

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   MICHAEL GREENLAW, AKA,                                 :

4   MIKEY,   :

5                                 Petitioner                                 :

6                         v.   :   No. 07-330

7   UNITED STATES.   :

8   - - - - - x

9   Washington, D.C.

10   Tuesday, April 15, 2008

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

15 APPEARANCES:

16 AMY HOWE, ESQ., Washington, D.C.; on behalf of the  
17         Petitioner.

18 DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor  
19         General, Department of Justice, Washington, D.C.;  
20         on behalf of the Respondent, supporting the reversal.

21 JAY T. JORGENSEN, ESQ., Washington, D.C.; for amicus  
22         curiae, support of the judgement below; Appointed by  
23         this Court.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	AMY HOWE, ESQ.	
4	On behalf of the Petitioner	3
5	DEANNE E. MAYNARD, ESQ.	
6	On behalf of the Respondent	16
7	JAY T. JORGENSEN, ESQ.	
8	As amicus curiae, support of the	
9	judgement below	32
10	REBUTTAL ARGUMENT OF	
11	AMY HOWE, ESQ.	
12	On behalf of the Petitioner	57
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
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6  
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12  
13  
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15  
16  
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19  
20  
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23  
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25

P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first today in Case 07-330, Greenlaw versus United States.

Ms. Howe.

ORAL ARGUMENT OF AMY HOWE

ON BEHALF OF THE PETITIONER

MS. HOWE: Mr. Chief Justice, and may it please the Court:

For over 200 years, this Court has held, without exception, that an appellate court may not modify a judgment in a party's favor unless that party has filed a notice of appeal. Such a rule, this Court has explained, serves important interests in notice and finality.

In 1984, Congress enacted the Sentencing Reform Act against the backdrop of this well settled rule. In 18 U.S.C. section 3742, Congress provided for limited appellate review of sentencing errors. Nothing in the text, structure, or history of section 3742 reflects any intent by Congress to deviate from the inveterate and certain cross-appeal rule, nor is there any reason why sentencing appeals should be treated any differently from other appeals. Instead, section 3742

1 reflects traditional principles of appellate  
2 jurisdiction. In --

3 JUSTICE STEVENS: Can I ask you this  
4 question? I've been thinking about this case.  
5 Supposing your client prevailed on appeal and they held  
6 a resentencing. Could the district judge have increased  
7 the sentence?

8 MS. HOWE: No. It could not have because  
9 the government --

10 JUSTICE STEVENS: The district judge could  
11 not have increased it? If they sent it back for a new  
12 sentencing, a fresh hearing on what the sentencing  
13 should be, would the district judge have been foreclosed  
14 from giving a higher sentence than he gave the first  
15 time?

16 MS. HOWE: If -- he would have been  
17 foreclosed, yes, Your Honor.

18 JUSTICE STEVENS: What's the authority for  
19 that proposition?

20 MS. HOWE: Simply that the -- the district  
21 --

22 JUSTICE STEVENS: Say, if it was a capital  
23 case and he won on appeal, he could get the death  
24 sentence the time -- the second time around, which is a  
25 little bit -- be a little more serious sentence.

1                   Why couldn't he have gotten a higher  
2 sentence.

3                   MS. HOWE: This is a -- the case actually in  
4 United States versus Harvey, which was a case out of the  
5 Third Circuit, and, although the district court could  
6 order the same sentence, it can't increase the sentence.  
7 It -- you know, would be circumventing the cross-appeal  
8 rule.

9                   JUSTICE GINSBURG: Is that based on any --  
10 any precedent of this Court?

11                   MS. HOWE: No. It's based on the  
12 cross-appeal rule.

13                   JUSTICE GINSBURG: So just on the  
14 cross-appeal rule? That's --

15                   CHIEF JUSTICE ROBERTS: I would have thought  
16 it would depend on what the mandate from the court of  
17 appeals said. If the mandate said the sentence is  
18 vacated and the case is remanded for resentencing, it  
19 seems to me that leaves open the full range of  
20 legitimate sentencing.

21                   MS. HOWE: Certainly. I mean, our argument  
22 would be that the -- you know, if the court of appeals  
23 can't order the sentence increased, that on remand the  
24 district court couldn't circumvent the cross-appeal rule  
25 by increasing the sentence as well.

1 CHIEF JUSTICE ROBERTS: Well, but the court  
2 of appeals -- if your argument is correct, the court of  
3 appeals is limited solely by virtue of the failure to  
4 file a notice of cross-appeal. That -- that's a  
5 limitation that wouldn't apply in the district court.

6 MS. HOWE: No, that's -- that's certainly  
7 true, that it would be circumventing the cross-appeal  
8 rule to allow the district court to do something that --

9 JUSTICE KENNEDY: And it would also, I take  
10 it, be circumventing what could happen in the district  
11 court. You have to move very -- seven days in the  
12 district court for mathematical error, and that's it.

13 MS. HOWE: Yes, under this rule.

14 JUSTICE KENNEDY: Other than for assistance  
15 --

16 MS. HOWE: Yes, the district court has, I  
17 believe, seven days to correct the sentence.

18 JUSTICE GINSBURG: This would not be a  
19 mathematical error?

20 MS. HOWE: No. This would be -- this would  
21 not be a mathematical error, but --

22 JUSTICE SCALIA: I could have sworn that  
23 I've seen more than one petition for certiorari in which  
24 the claim is that the sentence was increased on remand  
25 vindictively. I'm sure I've seen cert petitions like

1 that. And you're telling me that the assertion of -- of  
2 vindictiveness is unnecessary, and it just can't be  
3 increased on remand?

4 But all you have is a court of appeals case  
5 for that.

6 MS. HOWE: Yes, we do --

7 JUSTICE KENNEDY: Perhaps that's after a new  
8 trial.

9 MS. HOWE: Perhaps.

10 JUSTICE KENNEDY: What happens if it's --  
11 what happens if the sentence is five years, reversed on  
12 appeal, error in evidence, same -- same offense, same  
13 indictment? Then you have to comply with the  
14 vindictiveness rules before you can give a higher  
15 sentence?

16 MS. HOWE: I think it might be different if  
17 they were -- if there were a new trial on the same  
18 indictment. But -- you know, going back to the  
19 cross-appeal rule, I mean, the court of appeals could --  
20 the district court could certainly impose the same  
21 sentence.

22 JUSTICE KENNEDY: What do you think is the  
23 rule if there's a new trial and the judge says, you  
24 know, what about this, I heard the evidence again; I  
25 think I'm going to increase the sentence?

1 MS. HOWE: Well, our argument would be that  
2 the government had -- had forfeited the right to make  
3 that argument and that the district court would not  
4 be -- you know, that would essentially be sua sponte  
5 ordering --

6 JUSTICE KENNEDY: But what's sua sponte --

7 MS. HOWE: You know, if the government had  
8 --

9 JUSTICE KENNEDY: It's a resentence.  
10 There's a new judgment, a new conviction. What happens  
11 there?

12 MS. HOWE: New judgment and new conviction --  
13 it -- the rule may be different. You know, double  
14 jeopardy may apply as well.

15 JUSTICE GINSBURG: Double jeopardy if it's a  
16 new judge? Is that what you said?

17 MS. HOWE: I -- I'm not sure.

18 JUSTICE SCALIA: Who asked this question?  
19 We're going to get a totally different case here.

20 (Laughter.)

21 JUSTICE GINSBURG: But let's go back to where  
22 you started, and that was with the statute, 37 -- what  
23 is it? 42?

24 MS. HOWE: 42.

25 JUSTICE GINSBURG: -- (f). And the -- that



1 has two subparts, and the first part just says the court  
2 of appeals can decide whether a sentence was imposed in  
3 violation of law, period.

4 And (2) has two subparts that refer to the  
5 party appealing. So why doesn't the first one cover  
6 both sides when the second one is distinctly divided  
7 into (a) and (b) parts?

8 MS. HOWE: Certainly, Justice Ginsburg. And  
9 that -- this is reprinted on page 5a of the government's  
10 brief. And the inference that I think,  
11 Justice Ginsburg, you're drawing and that the amicus  
12 would have you draw is that the fact that the subsection  
13 (f)(2), which is on page 6a, subsection (f)(2)(A) and  
14 (b) refer to whether the appeal has been filed; whereas,  
15 subsection (f)(1) does not, which means that, in some  
16 circumstances, the cross-appeal rule does not apply and  
17 in some circumstances it does.

18 But our interpretation, which we think is  
19 the correct one, is that the only reason that subsection  
20 (f)(1) does not refer to whether an appeal has been  
21 filed is because subsection (f)(1) refers to the kind of  
22 claims that both defendants and the government can  
23 bring; whereas, subsection (f)(2) parallels  
24 subsections(a)(3) and (b)(3), but (c), only the  
25 defendant can appeal an upward departure; only the

1 government can appeal a downward departure.

2           And our interpretation, again, which we  
3 think is the correct one, is that subsection (f)(1)  
4 doesn't need to refer to whether an appeal has been  
5 filed, because -- because both the defendant and the  
6 government can bring those kinds of appeals.

7           And even if you don't agree with that  
8 interpretation, I think it's worth noting that the  
9 amicus -- that the amicus's construction is further  
10 flawed for three reasons. And the first is that that  
11 would cause subsection (f)(2) to operate illogically.  
12 There's no reason why the -- for example, if you had a  
13 case in which the defendant had appealed and the  
14 government had not appealed, under this interpretation  
15 the court of appeals could increase a sentence if it  
16 found there had been a misapplication of the Guidelines  
17 that would result in an increase in the defendant's  
18 sentence; but the court of appeals would not be allowed  
19 to increase the defendant's sentence if it found that  
20 there was an unwarranted downward departure, because the  
21 government had filed a notice of appeal. We don't think  
22 -- that doesn't make any sense. We don't think there's  
23 any reason why Congress would have intended to it to  
24 operate this way.

25           The second reason is that this is a very

1 thin reed to rest this construction of the statute on,  
2 given that Congress must have been aware of the  
3 cross-appeal rule. There's no reason to think that it  
4 would have departed from two centuries of appellate  
5 practice in this way, based on this -- this very thin  
6 reed, and in fact we know from the Organized Crime  
7 Control Act of 1970 that Congress was aware of the  
8 cross-appeal rule because in that case it expressly  
9 carved out an exception to the --

10 JUSTICE BREYER: What happens if it's just  
11 the converse case? The same thing, I take it.

12 MS. HOWE: I'm sorry?

13 JUSTICE BREYER: We -- we have a government  
14 appeal. The sentence was 10 years. The government  
15 thinks it should be 20.

16 On appeal, the appellate court thinks the  
17 government is wrong, and moreover, the appellate court  
18 discovers an error: It should have been one year. And  
19 you're saying, well, according to you, not only is the  
20 court of appeals helpless, but the district court is  
21 helpless. So this person is in jail for nine years  
22 where he shouldn't have been. That's your -- that's your  
23 position here?

24 MS. HOWE: That's correct, Justice Breyer.

25 JUSTICE BREYER: Well, that's a pretty tough

1 position. It -- it seems to me there could be errors --  
2 and I guess if he's sentenced to death, it's the same.  
3 I mean, you know, the -- the -- it's a pretty tough  
4 position, isn't it? That there is no authority in the  
5 courts of appeals, or in the district court, or anywhere  
6 in the system to create -- to correct a serious error  
7 where a person could, in fact, be in prison for a long  
8 time contrary to the law.

9 MS. HOWE: Well --

10 JUSTICE BREYER: How is it supposed to work  
11 in your system that we get those errors corrected?

12 MS. HOWE: I have three points,  
13 Justice Breyer.

14 The first is that Congress must have been  
15 aware of this scenario in particular because in the  
16 Organized Crime Control Act of 1970, when the government  
17 appealed, that under -- in those provisions, that brought  
18 up the defendant's sentence and his conviction for  
19 review. And Congress decided, for whatever reason, not  
20 to continue that -- that exception to the cross-appeal  
21 rule when it enacted the Sentencing Reform Act.

22 The second point, Justice Breyer, is that  
23 we're not aware that there's actually any body of case  
24 law in which this happens. No one has pointed to any  
25 cases in which this has actually happened. The --

1 JUSTICE STEVENS: I believe you say it has  
2 decided not to make an exception to the cross-appeal  
3 rule. Of course, the cross-appeal rule itself is not  
4 statutory, is it?

5 MS. HOWE: The cross-appeal rule itself is --  
6 is not statutory, but --

7 JUSTICE STEVENS: It's an arguable rule  
8 among the courts of appeal as to whether there is such a  
9 rule.

10 MS. HOWE: It is indeed, Justice Stevens,  
11 but --

12 JUSTICE STEVENS: So it's not surprising  
13 that Congress didn't make exception to a rule that isn't  
14 that firmly established.

15 MS. HOWE: It is not surprising, but we know  
16 from the Organized Crime Control Act that Congress  
17 certainly was aware of the cross-appeal rule, because in  
18 that case it did carve out a limited exception.

19 And my third point, Justice Breyer,  
20 returning to your question, is that the defendant in  
21 that case may well have an argument, may be able to seek  
22 post-conviction relief under section 2255, as the  
23 Government acknowledges in its brief.

24 And so he may be able to go back to the  
25 district court under section 2255 and obtain relief in

1 that manner.

2 JUSTICE SCALIA: I thought you -- I thought  
3 it was sort of an important part of your case that the  
4 cross-appeal rule was an established rule. You -- you  
5 now acknowledge that it's not an established rule?

6 MS. HOWE: Well, we do believe it is  
7 jurisdictional, Justice Scalia. In the Morley case,  
8 which we think is our most --

9 JUSTICE SCALIA: Not just jurisdictional  
10 but -- but well-established.

11 MS. HOWE: We believe it is both  
12 well-established and jurisdictional. And we believe, in  
13 particular, when you're talking about sentencing, even  
14 if you don't agree -- agree with us that the cross-appeal  
15 rule generally is jurisdictional, we believe that it --  
16 that section 3742 is jurisdictional. Because it sets out  
17 in subsections A and B, the kinds of errors that  
18 defendants and the government can bring.

19 But we also believe that it ultimately  
20 doesn't matter in this case, Justice Scalia, because  
21 even if, as amicus concedes, it is merely a rule of  
22 practice, it is a rule of practice that is not subject  
23 to exceptions, and Mr. Greenlaw timely invoked it at his  
24 earliest opportunity.

25 JUSTICE SCALIA: But you say it is a

1 well-established at least rule of practice.

2 MS. HOWE: Absolutely.

3 JUSTICE SCALIA: And what's to be said  
4 against that? How many courts of appeals do not apply  
5 it?

6 MS. HOWE: The Eighth Circuit in this case  
7 certainly does not apply it. The Tenth Circuit --

8 JUSTICE SCALIA: Well, they --

9 MS. HOWE: They acknowledge --

10 JUSTICE SCALIA: They didn't apply it under  
11 this statute. I am saying, apart from this statute,  
12 what -- what courts of appeals in other cases deny the  
13 existence of a cross-appeal rule?

14 MS. HOWE: Well, the District of Columbia  
15 Circuit and the Ninth Circuit both regard it is a rule of  
16 practice that -- that may be subject to exceptions and  
17 exceptional circumstances. But, even if it is a rule of  
18 practice, Justice Scalia, we still prevail because  
19 Mr. Greenlaw timely invoked it at his earliest  
20 opportunity and because in a sentencing context it is  
21 not subject to any exceptions.

22 JUSTICE GINSBURG: What difference does it  
23 make? Now, you said this is a jurisdictional rule  
24 because its no rule. What difference does it make if it  
25 is labeled "jurisdictional," or if it is just regarded

1 as a tight procedural requirement?

2 MS. HOWE: It makes a difference, Justice  
3 Ginsburg, in the sense that it can be -- it cannot be  
4 waived if it is jurisdictional. The Court can raise it  
5 at any time. If it is a rule of practice, it is subject  
6 to exceptions, although in this -- in this -- as in this  
7 case with this rule, the Court has not found an exception  
8 in over 200 years. The -- in the sentencing context in  
9 particular, it is not subject to -- to exceptions.

10 And Mr. Greenlaw timely invoked it. If this  
11 Court has no further questions, I'd like to reserve the  
12 remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, Ms. Howe.  
14 Ms. Maynard.

15 ORAL ARGUMENT OF DEANNE E. MAYNARD  
16 ON BEHALF OF THE RESPONDENT

17 MS. MAYNARD: Mr. Chief Justice, and may it  
18 please the Court:

19 The Court of Appeals erred in increasing  
20 Petitioner's sentence for two reasons:

21 First, it lacked jurisdiction to do so in  
22 the absence of a notice of appeal by the Government  
23 under 18 USC 3742(b).

24 Second, even assuming it did not strictly  
25 lack jurisdiction, it nevertheless violated the



1 mandatory claim-processing rule that a judgment may not  
2 be increased in favor of an appellee in the absence of a  
3 timely --

4 JUSTICE ALITO: Now, if the cross-appeal  
5 rule is jurisdictional, how do you account for the  
6 sentencing-package -- the sentencing-package cases? The  
7 court makes a mistake on count 1 -- the district court  
8 makes a mistake on count 1, the court of appeals vacates  
9 the entire sentence for the development of a new  
10 sentencing package.

11 MS. MAYNARD: Those cases are not  
12 inconsistent with the finding of jurisdictional, Justice  
13 Alito, because in those cases the court of appeals has  
14 granted the defendant's requested relief, and it has  
15 vacated the judgment at the request of the defendant.

16 And then, once it goes back to the district  
17 court, what the district court may lawfully do would  
18 turn on the scope of the mandate, not on principles of  
19 the cross-appeal rule.

20 JUSTICE STEVENS: But in this very case  
21 could the court of appeals said: We will -- we will  
22 grant the appellant a new sentencing hearing and send the  
23 case back to the district for resentencing; and, by the  
24 way, district judge, when you do the resentencing, take a  
25 look at the section that imposes a mandatory minimum?

1 Could they have done that?

2 MS. MAYNARD: If the court of appeals had  
3 found an error at the defendant's request, yes,  
4 Justice Stevens, and remanded it, depending on the scope  
5 of the mandate and under the scope of the mandate --

6 JUSTICE STEVENS: And they could have ended  
7 up with precisely the same result that they ended up  
8 with in this case.

9 MS. MAYNARD: But it would have been a key  
10 difference in the sense that they would have found some  
11 of the defendant's claims on appeal correct. Here the  
12 court of appeals rejected all of the defendant's claims;  
13 and, nevertheless, in the absence of a government  
14 appeal, increased the Petitioner's sentence.

15 JUSTICE ALITO: So if the district court --  
16 court of appeals had said that the sentence that was  
17 imposed by the district court was unreasonable by two  
18 months and accepted the defendant's argument to that  
19 extent and then remanded, on remand the district court  
20 could have corrected the sentence on the gun counts.

21 MS. MAYNARD: It would have depended on how  
22 the mandate was worded. But if they vacated the  
23 sentence in its entirety and remanded it, the district  
24 court could have imposed a lawful sentence at that point.  
25 Yes.

1 JUSTICE GINSBURG: Even though -- even though  
2 the prosecution didn't ask for it? I thought that you  
3 were relying on the division of authority between the  
4 executive, the prosecutor, and the court. And that is  
5 that a court reacts to the charges that the prosecutor  
6 brings, and if the prosecutor isn't asking for a higher  
7 sentence, the court has no authority to grant it.

8 MS. MAYNARD: Yes, Your Honor. In the court  
9 of appeals that is true. But I understood  
10 Justice Alito's hypothetical to posit a situation where  
11 at the defendant's request his sentence was vacated.  
12 And then what the district court could do on remand  
13 would depend on the scope of the mandate.

14 JUSTICE GINSBURG: Why not? Why wouldn't  
15 the prosecutor still have control and say: Judge, the  
16 government is asking for ten years, no more?

17 MS. MAYNARD: Before the district court,  
18 Justice Ginsburg, the government would be required to  
19 press the law. And, as it did here, the law is that  
20 under -- under 924(c) this is a second, or subsequent,  
21 conviction in count 10; and it is error. Petitioner  
22 should have been sentenced to a second, or subsequent,  
23 sentence of 25 years on count 10.

24 So if it were back in the district court and  
25 the district court were free under the scope of the

1 court of appeals mandate to impose sentence, then the  
2 government would be obligated to argue the law before  
3 the district court. What --

4 CHIEF JUSTICE ROBERTS: Well, usually the  
5 mandate in these cases simply says, you know, the case  
6 is remanded to the district court.

7 If that's all the mandate says, does that  
8 authorize the district court to do the right thing under  
9 the law?

10 MS. MAYNARD: The courts of appeals have  
11 different rules, Your Honor, about whether or not a  
12 general mandate of the type that you posit should be  
13 assumed to open up all issues for sentencing or not.

14 And there's actually some disagreement in  
15 the circuits on what one assumes from a general mandate.

16 JUSTICE KENNEDY: Well, actually rule 35 was  
17 changed because it used to be based on the mandate. But  
18 now rule 35 says you can reopen within seven days after  
19 the verdict or finding of guilty. So that would  
20 indicate under the rules that the mandate is irrelevant.

21 MS. MAYNARD: Well, no, Your Honor. I think  
22 rule 35 speaks to what the district can do within seven  
23 days of announcing the sentence. Once a sentence is  
24 timely appealed, if the defendant were to prevail or if  
25 the government were to prevail in a case in which the

1 government had actually appealed and it were to be  
2 remanded, then -- then the defendant --

3 JUSTICE KENNEDY: Within the scope of the  
4 appeal, which brings us right back to this case.

5 MS. MAYNARD: Within the scope of the  
6 mandate.

7 JUSTICE SOUTER: I don't understand your  
8 mandate rule as being consistent with your general  
9 theory of the case. Because if the court of appeals  
10 cannot order this kind of relief, how could it be that  
11 the court of appeals' mandate would authorize the  
12 relief?

13 It would seem to me that you've either got  
14 to take the position that the mandate is, in effect, a --  
15 a kind of neutral order. The district courts may or may  
16 not have authority to do something after the mandate  
17 comes down. But I don't see how you can take the  
18 position that the mandate, itself, by the court of  
19 appeals will, itself, determine what the district court  
20 can do.

21 MS. MAYNARD: Well --

22 JUSTICE SOUTER: Because, in effect, I think  
23 you are saying, by structuring the mandate in a certain  
24 way, the court of appeals can open the door to something  
25 that the court of appeals, itself, could not do. But by

1 structuring the mandate in a different way, the court of  
2 appeals can cut off the possibility of district court  
3 orders of a sort that the court of appeals couldn't do.  
4 And that seems -- that is what seems to me inconsistent  
5 with your -- with your theory of the limited court of  
6 appeals jurisdiction.

7 MS. MAYNARD: I don't think it is anomalous,  
8 Your Honor, in a case in which the court of appeals has  
9 jurisdiction over a claim, grants the requested relief,  
10 and vacates the sentence. For then, what the district  
11 court can do can turn on the -- on the scope of the court  
12 of appeals mandate.

13 JUSTICE SOUTER: All right. Now, let's  
14 consider -- assuming that the mandate leaves the -- open  
15 -- the question open entirely for the district court.

16 You said ultimately what the district court  
17 can do depends on the mandate. Can the court of appeals  
18 also by mandate say: And by the way, district court,  
19 because we couldn't increase the sentence here, you  
20 can't do it either? Is that open to the court of  
21 appeals?

22 MS. MAYNARD: I don't know there's any court  
23 of appeals that has held that it could do that. It --

24 JUSTICE SOUTER: Then what is the play in  
25 the mandate that -- that you are assuming when you say it

1 depends on the mandate? What the -- what the district  
2 court can do would depend on the mandate.

3 MS. MAYNARD: Well, I'm not sure I  
4 understand the --

5 JUSTICE SOUTER: Where is the -- what option  
6 does the court of appeals -- given the limits on what  
7 the court of appeals itself can order, what are the  
8 options that the court of appeals has in writing the  
9 mandate that will determine what the district court can  
10 do? What are you getting at.

11 MS. MAYNARD: I'm not sure that that's -- I  
12 don't know the precise contours of that, Justice Souter,  
13 but if the court of appeals grants the Petitioner's  
14 request to vacate the sentence --

15 JUSTICE SOUTER: Yes.

16 MS. MAYNARD: -- and then remands for  
17 resentencing, in a general way, that could leave open to  
18 the district court the ability to resentence.

19 JUSTICE SOUTER: Okay.

20 MS. MAYNARD: For example --

21 JUSTICE SOUTER: Now let's -- you say that  
22 could leave open -- if the mandate is general, that could  
23 leave open. Can the mandate be specific in precluding?

24 MS. MAYNARD: Given the lack of an appeal  
25 here.

1 JUSTICE SOUTER: Yes.

2 MS. MAYNARD: By the government?

3 JUSTICE SOUTER: Yes.

4 MS. MAYNARD: I -- I suppose it -- it might  
5 do that. I suppose it -- it might be able to do that.  
6 Here --

7 JUSTICE KENNEDY: I don't know about your  
8 initial premise. I -- I take it the policy here is that  
9 the defendant who appeals ought to know what's at stake  
10 in the appeal. He shouldn't be surprised.

11 MS. MAYNARD: That's right.

12 JUSTICE KENNEDY: The government  
13 cross-appeals, fine; if he doesn't cross-appeal,  
14 he knows what the stakes are.

15 MS. MAYNARD: That's right.

16 JUSTICE KENNEDY: But now you're saying that  
17 if the sentence is -- is vacated, they can start all  
18 over? That the district court can't start all over if  
19 it's down -- if still in the district court. Why should  
20 the court of appeals have any more authority than the  
21 district court does?

22 MS. MAYNARD: Well, because it -- once  
23 the court -- if the court -- if the Petitioner -- I mean  
24 -- at any risk in any appeal, and this is true in civil  
25 cases, too, you know, if you seek a new trial on damages,



1 for example, in a civil case, because of instructional  
2 error, and you go back, I think, you know, the jury who  
3 decides the damages a second time isn't bound by the  
4 first jury's decision. Any time --

5 CHIEF JUSTICE ROBERTS: So the -- the  
6 defendant who is appealing has to be very careful about  
7 the relief he requests? He says I don't want the  
8 sentence vacated; I want the sentence reduced to five  
9 years instead of 10.

10 And nothing else? That's the only relief I  
11 seek?

12 MS. MAYNARD: Well, I think if the court of  
13 appeals finds error in the sentence it vacates under the  
14 -- the remedial provisions in 3742 for the -- for the  
15 court -- for the district court to resentence the  
16 Petitioner.

17 For example --

18 JUSTICE SOUTER: Well -- if that's the case,  
19 if the -- if the -- if it cannot be structured by the  
20 request for relief as the Chief Justice is suggesting,  
21 then on the Government's theory, in a case like this, if  
22 the defendant wins on appeal, he is in serious trouble  
23 when that case goes back to the district court; whereas  
24 if he loses, he can't be any worse off than he is now.

25 That's a strange -- that's a strange rule.

1 MS. MAYNARD: Well, if the defendant wins in  
2 the sentencing appeal, there -- there's always a chance  
3 that on -- on remand, the -- the district court will  
4 reconfigure the sentence. If the sentence --

5 JUSTICE SOUTER: But in effect that means  
6 then -- and this -- I didn't understand this to be your  
7 position -- but that means, in effect, that the  
8 cross-appeal rule is essentially, as you're arguing for  
9 it, a -- a formality. It limits what the district court can  
10 do, but it is not a rule that embodies the notion that  
11 when a defendant appeals the defendant ought to know, in  
12 effect, what he can gain and what he can lose; because  
13 if, on your theory, if the defendant wins and there's a  
14 mandate back to the district court, it is wide open.

15 MS. MAYNARD: Well, I think, you know, if  
16 you look at cases -- recent -- I think post-Booker for  
17 example --

18 JUSTICE SOUTER: Well, I -- I want to look at  
19 them but I want to know what your position is first.  
20 And I take it your position is that if the defendant  
21 wins, and he cannot by his request for relief limit the  
22 relief, as the Chief Justice suggested, then when the  
23 case goes back to the district court, in effect, the  
24 slate is totally blank and he's starting all over again  
25 and he is subject to -- to whatever outer limits he

1 would have been subject to in the first instance.

2 MS. MAYNARD: Right. I was going to use the  
3 Booker case as an example. Post-Booker, you know,  
4 defendants have appealed, saying I was innocent, or  
5 mandatory Guidelines regime, and I want to be sentenced  
6 under the advisory Guidelines regime. And when those is  
7 cans have gone back, this -- courts of appeals have --  
8 most of the courts of appeals have held that the  
9 district court is not bound by its original sentence once  
10 freed from the mandatory Guidelines. It can consider  
11 all the factors as instructed by this Court, and can  
12 potentially decrease the sentence. And I think --

13 JUSTICE SOUTER: Then the cross-appeals rule  
14 is essentially a rule of appellate court procedure and  
15 nothing more.

16 MS. MAYNARD: Well, I think in this  
17 situation, actually -- it definitely is a rule of  
18 appellate court procedure.

19 JUSTICE SOUTER: Yes. But --

20 MS. MAYNARD: And it's definitely a  
21 mandatory --

22 JUSTICE SOUTER: But it doesn't go beyond  
23 that?

24 MS. MAYNARD: I think that's correct. If  
25 you succeed on your appeal you may end up in the

1 district court worse off than when you began. But the  
2 issue before this Court is what can a court of appeals  
3 do in the absence of a party pressing a claim before it.  
4 And --

5 CHIEF JUSTICE ROBERTS: In that context,  
6 aren't -- aren't you concerned about enlisting the court  
7 of appeals in doing something illegal? I mean, they  
8 know that what they're authorizing, or imposing really,  
9 as a sentence is illegal.

10 MS. MAYNARD: No. All they -- all they're  
11 doing, Your Honor, as we requested, is rejecting the  
12 Petitioner's claims on appeal.

13 CHIEF JUSTICE ROBERTS: Well, I know, but I'm  
14 reminded of what we do in statutory cases. If one party  
15 says this is -- it should be read A, and the other party  
16 says it should be read B, we've had cases where we say,  
17 well, they're both wrong, and we're going to read the  
18 statute as -- as C because we the Court want to do the  
19 right thing.

20 MS. MAYNARD: Well, the Government is not  
21 agreeing that there was -- with the Petitioner there was  
22 no deal error. What the Government is saying -- the  
23 question is -- so this is not a situation like you're  
24 positing, where the parties are trying to agree to the  
25 governing law. This is a question of which issues are

1 properly in the court of appeals to start with.

2 CHIEF JUSTICE ROBERTS: No -- no, in my  
3 hypothetical they weren't agreeing. They were -- one  
4 side was saying B, the other side was saying A.

5 MS. MAYNARD: Fair enough.

6 CHIEF JUSTICE ROBERTS: And the right answer  
7 was C.

8 MS. MAYNARD: Fair enough, but here there's --  
9 there's no disagreement about what the merits of the  
10 governing law is; the question is, is that question  
11 properly before the court of appeals.

12 JUSTICE GINSBURG: Why didn't the Government  
13 cross-appeal in this case?

14 MS. MAYNARD: There's nothing in the record  
15 to indicate why the Government didn't cross-appeal,  
16 Justice Ginsburg. But there are good reasons why the  
17 Government wouldn't cross-appeal in any given case.  
18 There are 8,000 plus adverse decisions against the  
19 Government in 2007, and reasons why the Government might  
20 not cross-appeal or appeal in a given case include the  
21 length of the sentence the person has already received,  
22 whether there's a need for clarification of a particular  
23 question of law, whether this is a recurring error --

24 CHIEF JUSTICE ROBERTS: Getting -- the  
25 difficulty -- getting the Solicitor General's office to

1 authorize the appeal?

2 (Laughter.)

3 JUSTICE SCALIA: Ms. Maynard --

4 MS. MAYNARD: But the -- may I -- yes,  
5 Justice Scalia.

6 JUSTICE SCALIA: It seems to me many of  
7 these horribles really exist, however we decide this  
8 case. I don't know that anybody says that if there is  
9 not a firm rule requiring the -- a cross-appeal, I don't  
10 know that anybody says that the court of appeals must  
11 search the record and correct any errors below.

12 MS. MAYNARD: Well, the amicus is  
13 arguing that's the meaning of 3742 --

14 JUSTICE SCALIA: The statute -- I'm talking  
15 about the general --

16 MS. MAYNARD: In general --

17 JUSTICE SCALIA: The general cross-appeal  
18 rule --

19 MS. MAYNARD: But there --

20 JUSTICE SCALIA: It happens all the time,  
21 that there's an error in the judgment which the court of  
22 appeals does not -- does not reach because there's been  
23 no court -- no cross-appeal. It's -- it's totally  
24 unexceptionable.

25 MS. MAYNARD: Exactly, Your Honor. And that

1 -- the danger to parties, in particular to the  
2 Government in having courts reach out and arrogate to  
3 themselves the decision -- thank you -- the decision to  
4 appeal is -- is illustrated by this particular case. In  
5 footnote 6 of the court of appeals opinion it recognizes  
6 a second error that aggrieves the government, deciding  
7 it was plain --

8 JUSTICE STEVENS: May I just ask this one  
9 question? This problem has been around for a long, long  
10 time; and sometimes cross-appeals -- courts of appeals  
11 have corrected what they thought was plain error, and  
12 without a cross-appeal there.

13 Has that generated a whole lot of problems  
14 over the years? I mean there are isolated cases that  
15 you've all been able to find searching 30 or 40 years of  
16 jurisprudence, but I don't see any wide -- widespread  
17 problem being generated by the courts of appeals who have  
18 disagreed with your view.

19 MS. MAYNARD: Well, if I could make two  
20 points. The court of appeals actually found two errors  
21 that aggrieved the government here, Justice Stevens, and  
22 ruled for us only on one. So in a case where we didn't  
23 notice an appeal, on an issue we did not brief, the  
24 court of appeals ruled against us.

25 And second, I'm aware of no case in this

1 Court where this Court has reached out to find plain  
2 error on behalf of a nonpetitioning respondent or a  
3 non-appealing appellant.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Ms. Maynard.

6 Mr. Jorgensen.

7 ORAL ARGUMENT OF JAY T. JORGENSEN,

8 AS AMICUS CURIAE,

9 IN SUPPORT OF THE JUDGMENT BELOW

10 MR. JORGENSEN: Mr. Chief Justice, and may  
11 it please the Court:

12 There are three questions really in this  
13 case, and the Court need not resolve all of them  
14 depending upon how it resolves the others, but some of  
15 them get lost sometimes, so I would like to state what  
16 the three are.

17 The three are first, does section 3742  
18 provide an answer? Is it an affirmative grant of power  
19 to the court of appeals to the Eighth Circuit to give  
20 the right answer when the -- when the Petitioner asked  
21 them is my sentence imposed in violation of law? Or is  
22 it a limit on the court's power telling them they cannot  
23 provide him with relief? That's the first question.

24 If the Court concludes that it's neither --  
25 if a Court concludes either that it is a grant of



1 jurisdiction, or rather of power -- or that it's not,  
2 that it's an affirmative limit, then the Court can end  
3 there.

4           If the Court concludes that 3742 is more like  
5 1291, just a general appellate statute that does not give  
6 the answer here, then the Court has to go on to decide is  
7 this case -- is this rule, this cross-appeal rule, in the  
8 criminal context not the civil context that is -- that is  
9 the subject of this 200 years of discussion, but in the  
10 criminal context is it a jurisdictional limit on what the  
11 courts can do or is it a rule of practice.

12           And then finally, if the Court concludes --  
13 if the Court concludes it is a jurisdictional limit,  
14 then that's the end. If the Court concludes that it is  
15 a rule of practice, the final third question is: Is it  
16 a waivable rule of practice or is it a firm and  
17 inflexible rule of practice? I think what often gets  
18 assumed. But, of course, in Kontrick, in Bowles, the  
19 Court addresses the issue in that case -- in those cases  
20 and decides whether the rule of practice at issue in  
21 that case is indeed --

22           JUSTICE GINSBURG: Mr. Jorgensen, suppose I  
23 think there's a larger anterior question to all of this?

24           MR. JORGENSEN: Yes.

25           JUSTICE GINSBURG: And that is what I

1 suggested in the colloquy with Ms. Howe, we have a  
2 system in which the prosecutor can bring charges. The  
3 judge may think, my goodness, looking at this set of  
4 facts, you could have charged much more.

5           The judge can't do that, he can't tell the  
6 prosecutor you have to charge "Y" -- as -- in addition to  
7 "X". The government chooses not to appeal. By what right  
8 does the court say, I know you didn't appeal,  
9 Government, but you should have so we're going to take  
10 care of it for you?

11           It seems to me that our system rests on a  
12 principle of party presentation as many systems do not.  
13 In many systems, the court does shape the controversy  
14 and can intrude issues on its own. But in our  
15 adversarial system, we rely on counsel to do that kind  
16 of thing. So, my problem with your whole position,  
17 without getting down to particular statutory provisions,  
18 is what business does the court have to put an issue in  
19 the case that counsel chose not to raise?

20           MR. JORGENSEN: That's a --the answer to that  
21 question, Justice Ginsburg, is -- is multi-part, and I'll  
22 try to move through it quickly. This Court had said --  
23 made the very point that you made at the charging stage.  
24 That at the charging stage the court -- the district  
25 court cannot decide what a -- what a criminal will be

1 charged with; but that once the trial has proceeded to  
2 judgment, that prosecutorial discretion is at an end. I  
3 wish I could remember the name of the case, but Justice  
4 Scalia was the author.

5 JUSTICE SCALIA: Me, too.

6 (Laughter.)

7 MR. JORGENSEN: The point being that once a  
8 crime has been proven, the law kicks in, and the -- the  
9 defendant must be sentenced in accordance with law.  
10 The same is true on appeal. I'm not advocating here  
11 for, I think, what your question would assume, which  
12 would be a roving court of jurisdiction -- a roving  
13 court of appeals that could reach out and take  
14 jurisdiction over a case that has not been brought to  
15 it.

16 Under 3742 no one questions that the court  
17 has jurisdiction over the case -- over the very  
18 sentencing issues because somebody has filed a notice of  
19 appeal and brought it to the court. The only question is  
20 when the defendant says to the court under 3742(a)(1) was  
21 my -- was my sentence imposed and the statutory language  
22 is: in violation of law, can the Eighth Circuit provide  
23 the right answer or is it powerless to provide the right  
24 answer to only provide an answer that benefits him?

25 JUSTICE SCALIA: Could we discuss -- let's --

1 could leave aside for the moment what the background rule  
2 of law is and discuss whether -- I guess it was your  
3 first point -- whether this particular statute proscribes  
4 the answer, and therefore, we don't have to go any  
5 further.

6 Why do you say it proscribes the answer?

7 MR. JORGENSEN: I believe that it does,  
8 Justice, because everybody agrees that the Sentencing  
9 Reform Act was a clean break with the past and imposed  
10 an entirely new regime. So, the talk about the regime  
11 of the past is somewhat beside the point.

12 So then you get down to the language itself  
13 of section 3742. Under (a), it provides that a  
14 defendant may ask the court of appeals was my sentence  
15 imposed in violation of law; and under (b)(1), the  
16 government can raise same appeal. Then under (d), the  
17 parties certify to the court or rather bring to the court  
18 the record that they think addresses the issue that either  
19 side raised; and then in (e), the court -- (e) says the  
20 court shall decide whether it was imposed in violation  
21 of law; and then (f) (1) says if the court determines  
22 that it was imposed in violation of law, it shall send  
23 it back with instructions.

24 Now, the main answer to that is well,  
25 (f)(1) -- you have to get all the way to (f)(1) before

1 you have got the answer. And that's unsurprising. I  
2 don't think any member of the court would say that the  
3 Eighth Circuit lacks the power, is barred from noticing  
4 the 924(c) error here.

5 Certainly the Eighth Circuit could see it;  
6 certainly the Eighth Circuit could say it. I see the  
7 error here. The only question is, can it provide the  
8 remedy? And that's what (f)(1) says. Not only can't  
9 you --

10 JUSTICE SCALIA: Well, why would -- why  
11 would Congress want a different disposition for (f)(1)  
12 than for (f)(2)? It's clear that under (f)(2) if the  
13 sentence is outside the applicable guidelines and the --  
14 or if the departure is based on an impermissible factor  
15 or is to an unreasonable degree or the sentence was  
16 imposed for an offense for which there is no applicable  
17 guideline and its plainly unreasonable, for that, it is  
18 clear that if it hasn't been raised by one or the other  
19 party, the court doesn't get into it.

20 Why -- why would it want a different rule for  
21 those too? In other words, I'm saying that far from  
22 supporting your case, as your brief suggests, (f)(2) (a)  
23 and (b) seems to me harms your case.

24 MR. JORGENSEN: Well, if I can give a  
25 two-part answer, Justice. First, the court is not in the

1 practice of overturning what the plain language says on  
2 a -- a sort of legislative history or surmising what  
3 Congress may have been motivated by. But even if it  
4 were, there is a clear answer.

5 (F)(1) subsumes (a)(1) and (a)(2) and (b)(1)  
6 and (b)(2). And the questions under those statutes or  
7 rather those provisions are legal questions. The kind  
8 of questions -- was this sentence imposed under (a)(1),  
9 (b)(1) in violation of law or (a)(2), (b)(2), was it an  
10 incorrect application of Sentencing Guidelines?

11 If the court of appeals gets that wrong,  
12 that's the kind of thing that's going to be imposed in  
13 everybody else's case. But under (3) and (4) it's this  
14 -- this defendant's case.

15 JUSTICE BREYER: Wait, (2)(a) and (b) I  
16 thought -- do I not have this right, (2)(a) and (b) say  
17 the same thing as (1)? It says if -- if the sentence is  
18 too high says the defendant's appeal, then what you do is  
19 you vacate it and send it back with such instructions as  
20 the court considers appropriate.

21 MR. JORGENSEN: Indeed.

22 JUSTICE BREYER: Subject to (g), which has  
23 to do with the district court.

24 Then the other part says if it is too low  
25 and it was the Government that appealed, the court shall

1 set it aside and send it back with such instructions as  
2 it considers appropriate, again subject to (g).

3 So all three say the same thing.

4 JUSTICE SCALIA: No. But not if it's too  
5 high and the defendant has appealed.

6 JUSTICE BREYER: That's what --

7 JUSTICE SCALIA: Not if it's too high and  
8 the Government has appealed.

9 JUSTICE BREYER: That's right.

10 JUSTICE SCALIA: If it's too high and the  
11 Government has appealed, you don't get any relief  
12 under -- under --

13 JUSTICE BREYER: Yes, do you. If it's too  
14 high -- wait. Wait. If it is too -- ah.

15 (Laughter.)

16 JUSTICE BREYER: I see.

17 MR. JORGENSEN: You're exactly right,  
18 Justice Scalia. So the question is, why would Congress  
19 say what it plainly said, which is under (f)(1)  
20 violations of law and incorrect applications of the  
21 Sentencing Guidelines, the court gives the right answer  
22 no matter who appeals. But under (f)(2) Congress  
23 specifies it matters under this who appeals. And the  
24 reason is, in those instances, it is too high in this  
25 defendant's case, and this defendant can be entrusted to

1 forward his own cause; but under (a)(1) and (a)(2), then  
2 you get a court of appeals precedent that -- that gives  
3 the wrong answer, if a question of law or the application  
4 of the Sentencing Guidelines.

5 So there is a difference between (a)(1),  
6 (a)(2), (b)(1), (b)(2) and 2 and 3 under --

7 JUSTICE SCALIA: Of course, you know, that  
8 difference disappears if you say that -- that, in fact,  
9 the whole thing assumes that the -- the factor complained  
10 of has been brought to the court's attention by the  
11 proper person. So that (f)(1) assumes that if it's the  
12 government appealing in violation of law because the  
13 defendant was given too little, or if it's the defendant  
14 appealing because in violation of law that he was given  
15 too much, it makes much more sense that way, it seems to  
16 me.

17 MR. JORGENSEN: That -- that -- if the Court  
18 were to go there, Justice, I believe that goes back to  
19 your previous question of: Would -- should we assume or  
20 should the Court believe that Congress was aware of its  
21 history and I think --

22 JUSTICE BREYER: The way to do this then is  
23 -- is -- I see -- this section foresees basically what  
24 the other side is saying. It foresees it, because it's  
25 a very unusual case what happened here.



1 MR. JORGENSEN: It is a very --

2 JUSTICE BREYER: So the way you should  
3 handle it, given this section, is the court of appeals  
4 would send -- I'm trying this on -- the court of appeals  
5 says, well, it's the defendant that appealed -- who  
6 appealed. He says the sentence is too high. Given what  
7 we have in front us in the issues, he's right; now we've  
8 noticed that there's is other problems here. So what we  
9 do is send it back for resentencing. And, Judge, when  
10 you resentence, look at it. And see if maybe we're  
11 right. That would be a perfectly fair way to handle it,  
12 and a normal way to handle it. Is that right?

13 MR. JORGENSEN: Well, importantly, Justice,  
14 one, two, three, and four, one being: Is it posed in  
15 violation of law? Two: Is it a correct application  
16 of Sentencing Guideline (c)(3)? Or is it too high?  
17 There's a body of case law as to what kind of a field --  
18 appeals fit within what category. And the parties and  
19 the courts of appeals are united in believing that the  
20 Petitioner's question in this case fits within (a)(1):  
21 Was his sentence imposed in violation of law.

22 But, as you know, the Court created the  
23 reasonableness question in Booker, and then the courts  
24 of appeals have agreed that that fits in within(a)(1).

25 JUSTICE BREYER: But you don't have --

1 JUSTICE SCALIA: Except -- except it's not  
2 enough to say, well, we've noticed by the way we're --  
3 you know, in looking at the proper appeal by the proper  
4 -- my goodness, look what we've noticed.

5 It's not that. You're saying the court of  
6 appeals has to search the record. It has to make sure  
7 that there were no errors in favor -- or harming the  
8 other party who has not cross-appealed.

9 And that's a considerable burden, as Judge  
10 Boudin's opinion on the court of appeals makes clear.

11 MR. JORGENSEN: Indeed.

12 JUSTICE SCALIA: And it's extraordinary.

13 MR. JORGENSEN: Indeed, although it is what  
14 3742 says, and I believe it's actually not that  
15 different than what happens with jurisdictional issues.  
16 The court must resolve those that are brought to it.

17 JUSTICE SCALIA: Precisely so.

18 MR. JORGENSEN: And then the court notices  
19 the ones that are obvious, has a duty to look for them  
20 but that doesn't --

21 JUSTICE SCALIA: Which is why we have tried  
22 to pare down what is jurisdictional.

23 MR. JORGENSEN: And on that question, I --  
24 before the time runs out, I want to, Justice Scalia,  
25 follow up on your question, which is: What if the Court

1 assumes that 3742 does not provide the answer? Which is  
2 I -- I believe where you're going.

3           Then the Court confronts the question of, is  
4 the cross-appeal rule jurisdictional or a rule of  
5 practice? Now, the Court has provided the answer to  
6 that once in, I believe it said, Langnes, and said that  
7 it is a rule of practice. And then since then, there's  
8 been obviously a long period of time. And then the Court  
9 has had its series of cases contra Bowles, Arbaugh. And  
10 under those cases, there is no good argument that it's  
11 jurisdictional. The teachings of those cases is that  
12 the Court has used the phrases "power" and  
13 "jurisdiction" too broadly, too loosely, and is now, as  
14 you say, trying to cut back on those jurisdictional  
15 limits. And a rule like this can only be jurisdictional  
16 if it's based on a statute, and I believe all the  
17 parties agree this rule is not based on a statute.

18           So then that gets us finally to the question  
19 of, if 3742 does not provide the answer and it is a rule  
20 of practice, is it a mandatory rule of practice, an  
21 inflexible rule of practice? Or one where the Court can  
22 use discretion as to whether or not to apply it when  
23 it's invoked?

24           And the -- there can be no question that  
25 there are discretionary rules of practice. Indeed, in

1 Bowles, the one issue on which all nine Justices agreed  
2 is just that: Justice Souter, writing for the dissent,  
3 would have found that that rule of practice was  
4 discretionary. Justice Thomas, writing for --

5 CHIEF JUSTICE ROBERTS: If it's -- well, if  
6 it's discretionary, how would you -- I assume it's  
7 reviewable for abuse of discretion.

8 MR. JORGENSEN: Indeed.

9 CHIEF JUSTICE ROBERTS: How would you know  
10 whether it's an abuse of discretion or not? I mean, the  
11 issue is going to be the same in every case. There was  
12 no cross-appeal. If there had been, we would have  
13 increased the sentence, and one court of appeals says,  
14 well, we're not going to do it; and the other court of  
15 appeals says, yes, we're going to do it.

16 Which one is reversed for abuse of  
17 discretion?

18 MR. JORGENSEN: I believe the one that  
19 refused to -- to correct such a plain error, obviously.

20 CHIEF JUSTICE ROBERTS: I thought you might  
21 say that. But I mean --

22 (Laughter.)

23 MR. JORGENSEN: But the -- your question was,  
24 what is the standard? If I -- if I may, I believe that's  
25 the question. And the Court has, I think, provided the

1 -- several formulations of what the standard is. In  
2 Langnes, the Court said good cause was the standard. In  
3 Reynolds, which contrary to what Petitioner said was a  
4 case where this Court afforded relief on a sentence to a  
5 criminal Petitioner who had not brought that issue to  
6 this --

7 JUSTICE BREYER: Would you -- could do you  
8 this? Because this is quite helpful to me. Reading, I  
9 started out where Justice Scalia was at the beginning of  
10 this argument. I thought the district court normally has  
11 it open, to the judge, to resentence. Resentence is  
12 resentence. You can't be vindictive, but that's the  
13 limit. That's how it works normally, I thought.

14 And given -- if that's so, then you look at  
15 the three sections we just saw, try to read them  
16 together, and say they certainly are written with the  
17 notion that the noticing of a plain error on the other  
18 side is going to be few and far between if ever.

19 So the normal way to handle it is just what  
20 we said: The judge decides on the record and the appeal  
21 -- I decide this for the defendant here. Says I decide.  
22 But I've noticed something, says the writing judge. And,  
23 of course. it's open on resentencing to go into that.

24 MR. JORGENSEN: I --

25 JUSTICE BREYER: So if you were going to do

1 something other than that, in the court of appeals,  
2 you'd have to have a reason, and it would have to be a  
3 fairly good reason. So you don't close off the escape  
4 hatch because we can't all foresee the future perfectly,  
5 but you say it's going to be few and far between.

6 Now does that work?

7 MR. JORGENSEN: I believe it does work,  
8 Justice Breyer.

9 JUSTICE BREYER: All right.

10 MR. JORGENSEN: And I believe it --

11 JUSTICE SCALIA: This argument is not an  
12 argument under the statute? This is an argument giving  
13 your interpretation of what the background rule is?

14 MR. JORGENSEN: I believe that's right.

15 JUSTICE SCALIA: And you would limit the  
16 background rule to plain error?

17 MR. JORGENSEN: Yes -- yes, Your Honor, I  
18 would. And that does not really contradict what the  
19 Eighth Circuit did here. Rule 52(b) is really another  
20 formulation of the very same thing that the court said  
21 in Langnes; that's good cause. In Neztosie, it -- the  
22 Court phrased it "countervailing considerations" which  
23 outweigh the institutional interests in fair notice and  
24 repose. And, of course, rule 52(b) talks about  
25 "fairness, integrity, and public reputation of judicial

1 proceedings." They're all different formulations of the  
2 same --

3 CHIEF JUSTICE ROBERTS: But if it's such a  
4 --

5 MR. JORGENSEN: -- of the same --

6 CHIEF JUSTICE ROBERTS: If it's such a plain  
7 error, it's fair to ask why -- why the Government didn't  
8 cross-appeal. Isn't it?

9 MR. JORGENSEN: There is nothing in the  
10 record here, Justice, on that. The Government has been  
11 very careful not to say -- I urge you on reply -- to ask.  
12 I believe it was a blunder, and so to adopt --

13 JUSTICE SOUTER: A blunder?

14 MR. JORGENSEN: A blunder. So, to adopt the  
15 Government's rule is to adopt a new -- a new  
16 exclusionary rule that the defendant goes free when the  
17 constable blunders.

18 JUSTICE KENNEDY: Well, if -- if this were to  
19 be a more frequent occurrence, i.e., plain errors, then  
20 we were to rule for you and court of appeals generally  
21 would do this, then a defendant might think twice  
22 about -- about appealing in a complex case.

23 MR. JORGENSEN: That's true, Justice.

24 JUSTICE KENNEDY: Because there's nothing  
25 that could happen -- once the district court rules and

1 the seven days for error goes by, there's nothing that  
2 anybody can do to raise it.

3 MR. JORGENSEN: Well, the first part of your  
4 question was true, Justice Kennedy, but respectfully the  
5 second part was not.

6 In the -- the way it currently works, under  
7 the rules, a defendant must file his notice of appeal  
8 before the Government files. And so, as it currently  
9 stands, he makes his choice before he ever knows. There  
10 is no extra burden that would be placed on him.

11 JUSTICE GINSBURG: Well, he doesn't have to  
12 pursue it if the Government appeals.

13 MR. JORGENSEN: That's exactly right. And  
14 the Government makes that point that at some point, if  
15 the Government raises its appeal, he could strike a deal  
16 with them. Now, it's not correct to assume that he  
17 could then unilaterally walk away because there is a  
18 notice of appeal, the Government's notice of appeal. So  
19 he has to strike a deal with the Government at that  
20 point. That's no different in this case -- than in this  
21 case. At oral argument, the Eighth Circuit asked both  
22 parties about this error. He could have struck a deal  
23 then.

24 If this case turns on notice, there isn't a  
25 notice problem here. It's all over the record. It's



1 raised at sentencing. It's raised on appeal. It's  
2 discussed in the briefs. It's discussed at oral  
3 argument. This error was -- was known -- known to all.  
4 Now --

5 JUSTICE GINSBURG: I didn't -- I didn't  
6 understand that a party couldn't voluntarily withdraw a  
7 notice of appeal.

8 I mean, suppose -- the only way that the  
9 court of appeals can get into this is because the  
10 defendant has pursued an appeal.

11 Suppose this comes up and the defendant  
12 says, oh, my goodness, I stand to get 15 more years in  
13 prison; I'm withdrawing my notice of appeal. There's  
14 nothing before the court of appeals then. Nothing.

15 MR. JORGENSEN: That's a critical  
16 difference, Justice Ginsburg. You're exactly right that  
17 the court of appeals must have, under 3742, a notice of  
18 appeal, or it has no jurisdiction.

19 JUSTICE GINSBURG: Yes.

20 MR. JORGENSEN: But under the hypothetical  
21 we were discussing, I -- I perhaps assumed incorrectly.  
22 I thought we were talking about the defendant files his  
23 notice of appeal before the Government ever files; then  
24 subsequently the Government files as well. Now, if the  
25 defendant withdraws, there's still a notice of appeal

1 before the court.

2 JUSTICE GINSBURG: Right.

3 MR. JORGENSEN: But if there -- if the  
4 government had never filed, you're exactly right that  
5 the defendant could take his back. But the problem is it  
6 doesn't answer Justice Kennedy's question. His question  
7 was: Isn't a defendant entitled to know that he's --  
8 that he's -- that the Government might appeal, that he  
9 might be at risk, that there might be a problem here?  
10 And my point is he doesn't know under the current system  
11 anyway. He has to make his choice before the Government  
12 ever makes its choice. Now --

13 JUSTICE SOUTER: Mr. Jorgensen, may I take  
14 you back to something you mentioned earlier in the  
15 argument? And I thought I followed it at the time, and  
16 I -- I may not have understood you.

17 As I recall, you were explaining the  
18 difference between (f)(1) and (f)(2)(A) and (B) by  
19 saying that in (f)(1), which was -- which does not  
20 embody any condition on who has appealed --

21 MR. JORGENSEN: Right.

22 JUSTICE SOUTER: -- the concern is that, if  
23 there is an error, it's an error which will in effect  
24 infect all cases. It's a circuit error and is  
25 potentially there for any case that comes along for

1 sentencing; whereas, in (f)(2), the -- if there's an  
2 error, the limited damage is simply to the case itself,  
3 to the particular defendant.

4           Where I don't follow that reasoning is in  
5 the fact that (f)(1) refers not only to an incorrect -- to  
6 a violation of law, but incorrect application of  
7 sentencing guidelines, which would seem to include a --  
8 the particulars of a given case. So am I either  
9 misunderstanding your argument or maybe misunderstanding  
10 subsection 1?

11           MR. JORGENSEN: Well, Justice Souter, the --  
12 the lines between A 1, 2, 3, and 4 are not as bright as  
13 they might be. But when Congress enacted it, in response  
14 to Justice Scalia's question of why might Congress have  
15 done this -- when it wrote it, which was before Booker,  
16 which introduced some additional theory as to which of  
17 those four does an appeal fit within, one was: Is it  
18 imposed in violation of law?

19           And, using that clear language, you can  
20 imagine the Congress would be concerned that violations  
21 of law not go unremedied.

22           JUSTICE SOUTER: If that's all it said, I  
23 would certainly understand your distinction.

24           MR. JORGENSEN: And then 2 is an incorrect  
25 application of the Sentencing Guidelines, which, again,

1 at the time of the Sentencing Reform Act was -- were  
2 intended to be, I believe, mandatory.

3 JUSTICE SCALIA: So that it was a violation  
4 of law?

5 MR. JORGENSEN: Indeed. Indeed, there isn't  
6 that much of a difference between 1 and 2. But then when  
7 you get to 3 and 4, then you get into the language that  
8 addresses the particulars of this case: Was this  
9 defendant's -- was the application to this defendant too  
10 high based on an unreasonable fact or to an unreasonable  
11 degree, I believe is the --

12 JUSTICE SOUTER: But the -- I guess the  
13 problem I still have is some incorrect applications of  
14 the sentencing guidelines pre-Booker were, in fact,  
15 violations of law. But not all of them were, any more  
16 than all of them are now. But forget the situation now.  
17 Not all of them were.

18 And I don't see how you can draw the sort of  
19 -- the nonporous distinction that you are drawing. I  
20 mean it's a -- it is a good try; but I -- I -- there --  
21 even pre-Booker there are some incorrect applications  
22 that could have been corrected on an abuse standard that  
23 were not properly described as violations of law per se.

24 MR. JORGENSEN: I think that's right,  
25 Justice Souter. And I could only say that what we're

1 doing here is we are hypothesizing why would Congress  
2 have said what they said; and it is a -- it is a  
3 dangerous game to play. But that is my best -- my best  
4 hypothesis. But it does say what it says.

5 Now, if I can return -- and I hope this is  
6 helpful -- to the questions that began the entire  
7 argument, which is the sentencing -- the sentence-  
8 packaging rule or the sentencing package rule which  
9 Justice Breyer addressed, I believe the right answer to  
10 your question, Justice Stevens, is that there -- that  
11 under the way the sentencing-package rule works, which is  
12 applied, I believe, by all circuits, is that if any part  
13 of a --

14 JUSTICE SCALIA: What do we mean by the  
15 "sentencing packaging rule"?

16 MR. JORGENSEN: That's a very good question,  
17 Justice Scalia. Under section 3553(a) after the  
18 Sentencing Reform Act was imposed, judges were --  
19 district judges were empowered and given the obligation  
20 to build a sentence that took into consideration a  
21 number of competing factors such that you might, if  
22 you were a judge, a district judge, reduce a sentence  
23 under one count of an indictment if you were going to  
24 give more under -- under another; and you put together a  
25 sentencing package; and then that's the -- that's the

1 sentence that the defendant receives.

2 And then when that goes up on appeal, if any  
3 part of that package is undone, the whole package is  
4 undone. This is the rule that the circuits follow.

5 To your question, Justice Ginsburg, I don't  
6 believe they have a precedent of this Court to fall --  
7 to base that on. But it is the -- it is the rule that is  
8 nearly uniformly followed. So then when the case goes  
9 back to the district court, the district court is free  
10 to -- to construct a new sentence.

11 So as -- here, if the defendant had prevailed  
12 in any way, then back on remand the district judge could  
13 have imposed the same sentence.

14 Now, a limit on that, Justice Scalia, is the  
15 vindictiveness cases. That if there is any evidence  
16 that -- that the increased sentence, making the sentence  
17 the same or more is as a -- you know, it's a pay back --

18 JUSTICE SCALIA: The punishment for getting  
19 him reversed, right?

20 MR. JORGENSEN: Exactly. And that can't be  
21 done. But, otherwise, with that narrow exception, the  
22 sentence can be exactly the same, even though the  
23 defendant prevailed on appeal.

24 Now, that played out exactly in this case.  
25 In this case, when it went back to the district court,

1 the defendant said to the district court: Don't give me  
2 more. You can fit the new fifteen years within what I  
3 already have. Give me what I already had.

4 And the District Judge said: No. I'm going  
5 to give you more.

6 Now, the answer clearly, I think, cannot  
7 turn on the fact that the Seventh -- excuse me -- the  
8 Eighth Circuit knew the answer. Well, there was -- we  
9 had some questions about what if the Eighth Circuit said:  
10 Well, I see an error here, but I don't know how it  
11 affects your sentence, so I am sending you back. Would  
12 that be okay?

13 But it can't turn on the -- that the Seventh  
14 Circuit knew in this instance that he would get an  
15 increased sentence as versus it would be okay to send it  
16 back without saying what the effect would be for the  
17 district judge to impose.

18 And, Justice Kennedy, your question was:  
19 What happens if there's a new trial? As my children  
20 would say, it is a complete do-over. When the -- when  
21 the trial starts all over again, new facts are found or  
22 not found, and the sentence is completely constructed all  
23 over again based on the facts as found by the jury in the  
24 second trial.

25 If I can end, Justices, I would end by

1 saying that I believe section 3742 does provide the  
2 answer here. Congress provided a clean break with the  
3 past. The idea that Congress was aware of a clear rule  
4 that they would have followed, I think, is contradicted  
5 by Reynolds, where this Court did the opposite; Langnes,  
6 where this Court said that the cross-appeal rule was a --  
7 was a rule of practice, not a jurisdictional limit; and  
8 the confusion in the courts of appeals.

9 I believe the answer to your question,  
10 Justice Scalia, on whether it is well-established is  
11 that in the civil context I believe the D.C. Third,  
12 Fourth, Eighth, and Ninth Circuits say that this is a  
13 rule of practice while -- while the Senate has debated  
14 it back and forth.

15 And in Neztosie the Court noted this  
16 confusion and noted, indeed, that some of the circuits  
17 are internally inconsistent as to what the rule is.

18 It is slightly different in the criminal  
19 context. I believe the Eighth and the Tenth Circuits  
20 have not followed -- have not followed the cross-appeal  
21 rule, while the Second, Third, Fourth and Seventh have;  
22 and the Fifth is internally inconsistent. I may -- I may  
23 have some error, honestly, in that recitation. I did it  
24 from memory when you asked.

25 But my point, I think, comes through no



1 matter what, which is: How could Congress have assumed  
2 this is a clear rule and, when we write these words, the  
3 courts will know that's what we mean, when there's all  
4 this confusion amongst the courts?

5 Thank you, Your Honors.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Ms. Howe, you have two minutes remaining.

8 REBUTTAL ARGUMENT OF AMY HOWE

9 ON BEHALF OF THE PETITIONER

10 MS. HOWE: Mr. Chief Justice, I have two  
11 points. The first is that the amicus argues that  
12 subsection (e) of section 3742 provides the answer in  
13 this case: That upon a review of the record the Court  
14 of Appeals shall determine. And so his argument is that  
15 this authorizes and, in fact, requires the court of  
16 appeals to determine whether any of the errors that are  
17 outlined in subsection (e) have occurred. But (e) can't  
18 possibly be this sort empowering, roving, free-standing  
19 authority that the amicus believes it is.

20 Because if you look at the language of  
21 subsection (e), all it provides -- and this Court has --  
22 has recognized that it merely provides the scope of  
23 review -- that, upon review of the record, the court of  
24 appeals shall determine. It doesn't say anything about  
25 whether a notice of appeal has been filed, how the record

1 got there. And to figure out those things you have to  
2 look at the structure of the statute.

3 And when you look at the structure of the  
4 statute, it is clear that subsections (a) and (b) are  
5 the provisions that provide for appellate jurisdiction  
6 in sentencing cases.

7 The amicus also tries to argue that, you  
8 know --

9 JUSTICE SCALIA: (E) also contradicts (f) --

10 MR. HOWE: (F)(2)and then --

11 JUSTICE SCALIA: -- (2)(A) and (B) because in  
12 -- in some of those cases it doesn't determine that if the  
13 appeal has been brought by the wrong party.

14 MS. HOWE: That's absolutely right. (F)  
15 merely provides the remedy, Justice Scalia.

16 And the amicus tries also to argue that this  
17 is not some sort of free-standing, roving appellate  
18 authority. That, you know, for example, if the case is  
19 brought under (A)(1), a violation of law, the court of  
20 appeals only needs to determine whether it is a  
21 violation of law. But he also argues that the court of  
22 appeals is not obligated to scour the record for errors.  
23 It is only to notice plain error.

24 But if one should start placing these  
25 limits, these limits come from subsections (a) and (b)

1 and the background of traditional appellate practice.  
2 And once you start placing these limits which do not  
3 appear in the text on subsection (e), the entire  
4 construction falls apart.

5           The second point I would make is that the  
6 amicus argues that, somehow, section 3742 represents as  
7 a break from the past; that Congress did not have in  
8 mind that this -- the background of this well-established  
9 appellate procedure. But in section 3742 Congress made  
10 clear -- may I finish -- that it was only providing for  
11 limited appellate review.

12           And if you are going to treat sentencing  
13 cases differently in light of this court's historic  
14 practice of construing the availability of government  
15 appeals narrowly, you need to treat -- you need to be  
16 even more reluctant to deviate from the cross-appeal  
17 rule.

18           CHIEF JUSTICE ROBERTS: Thank you, Miss  
19 Howe.

20           Mr. Jorgensen, you have briefed and argued  
21 this case as an amicus curiae in support of the judgment  
22 below on appointment by the Court. We thank you for  
23 undertaking and discharging that assignment.

24           The case is submitted.

25           (Whereupon, at 11:09 a.m., the case in the

1 above-entitled matter was submitted.)

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<b>A</b>				
<b>ability</b> 23:18	29:3	35:10,19 36:16	<b>APPEARAN...</b>	<b>arrogate</b> 31:2
<b>able</b> 13:21,24	<b>agrees</b> 36:8	38:18 42:3	1:15	<b>aside</b> 36:1 39:1
24:5 31:15	<b>ah</b> 39:14	45:20 48:7,15	<b>appellant</b> 17:22	<b>asked</b> 8:18
<b>above-entitled</b>	<b>AKA</b> 1:3	48:18,18 49:1	<b>appellate</b> 3:12	32:20 48:21
1:12 60:1	<b>Alito</b> 17:4,13	49:7,10,13,18	3:20 4:1 11:4	56:24
<b>absence</b> 16:22	18:15	49:23,25 50:8	11:16,17 27:14	<b>asking</b> 19:6,16
17:2 18:13	<b>Alito's</b> 19:10	51:17 54:2,23	27:18 32:3	<b>assertion</b> 7:1
28:3	<b>allow</b> 6:8	57:25 58:13	33:5 58:5,17	<b>assignment</b>
<b>absolutely</b> 15:2	<b>allowed</b> 10:18	<b>appealed</b> 10:13	59:1,9,11	59:23
58:14	<b>amicus</b> 1:21 2:8	10:14 12:17	<b>appellee</b> 17:2	<b>assistance</b> 6:14
<b>abuse</b> 44:7,10	9:11 10:9	20:24 21:1	<b>applicable</b> 37:13	<b>Assistant</b> 1:18
44:16 52:22	14:21 30:12	27:4 38:25	37:16	<b>assume</b> 35:11
<b>accepted</b> 18:18	32:8 57:11,19	39:5,8,11 41:5	<b>application</b>	40:19 44:6
<b>account</b> 17:5	58:7,16 59:6	41:6 50:20	38:10 40:3	48:16
<b>acknowledge</b>	59:21	<b>appealing</b> 9:5	41:15 51:6,25	<b>assumed</b> 20:13
14:5 15:9	<b>amicus's</b> 10:9	25:6 40:12,14	52:9	33:18 49:21
<b>acknowledges</b>	<b>AMY</b> 1:16 2:3	47:22	<b>applications</b>	57:1
13:23	2:11 3:7 57:8	<b>appeals</b> 3:24,25	39:20 52:13,21	<b>assumes</b> 20:15
<b>Act</b> 3:18 11:7	<b>announcing</b>	5:17,22 6:2,3	<b>applied</b> 53:12	40:9,11 43:1
12:16,21 13:16	20:23	7:4,19 9:2 10:6	<b>apply</b> 6:5 8:14	<b>assuming</b> 16:24
36:9 52:1	<b>anomalous</b> 22:7	10:15,18 11:20	9:16 15:4,7,10	22:14,25
53:18	<b>answer</b> 29:6	12:5 15:4,12	43:22	<b>attention</b> 40:10
<b>addition</b> 34:6	32:18,20 33:6	16:19 17:8,13	<b>Appointed</b> 1:22	<b>author</b> 35:4
<b>additional</b> 51:16	34:20 35:23,24	17:21 18:2,12	<b>appointment</b>	<b>authority</b> 4:18
<b>addressed</b> 53:9	35:24 36:4,6	18:16 19:9	59:22	12:4 19:3,7
<b>addresses</b> 33:19	36:24 37:1,25	20:1,10 21:9	<b>appropriate</b>	21:16 24:20
36:18 52:8	38:4 39:21	21:11,19,24,25	38:20 39:2	57:19 58:18
<b>adopt</b> 47:12,14	40:3 43:1,5,19	22:2,3,6,8,12	<b>April</b> 1:10	<b>authorize</b> 20:8
47:15	50:6 53:9 55:6	22:17,21,23	<b>Arbaugh</b> 43:9	21:11 30:1
<b>adversarial</b>	55:8 56:2,9	23:6,7,8,13	<b>arguable</b> 13:7	<b>authorizes</b>
34:15	57:12	24:9,20 25:13	<b>argue</b> 20:2 58:7	57:15
<b>adverse</b> 29:18	<b>anterior</b> 33:23	26:11 27:7,8	58:16	<b>authorizing</b>
<b>advisory</b> 27:6	<b>anybody</b> 30:8,10	28:2,7 29:1,11	<b>argued</b> 59:20	28:8
<b>advocating</b>	48:2	30:10,22 31:5	<b>argues</b> 57:11	<b>availability</b>
35:10	<b>anyway</b> 50:11	31:10,17,20,24	58:21 59:6	59:14
<b>affirmative</b>	<b>apart</b> 15:11 59:4	32:19 35:13	<b>arguing</b> 26:8	<b>aware</b> 11:2,7
32:18 33:2	<b>appeal</b> 3:14 4:5	36:14 38:11	30:13	12:15,23 13:17
<b>afforded</b> 45:4	4:23 7:12 9:14	39:22,23 40:2	<b>argument</b> 1:13	31:25 40:20
<b>aggrieved</b> 31:21	9:20,25 10:1,4	41:3,4,18,19	2:2,10 3:4,7	56:3
<b>aggrieves</b> 31:6	10:21 11:14,16	41:24 42:6,10	5:21 6:2 8:1,3	<b>a.m</b> 1:14 3:2
<b>agree</b> 10:7 14:14	13:8 16:22	44:13,15 46:1	13:21 16:15	59:25
14:14 28:24	18:11,14 21:4	47:20 48:12	18:18 32:7	
43:17	23:24 24:10,24	49:9,14,17	43:10 45:10	<b>B</b>
<b>agreed</b> 41:24	25:22 26:2	56:8 57:14,16	46:11,12,12	<b>b</b> 9:7,14,24
44:1	27:25 28:12	57:24 58:20,22	48:21 49:3	14:17 28:16
<b>agreeing</b> 28:21	29:20 30:1	59:15	50:15 51:9	29:4 36:15
	31:4,23 34:7,8	<b>appear</b> 59:3	53:7 57:8,14	37:23 38:5,6,9

<p>38:9,15,16 40:6,6 50:18 58:4,11,25 <b>back</b> 4:11 7:18 8:21 13:24 17:16,23 19:24 21:4 25:2,23 26:14,23 27:7 36:23 38:19 39:1 40:18 41:9 43:14 50:5,14 54:9 54:12,17,25 55:11,16 56:14 <b>backdrop</b> 3:18 <b>background</b> 36:1 46:13,16 59:1,8 <b>barred</b> 37:3 <b>base</b> 54:7 <b>based</b> 5:9,11 11:5 20:17 37:14 43:16,17 52:10 55:23 <b>basically</b> 40:23 <b>began</b> 28:1 53:6 <b>beginning</b> 45:9 <b>behalf</b> 1:16,20 2:4,6,12 3:8 16:16 32:2 57:9 <b>believe</b> 6:17 13:1 14:6,11 14:12,15,19 36:7 40:18,20 42:14 43:2,6 43:16 44:18,24 46:7,10,14 47:12 52:2,11 53:9,12 54:6 56:1,9,11,19 <b>believes</b> 57:19 <b>believing</b> 41:19 <b>benefits</b> 35:24 <b>best</b> 53:3,3 <b>beyond</b> 27:22 <b>bit</b> 4:25</p>	<p><b>blank</b> 26:24 <b>blunder</b> 47:12 47:13,14 <b>blunders</b> 47:17 <b>body</b> 12:23 41:17 <b>Booker</b> 27:3 41:23 51:15 <b>Boudin's</b> 42:10 <b>bound</b> 25:3 27:9 <b>Bowles</b> 33:18 43:9 44:1 <b>break</b> 36:9 56:2 59:7 <b>Breyer</b> 11:10,13 11:24,25 12:10 12:13,22 13:19 38:15,22 39:6 39:9,13,16 40:22 41:2,25 45:7,25 46:8,9 53:9 <b>brief</b> 9:10 13:23 31:23 37:22 <b>briefed</b> 59:20 <b>briefs</b> 49:2 <b>bright</b> 51:12 <b>bring</b> 9:23 10:6 14:18 34:2 36:17 <b>brings</b> 19:6 21:4 <b>broadly</b> 43:13 <b>brought</b> 12:17 35:14,19 40:10 42:16 45:5 58:13,19 <b>build</b> 53:20 <b>burden</b> 42:9 48:10 <b>business</b> 34:18</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>c</b> 2:1 3:1 9:24 28:18 29:7 41:16 <b>cans</b> 27:7 <b>capital</b> 4:22</p>	<p><b>care</b> 34:10 <b>careful</b> 25:6 47:11 <b>carve</b> 13:18 <b>carved</b> 11:9 <b>case</b> 3:4 4:4,23 5:3,4,18 7:4 8:19 10:13 11:8,11 12:23 13:18,21 14:3 14:7,20 15:6 16:7 17:20,23 18:8 20:5,25 21:4,9 22:8 25:1,18,21,23 26:23 27:3 29:13,17,20 30:8 31:4,22 31:25 32:13 33:7,19,21 34:19 35:3,14 35:17 37:22,23 38:13,14 39:25 40:25 41:17,20 44:11 45:4 47:22 48:20,21 48:24 50:25 51:2,8 52:8 54:8,24,25 57:13 58:18 59:21,24,25 <b>cases</b> 12:25 15:12 17:6,11 17:13 20:5 24:25 26:16 28:14,16 31:14 33:19 43:9,10 43:11 50:24 54:15 58:6,12 59:13 <b>category</b> 41:18 <b>cause</b> 10:11 40:1 45:2 46:21 <b>centuries</b> 11:4 <b>cert</b> 6:25 <b>certain</b> 3:23 21:23</p>	<p><b>certainly</b> 5:21 6:6 7:20 9:8 13:17 15:7 37:5,6 45:16 51:23 <b>certify</b> 36:17 <b>certiorari</b> 6:23 <b>chance</b> 26:2 <b>changed</b> 20:17 <b>charge</b> 34:6 <b>charged</b> 34:4 35:1 <b>charges</b> 19:5 34:2 <b>charging</b> 34:23 34:24 <b>Chief</b> 3:3,9 5:15 6:1 16:13,17 20:4 25:5,20 26:22 28:5,13 29:2,6,24 32:4 32:10 44:5,9 44:20 47:3,6 57:6,10 59:18 <b>children</b> 55:19 <b>choice</b> 48:9 50:11,12 <b>chooses</b> 34:7 <b>chose</b> 34:19 <b>circuit</b> 5:5 15:6 15:7,15,15 32:19 35:22 37:3,5,6 46:19 48:21 50:24 55:8,9,14 <b>circuits</b> 20:15 53:12 54:4 56:12,16,19 <b>circumstances</b> 9:16,17 15:17 <b>circumvent</b> 5:24 <b>circumventing</b> 5:7 6:7,10 <b>civil</b> 24:24 25:1 33:8 56:11 <b>claim</b> 6:24 22:9 28:3</p>	<p><b>claims</b> 9:22 18:11,12 28:12 <b>claim-processi...</b> 17:1 <b>clarification</b> 29:22 <b>clean</b> 36:9 56:2 <b>clear</b> 37:12,18 38:4 42:10 51:19 56:3 57:2 58:4 59:10 <b>clearly</b> 55:6 <b>client</b> 4:5 <b>close</b> 46:3 <b>colloquy</b> 34:1 <b>Columbia</b> 15:14 <b>come</b> 58:25 <b>comes</b> 21:17 49:11 50:25 56:25 <b>competing</b> 53:21 <b>complained</b> 40:9 <b>complete</b> 55:20 <b>completely</b> 55:22 <b>complex</b> 47:22 <b>comply</b> 7:13 <b>concedes</b> 14:21 <b>concern</b> 50:22 <b>concerned</b> 28:6 51:20 <b>concludes</b> 32:24 32:25 33:4,12 33:13,14 <b>condition</b> 50:20 <b>confronts</b> 43:3 <b>confusion</b> 56:8 56:16 57:4 <b>Congress</b> 3:17 3:19,22 10:23 11:2,7 12:14 12:19 13:13,16 37:11 38:3 39:18,22 40:20</p>
---	---	---	--	--

51:13,14,20 53:1 56:2,3 57:1 59:7,9 <b>consider</b> 22:14 27:10 <b>considerable</b> 42:9 <b>consideration</b> 53:20 <b>considerations</b> 46:22 <b>considers</b> 38:20 39:2 <b>consistent</b> 21:8 <b>constable</b> 47:17 <b>construct</b> 54:10 <b>constructed</b> 55:22 <b>construction</b> 10:9 11:1 59:4 <b>construing</b> 59:14 <b>context</b> 15:20 16:8 28:5 33:8 33:8,10 56:11 56:19 <b>continue</b> 12:20 <b>contours</b> 23:12 <b>contra</b> 43:9 <b>contradict</b> 46:18 <b>contradicted</b> 56:4 <b>contradicts</b> 58:9 <b>contrary</b> 12:8 45:3 <b>control</b> 11:7 12:16 13:16 19:15 <b>controversy</b> 34:13 <b>converse</b> 11:11 <b>conviction</b> 8:10 8:12 12:18 19:21 <b>correct</b> 6:2,17 9:19 10:3 11:24 12:6	18:11 27:24 30:11 41:15 44:19 48:16 <b>corrected</b> 12:11 18:20 31:11 52:22 <b>counsel</b> 34:15,19 57:6 <b>count</b> 17:7,8 19:21,23 53:23 <b>countervailing</b> 46:22 <b>counts</b> 18:20 <b>course</b> 13:3 33:18 40:7 45:23 46:24 <b>court</b> 1:1,13,23 3:10,11,12,14 5:5,10,16,22 5:24 6:1,2,5,8 6:11,12,16 7:4 7:19,20 8:3 9:1 10:15,18 11:16 11:17,20,20 12:5 13:25 16:4,7,11,18 16:19 17:7,7,8 17:13,17,17,21 18:2,12,15,16 18:17,19,24 19:4,5,7,8,12 19:17,24,25 20:1,3,6,8 21:9 21:11,18,19,24 21:25 22:1,2,3 22:5,8,11,11 22:15,16,17,18 22:20,22 23:2 23:6,7,8,9,13 23:18 24:18,19 24:20,21,23,23 25:12,15,15,23 26:3,9,14,23 27:9,11,14,18 28:1,2,2,6,18 29:1,11 30:10 30:21,23 31:5	31:20,24 32:1 32:1,11,13,19 32:24,25 33:2 33:4,6,12,13 33:14,19 34:8 34:13,18,22,24 34:25 35:12,13 35:16,19,20 36:14,17,17,19 36:20,21 37:2 37:19,25 38:11 38:20,23,25 39:21 40:2,17 40:20 41:3,4 41:22 42:5,10 42:16,18,25 43:3,5,8,12,21 44:13,14,25 45:2,4,10 46:1 46:20,22 47:20 47:25 49:9,14 49:17 50:1 54:6,9,9,25 55:1 56:5,6,15 57:13,15,21,23 58:19,21 59:22 <b>courts</b> 12:5 13:8 15:4,12 20:10 21:15 27:7,8 31:2,10,17 33:11 41:19,23 56:8 57:3,4 <b>court's</b> 32:22 40:10 59:13 <b>cover</b> 9:5 <b>create</b> 12:6 <b>created</b> 41:22 <b>crime</b> 11:6 12:16 13:16 35:8 <b>criminal</b> 33:8,10 34:25 45:5 56:18 <b>critical</b> 49:15 <b>cross-appeal</b> 3:23 5:7,12,14 5:24 6:4,7 7:19	9:16 11:3,8 12:20 13:2,3,5 13:17 14:4,14 15:13 17:4,19 24:13 26:8 29:13,15,17,20 30:9,17,23 31:12 33:7 43:4 44:12 47:8 56:6,20 59:16 <b>cross-appealed</b> 42:8 <b>cross-appeals</b> 24:13 27:13 31:10 <b>curiae</b> 1:22 2:8 32:8 59:21 <b>current</b> 50:10 <b>currently</b> 48:6,8 <b>cut</b> 22:2 43:14 <hr/> <b>D</b> <hr/> <b>d</b> 3:1 36:16 <b>damage</b> 51:2 <b>damages</b> 24:25 25:3 <b>danger</b> 31:1 <b>dangerous</b> 53:3 <b>days</b> 6:11,17 20:18,23 48:1 <b>deal</b> 28:22 48:15 48:19,22 <b>DEANNE</b> 1:18 2:5 16:15 <b>death</b> 4:23 12:2 <b>debated</b> 56:13 <b>decide</b> 9:2 30:7 33:6 34:25 36:20 45:21,21 <b>decided</b> 12:19 13:2 <b>decides</b> 25:3 33:20 45:20 <b>deciding</b> 31:6 <b>decision</b> 25:4 31:3,3	<b>decisions</b> 29:18 <b>decrease</b> 27:12 <b>defendant</b> 9:25 10:5,13 13:20 17:15 20:24 21:2 24:9 25:6 25:22 26:1,11 26:11,13,20 35:9,20 36:14 39:5,25 40:13 40:13 41:5 45:21 47:16,21 48:7 49:10,11 49:22,25 50:5 50:7 51:3 52:9 54:1,11,23 55:1 <b>defendants</b> 9:22 14:18 27:4 <b>defendant's</b> 10:17,19 12:18 17:14 18:3,11 18:12,18 19:11 38:14,18 39:25 52:9 <b>definitely</b> 27:17 27:20 <b>degree</b> 37:15 52:11 <b>deny</b> 15:12 <b>departed</b> 11:4 <b>Department</b> 1:19 <b>departure</b> 9:25 10:1,20 37:14 <b>depend</b> 5:16 19:13 23:2 <b>depended</b> 18:21 <b>depending</b> 18:4 32:14 <b>depends</b> 22:17 23:1 <b>described</b> 52:23 <b>determine</b> 21:19 23:9 57:14,16 57:24 58:12,20 <b>determines</b>
--	---	--	---	--

<p>36:21  <b>development</b>  17:9  <b>deviate</b> 3:22  59:16  <b>difference</b> 15:22  15:24 16:2  18:10 40:5,8  49:16 50:18  52:6  <b>different</b> 7:16  8:13,19 20:11  22:1 37:11,20  42:15 47:1  48:20 56:18  <b>differently</b> 3:25  59:13  <b>difficulty</b> 29:25  <b>disagreed</b> 31:18  <b>disagreement</b>  20:14 29:9  <b>disappears</b> 40:8  <b>discharging</b>  59:23  <b>discovers</b> 11:18  <b>discretion</b> 35:2  43:22 44:7,10  44:17  <b>discretionary</b>  43:25 44:4,6  <b>discuss</b> 35:25  36:2  <b>discussed</b> 49:2,2  <b>discussing</b> 49:21  <b>discussion</b> 33:9  <b>disposition</b>  37:11  <b>dissent</b> 44:2  <b>distinction</b>  51:23 52:19  <b>distinctly</b> 9:6  <b>district</b> 4:6,10  4:13,20 5:5,24  6:5,8,10,12,16  7:20 8:3 11:20  12:5 13:25  15:14 17:7,16</p>	<p>17:17,23,24  18:15,17,19,23  19:12,17,24,25  20:3,6,8,22  21:15,19 22:2  22:10,15,16,18  23:1,9,18  24:18,19,21  25:15,23 26:3  26:9,14,23  27:9 28:1  34:24 38:23  45:10 47:25  53:19,22 54:9  54:9,12,25  55:1,4,17  <b>divided</b> 9:6  <b>division</b> 19:3  <b>doing</b> 28:7,11  53:1  <b>door</b> 21:24  <b>double</b> 8:13,15  <b>downward</b> 10:1  10:20  <b>do-over</b> 55:20  <b>draw</b> 9:12 52:18  <b>drawing</b> 9:11  52:19  <b>duty</b> 42:19  <b>D.C</b> 1:9,16,19  1:21 56:11</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p>e 1:18 2:1,5 3:1  3:1 16:15  36:19,19 57:12  57:17,17,21  58:9 59:3  <b>earlier</b> 50:14  <b>earliest</b> 14:24  15:19  <b>effect</b> 21:14,22  26:5,7,12,23  50:23 55:16  <b>Eighth</b> 15:6  32:19 35:22  37:3,5,6 46:19</p>	<p>48:21 55:8,9  56:12,19  <b>either</b> 21:13  22:20 32:25  36:18 51:8  <b>else's</b> 38:13  <b>embodies</b> 26:10  <b>embody</b> 50:20  <b>empowered</b>  53:19  <b>empowering</b>  57:18  <b>enacted</b> 3:17  12:21 51:13  <b>ended</b> 18:6,7  <b>enlisting</b> 28:6  <b>entire</b> 17:9 53:6  59:3  <b>entirely</b> 22:15  36:10  <b>entirety</b> 18:23  <b>entitled</b> 50:7  <b>entrusted</b> 39:25  <b>erred</b> 16:19  <b>error</b> 6:12,19,21  7:12 11:18  12:6 18:3  19:21 25:2,13  28:22 29:23  30:21 31:6,11  32:2 37:4,7  44:19 45:17  46:16 47:7  48:1,22 49:3  50:23,23,24  51:2 55:10  56:23 58:23  <b>errors</b> 3:20 12:1  12:11 14:17  30:11 31:20  42:7 47:19  57:16 58:22  <b>escape</b> 46:3  <b>ESQ</b> 1:16,18,21  2:3,5,7,11  <b>essentially</b> 8:4  26:8 27:14</p>	<p><b>established</b>  13:14 14:4,5  <b>everybody</b> 36:8  38:13  <b>evidence</b> 7:12,24  54:15  <b>exactly</b> 30:25  39:17 48:13  49:16 50:4  54:20,22,24  <b>example</b> 10:12  23:20 25:1,17  26:17 27:3  58:18  <b>exception</b> 3:12  11:9 12:20  13:2,13,18  16:7 54:21  <b>exceptional</b>  15:17  <b>exceptions</b>  14:23 15:16,21  16:6,9  <b>exclusionary</b>  47:16  <b>excuse</b> 55:7  <b>executive</b> 19:4  <b>exist</b> 30:7  <b>existence</b> 15:13  <b>explained</b> 3:15  <b>explaining</b>  50:17  <b>expressly</b> 11:8  <b>extent</b> 18:19  <b>extra</b> 48:10  <b>extraordinary</b>  42:12</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p>f 8:25 9:13,13,15  9:20,21,23  10:3,11 36:21  36:25,25 37:8  37:11,12,12,22  38:5 39:19,22  40:11 50:18,18  50:19 51:1,5</p>	<p>58:9,10,14  <b>fact</b> 9:12 11:6  12:7 40:8 51:5  52:10,14 55:7  57:15  <b>factor</b> 37:14  40:9  <b>factors</b> 27:11  53:21  <b>facts</b> 34:4 55:21  55:23  <b>failure</b> 6:3  <b>fair</b> 29:5,8 41:11  46:23 47:7  <b>fairly</b> 46:3  <b>fairness</b> 46:25  <b>fall</b> 54:6  <b>falls</b> 59:4  <b>far</b> 37:21 45:18  46:5  <b>favor</b> 3:13 17:2  42:7  <b>field</b> 41:17  <b>fifteen</b> 55:2  <b>Fifth</b> 56:22  <b>figure</b> 58:1  <b>file</b> 6:4 48:7  <b>filed</b> 3:14 9:14  9:21 10:5,21  35:18 50:4  57:25  <b>files</b> 48:8 49:22  49:23,24  <b>final</b> 33:15  <b>finality</b> 3:16  <b>finally</b> 33:12  43:18  <b>find</b> 31:15 32:1  <b>finding</b> 17:12  20:19  <b>finds</b> 25:13  <b>fine</b> 24:13  <b>finish</b> 59:10  <b>firm</b> 30:9 33:16  <b>firmly</b> 13:14  <b>first</b> 3:4 4:14 9:1  9:5 10:10</p>
--	---	---	--	--



<p>25:4 26:19 27:1 32:17,23 36:3 37:25 48:3 57:11 <b>fit</b> 41:18 51:17 55:2 <b>fits</b> 41:20,24 <b>five</b> 7:11 25:8 <b>flawed</b> 10:10 <b>follow</b> 42:25 51:4 54:4 <b>followed</b> 50:15 54:8 56:4,20 56:20 <b>footnote</b> 31:5 <b>foreclosed</b> 4:13 4:17 <b>foresee</b> 46:4 <b>foresees</b> 40:23 40:24 <b>forfeited</b> 8:2 <b>forget</b> 52:16 <b>formality</b> 26:9 <b>formulation</b> 46:20 <b>formulations</b> 45:1 47:1 <b>forth</b> 56:14 <b>forward</b> 40:1 <b>found</b> 10:16,19 16:7 18:3,10 31:20 44:3 55:21,22,23 <b>four</b> 41:14 51:17 <b>Fourth</b> 56:12,21 <b>free</b> 19:25 47:16 54:9 <b>freed</b> 27:10 <b>free-standing</b> 57:18 58:17 <b>frequent</b> 47:19 <b>fresh</b> 4:12 <b>front</b> 41:7 <b>full</b> 5:19 <b>further</b> 10:9 16:11 36:5 <b>future</b> 46:4</p>	<p style="text-align: center;"><b>G</b></p> <p><b>g</b> 3:1 38:22 39:2 <b>gain</b> 26:12 <b>game</b> 53:3 <b>general</b> 1:19 20:12,15 21:8 23:17,22 30:15 30:16,17 33:5 <b>generally</b> 14:15 47:20 <b>General's</b> 29:25 <b>generated</b> 31:13 31:17 <b>getting</b> 23:10 29:24,25 34:17 54:18 <b>Ginsburg</b> 5:9,13 6:18 8:15,21 8:25 9:8,11 15:22 16:3 19:1,14,18 29:12,16 33:22 33:25 34:21 48:11 49:5,16 49:19 50:2 54:5 <b>give</b> 7:14 32:19 33:5 37:24 53:24 55:1,3,5 <b>given</b> 11:2 23:6 23:24 29:17,20 40:13,14 41:3 41:6 45:14 51:8 53:19 <b>gives</b> 39:21 40:2 <b>giving</b> 4:14 46:12 <b>go</b> 8:21 13:24 25:2 27:22 33:6 36:4 40:18 45:23 51:21 <b>goes</b> 17:16 25:23 26:23 40:18 47:16 48:1 54:2,8 <b>going</b> 7:18,25</p>	<p>8:19 27:2 28:17 34:9 38:12 43:2 44:11,14,15 45:18,25 46:5 53:23 55:4 59:12 <b>good</b> 29:16 43:10 45:2 46:3,21 52:20 53:16 <b>goodness</b> 34:3 42:4 49:12 <b>gotten</b> 5:1 <b>governing</b> 28:25 29:10 <b>government</b> 4:9 8:2,7 9:22 10:1 10:6,14,21 11:13,14,17 12:16 13:23 14:18 16:22 18:13 19:16,18 20:2,25 21:1 24:2,12 28:20 28:22 29:12,15 29:17,19,19 31:2,6,21 34:7 34:9 36:16 38:25 39:8,11 40:12 47:7,10 48:8,12,14,15 48:19 49:23,24 50:4,8,11 59:14 <b>government's</b> 9:9 25:21 47:15 48:18 <b>grant</b> 17:22 19:7 32:18,25 <b>granted</b> 17:14 <b>grants</b> 22:9 23:13 <b>Greenlaw</b> 1:3 3:4 14:23 15:19 16:10 <b>guess</b> 12:2 36:2</p>	<p>52:12 <b>guideline</b> 37:17 41:16 <b>guidelines</b> 10:16 27:5,6,10 37:13 38:10 39:21 40:4 51:7,25 52:14 <b>guilty</b> 20:19 <b>gun</b> 18:20</p> <p style="text-align: center;"><b>H</b></p> <p><b>handle</b> 41:3,11 41:12 45:19 <b>happen</b> 6:10 47:25 <b>happened</b> 12:25 40:25 <b>happens</b> 7:10,11 8:10 11:10 12:24 30:20 42:15 55:19 <b>harming</b> 42:7 <b>harms</b> 37:23 <b>Harvey</b> 5:4 <b>hatch</b> 46:4 <b>hear</b> 3:3 <b>heard</b> 7:24 <b>hearing</b> 4:12 17:22 <b>held</b> 3:11 4:5 22:23 27:8 <b>helpful</b> 45:8 53:6 <b>helpless</b> 11:20 11:21 <b>high</b> 38:18 39:5 39:7,10,14,24 41:6,16 52:10 <b>higher</b> 4:14 5:1 7:14 19:6 <b>historic</b> 59:13 <b>history</b> 3:21 38:2 40:21 <b>honestly</b> 56:23 <b>Honor</b> 4:17 19:8 20:11,21 22:8</p>	<p>28:11 30:25 46:17 <b>Honors</b> 57:5 <b>hope</b> 53:5 <b>horribles</b> 30:7 <b>Howe</b> 1:16 2:3 2:11 3:6,7,9 4:8,16,20 5:3 5:11,21 6:6,13 6:16,20 7:6,9 7:16 8:1,7,12 8:17,24 9:8 11:12,24 12:9 12:12 13:5,10 13:15 14:6,11 15:2,6,9,14 16:2,13 34:1 57:7,8,10 58:10,14 59:19 <b>hypothesis</b> 53:4 <b>hypothesizing</b> 53:1 <b>hypothetical</b> 19:10 29:3 49:20</p> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> 56:3 <b>illegal</b> 28:7,9 <b>illogically</b> 10:11 <b>illustrated</b> 31:4 <b>imagine</b> 51:20 <b>impermissible</b> 37:14 <b>important</b> 3:15 14:3 <b>importantly</b> 41:13 <b>impose</b> 7:20 20:1 55:17 <b>imposed</b> 9:2 18:17,24 32:21 35:21 36:9,15 36:20,22 37:16 38:8,12 41:21 51:18 53:18 54:13</p>
--	---	--	---	---

<b>imposes</b> 17:25	<b>interests</b> 3:15	52:5,24 53:16	15:8,10,18,22	7:7,10,22 8:6,9
<b>imposing</b> 28:8	46:23	54:20 59:20	16:2,13,17	20:16 21:3
<b>include</b> 29:20	<b>internally</b> 56:17	<b>judge</b> 4:6,10,13	17:4,12,20	24:7,12,16
51:7	56:22	7:23 8:16	18:4,6,15 19:1	47:18,24 48:4
<b>inconsistent</b>	<b>interpretation</b>	17:24 19:15	19:10,14,18	55:18
17:12 22:4	9:18 10:2,8,14	34:3,5 41:9	20:4,16 21:3,7	<b>Kennedy's</b> 50:6
56:17,22	46:13	42:9 45:11,20	21:22 22:13,24	<b>key</b> 18:9
<b>incorrect</b> 38:10	<b>introduced</b>	45:22 53:22,22	23:5,12,15,19	<b>kicks</b> 35:8
39:20 51:5,6	51:16	54:12 55:4,17	23:21 24:1,3,7	<b>kind</b> 9:21 21:10
51:24 52:13,21	<b>intrude</b> 34:14	<b>judgement</b> 1:22	24:12,16 25:5	21:15 34:15
<b>incorrectly</b>	<b>inveterate</b> 3:23	2:9	25:18,20 26:5	38:7,12 41:17
49:21	<b>invoked</b> 14:23	<b>judges</b> 53:18,19	26:18,22 27:13	<b>kinds</b> 10:6 14:17
<b>increase</b> 5:6	15:19 16:10	<b>judgment</b> 3:13	27:19,22 28:5	<b>knew</b> 55:8,14
7:25 10:15,17	43:23	8:10,12 17:1	28:13 29:2,6	<b>know</b> 5:7,22
10:19 22:19	<b>irrelevant</b> 20:20	17:15 30:21	29:12,16,24	7:18,24 8:4,7
<b>increased</b> 4:6,11	<b>isolated</b> 31:14	32:9 35:2	30:3,5,6,14,17	8:13 11:6 12:3
5:23 6:24 7:3	<b>issue</b> 28:2 31:23	59:21	30:20 31:8,21	13:15 20:5
17:2 18:14	33:19,20 34:18	<b>judicial</b> 46:25	32:4,10 33:22	22:22 23:12
44:13 54:16	36:18 44:1,11	<b>jurisdiction</b> 4:2	33:25 34:21	24:7,9,25 25:2
55:15	45:5	16:21,25 22:6	35:3,5,25 36:8	26:11,15,19
<b>increasing</b> 5:25	<b>issues</b> 20:13	22:9 33:1	37:10,25 38:15	27:3 28:8,13
16:19	28:25 34:14	35:12,14,17	38:22 39:4,6,7	30:8,10 34:8
<b>indicate</b> 20:20	35:18 41:7	43:13 49:18	39:9,10,13,16	40:7 41:22
29:15	42:15	58:5	39:18 40:7,18	42:3 44:9 50:7
<b>indictment</b> 7:13	<b>i.e</b> 47:19	<b>jurisdictional</b>	40:22 41:2,13	50:10 54:17
7:18 53:23		14:7,9,12,15	41:25 42:1,12	55:10 57:3
<b>infect</b> 50:24	<b>J</b>	14:16 15:23,25	42:17,21,24	58:8,18
<b>inference</b> 9:10	<b>jail</b> 11:21	16:4 17:5,12	44:2,4,5,9,20	<b>known</b> 49:3,3
<b>inflexible</b> 33:17	<b>JAY</b> 1:21 2:7	33:10,13 42:15	45:7,9,25 46:8	<b>knows</b> 24:14
43:21	32:7	42:22 43:4,11	46:9,11,15	48:9
<b>initial</b> 24:8	<b>jeopardy</b> 8:14	43:14,15 56:7	47:3,6,10,13	<b>Kontrick</b> 33:18
<b>innocent</b> 27:4	8:15	<b>jurisprudence</b>	47:18,23,24	
<b>instance</b> 27:1	<b>Jorgensen</b> 1:21	31:16	48:4,11 49:5	<b>L</b>
55:14	2:7 32:6,7,10	<b>jury</b> 25:2 55:23	49:16,19 50:2	<b>labeled</b> 15:25
<b>instances</b> 39:24	33:22,24 34:20	<b>jury's</b> 25:4	50:6,13,22	<b>lack</b> 16:25 23:24
<b>institutional</b>	35:7 36:7	<b>Justice</b> 1:19 3:3	51:11,14,22	<b>lacked</b> 16:21
46:23	37:24 38:21	3:9 4:3,10,18	52:3,12,25	<b>lacks</b> 37:3
<b>instructed</b> 27:11	39:17 40:17	4:22 5:9,13,15	53:9,10,14,17	<b>Langnes</b> 43:6
<b>instructional</b>	41:1,13 42:11	6:1,9,14,18,22	54:5,14,18	45:2 46:21
25:1	42:13,18,23	7:7,10,22 8:6,9	55:18 56:10	56:5
<b>instructions</b>	44:8,18,23	8:15,18,21,25	57:6,10 58:9	<b>language</b> 35:21
36:23 38:19	45:24 46:7,10	9:8,11 11:10	58:11,15 59:18	36:12 38:1
39:1	46:14,17 47:5	11:13,24,25	<b>Justices</b> 44:1	51:19 52:7
<b>integrity</b> 46:25	47:9,14,23	12:10,13,22	55:25	57:20
<b>intended</b> 10:23	48:3,13 49:15	13:1,7,10,12		<b>larger</b> 33:23
52:2	49:20 50:3,13	13:19 14:2,7,9	<b>K</b>	<b>Laughter</b> 8:20
<b>intent</b> 3:22	50:21 51:11,24	14:20,25 15:3	<b>Kennedy</b> 6:9,14	30:2 35:6

39:15 44:22	<b>looking</b> 34:3 42:3	29:8,14 30:3,4 30:12,16,19,25 31:19 32:5	<b>neither</b> 32:24	<b>O</b> 2:1 3:1
<b>law</b> 9:3 12:8,24 19:19,19 20:2 20:9 28:25 29:10,23 32:21 35:8,9,22 36:2 36:15,21,22 38:9 39:20 40:3,12,14 41:15,17,21 51:6,18,21 52:4,15,23 58:19,21	<b>loosely</b> 43:13	<b>mean</b> 5:21 7:19 12:3 24:23 28:7 31:14 44:10,21 49:8 52:20 53:14 57:3	<b>neutral</b> 21:15	<b>obligated</b> 20:2 58:22
<b>lawful</b> 18:24	<b>lose</b> 26:12	<b>means</b> 9:15 26:5 26:7	<b>never</b> 50:4	<b>obligation</b> 53:19
<b>lawfully</b> 17:17	<b>loses</b> 25:24	<b>member</b> 37:2	<b>nevertheless</b> 16:25 18:13	<b>obtain</b> 13:25
<b>leave</b> 23:17,22 23:23 36:1	<b>lost</b> 32:15	<b>memory</b> 56:24	<b>new</b> 4:11 7:7,17 7:23 8:10,10 8:12,12,16 17:9,22 24:25 36:10 47:15,15 54:10 55:2,19 55:21	<b>obvious</b> 42:19
<b>leaves</b> 5:19 22:14	<b>lot</b> 31:13	<b>mentioned</b> 50:14	<b>Neztsoie</b> 46:21 56:15	<b>obviously</b> 43:8 44:19
<b>legal</b> 38:7	<b>low</b> 38:24	<b>merely</b> 14:21 57:22 58:15	<b>nine</b> 11:21 44:1	<b>occurred</b> 57:17
<b>legislative</b> 38:2	<hr/> <b>M</b> <hr/>	<b>merits</b> 29:9	<b>Ninth</b> 15:15 56:12	<b>occurrence</b> 47:19
<b>legitimate</b> 5:20	<b>main</b> 36:24	<b>MICHAEL</b> 1:3	<b>nonpetitioning</b> 32:2	<b>offense</b> 7:12 37:16
<b>length</b> 29:21	<b>making</b> 54:16	<b>MIKEY</b> 1:4	<b>nonporous</b> 52:19	<b>office</b> 29:25
<b>let's</b> 8:21 22:13 23:21 35:25	<b>mandate</b> 5:16 5:17 17:18 18:5,5,22 19:13 20:1,5,7 20:12,15,17,20 21:6,8,11,14 21:16,18,23 22:1,12,14,17 22:18,25 23:1 23:2,9,22,23 26:14	<b>mind</b> 59:8	<b>non-pealing</b> 32:3	<b>oh</b> 49:12
<b>light</b> 59:13	<b>mandatory</b> 17:1 17:25 27:5,10 27:21 43:20 52:2	<b>minimum</b> 17:25	<b>normal</b> 41:12 45:19	<b>okay</b> 23:19 55:12,15
<b>limit</b> 26:21 32:22 33:2,10 33:13 45:13 46:15 54:14 56:7	<b>minutes</b> 57:7	<b>misapplication</b> 10:16	<b>normally</b> 45:10 45:13	<b>once</b> 17:16 20:23 24:22 27:9 35:1,7 43:6 47:25 59:2
<b>limitation</b> 6:5	<b>manner</b> 14:1	<b>mistake</b> 17:7,8	<b>noted</b> 56:15,16	<b>ones</b> 42:19
<b>limited</b> 3:20 6:3 13:18 22:5 51:2 59:11	<b>mathematical</b> 6:12,19,21	<b>misunderstan...</b> 51:9,9	<b>notice</b> 3:14,15 6:4 10:21 16:22 31:23 35:18 46:23 48:7,18,18,24 48:25 49:7,13 49:17,23,25 57:25 58:23	<b>open</b> 5:19 20:13 21:24 22:14,15 22:20 23:17,22 23:23 26:14 45:11,23
<b>limits</b> 23:6 26:9 26:25 43:15 58:25,25 59:2	<b>matter</b> 1:12 14:20 39:22 57:1 60:1	<b>modify</b> 3:13	<b>noted</b> 56:15,16	<b>operate</b> 10:11 10:24
<b>lines</b> 51:12	<b>matters</b> 39:23	<b>moment</b> 36:1	<b>notice</b> 3:14,15 6:4 10:21 16:22 31:23 35:18 46:23 48:7,18,18,24 48:25 49:7,13 49:17,23,25 57:25 58:23	<b>opinion</b> 31:5 42:10
<b>little</b> 4:25,25 40:13	<b>Maynard</b> 1:18 2:5 16:14,15 16:17 17:11 18:2,9,21 19:8 19:17 20:10,21 21:5,21 22:7 22:22 23:3,11 23:16,20,24 24:2,4,11,15 24:22 25:12 26:1,15 27:2 27:16,20,24 28:10,20 29:5	<b>months</b> 18:18	<b>noticed</b> 41:8 42:2,4 45:22	<b>opportunity</b> 14:24 15:20
<b>long</b> 12:7 31:9,9 43:8		<b>Morley</b> 14:7	<b>notices</b> 42:18	<b>opposite</b> 56:5
<b>look</b> 17:25 26:16 26:18 41:10 42:4,19 45:14 57:20 58:2,3		<b>motivated</b> 38:3	<b>noticing</b> 37:3 45:17	<b>option</b> 23:5
		<b>move</b> 6:11 34:22	<b>noting</b> 10:8	<b>options</b> 23:8
		<b>multi-part</b> 34:21	<b>notion</b> 26:10 45:17	<b>oral</b> 1:12 2:2 3:7 16:15 32:7 48:21 49:2
		<hr/> <b>N</b> <hr/>	<b>number</b> 53:21	<b>order</b> 5:6,23 21:10,15 23:7
		<b>N</b> 2:1,1 3:1		<b>ordering</b> 8:5
		<b>name</b> 35:3		<b>orders</b> 22:3
		<b>narrow</b> 54:21		<b>Organized</b> 11:6 12:16 13:16
		<b>narrowly</b> 59:15		<b>original</b> 27:9
		<b>nearly</b> 54:8		
		<b>need</b> 10:4 29:22 32:13 59:15,15		
		<b>needs</b> 58:20	<hr/> <b>O</b> <hr/>	

<p><b>ought</b> 24:9 26:11 <b>outer</b> 26:25 <b>outlined</b> 57:17 <b>outside</b> 37:13 <b>outweigh</b> 46:23 <b>overturning</b> 38:1</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>P</b> 3:1 <b>package</b> 17:10 53:8,25 54:3,3 <b>packaging</b> 53:8 53:15 <b>page</b> 2:2 9:9,13 <b>parallels</b> 9:23 <b>pare</b> 42:22 <b>part</b> 9:1 14:3 38:24 48:3,5 53:12 54:3 <b>particular</b> 12:15 14:13 16:9 29:22 31:1,4 34:17 36:3 51:3 <b>particulars</b> 51:8 52:8 <b>parties</b> 28:24 31:1 36:17 41:18 43:17 48:22 <b>parts</b> 9:7 <b>party</b> 3:13 9:5 28:3,14,15 34:12 37:19 42:8 49:6 58:13 <b>party's</b> 3:13 <b>pay</b> 54:17 <b>perfectly</b> 41:11 46:4 <b>period</b> 9:3 43:8 <b>person</b> 11:21 12:7 29:21 40:11 <b>petition</b> 6:23</p>	<p><b>Petitioner</b> 1:5 1:17 2:4,12 3:8 19:21 24:23 25:16 28:21 32:20 45:3,5 57:9 <b>Petitioner's</b> 16:20 18:14 23:13 28:12 41:20 <b>petitions</b> 6:25 <b>phrased</b> 46:22 <b>phrases</b> 43:12 <b>placed</b> 48:10 <b>placing</b> 58:24 59:2 <b>plain</b> 31:7,11 32:1 38:1 44:19 45:17 46:16 47:6,19 58:23 <b>plainly</b> 37:17 39:19 <b>play</b> 22:24 53:3 <b>played</b> 54:24 <b>please</b> 3:10 16:18 32:11 <b>plus</b> 29:18 <b>point</b> 12:22 13:19 18:24 34:23 35:7 36:3,11 48:14 48:14,20 50:10 56:25 59:5 <b>pointed</b> 12:24 <b>points</b> 12:12 31:20 57:11 <b>policy</b> 24:8 <b>posed</b> 41:14 <b>posit</b> 19:10 20:12 <b>positing</b> 28:24 <b>position</b> 11:23 12:1,4 21:14 21:18 26:7,19 26:20 34:16 <b>possibility</b> 22:2</p>	<p><b>possibly</b> 57:18 <b>post-Booker</b> 26:16 27:3 <b>post-conviction</b> 13:22 <b>potentially</b> 27:12 50:25 <b>power</b> 32:18,22 33:1 37:3 43:12 <b>powerless</b> 35:23 <b>practice</b> 11:5 14:22,22 15:1 15:16,18 16:5 33:11,15,16,17 33:20 38:1 43:5,7,20,20 43:21,25 44:3 56:7,13 59:1 59:14 <b>precedent</b> 5:10 40:2 54:6 <b>precise</b> 23:12 <b>precisely</b> 18:7 42:17 <b>precluding</b> 23:23 <b>premise</b> 24:8 <b>presentation</b> 34:12 <b>press</b> 19:19 <b>pressing</b> 28:3 <b>pretty</b> 11:25 12:3 <b>prevail</b> 15:18 20:24,25 <b>prevailed</b> 4:5 54:11,23 <b>previous</b> 40:19 <b>pre-Booker</b> 52:14,21 <b>principle</b> 34:12 <b>principles</b> 4:1 17:18 <b>prison</b> 12:7 49:13 <b>problem</b> 31:9,17</p>	<p>34:16 48:25 50:5,9 52:13 <b>problems</b> 31:13 41:8 <b>procedural</b> 16:1 <b>procedure</b> 27:14 27:18 59:9 <b>proceeded</b> 35:1 <b>proceedings</b> 47:1 <b>proper</b> 40:11 42:3,3 <b>properly</b> 29:1 29:11 52:23 <b>proposition</b> 4:19 <b>proscribes</b> 36:3 36:6 <b>prosecution</b> 19:2 <b>prosecutor</b> 19:4 19:5,6,15 34:2 34:6 <b>prosecutorial</b> 35:2 <b>proven</b> 35:8 <b>provide</b> 32:18 32:23 35:22,23 35:24 37:7 43:1,19 56:1 58:5 <b>provided</b> 3:19 43:5 44:25 56:2 <b>provides</b> 36:13 57:12,21,22 58:15 <b>providing</b> 59:10 <b>provisions</b> 12:17 25:14 34:17 38:7 58:5 <b>public</b> 46:25 <b>punishment</b> 54:18 <b>pursue</b> 48:12 <b>pursued</b> 49:10 <b>put</b> 34:18 53:24</p>	<hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> 4:4 8:18 13:20 22:15 28:23,25 29:10,10,23 31:9 32:23 33:15,23 34:21 35:11,19 37:7 39:18 40:3,19 41:20,23 42:23 42:25 43:3,18 43:24 44:23,25 48:4 50:6,6 51:14 53:10,16 54:5 55:18 56:9 <b>questions</b> 16:11 32:12 35:16 38:6,7,8 53:6 55:9 <b>quickly</b> 34:22 <b>quite</b> 45:8</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>R</b> 3:1 <b>raise</b> 16:4 34:19 36:16 48:2 <b>raised</b> 36:19 37:18 49:1,1 <b>raises</b> 48:15 <b>range</b> 5:19 <b>reach</b> 30:22 31:2 35:13 <b>reached</b> 32:1 <b>reacts</b> 19:5 <b>read</b> 28:15,16 28:17 45:15 <b>Reading</b> 45:8 <b>really</b> 28:8 30:7 32:12 46:18,19 <b>reason</b> 3:24 9:19 10:12,23,25 11:3 12:19 39:24 46:2,3 <b>reasonableness</b> 41:23 <b>reasoning</b> 51:4</p>
---	---	--	--	---

<p><b>reasons</b> 10:10 16:20 29:16,19 <b>REBUTTAL</b> 2:10 57:8 <b>recall</b> 50:17 <b>received</b> 29:21 <b>receives</b> 54:1 <b>recitation</b> 56:23 <b>recognized</b> 57:22 <b>recognizes</b> 31:5 <b>reconfigure</b> 26:4 <b>record</b> 29:14 30:11 36:18 42:6 45:20 47:10 48:25 57:13,23,25 58:22 <b>recurring</b> 29:23 <b>reduce</b> 53:22 <b>reduced</b> 25:8 <b>reed</b> 11:1,6 <b>refer</b> 9:4,14,20 10:4 <b>refers</b> 9:21 51:5 <b>reflects</b> 3:22 4:1 <b>Reform</b> 3:18 12:21 36:9 52:1 53:18 <b>refused</b> 44:19 <b>regard</b> 15:15 <b>regarded</b> 15:25 <b>regime</b> 27:5,6 36:10,10 <b>rejected</b> 18:12 <b>rejecting</b> 28:11 <b>relief</b> 13:22,25 17:14 21:10,12 22:9 25:7,10 25:20 26:21,22 32:23 39:11 45:4 <b>reluctant</b> 59:16 <b>rely</b> 34:15 <b>relying</b> 19:3 <b>remainder</b></p>	<p>16:12 <b>remaining</b> 57:7 <b>remand</b> 5:23 6:24 7:3 18:19 19:12 26:3 54:12 <b>remanded</b> 5:18 18:4,19,23 20:6 21:2 <b>remands</b> 23:16 <b>remedial</b> 25:14 <b>remedy</b> 37:8 58:15 <b>remember</b> 35:3 <b>reminded</b> 28:14 <b>reopen</b> 20:18 <b>reply</b> 47:11 <b>repose</b> 46:24 <b>represents</b> 59:6 <b>reprinted</b> 9:9 <b>reputation</b> 46:25 <b>request</b> 17:15 18:3 19:11 23:14 25:20 26:21 <b>requested</b> 17:14 22:9 28:11 <b>requests</b> 25:7 <b>required</b> 19:18 <b>requirement</b> 16:1 <b>requires</b> 57:15 <b>requiring</b> 30:9 <b>resentence</b> 8:9 23:18 25:15 41:10 45:11,11 45:12 <b>resentencing</b> 4:6 5:18 17:23,24 23:17 41:9 45:23 <b>reserve</b> 16:11 <b>resolve</b> 32:13 42:16 <b>resolves</b> 32:14 <b>respectfully</b></p>	<p>48:4 <b>respondent</b> 1:20 2:6 16:16 32:2 <b>response</b> 51:13 <b>rest</b> 11:1 <b>rests</b> 34:11 <b>result</b> 10:17 18:7 <b>return</b> 53:5 <b>returning</b> 13:20 <b>reversal</b> 1:20 <b>reversed</b> 7:11 44:16 54:19 <b>review</b> 3:20 12:19 57:13,23 57:23 59:11 <b>reviewable</b> 44:7 <b>Reynolds</b> 45:3 56:5 <b>right</b> 8:2 20:8 21:4 22:13 24:11,15 27:2 28:19 29:6 32:20 34:7 35:23,23 38:16 39:9,17,21 41:7,11,12 46:9,14 48:13 49:16 50:2,4 50:21 52:24 53:9 54:19 58:14 <b>risk</b> 24:24 50:9 <b>ROBERTS</b> 3:3 5:15 6:1 16:13 20:4 25:5 28:5 28:13 29:2,6 29:24 32:4 44:5,9,20 47:3 47:6 57:6 59:18 <b>roving</b> 35:12,12 57:18 58:17 <b>rule</b> 3:14,19,23 5:8,12,14,24 6:8,13 7:19,23 8:13 9:16 11:3</p>	<p>11:8 12:21 13:3,3,5,7,9,13 13:17 14:4,4,5 14:15,21,22 15:1,13,15,17 15:23,24 16:5 16:7 17:1,5,19 20:16,18,22 21:8 25:25 26:8,10 27:13 27:14,17 30:9 30:18 33:7,7 33:11,15,16,17 33:20 36:1 37:20 43:4,4,7 43:15,17,19,20 43:21 44:3 46:13,16,19,24 47:15,16,20 53:8,8,11,15 54:4,7 56:3,6,7 56:13,17,21 57:2 59:17 <b>ruled</b> 31:22,24 <b>rules</b> 7:14 20:11 20:20 43:25 47:25 48:7 <b>runs</b> 42:24</p> <hr/> <p><b>S</b></p> <p><b>S</b> 2:1 3:1 <b>saw</b> 45:15 <b>saying</b> 11:19 15:11 21:23 24:16 27:4 28:22 29:4,4 37:21 40:24 42:5 50:19 55:16 56:1 <b>says</b> 7:23 9:1 20:5,7,18 25:7 28:15,16 30:8 30:10 35:20 36:19,21 37:8 38:1,17,18,24 41:5,6 42:14 44:13,15 45:21</p>	<p>45:22 49:12 53:4 <b>Scalia</b> 6:22 8:18 14:2,7,9,20,25 15:3,8,10,18 30:3,5,6,14,17 30:20 35:4,5 35:25 37:10 39:4,7,10,18 40:7 42:1,12 42:17,21,24 45:9 46:11,15 52:3 53:14,17 54:14,18 56:10 58:9,11,15 <b>Scalia's</b> 51:14 <b>scenario</b> 12:15 <b>scope</b> 17:18 18:4 18:5 19:13,25 21:3,5 22:11 57:22 <b>scour</b> 58:22 <b>se</b> 52:23 <b>search</b> 30:11 42:6 <b>searching</b> 31:15 <b>second</b> 4:24 9:6 10:25 12:22 16:24 19:20,22 25:3 31:6,25 48:5 55:24 56:21 59:5 <b>section</b> 3:19,21 3:25 13:22,25 14:16 17:25 32:17 36:13 40:23 41:3 53:17 56:1 57:12 59:6,9 <b>sections</b> 45:15 <b>see</b> 21:17 31:16 37:5,6 39:16 40:23 41:10 52:18 55:10 <b>seek</b> 13:21 24:25 25:11 <b>seen</b> 6:23,25</p>
--	--	---	---	--

<b>Senate</b> 56:13	52:14 53:7,8	<b>specific</b> 23:23	16:9 26:25	<b>T</b>
<b>send</b> 17:22	53:15,18,25	<b>specifies</b> 39:23	27:1 33:9	<b>T</b> 1:21 2:1,1,7
36:22 38:19	58:6 59:12	<b>sponte</b> 8:4,6	38:22 39:2	32:7
39:1 41:4,9	<b>sentencing-pa...</b>	<b>stage</b> 34:23,24	<b>submitted</b> 59:24	<b>take</b> 6:9 11:11
55:15	17:6,6 53:11	<b>stake</b> 24:9	60:1	17:24 21:14,17
<b>sending</b> 55:11	<b>series</b> 43:9	<b>stakes</b> 24:14	<b>subparts</b> 9:1,4	24:8 26:20
<b>sense</b> 10:22 16:3	<b>serious</b> 4:25	<b>stand</b> 49:12	<b>subsection</b> 9:12	34:9 35:13
18:10 40:15	12:6 25:22	<b>standard</b> 44:24	9:13,15,19,21	50:5,13
<b>sent</b> 4:11	<b>serves</b> 3:15	45:1,2 52:22	9:23 10:3,11	<b>talk</b> 36:10
<b>sentence</b> 4:7,14	<b>set</b> 34:3 39:1	<b>stands</b> 48:9	51:10 57:12,17	<b>talking</b> 14:13
4:24,25 5:2,6,6	<b>sets</b> 14:16	<b>start</b> 24:17,18	57:21 59:3	30:14 49:22
5:17,23,25	<b>settled</b> 3:18	29:1 58:24	<b>subsections</b>	<b>talks</b> 46:24
6:17,24 7:11	<b>seven</b> 6:11,17	59:2	14:17 58:4,25	<b>teachings</b> 43:11
7:15,21,25 9:2	20:18,22 48:1	<b>started</b> 8:22	<b>subsections(a)...</b>	<b>tell</b> 34:5
10:15,18,19	<b>Seventh</b> 55:7,13	45:9	9:24	<b>telling</b> 7:1 32:22
11:14 12:18	56:21	<b>starting</b> 26:24	<b>subsequent</b>	<b>ten</b> 19:16
16:20 17:9	<b>shape</b> 34:13	<b>starts</b> 55:21	19:20,22	<b>Tenth</b> 15:7
18:14,16,20,23	<b>side</b> 29:4,4	<b>state</b> 32:15	<b>subsequently</b>	56:19
18:24 19:7,11	36:19 40:24	<b>States</b> 1:1,7,13	49:24	<b>text</b> 3:21 59:3
19:23 20:1,23	45:18	3:5 5:4	<b>subsumes</b> 38:5	<b>thank</b> 16:13
20:23 22:10,19	<b>sides</b> 9:6	<b>statute</b> 8:22 11:1	<b>succeed</b> 27:25	31:3 32:4 57:5
23:14 24:17	<b>simply</b> 4:20 20:5	15:11,11 28:18	<b>suggested</b> 26:22	57:6 59:18,22
25:8,8,13 26:4	51:2	30:14 33:5	34:1	<b>theory</b> 21:9 22:5
26:4 27:9,12	<b>situation</b> 19:10	36:3 43:16,17	<b>suggesting</b>	25:21 26:13
28:9 29:21	27:17 28:23	46:12 58:2,4	25:20	51:16
32:21 35:21	52:16	<b>statutes</b> 38:6	<b>suggests</b> 37:22	<b>thin</b> 11:1,5
36:14 37:13,15	<b>slate</b> 26:24	<b>statutory</b> 13:4,6	<b>support</b> 1:22 2:8	<b>thing</b> 11:11 20:8
38:8,17 41:6	<b>slightly</b> 56:18	28:14 34:17	32:9 59:21	28:19 34:16
41:21 44:13	<b>solely</b> 6:3	35:21	<b>supporting</b> 1:20	38:12,17 39:3
45:4 53:7,20	<b>Solicitor</b> 1:18	<b>Stevens</b> 4:3,10	37:22	40:9 46:20
53:22 54:1,10	29:25	4:18,22 13:1,7	<b>suppose</b> 24:4,5	<b>things</b> 58:1
54:13,16,16,22	<b>somebody</b> 35:18	13:10,12 17:20	33:22 49:8,11	<b>think</b> 7:16,22,25
55:11,15,22	<b>somewhat</b> 36:11	18:4,6 31:8,21	<b>supposed</b> 12:10	9:10,18 10:3,8
<b>sentenced</b> 12:2	<b>sorry</b> 11:12	53:10	<b>Supposing</b> 4:5	10:21,22 11:3
19:22 27:5	<b>sort</b> 14:3 22:3	<b>strange</b> 25:25,25	<b>Supreme</b> 1:1,13	14:8 20:21
35:9	38:2 52:18	<b>strictly</b> 16:24	<b>sure</b> 6:25 8:17	21:22 22:7
<b>sentencing</b> 3:17	57:18 58:17	<b>strike</b> 48:15,19	23:3,11 42:6	25:2,12 26:15
3:20,24 4:12	<b>Souter</b> 21:7,22	<b>struck</b> 48:22	<b>surmising</b> 38:2	26:16 27:12,16
4:12 5:20	22:13,24 23:5	<b>structure</b> 3:21	<b>surprised</b> 24:10	27:24 33:17,23
12:21 14:13	23:12,15,19,21	58:2,3	<b>surprising</b> 13:12	34:3 35:11
15:20 16:8	24:1,3 25:18	<b>structured</b>	13:15	36:18 37:2
17:10,22 20:13	26:5,18 27:13	25:19	<b>sworn</b> 6:22	40:21 44:25
26:2 35:18	27:19,22 44:2	<b>structuring</b>	<b>system</b> 12:6,11	47:21 52:24
36:8 38:10	47:13 50:13,22	21:23 22:1	34:2,11,15	55:6 56:4,25
39:21 40:4	51:11,22 52:12	<b>sua</b> 8:4,6	50:10	<b>thinking</b> 4:4
41:16 49:1	52:25	<b>subject</b> 14:22	<b>systems</b> 34:12	<b>thinks</b> 11:15,16
51:1,7,25 52:1	<b>speaks</b> 20:22	15:16,21 16:5	34:13	<b>third</b> 5:5 13:19

33:15 56:11,21 <b>Thomas</b> 44:4 <b>thought</b> 5:15 14:2,2 19:2 31:11 38:16 44:20 45:10,13 49:22 50:15 <b>three</b> 10:10 12:12 32:12,16 32:17 39:3 41:14 45:15 <b>tight</b> 16:1 <b>time</b> 4:15,24,24 12:8 16:5,12 25:3,4 30:20 31:10 42:24 43:8 50:15 52:1 <b>timely</b> 14:23 15:19 16:10 17:3 20:24 <b>today</b> 3:4 <b>totally</b> 8:19 26:24 30:23 <b>tough</b> 11:25 12:3 <b>traditional</b> 4:1 59:1 <b>treat</b> 59:12,15 <b>treated</b> 3:24 <b>trial</b> 7:8,17,23 24:25 35:1 55:19,21,24 <b>tried</b> 42:21 <b>tries</b> 58:7,16 <b>trouble</b> 25:22 <b>true</b> 6:7 19:9 24:24 35:10 47:23 48:4 <b>try</b> 34:22 45:15 52:20 <b>trying</b> 28:24 41:4 43:14 <b>Tuesday</b> 1:10 <b>turn</b> 17:18 22:11 55:7,13 <b>turns</b> 48:24	<b>twice</b> 47:21 <b>two</b> 9:1,4 11:4 16:20 18:17 31:19,20 41:14 41:15 57:7,10 <b>two-part</b> 37:25 <b>type</b> 20:12 <hr/> <b>U</b> <hr/> <b>ultimately</b> 14:19 22:16 <b>understand</b> 21:7 23:4 26:6 49:6 51:23 <b>understood</b> 19:9 50:16 <b>undertaking</b> 59:23 <b>undone</b> 54:3,4 <b>unexceptiona...</b> 30:24 <b>uniformly</b> 54:8 <b>unilaterally</b> 48:17 <b>united</b> 1:1,7,13 3:5 5:4 41:19 <b>unnecessary</b> 7:2 <b>unreasonable</b> 18:17 37:15,17 52:10,10 <b>unremedied</b> 51:21 <b>unsurprising</b> 37:1 <b>unusual</b> 40:25 <b>unwarranted</b> 10:20 <b>upward</b> 9:25 <b>urge</b> 47:11 <b>USC</b> 16:23 <b>use</b> 27:2 43:22 <b>usually</b> 20:4 <b>U.S.C</b> 3:19 <hr/> <b>V</b> <hr/> <b>v</b> 1:6 <b>vacate</b> 23:14	38:19 <b>vacated</b> 5:18 17:15 18:22 19:11 24:17 25:8 <b>vacates</b> 17:8 22:10 25:13 <b>verdict</b> 20:19 <b>versus</b> 3:4 5:4 55:15 <b>view</b> 31:18 <b>vindictive</b> 45:12 <b>vindictively</b> 6:25 <b>vindictiveness</b> 7:2,14 54:15 <b>violated</b> 16:25 <b>violation</b> 9:3 32:21 35:22 36:15,20,22 38:9 40:12,14 41:15,21 51:6 51:18 52:3 58:19,21 <b>violations</b> 39:20 51:20 52:15,23 <b>virtue</b> 6:3 <b>voluntarily</b> 49:6 <hr/> <b>W</b> <hr/> <b>wait</b> 38:15 39:14 39:14 <b>waivable</b> 33:16 <b>waived</b> 16:4 <b>walk</b> 48:17 <b>want</b> 25:7,8 26:18,19 27:5 28:18 37:11,20 42:24 <b>Washington</b> 1:9 1:16,19,21 <b>way</b> 10:24 11:5 17:24 21:24 22:1,18 23:17 36:25 40:15,22 41:2,11,12 42:2 45:19	48:6 49:8 53:11 54:12 <b>well-established</b> 14:10,12 15:1 56:10 59:8 <b>went</b> 54:25 <b>weren't</b> 29:3 <b>we're</b> 8:19 12:23 28:17 34:9 41:10 42:2 44:14,15 52:25 <b>we've</b> 28:16 41:7 42:2,4 <b>wide</b> 26:14 31:16 <b>widespread</b> 31:16 <b>wins</b> 25:22 26:1 26:13,21 <b>wish</b> 35:3 <b>withdraw</b> 49:6 <b>withdrawing</b> 49:13 <b>withdraws</b> 49:25 <b>within(a)(1)</b> 41:24 <b>won</b> 4:23 <b>worded</b> 18:22 <b>words</b> 37:21 57:2 <b>work</b> 12:10 46:6 46:7 <b>works</b> 45:13 48:6 53:11 <b>worse</b> 25:24 28:1 <b>worth</b> 10:8 <b>wouldn't</b> 6:5 19:14 29:17 <b>write</b> 57:2 <b>writing</b> 23:8 44:2,4 45:22 <b>written</b> 45:16 <b>wrong</b> 11:17 28:17 38:11 40:3 58:13	<b>wrote</b> 51:15 <hr/> <b>X</b> <hr/> <b>x</b> 1:2,8 34:7 <hr/> <b>Y</b> <hr/> <b>Y</b> 34:6 <b>year</b> 11:18 <b>years</b> 3:11 7:11 11:14,21 16:8 19:16,23 25:9 31:14,15 33:9 49:12 55:2 <hr/> <b>0</b> <hr/> <b>07-330</b> 1:6 3:4 <hr/> <b>1</b> <hr/> <b>1</b> 9:15,20,21 10:3 17:7,8 36:15,21,25,25 37:8,11 38:5,5 38:5,8,9,17 39:19 40:1,5,6 40:11 41:20 50:18,19 51:5 51:10,12 52:6 58:19 <b>10</b> 11:14 19:21 19:23 25:9 <b>10:10</b> 1:14 3:2 <b>11:09</b> 59:25 <b>1291</b> 33:5 <b>15</b> 1:10 49:12 <b>16</b> 2:6 <b>18</b> 3:19 16:23 <b>1970</b> 11:7 12:16 <b>1984</b> 3:17 <hr/> <b>2</b> <hr/> <b>2</b> 9:4,13,13,23 10:11 37:12,12 37:22 38:5,6,9 38:9,15,16 39:22 40:1,6,6 40:6 50:18 51:1,12,24 52:6 58:11
--	---	---	--	---

<p><b>2)and</b> 58:10  <b>20</b> 11:15  <b>200</b> 3:11 16:8  33:9  <b>2007</b> 29:19  <b>2008</b> 1:10  <b>2255</b> 13:22,25  <b>25</b> 19:23</p>	<p><b>924(c)</b> 19:20  37:4</p>			
<hr/> <p style="text-align: center;"><b>3</b></p> <hr/>				
<p><b>3</b> 2:4 9:24 38:13  40:6 41:16  51:12 52:7  <b>30</b> 31:15  <b>32</b> 2:9  <b>35</b> 20:16,18,22  <b>3553(a)</b> 53:17  <b>37</b> 8:22  <b>3742</b> 3:19,21,25  14:16 25:14  30:13 32:17  33:4 35:16  36:13 42:14  43:1,19 49:17  56:1 57:12  59:6,9  <b>3742(a)(1)</b> 35:20  <b>3742(b)</b> 16:23</p>				
<hr/> <p style="text-align: center;"><b>4</b></p> <hr/>				
<p><b>4</b> 38:13 51:12  52:7  <b>40</b> 31:15  <b>42</b> 8:23,24</p>				
<hr/> <p style="text-align: center;"><b>5</b></p> <hr/>				
<p><b>5a</b> 9:9  <b>52(b)</b> 46:19,24  <b>57</b> 2:12</p>				
<hr/> <p style="text-align: center;"><b>6</b></p> <hr/>				
<p><b>6</b> 31:5  <b>6a</b> 9:13</p>				
<hr/> <p style="text-align: center;"><b>8</b></p> <hr/>				
<p><b>8,000</b> 29:18</p>				
<hr/> <p style="text-align: center;"><b>9</b></p> <hr/>				