

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

PAUL ERLINGER,)
)
) Petitioner,)
)
) v.) No. 23-370
)
) UNITED STATES,)
)
) Respondent.)

Pages: 1 through 103
Place: Washington, D.C.
Date: March 27, 2024

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	JEFFREY L. FISHER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ERIC J. FEIGIN, ESQ.	
7	On behalf of the Respondent,	
8	supporting the Petitioner	39
9	ORAL ARGUMENT OF:	
10	D. NICK HARPER, ESQ.	
11	Court-appointed amicus curiae	
12	in support of the judgment below	69
13	REBUTTAL ARGUMENT OF:	
14	JEFFREY L. FISHER, ESQ.	
15	On behalf of the Petitioner	100
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 23-370, Erlinger versus United States.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER
ON BEHALF OF THE PETITIONER

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

Robust and clear precedent dictates the outcome here. In case after case, this Court has held that judges applying ACCA may find only what crime with what -- what crime with what elements a defendant was previously convicted of, nothing more.

And the Court has grounded that rule directly in the Sixth Amendment. A judge may not increase a defendant's sentencing range based on offense-related conduct that the prior jury did not need to find.

ACCA's occasions clause, as this Court construed it in Wooden, requires exactly that kind of factual inquiry. The whole point of the clause, in fact, is to require something more

1 than just three convictions before an ACCA
2 sentence is imposed. As such, the Apprendi rule
3 directly applies to it.

4 That leaves amicus's objection that
5 the Court should eschew that straightforward
6 analysis because applying the Sixth Amendment
7 here would somehow harm defendants. But, as the
8 briefs filed by criminal defense organizations
9 show in this case, that concern is unfounded.

10 Guilty pleas, waivers, and
11 stipulations, in all candor, make the occasions
12 clause not really an issue that's litigated in
13 most cases. But, in the rare cases, in fact, in
14 the handful of cases a year where you're going
15 to have a defendant who disputes the -- the
16 occasions issue, as well as the underlying
17 Section 922(g) charge, bifurcation is a
18 time-honored solution that courts have already
19 shown that they can apply to resolve that
20 situation and avoid any prejudice to the
21 defendant.

22 The Court should endorse that practice
23 and reverse the court of appeals.

24 I'm happy to take the Court's
25 questions.

1 JUSTICE THOMAS: Mr. Fisher, wouldn't
2 it be more straightforward to overrule
3 Almendarez-Torres?

4 MR. FISHER: Obviously, that's one
5 thing the Court could do if and when necessary,
6 but I don't --

7 JUSTICE THOMAS: Well, do you think we
8 should?

9 MR. FISHER: I think the Court should
10 someday, but I don't know the Court needs to do
11 it in this case. I think that -- our position
12 in this case is what the Court has already said
13 in Mathis and Descamps makes perfectly clear
14 that the occasions clause falls outside of
15 Almendarez-Torres, and I think, you know, the
16 reason we didn't brief the case that way is
17 because the Court's ordinary practice is not to
18 consider overruling a case unless you had to.

19 JUSTICE THOMAS: But don't you have --
20 it -- it seems that you and the government can
21 agree where you draw the line, right?

22 MR. FISHER: I think, Justice Thomas,
23 we agree on a whole lot. So we agree that the
24 test is whether or not it -- the fact at issue
25 is part of the prior conviction. And the

1 government uses the word "integral" to the prior
2 conviction. We think "inherent" in the prior
3 conviction.

4 So we agree with the test. We do have
5 some quibbles perhaps on the margins of how that
6 test would apply, but, again, this case wouldn't
7 present any of those issues.

8 JUSTICE ALITO: Well,
9 Almendarez-Torres is a -- an established
10 principle of -- an established precedent of the
11 Court that's been relied upon and reaffirmed in
12 subsequent cases, so if we were to reexamine
13 that, would it then be appropriate to reexamine
14 the entire question that was opened up in
15 Apprendi? Or you -- would you just like us to
16 open up the part that might yield a decision
17 that's favorable to you?

18 MR. FISHER: Well, I'm not even asking
19 you to do that today, Justice Alito.

20 JUSTICE ALITO: Well, you --

21 MR. FISHER: But, if you -- but, if
22 you did, I suppose fair is fair.

23 JUSTICE ALITO: -- you -- you sort of
24 took -- you sort of took Justice Thomas's bait.

25 MR. FISHER: I --

1 (Laughter.)

2 MR. FISHER: -- I -- I -- I suppose
3 fair would be fair and the Court could go back
4 to first principles, and I think those first
5 principles, as the Court -- as the Court's
6 opinions in Apprendi showed, you know, would
7 dictate the right to jury trial applies to all
8 facts necessary to include in --

9 JUSTICE ALITO: Well, that remains to
10 be seen, but anyway, when you --

11 CHIEF JUSTICE ROBERTS: Well, but --
12 I'm sorry.

13 JUSTICE ALITO: I'm sorry.

14 CHIEF JUSTICE ROBERTS: Go ahead.

15 JUSTICE ALITO: When -- when -- when
16 you say that we should say something favorable
17 about bifurcation, do you mean we should just
18 say that it's a discretionary determination for
19 trial judges, or you want us to hint more than
20 that?

21 MR. FISHER: Well, I think, as I
22 understand the argument on the other side, it's
23 that you should not apply the Sixth Amendment
24 here because it would prejudice defendants. And
25 so there's a ready answer to that question,

1 which is bifurcation. It's the time-honored
2 solution Justice Thomas identified in his
3 Apprendi concurrence and we show in the papers
4 has been endorsed by the Court in the past.

5 I think the Spencer versus Texas case
6 from nine -- from the '60s was one in which the
7 Court, I think, gently endorsed bifurcation, and
8 that was a state case. This is a federal case.
9 And so I think the Court, if it wanted to,
10 could -- could express a little more support for
11 that.

12 I -- frankly, I don't know what the
13 argument would be against bifurcation, Justice
14 Alito. As I said, there are only a handful of
15 cases a year where this is even going to arise.
16 There are fewer -- right now, there are fewer
17 than 200 ACCA cases a year, and, of course, most
18 of those are plea bargains.

19 So there's only a handful of cases a
20 year. And bifurcation occurs in things like
21 criminal forfeiture, it occurs in all kinds of
22 civil cases, and so just to move the fact
23 finding from the judge over to the jury, I don't
24 think it's very much to ask.

25 JUSTICE KAVANAUGH: The -- the broader

1 argument on the other side by the amicus is that
2 the historical practice is much more mixed and
3 that there were a variety of practices in the
4 1800s and earlier --

5 MR. FISHER: Yeah.

6 JUSTICE KAVANAUGH: -- 1900s on this
7 question and that recidivism, the question of
8 whether a defendant committed prior offenses,
9 was not routinely put before juries, in part
10 because it was related to punishment and in part
11 because it was perceived as different, because
12 it's harmful to defendants in most cases to have
13 it paraded before the jury.

14 So that historical practice, I think,
15 because it's mixed, actually supports
16 Almendarez-Torres and supports, arguably, the
17 amicus says -- I want to get your response --
18 the -- what -- the approach that they're
19 suggesting here, that Descamps and Mathis were
20 statutory cases, not constitutional cases.

21 Your response?

22 MR. FISHER: Right. So I think the
23 history question is an important one, and then
24 I'll turn to Descamps and Mathis. And starting
25 with the -- the way you should answer -- look at

1 the history question, we think, after Gaudin and
2 Apprendi, the question would be whether amicus
3 can show a uniform or near-uniform --

4 JUSTICE KAVANAUGH: Why --

5 MR. FISHER: -- historical tradition.

6 JUSTICE KAVANAUGH: -- why is that?

7 So I'm sorry to interrupt.

8 MR. FISHER: Yeah.

9 JUSTICE KAVANAUGH: But that's a key
10 point.

11 MR. FISHER: I -- I --

12 JUSTICE KAVANAUGH: I think it's the
13 -- the burden usually to establish a
14 constitutional right because it's not in the
15 text. The text, we have to -- and, therefore,
16 we have to look at what the understanding of
17 that text was, and we look at historical --

18 MR. FISHER: Yeah.

19 JUSTICE KAVANAUGH: -- practice, and
20 it would seem to me, to get something
21 established in the Constitution, you would need
22 to show more of a uniform historical practice,
23 which I think some of the prior writings and
24 commentary has assumed. But, when you get --
25 when you get into it, it's a more mixed picture,

1 I think.

2 MR. FISHER: So, Justice Kavanaugh --

3 JUSTICE KAVANAUGH: So those are two
4 different questions.

5 MR. FISHER: No, I think there's a lot
6 there and we want to work through it. And --
7 and I will say, to cut to the chase, I think
8 whatever test you apply on the history and
9 tradition, we're going to win, but I think what
10 the test is is -- is perhaps an important
11 question for the future.

12 And if you look at Gaudin, that's a
13 Sixth Amendment jury trial case, and what the
14 Court says is, to carve out an exception from
15 the general rule that the jury has to find all
16 the elements, the government in that case or the
17 other side has to show an overwhelming history
18 and tradition.

19 And I think, once Apprendi extended
20 the Gaudin all elements rule to any fact that
21 increases a sentence and creates what the
22 Apprendi Court itself called the general rule,
23 subject only to the exception of
24 Almendarez-Torres, then --

25 JUSTICE KAVANAUGH: Well --

1 MR. FISHER: -- to fall in that
2 exception, I think you have to make the
3 Gaudin text point, but let me --

4 JUSTICE KAVANAUGH: -- as you well
5 know, whether you call it the rule or the
6 exception kind of loads the dice, but the
7 established principle in some states from --
8 from early on in our history was that these --
9 these issues were not put -- put before the
10 jury. You can call that the exception or the
11 rule. But recidivism was not put before the
12 jury precisely because it's so harmful and is --

13 MR. FISHER: Well, Justice Kavanaugh,
14 let's just cut right to that then.

15 JUSTICE KAVANAUGH: Yeah.

16 MR. FISHER: I think that mix has
17 identified only four states where recidivism was
18 put to the judge instead of the jury when it
19 increases a defendant's sentence --

20 JUSTICE KAVANAUGH: Right. And there
21 --

22 MR. FISHER: -- up until the mid -- up
23 until the 20th Century.

24 JUSTICE KAVANAUGH: Right. And there
25 weren't --

1 MR. FISHER: And I think that's a --

2 JUSTICE KAVANAUGH: -- 50 then, so
3 four out of, you know, whatever it was.

4 MR. FISHER: Four out of -- by the
5 time -- all the way into the 1920s --

6 JUSTICE KAVANAUGH: Yeah.

7 MR. FISHER: -- four states. And then
8 I don't think that's enough to show any kind of
9 meaningful history. And, again, that's just on
10 the Almendarez-Torres question, Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Yeah.

13 MR. FISHER: As to the different
14 occasions type question that you have in front
15 of you in this case, there is a sum and total of
16 zero states up until 1929 that required any sort
17 of finding like this that was allowed to be made
18 by the -- by a judge instead of a jury.

19 So what amicus has done is cobbled
20 together four states that would just, you know,
21 cut against overruling Almendarez-Torres and
22 then a handful of other states with a few other
23 kinds of findings here and there that are not
24 offense-related conduct findings, which is what
25 you have here.

1 The, you know, amicus, I think the
2 only other category of findings that amicus is
3 really able to put much together on is the date
4 of a prior conviction for -- for -- for --
5 for understanding that it's a prior conviction
6 or a second conviction or that sort of thing.
7 But, again, that has to do with the inherent
8 nature of the conviction. It's not anything to
9 do with the offense-related conduct.

10 And so that's what makes this an easy
11 case. Whether you do it under Descamps and
12 Mathis -- and I'll come to that in a minute
13 because you asked me whether those are just
14 statutory -- but the rule in those cases or just
15 first principles, history and tradition, you
16 land in the same spot.

17 So let me turn to Descamps and Mathis
18 then because you asked that as well. We think
19 the Court, to use the Court's own words in
20 Mathis, said what it meant in those cases, and
21 the Court was very clear that one of the three
22 reasons why the categorical approach was
23 construed the way and -- and applied the way it
24 was was because of the "serious Sixth Amendment
25 concerns that would arise," and the Court, I

1 think, even went a step further in Mathis and
2 expressed an unambiguous rule in Sixth Amendment
3 terms that any facts beyond the elements of the
4 prior offense that are related to the conduct of
5 that prior offense have to be made by the jury
6 and cannot be made by the judge. And that's
7 stated unequivocally in Sixth Amendment terms in
8 the Mathis opinion.

9 JUSTICE JACKSON: Can I ask --

10 JUSTICE BARRETT: Mr. Fisher, can you
11 maybe address what history and tradition are on
12 your side? Because Justice Kavanaugh's question
13 said, oh, it would be loading the dice if you
14 say that it's amicus's burden to show the
15 history and tradition. So can you talk about
16 the history and tradition of fact finding by the
17 jury in cases of recidivism that supports your
18 side?

19 MR. FISHER: Yeah. So that's laid out
20 quite thoroughly in our blue brief, that even
21 when it came to a prior conviction itself, the
22 overwhelming practice was for the jury to make
23 those findings, and that's laid out quite
24 thoroughly in our brief. I don't think there's
25 a dispute that that was the common law rule.

1 And any other fact that amicus identifies, the
2 answer is the same.

3 And, Justice Barrett, I think
4 something else that's important to understand is
5 that the occasions inquiry in this case, you
6 know, arose from some 1960s reform movements
7 about recidivism statutes, so there is no direct
8 analogue from history because this is a
9 innovation of the '60s and beyond. And so --
10 and so it's really amicus that would depart from
11 history by letting this fact be found by the --
12 the judge instead of the jury.

13 JUSTICE BARRETT: One other question.
14 Do you agree with the government amicus that the
15 harmless error analysis would apply?

16 MR. FISHER: Yes. I think Neder --

17 JUSTICE BARRETT: I thought that.

18 MR. FISHER: -- dictates that harmless
19 error would apply in these cases, and so I think
20 there's -- this case would be one of some
21 pipeline cases that would be decided by lower
22 courts on a harmless error.

23 Obviously, once you establish this
24 rule, I don't think that's going to be much of
25 an issue even going forward.

1 JUSTICE JACKSON: Can I ask --

2 JUSTICE GORSUCH: No, please go ahead.

3 JUSTICE JACKSON: Yes. I just wanted
4 to know, if there is a history and tradition of
5 fact finding by the jury with respect to
6 recidivism, which I understood your answer to
7 Justice Barrett to be that that's the case, how
8 -- what is the basis then for the
9 Almendarez-Torres carveout? Like, why do we
10 have that?

11 MR. FISHER: I think for two reasons
12 as I understand the Court's jurisprudence. One
13 is, in Almendarez-Torres, the Court did talk
14 about a tradition of judicial fact finding when
15 it came to prior convictions. The problem, I
16 think, is that it's a more recent tradition.
17 It's not the kind of tradition the Court
18 typically looks to nowadays, but there was a
19 recent tradition of judicial fact finding.

20 And, secondly, the Court explained in
21 Apprendi that at least when it comes to the fact
22 of a prior conviction, which is to say the
23 elements and nothing more, you have prior
24 procedural protections in the form of a jury
25 right in that prior adjudication that are --

1 that -- that are different from any other fact
2 like the one here.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 JUSTICE ALITO: I have a few questions
8 about how trials would be conducted if you
9 prevail here. So what -- how would the
10 government be able to go about proving that an
11 offense -- that -- that a series of offenses
12 occurred on the same conviction? I -- I assume
13 they can introduce the judgment of conviction in
14 all of those offenses, right?

15 MR. FISHER: Yes.

16 JUSTICE ALITO: Can they introduce the
17 charging documents, which would typically say,
18 on or about March 27, 2024, so-and-so broke into
19 a house and burglarized it?

20 MR. FISHER: I think the charging
21 documents are harder, Justice Alito, because
22 they might be hearsay or the like. I mean, they
23 might -- so, for the truth of the matter
24 asserted in those charging documents, I think
25 the government might have a problem, but --

1 JUSTICE ALITO: Well, what if they're

2 --

3 MR. FISHER: -- most of these cases --
4 sorry.

5 JUSTICE ALITO: What if they're not
6 introduced for the truth of the matter asserted,
7 they are introduced for the truth of the fact
8 that this is what the person was charged with?

9 MR. FISHER: I -- I think perhaps.
10 That's something I've tried to research and just
11 haven't found much law on. Something else I
12 would add, though, is plea colloquies is going
13 to be -- is going to be --

14 JUSTICE ALITO: Plea colloquy --

15 MR. FISHER: -- obviously, most of
16 these cases are pleas --

17 JUSTICE ALITO: Plea colloquies would
18 --

19 MR. FISHER: -- and the defendant's
20 own admissions in plea colloquies.

21 JUSTICE ALITO: -- they would be
22 admissible?

23 MR. FISHER: Yes.

24 JUSTICE ALITO: And jury instructions
25 would be admissible, so if the jury is

1 instructed on Count I you must find that on or
2 about March 27, blah, blah, blah --

3 MR. FISHER: I think jury --

4 JUSTICE ALITO: -- that would be
5 admissible?

6 MR. FISHER: I think the jury
7 instructions might be admissible.

8 JUSTICE ALITO: It's a court document?

9 MR. FISHER: I -- I -- I think -- I
10 think -- and, basically, what I would tell the
11 Court is, you know, the Federal Rules of
12 Evidence have many provisions about official
13 records and court records and prior testimony
14 and the like, and so, you know, those rules and
15 precedent are readily -- readily available to
16 administer this rule.

17 JUSTICE ALITO: Okay. What about the
18 question of how the jury would be instructed on
19 the question of whether prior offenses occurred
20 on the same occasion? That was a -- a vexing
21 issue in *Wooden* and I think the Court's opinion
22 was well-crafted and nuanced, but it -- I would
23 be hard-pressed to reduce it to an instruction
24 that would be easily intelligible to a jury.
25 It's a multi-factor question.

1 MR. FISHER: I think the jury
2 instruction --

3 JUSTICE ALITO: Have you given any --
4 could you give us a model jury instruction on
5 this or do you have some idea how -- how a jury
6 could grapple with this question?

7 MR. FISHER: I think those exist,
8 Justice Alito, and they just mostly track the
9 language in the Court's opinion. So the
10 question for the jury overall, of course, is
11 whether these prior offenses were committed on
12 different occasions, which, as the Court put it
13 in that case, turns on whether it was a single
14 criminal episode or not, and then there are the
15 factors, temporal proximity, geographic
16 proximity, and the nature and relationship to
17 the offense.

18 I think it's similar to other kinds of
19 qualitative elements that juries sometimes find.
20 Mens rea can sometimes be highly qualitative.
21 Materiality in a fraud case can be -- can be
22 multi-factored in certain ways. So --

23 JUSTICE ALITO: But those are not
24 multi--- that's not a multi-factor
25 determination. Mens rea, you're -- you're

1 asking the jury to determine what is in the
2 defendant's mind. People make judgments about
3 what is in the mind of other people all the
4 time. That's a -- that's a common experience.

5 MR. FISHER: I -- I think what you had
6 --

7 JUSTICE ALITO: Materiality -- I can't
8 think of something offhand -- maybe you can --
9 that's -- that's quite as multi-dimensional and
10 nuanced as this.

11 MR. FISHER: Well, I think maybe one
12 way to think about it, Justice Alito, is you
13 have -- you have a top-line finding that needs
14 to be made, which is different occasions or a
15 single criminal episode, and then you have
16 subsidiary facts that feed into that ultimate
17 finding.

18 And that's just -- you know, that's
19 like most of the things, I think, we were just
20 talking about, which is a top-line finding and
21 then subsidiary facts. And just so you have an
22 opinion in *Wooden* itself that makes -- you know,
23 kind of lays out those various facts, and so the
24 jury could be instructed to consider those
25 things.

1 JUSTICE ALITO: So the judge says the
2 temporal factor, I don't want to dwell too much
3 on this, but it -- it would -- it will turn out
4 to be important if you prevail. Temporal
5 proximity is important. And so then the jury
6 says: Well, what does that mean? They were --
7 they had to occur on different days, different
8 weeks? And what's the judge supposed to say?

9 MR. FISHER: I don't think --

10 JUSTICE ALITO: Well, that's up to
11 you?

12 MR. FISHER: I think that's right.
13 And I think the judge would say --

14 JUSTICE ALITO: It's up to you?

15 MR. FISHER: -- in that situation
16 something like, the ultimate question you're
17 asking is whether this is a single criminal
18 episode or not when you come -- when you
19 consider these three prior offenses.

20 JUSTICE ALITO: So then they say,
21 well, what is assumed -- what is a -- a criminal
22 episode? How do you define a criminal episode?
23 DIG that?

24 MR. FISHER: I think we're doing the
25 Wooden argument again.

1 JUSTICE ALITO: I know. That's the
2 problem.

3 (Laughter.)

4 MR. FISHER: Well, I think an -- I
5 think an episode involves sort of a -- a -- a --
6 a single coherent, you know, plan or experience
7 or event.

8 JUSTICE ALITO: Like a whole RICO
9 enterprise. That's a single criminal episode?

10 MR. FISHER: I don't think so. I
11 think there's, you know, temporal -- I think
12 there are limits temporally, but I don't think
13 -- as the Court itself went back and forth at
14 the oral argument in *Wooden*, I don't think it's
15 necessarily a single day or a single -- single
16 place. I think the qualitative nature of a
17 single episode allows for a little bit more than
18 that.

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 JUSTICE SOTOMAYOR: Mr. Fisher, do you
23 have -- the SG is suggesting, as you are, that
24 we remand for the lower court to do the harmless
25 error analysis. That's what we generally do.

1 MR. FISHER: Right.

2 JUSTICE SOTOMAYOR: But amici wants us
3 to address it. Do you have a viable argument
4 below?

5 MR. FISHER: Oh, yes, we do. We have
6 -- what's at issue in this case are three
7 convictions over eight days allegedly in the
8 same place, allegedly over eight days in the
9 same place, all for -- for --

10 JUSTICE SOTOMAYOR: Same city, not the
11 same place. It wasn't the same. One was a
12 pizzeria. Another --

13 MR. FISHER: Yes. Forgive me. That's
14 what I meant to say. Yes, that's what's
15 alleged. And so, just as I was describing to
16 Justice Alito, I think you could have a
17 situation where imagine somebody, you know, had
18 to pay a debt and so, to -- to -- to get money
19 to pay that gambling debt, they conducted a
20 string of burglaries over a few days of various
21 commercial establishments.

22 I think a jury could -- a rational
23 jury could find that's a single criminal
24 episode, especially against the backdrop of what
25 ACCA is trying to accomplish with the different

1 occasions clause.

2 Remember, what you're trying to
3 accomplish is identifying career offenders,
4 people who have a long practice of offending.
5 And so somebody who goes on a single bender or
6 executes a single plan is not the kind of person
7 that ACCA seems to be trying to identify.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: There's been some talk
11 in the briefs about the exact scope of the
12 Almendarez-Torres exception. Do those questions
13 get litigated, or are they entirely academic,
14 and does it matter, the exact scope for this
15 case?

16 MR. FISHER: It doesn't matter, the
17 exact scope for this case, because all the Court
18 has to do is apply the rule that's announced in
19 Descamps and Mathis, which is any
20 offense-related conduct that goes beyond the
21 elements is covered by Apprendi, not
22 Almendarez-Torres. That's enough to decide this
23 case.

24 So, Justice Kagan, there are a few
25 other facts. Candidly, there are not many cases

1 about them because there aren't very many
2 recidivist statutes that deal with something
3 like the date of the offense or other kinds of
4 facts that are about -- I'm not going to say
5 never, but there is very little case law on it.

6 And something like, you know, these
7 other kind of facts are -- are, again, rarely
8 going to be litigated because the defendant may
9 not have any legitimate argument when it comes
10 to, you know, these other kind of facts.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 JUSTICE GORSUCH: I just want to
14 explore a little bit about what happens on
15 remand, not that we need to address it but just
16 to pick your brain for a minute.

17 MR. FISHER: Yeah.

18 JUSTICE GORSUCH: Our line between
19 what is susceptible to harmless error review and
20 what is structural error, I confess, sometimes
21 defies me. On the one hand, it's structural
22 error if you don't have a reasonable doubt
23 instruction or if you've been denied your choice
24 of counsel. On the other hand, it's susceptible
25 to harmless error review if you didn't instruct

1 the jury with respect to an element of the crime
2 or if there's a variance.

3 MR. FISHER: Right.

4 JUSTICE GORSUCH: Here, we have the
5 plea bargaining context, so we don't even have a
6 trial record to analyze for harmless error
7 review. So I'm -- I'm a bit uncertain how one
8 would do harmless error review, other than look
9 at the very records that you want to be able to
10 challenge before a jury, right?

11 You -- you -- you may be taking
12 judicial notice that he did it on such and such
13 a date and he did this in -- in a certain place.

14 MR. FISHER: Right.

15 JUSTICE GORSUCH: How does that work?
16 How do you do harmless error review when you
17 don't have a trial record? And -- let me add
18 one more thing in there, a lot, I know -- here,
19 your client pleaded to an information that
20 listed as the ACCA predicate offense different
21 crimes, so he didn't even have notice that the
22 government was going to reach back to when he
23 was 18 or thereabouts for this string of
24 burglaries to enhance his sentence by 15 years.
25 And he's now in his mid 40s so that he'll never

1 -- he won't get out of prison until he's in his
2 -- maybe 60 or so.

3 And how do we analyze, oh, it was
4 harmless that he didn't even know what he was
5 pleading guilty to?

6 MR. FISHER: I think you're right
7 there are challenges even with conducting a
8 Neder-type harmless error analysis after a jury
9 verdict. Justice Scalia pointed out in dissent
10 in that case that becomes a very difficult
11 speculative enterprise. Of course, the majority
12 of the Court disagreed. And the Court has also
13 disagreed when it comes to indictments.

14 So I don't want to butt myself up too
15 hard against the Court's precedent, but I do
16 think you make a good point that when it comes
17 to cases where you have plea bargains, the
18 question whether a jury might have found
19 something or not requires, you know, a very
20 unusual showing on the government's part that
21 it's absolutely so clear based on the kind of
22 documents that we all agree a court can look at
23 under the Almendarez-Torres exception itself.

24 So you're going to have some cases
25 where the dates of conviction are so far apart

1 or other things like that that I think, you
2 know, are going to be harmless, but I -- I think
3 that just bolsters my answer to Justice
4 Sotomayor as to why we have a serious harmless
5 error -- or not harmless error argument on
6 remand.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: On both Justice
10 Alito's questions about instructions and Justice
11 Gorsuch's question there, Wooden said courts
12 have nearly always treated offenses as occurring
13 on separate occasions if a person committed them
14 a day or more apart or a significant distance.
15 That's still good law, correct?

16 MR. FISHER: Of course. Yeah.

17 JUSTICE KAVANAUGH: And --

18 MR. FISHER: "Nearly always," I think,
19 is the -- is the phrase there.

20 JUSTICE KAVANAUGH: Okay. Then,
21 second question, Descamps and Mathis, obviously,
22 didn't affect the states' criminal justice
23 systems. Our holding here will cause states to
24 have to revamp their recidivism practices, so
25 that strikes me as something we didn't even

1 contemplate in Mathis and Descamps.

2 You're saying, I think, they're fueled
3 by constitutional concerns. But they didn't
4 actually -- amicus makes this point -- address
5 the constitutional question, correct?

6 MR. FISHER: Well, I think they did
7 address the constitutional question. I grant
8 you they also, you know, grounded the case in
9 statutory analysis. But, as to the effect on
10 the states, there are a handful of states only
11 that have anything like a different occasions
12 kind of finding. Obviously, if you overruled
13 Almendarez-Torres, that would have a bigger
14 effect on the states.

15 But you have only a hand -- a small
16 handful of states that have a finding anything
17 like this, Justice Kavanaugh, and that's, I -- I
18 would just submit, quite small potatoes compared
19 to what the Court has done in other Apprendi
20 cases, you know, and required the states to do
21 in reaction. And I think it's probably telling
22 that you don't even have a state's amicus brief
23 in this case, and it's because it would be so
24 easy for states to just engraft the jury
25 procedure onto the existing structures you

1 already have.

2 JUSTICE KAVANAUGH: And last question.
3 What about the concern raised by Judge Bibas in
4 his article that amicus cites that because of
5 the prevalence of plea bargaining that goes on,
6 that having this as an element of the offense
7 will actually be problematic for criminal
8 defendants?

9 I know you have the amicus briefs on
10 the other side, but I just want you, since it's
11 --

12 MR. FISHER: Yeah.

13 JUSTICE KAVANAUGH: -- raised by
14 amicus here, to respond to that.

15 MR. FISHER: Right. I think the NAFD
16 brief actually deals with the plea bargaining
17 dynamics that follow from a holding in our favor
18 here, and they're actually good, because the
19 problem with felon-in-possession cases where
20 ACCA is a -- is a -- is a -- is a kicker on the
21 back end is that there's nothing to plead to
22 because the -- before Wooden and hopefully this
23 case, you know, the -- the probation officer
24 could just tell the judge you have to increase
25 the sentence, the defendant had no fair notice

1 and -- and -- and no way to defend, no -- no --
2 nothing to bargain with, is -- is what I mean to
3 say.

4 And so, if you look at actually
5 statistics, 14 percent of felon-in-possession
6 cases go to trial. That's a very high number
7 for the federal system. Here, if you were to
8 say that the different occasions clause is an
9 element, that then puts prosecutorial discretion
10 in the government's hands and gives the
11 defendant something to bargain with the
12 government with. So you can have in the future
13 defendants who plead guilty to the underlying
14 922(g) charge who would not have done so in the
15 past in exchange for taking the ACCA enhancement
16 off the table.

17 And one last thing about that.
18 Remember, at the time this case was litigated,
19 the maximum punishment for 922(g) was 10 years.
20 Now it's 15 years. So those -- that actual
21 change in law and the dynamics that would follow
22 from a decision in our favor actually, you know,
23 bolster the plea bargaining process.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: No.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: So is there any
6 distinction between your position and the SG's
7 position, and, if so, can you just zero in on
8 it?

9 MR. FISHER: There's no difference in
10 this case.

11 JUSTICE JACKSON: Okay.

12 MR. FISHER: There's no difference as
13 to what the rule that you should apply in this
14 case is, which is any offense-related conduct
15 beyond the elements of the crime are subject to
16 Apprendi and not Almendarez-Torres.

17 The only differences that I can
18 discern in the briefing between our position and
19 the SG are a few borderline in-between question
20 -- questions about how you apply that test to
21 particular facts.

22 So there's offense -- the date of the
23 offense, I think, is something the Solicitor
24 General suggests might be within the prior
25 conviction exception. We don't think it is

1 because the date of the offense is not an
2 element of the crime. It's not something a
3 prior jury would have had to find.

4 JUSTICE JACKSON: Does that suggest
5 that the -- the sort of future work of this
6 Court and other courts is going to be to have to
7 identify which facts go to the judge and go to
8 the jury? I mean, are -- are we at that level?
9 It seems at least the other side has a sort of
10 simpler conception of this, which is recidivism,
11 put it in the bucket of Almendarez-Torres.

12 MR. FISHER: Well, it might be simpler
13 to say any fact about a prior conviction, using
14 a gun, vulnerable victim, whatever you could
15 imagine, would be called within recidivism. I
16 just think that's so at odds with the Court's
17 Apprendi jurisprudence that that option is just
18 not on the table as a matter of stare decisis.

19 JUSTICE JACKSON: Well, let me ask you
20 another question about that option --

21 MR. FISHER: Yeah.

22 JUSTICE JACKSON: -- which is it seems
23 very complex. This is going back to Justice
24 Alito's line of questions. I totally understand
25 your point, I understand the precedents, but we

1 do have this Almendarez-Torres carveout, and
2 part of this case is -- is understanding its
3 scope and whether or not this kind of thing
4 should fit -- does fit in it as a matter of
5 precedent or should fit in it given all of the
6 various ways in which this could go.

7 And one concern I have is that I
8 think, when we're talking about two different
9 sets of facts with respect to the jury, there
10 is, like, added complexity. What I mean by that
11 is we have the facts that relate to the charged
12 crime, today's charged crime in this case, it's
13 the 924(g), but we also have facts that relate
14 to past crimes that this defendant was convict
15 -- convicted of committing, and I guess I'm just
16 trying to understand how today's jury
17 adjudicates past crime facts.

18 So are they limited to the record that
19 was presented to the original jury on those
20 facts? Can new evidence come in related to
21 crimes that happened 20 years ago as we try to
22 figure out whether they happened on a single
23 occasion, or how does this work?

24 MR. FISHER: So, remember, if you
25 bifurcate, the jury's not doing the two things

1 at the same time. They're doing the -- they're
2 doing the 922(g).

3 JUSTICE JACKSON: Yes.

4 MR. FISHER: And then -- and then
5 they're having a separate proceeding.

6 JUSTICE JACKSON: Right.

7 MR. FISHER: In that separate
8 proceeding, I do think other evidence could come
9 in beyond the -- beyond the record that was
10 established in the initial conviction because
11 the way I think Congress drafted this, was
12 committed on separate occasions, is an
13 open-ended fact finding.

14 JUSTICE JACKSON: So we're -- how do
15 we keep this from being just like many retrials
16 of the whole -- are you saying we have to have
17 the evidence with respect --

18 MR. FISHER: Well, remember, Justice
19 Jackson --

20 JUSTICE JACKSON: Yeah.

21 MR. FISHER: -- you're having that
22 inquiry regardless. It's just whether or not
23 the judge or the jury is going to make the
24 finding.

25 JUSTICE JACKSON: Hmm.

1 MR. FISHER: Now, if the jury's making
2 the finding, the Rule of Evidence applies in
3 ways it doesn't to the judge. But all the
4 litigation is going to happen regardless. It's
5 just who's making the fact finding.

6 And I think you -- I want to come back
7 to your other question quickly.

8 JUSTICE JACKSON: Yes.

9 MR. FISHER: You asked about are we
10 going to have these borderline Almendarez-Torres
11 cases coming back to you. I don't think that's
12 necessarily the case. I won't say it's
13 impossible, but this is my answer to Justice
14 Kagan. There are very few states that have or
15 -- or in the federal code that have facts beyond
16 the prior conviction itself that trigger
17 enhancements that are -- that are currently in
18 the law found by judges. So I think it's very
19 uncommon.

20 And, of course, there will be further
21 guidance presumably in this opinion for -- for
22 -- for federal and state judges, so I think it's
23 very unlikely you're going to see additional
24 cases just because those laws are so uncommon.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Feigin.

4 ORAL ARGUMENT OF ERIC J. FEIGIN ON
5 BEHALF OF THE RESPONDENT,
6 SUPPORTING THE PETITIONER

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

9 As I think the colloquy so far this
10 morning has demonstrated, as we see it, this
11 case boils down to an unavoidable syllogism,
12 which is that under *Wooden*, the different
13 occasions finding under the ACCA requires a
14 multi-factored inquiry involving the timing, the
15 proximity of location, and the character and
16 relationship of prior offenses, whereas the
17 Sixth Amendment prohibits, to use the words in
18 *Mathis*, exploring the manner in which a prior
19 conviction's offense occurred.

20 And we therefore think that because a
21 district judge is disempowered from doing it,
22 the only option left is that the jury has to do
23 it, and so we have acknowledged that a -- a jury
24 would need to do that.

25 I'm happy to take the Court's

1 questions, but I don't think the Court needs to
2 or, frankly, should say much more than that to
3 resolve this case.

4 JUSTICE THOMAS: Well, wouldn't it be
5 cleaner, though, to just simply overrule
6 *Almendarez-Torres*?

7 MR. FEIGIN: I had a suspicion you
8 might ask me that question, Justice Thomas.

9 (Laughter.)

10 MR. FEIGIN: And as you might
11 anticipate, your suspicion might have been my
12 answer is no, and the reason why is that we
13 don't -- we think *Almendarez-Torres* is correct,
14 but it's also a precedent this Court has adhered
15 to for 25 years post-*Apprendi*, always
16 acknowledging this.

17 Nobody's asked the Court to overrule
18 it in this case. There's no need for the Court
19 to overrule it in this case. And we therefore
20 just leave it the way it is.

21 To address some of the questioning
22 from Justice Jackson and I think maybe Justice
23 Kagan, we don't think very many
24 *Almendarez-Torres* questions are really going to
25 come up in practice. We do think that it means

1 a bit more than I think my friend thinks it
2 means, but our principal interest here is
3 actually in the type of cases that are currently
4 before the Court in the Brown and Jackson cases,
5 which involve the comparison of state predicates
6 to federal predicates and some timing questions
7 that come up with those.

8 And that situation's already covered
9 by McNeill. It's clear that a court can find
10 what version of the statute was applied to the
11 defendant at the time of the prior conviction,
12 so --

13 JUSTICE KAVANAUGH: Do you want to say
14 why you think Almendarez-Torres is correct?

15 MR. FEIGIN: Well, Your Honor, I -- I
16 don't really want to turn this into relitigation
17 of Almendarez-Torres, which, again, even
18 Petitioner has not asked for, but we think the
19 Court was correct. There are more states that I
20 think support that than my friend was -- would
21 acknowledge.

22 There are -- there's some clear
23 precedent from Alabama, Louisiana, South
24 Carolina, and Kansas. There are the superseding
25 indictment statutes out of Virginia, West

1 Virginia, Maine, and Massachusetts.

2 And although some of those statutes
3 allow for jury trials on the back end, that was
4 all historical evidence that was in front of the
5 Court in *Almendarez-Torres*, and the Court found
6 that -- and this goes to some of your earlier
7 questioning, Justice Kavanaugh -- that there was
8 at least enough non-uniformity on the issue to
9 allow legislatures some wiggle room on this
10 topic, which, again, *Almendarez* --

11 JUSTICE KAVANAUGH: Who do you think
12 has the burden on the historical practice?

13 MR. FEIGIN: Well, Your Honor, it's a
14 little bit of do you want to see two faces or a
15 vase. I think, as we view it --

16 JUSTICE KAVANAUGH: I'm going to need
17 more than that.

18 (Laughter.)

19 MR. FEIGIN: Yeah. I -- I -- I
20 thought you might. I think, as we view it, the
21 Court made a move in *Apprendi* that I think your
22 colloquy with Mr. Fisher illustrated, the Court
23 made a move in *Apprendi* to extend the Sixth
24 Amendment's treatment of things as an element to
25 various features of criminal statutes that the

1 legislature intended as sentencing factors.

2 And I think we would take the view
3 that that -- viewing that as somewhat of an
4 extension of what the Sixth Amendment literally
5 demands, that there wouldn't be any burden on us
6 to show unanimous or near unanimous practice.
7 So long as, as we think the history indicates,
8 this was left to the legislature to describe, we
9 think the legislature would retain that room
10 today.

11 But, again, the Court doesn't need to
12 get into any of this today. It is clear from
13 the historical practice that there's really
14 nothing like this. At most, the amicus marshals
15 some decisions that show beyond simply
16 reaffirming the correctness of
17 *Almendarez-Torres*, that show that district
18 courts or trial courts could conduct some sort
19 of sequencing determination, which we think a
20 court can do because it can find the time of the
21 prior offense, but, at the very least, can find
22 the time of the prior conviction.

23 And even those cases are relatively
24 modern. There is -- only South Carolina so far
25 as we can tell under a 1955 statute and a 1972

1 decision has allowed for litigation in front of
2 a judge of the type of thing that the different
3 occasions inquiry of ACCA might encompass.

4 And we're talking about, you know,
5 precise timing questions. So a court, we think,
6 on its own could determine that on or -- the
7 jury necessarily found that an event occurred on
8 or about April 7th, for example. But the kind
9 of timing questions that are involved under the
10 ACCA's different occasions inquiry are going to
11 be more fine-grained than that.

12 You could have acts occurring across a
13 single day that are separate occasions. Sells
14 drugs in the morning. In the afternoon, robs a
15 store. In the evening, comes home and beats his
16 spouse. Like, those would be three separate
17 occasions. There's clearly a chance to have a
18 break in between those.

19 JUSTICE BARRETT: What about this one
20 across --

21 MR. FEIGIN: This one, we think, is
22 crystal-clear. We -- we think it should clearly
23 be found harmless on remand. You have --

24 JUSTICE BARRETT: Not -- not we
25 shouldn't do it?

1 MR. FEIGIN: Oh, Your Honor, we're
2 fine with you simply affirming on harmlessness
3 grounds if that's what the Court chooses to do.
4 The Court's usual practice is to remand these
5 things. We -- we think we've got a
6 crystal-clear case on remand, and we will in
7 most of these cases. It'll be a vanishingly
8 small number where -- where we don't. But,
9 here, you have separate robberies that occurred
10 on April 4th, April 8th, and April 11th --

11 JUSTICE BARRETT: And would there be
12 some value -- I mean, I guess, a value if you
13 think -- I'm not saying I agree with you -- but,
14 if -- if we agreed with you that this was a
15 crystal-clear case, would there be some value to
16 lower courts in saying, like, this is the kind
17 of thing that, you know, under Wooden would
18 still be different occasions?

19 MR. FEIGIN: Sure. I mean, we think
20 that's already clear to some degree from Wooden,
21 which I take to generally say that if you've got
22 offenses spaced as far apart as these are, that
23 it's almost invariably going to be the case that
24 they are on separate occasions.

25 But, if the Court wishes to explain

1 that, that -- that would be great for us. In
2 particular -- or great by us. For us as well.

3 (Laughter.)

4 MR. FEIGIN: In particular, to -- just
5 to address the harmless error argument that Mr.
6 Fisher posited a few minutes ago, we don't think
7 simply "I was in debt" is enough to make things
8 the same occasion. The -- the kinds of
9 circumstances where possibly a jury could -- you
10 know, we -- we think, you know, it would be fair
11 to find -- obviously, this always goes to the
12 jury, but we think would really be realistically
13 found to be the same occasion if they occur
14 across the course of several days might be what
15 the Court posited in *Wooden* itself, like they're
16 part of a common criminal scheme.

17 So, for example, you burglarize a
18 store to steal what you need to commit a
19 kidnapping. You commit an assault during the
20 course of the kidnapping, and later you murder
21 the victim. It's possible that, you know, a
22 jury could find that those were all the same
23 occasions --

24 JUSTICE GORSUCH: Mr. --

25 MR. FEIGIN: -- even if it occurred

1 over the course of a few days.

2 JUSTICE GORSUCH: So, Mr. Feigin, on
3 that, first of all, I commend the government for
4 acknowledging the error below in this case.
5 That's an admirable step of candor.

6 But, on -- on -- on this harmless
7 error question, let me ask you first, how is a
8 court supposed to conduct that when there hasn't
9 been a trial and in a world in which almost
10 everybody pleads guilty these days? A really
11 novel development during the course of our
12 lifetimes.

13 So, here, the defendant was told that
14 the three predicate ACCA crimes were different
15 than these three crimes that you're now asking
16 us to -- for a court to say are clearly separate
17 occasions and -- and, therefore, harmless error.

18 How is it harmless when he didn't know
19 what the charges would be against him when he
20 pled guilty?

21 MR. FEIGIN: Well, Your Honor, I think
22 he --

23 JUSTICE GORSUCH: Wouldn't that have
24 informed his bargain? Perhaps he would have
25 chosen not to plead guilty if you were going to

1 drag back up convictions from when he was 18
2 that have nothing to do with his possession of a
3 firearm today as a 40-something-year-old man.

4 MR. FEIGIN: Well, Your Honor, first
5 of all, I don't think he was under any
6 assurances that he would not receive an ACCA
7 sentence. In fact, he was --

8 JUSTICE GORSUCH: No, but in the
9 information, the government specifically listed
10 three other predicate offenses, not these.

11 MR. FEIGIN: Well, Your Honor, to the
12 extent you're suggesting that the availability
13 of an ACCA sentence might have informed his
14 decision to plead, he was perfectly on notice
15 that he could receive an ACCA sentence.

16 It turns out that it's for three -- or
17 I think only two of the crimes are different
18 than the original ones because of intervening
19 decisional law that made some of the original
20 charged predicates no longer valid.

21 To be clear, we don't think that in
22 the indictment we actually need to charge what
23 the specific predicates are.

24 JUSTICE GORSUCH: No, but you did in
25 this information.

1 MR. FEIGIN: We -- we did in this
2 information, but I don't think that --

3 JUSTICE GORSUCH: And wouldn't the --

4 MR. FEIGIN: -- given that he had --
5 he has a fairly long rap sheet --

6 JUSTICE GORSUCH: No, I understand
7 that.

8 MR. FEIGIN: -- I don't --

9 JUSTICE GORSUCH: But do you think a
10 defendant might make a reasonably different
11 choice if he knows what -- what the -- I may be
12 able to have a good occasions clause argument
13 with respect to these crimes but not those
14 crimes. And -- and the ones you chose are
15 different than the ones you're now seeking to
16 pursue.

17 MR. FEIGIN: Well, to be clear, Your
18 Honor, we charged them, as I read the
19 information, as -- I mean, it put him on notice
20 of the ACCA because it cited --

21 JUSTICE GORSUCH: You did.

22 MR. FEIGIN: It put him on notice of
23 the ACCA, but it was also in support of the
24 basic underlying 922(g) offense. In addition, I
25 think he is fairly charged with knowing --

1 JUSTICE GORSUCH: Okay.

2 MR. FEIGIN: -- his own prior
3 conviction history.

4 JUSTICE GORSUCH: And then, on that,
5 in response to Justice Barrett, you -- you --
6 you admitted, I think, that there are some
7 situations in which a jury could reasonably find
8 that a -- a series of crimes happened on the
9 same occasion even though they happened over the
10 span of some days.

11 At least in a jury trial, you've got
12 all the facts before you. Here, we have just
13 the pleading documents from those prior cases.
14 How is a judge -- how are we supposed to have a
15 hundred percent confidence that it's harmless
16 that these were, in fact, on separate occasions
17 when there's been no trial and all we have
18 before us are these pleading documents?

19 MR. FEIGIN: Well, first of all, Your
20 Honor, I -- I don't think we look at it quite as
21 that there has been no trial. It's that the --

22 JUSTICE GORSUCH: Well, there's been
23 no trial.

24 MR. FEIGIN: -- the entire record here
25 would encompass the sentencing proceedings.

1 This is the same error the Court considered in
2 Neder, where an element was erroneously
3 presented to a judge but not a jury.

4 And, here, you have the record. We
5 have the documents.

6 JUSTICE GORSUCH: But we don't know
7 what the defendant would say. He might say it
8 was all part -- I -- I did this crime to commit
9 that crime, to commit the third crime, just as
10 you posited in response to Justice Barrett. We
11 don't know what he would say in -- with respect
12 to whether these three crimes that you wound up
13 using are part of a single occasion or different
14 ones.

15 MR. FEIGIN: Well, Your Honor, now
16 that we've expanded the different occasions
17 inquiry into a fundamentally factual one --
18 that's the holding of -- of Wooden -- I think
19 looking at what the defendant precisely did, it
20 doesn't remotely support an argument of that
21 sort.

22 And also, the idea that I -- I -- I --
23 I would resist the idea that it's part of a
24 common scheme or plan simply just to undertake a
25 string of robberies within a week. Like,

1 clearly, he had the means to do the first one,
2 to do the second one, and to do the third one.
3 He had several days in between to cool off. He
4 did not -- and on the last day, he robbed two
5 stores, Druthers and Schnitzelbank. The -- if
6 you want to look at the sentencing memorandum,
7 the government's sentencing memorandum, at page
8 6, those are fairly far apart from one another.

9 I don't really think he has any viable
10 argument, and I don't take debt, simply a debt,
11 to be an argument. Otherwise, a gambling addict
12 could constantly be on the same occasion.

13 JUSTICE GORSUCH: It seems to me
14 probably right, but we have to decide whether
15 it's harmless beyond a reasonable doubt, and we
16 don't have anything from the defendant here with
17 respect to his views about why this might be a
18 single occasion, and I'm just wondering how
19 we're supposed to do that, but --

20 MR. FEIGIN: Well, Your -- Your Honor,
21 I think we do because this issue was litigated
22 before the judge, notwithstanding his objection.
23 And I really don't think he has anything there.
24 If he did --

25 JUSTICE GORSUCH: Okay.

1 MR. FEIGIN: -- I think you would have
2 heard it earlier this morning.

3 JUSTICE GORSUCH: Thank you, Mr.
4 Feigin.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Well, I wanted to ask
10 you some of the same questions I asked Mr.
11 Fisher about how these cases will be tried if
12 your view of the law prevails.

13 So I asked him about the admissibility
14 of the judgment of conviction, the charging
15 document, the jury instructions, plea colloquy.
16 You think all of that is admissible?

17 MR. FEIGIN: Yes, Your Honor. I mean,
18 there are -- for example, in addition to the
19 hearsay exceptions that might cover those, I
20 think, to the extent you're submitting documents
21 that were just shown to the jury that are being
22 used for the purpose of showing what the jury
23 was instructed as opposed to for the truth of
24 the matter asserted, there isn't a hearsay
25 problem with those.

1 JUSTICE ALITO: Now suppose the rule
2 is -- I mean, the -- what -- what was said in
3 Wooden was that judges have usually regarded
4 things that are separated by more than a day as
5 having occurred on separate occasions. I don't
6 know whether you can instruct a jury about what
7 judges previously did, but put that aside.

8 Suppose there's a rule that says that,
9 in general, offenses that are separated by a day
10 or more are -- occur on different occasions.
11 And suppose the documents that I mention don't
12 nail down the exact day on which the offense
13 occurred. So you have, let's say, the charging
14 document for one says on or about March 27th.
15 The other one says on or about March the 30th.

16 Is that sufficient to prove beyond a
17 reasonable doubt that they occurred within a
18 day? If it's not, then what are you going to
19 do? You're going to have to call the witnesses
20 from those prior trials, if they can be found,
21 and nail down the exact day on which this
22 occurred?

23 MR. FEIGIN: Well, to answer your
24 first question, Your Honor, I do think the jury
25 could -- that would be enough to support a

1 jury's inference beyond a reasonable doubt that
2 they are on different occasions, particularly if
3 there are other aspects of the crimes that are
4 different.

5 But, number two, if we can't otherwise
6 establish that -- and, again, this is an inquiry
7 that judges used to undertake from the Shepard
8 documents as to which they didn't really differ
9 and were reaching by and large common-sense
10 conclusions. So it will be even easier for a
11 jury to do that if --

12 JUSTICE ALITO: Well, were they doing
13 it beyond a reasonable doubt, based on the
14 beyond-a-reasonable-doubt standard?

15 MR. FEIGIN: Yes, Your Honor. I -- I
16 think this is the kind of thing where the jury
17 could infer that, for example, a robbery on or
18 about March 28th and an assault on or about
19 March 30th would be different occasions,
20 particularly if there is really no contrary
21 argument that connects them.

22 And, you know, if necessary -- and one
23 -- one reason we don't really think that
24 Almendarez-Torres should be overruled as a
25 practical matter is we don't really want to have

1 to get the victims back into court to testify
2 about what happened or the exact day on which it
3 happened.

4 But I -- I -- I don't take this to be
5 a particularly complicated inquiry. It's a
6 common-sense one. Wooden expressly explained it
7 as such. And we've had, due to the uniformity
8 of the circuits against the position we're
9 conceding now, very few actual jury trials, but
10 we've had four of them, and it hasn't proven to
11 really be a problem for us.

12 JUSTICE ALITO: Now what about the
13 question about differences in the nature of the
14 offenses? So, if the offenses are sufficiently
15 different, that may support the conclusion that
16 they were not part of -- they were not committed
17 on the same occasion, they're not part of the
18 same scheme. What's the judge supposed to tell
19 the jury about that?

20 Suppose you have a case where the
21 defendant committed a robbery in the morning on
22 one day by grabbing a woman's purse and running
23 away with it. Then, in the evening, a defendant
24 committed another mugging using a knife and then
25 the following morning went into some retail

1 establishment and just grabbed \$500 worth of
2 merchandise and ran away.

3 Are they sufficiently different?

4 MR. FEIGIN: Yes, I -- I think they
5 are.

6 JUSTICE ALITO: And on what theory?
7 What would you tell the -- what would the judge
8 tell the jury?

9 MR. FEIGIN: Well, Your Honor, I -- I
10 take separate occasions essentially where --
11 to -- to take this a couple -- in a couple of
12 pieces.

13 It's clear, and the Court was
14 explaining this in *Wooden*, that what Congress
15 was trying to do was to address the situation in
16 the *Petty* case out of the Eighth Circuit where
17 the government and the solicitor general had
18 confessed error where essentially he got all of
19 the occasions out of one act.

20 Where you have the three kinds of acts
21 even over a -- a short span of time such as
22 you've described, Justice Alito, I think that's
23 presumptively going to be separate occasions,
24 not that you'd instruct the jury with such a
25 presumption, but that it would be presumption in

1 the sense that the jury would -- I would expect
2 the jury to find those to be separate occasions,
3 unless the defendant produced some substantial
4 evidence to convince the jury otherwise.

5 JUSTICE ALITO: All right. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 Justice Kagan?

9 JUSTICE KAGAN: Did I hear you say to
10 Justice Alito that you've had four of these
11 types of trials?

12 MR. FEIGIN: You did.

13 JUSTICE KAGAN: What -- what did those
14 look like? What were they about? How did they
15 go?

16 MR. FEIGIN: They were --

17 JUSTICE KAGAN: Did you -- did you
18 bifurcate?

19 MR. FEIGIN: -- they were bifurcated
20 trials, Your Honor, and --

21 JUSTICE KAGAN: Well, do you always
22 expect to bifurcate?

23 MR. FEIGIN: I think in the -- unless
24 there's some reason that we, frankly, haven't
25 been able to anticipate as to why you wouldn't

1 bifurcate, we generally agree to bifurcation,
2 although I think, as Mr. Fisher said, in a lot
3 of cases, the defendant's going to choose to
4 plead to this or else just will enter into a
5 stipulation and can handle it that way.

6 JUSTICE KAGAN: And what do those --
7 those trials look like?

8 MR. FEIGIN: I mean, I think they look
9 like normal bifurcated proceedings, where you
10 would prove -- we prove the 922(g) offense and
11 then there was, after that, separate jury
12 consideration of the enhancement, where we
13 introduce evidence about the prior crimes, had
14 argument about the prior crimes, and the jury --
15 the -- those questions were submitted to the
16 jury.

17 JUSTICE KAGAN: I -- I guess what I'm
18 asking is there's been some talk about how
19 difficult this is going to be for everybody.
20 Was it?

21 MR. FEIGIN: Well, let me say two
22 things about that, Your Honor. I mean, one is
23 this obviously was not our first-choice
24 position. We have been arguing to the contrary
25 for a long time. Our position in Wooden was

1 largely informed by the fact that if it was a
2 judge inquiry, that it needed to be a much
3 simpler inquiry. And this is not -- this is
4 imposing some burden on us.

5 But number two is that it -- it's
6 manageable, and we believe it will be
7 manageable. Obviously, because of the
8 uniformity of the circuits, it's a little bit
9 hard to predict that. But this is -- ACCA cases
10 are less than 1 percent of the federal criminal
11 docket, and in those cases, with the
12 availability of pleas, stipulations, and
13 bifurcations, we are reasonably confident that
14 we can manage this.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: I have a few
19 questions. Sorry.

20 On the facts here, this defendant had
21 nine prior felonies over a 13-year period. Is
22 that accurate?

23 MR. FEIGIN: Your Honor, I couldn't --
24 standing here, I -- I don't remember the precise
25 number, but he -- he has more than the three

1 that --

2 JUSTICE KAVANAUGH: Right.

3 MR. FEIGIN: -- comprise the -- that,
4 sorry, made up the ACCA determination.

5 JUSTICE KAVANAUGH: Right. You're on
6 notice after even one not to possess firearms,
7 and he had 16 long guns and four other guns in
8 his garage, correct?

9 MR. FEIGIN: That's right, Your Honor.

10 JUSTICE KAVANAUGH: Okay. On the
11 confession of error, I guess I thought of it a
12 little differently than Justice Gorsuch did,
13 because not one way or the other, but all the
14 courts of appeals have rejected the confession
15 of error, right, and ruled still for the
16 government's original position?

17 MR. FEIGIN: That's true, Your Honor,
18 but we don't think that those holdings are
19 viable. I mean, some -- in some cases, they've
20 just been waiting for this Court to itself
21 announce that the syllogism I mentioned at the
22 beginning is correct, because the Court
23 expressly reserved the question in *Wooden*.

24 In some cases, we think they're just
25 reading the *Almendarez-Torres* exception too far,

1 and in other cases, they're talking about
2 prejudice to the defendant, which, first of all,
3 we don't -- we think is itself a manageable
4 problem, but also, as Mr. Fisher said, if -- if
5 you don't believe me, you -- you can believe the
6 defense bar, which is coming in on the
7 Petitioner's side here.

8 JUSTICE KAVANAUGH: All right. Thank
9 you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: Mr. Feigin, just a
13 quick clarifying question. When you were going
14 back and forth with Justice Alito about how this
15 would actually be done as a practical matter, he
16 was asking you about burden of proof, and I
17 don't think you ever went back to it.

18 I mean, in the old system, when judges
19 were doing this, it was by a preponderance, I
20 assume?

21 MR. FEIGIN: Correct.

22 JUSTICE BARRETT: The sentencing? So
23 do you anticipate, which I took to be the thrust
24 of some of Justice Alito's questions, that when
25 juries are doing this beyond a reasonable doubt,

1 do you think that the problems of proof would
2 make it much more difficult to prove the
3 predicates?

4 MR. FEIGIN: I think that it will do
5 two things. It may well do two things. And,
6 again, for reasons I've stated, this is kind of
7 predictive.

8 I -- I do think it may incentivize
9 defendants to submit this to a jury whereas they
10 might not have before, and I don't know that
11 that's necessarily a particularly beneficial
12 thing as a practical matter because I think very
13 rarely would it actually be the case that these
14 were not -- that a defendant's three prior
15 offenses were not committed on separate
16 occasions.

17 And, second, going before the jury, we
18 might need to introduce different types of proof
19 or it may be harder to acquire everything that
20 we might need. We'd prefer, as I said, not to
21 have to bring the victim back in to say --

22 JUSTICE BARRETT: Sure.

23 MR. FEIGIN: -- yes, I -- I can
24 remember, the -- the date is stamped in my
25 brain, you know, October 26th, that's a day I'll

1 never forget because that's the day that that
2 man robbed me, particularly if it's 10 years in
3 the past and memories may have faded.

4 In fact, this kind of inquiry or --
5 and much more overruling Almendarez-Torres would
6 be a windfall for defendants who have a long rap
7 sheet, as Mr. Erlinger does here, but who
8 several of their crimes have been knocked out by
9 various of this Court's or the court of appeals'
10 decisions, and so we have to rely on some of the
11 older crimes as to which it may be harder to
12 produce this evidence or even to find every
13 single state record that we might need, where
14 there would otherwise be no dispute about it
15 because the defendant knows quite well that he
16 actually committed those offenses and what they
17 were about.

18 JUSTICE BARRETT: One other question.
19 So Justice Kagan asked you about the four trials
20 the government has already conducted that were
21 bifurcated. The same jury or did you -- was it
22 a different jury?

23 MR. FEIGIN: I believe it was the same
24 jury, Your Honor. I -- I -- I -- I'm not -- I'm
25 not certain, but I don't see any reason why

1 you'd need to swear in an entirely new jury and
2 say, hello, here's the defendant, you know,
3 here's what we've already determined.

4 JUSTICE BARRETT: Sure. Thanks.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So I just want to
8 clarify one thing because I've seen cases in
9 which the indictment has many counts talking
10 about different acts of the defendant and uses
11 the kind of language that Judge Alito points to,
12 "on or about" X date. In some of them, those
13 counts even have overlapping dates and, you
14 know, time frames. And so I guess I would
15 expect that it would be those kinds of cases in
16 which the defendant would have a colorable
17 argument that these things happened on the same
18 occasion, and those would be the ones that would
19 be more likely to go to trial, right?

20 I mean, it's -- I guess I'm -- I'm
21 suggesting that the trial scenario seems to me
22 to be precisely the one where you would have to
23 bring in all the evidence related to the past
24 crime because, if it was just as easy as, you
25 know, these things are on separate dates, the

1 person probably wouldn't go to trial, right?

2 MR. FEIGIN: Well, Your Honor, I -- I
3 do think that -- again, we don't have a ton of
4 experience with this.

5 JUSTICE JACKSON: Yes.

6 MR. FEIGIN: But I do think that to
7 the extent that the indictments for the prior
8 crimes or the information for the prior crimes,
9 the charging documents, show that they occurred
10 on different days or at least allow a jury to
11 infer as much, I'm not sure that the defendant,
12 in the absence of some plausible argument --
13 and, again, I think that's going to be the rare
14 case, and I take Wooden to say it's the rare
15 case -- in the absence of a plausible argument
16 that they're part of a common scheme, not just a
17 common motivation like I'm an inveterate gambler
18 and I need to rob stores to make my money but an
19 actual part of a common scheme, that the
20 defendant's actually going to want to go to
21 trial on that, because, you know, among other
22 things like lots of cases plead, the defendant
23 may not, for -- for -- may not wish to kind of
24 try the district court's patience with holding
25 separate proceedings on something --

1 JUSTICE JACKSON: Yeah.

2 MR. FEIGIN: -- that's not going to
3 benefit him.

4 JUSTICE JACKSON: All right. Let me
5 ask you another question that comes from a
6 colloquy that you had with Justice Barrett about
7 harmless error.

8 So any ruling that this Court made,
9 let's say we decided to address harmless in
10 this context, you would anticipate that that
11 rule would then be incorporated into jury
12 instructions if these cases should happen in the
13 future?

14 MR. FEIGIN: It would depend what the
15 Court said, Your Honor. Our -- our current
16 proposed model jury instruction, which, again,
17 we haven't really had to use very often because
18 the courts of appeals --

19 JUSTICE JACKSON: Yeah.

20 MR. FEIGIN: -- haven't gone in our
21 favor, largely tracks what Mr. Fisher said
22 earlier this morning.

23 JUSTICE JACKSON: No, I know. But any
24 future thing that courts say about harmless
25 in a situation, right, if we look at the facts

1 here and we say this is harmless because, fill
2 in the blank, that would then become a rule that
3 I would assume would have to be incorporated
4 into future jury instructions in order to make
5 sure we have some sort of uniformity coming out
6 of this, right?

7 MR. FEIGIN: It would depend what --
8 it would depend what the Court said. I -- I
9 don't know that we would invariably, even under
10 the current Wooden decision as we have it,
11 insist that the jury be instructed that, for
12 example, different days almost always means
13 separate occasions. I think we're comfortable
14 enough with kind of a description of the general
15 inquiry --

16 JUSTICE JACKSON: But it doesn't
17 bother the government that you could have a jury
18 that is -- that you could have different
19 defendants who basically got the same rap sheets
20 coming out differently, unless we have a rule
21 about when it's going to be treated as a
22 different occasion?

23 MR. FEIGIN: That does bother us, Your
24 Honor. We always want like offendants to be
25 treated alike. That's a basic -- a basic

1 animating principle of the Sentencing Reform Act
2 and sentencing in general. And to the extent we
3 can, we would want jury instructions that would
4 tend to reach that conclusion.

5 However, as this Court has noted, you
6 know, for example, in United States against
7 Williams, like, different juries even instructed
8 the exact same way --

9 JUSTICE JACKSON: Yeah.

10 MR. FEIGIN: -- can come out different
11 ways on similar facts. That's just --

12 JUSTICE JACKSON: Thank you.

13 MR. FEIGIN: -- the nature of the
14 system.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. FEIGIN: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Harper.

19 ORAL ARGUMENT OF D. NICK HARPER,
20 COURT-APPOINTED AMICUS CURIAE IN SUPPORT OF
21 THE JUDGMENT BELOW

22 MR. HARPER: Thank you, Mr. Chief
23 Justice, and may it please the Court:

24 ACCA's occasions clause requires
25 judges to make a classic recidivism

1 determination, a finding about the separateness
2 of prior offenses. Under this Court's
3 precedents, that legislative choice is
4 consistent with the Constitution. This Court
5 held in *Almendarez-Torres*, based on
6 centuries-old sentencing practices, that judges
7 can impose sentencing enhancements based on
8 recidivism.

9 For decades, the federal courts of
10 appeals have unanimously applied
11 *Almendarez-Torres* to uphold judicial fact
12 finding under the occasions clause, and states
13 also have relied on *Almendarez-Torres* to enact
14 and enforce similar state recidivism schemes.

15 Petitioner and the government seek to
16 upend this practice, but they don't offer a
17 principled basis for doing so. Their front-line
18 position is that judges can find only the
19 elements of prior offenses. But they concede
20 that *Almendarez-Torres* authorizes judges to find
21 various non-elemental facts as well. So they're
22 forced to make exception after exception to
23 their elements-only principle, and they
24 ultimately land on standards that are
25 inconsistent with one another and divorced from

1 any constitutional principle or precedent of
2 this Court.

3 I think what this Court's precedents
4 show is that judges can find facts about prior
5 offenses under *Almendarez-Torres*, whereas juries
6 must find facts about present offenses under
7 *Apprendi*.

8 But, even if the other side's
9 approaches were correct, the Court should still
10 affirm because at least the government agrees
11 that judges applying ACCA's predicate felony
12 clause can find facts about the dates and
13 locations of prior offenses, and those very same
14 facts are going to resolve most occasions
15 questions, as this case illustrates. It would
16 make no sense to allow judges to find those
17 facts under one clause of ACCA but not the
18 other.

19 This Court should not set aside
20 decades of consensus and impose on all federal
21 and state courts an untested recidivism regime
22 that would gravely prejudice defendants.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: Counsel, the --
25 what's your best historical evidence that judges

1 have performed inquiries like the occasions --
2 the different occasions inquiry here?

3 MR. HARPER: Sure, Justice Thomas. I
4 -- I want to flag up front that I don't think
5 the -- the right question is to ask whether
6 there are sort of direct historical analogues.
7 But, to answer your question directly first, I
8 do think that the statutes that Mr. Feigin
9 mentioned about sequencing that go back to the
10 early 1800s, finding that an offense occurred
11 after a prior conviction, that an offense
12 occurred after a defendant escaped or was
13 released from prison, I think those are quite
14 analogous to the occasions clause.

15 I think, at bottom, in most cases, the
16 occasions clause is essentially asking judges to
17 make a question about -- to make a decision
18 about sequencing, about how prior offenses
19 occurred, whether they occurred one after
20 another. And I do think these statutes that,
21 again, go back to the early 1800s are quite
22 similar in that regard.

23 I do want to say, though, I don't
24 think that that's the right historical question.
25 I think the way the Court should think about the

1 historical inquiry here is to ask, at the time
2 of the founding, was there a settled practice
3 that legislatures had to treat recidivism as an
4 element of the offense? And I think the answer
5 to that question is no, as Almendarez-Torres
6 recognized.

7 CHIEF JUSTICE ROBERTS: Why -- why
8 doesn't bifurcation take care of all the
9 problems from your perspective?

10 MR. HARPER: So I think for a couple
11 things, Your Honor. I think, first, bifurcation
12 is -- is extremely rare in criminal cases. I
13 think the other side has cited only two contexts
14 in which it occurs regularly. One is the death
15 penalty context, where it's required by statute.
16 The other is the criminal forfeiture context,
17 where it's required by rule.

18 And I think, here, it's going to be
19 discretionary. And I don't think they've cited
20 you a case in -- or a context in which
21 discretionary bifurcation happens as a matter of
22 course. And I do think that the -- because it's
23 discretionary, the government is, I think, going
24 to have good arguments against bifurcation in at
25 least some cases. I would think if I were the

1 government I would argue that the government has
2 a right to present all of its evidence on all of
3 the elements of the crime to a single jury so
4 that that jury can make a moral judgment about
5 whether this defendant has committed the crime
6 as defined by Congress, and the defendant
7 doesn't have the right to sort of hide an
8 element from the jury on the first go-round and
9 then show it to the jury in a bifurcated
10 proceeding.

11 And I think there already is some
12 evidence of this. So we cite the Harrell case
13 at page 46 of our brief. That's a case in which
14 the government -- the prosecutor opposed
15 bifurcation post-Wooden. The judge denied
16 bifurcation. And then the -- the defendant was
17 forced to stipulate to the occasions question.

18 And the jury was told, this is a
19 three-time convicted felon, and then the
20 prosecutor at closing told the jury this is a
21 drug-slinging, gun-toting, three-time convicted
22 felon. So I think that shows that when
23 prosecutors decide they don't want to bifurcate,
24 judges may well agree with that and that when
25 they don't bifurcate, it's going to be seriously

1 prejudicial to defendants.

2 CHIEF JUSTICE ROBERTS: Well, of
3 course, part of their answer is that this will
4 be an incentive for the defendants to plead.

5 MR. HARPER: So I think that's right,
6 but I think that goes to my point, which is that
7 this is -- this is prejudicial whether it's --
8 it's -- it forces defendants to plead to worse
9 deals or it forces them to go through
10 non-bifurcated proceedings in which these prior
11 convictions are paraded before the jury.

12 JUSTICE ALITO: There are a lot of
13 occasions in which a defendant might love to
14 have a bifurcated proceeding because jurors
15 don't usually think like lawyers, who are open
16 to arguments in the alternative, so if the --
17 you know, if the defense is going to be I didn't
18 do it, but if I did it, I didn't have the intent
19 that is necessary under the statute, it might be
20 really beneficial to have a trial first on the
21 actus reus and then have a separate trial later
22 on the mens rea.

23 MR. HARPER: So I think there's no
24 doubt that defendants are going to want to have
25 bifurcated trials. I think the question is

1 whether the government is going to want to. And
2 Mr. Feigin said that at least the federal
3 government is going to be willing to do that in
4 most cases, apparently not all cases, but most
5 cases.

6 But I don't think there's any
7 guarantee that -- this is going to apply to the
8 states. Whatever this Court says in this case
9 is going to apply to the states too, and I don't
10 think there's any guarantee that state
11 prosecutors are going to feel the same way.

12 In fact, I would think -- I mean, I
13 would think that this is going to be a pretty
14 significant piece of leverage that prosecutors
15 can use against defendants to say either plead
16 to a worse deal or we're going to try to get
17 this in front of a jury, and that's -- and it's
18 seriously prejudicial.

19 JUSTICE ALITO: Do you think it's the
20 right historical question to ask whether there
21 was an established precedent on the narrow
22 question, whether recidivism questions, whether
23 the question whether the defendant had committed
24 other offenses in the past, was recognized as an
25 exception at the time of the adoption of the

1 Sixth Amendment, or would the broader question
2 be more appropriate, which was whether it was
3 well understood at the time of the adoption of
4 the Sixth Amendment that judges could make
5 discretionary sentencing decisions, which would
6 take into account prior criminal convictions?

7 And if it's the broader question, the
8 historical evidence is extremely strong, as --
9 as distinguished scholars have pointed out. At
10 the time of the adoption of the Sixth Amendment,
11 the -- the first Congress, which sent the Sixth
12 Amendment to the states, also adopted the first
13 criminal -- federal criminal proceedings.

14 And contrary to the suggestion in
15 Apprendi, they didn't say, if you commit -- if
16 you commit burglary, you get five years'
17 imprisonment. No, they said, if you commit such
18 and such an offense, you shall be sentenced to
19 no more than a certain sentence, which gave the
20 trial judge discretion.

21 MR. HARPER: So, to be candid, Your
22 Honor, I think there are two lines of history
23 here. One is the history you just referenced,
24 which is that judges have enormous -- an
25 enormous amount of discretion to, you know,

1 change sentences within a sentencing range.

2 The other is the Apprendi line of
3 history, which is that generally speaking,
4 sentence enhancing facts about present crimes
5 were treated as elements that had to go to a
6 jury. And so I think the relevant historical
7 question is, was there a uniform understanding
8 about sort of which box these recidivism-related
9 facts fell into?

10 And I think the answer is no. I think
11 the answer is that there were at least eight
12 states that we've identified going back to the
13 early 1800s that -- where legislatures had
14 discretion to treat recidivism as an element of
15 the offense or not, and that's because
16 recidivism was different than facts about
17 present crimes. It went to punishment only, not
18 guilt. And putting that recidivism -- those
19 recidivism facts before a jury would seriously
20 prejudice the defendant.

21 So I think that --

22 JUSTICE SOTOMAYOR: Counsel --

23 JUSTICE KAVANAUGH: Mr. --

24 JUSTICE SOTOMAYOR: -- when we start
25 talking about history, I -- I get very annoyed

1 because, in every history, there are exceptions.
2 The question then becomes how many of an
3 exception defeats the general rule. I'm not
4 going to argue whether it was eight or four. I
5 think it was four. And so I don't think that
6 that defeats the general rule. That's the
7 point.

8 As to your earlier question on what
9 prejudices a defendant or not, it's really only
10 a defendant that has a viable single occasion
11 argument who's ever going to think about raising
12 it because both with perjury enhancements to
13 sentencing that judges possess, as well as
14 annoying a judge enough so that a lighter
15 sentence is unlikely because, when the sentence
16 comes about, you're going to add the 15 years to
17 a base that the judge can have from a low to a
18 high, so it really is a question at the end, in
19 my mind, of a viable argument on a single --
20 about a single occasion or not, will it hurt the
21 defendant.

22 And as others here have said, I don't
23 know why we take your judgment as opposed to the
24 judgment of the bar.

25 MR. HARPER: So --

1 JUSTICE SOTOMAYOR: And every criminal
2 defense bar.

3 MR. HARPER: -- it is certainly a fair
4 point, Your Honor, that the criminal defenders
5 are on the other side. I think they've clearly
6 made a judgment that this rule that Petitioner
7 and the government are urging is a net benefit
8 for criminal defendants, and I -- I don't think
9 you should take my word over theirs on that.

10 What I think -- my submission, though,
11 is that I think it's indisputable that in some
12 cases, like Your Honor said, the cases where
13 this is a close question and the government
14 refuses to bifurcate, I think it's going to
15 prejudice defendants. I think that's what the
16 Harrell case that we cite at page 46 shows.

17 In some cases, this is going to
18 prejudice defendants, and I think that --

19 JUSTICE KAGAN: Well, isn't that true
20 of Apprendi generally? I mean, Apprendi was not
21 justified on the basis of this is always going
22 to help defendants. There are any number of
23 elements that a particular defendant might prove
24 and might decide in a particular set of
25 circumstances he would rather argue to a judge.

1 I mean, you know, it just doesn't seem
2 to me that that's a reason for denying the force
3 of Apprendi in this situation.

4 MR. HARPER: So I agree that the same
5 could be said of the prejudice point in
6 Apprendi. But I think this is not just
7 something that I'm making up. This is what
8 courts have said going back hundreds of years,
9 there's a reason to treat recidivism
10 differently.

11 And so I think Apprendi recognized a
12 tradition as to present crimes, and Apprendi
13 made that very clear at pages 488 and 496 of the
14 opinion in distinguishing Almendarez-Torres.
15 What the Court said there was that
16 Almendarez-Torres was about prior crimes. It
17 was about -- it was about issues that didn't go
18 to the defendant's guilt. They went to
19 punishment only.

20 This tradition that we're recognizing
21 here is about present crimes. And I think
22 courts recognized that it was both the prejudice
23 point and the fact that this was sort of a
24 collateral issue, it was more like a sentencing
25 issue, was why there was a different tradition

1 as to recidivism.

2 JUSTICE KAVANAUGH: So your point is
3 it wasn't a historical accident necessarily, it
4 was justified by a principle of not prejudicing
5 -- prejudicing defendants?

6 MR. HARPER: That's right. And I
7 think a good place to look for this is the
8 Bishop treatise, one of the leading criminal law
9 treatise writers of the 19th Century said just
10 that. He said that recidivism is treated
11 differently because putting it before a jury is
12 seriously prejudicial to defendants and because
13 this is an issue that's more like a sentencing
14 issue, which, as Justice Alito noted, has a
15 tradition for hundreds of years as being not
16 subject to Sixth Amendment constraints.

17 JUSTICE KAVANAUGH: On Justice -- on
18 Justice Sotomayor's question, because I think
19 the methodological question if we get deep into
20 this is pretty important here, how to think
21 about all this, so start with the text. The
22 text itself of the Constitution does not tell us
23 the answer, just the bare words, correct?

24 MR. HARPER: Correct.

25 JUSTICE KAVANAUGH: Okay. So then we

1 usually look to history. We might not like it,
2 but I don't --

3 MR. HARPER: Agreed.

4 JUSTICE KAVANAUGH: -- unless we're
5 just making it up, I don't know where else we're
6 going to look. And the question Mr. Fisher
7 raised was who has the burden on that, and I
8 think I'd like you to speak to who has the
9 burden.

10 Do you have the burden to show a
11 consistent, uniform practice or does he have the
12 burden to show a consistent, uniform practice
13 going the other way in which recidivism always
14 went to the jury?

15 MR. HARPER: So I think that is the
16 critical question because, if the government has
17 the burden, then I see no way in which
18 Almendarez-Torres is correctly decided.

19 But I think that the government in
20 these cases does not have the burden because I
21 think, as a default principle, when somebody is
22 coming into this Court or a court saying the
23 Constitution violates or invalidates my sentence
24 or invalidates a statute, typically, it is upon
25 that person to show that there is some

1 well-established understanding that that's what
2 the Constitution means.

3 And sometimes, when the text is clear,
4 like in the Gaudin case that Mr. Fisher cited,
5 then the burden flips to the government to show
6 some -- some historical practice that
7 contradicts the text.

8 But, as Your Honor noted, the text
9 here doesn't answer the question, and so we're
10 looking to history. And I would say we're not
11 only just looking -- we're not looking to
12 history directly interpreting the text of the
13 Sixth Amendment. We're looking to history --
14 we're looking to state common law principles.

15 And I think, when the Court is that
16 far removed from something actually interpreting
17 the Sixth Amendment, the Court should demand a
18 level of uniformity in those state common law
19 principles before making the leap that the
20 Constitution necessarily incorporated those
21 common law principles.

22 JUSTICE KAVANAUGH: Is the right year
23 to look at 1791 or 1868? Obviously, this is a
24 federal case, but --

25 MR. HARPER: So I think there's

1 certainly academic debate about that. I think,
2 for purposes of this case, the right -- the time
3 of the founding is obviously the most relevant
4 time.

5 And I guess what I would say is I
6 think, if anything, what the history shows here
7 is that there was a almost uniform practice that
8 legislatures had discretion in this area. So it
9 wasn't only the four states where judges were
10 allowed to make findings about recidivism. It
11 was also four -- four states -- we have
12 Virginia, Massachusetts, and Maine, significant
13 states, between 1818 and 1824 enacting
14 supplemental information statutes that allowed
15 the government to withhold recidivism
16 allegations from an indictment, despite that --
17 generally requiring all elements of an offense
18 to be in an indictment. So we have at least
19 eight -- and then West Virginia added on a
20 similar statute in 1868. So we have eight
21 states.

22 And then I think the government -- on
23 the other side, the government and Petitioner
24 haven't cited a single case in any relevant time
25 period where a court struck down a statute on

1 the ground that it assigned recidivism findings
2 to -- to judges or allowed the government to
3 withhold these allegations from -- from the
4 indictment.

5 And so I think, as far as I can see,
6 there's an unrebutted tradition here of
7 legislatures having discretion when it comes to
8 recidivism, and I think there were good reasons
9 for that, as we discussed.

10 JUSTICE BARRETT: Did all of those
11 states -- I mean, you know, the Sixth Amendment
12 didn't apply to the states back then. So in --
13 when you're saying, well, you can't point to a
14 single one in which a court struck it down, were
15 there state analogues to the Sixth Amendment
16 that would be relevant?

17 MR. HARPER: So I think states did
18 have comparable jury trial rights, and also
19 states in which the supplemental information
20 statutes were enacted, they had grand jury
21 requirements that required all elements to be in
22 an indictment.

23 And so -- and these were challenged on
24 constitutional grounds, and courts uniformly
25 upheld them. This goes all the way back to 1824

1 and the Massachusetts Ross case that we cite in
2 our brief, all the way through to this Court's
3 decision in Graham. There's no decision that
4 I'm aware of to the contrary.

5 So I do think there is a -- even if it
6 was -- even if it were our burden to show a
7 uniform tradition here, I think the uniform
8 tradition was one of legislative discretion when
9 it comes to recidivism.

10 JUSTICE BARRETT: What about Mathis
11 and Descamps? You know, it's true they're
12 statutory cases, but, you know, there is some
13 avoidance language in them, which you recognize
14 in your brief. Do you want to talk about that a
15 little about it?

16 MR. HARPER: Sure. So the language in
17 Mathis and Descamps, admittedly, not great for
18 my position here. I -- I think -- I do think
19 that the Court --

20 JUSTICE BARRETT: We appreciate your
21 candor.

22 (Laughter.)

23 MR. HARPER: I do think that the Court
24 just didn't resolve the constitutional question
25 in those cases. They -- they were -- as you

1 said, they were avoidance cases. I think most
2 of what the Court held in those cases was that
3 there is a serious constitutional question about
4 the scope of *Almendarez-Torres*. And I think
5 that's what this case is about.

6 But I don't think that those cases
7 resolved that question, and I don't think any
8 other decision of this Court has either.

9 JUSTICE JACKSON: Can you turn to the
10 theory for a second? You said in your opening
11 that you find the other side's position to be
12 unprincipled. So why is that?

13 MR. HARPER: So for a few reasons. I
14 think, first of all, they -- their principle in
15 this case, which I think Mr. Fisher reiterated
16 in his opening, was that -- this elements-only
17 principle, this principle that judges can only
18 find facts that juries previously found beyond a
19 reasonable doubt.

20 And I just don't think that their
21 theory, their -- their test that they end up
22 articulating line up with that principle because
23 they recognize that if the Court were to
24 double-down on that elements-only principle, it
25 would blow up the categorical -- categorical

1 approach because judges, in doing predicate
2 felony determinations, often find facts that are
3 not elements of prior offenses, like identity,
4 like the date of the offense, like the
5 sequencing issue in Almendarez-Torres itself.

6 So they articulate -- they have to
7 fall back from their elements-only principle,
8 and they end up articulating standards like the
9 government's standard, for example, facts
10 encapsulated in judicial records that are
11 components of prior convictions. I think that's
12 what the government says. That test is in no
13 decision of this Court. I don't think it's in a
14 decision of any court as far as I can tell.

15 And so I think, because they are
16 departing from their principle, they are
17 articulating novel tests that really don't have
18 any grounding in this Court.

19 And then the last thing I would say is
20 that I think their test, at -- at least the
21 government's test, is not descriptively
22 accurate, even to -- because the -- the test,
23 facts encapsulated in judicial records, that --
24 identity is not encapsulated in judicial
25 records. The date of the offense is not a

1 component of the prior conviction.

2 So I think the government's test and I
3 think Petitioner's test too, although I'm a
4 little less clear on what Petitioner's test
5 actually is, I think none of them have a
6 principle that actually explains where they end
7 up landing.

8 JUSTICE KAGAN: I mean, as I
9 understand that argument, it's really just to
10 say that Almendarez-Torres and Apprendi are in a
11 little bit of tension with each other. And who
12 would deny that really? I mean, even Apprendi
13 understood that.

14 But there's nothing about that bit of
15 tension that has made the system fail to work.
16 And, you know, why would we allow that bit of
17 tension, which has existed for decades now, to
18 suggest an answer to this question that does not
19 seem the one that all our past precedents point
20 to?

21 MR. HARPER: So I -- I guess I would
22 say I don't think there needs to be tension
23 between Apprendi and Almendarez-Torres. I
24 think, certainly, under the government and
25 Petitioner's view, there is tension. But I

1 think under -- my reading of Apprendi and
2 Almendarez-Torres is that they're -- they drew a
3 pretty clear line between facts about prior
4 crimes, facts about present crimes. I think,
5 again, Apprendi said that multiple times.

6 And so I think, if you interpret it
7 that way, it's -- the -- the tension sort of
8 resolves itself. And I think the fact that the
9 Court has -- or courts have found non-elemental
10 facts in doing the predicate felony inquiry
11 suggests that that's really what the line is, is
12 I think my fundamental point.

13 JUSTICE KAVANAUGH: Your -- on the
14 tension, I think your point is that the history
15 has two different rules.

16 MR. HARPER: That's right. And I
17 think --

18 JUSTICE KAVANAUGH: And -- and --

19 MR. HARPER: -- Almendarez-Torres
20 recognized that.

21 JUSTICE KAVANAUGH: -- and it's rooted
22 in concern about prejudicing defendants.

23 MR. HARPER: That's right. And I
24 think, in Apprendi itself, the Court demanded a
25 uniform standard as to sentence-enhancing facts

1 about present crimes. And so I think it would
2 be somewhat anomalous not to require an
3 extension of that uniformity down to the
4 different tradition of recidivism facts. And I
5 think that's exactly what Almendarez-Torres
6 recognized, admittedly, before Apprendi, but
7 that there was no such uniform tradition in this
8 different context. And so, in this context,
9 facts about present crimes, those don't need --
10 there's no constitutional prescription there.

11 JUSTICE KAVANAUGH: Can I ask -- go
12 ahead.

13 JUSTICE GORSUCH: No, please.

14 JUSTICE KAVANAUGH: Go ahead.

15 JUSTICE GORSUCH: No, finish up.

16 JUSTICE KAVANAUGH: No.

17 JUSTICE GORSUCH: Just looking to
18 history, I know South Carolina you have in your
19 corner. Do you have any other antebellum cases
20 from the states?

21 MR. HARPER: So we have the Louisiana
22 Hudson decision, which I think even Petitioner
23 agrees is in our camp. And I think Petitioner
24 agrees all of these are in our camp. We have
25 the --

1 JUSTICE GORSUCH: Well, I know you
2 have some later decisions.

3 MR. HARPER: Well, that's it. I think
4 Hudson is -- I think it's in the 1850s. I could
5 be wrong about that. We have an -- we have an
6 Alabama decision that's -- I think decisions
7 from the early 1900s, but what they were lacking
8 is --

9 JUSTICE GORSUCH: Yeah. No, no, I'm
10 -- I'm -- if we're interpreting the original
11 meaning of the Sixth Amendment, I would have
12 thought closer-in-time contemporaneous evidence
13 would be better. Would you agree with that?

14 MR. HARPER: I think that's right, but
15 I think what the Alabama cases --

16 JUSTICE GORSUCH: And so South
17 Carolina is your best one, I think.

18 MR. HARPER: That's right. I think --

19 JUSTICE GORSUCH: And they've admitted
20 that they're an outlier. What do we do about
21 that?

22 MR. HARPER: So I guess a couple of
23 points. First, I think it is true that the four
24 states that I think were on the other side of
25 this judge -- whether judges or juries had to

1 make these recidivism findings, they were an --
2 they were an outlier as to the default common
3 law rule in this context.

4 I concede that the majority of states
5 had a default common law rule that these
6 recidivism findings or these recidivism facts
7 had to be in an indictment and proved to a jury
8 beyond a reasonable doubt. I think -- so I
9 think South Carolina, Alabama, Louisiana,
10 Kansas, they were outliers with respect to that
11 tradition.

12 But what I don't think they were --
13 JUSTICE GORSUCH: And some of them
14 weren't even members of -- of the original
15 states that formed the compact that led to the
16 Sixth Amendment.

17 MR. HARPER: That's true, Your Honor,
18 but I think the -- and as -- as to your second
19 point, the later cases, Alabama, Kansas, they --
20 although they come later, they recognize that
21 there had been a settled tradition in those
22 states. And I think Petitioner and the
23 government have shown nothing to -- to
24 contradict that. So I think that is a fair
25 assumption.

1 And I do think that -- that -- so the
2 -- the fact that there is this different common
3 law tradition in the majority of states, it
4 doesn't -- I don't think that's enough to
5 establish that this was a fundamental principle
6 that was incorporated into the Constitution
7 because -- because we have these -- these states
8 within that majority, Virginia, Massachusetts,
9 Maine, these are significant states that were a
10 part of the initial compact and that allowed
11 legislatures to deviate from the common law
12 rule. And then, when those supplemental
13 information statutes were challenged in court on
14 constitutional grounds, courts rejected those
15 challenges all the way through to this Court's
16 decision in 1910 endorsing the Massachusetts
17 Ross decision from 1824.

18 So I think there's just a uniform
19 string of precedents saying this majority common
20 law rule that recidivism has to be in the
21 indictment and proved to a jury is something the
22 legislature can alter.

23 JUSTICE KAVANAUGH: Can I ask you
24 about bifurcation? Do you think bifurcation is
25 completely in the discretion of the trial judge?

1 MR. HARPER: I -- I think it's in the
2 discretion of the trial judge --

3 JUSTICE KAVANAUGH: If you lose here
4 and have --

5 MR. HARPER: That's right. I think,
6 in the federal system, it is -- under Rule 14, I
7 think it's subject to the discretion of the
8 trial judge, subject to abuse of discretion
9 review.

10 JUSTICE KAVANAUGH: Would there be any
11 constitutional overlay on that? In other words,
12 it was impermissible to deny bifurcation under
13 these circumstances?

14 MR. HARPER: I don't think so. I
15 think the Court has refused to require
16 bifurcation as a constitutional matter, and I
17 don't think the Court should do so in this case.

18 And I also don't think the Court
19 should sort of place a thumb on the scale even
20 if the Court sides with Petitioner and the
21 government here to say that bifurcation should
22 ordinarily be required in these cases because I
23 do think there is something to -- to the -- to
24 the idea that the government really does have, I
25 think, a right to present to a single jury all

1 of the -- all of its evidence on all of the
2 elements of the crime.

3 And if you rule for Petitioner and the
4 government here, I think what you are saying is
5 that this occasions fact is sort of an element
6 of the crime.

7 And then -- and then, on
8 bifurcation -- I think bifurcation, the other
9 problem which I mentioned earlier is that states
10 have varying procedures on bifurcation, and so
11 some of them make it discretionary, and I think
12 -- so it's going to have -- it's hard to say
13 exactly how this is going to play out in the
14 states.

15 JUSTICE BARRETT: That's true with
16 respect to Old Chief too?

17 MR. HARPER: Correct. I think Old
18 Chief -- I think Old Chief doesn't really solve
19 the prejudice problem because, as you see from
20 the Harrell case we cite, that case involved an
21 Old Chief stipulation, so bifurcation was
22 denied. The defendant was then forced to
23 stipulate or he chose to stipulate, I guess,
24 under Old Chief.

25 And that stipulation has to be read to

1 the jury, and that jury has to be told this is a
2 three-time convicted felon. That's a big
3 difference from being told this is, you know, a
4 one-time convicted felon.

5 JUSTICE BARRETT: Justice Alito asked
6 questions of your friends on the other side
7 about -- and Justice Jackson too -- about what
8 kind of proof would be used to prove this up to
9 a jury. Do you have anything to say about that?

10 MR. HARPER: So I think, if it's going
11 before a jury, subject to the rules of evidence,
12 which, admittedly, I'm not an expert on, I think
13 anything that's admissible and relevant I would
14 think would be able to be used to prove this
15 question to a jury.

16 JUSTICE BARRETT: But it would make it
17 harder since they don't apply to a judge and a
18 judge has to find these things by a
19 preponderance if you're right?

20 MR. HARPER: I think that it
21 probably -- I'm sure the standard would make it
22 harder for them to prove these issues.

23 Again, I don't think it -- I agree
24 with the government that I don't think this is
25 going to matter in all that many cases because I

1 think most of these cases are going to be pretty
2 clear that the crimes were on separate
3 occasions. This case, for example, I think it's
4 clear beyond a doubt, as the government said,
5 that this is -- these crimes occurred multiple
6 days apart. They were on separate occasions.

7 And I think most juries -- I guess the
8 one point I would make is there is a potential
9 nullification risk, I think, in some of these
10 cases because of the severe mandatory minimums
11 at issue. And I think the Petitioner cited one
12 case in his cert petition where a Georgia jury
13 refused to find different occasions despite
14 the -- the -- the -- the convictions being or
15 the offenses being months and years apart.

16 So I do think that might happen in
17 some cases, but for the most part, I think these
18 are going to be pretty straightforward.

19 JUSTICE BARRETT: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank -- thank
21 you, counsel.

22 Justice Thomas, any -- anything
23 further?

24 JUSTICE SOTOMAYOR: There is a lot of
25 debate on whether historically jury

1 nullification was an okay thing.

2 MR. HARPER: That's right, Your Honor.
3 I don't want to wade into that debate.

4 JUSTICE SOTOMAYOR: No, I'm not
5 suggesting we do. But it is an open question.

6 CHIEF JUSTICE ROBERTS: Anything
7 further? No?

8 Thank you, counsel.

9 Rebuttal, Mr. Fisher.

10 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

11 ON BEHALF OF THE PETITIONER

12 MR. FISHER: Thank you. I'd like to
13 cover two topics. First, a couple more words
14 about bifurcation.

15 There was some talk about state
16 practices. Even in 1967, when the Court looked
17 at this issue in Spencer, it noted that the
18 majority of the states require bifurcation by
19 statute. It's not even a prosecutorial
20 discretion, discretionary decision.

21 And I think that trend has continued
22 for all the common-sense reasons laid out in
23 the -- in the briefs you have. So, Justice
24 Kavanaugh, it's not even a constitutional
25 question necessarily. It's just already been

1 decided by the states.

2 If you had -- you know, this is a
3 federal case where you have your own supervisory
4 powers and you can, I think, you know, make
5 whatever suggestions you like in the opinion,
6 and we think it would be appropriate for the
7 Court to say that bifurcation is the accepted
8 solution here that seems to be the right one.

9 I'd also like to say a couple words
10 about the harmless error conversation that's
11 taken place today.

12 We haven't briefed that issue
13 precisely because the Court's common practice
14 and -- and overwhelming practice is to leave
15 decisions -- leave questions like that that were
16 not addressed by the lower courts for the lower
17 courts to decide in the first instance.

18 And that's what we'd ask for the Court
19 to do here. And -- and forgive me, I may have
20 even misunderstood the way the amicus
21 appointment works in this case. You know,
22 of course, we are -- we are not in line with the
23 government on harmless error in this case, but
24 the government's top-side brief said the case
25 should be remanded for harmless error.

1 And so, on the issue on which we are
2 adverse to the government, you know, I don't
3 know that amicus can come in and tell this Court
4 to go ahead and address it.

5 But leaving -- you know, leaving that
6 perhaps thorny issue of the Court's practice
7 aside, in all events, we think the safest thing
8 is to leave that for remand.

9 But -- but I'll just add a couple of
10 things about the factual conversation that took
11 place today. Remember, when they -- when you
12 ask whether these crimes that are alleged to be
13 committed on eight days, you know, on an
14 eight-day stretch, three different crimes on an
15 eight-day stretch could possibly be the same
16 occasion, you are yourselves relying on these
17 kinds of documents that you have noted in Mathis
18 and Descamps are highly unreliable. And, in
19 fact, these documents themselves, the plea
20 documents themselves here say that Mr. Erlinger
21 agrees to cooperate against all of his
22 co-defendants.

23 There were no co-defendants in these
24 cases. And so, Justice Jackson, you noted that
25 an indictment might say on or about certain

1 days. And when you get into an eight-day
2 stretch, on or about matters quite a lot.

3 So what we would say on remand in part
4 -- and this goes to Justice Gorsuch's questions
5 about how harmless error would work here -- is
6 that the government may not have been able to
7 prove beyond a reasonable doubt to a jury that
8 these crimes were committed on separate
9 occasions, and that's enough to allow -- you
10 know, to allow a retrial or just at least
11 renegotiations on that point.

12 If the Court has no further questions,
13 I'll submit.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Harper, this Court appointed you
17 to brief and argue this case as an amicus curiae
18 in support of the judgment below. You have ably
19 discharged that responsibility, for which we are
20 grateful.

21 The case is submitted.

22 (Whereupon, at 11:40 a.m., the case
23 was submitted.)

24

25

Official - Subject to Final Review

\$	69 ^[1] 2:12	admissible ^[6] 19:22,25 20:5,7 53:16 98:13	39:17 43:4 77:1,4,10,12 82:16 84:13,17 86:11,15 93:11 94:16	April ^[4] 44:8 45:10,10,10
\$500 ^[1] 57:1	7	admissions ^[1] 19:20	Amendment's ^[1] 42:24	area ^[1] 85:8
1	7th ^[1] 44:8	admitted ^[2] 50:6 93:19	amici ^[1] 25:2	aren't ^[1] 27:1
1 ^[1] 60:10	8	admittedly ^[3] 87:17 92:6 98:12	amicus ^[2] 1:24 2:11 9:1, 17 10:2 13:19 14:1,2 16:1, 10,14 31:4,22 32:4,9,14 43: 14 69:20 101:20 102:3 103:17	arguably ^[1] 9:16
10 ^[2] 33:19 64:2	9	adopted ^[1] 77:12	amicus's ^[2] 4:4 15:14	argue ^[4] 74:1 79:4 80:25 103:17
10:06 ^[2] 1:15 3:2	922(g) ^[6] 4:17 33:14,19 37: 2 49:24 59:10	adoption ^[3] 76:25 77:3,10	among ^[1] 66:21	arguing ^[1] 59:24
100 ^[1] 2:15	924(g) ^[1] 36:13	adverse ^[1] 102:2	amount ^[1] 77:25	argument ^[3] 1:14 2:2,5,9, 13 3:4,7 7:22 8:13 9:1 23: 25 24:14 25:3 27:9 30:5 39:4 46:5 49:12 51:20 52: 10,11 55:21 59:14 65:17 66:12,15 69:19 79:11,19 90:9 100:10
11:40 ^[1] 103:22	A	affect ^[1] 30:22	analogous ^[1] 72:14	arguments ^[2] 73:24 75: 16
11th ^[1] 45:10	a.m ^[3] 1:15 3:2 103:22	affirm ^[1] 71:10	analogue ^[1] 16:8	arise ^[2] 8:15 14:25
13-year ^[1] 60:21	able ^[7] 14:3 18:10 28:9 49: 12 58:25 98:14 103:6	affirming ^[1] 45:2	analogues ^[2] 72:6 86:15	arose ^[1] 16:6
14 ^[2] 33:5 96:6	ably ^[1] 103:18	afternoon ^[1] 44:14	analysis ^[5] 4:6 16:15 24: 25 29:8 31:9	article ^[1] 32:4
15 ^[3] 28:24 33:20 79:16	above-entitled ^[1] 1:13	ago ^[2] 36:21 46:6	analyze ^[2] 28:6 29:3	articulate ^[1] 89:6
16 ^[1] 61:7	absence ^[2] 66:12,15	agree ^[12] 5:21,23,23 6:4 16:14 29:22 45:13 59:1 74: 24 81:4 93:13 98:23	announce ^[1] 61:21	articulating ^[3] 88:22 89:8, 17
1791 ^[1] 84:23	absolutely ^[1] 29:21	agreed ^[2] 45:14 83:3	announced ^[1] 26:18	aside ^[3] 54:7 71:19 102:7
18 ^[2] 28:23 48:1	abuse ^[1] 96:8	agrees ^[4] 71:10 92:23,24 102:21	annoyed ^[1] 78:25	aspects ^[1] 55:3
1800s ^[4] 9:4 72:10,21 78: 13	academic ^[2] 26:13 85:1	ahead ^[5] 7:14 17:2 92:12, 14 102:4	annoying ^[1] 79:14	assault ^[2] 46:19 55:18
1818 ^[1] 85:13	ACCA ^[19] 3:13 4:1 8:17 25: 25 26:7 28:20 32:20 33:15 39:13 44:3 47:14 48:6,13, 15 49:20,23 60:9 61:4 71: 17	Alabama ^[5] 41:23 93:6,15 94:9,19	announced ^[1] 26:18	asserted ^[3] 18:24 19:6 53: 24
1824 ^[3] 85:13 86:25 95:17	ACCA's ^[4] 3:22 44:10 69: 24 71:11	alike ^[1] 68:25	answer ^[16] 7:25 9:25 16:2 17:6 30:3 38:13 40:12 54: 23 72:7 73:4 75:3 78:10, 11 82:23 84:9 90:18	assigned ^[1] 86:1
1850s ^[1] 93:4	accepted ^[1] 101:7	ALITO ^[49] 6:8,19,20,23 7:9, 13,15 8:14 18:6,7,16,21 19: 1,5,14,17,21,24 20:4,8,17 21:3,8,23 22:7,12 23:1,10, 14,20 24:1,8,19 25:16 53:8, 9 54:1 55:12 56:12 57:6, 22 58:5,10 62:14 65:11 75: 12 76:19 82:14 98:5	assault ^[2] 46:19 55:18	assumed ^[2] 10:24 23:21
1868 ^[2] 84:23 85:20	accident ^[1] 82:3	Alito's ^[3] 30:10 35:24 62: 24	asserted ^[3] 18:24 19:6 53: 24	assumption ^[1] 94:25
1900s ^[2] 9:6 93:7	accomplish ^[2] 25:25 26:3	allegations ^[2] 85:16 86:3	assigned ^[1] 86:1	assurances ^[1] 48:6
1910 ^[1] 95:16	account ^[1] 77:6	alleged ^[2] 25:15 102:12	assume ^[3] 18:12 62:20 68: 3	availability ^[2] 48:12 60:12
1920s ^[1] 13:5	accurate ^[2] 60:22 89:22	allegedly ^[2] 25:7,8	assumed ^[2] 10:24 23:21	available ^[1] 20:15
1929 ^[1] 13:16	acknowledge ^[1] 41:21	allow ^[7] 42:3,9 66:10 71: 16 90:16 103:9,10	assured ^[2] 10:24 23:21	avoid ^[1] 4:20
1955 ^[1] 43:25	acknowledged ^[1] 39:23	allowed ^[6] 13:17 44:1 85: 10,14 86:2 95:10	assured ^[2] 10:24 23:21	avoidance ^[2] 87:13 88:1
1960s ^[1] 16:6	acknowledging ^[2] 40:16 47:4	allows ^[1] 24:17	assured ^[2] 10:24 23:21	aware ^[1] 87:4
1967 ^[1] 100:16	acquire ^[1] 63:19	Almendarez ^[1] 42:10	assured ^[2] 10:24 23:21	away ^[2] 56:23 57:2
1972 ^[1] 43:25	across ^[3] 44:12,20 46:14	Almendarez-Torres ^[43] 5:3,15 6:9 9:16 11:24 13: 10,21 17:9,13 26:12,22 29: 23 31:13 34:16 35:11 36:1 38:10 40:6,13,24 41:14,17 42:5 43:17 55:24 61:25 64: 5 70:5,11,13,20 71:5 73:5 81:14,16 83:18 88:4 89:5 90:10,23 91:2,19 92:5	assured ^[2] 10:24 23:21	
19th ^[1] 82:9	act ^[2] 57:19 69:1	almost ^[4] 45:23 47:9 68: 12 85:7	assured ^[2] 10:24 23:21	
2	acts ^[3] 44:12 57:20 65:10	already ^[9] 4:18 5:12 32:1 41:8 45:20 64:20 65:3 74: 11 100:25	assured ^[2] 10:24 23:21	
20 ^[1] 36:21	actual ^[3] 33:20 56:9 66:19	alter ^[1] 95:22	assured ^[2] 10:24 23:21	
200 ^[1] 8:17	actually ^[16] 9:15 31:4 32:7, 16,18 33:4,22 41:3 48:22 62:15 63:13 64:16 66:20 84:16 90:5,6	alternative ^[1] 75:16	assured ^[2] 10:24 23:21	
2024 ^[2] 1:11 18:18	add ^[4] 19:12 28:17 79:16 102:9	although ^[4] 42:2 59:2 90: 3 94:20	assured ^[2] 10:24 23:21	
20th ^[1] 12:23	added ^[2] 36:10 85:19	Amendment ^[20] 3:18 4:6 7:23 11:13 14:24 15:2,7	assured ^[2] 10:24 23:21	
23-370 ^[1] 3:4	addict ^[1] 52:11		assured ^[2] 10:24 23:21	
25 ^[1] 40:15	addition ^[2] 49:24 53:18		assured ^[2] 10:24 23:21	
26th ^[1] 63:25	additional ^[1] 38:23		assured ^[2] 10:24 23:21	
27 ^[3] 1:11 18:18 20:2	address ^[10] 15:11 25:3 27: 15 31:4,7 40:21 46:5 57: 15 67:9 102:4		assured ^[2] 10:24 23:21	
27th ^[1] 54:14	addressed ^[1] 101:16		assured ^[2] 10:24 23:21	
28th ^[1] 55:18	adhered ^[1] 40:14		assured ^[2] 10:24 23:21	
3	adjudicates ^[1] 36:17		assured ^[2] 10:24 23:21	
3 ^[1] 2:4	adjudication ^[1] 17:25		assured ^[2] 10:24 23:21	
30th ^[2] 54:15 55:19	administer ^[1] 20:16		assured ^[2] 10:24 23:21	
39 ^[1] 2:8	admirable ^[1] 47:5		assured ^[2] 10:24 23:21	
4	admissibility ^[1] 53:13		assured ^[2] 10:24 23:21	
40-something-year-old ^[1] 48:3			assured ^[2] 10:24 23:21	
40s ^[1] 28:25			assured ^[2] 10:24 23:21	
46 ^[2] 74:13 80:16			assured ^[2] 10:24 23:21	
488 ^[1] 81:13			assured ^[2] 10:24 23:21	
496 ^[1] 81:13			assured ^[2] 10:24 23:21	
4th ^[1] 45:10			assured ^[2] 10:24 23:21	
5			assured ^[2] 10:24 23:21	
50 ^[1] 13:2			assured ^[2] 10:24 23:21	
6			assured ^[2] 10:24 23:21	
6 ^[1] 52:8			assured ^[2] 10:24 23:21	
60 ^[1] 29:2			assured ^[2] 10:24 23:21	
60s ^[2] 8:6 16:9			assured ^[2] 10:24 23:21	

Official - Subject to Final Review

<p>basic ^[3] 49:24 68:25,25 basically ^[2] 20:10 68:19 basis ^[3] 17:8 70:17 80:21 beats ^[1] 44:15 become ^[1] 68:2 becomes ^[2] 29:10 79:2 beginning ^[1] 61:22 behalf ^[1] 1:19,21 2:4,7,15 3:8 39:5 100:11 believe ^[4] 60:6 62:5,5 64:23 below ^[6] 1:25 2:12 25:4 47:4 69:21 103:18 bender ^[1] 26:5 beneficial ^[2] 63:11 75:20 benefit ^[2] 67:3 80:7 best ^[2] 71:25 93:17 better ^[1] 93:13 between ^[8] 27:18 34:6,18 44:18 52:3 85:13 90:23 91:3 beyond ^[17] 15:3 16:9 26:20 34:15 37:9,9 38:15 43:15 52:15 54:16 55:1,13 62:25 88:18 94:8 99:4 103:7 beyond-a-reasonable-doubt ^[1] 55:14 Bibas ^[1] 32:3 bifurcate ^[7] 36:25 58:18,22 59:1 74:23,25 80:14 bifurcated ^[6] 58:19 59:9 64:21 74:9 75:14,25 bifurcation ^[25] 4:17 7:17 8:1,7,13,20 59:1 73:8,11,21,24 74:15,16 95:24,24 96:12,16,21 97:8,8,10,21 100:14,18 101:7 bifurcations ^[1] 60:13 big ^[1] 98:2 bigger ^[1] 31:13 Bishop ^[1] 82:8 bit ^[9] 24:17 27:14 28:7 41:1 42:14 60:8 90:11,14,16 blah ^[3] 20:2,2,2 blank ^[1] 68:2 blow ^[1] 88:25 blue ^[1] 15:20 boils ^[1] 39:11 bolster ^[1] 33:23 bolsters ^[1] 30:3 borderline ^[2] 34:19 38:10 both ^[3] 30:9 79:12 81:22 bother ^[2] 68:17,23 bottom ^[1] 72:15 box ^[1] 78:8 brain ^[2] 27:16 63:25 break ^[1] 44:18 brief ^[10] 5:16 15:20,24 31:22 32:16 74:13 87:2,14 101:24 103:17 briefed ^[1] 101:12 briefing ^[1] 34:18 briefs ^[4] 4:8 26:11 32:9 100:23</p>	<p>bring ^[2] 63:21 65:23 broader ^[3] 8:25 77:1,7 broke ^[1] 18:18 Brown ^[1] 41:4 bucket ^[1] 35:11 burden ^[14] 10:13 15:14 42:12 43:5 60:4 62:16 83:7,9,10,12,17,20 84:5 87:6 burglaries ^[2] 25:20 28:24 burglarize ^[1] 46:17 burglarized ^[1] 18:19 burglary ^[1] 77:16 butt ^[1] 29:14</p> <p style="text-align: center;">C</p> <p>California ^[1] 1:18 call ^[3] 12:5,10 54:19 called ^[2] 11:22 35:15 came ^[3] 1:13 15:21 17:15 camp ^[2] 92:23,24 candid ^[1] 77:21 Candidly ^[1] 26:25 Canid ^[3] 4:11 47:5 87:21 cannot ^[1] 15:6 care ^[1] 73:8 career ^[1] 26:3 Carolina ^[5] 41:24 43:24 92:18 93:17 94:9 carve ^[1] 11:14 carveout ^[2] 17:9 36:1 Case ^[74] 3:4,12,12 4:9 5:11,12,16,18 6:6 8:5,8,8 11:13,16 13:15 14:11 16:5,20 17:7 21:13,21 25:6 26:15,17,23 27:5 29:10 31:8,23 32:23 33:18 34:10,14 36:2,12 38:12 39:11 40:3,18,19 45:6,15,23 47:4 56:20 57:16 63:13 66:14,15 71:15 73:20 74:12,13 76:8 80:16 84:4,24 85:2,24 87:1 88:5,15 96:17 97:20,20 99:3,12 101:3,21,23,24 103:17,21,22 cases ^[66] 4:13,13,14 6:12 8:15,17,19,22 9:12,20,20 14:14,20 15:17 16:19,21 19:3,16 26:25 29:17,24 31:20 32:19 33:6 38:11,24 41:3,4 43:23 45:7 50:13 53:11 59:3 60:9,11 61:19,24 62:1 65:8,15 66:22 67:12 72:15 73:12,25 76:4,4,5 80:12,12,17 83:20 87:12,25 88:1,2,6 92:19 93:15 94:19 96:22 98:25 99:1,10,17 102:24 categorical ^[3] 14:22 88:25,25 category ^[1] 14:2 cause ^[1] 30:23 centuries-old ^[1] 70:6 Century ^[2] 12:23 82:9 cert ^[1] 99:12</p>	<p>certain ^[5] 21:22 28:13 64:25 77:19 102:25 certainly ^[3] 80:3 85:1 90:24 challenge ^[1] 28:10 challenged ^[2] 86:23 95:13 challenges ^[2] 29:7 95:15 chance ^[1] 44:17 change ^[2] 33:21 78:1 character ^[1] 39:15 charge ^[3] 4:17 33:14 48:22 charged ^[6] 19:8 36:11,12 48:20 49:18,25 charges ^[1] 47:19 charging ^[6] 18:17,20,24 53:14 54:13 66:9 chase ^[1] 11:7 CHIEF ^[31] 3:3,9 7:11,14 18:3 24:20 26:9 27:11 30:7 33:25 34:3 39:1,7 53:5 58:6 60:15 62:10 65:5 69:15,18,22 73:7 75:2 97:16,18,18,21,24 99:20 100:6 103:14 choice ^[3] 27:23 49:11 70:3 choose ^[1] 59:3 chooses ^[1] 45:3 chose ^[2] 49:14 97:23 chosen ^[1] 47:25 Circuit ^[1] 57:16 circuits ^[2] 56:8 60:8 circumstances ^[3] 46:9 80:25 96:13 cite ^[4] 74:12 80:16 87:1 97:20 cited ^[6] 49:20 73:13,19 84:4 85:24 99:11 cites ^[1] 32:4 city ^[1] 25:10 civil ^[1] 8:22 clarify ^[1] 65:8 clarifying ^[1] 62:13 classic ^[1] 69:25 clause ^[13] 3:22,25 4:12 5:14 26:1 33:8 49:12 69:24 70:12 71:12,17 72:14,16 cleaner ^[1] 40:5 clear ^[17] 3:11 5:13 14:21 29:21 41:9,22 43:12 45:20 48:21 49:17 57:13 81:13 84:3 90:4 91:3 99:2,4 clearly ^[5] 44:17,22 47:16 52:1 80:5 client ^[1] 28:19 close ^[1] 80:13 closer-in-time ^[1] 93:12 closing ^[1] 74:20 co-defendants ^[2] 102:22,23 cobbled ^[1] 13:19 code ^[1] 38:15</p>	<p>coherent ^[1] 24:6 collateral ^[1] 81:24 colloquies ^[3] 19:12,17,20 colloquy ^[5] 19:14 39:9 42:22 53:15 67:6 colorable ^[1] 65:16 come ^[10] 14:12 23:18 36:20 37:8 38:6 40:25 41:7 69:10 94:20 102:3 comes ^[9] 17:21 27:9 29:13,16 44:15 67:5 79:16 86:7 87:9 comfortable ^[1] 68:13 coming ^[5] 38:11 62:6 68:5,20 83:22 commend ^[1] 47:3 commentary ^[1] 10:24 commercial ^[1] 25:21 commit ^[7] 46:18,19 51:8,9 77:15,16,17 committed ^[13] 9:8 21:11 30:13 37:12 56:16,21,24 63:15 64:16 74:5 76:23 102:13 103:8 committing ^[1] 36:15 common ^[16] 15:25 22:4 46:16 51:24 66:16,17,19 84:14,18,21 94:2,5 95:2,11,19 101:13 common-sense ^[3] 55:9 56:6 100:22 compact ^[2] 94:15 95:10 comparable ^[1] 86:18 compared ^[1] 31:18 comparison ^[1] 41:5 completely ^[1] 95:25 complex ^[1] 35:23 complexity ^[1] 36:10 complicated ^[1] 56:5 component ^[1] 90:1 components ^[1] 89:11 comprise ^[1] 61:3 concede ^[2] 70:19 94:4 conceding ^[1] 56:9 conception ^[1] 35:10 concern ^[4] 4:9 32:3 36:7 91:22 concerns ^[2] 14:25 31:3 conclusion ^[2] 56:15 69:4 conclusions ^[1] 55:10 concurrence ^[1] 8:3 conduct ^[8] 3:20 13:24 14:9 15:4 26:20 34:14 43:18 47:8 conducted ^[3] 18:8 25:19 64:20 conducting ^[1] 29:7 confess ^[1] 27:20 confessed ^[1] 57:18 confession ^[2] 61:11,14 confidence ^[1] 50:15 confident ^[1] 60:13 Congress ^[4] 37:11 57:14 74:6 77:11</p>	<p>connects ^[1] 55:21 consensus ^[1] 71:20 consider ^[3] 5:18 22:24 23:19 consideration ^[1] 59:12 considered ^[1] 51:1 consistent ^[3] 70:4 83:11,12 constantly ^[1] 52:12 Constitution ^[7] 10:21 70:4 82:22 83:23 84:2,20 95:6 constitutional ^[14] 9:20 10:14 31:3,5,7 71:1 86:24 87:24 88:3 92:10 95:14 96:11,16 100:24 constraints ^[1] 82:16 construed ^[2] 3:23 14:23 contemplate ^[1] 31:1 contemporaneous ^[1] 93:12 context ^[8] 28:5 67:10 73:15,16,20 92:8,8 94:3 contexts ^[1] 73:13 continued ^[1] 100:21 contradict ^[1] 94:24 contradicts ^[1] 84:7 contrary ^[4] 55:20 59:24 77:14 87:4 conversation ^[2] 101:10 102:10 convict ^[1] 36:14 convicted ^[6] 3:16 36:15 74:19,21 98:2,4 conviction ^[22] 5:25 6:2,3 14:4,5,6,8 15:21 17:22 18:12,13 29:25 34:25 35:13 37:10 38:16 41:11 43:22 50:3 53:14 72:11 90:1 conviction's ^[1] 39:19 convictions ^[8] 4:1 17:15 25:7 48:1 75:11 77:6 89:11 99:14 convince ^[1] 58:4 cool ^[1] 52:3 cooperate ^[1] 102:21 corner ^[1] 92:19 correct ^[12] 30:15 31:5 40:13 41:14,19 61:8,22 62:21 71:9 82:23,24 97:17 correctly ^[1] 83:18 correctness ^[1] 43:16 couldn't ^[1] 60:23 counsel ^[10] 18:4 27:24 39:2 53:6 69:16 71:24 78:22 99:21 100:8 103:15 Count ^[1] 20:1 counts ^[2] 65:9,13 couple ^[7] 57:11,11 73:10 93:22 100:13 101:9 102:9 course ^[12] 8:17 21:10 29:11 30:16 38:20 46:14,20 47:1,11 73:22 75:3 101:22 COURT ^[104] 1:1,14 3:10,</p>
---	--	--	--	--

Official - Subject to Final Review

13,17,22 4:5,22,23 5:5,9, 10,12 6:11 7:3,5 8:4,7,9 11:14,22 14:19,21,25 17: 13,17,20 20:8,11,13 21:12 24:13,24 26:17 29:12,12, 22 31:19 35:6 39:8 40:1, 14,17,18 41:4,9,19 42:5,5, 21,22 43:11,20 44:5 45:3, 25 46:15 47:8,16 51:1 56: 1 57:13 61:20,22 64:9 67: 8,15 68:8 69:5,23 70:4 71: 2,9,19 72:25 76:8 81:15 83:22,22 84:15,17 85:25 86:14 87:19,23 88:2,8,23 89:13,14,18 91:9,24 95:13 96:15,17,18,20 100:16 101: 7,18 102:3 103:12,16 Court's [20] 4:24 5:17 7:5 14:19 17:12 20:21 21:9 29: 15 35:16 39:25 45:4 64:9 66:24 70:2 71:3,23 87:2 95:15 101:13 102:6 Court-appointed [3] 1:24 2:11 69:20 courts [19] 4:18 16:22 30: 11 35:6 43:18,18 45:16 61: 14 67:18,24 70:9 71:21 81: 8,22 86:24 91:9 95:14 101: 16,17 cover [2] 53:19 100:13 covered [2] 26:21 41:8 creates [1] 11:21 crime [16] 3:14,14 28:1 34: 15 35:2 36:12,12,17 51:8,9, 9 65:24 74:3,5 97:2,6 crimes [31] 28:21 36:14,21 47:14,15 48:17 49:13,14 50:8 51:12 55:3 59:13,14 64:8,11 66:8,8 78:4,17 81: 12,16,21 91:4,4 92:1,9 99: 2,5 102:12,14 103:8 criminal [23] 4:8 8:21 21: 14 22:15 23:17,21,22 24:9 25:23 30:22 32:7 42:25 46: 16 60:10 73:12,16 77:6,13, 13 80:1,4,8 82:8 critical [1] 83:16 crystal-clear [3] 44:22 45: 6,15 curiae [4] 1:24 2:11 69:20 103:17 current [2] 67:15 68:10 currently [2] 38:17 41:3 cut [3] 11:7 12:14 13:21	22 63:25 64:1 days [14] 23:7 25:7,8,20 46: 14 47:1,10 50:10 52:3 66: 10 68:12 99:6 102:13 103: 1 deal [2] 27:2 76:16 deals [2] 32:16 75:9 death [1] 73:14 debate [3] 85:1 99:25 100: 3 debt [5] 25:18,19 46:7 52: 10,10 decades [3] 70:9 71:20 90: 17 decide [5] 26:22 52:14 74: 23 80:24 101:17 decided [4] 16:21 67:9 83: 18 101:1 decision [16] 6:16 33:22 44:1 48:14 68:10 72:17 87: 3,3 88:8 89:13,14 92:22 93:6 95:16,17 100:20 decisional [1] 48:19 decisions [6] 43:15 64:10 77:5 93:2,6 101:15 decisive [1] 35:18 deep [1] 82:19 default [3] 83:21 94:2,5 defeats [2] 79:3,6 defend [1] 33:1 defendant [37] 3:15 4:15, 21 9:8 27:8 32:25 33:11 36:14 41:11 47:13 49:10 51:7,19 52:16 56:21,23 58: 3 60:20 62:2 64:15 65:2, 10,16 66:11,22 72:12 74:5, 6,16 75:13 76:23 78:20 79: 9,10,21 80:23 97:22 defendant's [8] 3:19 12:19 19:19 22:2 59:3 63:14 66: 20 81:18 defendants [21] 4:7 7:24 9: 12 32:8 33:13 63:9 64:6 68:19 71:22 75:1,4,8,24 76:15 80:8,15,18,22 82:5, 12 91:22 defenders [1] 80:4 defense [4] 4:8 62:6 75:17 80:2 defies [1] 27:21 define [1] 23:22 defined [1] 74:6 degree [1] 45:20 demand [1] 84:17 demanding [1] 91:24 demands [1] 43:5 demonstrated [1] 39:10 denied [3] 27:23 74:15 97: 22 deny [2] 90:12 96:12 denying [1] 81:2 depart [1] 16:10 departing [1] 89:16 Department [1] 1:20	depend [3] 67:14 68:7,8 Deputy [1] 1:20 Descamps [11] 5:13 9:19, 24 14:11,17 26:19 30:21 31:1 87:11,17 102:18 describe [1] 43:8 described [1] 57:22 describing [1] 25:15 description [1] 68:14 descriptively [1] 89:21 despite [2] 85:16 99:13 determination [5] 7:18 21: 25 43:19 61:4 70:1 determinations [1] 89:2 determine [2] 22:1 44:6 determined [1] 65:3 development [1] 47:11 deviate [1] 95:11 dice [2] 12:6 15:13 dictate [1] 7:7 dictates [2] 3:11 16:18 differ [1] 55:8 difference [3] 34:9,12 98:3 differences [2] 34:17 56: 13 different [47] 9:11 11:4 13: 13 18:1 21:12 22:14 23:7, 7 25:25 28:20 31:11 33:8 36:8 39:12 44:2,10 45:18 47:14 48:17 49:10,15 51: 13,16 54:10 55:2,4,19 56: 15 57:3 63:18 64:22 65:10 66:10 68:12,18,22 69:7,10 72:2 78:16 81:25 91:15 92: 4,8 95:2 99:13 102:14 differently [4] 61:12 68:20 81:10 82:11 difficult [3] 29:10 59:19 63: 2 DIG [1] 23:23 direct [2] 16:7 72:6 directly [4] 3:18 4:3 72:7 84:12 disagreed [2] 29:12,13 discern [1] 34:18 discharged [1] 103:19 discretion [12] 33:9 77:20, 25 78:14 85:8 86:7 87:8 95:25 96:2,7,8 100:20 discretionary [7] 7:18 73: 19,21,23 77:5 97:11 100: 20 discussed [1] 86:9 disempowered [1] 39:21 dispute [2] 15:25 64:14 disputes [1] 4:15 dissent [1] 29:9 distance [1] 30:14 distinction [1] 34:6 distinguished [1] 77:9 distinguishing [1] 81:14 district [3] 39:21 43:17 66: 24 divorced [1] 70:25	docket [1] 60:11 document [3] 20:8 53:15 54:14 documents [14] 18:17,21, 24 29:22 50:13,18 51:5 53: 20 54:11 55:8 66:9 102:17, 19,20 doing [1] 23:24 36:25 37: 1,2 39:21 55:12 62:19,25 70:17 89:1 91:10 done [4] 13:19 31:19 33:14 62:15 double-down [1] 88:24 doubt [11] 27:22 52:15 54: 17 55:1,13 62:25 75:24 88: 19 94:8 99:4 103:7 down [6] 39:11 54:12,21 85:25 86:14 92:3 drafted [1] 37:11 drag [1] 48:1 draw [1] 5:21 drew [1] 91:2 drug-slinging [1] 74:21 drugs [1] 44:14 Druthers [1] 52:5 due [1] 56:7 during [2] 46:19 47:11 dwell [1] 23:2 dynamics [2] 32:17 33:21	endorsed [2] 8:4,7 endorsing [1] 95:16 enforce [1] 70:14 engraft [1] 31:24 enhance [1] 28:24 enhancement [2] 33:15 59:12 enhancements [3] 38:17 70:7 79:12 enhancing [1] 78:4 enormous [2] 77:24,25 enough [9] 13:8 26:22 42: 8 46:7 54:25 68:14 79:14 95:4 103:9 enter [1] 59:4 enterprise [2] 24:9 29:11 entire [2] 6:14 50:24 entirely [2] 26:13 65:1 episode [9] 21:14 22:15 23: 18,22,22 24:5,9,17 25:24 ERIC [3] 1:20 2:6 39:4 ERLINGER [4] 1:3 3:5 64: 7 102:20 erroneously [1] 51:2 error [27] 16:15,19,22 24: 25 27:19,20,22,25 28:6,8, 16 29:8 30:5,5 46:5 47:4,7, 17 51:1 57:18 61:11,15 67: 7 101:10,23,25 103:5 escaped [1] 72:12 eschew [1] 4:5 especially [1] 25:24 ESQ [4] 2:3,6,10,14 ESQUIRE [2] 1:18,23 essentially [3] 57:10,18 72: 16 establish [4] 10:13 16:23 55:6 95:5 established [6] 6:9,10 10: 21 12:7 37:10 76:21 establishment [1] 57:1 establishments [1] 25:21 even [34] 6:18 8:15 15:1,20 16:25 28:5,21 29:4,7 30: 25 31:22 41:17 43:23 46: 25 50:9 55:10 57:21 61:6 64:12 65:13 68:9 69:7 71: 8 87:5,6 89:22 90:12 92: 22 94:14 96:19 100:16,19, 24 101:20 evening [2] 44:15 56:23 event [2] 24:7 44:7 events [1] 102:7 everybody [2] 47:10 59:19 everything [1] 63:19 Evidence [17] 20:12 36:20 37:8,17 38:2 42:4 58:4 59: 13 64:12 65:23 71:25 74:2, 12 77:8 93:12 97:1 98:11 exact [7] 26:11,14,17 54:12, 21 56:2 69:8 exactly [3] 3:23 92:5 97:13 example [8] 44:8 46:17 53: 18 55:17 68:12 69:6 89:9
--	--	--	---	--

E

each [1] 90:11
earlier [6] 9:4 42:6 53:2 67:
22 79:8 97:9
early [5] 12:8 72:10,21 78:
13 93:7
easier [1] 55:10
easily [1] 20:24
easy [3] 14:10 31:24 65:24
effect [2] 31:9,14
eight [7] 25:7,8 78:11 79:4
85:19,20 102:13
eight-day [3] 102:14,15
103:1
Eighth [1] 57:16
either [2] 76:15 88:8
element [10] 28:1 32:6 33:
9 35:2 42:24 51:2 73:4 74:
8 78:14 97:5
elements [16] 3:15 11:16,
20 15:3 17:23 21:19 26:21
34:15 70:19 74:3 78:5 80:
23 85:17 86:21 89:3 97:2
elements-only [4] 70:23
88:16,24 89:7
enact [1] 70:13
enacted [1] 86:20
enacting [1] 85:13
encapsulated [3] 89:10,
23,24
encompass [2] 44:3 50:25
end [6] 32:21 42:3 79:18 88:
21 89:8 90:6
endorse [1] 4:22

Official - Subject to Final Review

<p>99:3 exception [13] 11:14,23 12:2,6,10 26:12 29:23 34:25 61:25 70:22,22 76:25 79:3 exceptions [2] 53:19 79:1 exchange [1] 33:15 executes [1] 26:6 exist [1] 21:7 existed [1] 90:17 existing [1] 31:25 expanded [1] 51:16 expect [3] 58:1,22 65:15 experience [3] 22:4 24:6 66:4 expert [1] 98:12 explain [1] 45:25 explained [2] 17:20 56:6 explaining [1] 57:14 explains [1] 90:6 explore [1] 27:14 exploring [1] 39:18 express [1] 8:10 expressed [1] 15:2 expressly [2] 56:6 61:23 extend [1] 42:23 extended [1] 11:19 extension [2] 43:4 92:3 extent [4] 48:12 53:20 66:7 69:2 extremely [2] 73:12 77:8</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faces [1] 42:14 fact [28] 3:25 4:13 5:24 8:22 11:20 15:16 16:1,11 17:5,14,19,21 18:1 19:7 35:13 37:13 38:5 48:7 50:16 60:1 64:4 70:11 76:12 81:23 91:8 95:2 97:5 102:19 factor [1] 23:2 factors [2] 21:15 43:1 facts [42] 7:8 15:3 22:16,21,23 26:25 27:4,7,10 34:21 35:7 36:9,11,13,17,20 38:15 50:12 60:20 67:25 69:11 70:21 71:4,6,12,14,17 78:4,9,16,19 88:18 89:2,9,23 91:3,4,10,25 92:4,9 94:6 factual [3] 3:24 51:17 102:10 faded [1] 64:3 fail [1] 90:15 fair [8] 6:22,22 7:3,3 32:25 46:10 80:3 94:24 fairly [3] 49:5,25 52:8 fall [2] 12:1 89:7 falls [1] 5:14 far [9] 29:25 39:9 43:24 45:22 52:8 61:25 84:16 86:5 89:14 favor [3] 32:17 33:22 67:21 favorable [2] 6:17 7:16 features [1] 42:25</p>	<p>federal [14] 8:8 20:11 33:7 38:15,22 41:6 60:10 70:9 71:20 76:2 77:13 84:24 96:6 101:3 feed [1] 22:16 feel [1] 76:11 FEIGIN [63] 1:20 2:6 39:3,4,7 40:7,10 41:15 42:13,19 44:21 45:1,19 46:4,25 47:2,21 48:4,11 49:1,4,8,17,22 50:2,19,24 51:15 52:20 53:1,4,17 54:23 55:15 57:4,9 58:12,16,19,23 59:8,21 60:23 61:3,9,17 62:12,21 63:4,23 64:23 66:2,6 67:2,14,20 68:7,23 69:10,13,17 72:8 76:2 fell [1] 78:9 felon [4] 74:19,22 98:2,4 felon-in-possession [2] 32:19 33:5 felonies [1] 60:21 felony [3] 71:11 89:2 91:10 few [11] 13:22 18:7 25:20 26:24 34:19 38:14 46:6 47:1 56:9 60:18 88:13 fewer [2] 8:16,16 figure [1] 36:22 filed [1] 4:8 fill [1] 68:1 find [26] 3:14,21 11:15 20:1 21:19 25:23 35:3 41:9 43:20,21 46:11,22 50:7 58:2 64:12 70:18,20 71:4,6,12,16 88:11,18 89:2 98:18 99:13 finding [19] 8:23 13:17 15:16 17:5,14,19 22:13,17,20 31:12,16 37:13,24 38:2,5 39:13 70:1,12 72:10 findings [8] 13:23,24 14:2 15:23 85:10 86:1 94:1,6 fine [1] 45:2 fine-grained [1] 44:11 finish [1] 92:15 firearm [1] 48:3 firearms [1] 61:6 first [21] 3:4 7:4,4 14:15 47:3,7 48:4 50:19 52:1 54:24 62:2 72:7 73:11 74:8 75:20 77:11,12 88:14 93:23 100:13 101:17 first-choice [1] 59:23 FISHER [93] 1:18 2:3,14 3:6,7,9 5:1,4,9,22 6:18,21,25 7:2,21 9:5,22 10:5,8,11,18 11:2,5 12:1,13,16,22 13:1,4,7,13 15:10,19 16:16,18 17:11 18:15,20 19:3,9,15,19,23 20:3,6,9 21:1,7 22:5,11 23:9,12,15,24 24:4,10,22 25:1,5,13 26:16 27:17 28:3,14 29:6 30:16,18 31:6 32:12,15 34:9,12 35:12,</p>	<p>21 36:24 37:4,7,18,21 38:1,9 42:22 46:6 53:11 59:2 62:4 67:21 83:6 84:4 88:15 100:9,10,12 fit [3] 36:4,4,5 five [1] 77:16 flag [1] 72:4 flips [1] 84:5 follow [2] 32:17 33:21 following [1] 56:25 force [1] 81:2 forced [3] 70:22 74:17 97:22 forces [2] 75:8,9 forfeiture [2] 8:21 73:16 forget [1] 64:1 Forgive [2] 25:13 101:19 form [1] 17:24 formed [1] 94:15 forth [2] 24:13 62:14 forward [1] 16:25 found [11] 16:11 19:11 29:18 38:18 42:5 44:7,23 46:13 54:20 88:18 91:9 founding [2] 73:2 85:3 four [15] 12:17 13:3,4,7,20 56:10 58:10 61:7 64:19 79:4,5 85:9,11,11 93:23 frames [1] 65:14 frankly [3] 8:12 40:2 58:24 fraud [1] 21:21 friend [2] 41:1,20 friends [1] 98:6 front [5] 13:14 42:4 44:1 72:4 76:17 front-line [1] 70:17 fueled [1] 31:2 fundamental [2] 91:12 95:5 fundamentally [1] 51:17 further [5] 15:1 38:20 99:23 100:7 103:12 future [6] 11:11 33:12 35:5 67:13,24 68:4</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gambler [1] 66:17 gambling [2] 25:19 52:11 garage [1] 61:8 Gaudin [5] 10:1 11:12,20 12:3 84:4 gave [1] 77:19 General [10] 1:20 11:15,22 34:24 54:9 57:17 68:14 69:2 79:3,6 generally [6] 24:25 45:21 59:1 78:3 80:20 85:17 gently [1] 8:7 geographic [1] 21:15 Georgia [1] 99:12 give [1] 21:4 given [3] 21:3 36:5 49:4 gives [1] 33:10 go-round [1] 74:8</p>	<p>GORSUCH [32] 17:2 27:12,13,18 28:4,15 46:24 47:2,23 48:8,24 49:3,6,9,21 50:1,4,22 51:6 52:13,25 53:3 60:16 61:12 92:13,15,17 93:1,9,16,19 94:13 Gorsuch's [2] 30:11 103:4 got [5] 45:5,21 50:11 57:18 68:19 government [41] 5:20 6:1 11:16 16:14 18:10,25 28:22 33:12 47:3 48:9 57:17 64:20 68:17 70:15 71:10 73:23 74:1,1,14 76:1,3 80:7,13 83:16,19 84:5 85:15,22,23 86:2 89:12 90:24 94:23 96:21,24 97:4 98:24 99:4 101:23 102:2 103:6 government's [8] 29:20 33:10 52:7 61:16 89:9,21 90:2 101:24 grabbed [1] 57:1 grabbing [1] 56:22 Graham [1] 87:3 grand [1] 86:20 grant [1] 31:7 grapple [1] 21:6 grateful [1] 103:20 gravely [1] 71:22 great [3] 46:1,2 87:17 ground [1] 86:1 grounded [2] 3:17 31:8 grounding [1] 89:18 grounds [3] 45:3 86:24 95:14 guarantee [2] 76:7,10 guess [11] 36:15 45:12 59:17 61:11 65:14,20 85:5 90:21 93:22 97:23 99:7 guidance [1] 38:21 guilt [2] 78:18 81:18 Guilty [6] 4:10 29:5 33:13 47:10,20,25 gun [1] 35:14 gun-toting [1] 74:21 guns [2] 61:7,7</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hand [3] 27:21,24 31:15 handful [6] 4:14 8:14,19 13:22 31:10,16 handle [1] 59:5 hands [1] 33:10 happen [3] 38:4 67:12 99:16 happened [7] 36:21,22 50:8,9 56:2,3 65:17 happens [2] 27:14 73:21 happy [2] 4:24 39:25 hard [3] 29:15 60:9 97:12 hard-pressed [1] 20:23 harder [5] 18:21 63:19 64:11 98:17,22 harm [1] 4:7</p>	<p>harmful [2] 9:12 12:12 harmless [27] 16:15,18,22 24:24 27:19,25 28:6,8,16 29:4,8 30:2,4,5 44:23 46:5 47:6,17,18 50:15 52:15 67:7 68:1 101:10,23,25 103:5 harmlessness [3] 45:2 67:9,24 HARPER [40] 1:23 2:10 69:18,19,22 72:3 73:10 75:5,23 77:21 79:25 80:3 81:4 82:6,24 83:3,15 84:25 86:17 87:16,23 88:13 90:21 91:16,19,23 92:21 93:3,14,18,22 94:17 96:1,5,14 97:17 98:10,20 100:2 103:16 Harrell [3] 74:12 80:16 97:20 he'll [1] 28:25 hear [2] 3:3 58:9 heard [1] 53:2 hearsay [3] 18:22 53:19,24 held [3] 3:13 70:5 88:2 hello [1] 65:2 help [1] 80:22 hide [1] 74:7 high [2] 33:6 79:18 highly [2] 21:20 102:18 hint [1] 7:19 historical [17] 9:2,14 10:5,17,22 42:4,12 43:13 71:25 72:6,24 73:1 76:20 77:8 78:6 82:3 84:6 historically [1] 99:25 history [27] 9:23 10:1 11:8,17 12:8 13:9 14:15 15:11,15,16 16:8,11 17:4 43:7 50:3 77:22,23 78:3,25 79:1 83:1 84:10,12,13 85:6 91:14 92:18 Hmm [1] 37:25 holding [4] 30:23 32:17 51:18 66:24 holdings [1] 61:18 home [1] 44:15 Honor [30] 41:15 42:13 45:1 47:21 48:4,11 49:18 50:20 51:15 52:20 53:17 54:24 55:15 57:9 58:20 59:22 60:23 61:9,17 64:24 66:2 67:15 68:24 73:11 77:22 80:4,12 84:8 94:17 100:2 hopefully [1] 32:22 house [1] 18:19 However [1] 69:5 Hudson [2] 92:22 93:4 hundred [1] 50:15 hundreds [2] 81:8 82:15 hurt [1] 79:20</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea [4] 21:5 51:22,23 96:24 identified [3] 8:2 12:17 78:</p>
---	---	--	--	---

Official - Subject to Final Review

<p>12 identifies [1] 16:1 identify [2] 26:7 35:7 identifying [1] 26:3 identity [2] 89:3,24 illustrated [1] 42:22 illustrates [1] 71:15 imagine [2] 25:17 35:15 impermissible [1] 96:12 important [6] 9:23 11:10 16:4 23:4,5 82:20 impose [2] 70:7 71:20 imposed [1] 4:2 imposing [1] 60:4 impossible [1] 38:13 imprisonment [1] 77:17 in-between [1] 34:19 incentive [1] 75:4 incentivize [1] 63:8 include [1] 7:8 inconsistent [1] 70:25 incorporated [4] 67:11 68: 3 84:20 95:6 increase [2] 3:19 32:24 increases [2] 11:21 12:19 indicates [1] 43:7 indictment [10] 41:25 48: 22 65:9 85:16,18 86:4,22 94:7 95:21 102:25 indictments [2] 29:13 66: 7 indisputable [1] 80:11 infer [2] 55:17 66:11 inference [1] 55:1 information [9] 28:19 48:9, 25 49:2,19 66:8 85:14 86: 19 95:13 informed [3] 47:24 48:13 60:1 inherent [2] 6:2 14:7 initial [2] 37:10 95:10 innovation [1] 16:9 inquiries [1] 72:1 inquiry [16] 3:24 16:5 37: 22 39:14 44:3,10 51:17 55: 6 56:5 60:2,3 64:4 68:15 72:2 73:1 91:10 insist [1] 68:11 instance [1] 101:17 instead [3] 12:18 13:18 16: 12 instruct [3] 27:25 54:6 57: 24 instructed [6] 20:1,18 22: 24 53:23 68:11 69:7 instruction [5] 20:23 21:2, 4 27:23 67:16 instructions [7] 19:24 20: 7 30:10 53:15 67:12 68:4 69:3 integral [1] 6:1 intelligible [1] 20:24 intended [1] 43:1 intent [1] 75:18</p>	<p>interest [1] 41:2 interpret [1] 91:6 interpreting [3] 84:12,16 93:10 interrupt [1] 10:7 intervening [1] 48:18 introduce [4] 18:13,16 59: 13 63:18 introduced [2] 19:6,7 invalidates [2] 83:23,24 invariably [2] 45:23 68:9 inveterate [1] 66:17 involve [1] 41:5 involved [2] 44:9 97:20 involves [1] 24:5 involving [1] 39:14 isn't [2] 53:24 80:19 issue [18] 4:12,16 5:24 16: 25 20:21 25:6 42:8 52:21 81:24,25 82:13,14 89:5 99: 11 100:17 101:12 102:1,6 issues [4] 6:7 12:9 81:17 98:22 It'll [1] 45:7 itself [13] 11:22 15:21 22: 22 24:13 29:23 38:16 46: 15 61:20 62:3 82:22 89:5 91:8,24</p> <p style="text-align:center">J</p> <p>JACKSON [32] 15:9 17:1,3 34:4,5,11 35:4,19,22 37:3, 6,14,19,20,25 38:8,25 40: 22 41:4 65:6,7 66:5 67:1,4, 19,23 68:16 69:9,12 88:9 98:7 102:24 JEFFREY [5] 1:18 2:3,14 3: 7 100:10 judge [34] 3:18 8:23 12:18 13:18 15:6 16:12 23:1,8, 13 32:3,24 35:7 37:23 38: 3 39:21 44:2 50:14 51:3 52:22 56:18 57:7 60:2 65: 11 74:15 77:20 79:14,17 80:25 93:25 95:25 96:2,8 98:17,18 judges [26] 3:13 7:19 38: 18,22 54:3,7 55:7 62:18 69:25 70:6,18,20 71:4,11, 16,25 72:16 74:24 77:4,24 79:13 85:9 86:2 88:17 89: 1 93:25 judgment [10] 1:25 2:12 18:13 53:14 69:21 74:4 79: 23,24 80:6 103:18 judgments [1] 22:2 judicial [7] 17:14,19 28:12 70:11 89:10,23,24 juries [8] 9:9 21:19 62:25 69:7 71:5 88:18 93:25 99: 7 jurisprudence [2] 17:12 35:17 jurors [1] 75:14</p>	<p>jury [107] 3:21 7:7 8:23 9: 13 11:13,15 12:10,12,18 13:18 15:5,17,22 16:12 17: 5,24 19:24,25 20:3,6,18,24 21:1,4,5,10 22:1,24 23:5 25:22,23 28:1,10 29:8,18 31:24 35:3,8 36:9,16,19 37:23 39:22,23 42:3 44:7 46:9,12,22 50:7,11 51:3 53:15,21,22 54:6,24 55:11, 16 56:9,19 57:8,24 58:1,2, 4 59:11,14,16 63:9,17 64: 21,22,24 65:1 66:10 67:11, 16 68:4,11,17 69:3 74:3,4, 8,9,18,20 75:11 76:17 78:6, 19 82:11 83:14 86:18,20 94:7 95:21 96:25 98:1,1,9, 11,15 99:12,25 103:7 jury's [3] 36:25 38:1 55:1 Justice [267] 1:21 3:3,9 5:1, 7,19,22 6:8,19,20,23,24 7: 9,11,13,14,15 8:2,13,25 9: 6 10:4,6,9,12,19 11:2,3,25 12:4,13,15,20,24 13:2,6,10, 12 15:9,10,12 16:3,13,17 17:1,2,3,7 18:3,5,6,7,16,21 19:1,5,14,17,21,24 20:4,8, 17 21:3,8,23 22:7,12 23:1, 10,14,20 24:1,8,19,20,20, 22 25:2,10,16 26:8,9,9,10, 24 27:11,11,13,18 28:4,15 29:9 30:3,7,9,9,10,17,20, 22 31:17 32:2,13 33:24,25, 25 34:2,3,3,5,11 35:4,19, 22,23 37:3,6,14,18,20,25 38:8,13,25 39:1,8 40:4,8, 22,22 41:13 42:7,11,16 44: 19,24 45:11 46:24 47:2,23 48:8,24 49:3,6,9,21 50:1,4, 5,22 51:6,10 52:13,25 53:3, 5,7,8,9 54:1 55:12 56:12 57:6,22 58:5,6,6,8,9,10,13, 17,21 59:6,17 60:15,15,17, 18 61:2,5,10,12 62:8,10,10, 12,14,22,24 63:22 64:18, 19 65:4,5,5,7 66:5 67:1,4, 6,19,23 68:16 69:9,12,15, 18,23 71:24 72:3 73:7 75: 2,12 76:19 78:22,23,24 80: 1,19 82:2,14,17,17,18,25 83:4 84:22 86:10 87:10,20 88:9 90:8 91:13,18,21 92: 11,13,14,15,16,17 93:1,9, 16,19 94:13 95:23 96:3,10 97:15 98:5,5,7,16 99:19,20, 22,24 100:4,6,23 102:24 103:4,14 justified [2] 80:21 82:4</p> <p style="text-align:center">K</p> <p>Kagan [15] 26:9,10,24 38: 14 40:23 58:8,9,13,17,21 59:6,17 64:19 80:19 90:8 Kansas [3] 41:24 94:10,19</p>	<p>KAVANAUGH [53] 8:25 9: 6 10:4,6,9,12,19 11:2,3,25 12:4,13,15,20,24 13:2,6,11, 12 30:8,9,17,20 31:17 32:2, 13 33:24 41:13 42:7,11,16 60:17,18 61:2,5,10 62:8 78:23 82:2,17,25 83:4 84: 22 91:13,18,21 92:11,14, 16 95:23 96:3,10 100:24 Kavanaugh's [1] 15:12 keep [1] 37:15 key [1] 10:9 kicker [1] 32:20 kidnapping [2] 46:19,20 kind [20] 3:24 12:6 13:8 17: 17 22:23 26:6 27:7,10 29: 21 31:12 36:3 44:8 45:16, 55:16 63:6 64:4 65:11 66: 23 68:14 98:8 kinds [8] 8:21 13:23 21:18 27:3 46:8 57:20 65:15 102: 17 knife [1] 56:24 knocked [1] 64:8 knowing [1] 49:25 knows [2] 49:11 64:15</p> <p style="text-align:center">L</p> <p>lacking [1] 93:7 laid [3] 15:19,23 100:22 land [2] 14:16 70:24 landing [1] 90:7 language [4] 21:9 65:11 87:13,16 large [1] 55:9 largely [2] 60:1 67:21 last [4] 32:2 33:17 52:4 89: 19 later [5] 46:20 75:21 93:2 94:19,20 Laughter [6] 7:1 24:3 40:9 42:18 46:3 87:22 law [17] 15:25 19:11 27:5 30:15 33:21 38:18 48:19 53:12 82:8 84:14,18,21 94: 3,5 95:3,11,20 laws [1] 38:24 lawyers [1] 75:15 lays [1] 22:23 leading [1] 82:8 leap [1] 84:19 least [13] 17:21 35:9 42:8 43:21 50:11 66:10 71:10 73:25 76:2 78:11 85:18 89: 20 103:10 leave [4] 40:20 101:14,15 102:8 leaves [1] 4:4 leaving [2] 102:5,5 led [1] 94:15 left [2] 39:22 43:8 legislative [2] 70:3 87:8 legislature [4] 43:1,8,9 95: 22</p>	<p>legislatures [6] 42:9 73:3 78:13 85:8 86:7 95:11 legitimate [1] 27:9 less [2] 60:10 90:4 letting [1] 16:11 level [2] 35:8 84:18 leverage [1] 76:14 lifetimes [1] 47:12 lighter [1] 79:14 likely [1] 65:19 limited [1] 36:18 limits [1] 24:12 line [8] 5:21 27:18 35:24 78: 2 88:22 91:3,11 101:22 lines [1] 77:22 listed [2] 28:20 48:9 literally [1] 43:4 litigated [5] 4:12 26:13 27: 8 33:18 52:21 litigation [2] 38:4 44:1 little [10] 8:10 24:17 27:5, 14 42:14 60:8 61:12 87:15 90:4,11 loading [1] 15:13 loads [1] 12:6 location [1] 39:15 locations [1] 71:13 long [6] 26:4 43:7 49:5 59: 25 61:7 64:6 longer [1] 48:20 look [17] 9:25 10:16,17 11: 12 28:8 29:22 33:4 50:20 52:6 58:14 59:7,8 67:25 82:7 83:1,6 84:23 looked [1] 100:16 looking [7] 51:19 84:10,11, 11,13,14 92:17 looks [1] 17:18 lose [1] 96:3 lot [7] 5:23 11:5 28:18 59:2 75:12 99:24 103:2 lots [1] 66:22 Louisiana [3] 41:23 92:21 94:9 love [1] 75:13 low [1] 79:17 lower [5] 16:21 24:24 45: 16 101:16,16</p> <p style="text-align:center">M</p> <p>made [12] 13:17 15:5,6 22: 14 42:21,23 48:19 61:4 67: 8 80:6 81:13 90:15 Maine [3] 42:1 85:12 95:9 majority [6] 29:11 94:4 95: 3,8,19 100:18 man [2] 48:3 64:2 manage [1] 60:14 manageable [3] 60:6,7 62: 3 mandatory [1] 99:10 manner [1] 39:18 many [8] 20:12 26:25 27:1 37:15 40:23 65:9 79:2 98:</p>
---	--	---	--	---

Official - Subject to Final Review

<p>25 March [7] 1:11 18:18 20:2 54:14,15 55:18,19 margins [1] 6:5 marshals [1] 43:14 Massachusetts [5] 42:1 85:12 87:1 95:8,16 Materiality [2] 21:21 22:7 Mathis [15] 5:13 9:19,24 14:12,17,20 15:1,8 26:19 30:21 31:1 39:18 87:10,17 102:17 matter [14] 1:13 18:23 19:6 26:14,16 35:18 36:4 53:24 55:25 62:15 63:12 73:21 96:16 98:25 matters [1] 103:2 maximum [1] 33:19 McNeill [1] 41:9 mean [22] 7:17 18:22 23:6 33:2 35:8 36:10 45:12,19 49:19 53:17 54:2 59:8,22 61:19 62:18 65:20 76:12 80:20 81:1 86:11 90:8,12 meaning [1] 93:11 meaningful [1] 13:9 means [5] 40:25 41:2 52:1 68:12 84:2 meant [2] 14:20 25:14 members [1] 94:14 memorandum [2] 52:6,7 memories [1] 64:3 Menlo [1] 1:18 Mens [3] 21:20,25 75:22 mention [1] 54:11 mentioned [3] 61:21 72:9 97:9 merchandise [1] 57:2 methodological [1] 82:19 mid [2] 12:22 28:25 might [30] 6:16 18:22,23,25 20:7 29:18 34:24 35:12 40:8,10,11 42:20 44:3 46:14 48:13 49:10 51:7 52:17 53:19 63:10,18,20 64:13 75:13,19 80:23,24 83:1 99:16 102:25 mind [3] 22:2,3 79:19 minimums [1] 99:10 minute [2] 14:12 27:16 minutes [1] 46:6 misunderstood [1] 101:20 mix [1] 12:16 mixed [3] 9:2,15 10:25 model [2] 21:4 67:16 modern [1] 43:24 money [2] 25:18 66:18 months [1] 99:15 moral [1] 74:4 morning [7] 3:4 39:10 44:14 53:2 56:21,25 67:22 most [17] 4:13 8:17 9:12 19:3,15 22:19 43:14 45:7 71:</p>	<p>14 72:15 76:4,4 85:3 88:1 99:1,7,17 mostly [1] 21:8 motivation [1] 66:17 move [3] 8:22 42:21,23 movements [1] 16:6 much [11] 8:24 9:2 14:3 16:24 19:11 23:2 40:2 60:2 63:2 64:5 66:11 mugging [1] 56:24 multi [1] 21:24 multi-dimensional [1] 22:9 multi-factor [2] 20:25 21:24 multi-factored [2] 21:22 39:14 multiple [2] 91:5 99:5 murder [1] 46:20 must [2] 20:1 71:6 myself [1] 29:14</p> <hr/> <p style="text-align: center;">N</p> <p>NAFD [1] 32:15 nail [2] 54:12,21 narrow [1] 76:21 nature [5] 14:8 21:16 24:16 56:13 69:13 near [1] 43:6 near-uniform [1] 10:3 nearly [2] 30:12,18 necessarily [7] 24:15 38:12 44:7 63:11 82:3 84:20 100:25 necessary [4] 5:5 7:8 55:22 75:19 Neder [2] 16:16 51:2 Neder-type [1] 29:8 need [15] 3:21 10:21 27:15 39:24 40:18 42:16 43:11 46:18 48:22 63:18,20 64:13 65:1 66:18 92:9 needed [1] 60:2 needs [4] 5:10 22:13 40:1 90:22 net [1] 80:7 never [3] 27:5 28:25 64:1 new [2] 36:20 65:1 NICK [3] 1:23 2:10 69:19 nine [2] 8:6 60:21 Nobody's [1] 40:17 non-bifurcated [1] 75:10 non-elemental [2] 70:21 91:9 non-uniformity [1] 42:8 none [1] 90:5 normal [1] 59:9 noted [6] 69:5 82:14 84:8 100:17 102:17,24 nothing [8] 3:16 17:23 32:21 33:2 43:14 48:2 90:14 94:23 notice [7] 28:12,21 32:25 48:14 49:19,22 61:6</p>	<p>notwithstanding [1] 52:22 novel [2] 47:11 89:17 nowadays [1] 17:18 nuanced [2] 20:22 22:10 nullification [2] 99:9 100:1 number [6] 33:6 45:8 55:5 60:5,25 80:22</p> <hr/> <p style="text-align: center;">O</p> <p>objection [2] 4:4 52:22 Obviously [10] 5:4 16:23 19:15 30:21 31:12 46:11 59:23 60:7 84:23 85:3 occasion [14] 20:20 36:23 46:8,13 50:9 51:13 52:12,18 56:17 65:18 68:22 79:10,20 102:16 occasions [49] 3:22 4:11,16 5:14 13:14 16:5 21:12 22:14 26:1 30:13 31:11 33:8 37:12 39:13 44:3,10,13,17 45:18,24 46:23 47:17 49:12 50:16 51:16 54:5,10 55:2,19 57:10,19,23 58:2 63:16 68:13 69:24 70:12 71:14 72:1,2,14,16 74:17 75:13 97:5 99:3,6,13 103:9 occur [3] 23:7 46:13 54:10 occurred [16] 18:12 20:19 39:19 44:7 45:9 46:25 54:5,13,17,22 66:9 72:10,12,19,19 99:5 occurring [2] 30:12 44:12 occurs [3] 8:20,21 73:14 October [1] 63:25 odds [1] 35:16 offendants [1] 68:24 offenders [1] 26:3 offending [1] 26:4 offense [23] 15:4,5 18:11 21:17 27:3 28:20 32:6 34:22,23 35:1 39:19 43:21 49:24 54:12 59:10 72:10,11 73:4 77:18 78:15 85:17 89:4,25 offense-related [5] 3:20 13:24 14:9 26:20 34:14 offenses [24] 9:8 18:11,14 20:19 21:11 23:19 30:12 39:16 45:22 48:10 54:9 56:14,14 63:15 64:16 70:2,19 71:5,6,13 72:18 76:24 89:3 99:15 offer [1] 70:16 offhand [1] 22:8 officer [1] 32:23 official [1] 20:12 often [2] 67:17 89:2 Okay [8] 20:17 30:20 34:11 50:1 52:25 61:10 82:25 100:1</p>	<p>old [6] 62:18 97:16,17,18,21,24 older [1] 64:11 once [2] 11:19 16:23 one [48] 5:4 8:6 9:23 14:21 16:13,20 17:12 18:2 22:11 25:11 27:21 28:7,18 33:17 36:7 44:19,21 51:17 52:1,2,2,8 54:14,15 55:22,23 56:6,22 57:19 59:22 61:6,13 64:18 65:8,22 70:25 71:17 72:19 73:14 77:23 82:8 86:14 87:8 90:19 93:17 99:8,11 101:8 one-time [1] 98:4 ones [5] 48:18 49:14,15 51:14 65:18 only [20] 3:14 8:14,19 11:23 12:17 14:2 31:10,15 34:17 39:22 43:24 48:17 70:18 73:13 78:17 79:9 81:19 84:11 85:9 88:17 open [3] 6:16 75:15 100:5 open-ended [1] 37:13 opened [1] 6:14 opening [2] 88:10,16 opinion [7] 15:8 20:21 21:9 22:22 38:21 81:14 101:5 opinions [1] 7:6 opposed [3] 53:23 74:14 79:23 option [3] 35:17,20 39:22 oral [8] 1:14 2:2,5,9 3:7 24:14 39:4 69:19 order [1] 68:4 ordinarily [1] 96:22 ordinary [1] 5:17 organizations [1] 4:8 original [6] 36:19 48:18,19 61:16 93:10 94:14 other [49] 7:22 9:1 11:17 13:22,22 14:2 16:1,13 18:1 21:18 22:3 26:25 27:3,7,10,24 28:8 30:1 31:19 32:10 35:6,9 37:8 38:7 48:10 54:15 55:3 61:7,13 62:1 64:18 66:21 71:8,18 73:13,16 76:24 78:2 80:5 83:13 85:23 88:8,11 90:11 92:19 93:24 96:11 97:8 98:6 others [1] 79:22 Otherwise [4] 52:11 55:5 58:4 64:14 out [21] 11:14 13:3,4 15:19,23 22:23 23:3 29:1,9 36:22 41:25 48:16 57:16,19 64:8 68:5,20 69:10 77:9 97:13 100:22 outcome [1] 3:12 outlier [2] 93:20 94:2 outliers [1] 94:10 outside [1] 5:14 over [9] 8:23 25:7,8,20 47:1 50:9 57:21 60:21 80:9</p>	<p>overall [1] 21:10 overlapping [1] 65:13 overlay [1] 96:11 overrule [4] 5:2 40:5,17,19 overruled [2] 31:12 55:24 overruling [3] 5:18 13:21 64:5 overwhelming [3] 11:17 15:22 101:14 own [5] 14:19 19:20 44:6 50:2 101:3</p> <hr/> <p style="text-align: center;">P</p> <p>PAGE [4] 2:2 52:7 74:13 80:16 pages [1] 81:13 papers [1] 8:3 paraded [2] 9:13 75:11 Park [1] 1:18 part [18] 5:25 6:16 9:9,10 29:20 36:2 46:16 51:8,13,23 56:16,17 66:16,19 75:3 95:10 99:17 103:3 particular [5] 34:21 46:2,4 80:23,24 particularly [5] 55:2,20 56:5 63:11 64:2 past [8] 8:4 33:15 36:14,17 64:3 65:23 76:24 90:19 patience [1] 66:24 PAUL [1] 1:13 pay [2] 25:18,19 penalty [1] 73:15 People [3] 22:2,3 26:4 perceived [1] 9:11 percent [3] 33:5 50:15 60:10 perfectly [2] 5:13 48:14 performed [1] 72:1 perhaps [5] 6:5 11:10 19:9 47:24 102:6 period [2] 60:21 85:25 perjury [1] 79:12 person [5] 19:8 26:6 30:13 66:1 83:25 perspective [1] 73:9 petition [1] 99:12 Petitioner [19] 1:4,19,22 2:4,8,15 3:8 39:6 41:18 70:15 80:6 85:23 92:22,23 94:22 96:20 97:3 99:11 100:11 Petitioner's [4] 62:7 90:3,4,25 Petty [1] 57:16 phrase [1] 30:19 pick [1] 27:16 picture [1] 10:25 piece [1] 76:14 pieces [1] 57:12 pipeline [1] 16:21 pizzeria [1] 25:12 place [9] 24:16 25:8,9,11 28:13 82:7 96:19 101:11</p>
---	--	--	--	---

Official - Subject to Final Review

<p>102:11 plan [3] 24:6 26:6 51:24 plausible [2] 66:12,15 play [1] 97:13 plea [12] 8:18 19:12,14,17, 20 28:5 29:17 32:5,16 33:23 53:15 102:19 plead [9] 32:21 33:13 47:25 48:14 59:4 66:22 75:4, 8 76:15 pleaded [1] 28:19 pleading [3] 29:5 50:13,18 pleads [1] 47:10 pleas [3] 4:10 19:16 60:12 please [5] 3:10 17:2 39:8 69:23 92:13 pled [1] 47:20 point [19] 3:24 10:10 12:3 29:16 31:4 35:25 75:6 79:7 80:4 81:5,23 82:2 86:13 90:19 91:12,14 94:19 99:8 103:11 pointed [2] 29:9 77:9 points [2] 65:11 93:23 positioned [3] 46:6,15 51:10 position [11] 5:11 34:6,7, 18 56:8 59:24,25 61:16 70:18 87:18 88:11 possess [2] 61:6 79:13 possession [1] 48:2 possible [1] 46:21 possibly [2] 46:9 102:15 post-Wooden [1] 40:15 post-Wooden [1] 74:15 potatoes [1] 31:18 potential [1] 99:8 powers [1] 101:4 practical [3] 55:25 62:15 63:12 practice [22] 4:22 5:17 9:2, 14 10:19,22 15:22 26:4 40:25 42:12 43:6,13 45:4 70:16 73:2 83:11,12 84:6 85:7 101:13,14 102:6 practices [4] 9:3 30:24 70:6 100:16 precedent [9] 3:11 6:10 20:15 29:15 36:5 40:14 41:23 71:1 76:21 precedents [5] 35:25 70:3 71:3 90:19 95:19 precise [2] 44:5 60:24 precisely [4] 12:12 51:19 65:22 101:13 predicate [6] 28:20 47:14 48:10 71:11 89:1 91:10 predicates [5] 41:5,6 48:20,23 63:3 predict [1] 60:9 predictive [1] 63:7 prefer [1] 63:20 prejudice [10] 4:20 7:24 62:2 71:22 78:20 80:15,18 81:5,22 97:19</p>	<p>prejudices [1] 79:9 prejudicial [4] 75:1,7 76:18 82:12 prejudicing [3] 82:4,5 91:22 preponderance [2] 62:19 98:19 prescription [1] 92:10 present [11] 6:7 71:6 74:2 78:4,17 81:12,21 91:4 92:1,9 96:25 presented [2] 36:19 51:3 presumably [1] 38:21 presumption [2] 57:25,25 presumptively [1] 57:23 pretty [5] 76:13 82:20 91:3 99:1,18 prevail [2] 18:9 23:4 prevails [1] 53:12 prevalence [1] 32:5 previously [3] 3:15 54:7 88:18 principal [1] 41:2 principle [16] 6:10 12:7 69:1 70:23 71:1 82:4 83:21 88:14,17,17,22,24 89:7,16 90:6 95:5 principled [1] 70:17 principles [6] 7:4,5 14:15 84:14,19,21 prior [50] 3:20 5:25 6:1,2 9:8 10:23 14:4,5 15:4,5,21 17:15,22,23,25 20:13,19 21:11 23:19 34:24 35:3,13 38:16 39:16,18 41:11 43:21,22 50:2,13 54:20 59:13,14 60:21 63:14 66:7,8 70:2,19 71:4,13 72:11,18 75:10 77:6 81:16 89:3,11 90:1 91:3 prison [2] 29:1 72:13 probably [4] 31:21 52:14 66:1 98:21 probation [1] 32:23 problem [9] 17:15 18:25 24:2 32:19 53:25 56:11 62:4 97:9,19 problematic [1] 32:7 problems [2] 63:1 73:9 procedural [1] 17:24 procedure [1] 31:25 procedures [1] 97:10 proceeding [4] 37:5,8 74:10 75:14 proceedings [5] 50:25 59:9 66:25 75:10 77:13 process [1] 33:23 produce [1] 64:12 produced [1] 58:3 prohibits [1] 39:17 proof [4] 62:16 63:1,18 98:8 proposed [1] 67:16 prosecutor [2] 74:14,20</p>	<p>prosecutorial [2] 33:9 100:19 prosecutors [3] 74:23 76:11,14 protections [1] 17:24 prove [9] 54:16 59:10,10 63:2 80:23 98:8,14,22 103:7 proved [2] 94:7 95:21 proven [1] 56:10 proving [1] 18:10 provisions [1] 20:12 proximity [4] 21:15,16 23:5 39:15 punishment [4] 9:10 33:19 78:17 81:19 purpose [1] 53:22 purposes [1] 85:2 purse [1] 56:22 pursue [1] 49:16 put [11] 9:9 12:9,9,11,18 14:3 21:12 35:11 49:19,22 54:7 puts [1] 33:9 putting [2] 78:18 82:11</p> <p style="text-align:center">Q</p> <p>qualitative [3] 21:19,20 24:16 question [64] 6:14 7:25 9:7,7,23 10:1,2 11:11 13:10,14 15:12 16:13 20:18,19,25 21:6,10 23:16 29:18 30:11,21 31:5,7 32:2 34:19 35:20 38:7 40:8 47:7 54:24 56:13 61:23 62:13 64:18 67:5 72:5,7,17,24 73:5 74:17 75:25 76:20,22,23 77:1,18,19 83:6,16 84:9 87:24 88:3,7 90:18 98:15 100:5,25 questioning [2] 40:21 42:7 questions [23] 4:25 11:4 18:7 26:12 30:10 34:20 35:24 40:1,24 41:6 44:5,9 53:10 59:15 60:19 62:24 71:15,23 76:22 98:6 101:15 103:4,12 quibbles [1] 6:5 quick [1] 62:13 quickly [1] 38:7 quite [9] 15:20,23 22:9 31:18 50:20 64:15 72:13,21 103:2</p> <p style="text-align:center">R</p> <p>raised [3] 32:3,13 83:7 raising [1] 79:11 ran [1] 57:2 range [2] 3:19 78:1 rap [3] 49:5 64:6 68:19 rare [4] 4:13 66:13,14 73:</p>	<p>12 rarely [2] 27:7 63:13 rather [1] 80:25 rational [1] 25:22 rea [3] 21:20,25 75:22 reach [2] 28:22 69:4 reaching [1] 55:9 reaction [1] 31:21 read [2] 49:18 97:25 readily [2] 20:15,15 reading [2] 61:25 91:1 ready [1] 7:25 reaffirmed [1] 6:11 reaffirming [1] 43:16 realistically [1] 46:12 really [25] 4:12 14:3 16:10 40:24 41:16 43:13 46:12 47:10 52:9,23 55:8,20,23,25 56:11 67:17 75:20 79:9,18 89:17 90:9,12 91:11 96:24 97:18 reason [7] 5:16 40:12 55:23 58:24 64:25 81:2,9 reasonable [9] 27:22 52:15 54:17 55:1,13 62:25 88:19 94:8 103:7 reasonably [3] 49:10 50:7 60:13 reasons [6] 14:22 17:11 63:6 86:8 88:13 100:22 REBUTTAL [3] 2:13 100:9,10 receive [2] 48:6,15 recent [2] 17:16,19 recidivism [33] 9:7 12:11,17 15:17 16:7 17:6 30:24 35:10,15 69:25 70:8,14 71:21 73:3 76:22 78:14,16,18,19 81:9 82:1,10 83:13 85:10,15 86:1,8 87:9 92:4 94:1,6,6 95:20 recidivism-related [1] 78:8 recidivist [1] 27:2 recognize [3] 87:13 88:23 94:20 recognized [6] 73:6 76:24 81:11,22 91:20 92:6 recognizing [1] 81:20 record [7] 28:6,17 36:18 37:9 50:24 51:4 64:13 records [6] 20:13,13 28:9 89:10,23,25 reduce [1] 20:23 reexamine [2] 6:12,13 referenced [1] 77:23 reform [2] 16:6 69:1 refused [2] 96:15 99:13 refuses [1] 80:14 regard [1] 72:22 regarded [1] 54:3 regardless [2] 37:22 38:4 regime [1] 71:21 regularly [1] 73:14</p>	<p>reiterated [1] 88:15 rejected [2] 61:14 95:14 relate [2] 36:11,13 related [4] 9:10 15:4 36:20 65:23 relationship [2] 21:16 39:16 relatively [1] 43:23 released [1] 72:13 relevant [5] 78:6 85:3,24 86:16 98:13 relied [2] 6:11 70:13 relitigation [1] 41:16 rely [1] 64:10 relying [1] 102:16 remains [1] 7:9 remand [8] 24:24 27:15 30:6 44:23 45:4,6 102:8 103:3 remanded [1] 101:25 Remember [7] 26:2 33:18 36:24 37:18 60:24 63:24 102:11 remotely [1] 51:20 removed [1] 84:16 renegotiations [1] 103:11 require [4] 3:25 92:2 96:15 100:18 required [6] 13:16 31:20 73:15,17 86:21 96:22 requirements [1] 86:21 requires [4] 3:23 29:19 39:13 69:24 requiring [1] 85:17 research [1] 19:10 reserved [1] 61:23 resist [1] 51:23 resolve [4] 4:19 40:3 71:14 87:24 resolved [1] 88:7 resolves [1] 91:8 respect [9] 17:5 28:1 36:9 37:17 49:13 51:11 52:17 94:10 97:16 respond [1] 32:14 Respondent [4] 1:7,22 2:7 39:5 response [4] 9:17,21 50:5 51:10 responsibility [1] 103:19 retail [1] 56:25 retain [1] 43:9 retrial [1] 103:10 retrials [1] 37:15 reus [1] 75:21 revamp [1] 30:24 reverse [1] 4:23 review [6] 27:19,25 28:7,8,16 96:9 RICO [1] 24:8 rights [1] 86:18 risk [1] 99:9 rob [1] 66:18 robbed [2] 52:4 64:2</p>
--	---	--	---	--

Official - Subject to Final Review

<p>robberies [2] 45:9 51:25 robbery [2] 55:17 56:21 ROBERTS [23] 3:3 7:11,14 18:3 24:20 26:9 27:11 30: 7 33:25 34:3 39:1 53:5 58: 6 60:15 62:10 65:5 69:15, 18 73:7 75:2 99:20 100:6 103:14 robs [1] 44:14 Robust [1] 3:11 room [2] 42:9 43:9 rooted [1] 91:21 Ross [2] 87:1 95:17 routinely [1] 9:9 rule [30] 3:17 4:2 11:15,20, 22 12:5,11 14:14 15:2,25 16:24 20:16 26:18 34:13 38:2 54:1,8 67:11 68:2,20 73:17 79:3,6 80:6 94:3,5 95:12,20 96:6 97:3 ruled [1] 61:15 Rules [4] 20:11,14 91:15 98:11 ruling [1] 67:8 running [1] 56:22</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safest [1] 102:7 same [28] 14:16 16:2 18:12 20:20 25:8,9,10,11,11 37:1 46:8,13,22 50:9 51:1 52: 12 53:10 56:17,18 64:21, 23 65:17 68:19 69:8 71:13 76:11 81:4 102:15 saying [8] 31:2 37:16 45: 13,16 83:22 86:13 95:19 97:4 says [9] 9:17 11:14 23:1,6 54:8,14,15 76:8 89:12 scale [1] 96:19 Scalia [1] 29:9 scenario [1] 65:21 scheme [5] 46:16 51:24 56: 18 66:16,19 schemes [1] 70:14 Schnitzelbank [1] 52:5 scholars [1] 77:9 scope [5] 26:11,14,17 36:3 88:4 second [6] 14:6 30:21 52:2 63:17 88:10 94:18 secondly [1] 17:20 Section [1] 4:17 see [7] 38:23 39:10 42:14 64:25 83:17 86:5 97:19 seek [1] 70:15 seeking [1] 49:15 seem [3] 10:20 81:1 90:19 seems [7] 5:20 26:7 35:9, 22 52:13 65:21 101:8 seen [2] 7:10 65:8 Sells [1] 44:13 sense [2] 58:1 71:16 sent [1] 77:11</p>	<p>sentence [13] 4:2 11:21 12: 19 28:24 32:25 48:7,13,15 77:19 78:4 79:15,15 83:23 sentence-enhancing [1] 91:25 sentenced [1] 77:18 sentences [1] 78:1 sentencing [15] 3:19 43:1 50:25 52:6,7 62:22 69:1,2 70:6,7 77:5 78:1 79:13 81: 24 82:13 separate [23] 30:13 37:5,7, 12 44:13,16 45:9,24 47:16 50:16 54:5 57:10,23 58:2 59:11 63:15 65:25 66:25 68:13 75:21 99:2,6 103:8 separated [2] 54:4,9 separateness [1] 70:1 sequencing [4] 43:19 72:9, 18 89:5 series [2] 18:11 50:8 serious [3] 14:24 30:4 88:3 seriously [4] 74:25 76:18 78:19 82:12 set [2] 71:19 80:24 sets [1] 36:9 settled [2] 73:2 94:21 several [3] 46:14 52:3 64:8 severe [1] 99:10 SG [2] 24:23 34:19 SG's [1] 34:6 shall [1] 77:18 sheet [2] 49:5 64:7 sheets [1] 68:19 Shepard [1] 55:7 short [1] 57:21 shouldn't [1] 44:25 show [18] 4:9 8:3 10:3,22 11:17 13:8 15:14 43:6,15, 17 66:9 71:4 74:9 83:10, 12,25 84:5 87:6 showed [1] 7:6 showing [2] 29:20 53:22 shown [3] 4:19 53:21 94: 23 shows [3] 74:22 80:16 85: 6 side [13] 7:22 9:1 11:17 15: 12,18 32:10 35:9 62:7 73: 13 80:5 85:23 93:24 98:6 side's [2] 71:8 88:11 sides [1] 96:20 significant [4] 30:14 76:14 85:12 95:9 similar [5] 21:18 69:11 70: 14 72:22 85:20 simpler [3] 35:10,12 60:3 simply [6] 40:5 43:15 45:2 46:7 51:24 52:10 since [2] 32:10 98:17 single [24] 21:13 22:15 23: 17 24:6,9,15,15,17 25: 23 26:5,6 36:22 44:13 51: 13 52:18 64:13 74:3 79:10,</p>	<p>19,20 85:24 86:14 96:25 situation [6] 4:20 23:15 25: 17 57:15 67:25 81:3 situation's [1] 41:8 situations [1] 50:7 Sixth [21] 3:18 4:6 7:23 11: 13 14:24 15:2,7 39:17 42: 23 43:4 77:1,4,10,11 82:16 84:13,17 86:11,15 93:11 94:16 small [3] 31:15,18 45:8 so-and-so [1] 18:18 Solicitor [3] 1:20 34:23 57: 17 solution [3] 4:18 8:2 101:8 solve [1] 97:18 somebody [3] 25:17 26:5 83:21 someday [1] 5:10 somehow [1] 4:7 sometimes [4] 21:19,20 27:20 84:3 something [2] 43:3 92:2 sorry [6] 7:12,13 10:7 19:4 60:19 61:4 sort [17] 6:23,24 13:16 14:6 24:5 35:5,9 43:18 51:21 68:5 72:6 74:7 78:8 81:23 91:7 96:19 97:5 Sotomayor [12] 24:21,22 25:2,10 26:8 30:4 58:7 78: 22,24 80:1 99:24 100:4 Sotomayor's [1] 82:18 South [5] 41:23 43:24 92: 18 93:16 94:9 spaced [1] 45:22 span [2] 50:10 57:21 speaking [1] 78:3 specific [1] 48:23 specifically [1] 48:9 speculative [1] 29:11 Spencer [2] 8:5 100:17 spot [1] 14:16 spouse [1] 44:16 stamped [1] 63:24 standard [4] 55:14 89:9 91: 25 98:21 standards [2] 70:24 89:8 standing [1] 60:24 stare [1] 35:18 start [2] 78:24 82:21 starting [1] 9:24 state [11] 8:8 38:22 41:5 64: 13 70:14 71:21 76:10 84: 14,18 86:15 100:15 state's [1] 31:22 stated [2] 15:7 63:6 STATES [45] 1:1,6,15 3:5 12:7,17 13:7,16,20,22 30: 23 31:10,10,14,16,20,24 38:14 41:19 69:6 70:12 76: 8,9 77:12 78:12 85:9,11,13, 21 86:11,12,17,19 92:20 93:24 94:4,15,22 95:3,7,9</p>	<p>97:9,14 100:18 101:1 states' [1] 30:22 statistics [1] 33:5 statute [8] 41:10 43:25 73: 15 75:19 83:24 85:20,25 100:19 statutes [10] 16:7 27:2 41: 25 42:2,25 72:8,20 85:14 86:20 95:13 statutory [4] 9:20 14:14 31: 9 87:12 steal [1] 46:18 step [2] 15:1 47:5 still [4] 30:15 45:18 61:15 71:9 stipulate [3] 74:17 97:23, 23 stipulation [3] 59:5 97:21, 25 stipulations [2] 4:11 60: 12 store [2] 44:15 46:18 stores [2] 52:5 66:18 straightforward [3] 4:5 5: 2 99:18 stretch [3] 102:14,15 103:2 strikes [1] 30:25 string [4] 25:20 28:23 51: 25 95:19 strong [1] 77:8 struck [2] 85:25 86:14 structural [2] 27:20,21 structures [1] 31:25 subject [6] 11:23 34:15 82: 16 96:7,8 98:11 submission [1] 80:10 submit [3] 31:18 63:9 103: 13 submitted [3] 59:15 103: 21,23 submitting [1] 53:20 subsequent [1] 6:12 subsidiary [2] 22:16,21 substantial [1] 58:3 sufficient [1] 54:16 sufficiently [2] 56:14 57:3 suggest [2] 35:4 90:18 suggesting [5] 9:19 24:23 48:12 65:21 100:5 suggestion [1] 77:14 suggestions [1] 101:5 suggests [2] 34:24 91:11 sum [1] 13:15 superseding [1] 41:24 supervisory [1] 101:3 supplemental [3] 85:14 86:19 95:12 support [10] 1:24 2:12 8: 10 41:20 49:23 51:20 54: 25 56:15 69:20 103:18 supporting [3] 1:22 2:8 39: 6 supports [3] 9:15,16 15:17 suppose [6] 6:22 7:2 54:1,</p>	<p>8,11 56:20 supposed [5] 23:8 47:8 50: 14 52:19 56:18 SUPREME [2] 1:1,14 susceptible [2] 27:19,24 suspicion [2] 40:7,11 swear [1] 65:1 syllogism [2] 39:11 61:21 system [5] 33:7 62:18 69: 14 90:15 96:6 systems [1] 30:23</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table [2] 33:16 35:18 temporal [4] 21:15 23:2,4 24:11 temporally [1] 24:12 tend [1] 69:4 tension [7] 90:11,15,17,22, 25 91:7,14 terms [2] 15:3,7 test [14] 5:24 6:4,6 11:8,10 34:20 88:21 89:12,20,21, 22 90:2,3,4 testify [1] 56:1 testimony [1] 20:13 tests [1] 89:17 Texas [1] 8:5 text [10] 10:15,15,17 12:3 82:21,22 84:3,7,8,12 Thanks [1] 65:4 theirs [1] 80:9 themselves [2] 102:19,20 theory [3] 57:6 88:10,21 there's [3] 7:25 8:19 11:5 15:24 16:20 24:11 26:10 28:2 32:21 34:9,12,22 40: 18 41:22 43:13 44:17 50: 17,22 54:8 58:24 59:18 75: 23 76:6,10 81:9 84:25 86: 6 87:3 90:14 92:10 95:18 thereabouts [1] 28:23 therefore [4] 10:15 39:20 40:19 47:17 they've [4] 61:19 73:19 80: 5 93:19 thinks [1] 41:1 third [2] 51:9 52:2 THOMAS [12] 5:1,7,19,22 8:2 18:5 40:4,8 53:7 71:24 72:3 99:22 Thomas's [1] 6:24 thorny [1] 102:6 thoroughly [2] 15:20,24 though [5] 19:12 40:5 50:9 72:23 80:10 three [14] 4:1 14:21 23:19 25:6 44:16 47:14,15 48:10, 16 51:12 57:20 60:25 63: 14 102:14 three-time [3] 74:19,21 98: 2 thrust [1] 62:23 thumb [1] 96:19</p>
---	---	---	--	--

Official - Subject to Final Review

<p>time-honored [2] 4:18 8:1 timing [4] 39:14 41:6 44:5, 9 today [6] 6:19 43:10, 12 48:3 101:11 102:11 today's [2] 36:12, 16 together [2] 13:20 14:3 ton [1] 66:3 took [4] 6:24, 24 62:23 102:10 top-line [2] 22:13, 20 top-side [1] 101:24 topic [1] 42:10 topics [1] 100:13 total [1] 13:15 totally [1] 35:24 track [1] 21:8 tracks [1] 67:21 tradition [24] 10:5 11:9, 18 14:15 15:11, 15, 16 17:4, 14, 16, 17, 19 81:12, 20, 25 82:15 86:6 87:7, 8 92:4, 7 94:11, 21 95:3 treat [3] 73:3 78:14 81:9 treated [5] 30:12 68:21, 25 78:5 82:10 treatise [2] 82:8, 9 treatment [1] 42:24 trend [1] 100:21 trial [23] 7:7, 19 11:13 28:6, 17 33:6 43:18 47:9 50:11, 17, 21, 23 65:19, 21 66:1, 21 75:20, 21 77:20 86:18 95:25 96:2, 8 trials [9] 18:8 42:3 54:20 56:9 58:11, 20 59:7 64:19 75:25 tried [2] 19:10 53:11 trigger [1] 38:16 true [6] 61:17 80:19 87:11 93:23 94:17 97:15 truth [4] 18:23 19:6, 7 53:23 try [3] 36:21 66:24 76:16 trying [5] 25:25 26:2, 7 36:16 57:15 turn [5] 9:24 14:17 23:3 41:16 88:9 turns [2] 21:13 48:16 two [16] 11:3 17:11 36:8, 25 42:14 48:17 52:4 55:5 59:21 60:5 63:5, 5 73:13 77:22 91:15 100:13 type [3] 13:14 41:3 44:2 types [2] 58:11 63:18 typically [3] 17:18 18:17 83:24</p> <hr/> <p style="text-align:center">U</p> <p>ultimate [2] 22:16 23:16 ultimately [1] 70:24 unambiguous [1] 15:2 unanimous [2] 43:6, 6 unanimously [1] 70:10 unavoidable [1] 39:11</p>	<p>uncertain [1] 28:7 uncommon [2] 38:19, 24 under [20] 14:11 29:23 39:12, 13 43:25 44:9 45:17 48:5 68:9 70:2, 12 71:5, 6, 17 75:19 90:24 91:1 96:6, 12 97:24 underlying [3] 4:16 33:13 49:24 understand [8] 7:22 16:4 17:12 35:24, 25 36:16 49:6 90:9 understanding [5] 10:16 14:5 36:2 78:7 84:1 understood [3] 17:6 77:3 90:13 undertake [2] 51:24 55:7 unequivocally [1] 15:7 unfounded [1] 4:9 uniform [11] 10:3, 22 78:7 83:11, 12 85:7 87:7, 7 91:25 92:7 95:18 uniformity [5] 56:7 60:8 68:5 84:18 92:3 uniformly [1] 86:24 UNITED [5] 1:1, 6, 15 3:5 69:6 unless [5] 5:18 58:3, 23 68:20 83:4 unlikely [2] 38:23 79:15 unprincipled [1] 88:12 unrebutted [1] 86:6 unreliable [1] 102:18 untested [1] 71:21 until [4] 12:22, 23 13:16 29:1 unusual [1] 29:20 up [23] 6:14, 16 12:22, 22 13:16 23:10, 14 29:14 40:25 41:7 48:1 51:12 61:4 72:4 81:7 83:5 88:21, 22, 25 89:8 90:7 92:15 98:8 upend [1] 70:16 upheld [1] 86:25 uphold [1] 70:11 urging [1] 80:7 uses [2] 6:1 65:10 using [3] 35:13 51:13 56:24 usual [1] 45:4</p> <hr/> <p style="text-align:center">V</p> <p>valid [1] 48:20 value [3] 45:12, 12, 15 vanishingly [1] 45:7 variance [1] 28:2 variety [1] 9:3 various [6] 22:23 25:20 36:6 42:25 64:9 70:21 varying [1] 97:10 vase [1] 42:15 verdict [1] 29:9 version [1] 41:10 versus [2] 3:5 8:5</p>	<p>vexing [1] 20:20 viable [5] 25:3 52:9 61:19 79:10, 19 victim [3] 35:14 46:21 63:21 victims [1] 56:1 view [5] 42:15, 20 43:2 53:12 90:25 viewing [1] 43:3 views [1] 52:17 violates [1] 83:23 Virginia [5] 41:25 42:1 85:12, 19 95:8 vulnerable [1] 35:14</p> <hr/> <p style="text-align:center">W</p> <p>wade [1] 100:3 waiting [1] 61:20 waivers [1] 4:10 wanted [3] 8:9 17:3 53:9 wants [1] 25:2 Washington [3] 1:10, 21, 23 way [21] 5:16 9:25 13:5 14:23, 23 22:12 33:1 37:11 40:20 59:5 61:13 69:8 72:25 76:11 83:13, 17 86:25 87:2 91:7 95:15 101:20 ways [4] 21:22 36:6 38:3 69:11 Wednesday [1] 1:11 week [1] 51:25 weeks [1] 23:8 welcome [1] 71:23 well-crafted [1] 20:22 well-established [1] 84:1 West [2] 41:25 85:19 whatever [5] 11:8 13:3 35:14 76:8 101:5 whereas [3] 39:16 63:9 71:5 Whereupon [1] 103:22 whether [31] 5:24 9:8 10:2 12:5 14:11, 13 20:19 21:11, 13 23:17 29:18 36:3, 22 37:22 51:12 52:14 54:6 72:5, 19 74:5 75:7 76:1, 20, 22, 22, 23 77:2 79:4 93:25 99:25 102:12 who's [2] 38:5 79:11 whole [4] 3:24 5:23 24:8 37:16 wiggle [1] 42:9 will [14] 3:3 11:7 23:3 30:23 32:7 38:20 45:6 53:11 55:10 59:4 60:6 63:4 75:3 79:20 Williams [1] 69:7 willing [1] 76:3 win [1] 11:9 windfall [1] 64:6 wish [1] 66:23 wishes [1] 45:25 withhold [2] 85:15 86:3</p>	<p>within [6] 34:24 35:15 51:25 54:17 78:1 95:8 witnesses [1] 54:19 woman's [1] 56:22 wondering [1] 52:18 Wooden [19] 3:23 20:21 22:22 23:25 24:14 30:11 32:22 39:12 45:17, 20 46:15 51:18 54:3 56:6 57:14 59:25 61:23 66:14 68:10 word [2] 6:1 80:9 words [6] 14:19 39:17 82:23 96:11 100:13 101:9 work [6] 11:6 28:15 35:5 36:23 90:15 103:5 works [1] 101:21 world [1] 47:9 worse [2] 75:8 76:16 worth [1] 57:1 wound [1] 51:12 writers [1] 82:9 writings [1] 10:23</p> <hr/> <p style="text-align:center">Y</p> <p>year [5] 4:14 8:15, 17, 20 84:22 years [10] 28:24 33:19, 20 36:21 40:15 64:2 79:16 81:8 82:15 99:15 years' [1] 77:16 yield [1] 6:16 yourselves [1] 102:16</p> <hr/> <p style="text-align:center">Z</p> <p>zero [2] 13:16 34:7</p>
--	---	---	---