLOMON: It does, Your Honor,
4 absolutely. Equitable tolling is always available in an
5 extraordinary case when the plaintiff could not put a
6 complaint on file within the period of the statute of
7 limitations. And unlike Federal -- the accrual question,
8 as I indicated a moment ago, the tolling is governed by
9 the states. In this case, for example, because Mr. Wallace
10 was only 15 years old at the time of the arrest, his
11 claim was tolled. He actually had nearly four years
12 beyond the two-year statute of limitations to put a
13 complaint on file and it still would have been toll --
14 would have been timely. He filed outside even that
15 time.

16 Illinois does not toll for prisoners, but
17 many states do, as the Court indicated in the Hardin
18 case. So there's all sorts of tolling available,
19 under State law. But Mr. Wallace has actually never
20 urged tolling in this case and I assume that
21 that's because there is no basis for that under State
22 law. He did get the advantage already of the time when
23 he was a minor and there is no other basis under
24 Illinois law that would allow him any basis for tolling.

25 But of course, tolling is proper when the

1 plaintiff does not know and could not know that his
2 rights were violated. If Mr. Wallace was illegally
3 seized, he was right there when it happened. He might
4 not have known that a court would ultimately accept his
5 argument on that, but of course the plaintiff never has
6 a right to be told that he has a successful claim before
7 he brings that claim.

8 JUSTICE GINSBURG: Is there any remedy that
9 Illinois law provides for a case like this where a
10 person spends, what was it, eight years in prison and is
11 ultimately released because the State never had enough
12 evidence to try him in the first place?

13 MS. SOLOMON: In many cases, the State law
14 of malicious prosecution will provide a remedy. Of
15 course, in Illinois and in all states, it requires
16 favorable termination. In this case, of course,
17 Petitioner conceded long ago that he cannot show
18 favorable termination because the circumstances under
19 which the criminal case ended did not -- were not
20 consistent with a favorable termination.

21 But, of course, he would have had a Fourth
22 Amendment claim if he had filed it timely. He would
23 have had a State law malicious prosecution claim if he
24 had been able to show favorable termination. In states
25 that don't have malicious prosecution, perhaps there

1 would be a due process claim as well.

2 The result that there are no damages
3 available to somebody when the conviction is overturned
4 solely by operation of the exclusionary rule, however,
5 should not be troubling because the conviction itself,
6 of course, was not an independent violation of the
7 Constitution. Petitioner did receive the benefit of the
8 exclusionary rule. His conviction was overturned.
9 We're not aware of any case indicating that deterrence
10 purposes would require both the exclusion of evidence
11 and a damages claim.

12 JUSTICE KENNEDY: Would it ever be proper
13 for a district court to insist on proceeding to the
14 merits of the claim, to dispose of the merits of the
15 claim, while the prosecution was pending? Suppose the
16 district court thought that it was seeing too many of
17 these claims and it wanted to get to the bottom of them?

18 MS. SOLOMON: Well, in our experience the
19 district courts don't tend to want to go ahead. But I
20 would suppose that if the -- if the court did, rules of
21 comity are sufficient to allow the State courts to have
22 the first crack at issues that are arising in the
23 criminal cases, to be the ones that --

24 JUSTICE KENNEDY: We haven't written about
25 that other than in Heck explicitly and implicitly, and

1 in Younger? That's about it? So far as --

2 MS. SOLOMON: In Heck and in Younger.

3 There's the concurrence in Deacons against Monahan
4 indicates that a claim for damages should be stayed and

5 not dismissed or gone forward with. Justice White's

6 concurrence specifically addressed the difference

7 between dismissing and going forward with the claim.

8 And of course, the footnotes 8 and 9 in the Heck opinion

9 are very powerful indications of the weighty reasons. We

10 have no reason to think that the district court would

11 want to charge ahead with a claim that would -- with a

12 case that will only get simpler if it waits for the

13 State court proceedings to conclude, as well as of

14 course the comity and respect for the State courts.

15 In this case, of course, as I mentioned,

16 the -- Mr. Wallace always had a claim available to him

17 for his initial seizure regardless of the outcome of his

18 criminal prosecution. If he wanted to seek damages for

19 that prosecution and our primary submission, part one of

20 our brief is even assuming those damages might be

21 available on a Fourth Amendment claim, he was

22 nevertheless obligated to bring that claim within the

23 period of the statute of limitations, because otherwise

24 it would be time barred.

25 In our view, Petitioner does not have

1 one claim for that arrest and another claim for his
2 trial and prosecution. He has one claim for a Fourth
3 Amendment violation with two elements of damages. But
4 mounting future or delayed damages do not delay accrual.
5 Even where the plaintiff does not know the full extent
6 of his injuries, he still must sue within the period of
7 the statute of limitations.

8 In fact, Petitioner does not cite a
9 single case including the ones newly arrived in the
10 reply brief that uses either his accrual rule or his
11 damages rule to award damages for the entire time of a
12 lengthy period of incarceration. And as I indicated
13 Petitioner did concede long ago that he cannot show
14 favorable termination. And although he could have
15 obtained some damages had he brought his claim timely,
16 his claim did accrue when he was seized and not when the
17 charges were dismissed --

18 JUSTICE GINSBURG: Do you agree with Judge
19 Wood that the limitation on damages would be from the
20 period, from the time of the arrest until the
21 arraignment? That would be the measure and nothing
22 after?

23 MS. SOLOMON: A number of courts have
24 reached that result, Your Honor. Footnote 25 recites
25 five court of appeals decisions to that effect. But our

1 primary submission in this Court is that regardless of
2 the damages that are available on a Fourth Amendment
3 claim, that the mounting of damages did not delay
4 accrual, and without a timely claim, it doesn't matter
5 what damages the plaintiff is seeking.

6 The reference in Heck to a claim for damages
7 for unconstitutional conviction, we take to be a
8 shorthand for a claim of some sort of constitutional
9 violation that can be brought through the vehicle of
10 section 1983 that would enable the plaintiff to recover
11 damages for the incarceration. 1983 of course itself
12 does not create any substantive rights. The plaintiff
13 needs an underlying claim and in this case of course the
14 plaintiff only has the Fourth Amendment claim.

15 We do have, in our brief and argument why
16 the Fourth Amendment should not be regarded as allowing
17 those damages, but our primary submission and we do
18 think the Court can decide the case without -- without
19 reaching that issue.

20 The only date to delay accrual in this
21 case was the date that the charges were nol prossed.
22 But that date is meaningless for the Fourth Amendment
23 and it is therefore meaningless for accrual. We would
24 the judgment be affirmed.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Ms. Solomon.

2 Mr. Flaxman, you have four minutes
3 remaining.

4 REBUTTAL ARGUMENT OF KENNETH N. FLAXMAN
5 ON BEHALF OF PETITIONER

6 MR. FLAXMAN: The issue that has been
7 sitting in this case like the elephant in the room is
8 what is Mr. Wallace's cause of action? Is it a cause of
9 action for being seized until he was arraigned? Or is
10 it a cause of action for being seized for the eight and
11 a half years that he was locked up until he was, the
12 criminal case was resolved in his favor?

13 My sister argues that it was just, the
14 Federal remedy is only until you're being arraigned, and
15 that the State remedy for malicious prosecution doesn't
16 exist if the Seventh Circuit has construed Illinois law
17 to say that there is no malicious prosecution when you
18 win the Federal case, when you win the criminal case,
19 because the evidence has been suppressed. The false
20 imprisonment, State false imprisonment was dismissed by
21 the district court, under his reading of Illinois law
22 that the cause of action accrued at the time of the
23 arrest. Not at the time he was released. And the
24 Seventh Circuit when that issue was raised on appeal to
25 them in a brief by both sides chose to reject it without

1 discussion.

2 What, the cause of action that Respondent
3 proposes is none, for the eight and a half year seizure.
4 There is no State cause of action in Illinois. And
5 there is no Federal cause of action. It is just tough.
6 You are seized for eight and a half years, and you can't
7 go to State court, you can't go to Federal court. You
8 should have sued immediately after you were arrested to
9 get a little bit of damages, but that's all you can get.
10 And have a nice day; we're sorry.

11 That, I don't think is consistent with Heck.
12 I don't think it is consistent with this Court's
13 jurisprudence about the meaning of section 1983. I
14 don't think it is consistent with the Fourth Amendment
15 and it should not be the rule that the Court adopts.

16 The statute of limitations problem isn't
17 really a problem because all of the evidence that's
18 material to the legality of the arrest, to the legality
19 and the -- whether the confession was the proximate --
20 was proximately caused by the arrest or proximately
21 caused the incarceration, has been developed in the
22 criminal case. When there's very strong interest in
23 seeing that the facts are fully determined and fairly
24 determined for both sides. It is not that the police
25 officer who sued eight -- eight and a half years later

1 is much less prejudiced than Mr. Wallace
2 is, who comes out of prison after eight and a half years
3 with no remedy.

4 The questions about the multiple causes of
5 action that can arise: if you're beaten, you have to
6 sue immediately after you're beaten; if you're beaten
7 but a confession is extorted from you, your right to sue
8 starts when the confession is used against you at
9 trial -- and if there's some constitutional violation
10 which necessarily impairs the conviction, then you can
11 sue after you successfully defended a criminal case --
12 is really an administrative nightmare that really could
13 be solved by a Federal tolling rule that all section
14 1983 cases are tolled; the statute does not start to run
15 until the criminal case has been resolved.

16 In most cases, then, instead of being filed
17 in district court --

18 JUSTICE KENNEDY: That in effect is saying
19 we can't have a statute of limitations rule; we're just
20 going to laches, we're just going to an equitable rule.

21 MR. FLAXMAN: Well --

22 JUSTICE KENNEDY: We're just throwing up our
23 hands and saying there is no statute of limitations.

24 MR. FLAXMAN: No, there is a statute of
25 limitations. It starts to run when the criminal case is

1 over. That will weed out all of the really nonsensical
2 cases that would otherwise be filed under Respondent's
3 rule, when you file the 1983 action the same day you
4 file the motion to suppress and the district judge says
5 well, this goes on my State calendar of 5,000 cases and
6 the clerk's office is troubled with collecting the \$350
7 filing fee in installments, and the jails are troubled
8 by paying those installments every time there's \$10 in
9 the prisoner's account. It's -- it would -- there are
10 more important things for the courts, the prisons to do.
11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
13 The case is submitted.

14 (Whereupon, at 12:03 p.m., the case in the
15 above-entitled matter was submitted.)

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abeyance 37:5	action 3:21,23 3:24 4:18 6:5,9 6:14,23,24 11:15 13:19 17:13 18:24 19:1,18 20:9 21:7,20,21,22 22:1 23:18 24:6,10,19,24 24:25 25:20 26:7,9 33:8 34:13,20 37:7 37:16 40:11 50:8,9,10,22 51:2,4,5 52:5 53:3	agrees 11:23	antecedent 41:1	14:23 18:8,11 19:20 21:6,9 21:23 24:5,24 25:8,17 27:18 41:6 51:8
able 45:24	acts 29:7	ahead 16:12 35:14 38:5,6 46:19 47:11	anyway 13:8 32:3	arrived 48:9
above-entitled 1:12 53:15	addition 10:8	ALITO 8:2,12 8:23 9:12 10:14 23:14	appeal 30:1 50:24	aside 4:1 12:12
absolutely 5:9 6:22 11:3 17:24 33:1 39:10 44:4	additional 8:6,8 8:12,24,25 9:1	allegation 11:6	appeals 4:2,2 17:19,21 30:8 48:25	asked 4:1 22:4,6 39:16
abstain 34:5	addressed 3:11 47:6	alleged 5:18 12:6 29:20 32:1	APPEARAN... 1:15	asking 32:10
abstention 35:20,21,25 37:6	adhere 7:14	allegedly 21:14 34:20	appellate 30:2 30:10 41:3	assert 30:20
accept 45:4	administered 16:18	alleges 33:8	applied 4:23	assume 31:25 44:20
Accepting 38:9	administrative 52:12	allow 16:14,15 22:14 39:12 44:24 46:21	apply 4:2,3 8:5 13:19	assuming 16:3 33:21,23 47:20
accomplished 32:19	adopt 4:3	allowed 12:4 27:13	applying 13:20	assumption 11:6 13:7 33:23,25 40:14
account 43:2,3 53:9	adopted 40:19	allowing 49:16	appropriate 13:19,22	attack 16:10
accrual 13:23 18:24 28:5 32:6,10,14 33:5,7 36:6,8 36:14 37:15 38:11,12,24 39:11 41:24 44:7 48:4,10 49:4,20,23	adopting 18:23	alternatives 23:9	argued 35:8	attacks 16:9
accrue 6:15 21:21 23:6 24:11 25:20 28:23 29:7,12 29:17 48:16	adopts 51:15	ambush 5:16	argues 50:13	attorney 14:10
accrued 6:5,9 23:18 24:10,20 24:22 28:9,12 50:22	advantage 37:18 42:8 44:22	ambushed 10:12	arguing 8:17 9:20 38:4	attributed 21:17
accrues 3:25 11:23 23:10,11 23:11,13 25:21 32:7	advantages 39:2	Amendment 14:7,9,12 28:5 28:8,15,16,19 29:8,13,17,20 30:13,19,21,25 31:2,8,10,12 31:13,17,20,22 32:3,5,16,16 32:18,22 33:6 33:7,9,14,16 33:17,24 34:5 34:14 38:25 40:24 41:8 42:3,4 43:16 45:22 47:21 48:3 49:2,14 49:16,22 51:14	argument 1:13 2:2,5,8 3:3,6 8:3 27:23 40:23 42:25 45:5 49:15 50:4	available 14:3 44:4,18 46:3 47:16,21 49:2
accruing 31:20	advocating 19:23,25	ambush 5:16	arising 46:22	average 9:16,17
accuse 8:19	affirmed 3:14 49:24	Amendment 14:7,9,12 28:5 28:8,15,16,19 29:8,13,17,20 30:13,19,21,25 31:2,8,10,12 31:13,17,20,22 32:3,5,16,16 32:18,22 33:6 33:7,9,14,16 33:17,24 34:5 34:14 38:25 40:24 41:8 42:3,4 43:16 45:22 47:21 48:3 49:2,14 49:16,22 51:14	armed 27:12	avoid 14:1 36:23 43:4
acquiesce 30:24	age 9:16	ANDRE 1:3	arraigned 50:9 50:14	awaiting 6:4
acquitted 18:10	ago 44:8 45:17 48:13	answer 11:2 16:11,11 21:1 31:2 35:14	arraignment 21:15,17,24 22:2 48:21	awake 14:11
act 12:17 31:21 32:7	agree 34:2,10,12 48:18	answers 18:21	arrest 6:11,12 6:16,21 7:1,3,4 10:4 11:10 15:6 19:19 21:15 22:11,14 22:19 25:2 27:2 28:10 31:10 41:1 44:10 48:1,20 50:23 51:18,20	award 48:11
		ante 5:8,14	arrested 4:5 6:6 10:21 11:22	aware 19:16 20:14 46:9
				awful 41:10
				a.m 1:14 3:2
				B
				back 13:17 15:14 18:2 21:20 39:23
				bar 14:9
				barred 24:17 28:12 47:24
				base 9:8 10:2
				based 21:5 29:20
				basically 22:24

<p>basis 10:23 17:14 22:17 30:11 44:21,23 44:24 battery 11:17,19 12:21,25 13:2 13:10 24:14,15 24:15 bearing 26:21 beat 25:18,22,25 26:2 beaten 26:15 42:13,13 52:5 52:6,6 beating 25:22 26:4,5 28:25 32:1 43:14 beautifully 40:9 becoming 14:1 began 10:16 beginning 28:14 behalf 1:16,19 2:4,7,10 3:7 27:24 50:5 believe 28:18,19 31:2,3 32:13 36:10,12 43:1 believes 4:23 benefit 21:4,11 23:7 46:7 benefits 41:17 BENNA 1:18 2:6 27:23 better 41:13 beyond 44:12 bias 17:3,6 bind-over 7:8 bit 8:18 51:9 Board 19:14 borrow 19:10 bottom 46:17 bound 6:10 10:6 boundaries 22:11 break 7:14 breaking 7:10 Breyer 14:21</p>	<p>15:11,17,20,23 15:25 18:4 19:3,11,22 20:6,13 25:7 34:17 35:16,18 37:20 38:12 Breyer's 26:21 brief 47:20 48:10 49:15 50:25 briefs 43:1 Briggs 7:13 bring 5:21 15:12 20:4 24:6,21 25:8 38:22 41:18 47:22 brings 45:7 broken 11:18 brought 7:19 19:21 21:6,8 24:22 25:5,10 29:23 33:4,13 33:19,24 38:15 48:15 49:9 build 9:17 burden 41:19</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calendar 53:5 call 7:8 34:19 36:5 called 18:16 carving 19:6 case 3:10,15,17 3:19,20 4:9,14 4:19,24 5:5,13 6:22 8:15,17 8:18 9:9,12,13 9:19,24 10:24 12:1,2,18,18 12:18,19 13:16 14:6 16:14 17:2,3,7,10,14 19:4 20:1,2,2 21:6,24 22:5 22:23 23:8,10</p>	<p>23:10,11,20,22 23:25 24:2 26:3,18,23 29:8,18,24 30:20 31:24,25 33:9 34:3,11 34:15 36:15,21 37:25 38:15,17 40:10,13,21 41:14,21 42:10 43:9,18 44:2,5 44:9,18,20 45:9,16,19 46:9 47:12,15 48:9 49:13,18 49:21 50:7,12 50:18,18 51:22 52:11,15,25 53:13,14 cases 4:6 5:9,17 14:16 16:20,21 19:9,11,20 20:15 21:10 23:16 25:3,5 27:1 32:15,16 33:3 36:18,19 36:19 39:13,21 39:22,23 40:12 40:15 41:15,19 41:20 42:21 43:24 45:13 46:23 52:14,16 53:2,5 categorical 4:4 causation 7:11 7:14 cause 4:18 6:5,8 6:22,24,24 7:23 8:19 13:19 18:24 20:9 21:7,20 21:21,22,25 22:1 23:17 25:19 26:7 50:8,8,10,22 51:2,4,5 caused 24:15</p>	<p>51:20,21 causes 19:1 26:9 26:10 52:4 caveat 36:5,10 certain 33:5 37:25 certainly 19:6 chain 7:10,14 challenge 5:1 18:13 20:3 challenged 5:1 challenging 3:16 chance 41:17 Chardon 32:15 charge 19:20 21:5 47:11 charged 18:8 26:16 charges 6:4 48:17 49:21 charging 41:2 Chavez 28:20 29:17 Chicago 1:6,16 1:19 Chief 3:3,8 5:19 5:25 13:25 19:8 20:22 23:24 24:8,19 27:21,25 37:11 37:18 39:18 49:25 53:12 choices 36:5 choose 23:9 chose 50:25 circuit 17:16,20 19:17,21 21:7 21:13,22 22:1 23:8 29:25 30:2,16 50:16 50:24 circuits 19:17 Circuit's 13:23 21:19 circumstances 45:18 cite 48:8</p>	<p>civil 3:15,18 4:20 15:9 16:14 17:1,13 17:18 23:20 24:6 30:19 37:16 claim 4:7 6:13 6:20,22 11:23 12:23 14:7,9 14:14 21:1 22:11,14 23:20 28:6,9,12,14 28:15,16,17,19 28:20,21,21,23 28:23,24 29:2 29:12,13,17,20 30:4,21 31:2,4 31:9,10,12,13 32:3,7,18,22 33:6,7,14,16 33:17,24 34:6 34:15,24 35:7 38:25 41:8 43:13 44:11 45:6,7,22,23 46:1,11,14,15 47:4,7,11,16 47:21,22 48:1 48:1,2,15,16 49:3,4,6,8,13 49:14 claimant 4:20 claimant's 42:1 claims 29:5,6,6 29:23 30:19 31:17,20 41:11 42:5 46:17 clear 32:15,16 35:25 36:1 clerk's 53:6 client 9:18 10:9 25:10 26:15,16 42:13 client's 14:23 close 40:2 coerced 28:20 29:20 30:17</p>
---	--	--	---	--

cognizable 14:14	30:12,14,15,17 32:1,23 42:14	42:6 46:3,5,8 49:7 52:10	39:21 41:4,19 41:21,21 43:2	custody 7:2 19:1 20:10 22:3
collateral 16:9 16:10	51:19 52:7,8	Cook 17:17,20 43:5,6	43:6 44:17 45:4 46:13,16	cut 43:24
collaterally 3:16	confessions 27:19	core 4:10,13,17 6:24	46:20 47:10,13 48:25 49:1,18	D
collecting 53:6	confident 17:24	Corporation 1:18	50:21 51:7,7 51:15 52:17	D 3:1
come 13:22,24 18:2,2 38:17 39:16,23	conscience 29:3	corp 14:14 25:6	courts 17:25 37:6 46:19,21	damage 17:8
comes 3:20 38:21 52:2	consensual 33:10	corpus 14:14 25:6	47:14 48:23 53:10	damages 3:24 4:7,18 11:19
coming 41:2	consider 17:10 22:6 23:12	correct 4:16 6:22 7:6,16,16	court's 15:16 28:19 51:12	21:2,9,13,16 22:7,7,8,14,23
comity 46:21 47:14	consistent 20:17 23:4 45:20 51:11,12,14	33:20 35:9,17 35:19 37:3 40:4	crack 46:22	26:14 40:24 42:3,14,15
commenced 26:23 27:2	Constitution 11:7 46:7	correctness 35:11	create 49:12	46:2,11 47:4 47:18,20 48:3
comment 41:6 42:11	constitutional 12:8,9,10 49:8 52:9	counsel 1:18 42:10,12 53:12	crime 8:20 10:19 26:17 27:12	48:4,11,11,15 48:19 49:2,3,5
commit 10:18	construct 38:10	County 17:17,20 43:6,6	27:12	49:6,11,17 51:9
common 4:20 6:14 13:18,21 19:18 22:13,22 23:2,5,12	construed 50:16	coupled 38:24	crimes 27:7,11	date 33:5 49:20 49:21,22
complaint 43:8 43:10,12,21 44:6,13	content 26:20 41:20	course 29:14 33:1 34:15	criminal 3:17,18 3:20 4:19 5:3,9	49:21,22
completed 6:18	context 3:12,13 3:17	36:15 40:23 41:20 42:12	5:10,13,17 8:4 9:23 10:2	day 5:22 25:8 51:10 53:3
complicated 18:4 27:7	continues 22:2	43:8 44:25 45:5,15,16,21	12:19 13:16 14:6 16:5,7,15	days 24:10
concede 48:13	contradict 12:11	46:6 47:8,14 47:15 49:11,13	16:21,25 17:3 17:7,14 20:10	Deacons 47:3
conceded 45:17	contrary 20:14	court 1:1,13 3:9 3:10,20,23 4:2	20:11 23:16,20 23:22 24:1	debate 9:6
concern 4:15 42:22	convenience 32:4	4:2,17,22 13:18 15:22	26:17,18,23 27:1 29:24	decide 49:18
concerned 6:17 23:23 27:16	convict 42:16	16:2,4,6,9,20 17:14,16,20	34:3,11,15 35:3 36:21	decision 6:10 12:10 35:6 38:2
conclude 47:13	convicted 15:5 18:8,12 19:19	19:5,15,16 20:18 25:10	37:25 39:15,20 40:10,13 45:19	38:2
concluding 4:17	20:4 21:9	28:1 29:25 30:2,2,5,8,10	46:23 47:18 50:12,18 51:22	decisions 48:25
concurrence 47:3,6	22:20 24:13	30:16 31:1,5 32:13 34:4,11	52:11,15,25	defendant 5:10 5:17 8:4 9:22
conduct 41:1	28:8 38:20	34:12,24 35:8 35:13 36:7,12	critical 37:1	9:23 10:13 12:22 16:15
confessed 33:12	40:20 43:17	37:4,8 38:5,7 39:1,9,14,16	17:15,17 18:1	17:1 20:11,11
confession 7:1 7:17,18,24 8:1 8:21 10:5,8,22 26:5,6,7 28:15 28:20 29:3,4,5 29:21 30:3,8	conviction 3:14 3:17,25,25 5:3 8:10,14,22 9:1 9:5,11 12:3,5,7 12:11,12,14 13:7,9,11 18:10,13 20:3 20:10 21:5 30:11 35:12,12 38:21 40:20		cross-examina... 17:15,17 18:1	25:17 27:13 29:1 32:21 35:2 38:3 39:5 39:5,15,15 40:11

<p>delay 38:11,12 48:4 49:3,20 delayed 39:11 41:24 48:4 deny 20:22 denying 4:18 18:24 Deputy 1:18 described 31:18 description 9:18 detention 28:10 33:9 determination 38:1 determine 37:4 determined 51:23,24 deterrence 46:9 developed 31:4 51:21 Diaz 24:18 dictate 33:7 dictionary 9:6 dies 24:15 difference 19:24 19:24 37:12 47:6 different 3:12 8:15,17 13:4 18:18 29:13 33:6 34:2 38:4 difficult 38:1 directed 6:21 disadvantage 37:21 38:13 disclosed 5:16 discovery 5:10 5:16 23:16 discussion 51:1 disinclined 17:1 dismissed 47:5 48:17 50:20 dismissing 47:7 dispose 46:14 dissenting 5:5 distinguish 34:21</p>	<p>district 15:15,22 16:2,4,6,9,13 16:20 37:4 39:14 41:21 43:2 46:13,16 46:19 47:10 50:21 52:17 53:4 docket 15:16 dockets 16:20 double 24:17 due 46:1 duty 42:12 D.C 1:10</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 23:18 38:9 easier 36:24 39:13 easily 16:18 easy 34:16,18 effect 3:16 48:25 52:18 effectively 12:11 eight 10:23 45:10 50:10 51:3,6,25,25 52:2 either 21:23 35:25 38:11 40:16 48:10 element 13:14 13:15 23:3,5 25:22 28:21,22 29:6 31:18 elements 48:3 elephant 50:7 eliminating 8:20 enable 49:10 ended 45:19 ends 21:23 23:13 entire 48:11 equitable 18:17 37:13 39:25</p>	<p>44:2,4 52:20 equitably 18:9 error 31:3,6 especially 21:6 ESQ 1:16,18 2:3 2:6,9 essentially 36:4 38:10 established 18:25 EUGENE 1:7 event 34:22 evidence 5:1,1 5:13,18 7:24 8:4,5,7,9,12,18 8:24,25 9:2,7 9:10 10:1 11:11 12:24 29:10,10 32:17 36:25,25 37:1 37:2,23 39:6 45:12 46:10 50:19 51:17 ex 5:8,13 exactly 29:2 35:19 37:9 43:18 example 34:25 44:9 excellent 20:12 exception 31:19 exceptions 4:4 excessive 11:21 25:18 29:4 excluded 9:8 exclusion 46:10 exclusionary 46:4,8 excuse 36:20 exist 21:11 50:16 existed 12:6 existence 4:18 18:24 experience 46:18 experiences</p>	<p>32:8 expires 25:10 explain 17:4 explicitly 46:25 exploited 6:25 11:11 exploiting 7:4 extent 48:5 extort 26:5 extorted 10:5 52:7 extorting 28:15 extracted 32:23 extraordinary 44:5 eyewitness 9:24 eyewitnesses 10:9</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facing 37:16 fact 9:3 11:4,16 20:16 25:9 43:11 48:8 facts 7:6 51:23 factual 7:15,16 fair 11:3 14:7,13 fairly 16:17 51:23 false 6:11,12,14 10:22 19:19 22:11,13,19 23:5 24:7 31:10 42:14 43:13 50:19,20 far 6:16 31:6 36:24 39:13 41:18 47:1 favor 4:19 20:11 50:12 favorable 45:16 45:18,20,24 48:14 feature 30:6 Federal 3:20 12:18 14:14 18:25 19:14</p>	<p>20:8,17,20 25:5,13 30:4 34:24 35:4,21 35:22 36:8,20 37:22 38:6 39:14 40:12 43:2,9 44:7 50:14,18 51:5 51:7 52:13 fee 53:7 Fifth 28:15,19 29:16,20 30:19 30:21,25 31:1 31:8,11,12 32:2,17,22 33:5,14,23 34:22 fighting 3:19 figure 36:24 39:14 41:22 figures 39:14 figuring 36:22 39:19 file 4:7 12:17,18 14:11,24 16:10 17:1 18:6 23:19 30:18 34:23 35:2 40:11,19 41:13 43:9 44:6,13 53:3,4 filed 3:15 11:14 15:3 16:3,3 18:13 28:11 34:8 36:16 40:12,17,21 41:11 43:21 44:14 45:22 52:16 53:2 files 3:22 11:13 24:9 35:2 filing 6:4 36:15 53:7 final 15:16 finally 10:24 financial 27:7 find 20:25</p>
--	--	--	--	---

<p>finding 30:16,18 findings 30:2,13 first 20:1 25:25 26:13 39:3 45:12 46:22 fits 9:18 40:8 five 48:25 Flaxman 1:16 2:3,9 3:5,6,8 4:8,12,16 5:4,9 5:15,23 6:3,20 7:13,20,22 8:2 8:8,16 9:4,21 10:11,15 11:4 11:9,21 12:2 12:16,23 13:1 13:4,9,14 14:5 14:19 15:9,15 15:18,21,24 16:13,19,25 17:6,16,21,24 18:21 19:5,13 20:5,8,18 21:3 21:19 22:6,13 22:19 23:2,19 24:4,12,23 25:13,21 26:4 26:10,14,19 27:1,6,10,17 27:22 50:2,4,6 52:21,24 Flaxman's 42:7 follow 19:17 follows 33:15 41:7 footnote 31:19 48:24 footnotes 47:8 force 11:21 25:18 29:4 forced 27:18 forth 12:25 41:7 forums 18:18 forward 15:2 16:14 47:5,7 found 10:7,8 four 18:21 19:17</p>	<p>44:11 50:2 fourth 14:7,9,12 23:12 28:4,8 28:16 29:7,13 30:13,19 31:10 31:16,19,21 32:4,15,16,18 33:7,9,16,17 34:5,14,21 38:25 40:24 41:8 42:2,4 43:16 45:21 47:21 48:2 49:2,14,16,22 51:14 free 10:24 frequent 31:25 frequently 25:4 friend 6:8 frivolous 41:11 front 37:23 fruitless 12:17 fruits 25:1 full 14:7,13 48:5 fully 20:20 32:18 51:23 further 16:7,11 future 48:4</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 gather 6:13 29:15 general 37:8 generally 13:9 13:10 Gerstein 21:25 getting 13:17 14:13 35:19 GINSBURG 4:8 4:14 21:12 22:4,10 29:15 30:6 44:1 45:8 48:18 give 14:10 22:22 27:18 40:10 given 7:17,18</p>	<p>gives 10:21 go 9:9 15:13,14 16:12,14 27:9 35:10,14 38:5 38:6 46:19 51:7,7 goes 21:20 53:5 going 4:3 6:13 6:14 15:2,4 16:10 18:9 19:25 20:1,4 20:24 21:1,10 23:17,19,22,24 24:1,2,3 25:4 25:11 30:4 31:24 34:11 35:6,7 37:13 37:16,22,24 38:17 39:13,18 39:22 40:15 42:9 43:12 47:7 52:20,20 good 30:9 governed 22:24 44:8 grant 31:1 39:19 granted 39:23 ground 37:8 grounds 23:4 guess 6:15 15:8 15:11 20:1,6 guilt 23:4 guilty 43:17</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>habeas 4:11,15 14:2,3,14 25:6 half 10:23 50:11 51:3,6,25 52:2 hand 37:8 handling 41:21 hands 52:23 happen 15:4,5 20:4 22:12 34:8 35:4 37:24 43:8 happened 5:5</p>	<p>45:3 happens 6:13 14:21 21:17 24:8 35:1 Hardin 44:17 hear 3:3 42:17 heard 27:5 hearing 7:9 14:7 14:13 21:25 Heck 3:11,13,23 4:9,10,16,22 12:5,6 13:17 13:18,20 14:1 15:8 18:23 31:19 46:25 47:2,8 49:6 51:11 height 9:17 held 3:23 10:23 16:6 30:8 help 18:16 26:24 Herring 43:18 43:18 hey 16:10 highest 17:25 hold 7:2,23 11:11 37:5 hole 19:6 Honor 6:21 40:5 40:15 41:16 43:24 44:3 48:24 hope 18:22 horrible 15:19 15:21 Humphrey 3:11 hundreds 41:15 41:15 hurt 23:22 26:18 hypothetical 10:19 25:17</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>identical 19:23 identification 9:25 identified 10:9</p>	<p>Ill 1:16,19 illegal 15:5 32:19 illegally 8:5 41:4 45:2 Illinois 4:7 5:24 7:8 17:25 29:24 30:1,10 30:16 41:3 44:16,24 45:9 45:15 50:16,21 51:4 imagine 43:23 immediate 13:23 36:14 38:24 immediately 5:21 13:2 16:4 23:10 36:15 51:8 52:6 immune 33:1 impair 12:3 impairs 52:10 impeach 17:3,6 implicated 29:12 implicitly 46:25 implied 4:4 imply 8:10,21 9:11 42:5 important 39:10 53:10 imprisoned 3:19 imprisonment 3:25 6:15,16 22:15 23:6,13 24:7 50:20,20 inapplicable 14:17 incarcerated 6:3 incarceration 3:22 6:11 7:12 48:12 49:11 51:21 incentive 40:10 incident 6:12 includes 28:14</p>
---	---	---	---	--

including 48:9	8:21 9:11 12:3	18:2,4 19:3,8	know 5:12,15,20	36:17 39:4
inconsistent 19:14	42:5	19:11,22 20:6	7:7 10:4,6,17	41:18,25 44:7
independent 6:10,18 46:6	invasion 40:25	20:13,22 21:12	14:5,8,9 15:4	44:12 47:23
indicated 30:22	involuntarily 10:22	22:4,10,17,22	20:14 23:17,25	48:7 51:16
31:15 39:12	involuntary 10:22 33:11	23:14,24 24:8	24:1,2 34:18	52:19,23,25
42:2 43:15	involved 12:14	24:19 25:7,15	36:3 37:13,15	limited 8:3
44:8,17 48:12	27:11	25:16,24 26:8	38:4,14,16,19	line 4:10
indicates 42:21	involves 4:15	26:12,19,21	42:17 45:1,1	lines 31:24
47:4	in-court 9:25	27:4,8,15,21	48:5	literally 41:14
indicating 46:9	issue 17:23	27:25 28:13,25	known 45:4	litigated 39:1
indications 47:9	49:19 50:6,24	29:15,16 30:6	knows 5:10	litigation 31:4
indifferent 36:12	issues 22:8	30:22 31:8,23	14:11 23:21	31:11
initial 42:10	46:22	32:9,12,21	KRISTEN 1:7	little 8:18 51:9
47:17	J	33:2,13,21		locked 50:11
injured 11:20	jails 53:7	34:10,17 35:16	L	long 6:1 18:12
injuries 48:6	January 14:22	35:18 37:3,9	laches 52:20	22:20 26:22
injury 11:24	34:19,22	37:11,18,20	language 5:3	34:3 37:14
12:22 24:15	jeopardy 24:17	38:12 39:18	Laughter 6:2	43:10 45:17
32:8	judge 5:5 9:16	40:7,18 41:5	16:24 18:3	48:13
innocence 22:18	16:13 19:25,25	42:7,20 43:5	law 4:21 6:14	look 13:21 20:15
22:25 23:4	35:4,5 37:22	43:11,20 44:1	13:18,21 19:10	37:23
innocent 10:21	48:18 53:4	45:8 46:12,24	19:13,18 20:16	looked 13:18
insist 46:13	judges 18:17	47:5 48:18	20:20 22:13,22	20:16
installments 53:7,8	judgment 49:24	49:25 52:18,22	23:3,5,12 40:9	looking 39:22
instance 38:16	judicial 7:18	53:12	44:19,22,24	loose 27:13
instances 38:14	judiciary 7:9	K	45:9,13,23	lost 29:24
insufficient 8:13	jurisdiction 23:15	Kato 1:7 3:4	50:16,21	lot 23:16 39:19
8:25	jurisprudence 51:13	Kennedy 11:1,5	lawsuit 3:22	41:10 42:9
interest 42:1	jury 17:10 42:11	11:16,25 12:20	28:11 39:6	love 42:11
51:22	Justice 3:3,8 4:8	12:24 13:3,12	lawyer 23:21	
interested 42:15	4:14,25 5:7,12	14:16 28:25	lawyers 41:12	M
interests 39:10	5:19,25 6:7 7:5	31:23 32:9,13	leave 44:2	magistrate 6:10
42:1	7:15,21 8:2,12	37:3,10 42:7	legality 51:18,18	6:19 7:19,22
interference 36:23	8:23 9:12 10:3	42:20 43:5,11	lengthy 48:12	7:25 8:1
interrogation 26:2	10:14 11:1,5	43:20 46:12,24	let's 9:17 34:19	main 36:11
intervention 7:19	11:16,25 12:5	52:18,22	35:1	41:23
introduced 32:24	12:20,24 13:3	Kennedy's 25:17	level 17:25	major 37:17
invalidate 5:3	13:6,12,25	KENNETH 1:16 2:3,9 3:6	lied 42:17	making 32:9,13
invalidity 8:10	14:16,21 15:11	50:4	limb 11:18	malicious 4:21
	15:17,20,23,25	KENNEY 13:6	limit 17:15	22:20 23:3
	16:1,16,22	kind 17:15 20:3	limitation 20:24	45:14,23,25
	17:4,12,19,22	27:11 35:7	48:19	50:15,17
		kinds 27:11	limitations 4:6	Malley 7:13
		knew 5:17 10:7	5:22,24 24:1	man 9:9,22
			25:9 26:24,25	10:18,21 38:19
			28:10 29:22	marshalling 39:6
			30:20 34:9	

<p>material 51:18 matter 1:12 7:16 7:17 22:12 25:3 27:3 28:6 32:3,4 39:25 49:4 53:15 mean 5:20 6:7 8:24,24,25 9:1 9:5,7 11:5 16:2 16:17,19 19:22 35:11 37:21 39:21 40:1 meaning 51:13 meaningless 49:22,23 means 9:4 measure 48:21 mentioned 47:15 merged 32:2 merits 41:9 46:14,14 mess 15:20,21 16:1 mind 26:21 minimum 41:2 42:2 minor 44:23 minutes 50:2 missed 42:7 misspoke 31:16 mixed 28:16 modification 18:5 modify 15:25 moment 6:9 34:21 44:8 Monahan 47:3 Monday 1:11 money 17:8,9 42:9 month 35:2 months 35:1 morning 28:2 motion 11:13 29:25 41:13 53:4</p>	<p>motions 14:11 mounting 48:4 49:3 multiple 26:10 37:7 52:4 multiply 40:12 multitude 11:15 murder 5:24 9:15 24:16 27:12</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 1:16 2:1,1,3,9 3:1,6 50:4 nearly 36:19 44:11 necessarily 5:2,7 8:9,10,21,23 12:2 15:6 17:13 20:2 35:13 37:6 42:5 52:10 necessary 39:12 need 25:11 36:15,19 needs 43:3 49:13 negate 31:17 never 23:24 24:1 24:2,21,22 30:18 40:21 44:19 45:5,11 nevertheless 47:22 newly 48:9 nice 51:10 nightmare 52:12 nine 28:11 nol 49:21 nonsensical 53:1 non-existent 14:20 notice 39:5 43:9 November 1:11 number 33:16 33:21 40:12,15 48:23</p>	<hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objection 40:5 obligated 47:22 obtain 14:14 29:3,4 obtained 30:12 48:15 occur 17:17 34:8 occurred 7:5,7 28:11 occurrence 14:20 occurs 28:5 31:22 34:22 offense 13:15 25:23 26:17 31:18 32:24 office 53:6 officer 33:4 41:18 51:25 officers 1:6 6:25 10:25 11:10,20 17:9 20:23 21:3,11 37:12 Okay 7:21 17:22 old 44:10 once 12:25 16:2 21:16 38:19,20 ones 46:23 48:9 ongoing 36:21 36:24 operation 46:4 opinion 47:8 opponent's 40:18 opposed 36:6 options 36:11 oral 1:12 2:2,5 3:6 27:23 order 29:11 36:23 43:3,12 outcome 47:17 outset 30:3 33:11 outside 44:14 outstanding</p>	<p>12:7,14 overruling 19:9 19:12 20:19 overturned 30:11 46:3,8</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 PAGE 2:2 papers 37:23 part 29:19 31:11 47:19 passed 26:25 passing 21:13 paying 53:8 pending 12:19 15:10 34:3 37:7 39:20 46:15 people 27:9 period 33:19 36:16 44:6 47:23 48:6,12 48:20 person 18:7 21:5 23:1 41:6 45:10 persuade 9:2 petition 5:6 30:24 31:1 Petitioner 1:4 1:17 2:4,10 3:7 4:23 30:18 33:8 45:17 46:7 47:25 48:8,13 50:5 Petitioner's 28:8 29:19 place 9:15 45:12 plaintiff 3:18 32:7 35:10 39:16 44:5 45:1,5 48:5 49:5,10,12,14 plaintiff's 41:25 pleading 29:19 31:3,6 43:10</p>	<p>please 3:9 28:1 plus 7:4 point 4:9 6:11 6:18 7:9 13:25 14:1 33:12 34:19 41:23 42:8,12 43:20 43:22 police 1:6 6:25 7:11 10:25 11:10,19 15:1 17:9 25:18 33:4,10 51:24 policemen 32:22 35:8 38:14 42:17 policy 32:3 portion 30:25 position 25:16 34:7 44:1 possibility 16:8 23:12 potential 41:7,8 41:10 Powell 14:4,9,17 25:5 powerful 47:9 practical 3:16 25:3 27:3 36:13 40:8 precisely 30:21 40:1 42:4 prefer 36:3 prejudice 40:3 prejudiced 52:1 premise 16:16 presented 7:24 7:25 22:9 30:24 presents 3:10 preserving 39:7 presume 11:1 prevailed 3:18 primary 47:19 49:1,17 principle 4:1 37:12</p>
---	---	---	--	---

<p>prior 7:7,8,9 prison 3:14 23:7 45:10 52:2 prisoner 3:13 prisoners 44:16 prisoner's 53:9 prisons 53:10 privacy 40:25 probable 6:24 7:23 8:19 21:25 problem 4:10,13 4:17 11:12 14:2,22,25,25 18:16,19,20 19:2 25:7 29:22 31:6 34:17 35:19 40:8 51:16,17 problems 25:14 30:4 Procease 43:18 procedure 41:12 proceed 34:12 proceeding 18:13 35:3 38:22 46:13 proceedings 16:5,7,8 34:5 47:13 proceeds 40:13 process 10:16 46:1 produce 11:15 product 32:1 profit 43:13 proper 18:1 44:25 46:12 properly 21:9 25:5 35:22 propose 38:23 proposes 51:3 proposition 28:3 prosecute 9:10 15:1,3 prosecuted 24:10 25:11</p>	<p>28:7 prosecution 4:21 5:11,21 9:9 10:2 11:3 22:20 23:3 24:16,21 36:24 39:20 43:21 45:14,23,25 46:15 47:18,19 48:2 50:15,17 prosecutor 10:1 32:23,25 42:8 prosecutor's 43:12 prossed 49:21 protect 20:20 provide 45:14 provides 45:9 proximate 51:19 proximately 51:20,20 purpose 20:23 purposes 28:5,9 39:3 41:24 46:10 pursued 30:1 put 26:22 43:9 44:5,12 puts 39:4 puzzled 12:21 puzzling 30:6 p.m 53:14</p> <hr/> <p style="text-align: center;">Q</p> <p>question 3:11 9:13 12:21 13:17 16:17 22:7,9 30:23 30:25 31:23 34:2 35:14 36:9,22 39:17 40:16 44:7 questions 52:4 quickly 21:13 quite 32:14 37:25 38:14,16</p> <hr/> <p style="text-align: center;">R</p>	<p>R 3:1 raised 3:11 34:15 50:24 rape 27:13 reached 48:24 reaching 49:19 reaction 42:10 reading 50:21 realized 10:1 really 10:6 38:10 51:17 52:12,12 53:1 reason 14:18 20:23 30:23 36:7 43:1 47:10 reasons 30:21 33:4,6 36:13 47:9 REBUTTAL 2:8 50:4 receive 14:6 46:7 recites 48:24 records 39:7 recover 3:24 49:10 reference 49:6 reflect 20:20 regard 25:16 40:9 regarded 31:20 49:16 regarding 30:14 regardless 47:17 49:1 Regents 19:14 rehearing 5:6 reject 50:25 relate 26:1 related 20:3 22:8 26:5 relates 25:22 release 22:23 released 22:3,15 23:6 24:5,6 38:19 45:11</p>	<p>50:23 relief 14:3,15 remaining 50:3 remedies 15:14 remedy 3:21 45:8,14 50:14 50:15 52:3 reply 48:10 repose 20:24 39:8 require 19:6,9 19:11 46:10 required 34:4 requires 23:3 45:15 reserve 27:20 resolved 4:19 16:21 17:23 20:11 50:12 52:15 respect 32:12 41:16 47:14 respected 36:7 39:9 Respondent 6:25 51:2 Respondents 1:19 2:7 27:24 Respondent's 53:2 response 29:16 rests 28:2 result 35:25 46:2 48:24 resulting 12:22 reviewed 30:18 Ricks 32:15 right 4:11 11:19 19:3 20:17 26:13,15 28:4 29:9,11 33:2 33:23 35:15,18 36:2,3 37:9 38:3 40:1,24 42:3 45:3,6 52:7 rights 3:15,18</p>	<p>4:20 17:1 20:21 23:20 24:6 43:16 45:2 49:12 robbery 27:12 Roberts 3:3 5:19 5:25 13:25 19:8 20:22 23:24 24:8,19 27:21 37:11,19 39:18 49:25 53:12 room 26:2 44:2 50:7 routine 41:12 Roy 1:8 3:4 rule 4:4,20,21 9:19 13:19,22 13:23,24 14:17 14:23 18:23,25 19:18,23,24 20:9 23:13,15 25:13 28:18 29:8 32:6,10 32:13 36:6,6 36:14,14 37:15 37:18 38:23 39:11,11,25 40:5,19 41:24 46:4,8 48:10 48:11 51:15 52:13,19,20 53:3 rules 32:14 35:20,21,23 36:1,1,8 38:10 46:20 run 14:2 18:11 21:14 27:13 31:13 52:14,25 running 9:17 33:17 runs 5:22 RUTH 1:18 2:6 27:23</p> <hr/> <p style="text-align: center;">S</p>
---	--	---	---	---

<p>S 2:1 3:1 save 26:20 saw 9:15,22 saying 3:21 11:12 18:25 52:18,23 says 4:5 6:8 43:11 53:4 SCALIA 4:25 5:7,12 10:3 12:5 26:19 27:4,8,15 32:21 33:2 scenario 6:6 search 28:3 32:19 second 24:16 30:7 37:17 section 3:20 11:14 49:10 51:13 52:13 see 35:24 37:18 37:21 seeing 46:16 51:23 seek 3:21 47:18 seeking 17:8 49:5 seize 7:2 seized 8:5 25:1 41:4 45:3 48:16 50:9,10 51:6 seizure 21:18 28:4 32:20 47:17 51:3 sensible 34:4 35:24 sentence 21:10 serious 11:17 12:22 26:17 36:13 42:22 serve 39:3,4 served 39:10 42:1 serving 21:10 set 4:1 10:20,24</p>	<p> 12:12 35:20 settled 32:14 Seventh 13:23 19:17,21 21:7 21:12,19,22 23:8 50:16,24 shocking 29:3 short 31:2 shorthand 49:8 show 8:1 42:16 43:13 45:17,24 48:13 shows 43:19 shudder 16:19 16:23 side 6:8 sides 50:25 51:24 simple 31:5 simpler 47:12 simply 16:6,7,9 25:8 31:4 34:4 single 48:9 sister 50:13 sit 37:22 40:13 sitting 35:5 50:7 situation 8:3,11 12:13 13:3 26:21 39:24 situations 8:6 slight 36:10 slightly 3:12 slip 29:19 solely 6:20 46:4 Solomon 1:18 2:6 27:22,23 27:25 28:18 29:2,15,23 30:10 31:15 32:6,12,25 33:3,20 34:7 34:14 35:16 36:4 37:9,17 38:9,23 40:4 40:14,22 41:16 42:19,23 43:7 43:15,23 44:3</p>	<p> 45:13 46:18 47:2 48:23 50:1 solution 4:21,23 20:12 solve 25:14 solved 19:2 25:7 52:13 solves 4:17 18:19 somebody 9:15 11:22 23:14 46:3 someone's 20:9 soon 11:13 28:4 28:10 sorry 31:3,15 43:24 51:10 sort 36:20 38:25 49:8 sorts 44:18 sounds 35:5 38:1,2 SOUTER 6:7 7:5,15,21 16:1 16:16,22 17:4 17:12,19,22 18:2 22:17,22 31:8 33:13,21 34:10 speak 42:24 43:25 specifically 42:25 43:25 47:6 spends 45:10 stake 20:21 stand 13:8,10 stands 40:20 start 10:20 11:6 15:1,3 24:3 52:14 starting 4:8 14:24 starts 14:6 18:11 21:22 52:8,25 State 12:19</p>	<p> 14:10 19:10,13 20:16,20 35:3 35:12 36:24 38:5 39:1,21 44:19,21 45:11 45:13,23 46:21 47:13,14 50:15 50:20 51:4,7 53:5 states 1:1,13 18:18 20:15,16 24:18 36:8 44:9,17 45:15 45:24 station 33:10 statute 4:6 5:22 5:23 16:3 18:7 18:11 23:25 25:9 26:23,24 28:9 29:21 30:20 31:13 33:17 36:16 41:17,25 44:6 44:12 47:23 48:7 51:16 52:14,19,23,24 statutes 20:24 39:4 stay 14:11 16:7 16:11 36:20,23 37:8,15,20,22 38:24 39:12,19 39:23 40:2 stayed 15:9 16:21 17:13 41:19,20 47:4 steps 7:10 Stevens 25:15 25:24 26:8,12 28:13 29:16 30:22 40:7,18 41:5 Stone 14:4,8,17 25:4 stop 15:7,12,13 straight 28:14 street 6:23 27:12</p>	<p>strike 33:24 strong 51:22 subject 31:11 submission 28:2 47:19 49:1,17 submitted 53:13 53:15 subsequent 7:11 21:24 subsequently 28:7,7 substantive 49:12 successful 45:6 successfully 52:11 sue 11:13,18 12:8,9,25 13:1 13:2 26:12,15 28:4 48:6 52:6 52:7,11 sued 21:4 37:14 51:8,25 sues 10:25 sufficient 46:21 suggest 18:5 24:12 33:5 suggested 18:17 36:2 suit 18:5 24:9 support 8:13 9:1 suppose 9:13 11:17 12:21 14:23 15:25 18:4 25:24 31:24 37:3,11 46:15,20 supposed 35:4 suppress 11:14 53:4 suppressed 50:19 suppressing 8:20 suppression 22:24 29:10,25 41:13</p>
---	---	---	---	---

<p>Supreme 1:1,13 sure 25:15 sustained 5:2</p> <hr/> <p style="text-align: center;">T</p> <p>T 2:1,1 take 9:19 22:4 33:14 34:1,2 34:11,18 41:17 43:2,3 49:7 taken 6:23 takes 6:19 8:14 talked 23:8 talking 10:19 27:6,10 techniques 29:3 tell 5:14 10:10 16:4 23:21 26:15,16 33:22 42:11 ten 15:16 20:25 tend 46:19 termination 45:16,18,20,24 48:14 terrified 42:13 testifies 17:7 Thank 3:8 27:21 27:25 49:25 53:11,12 theory 35:6 they'd 15:12,12 thing 19:16 41:5 things 38:4 53:10 think 9:4,5,7 10:20 14:22 15:5 16:20 17:12,23 19:15 19:17 20:5,8 20:18 21:25 22:7 24:17,18 24:23 32:14 36:4 37:24 39:21 40:8,14 47:10 49:18 51:11,12,14</p>	<p>thought 7:7 21:12 30:7 41:6 46:16 three 23:9 25:25 throwing 52:22 time 6:1,4 9:14 10:4,5,5 11:23 12:6 15:3 17:2 17:18 18:8 20:1 21:14,15 21:23 22:2,2 22:14,16 25:21 25:25 26:20 27:20 28:12 29:7,25 30:8 31:21 32:19 33:8 39:1,11 39:19 41:1,14 44:10,15,22 47:24 48:11,20 50:22,23 53:8 timely 44:14 45:22 48:15 49:4 times 25:25 told 45:6 toll 44:13,16 tolled 18:7,9,14 19:1 25:11 38:20,21 44:11 52:14 tolling 18:17,25 19:9 20:8,9 25:13 26:21,25 35:23 36:1,6,7 37:13 38:13,20 39:25 44:2,4,8 44:18,20,24,25 52:13 Tomiano 19:7 19:15 tort 11:7,9 12:6 12:8,10,10 tough 16:12 51:5 trial 5:16 10:7 10:10,15,16</p>	<p>15:2,7,9 23:17 28:21,23 29:5 29:9,10,11,11 29:12,18 32:18 32:24 34:13 37:24 48:2 52:9 tried 42:20,23 trier 9:2 troubled 53:6,7 troubling 46:5 true 38:15 40:9 truthfulness 17:11 try 38:5,6 45:12 trying 9:6 14:21 43:13 turn 41:11 turns 24:20 two 14:24 16:3 18:6 20:25 24:5,23 25:11 25:25 26:8,11 27:4,14 29:23 32:2 33:21 34:23 35:1 36:5,11 38:4 38:10 39:1 48:3 two-year 26:23 28:9 33:19 44:12</p> <hr/> <p style="text-align: center;">U</p> <p>ultimately 17:23 45:4,11 umbrella 31:12 unaffected 33:18 uncertainty 38:18,19 unconsensual 33:11 unconstitutio... 3:22,24 34:20 35:9 49:7 underlying</p>	<p>49:13 undermines 41:24 understand 11:8 26:20 31:9 43:7 understood 25:16 unfair 10:12 United 1:1,13 24:18 unlawful 11:10 21:14 25:1,2 27:2 28:10 unlawfully 10:21 14:23 27:18 unreasonable 28:3 untruthful 7:1 unusual 27:7 urge 29:8 urged 44:20 use 28:21 29:5,9 30:12 43:12 uses 48:10</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5 valid 14:13 vehicle 49:9 versus 3:4,11 7:13 14:4,8,17 19:14 24:18 25:5 victim 24:14 28:3,6 40:23 42:2 43:16 view 4:12 21:20 28:19,22 31:16 33:14 34:19 47:25 violated 33:8 45:2 violates 31:21 violation 11:7 28:5 30:12</p>	<p>32:17,18 34:24 35:11 40:24 42:3 46:6 48:3 49:9 52:9 virtually 16:4 vitiated 35:13 voluntariness 30:15 voluntary 30:3 30:17</p> <hr/> <p style="text-align: center;">W</p> <p>wait 5:21 6:1 12:15,16 13:13 13:15 18:6 20:25 26:17 32:2,4,10,11 waited 23:18 waiting 15:16 waits 47:12 Wallace 1:3 3:4 7:2,23 9:23,25 10:20 11:12,13 13:22 14:6,10 14:12 23:7,15 24:4 41:2 44:9 44:19 45:2 47:16 52:1 Wallace's 30:14 50:8 want 17:9 18:5 25:15 26:14 33:22 34:21 41:5,12 46:19 47:11 wanted 46:17 47:18 wants 37:4 warranted 36:23 Washington 1:10 wasn't 10:1 waste 39:19 way 18:10 20:6 22:25 26:22 35:24 40:16</p>
---	---	---	---	---

42:23	5:20 7:2,3	<hr/> 5 <hr/>		
ways 43:24	10:24 14:24	5,000 53:5		
weed 53:1	15:16 18:6	<hr/> 6 <hr/>		
weigh 17:10	20:25,25 24:5	6 1:11 31:19		
weighing 36:13	24:14 27:2,4	<hr/> 8 <hr/>		
weighty 31:6	27:14 28:11	8 47:8		
47:9	34:23 37:14,14	8-1/2 3:19 7:2,3		
weren't 10:18	42:16 44:10,11	<hr/> 9 <hr/>		
we'll 3:3 41:17	45:10 50:11	9 47:8		
42:15	51:6,25 52:2			
we're 4:3 27:6	Younger 47:1,2			
27:10 32:9	<hr/> \$ <hr/>			
35:19 41:20	\$10 53:8			
42:14 46:9	\$350 53:6			
51:10 52:19,20	<hr/> 0 <hr/>			
52:22	05-1240 1:5			
whatsoever 4:5	<hr/> 1 <hr/>			
8:4	1 14:22 30:25			
White's 47:5	34:19,22			
wholly 41:24	10 24:14 37:14			
willing 27:8	11:05 1:14 3:2			
win 50:18,18	12 37:14			
winning 23:22	12:03 53:14			
wins 10:24	15 9:16 42:16			
35:10	44:10			
withheld 10:12	1983 3:21 4:6,10			
witness 9:14,21	11:14,15 14:1			
Wood 48:19	19:18 34:13,24			
work 15:11,17	40:11 41:14			
15:23,24	49:10,11 51:13			
worked 35:22	52:14 53:3			
worse 38:17	<hr/> 2 <hr/>			
wouldn't 21:8	2 4:5			
29:17,21 40:5	20,000 16:20,22			
40:19	2006 1:11			
written 46:24	25 9:16 48:24			
wrong 6:17,17	27 2:7			
7:6 36:2 37:4	<hr/> 3 <hr/>			
38:3 40:1	3 2:4			
<hr/> X <hr/>	350 24:10			
x 1:2,9	<hr/> 4 <hr/>			
<hr/> Y <hr/>	49 2:10			
Yeah 19:8				
year 15:1 16:3				
24:9,9 51:3				
years 3:19 4:6				