

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HUMBERTO FIDEL REGALADO :

4 CUELLAR, :

5 Petitioner :

6 v. : No. 06-1456

7 UNITED STATES. :

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9 Washington, D.C.

10 Monday, February 25, 2008

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:02 a.m.

15 APPEARANCES:

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
JERRY V. BEARD, ESQ.	
On behalf of the Petitioner	3
LISA H. SCHERTLER, ESQ.	
On behalf of the Respondent	27
REBUTTAL ARGUMENT OF	
JERRY V. BEARD, ESQ.	
On behalf of the Petitioner	54

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

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument first
4 today in Case 06-1456, Cuellar versus United States.
5 Mr. Beard.

6 ORAL ARGUMENT OF JERRY V. BEARD

7 ON BEHALF OF THE PETITIONER

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

10 Section 1956, the money laundering statute,
11 requires an intent to minimize the criminal taint of
12 unlawful proceeds. But the statute does not criminalize
13 concealing money's existence. In this case,
14 Mr. Cuellar's conviction should be reversed for two
15 reasons. First, while the method of the transportation
16 involved may have been designed to conceal, the
17 transportation itself was not. Secondly, while Cuellar
18 may have in fact concealed money itself, he did not
19 conceal the nature, source, location, ownership or
20 control of the unlawful proceeds.

21 CHIEF JUSTICE ROBERTS: Well, he certainly
22 concealed the location. They were secreted in the car,
23 under the goat hair and everything else. The location
24 of the money was certainly concealed.

25 MR. BEARD: Chief Justice, in the broader

1 sense location was concealed. The point to be taken
2 here I think is this: An examination of the text itself
3 reveals particular listed attributes, and location
4 numbers among them. But what this suggests, the
5 requirement that there be a design to conceal or to
6 disguise these particular attributes, necessarily means
7 a plan, if you will, for those -- excuse me -- for those
8 attributes to be presented either to law enforcement if
9 they intercept the money or inject it into legitimate
10 commerce later. In other words, they'll be observed
11 later. Location has independent meaning, but it's also
12 understood within the context of the words that surround
13 it. All money changes location, whether concealed or
14 not. Location in this context means more than the
15 location that the money was found in the car.

16 JUSTICE BREYER: Maybe I should ask you this
17 now because you've probably thought about it and I can't
18 work it out. I don't see any problem with the word
19 "location." I thought what you would say is it isn't
20 the transportation in this instance that concealed the
21 location, it's the method of transportation that sealed
22 the location.

23 MR. BEARD: Yes, Justice --

24 JUSTICE BREYER: And if you read it that
25 literally, then there is no problem in getting to your

1 interpretation of the statute, or is there? Because
2 since you didn't advance that argument, I thought maybe
3 there's something I've not seen here.

4 MR. BEARD: No, Justice Breyer; you're
5 correct. There is a huge difference between the method
6 of transportation and the transportation itself. And in
7 this particular case, the difference is certainly
8 implicated. What we understand the government to be
9 arguing is that the method of the transportation
10 signifies the listed attributes. But if that were the
11 case it would effectively render all transportation of
12 funds necessarily to be money laundering.

13 JUSTICE STEVENS: May I just ask, what do
14 you mean by method of transportation in this case? I
15 mean, that it was in a car or the fact it was wrapped up
16 in dirty -- in a dirty kind of container, and so forth
17 and so on?

18 MR. BEARD: Justice Stevens, what I'm
19 referring to is certainly that it was in a car, but
20 there was a secret compartment, goat hair was sprinkled
21 around to try to throw off drug detection dogs, and
22 those type of characteristics.

23 JUSTICE STEVENS: But isn't that all just
24 evidence that there was a motive to conceal the
25 ownership?

1 MR. BEARD: No, I don't think so,
2 Justice Stevens. What we're looking at here is that the
3 design of the -- the fact Mr. Cuellar may or may not
4 have known, for example, who owned -- where the money
5 was coming from or who owned it, that doesn't go to the
6 design of the transportation. The design of the
7 transportation itself is just to get the money to
8 Mexico. I can say that abstractly, but in this case in
9 particular because we know from the government's
10 evidence that what this was was essentially the last leg
11 of a drug trafficking deal. We know that this was
12 repayment. So in this particular case at least, the
13 purpose of this transportation was to get this money
14 back as repayment money.

15 JUSTICE GINSBURG: If he were a courier
16 bringing the marijuana into the United States what would
17 be the crime and the penalty?

18 MR. BEARD: Justice, if he was bringing --

19 JUSTICE GINSBURG: If he was bringing
20 marijuana into the United States instead of returning
21 with the proceeds?

22 MR. BEARD: Well, presumably, Your Honor, it
23 would be a drug trafficking crime. But of course, as I
24 understand your hypothetical, he would possess marijuana
25 at that time.

1 JUSTICE GINSBURG: But now he possesses
2 money. And you're not saying this is innocent behavior.
3 It is criminal behavior, so what is the crime if not
4 money laundering?

5 MR. BEARD: We have suggested that
6 Mr. Cuellar's, liability, liability or culpability, lie
7 more properly under the bulk cash smuggling statute.

8 JUSTICE GINSBURG: But that requires knowing
9 that it's illegal to take out more than X amount of
10 money, and there's nothing that indicates that the
11 common courier would know anything about such a
12 provision.

13 MR. BEARD: Yes, you're correct that it
14 would require inference as opposed to direct evidence.
15 This is why in our reply brief, we gave an example of
16 where the identical type behavior arose, not in Texas
17 but in Alabama, and in fact the individual pleaded
18 guilty to bulk cash smuggling.

19 So I suppose my response would be this. The
20 same weak inferences that supported the money laundering
21 conviction in the government's eyes would be the same
22 inferences that would support the cash smuggling.

23 JUSTICE KENNEDY: If we take it that you
24 concede -- I don't want to say that you concede. If we
25 take it the government has a strong case under the

1 smuggling statute, wouldn't it have an equally strong
2 case under (i) of the statute that we're considering
3 here, which doesn't require concealing or disguising the
4 nature, just to avoid a transportation reporting
5 requirement. That's the same as the smuggling statute.

6 MR. BEARD: No, I don't think --

7 JUSTICE KENNEDY: I know the government
8 didn't indict under (ii).

9 MR. BEARD: But I don't think it is the
10 same, Your Honor, because the cash smuggling, the bulk
11 cash smuggling statute, speaks to currency and of course
12 this speaks to transactions. So I think that there
13 is in fact --

14 JUSTICE KENNEDY: You mean as the proceeds
15 of an illegal transaction?

16 MR. BEARD: Well, I'm distinguishing between
17 currency and transaction because as I understand it at
18 least transaction might implicate in a banking context,
19 but cash is cash, if you will. So --

20 JUSTICE GINSBURG: And it doesn't matter for
21 purposes of the bulk cash statute that it was illegal.
22 It could be perfectly lawful money.

23 MR. BEARD: Yes, Your Honor, absolutely.
24 That's certainly true.

25 CHIEF JUSTICE ROBERTS: But why -- why isn't

1 this transporting to conceal the location or the
2 ownership in this sense? Suppose you have someone the
3 police suspect of engaging in drug activities. They
4 know he sold, you know, so much marijuana or whatever
5 and got cash back. They think it's there, and they're
6 going to investigate it, but this fellow comes in and
7 they transport the proceeds across the border.

8 Isn't that transportation to conceal the
9 location or the ownership?

10 MR. BEARD: As I understand it, Mr. Chief
11 Justice, if the police are aware of it and then the
12 flush, if you will, takes the money across, I think
13 that's -- that's much closer. That's --

14 CHIEF JUSTICE ROBERTS: Well, they think
15 it's there, but they're not sure, and they -- you know,
16 that would help them make their case, to find out that
17 the guy they think sold the drugs has \$80,000. So they
18 get a search warrant or whatever, and it turns out he
19 doesn't, because it's been transported to conceal the
20 location or ownership.

21 MR. BEARD: I would -- no, I think that
22 the -- if the police were aware, if the police were
23 aware and the kingpin were aware and put in place some
24 type of design, if you will, to flush the money and
25 perhaps to -- to Mexico under the circumstances you

1 described, then you would be closer to, to having money
2 laundering liability, although certainly I don't know
3 that the courier necessarily would.

4 However, I think it's very important to
5 consider that the money laundering statute necessarily
6 contemplates this notion of -- of detection or the money
7 resurfacing, if you will. And the reason I think that's
8 important is because it gives a particular meaning to
9 those listed attributes. If the police were just --
10 well, in this case, just stumbled upon it, and nothing
11 was -- had been done and there was no evidence on the
12 record to suggest that there was going to be anything
13 done in this case other than repayment, money laundering
14 liability is simply not going to arise.

15 Now, I think that --

16 JUSTICE BREYER: I still don't see why isn't
17 what the Chief Justice said absolutely right? If you
18 are transporting this money to get it out of town so the
19 police can't find it, you're transporting it to conceal
20 it. That falls right within the statute.

21 MR. BEARD: I --

22 JUSTICE BREYER: If you're transporting it
23 simply to pay some courier somewhere else, you're not
24 transporting it to conceal it. And if in fact the
25 transportation is done in a way that conceals it, that's

1 beside the point because the statute is interested in
2 transporting it in order to conceal it.

3 MR. BEARD: I think that --

4 JUSTICE BREYER: What is wrong with that?

5 MR. BEARD: I think what's wrong, Your
6 Honor, is that the -- the statute focuses on the
7 transportation or some of the other transfers of
8 transmission and specifically is coupled, if you will,
9 with this notion of -- of the attributes themselves. I
10 don't know that it's -- it's simply too broad, in fact,
11 to say that all transportation's will necessarily incur
12 the money laundering liability.

13 JUSTICE SCALIA: I -- maybe I don't
14 understand the -- I thought he was helping you, but
15 maybe --

16 (Laughter.)

17 JUSTICE SCALIA: Were you helping him? I
18 thought so.

19 (Laughter.)

20 JUSTICE GINSBURG: It sounds like he was
21 making the distinction that didn't the dissenting judge
22 make between -- the dissenting judge says transporting
23 to conceal is no good, but concealing to transport is
24 okay.

25 MR. BEARD: That -- you're correct, Your

1 Honor, and that is, I think, a point to be made. The --
2 Judge Smith below did try to highlight the fact that if
3 you transport to conceal, then you're beginning to
4 implicate money laundering liability.

5 JUSTICE ALITO: Suppose someone transports
6 money across a border and is recorded surreptitiously on
7 tape explaining exactly why the person did it, and the
8 person says: The reason why I'm transporting this
9 across the border is because I know that when I get it
10 to the destination country, that's a place where people
11 use huge amounts of cash for bank deposits, for
12 purchases; and, therefore the act of transporting it
13 from the United States to the other country will
14 disguise the nature of the cash as drug money.

15 Would that fall within the statute?

16 MR. BEARD: No, I don't think so,
17 Justice Alito, and the reason I don't is because that
18 -- what you've described implicates potential money
19 spending, this notion that the money is easier spent.
20 But without more, money spending would not equate to
21 money laundering. That's --

22 JUSTICE ALITO: Why wouldn't that fit the
23 literal language of the statute? It's a transportation
24 across the board with the design to conceal the nature,
25 i.e., that it's drug money, of this money?

1 MR. BEARD: I'm not sure, Justice, that
2 you've actually concealed the nature. If the money was
3 going -- if the money was dirty and going across dirty,
4 it remained dirty and just happened to be spent. But --

5 JUSTICE SOUTER: Yes, but it doesn't remain
6 dirty simply because it goes to a place in which the
7 appearance of this kind of cash does not have the dirty
8 appearance that it does at home. Why -- why isn't
9 that the correct answer?

10 MR. BEARD: I --

11 JUSTICE SOUTER: Why doesn't that make it
12 laundering?

13 MR. BEARD: Again, I don't know that there
14 has been -- as I understood the hypothetical, I don't
15 think that there's been any suggestion of a design to
16 conceal, the why. You're just taking dirty and you're
17 --

18 JUSTICE SOUTER: No, but the design to
19 conceal -- maybe I misunderstood the hypo, but I thought
20 the design to conceal was you conceal the dirty
21 character of the money by taking it to a place and using
22 it in that place where use of large amounts of cash,
23 whether for bank deposits or spending in luxury stores,
24 does not have the dirty implication, the dirty
25 appearance that it does in the United States.

1 So, why doesn't that therefore satisfy the
2 concealment?

3 MR. BEARD: I -- Justice Souter, I think
4 that the answer to the question is here. The statute is
5 designed to take -- or purposed to take these dirty
6 proceeds, unlawful proceeds, and to cleanse them so as
7 to prevent their injection into streams of legitimate
8 commerce.

9 What you've described as spending is
10 admittedly spending, but I don't think that the spending
11 that's -- that you've contemplated there basically
12 implicates the core concern, if you will. The money --

13 JUSTICE SCALIA: You don't have any evidence
14 like that here anyway, do we? Do we know that this was
15 going to "Spendy Land" where everybody has a lot of
16 money? Did we know that?

17 MR. BEARD: Justice Scalia, what we know,
18 because the government's evidence established it, is
19 that the money was being sent back to Mexico to repay
20 --

21 JUSTICE SCALIA: Does everybody have a lot
22 of money in Mexico? Is that --

23 MR. BEARD: Well, I would hazard to say no,
24 of course, but the record --

25 JUSTICE ALITO: Was there -- was there

1 evidence about the nature of the Mexican economy?

2 MR. BEARD: There was. There was, Your
3 Honor.

4 JUSTICE ALITO: What was the evidence?

5 MR. BEARD: I'm sorry?

6 JUSTICE ALITO: What was the evidence?

7 MR. BEARD: The evidence that you just asked
8 about went to that it was easier to spend money in
9 Mexico.

10 JUSTICE ALITO: Wasn't there an expert who
11 said that Mexico has a cash economy?

12 MR. BEARD: Yes, yes. And it -- and --

13 JUSTICE ALITO: And what does that mean?

14 MR. BEARD: What I take it to mean --

15 JUSTICE ALITO: Does it mean people can
16 spend a lot of cash without raising eyebrows?

17 MR. BEARD: Certainly more than here. That
18 was what I think that the evidence was offered for. And
19 the same expert, of course offered, you know,
20 established -- or the government established through the
21 same expert that the purpose of this particular
22 transportation was to complete the transaction, the drug
23 transaction.

24 JUSTICE ALITO: In your brief, you argue
25 that there has to be a design to create the appearance

1 of legitimate wealth. Are you drawing back now from
2 that argument?

3 MR. BEARD: No, and, of course, we are well
4 aware that those words are not found in the statute, nor
5 do we suggest that they were. But what we have
6 suggested is simply that that's, if you will, shorthand
7 for describing what necessarily occurs if the
8 attributes, the listed attributes, are obfuscated. That
9 is the cleansing mechanism.

10 JUSTICE ALITO: Well, why would that be so?
11 Suppose -- I mean, just take -- modify my hypothetical.
12 What this person says on the tape is: I'm sending this
13 money across the border because I know that if it --
14 once it gets there, it will be harder to establish my
15 ownership of it. People will still know that it's drug
16 money perhaps, but they -- it will be harder to
17 establish my ownership of it.

18 Now, would that fall within the statute?

19 MR. BEARD: Well, at that point, yes,
20 because I think --

21 JUSTICE ALITO: But there wouldn't be an
22 attempt to create the appearance of legitimate wealth
23 there then, would there?

24 MR. BEARD: Well, to the extent that the
25 individual who has been taped is contemplating the

1 money's resurfacing, I think that there would be. It
2 would be not legitimate wealth, though. And perhaps I
3 need to drive this point home. It would be less dirty.
4 In other words, there's not a requirement that the dirty
5 money necessarily be made clean or a description, but
6 that the dirty money be made less dirty. And that I
7 think is -- is what we're talking about.

8 JUSTICE SCALIA: Does the statutory purpose
9 have to be the only purpose or the principal purpose? I
10 mean, I could conceive that the principal purpose of
11 this transportation was to give the money back to the
12 fellow who gave the drugs, to pay the provider of the
13 drugs. I assume that would be the principal purpose.

14 But what if you know that when the -- when
15 the provider of the drugs is paid, he'll be able to
16 spend this cash easily in Mexico, which has a cash
17 economy? And let's assume that the latter is enough to
18 satisfy the purpose requirement of this statute. What
19 -- what would be the result?

20 MR. BEARD: If we -- well, Justice Scalia,
21 if we --

22 JUSTICE SCALIA: If you assume a primary
23 purpose to pay off the --

24 MR. BEARD: Right. If we assume that the --
25 that the latter, as you just said, satisfies the

1 statute, then you have a conviction.

2 But we certainly don't assume that, because
3 that implicates money spending, and money spending
4 hasn't -- hasn't been held to be money laundering.

5 JUSTICE SCALIA: Even though that wasn't the
6 real purpose -- I mean, the real purpose was to pay off
7 this fellow, who otherwise might come to hurt you.

8 MR. BEARD: Yes, absolutely.

9 JUSTICE SCALIA: But once you do pay him
10 off, you know that the money is going to be ready
11 spendable.

12 MR. BEARD: Well, certainly in this case, we
13 don't have any evidence that Mr. Cuellar knew any such
14 thing. If you were to remove it from the confines of
15 the Cuellar case, I think you -- your hypothetical does
16 come closer to implicating liability; but that's simply
17 not what we have here, at least.

18 JUSTICE STEVENS: Now, what you understand
19 the language "disguise the nature of the proceeds of
20 this specified unlawful activity" to mean, does that --
21 is that satisfied by merely proof that it is proceeds of
22 unlawful activity? Or do you have to tell that -- what
23 is the word "nature" talking about?

24 MR. BEARD: No, Justice Stevens. It would
25 again, I think, require more. If all that were required

1 is to show that there was unlawful proceeds --

2 JUSTICE STEVENS: Well, that's what it seems
3 to say. What I'm asking is: What do you think it
4 means?

5 MR. BEARD: Well, what I think it means is
6 that there has to be some -- the transportation or what
7 have you has to be purposed, designed, to take the
8 nature and obfuscate it. And this --

9 JUSTICE STEVENS: But I'm just asking about
10 the word -- the meaning of the word "nature." What is
11 the nature, other than the fact it's proceeds of
12 unlawful activity?

13 MR. BEARD: That it would -- I think that it
14 would -- "nature" is perhaps the first and foremost of
15 the attributes, but I think that it means, that it means
16 dirty, unclean.

17 JUSTICE STEVENS: "Dirty" in some sense
18 other than being proceeds of specified unlawful
19 activity?

20 MR. BEARD: Oh, okay. I don't know.

21 JUSTICE STEVENS: I just don't know what
22 that means other than that it is proceeds of unlawful --

23 MR. BEARD: When I have -- when I read the
24 attributes and contemplate --

25 JUSTICE STEVENS: I'm just talking about the

1 one attribute, "nature."

2 MR. BEARD: Right.

3 JUSTICE STEVENS: I'm trying to understand
4 what you think that means.

5 MR. BEARD: I have thought of it as meaning
6 basically dirty.

7 JUSTICE STEVENS: Proceeds of unlawful
8 activity.

9 MR. BEARD: Proceeds of unlawful activity
10 are the --

11 JUSTICE STEVENS: It's always dirty.

12 MR. BEARD: There may be -- well, yes, I see
13 where you're going. Is there -- what is the independent
14 meaning of "nature." I think that --

15 JUSTICE GINSBURG: Why isn't it simply to
16 change the nature from being drug money to look like
17 it's apparently innocent? I mean the change of the
18 nature -- the nature going in is it's always dirty.
19 It's drug money. And the purpose of the concealment is
20 to get it converted to some different nature, i.e.,
21 clean money.

22 Isn't that what "disguise the nature" means?

23 MR. BEARD: I don't -- I brook no quarrel
24 with that. I mean, yes. I'm just -- what I was simply
25 suggesting --

1 JUSTICE STEVENS: But the verb is not
2 "transformed." The verb is "disguise" or "conceal."

3 MR. BEARD: That's true, and the meaning
4 certainly of "conceal" would be to bring it forward with
5 maybe no explanation of the taint, if you will. And, of
6 course, "disguise" would be to maybe create a false
7 explanation of where the money is --

8 JUSTICE KENNEDY: Was there a reporting
9 requirement for -- for this shipment. If he had gone to
10 the border, would he -- well, then, a lot of what you're
11 arguing about isn't very important because they could
12 just indict under (ii).

13 MR. BEARD: To avoid a transaction-reporting
14 --

15 JUSTICE KENNEDY: To avoid a
16 transaction-reporting requirement, and you wouldn't have
17 to go through all this "nature" thing.

18 MR. BEARD: Your Honor, as I understand it
19 he would have a currency-reporting requirement, had he
20 been going South.

21 JUSTICE KENNEDY: You indicated that there
22 is such a requirement.

23 MR. BEARD: A currency-reporting
24 requirement, yes. I'm not sure that there is a
25 transaction-reporting requirement. I think that that --

1 JUSTICE KENNEDY: Oh, I see.

2 MR. BEARD: -- may implicate different
3 considerations.

4 JUSTICE GINSBURG: And if he -- if he didn't
5 know about the currency-reporting requirement, then he's
6 not guilty under that statute because it requires
7 knowledge.

8 MR. BEARD: Yes, Your Honor, I understand.
9 And so where we are left is he may not be guilty under
10 money laundering and perhaps, perhaps not under bulk
11 cash smuggling. But that in itself does not necessitate
12 a broadly interpreted understanding of the money
13 laundering statute.

14 JUSTICE GINSBURG: If he's not -- if he
15 doesn't fit into either category, then there's no crime?

16 MR. BEARD: That's a possibility, yes,
17 absolutely.

18 CHIEF JUSTICE ROBERTS: Counsel, can I ask
19 you to go back to Justice Stevens's line of questioning?
20 If -- do you conceal the nature of proceeds if you
21 conceal the proceeds?

22 MR. BEARD: No, and I think that --
23 Mr. Chief Justice, I think that it's important to
24 understand, for example, that hiding money is not
25 necessarily the same thing as -- I mean, concealing

1 money is not necessarily the same thing as concealing
2 the location. And I think you could make the same type
3 of analysis in the other --

4 CHIEF JUSTICE ROBERTS: Well, that -- that
5 doesn't seem to follow. I understand the argument with
6 "nature." In other words, you're not concealing the
7 nature; it's just not there. But when you're hiding it,
8 you are concealing the location.

9 MR. BEARD: Yes. But, again, I think that
10 the term "location," which is understood in the context
11 of the words surrounding it, if I take money and hide it
12 in my --

13 CHIEF JUSTICE ROBERTS: Well, that gets me
14 to a question. Several times you've referenced the
15 attributes. Are you saying that the statute would have
16 a different meaning if it just said "location"?

17 MR. BEARD: What I'm suggesting, Chief
18 Justice, is that if the -- that the statute would have a
19 particularly different meaning from the one that the
20 government wants if the attributes just listed existence
21 of the money. There is a huge difference between hiding
22 money or hiding the location of the money.

23 If you just had location by itself, I'd be
24 making the same argument; but there's a huge difference
25 between hiding money or hiding the location.

1 CHIEF JUSTICE ROBERTS: Well, you better
2 explain that a little more for me.

3 MR. BEARD: All right, then. If I --

4 CHIEF JUSTICE ROBERTS: Because they seem to
5 me the same.

6 MR. BEARD: If I -- no. I think that the --
7 hiding the location suggests that the individual is
8 contemplating the money resurfacing later, either for
9 injection into commerce or for -- perhaps if the police
10 discover it, and they're trying -- the launderer, if you
11 will, is trying to make sure that the money would
12 survive that subsequent --

13 CHIEF JUSTICE ROBERTS: Okay, so hiding
14 location assumes it's going to come up later.

15 MR. BEARD: Yes.

16 CHIEF JUSTICE ROBERTS: And if you just hide
17 the money, you assume he's just going to leave it
18 somewhere and forget about it?

19 MR. BEARD: No. No, Mr. Chief Justice. If
20 you just hide the money, that would encompass just
21 hiding money, for example, in the back yard of your
22 house with -- with -- or in a tin can or under a
23 mattress or whatever. It's a much broader -- broader
24 concept.

25 And I think that that's really what is at

1 play here because, to the extent that the government is
2 focusing on the method or -- of the concealment here,
3 they're -- they're implicating that type of behavior, if
4 you will, and saying it's sufficient to support a money
5 laundering conviction.

6 JUSTICE ALITO: But what if there is a wire
7 transfer to a bank in another country because that bank
8 has bank secrecy laws that will make it impossible to
9 ascertain the location of the money once it is there?

10 Does that fall within the statute?

11 MR. BEARD: At this point, no, Justice,
12 because you haven't suggested that there was any type of
13 design, any intent to disguise or conceal. You've just
14 suggested it went to another place. If I sent it to an
15 account --

16 JUSTICE ALITO: If that's the purpose. If
17 the person says, I'm sending this to blank country
18 because they've got bank secrecy laws there that make it
19 impossible to find this money once it gets into their
20 banking system.

21 MR. BEARD: No.

22 JUSTICE ALITO: That's not --

23 MR. BEARD: On those facts, no, I don't
24 think so. Now, if I were sending money to accounts in
25 the jurisdiction you've described, and perhaps with a

1 little bit more, different names on the accounts or what
2 have you, then I -- then I think a different result.
3 But if I'm just sending from my account here to my
4 account there, then no.

5 JUSTICE GINSBURG: Would you say the same
6 thing for -- if you just put it in a safe deposit box in
7 a bank in the Bahamas?

8 MR. BEARD: I would make the same -- my
9 answer would be the same without more, Your Honor.

10 CHIEF JUSTICE ROBERTS: Well, the "more" is
11 they don't hold it under your name. They hold it under
12 a numerical account number. Then that changes
13 everything?

14 MR. BEARD: It very well may. At least -- I
15 don't know that it changes everything, but it very well
16 may lead to a different result. But you just modified
17 the hypothetical.

18 What I'm -- what I'm suggesting is that if
19 you're just putting money in a safety deposit box or
20 this account or under the mattress or in the hole in the
21 back yard --

22 JUSTICE SCALIA: Because the police can't
23 find it in that account even if it is still under your
24 name. In an account here the police would be able to
25 find it. In an account in the Cayman Islands, they

1 won't be able to. Isn't that -- isn't that transporting
2 it in order to conceal, to conceal it?

3 MR. BEARD: Justice, no, I don't think so,
4 and I'll briefly answer and try to come back to you in
5 rebuttal.

6 But I think that it's important to
7 understand the money laundering statute is not a
8 detection statute. That's not where the focus of the
9 statute rests.

10 Mr. Chief Justice, if I can reserve the
11 balance of my time.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Beard.

14 JUSTICE SCALIA: I don't understand that, so
15 I hope you will explain it later. It doesn't mean
16 anything if it's not a detection statute.

17 CHIEF JUSTICE ROBERTS: Ms. Schertler.

18 ORAL ARGUMENT OF LISA H. SCHERTLER

19 ON BEHALF OF THE RESPONDENT

20 MS. SCHERTLER: Mr. Chief Justice, and may
21 it please the Court:

22 The international concealment money
23 laundering statute contains no appearance of legitimate
24 wealth requirement, nor does it demand proof that the
25 illegal proceeds will be cleansed after they cross the

1 United States border. Petitioner's construction of the
2 statute is not supported by its tests and would defeat
3 its purpose.

4 What the statute does require is proof
5 beyond a reasonable doubt that the defendant knows that
6 he has illegal proceeds and that he knows that the
7 transportation across the border of those known illegal
8 proceeds is designed in whole or in part to conceal or
9 disguise one, at least one, of the facts in the statute
10 about those proceeds. The phrase "designed in whole or
11 in part" directs a full examination of the plan, of the
12 way in which the cross-border transportation of these
13 known illegal proceeds was planned out.

14 JUSTICE ALITO: Does the word
15 "transportation" mean the act of transportation across
16 the border or the method of transportation?

17 MS. SCHERTLER: The word "transportation"
18 itself means the carrying of something from one place to
19 another. The phrase "designed in whole or in part,"
20 suggests that one should look at the entire plan, the
21 way that this transportation was conceived or planned
22 out in the mind, which would include, we would submit,
23 the method that was -- that was chosen to be used for
24 this transportation, the individual who was designated
25 to conduct this transportation of known illegal proceeds

1 across the United States border, and, yes, reasons for
2 conducting that transportation as well.

3 But it is not limited, as Petitioner would
4 suggest, to just one fact, that being what's going to
5 happen to the funds after the transportation is over.

6 JUSTICE BREYER: You go back to
7 Justice Alito's question. I agree with you that you
8 could read this as including a prohibition against a
9 method of transportation which method is to hide the
10 money. You could. But you could also read it the way
11 that the question suggests, to refer only to the
12 transportation. So you transport it physically in order
13 later to hide it.

14 Now, the difference between the two is if we
15 accept yours, which is the broader, this statute
16 includes everything that has nothing to do with the
17 common word "money laundering." Any time you hide
18 something, for whatever reason you hide it, to take it
19 to pay the couriers, you're money laundering. Any time
20 you run a gambling operation and the people stick the
21 money in the wad of their shoe, they're money
22 laundering.

23 I mean, why would you think Congress would
24 want that narrow reading when it can be read to focus
25 much more closely on money laundering just by reading it

1 literally for what it says?

2 MS. SCHERTLER: Your Honor, several
3 responses to that, to that question.

4 First of all, what's the purpose -- if we
5 want to look beyond the words "designed in whole or in
6 part" in the context of the international money
7 laundering statute to try to discern what the purpose
8 was of the statute, the purpose of this statute was to
9 prevent criminals from taking their proceeds abroad
10 where they would be outside the reach of all of these
11 controls that have been set up in the United States in
12 order to detect illegal proceeds and use those proceeds
13 to trace back to the crimes and the criminals that
14 generated them.

15 JUSTICE SOUTER: But if that's all they were
16 getting at, they wouldn't have to have this
17 international component at all, because if you totally
18 eliminated the "to or through" requirement and you were
19 able to focus or properly focus solely on the method of
20 the transportation, et cetera, then you would cover not
21 only cases in which the concealment ultimately would
22 take place by crossing a border, but you would pick up
23 cases in which the concealment would take place even
24 within the United States; and that would certainly be in
25 the government's interest.

1 But if you add, if you say, well, but this
2 is limited by a to or through requirement, then it
3 suggests, it seems to me, as Justice Breyer's question
4 does, that it must -- the statute must be getting at
5 what happens when it crosses the border as opposed to
6 the means of crossing.

7 What's your answer to that?

8 MS. SCHERTLER: My answer to that, Your
9 Honor, is that that would have -- that would defeat the
10 purpose for which this statute was enacted. The -- the
11 premise of this statute was that once illegal proceeds
12 are taken abroad, taken outside of the United States
13 system, we lose control of them, we lose the ability to
14 find them, and we will have no idea --

15 JUSTICE SOUTER: But that would be -- that
16 would be equally true and an equally appropriate
17 objective without the "to or through" requirement in
18 there. In other words, you don't have to have the "to
19 or through" requirement in order to give the government
20 a tool for exactly the purpose that you describe.

21 MS. SCHERTLER: And there -- there could
22 have been drafted a statute that was even broader than
23 this one in that respect. But the way -- the reason
24 that Congress imposed the "to or through" requirement is
25 that it knew -- is that that was when law enforcement in

1 the United States would lose the ability to use ordinary
2 investigative methods to find the proceeds of illegal
3 fraud.

4 JUSTICE KENNEDY: Then what you're saying, I
5 suppose, is that the movement of funds, if they're
6 illegal proceeds, outside of the country is a per se
7 concealment?

8 MS. SCHERTLER: No, Your Honor. We do not
9 --

10 JUSTICE KENNEDY: Give me an example of when
11 you take money outside of the country that's illegal
12 money --

13 MS. SCHERTLER: Yes.

14 JUSTICE KENNEDY: -- that's not a
15 concealment?

16 MS. SCHERTLER: Yes. Let's say you have a
17 drug dealer who conducts a number of drug transactions
18 on one side of the border, takes his daily take, puts it
19 in his pocket or his wallet and crosses the border into
20 Mexico. Based on that evidence alone, the government
21 would not be able to show beyond a reasonable doubt that
22 merely taking those illegal proceeds, known illegal
23 proceeds, putting them in your pocket, that that was
24 designed to conceal the location, that there was a
25 plan --

1 JUSTICE SCALIA: He puts it in his shoe,
2 okay. Because it's a lot, he puts it in his shoe.

3 MS. SCHERTLER: That would --

4 JUSTICE SCALIA: That would be enough,
5 wouldn't it?

6 MS. SCHERTLER: That would -- yes. Your
7 Honor, that would permit the inference. Now, of course,
8 ultimately --

9 JUSTICE SOUTER: What if he gives it to his
10 brother and says take it across for me, will you?

11 MS. SCHERTLER: Well, I don't think that
12 that alone is -- is enough, Your Honor.

13 What the statute asks is can you find --

14 JUSTICE SOUTER: If he tells his brother to
15 put it in his shoe?

16 (Laughter.)

17 MS. SCHERTLER: That would -- that would --
18 that would get close.

19 CHIEF JUSTICE ROBERTS: Why isn't that
20 enough? If, for example, he's being -- he thinks he's
21 being watched by law enforcement because they know he's
22 up to something, but his brother isn't, why isn't that
23 concealing?

24 MS. SCHERTLER: With that additional
25 evidence, absolutely. I think there would be a basis

1 for a jury to find beyond a reasonable doubt that that
2 was designed, that that was designed to conceal.

3 JUSTICE KENNEDY: Well then, let me back up.
4 Then let me add this. It seems to me that you're
5 saying, as you have to say, that any movement of illegal
6 funds outside the country which is concealed is per se
7 concealing a relevant attribute?

8 MS. SCHERTLER: We don't go that far, Your
9 Honor. As I said --

10 JUSTICE KENNEDY: But if you do.

11 MS. SCHERTLER: -- you need to find --

12 JUSTICE KENNEDY: I think you have to go
13 that far to make the case you're making.

14 MS. SCHERTLER: No, not at all. I mean,
15 what -- Congress could have said every cross-border
16 transportation of illegal proceeds is covered. And they
17 did not. What they did was they set up this filter
18 for the ones --

19 JUSTICE KENNEDY: But you're always
20 concealing the control. You're always concealing the
21 ownership. You're always concealing the location if
22 it's in your shoe or in the bottom of the car.

23 MS. SCHERTLER: I don't -- you have -- they
24 have to find a design to conceal.

25 JUSTICE BREYER: He purposely puts it in his

1 shoe, okay.

2 MS. SCHERTLER: Yes.

3 JUSTICE BREYER: It's a design. He knows
4 he's going to do it. So -- and you're saying, I take
5 it, 100 percent of the time that's illegal. If you're
6 not saying that, I don't understand what you're saying.

7 MS. SCHERTLER: No --

8 JUSTICE BREYER: If you are saying that, I
9 don't know why they call this statute "Laundering of
10 Monetary Instruments." Why didn't they call it "shoe
11 hiding"?

12 (Laughter.)

13 JUSTICE SCALIA: And you're basically
14 confronting face-on the dissent here, which drew a
15 distinction between transporting to conceal and
16 concealing to transport. And all you have here is
17 concealing to transport, and the question is whether
18 that violates the statute.

19 I agree with Justice Breyer that if this is
20 a statute directed at concealing to transport, it's a
21 funny name for it to think that it's a money laundering
22 statute.

23 MS. SCHERTLER: Your Honor, the title of
24 this statute, "Money Laundering," this is exactly
25 what -- among the conduct that Congress had in mind when

1 it enacted and when it confronted money laundering in
2 1986. It saw money laundering as the variety of ways in
3 which criminals prevent the detection of their illegal
4 proceeds and thus are able to profit from their crimes.
5 It covered a wide range of conduct that included
6 converting, yes, illegitimate wealth into legitimate
7 forms through very complex means.

8 But Congress was also concerned about
9 criminals taking their proceeds across the border
10 surreptitiously --

11 JUSTICE GINSBURG: Were they concerned that
12 this was a 20-year penalty, not what you're talking
13 about, the person who gets -- who is the drug dealer,
14 but all that this evidence shows is that we have a
15 courier. We don't even know if he knows who put the
16 money in the car. We don't know if he knows the -- who
17 the person is that he's to deliver the money to.

18 So on your theory, all you have to prove is
19 that this defendant drove a car in which illicit money
20 was hidden in order to get it out of the country. No
21 grand design. All he is is a courier.

22 MS. SCHERTLER: He needs to know that part
23 of the design, part of the plan of that transportation,
24 was to conceal or disguise --

25 JUSTICE GINSBURG: That's a -- that's a lot

1 of fancy language. All he knows, in fact, if he's just
2 a courier is that somebody gave him money to take this
3 car in which drug money is hidden across the border.

4 MS. SCHERTLER: And the use of that courier
5 also was part of a design to conceal or disguise the
6 ownership and control --

7 JUSTICE GINSBURG: Not his design. His
8 design is only -- I mean, he's just a drug courier, and
9 I think that's what -- that's a problem with your
10 interpretation of the statute. One can think of the
11 kingpin having this elaborate plan, and when it gets to
12 Mexico it's going to go into this bank and that place.
13 But here the defendant is simply a courier, and on the
14 government's theory anyone who transports hidden money
15 to get it out of the country, who drives the car, just
16 the driver, is a money launderer.

17 MS. SCHERTLER: Justice Ginsburg, the --
18 Congress's purpose here was in getting at exactly this
19 kind of conduct by third parties in particular, because
20 when you use a third party that violates another purpose
21 at which the statute is directed: using third parties
22 to conceal who the true owner in control of the proceeds
23 is.

24 JUSTICE SOUTER: I suppose then the brother
25 should be -- giving the money to the brother should

1 satisfy the statute.

2 MS. SCHERTLER: It --

3 JUSTICE SOUTER: Because if I'm -- if I'm in
4 the drug business and my -- my brother is an
5 international social worker or something, I'm certainly
6 going to conceal when I give it to him and he carries it
7 across the border.

8 MS. SCHERTLER: Yes, Justice Souter, that
9 would be another example of using a third party so that
10 a -- so that one part of the design of that
11 transportation is to conceal the ownership and control
12 of the proceeds.

13 And in response to Justice Ginsburg's
14 question, Congress also -- well, in the sentencing
15 guidelines system now, the guidelines takes account of
16 whether you have the individual who is also engaged in
17 the underlying offense or whether you have a third party
18 who had not been involved in the underlying offense.

19 But no -- no matter how you see it, this was
20 precisely the conduct that Congress is getting at. It
21 saw that the only way to -- to get at crime -- one way
22 that was very important to it was to get at the money
23 and in order to get at the money you need to be able to
24 counteract the ways in which the criminals would prevent
25 law enforcement from getting at the money.

1 JUSTICE ALITO: Suppose the person who set
2 all this up lives in Mexico and the sole intent of that
3 person was to bring the money back to him in the place
4 where he lives? That would -- would that be money
5 laundering by him, to start out with?

6 MS. SCHERTLER: If he had designed this
7 transportation, yes, Your Honor, because the whole --
8 the design of this transportation was to conceal or
9 disguise all five of the attributes of these illegal
10 proceeds.

11 JUSTICE ALITO: Isn't that a question of --
12 isn't that a question of his intent?

13 MS. SCHERTLER: I --

14 JUSTICE ALITO: It's not the effect of the
15 design, is it? It's the intent of the design.

16 MS. SCHERTLER: It -- it is -- what was --
17 what was the plan? What was the conception? What
18 decisions were made about why and how we get these
19 proceeds from point A to point B.

20 JUSTICE SCALIA: Everybody knows he's a drug
21 dealer, back in Juarez or wherever he lives in Mexico.

22 MS. SCHERTLER: But by --

23 JUSTICE SCALIA: He's famous in town. He's
24 a well respected man because he's a big drug dealer.
25 And he has just arranged get the money delivered to him

1 so that he can spend it. What -- what's concealing
2 there?

3 MS. SCHERTLER: And he's arranged it in a
4 way, if we're assuming the transportation here, so that
5 his ownership and control of those proceeds will be
6 disguised --

7 JUSTICE SCALIA: It won't be disguised.

8 MS. SCHERTLER: -- during the course of the
9 transportation by saying, I'm going to select a third
10 party.

11 CHIEF JUSTICE ROBERTS: During the course of
12 the transportation. That is not what you say in your
13 brief. I'm looking at page 41 and what you say is: "If
14 no independent evidence establishes that concealment or
15 disguising of the pertinent attribute of the proceeds
16 would occur at the point of destination, then a
17 factfinder would lack a reasonable basis for inferring
18 that the transportation was designed to conceal or
19 disguise."

20 In other words, in the hypothetical
21 Justice Scalia just gave -- in other words everybody
22 knows he's a drug dealer, he spends the money -- there
23 is no concealment or disguising the pertinent attribute
24 at the point of destination.

25 MS. SCHERTLER: That -- the sentence,

1 Mr. Chief Justice, that you just read is the last in a
2 series of "if's" that we lay out in our brief, where we
3 -- where we assert that at any point in the
4 transportation a jury could find evidence of a design to
5 conceal or disguise. And that last sentence says if
6 they haven't found any evidence concerning the means and
7 the method and the person used for the act of
8 cross-border transportation, and if in addition there
9 was no evidence of what would occur at the point of
10 destination, then there would be no evidence.

11 CHIEF JUSTICE ROBERTS: So there is no money
12 laundering if they conceal the proceeds in a suitcase
13 that's in the trunk of the car? Is that enough?

14 MS. SCHERTLER: Well, that would --

15 CHIEF JUSTICE ROBERTS: Is that concealing
16 the money?

17 MS. SCHERTLER: If we're talking about just
18 the attribute of location, use of a suitcase I would say
19 provides some evidence that there was a design to
20 conceal the location of those illegal proceeds during --
21 as part of this cross-border transportation.

22 CHIEF JUSTICE ROBERTS: Does use of a
23 suitcase provide that evidence?

24 MS. SCHERTLER: I think it would provide
25 basis for a jury to make --

1 CHIEF JUSTICE ROBERTS: When I use a
2 suitcase I'm using it to carry my clothes, not to
3 conceal them.

4 MS. SCHERTLER: And if the jury were
5 presented with testimony that that was the design --
6 that the only design, the only purpose, the only plan in
7 using that suitcase was to use it to secure money for
8 travel, then we would not have met our burden, but based
9 solely on the circumstances.

10 JUSTICE KENNEDY: Well, your answer to
11 Justice Scalia's hypothetical is still not clear to me.
12 It -- it seems to me your answer should be yes, because
13 he's concealing the ownership as of the time he goes
14 across the border, which brings me to my earlier
15 question, if once it's concealed, the statute is always
16 -- is always valid.

17 Then you indicated that oh, well, what
18 happens at the destination is very important. Then we
19 had Justice Scalia's hypothetical. I'm not sure where
20 you came out on that.

21 MS. SCHERTLER: Oh, our -- let me -- let me
22 be clear. I think even if one were to hypothesize that
23 there would be no effort whatsoever to conceal the money
24 at the point of destination, but a jury could find that
25 the transportation itself was designed in other

1 respects -- in its method, in its means -- to conceal or
2 disguise an attribute of the proceeds, that would be
3 enough to find that it was designed in whole or in part,
4 in any part --

5 JUSTICE KENNEDY: So Concealment,
6 concealment during the transportation is always a
7 concealment of an attribute under the statute. That has
8 to be your position.

9 MS. SCHERTLER: Concealment -- yes. The
10 only exception that we make would be in the Chief
11 Justice's example, if the jury were to find that there
12 was no design to conceal the location, for instance, to
13 prevent its discovery; it was only -- my only design was
14 to secure this for transport, like I put my money in my
15 wallet to do that.

16 JUSTICE STEVENS: May I ask you a broader
17 question, forgetting the text of the statute for just a
18 minute, because the text is extremely broad. Do you
19 think the question whether there's an attempt to create
20 an appearance of legitimate wealth has anything to do
21 with the analysis? The question presented is whether
22 there must be such a --

23 MS. SCHERTLER: The question presented --

24 JUSTICE STEVENS: And you're arguing that's
25 totally irrelevant and that -- and also that that

1 familiar title, "Money Laundering," totally irrelevant?

2 MS. SCHERTLER: Your Honor, we disagree that
3 there is any -- there is no appearance of legitimate
4 wealth requirement in the statute. This --

5 JUSTICE STEVENS: There is no -- okay.

6 MS. SCHERTLER: This statute --

7 JUSTICE STEVENS: And the term "laundering"
8 really should be totally ignored?

9 MS. SCHERTLER: The term "laundering" under
10 -- when it is understood to mean the way Congress meant
11 it and the way Congress was viewing this conduct is much
12 broader than Petitioner suggests.

13 Laundering is the many ways in which
14 criminals prevent detection of their proceeds. It would
15 include and Congress certainly had evidence before it --

16 JUSTICE STEVENS: I understand you could
17 find a violation of it, but what I'm really asking you:
18 Is this just a total wild goose chase? We shouldn't
19 even consider laundering at all? As I understand your
20 argument, it's totally irrelevant.

21 MS. SCHERTLER: The title of the statute
22 says -- but the terms of the statute are what matter
23 here.

24 JUSTICE STEVENS: So it is irrelevant?

25 MS. SCHERTLER: The terms are plain. But

1 even if you were to look at the term "laundering," it
2 would not support Petitioner's argument that that has a
3 narrow meaning that includes only conduct that creates
4 an appearance of legitimate wealth.

5 CHIEF JUSTICE ROBERTS: So if this fellow
6 were driving to Canada would that be a different case,
7 because Canada does not have the sort of cash economy
8 we've heard about in Mexico?

9 MS. SCHERTLER: If the method of
10 transportation were exactly the same, it would make no
11 difference, Your Honor. In this case, this -- this
12 transportation method was designed, a jury could find
13 beyond a reasonable doubt, to conceal or disguise the
14 ownership and control of the proceeds through the third
15 party, and if that were the case and they were going to
16 Mexico it would be the same. The nature and the
17 location of the proceeds through the use of this secret
18 compartment and the goat hair to discuss the scent of
19 the proceeds from the drug detection dog.

20 CHIEF JUSTICE ROBERTS: So, what if the
21 fellow says: You know, there are dangerous roads
22 between here and Mexico. I'm hiding the money so that
23 if, you know, a gang comes up they don't find it. And
24 you say: No, we think you're hiding it because it's
25 illegal proceeds? Is that enough to get to the jury?

1 MS. SCHERTLER: I think that's enough to get
2 to the jury, and that would be a jury question, Your
3 Honor, yes.

4 JUSTICE SCALIA: Just to be clear, you
5 affirmatively say that concealing to transport is
6 enough, right?

7 MS. SCHERTLER: Yes, Your Honor. It's --
8 that is enough. Concealing to transport when the jury
9 -- when it is part of the design of the transportation
10 to conceal the location, nature, source, ownership, or
11 control, any single one of those things. And all of
12 those are in here.

13 JUSTICE GINSBURG: Why do you make
14 distinctions between methods of concealment? And if the
15 design is to get the money out of the country, why
16 should it matter whether you put it in a travel bag, you
17 put it in the glove compartment, you put it in your
18 wallet, or you go through this elaborate disguise that
19 we see here?

20 What -- if what's important is getting it
21 beyond the border beyond the reach of law enforcement in
22 the United States, why should it make a difference how
23 carefully it is concealed?

24 MS. SCHERTLER: That need not make a
25 difference if there is evidence before the jury, if

1 there is evidence that the ultimate design of the
2 transportation is to conceal or disguise the proceeds at
3 the point of destination.

4 JUSTICE KENNEDY: Well, then your only
5 defense is to go across the border and before you go
6 across you put all the money in your arms so the people
7 can see it? That's the way you do it?

8 (Laughter.)

9 JUSTICE KENNEDY: Other than that?

10 MS. SCHERTLER: In that situation, there
11 would no basis to find concealment or disguise of
12 location. Now, some of the other attributes may be at
13 issue if a third party is conducting that
14 transportation, but location from the method alone. So
15 the jury would need information about, well, what is the
16 design, what is the purpose of this cross-border
17 transportation? They could still find that the
18 necessary design to conceal or disguise is satisfied by
19 evidence that the whole purpose here is to get it to
20 Mexico where it will be turned into legitimate wealth,
21 for instance.

22 JUSTICE GINSBURG: That's transporting to
23 conceal.

24 MS. SCHERTLER: That's -- and I, for one --

25 JUSTICE GINSBURG: But you're saying this

1 statute covers both?

2 MS. SCHERTLER: It covers both, Your Honor.
3 It asks broadly what was this -- how was this
4 transportation designed and planned out in whole or in
5 part? In any part, was it designed to conceal or
6 disguise? And that would encompass all of the stages
7 that we are -- that we are discussing.

8 JUSTICE GINSBURG: In your brief, you said
9 the bulk cash statute would not apply to a courier. Do
10 you still take that position, that the government's
11 choice is to indict for money laundering or nothing?

12 MS. SCHERTLER: The bulk cash -- well,
13 the bulk -- in this case, there's no evidence in this
14 record that a bulk cash smuggling statute charge would
15 have been viable because there's no evidence in this
16 record that this defendant knew of a currency reporting
17 requirement and intended to evade it.

18 Petitioner's argument that the bulk cash
19 smuggling statute shows that the conduct here was not
20 intended to be covered by the money laundering statute
21 is incorrect for the very reason that Justice Kennedy
22 has identified. The bulk cash smuggling statute could
23 not have filled a gap in the money laundering statute
24 for the conduct here because it has always contained a
25 provision that covers the transportation of known

1 illegal proceeds across the border to evade a --
2 reporting requirements.

3 JUSTICE SCALIA: There's no principle that
4 all criminal statutes have to cover every -- every bad
5 act. Maybe Congress has left a gap. I'm willing to
6 entertain the possibility that this individual,
7 obviously doing something very bad, doesn't -- falls
8 between the two stools. He is neither guilty under the
9 taking currency out of the country statute because he
10 didn't know of the existence of the statute, and he's
11 not guilty under one because he was not transporting to
12 conceal but was concealing to transport. And so there's
13 a gap. The Justice Department can certainly get that
14 gap filled readily enough. I don't know why we should
15 torture either one of the statutes to close it.

16 MS. SCHERTLER: The plain reading of the
17 money laundering statute covers this conduct, and
18 Congress specifically had this conduct in mind. As
19 Senator Biden said in questioning -- and he became one
20 of the co-sponsors -- questioning a witness about this:
21 Isn't it the truth that if we -- if we strengthen all
22 our domestic controls against money laundering, aren't
23 the criminals going to resort to physically transporting
24 their cash out of the United States? This is a --

25 CHIEF JUSTICE ROBERTS: How many co-sponsors

1 were there?

2 MS. SCHERTLER: I don't know, Your Honor.

3 This is part of the core conduct at which
4 this statute was directed, this international
5 concealment money laundering statute.

6 JUSTICE BREYER: How does that show what you
7 want it to show? I mean, what I just heard you say is
8 that Senator Biden said if we make it very tough to
9 launder money in the United States, then criminals will
10 send their money abroad to be laundered.

11 MS. SCHERTLER: And --

12 JUSTICE BREYER: They'll transport it abroad
13 in order to launder it. How does that help you?

14 MS. SCHERTLER: They will resort to taking
15 their money physically out of the United States. And
16 the Senate report says that this provision was designed
17 to halt this flow.

18 JUSTICE BREYER: In order to launder it.
19 Were they not talking about money laundering?

20 MS. SCHERTLER: If the premise --

21 JUSTICE BREYER: Or were they not talking
22 about it? I'm just going back -- I didn't read Senator
23 Biden's statement, so I'm just curious.

24 MS. SCHERTLER: This provision was directed
25 at preventing the illegal moneys from leaving the

1 country. It would have made no sense for Congress,
2 having understood that when money leaves the United
3 States we have little if any ability to know what
4 happens to it, to require in the statute proof beyond a
5 reasonable doubt of what would happen to the money once
6 it --

7 JUSTICE SCALIA: If you're trying to prevent
8 the money --

9 JUSTICE KENNEDY: But you, in response to
10 one of my hypotheticals, said that it would be relevant
11 in some cases to show that it was designed to create the
12 appearance of legitimate wealth. So you put that back
13 in --

14 MS. SCHERTLER: If --

15 JUSTICE KENNEDY: So you put that back into
16 play.

17 MS. SCHERTLER: If we have that evidence,
18 yes, Your Honor. But to take Petitioner's position that
19 it would be necessary evidence in every case in which to
20 prevail under this statute to know of future plans to
21 launder abroad, when the premise of this statute is that
22 when the money leaves the country we cannot know what
23 happens to it, makes no sense.

24 JUSTICE SCALIA: What if --- if that's what
25 they're concerned about, taking the money out of the

1 country, why do they have the concealment requirement?
2 They could have just said, you know, if you take dirty
3 money out of the country you're guilty.

4 MS. SCHERTLER: They --

5 JUSTICE SCALIA: They didn't say that. They
6 have a concealment -- I can't understand why, if the
7 money is hidden during the transportation, it's any
8 worse than when the money is not hidden during the
9 transportation. It isn't -- it isn't the hiding during
10 the transportation they're concerned about. The statute
11 doesn't make any sense that way.

12 MS. SCHERTLER: I think that it does, Your
13 Honor.

14 The Court -- the Congress certainly could
15 have written it in the broad way that you've suggested.
16 It's not unlike the way that they wrote section 1957,
17 which covers broadly all transactions in illegal money.

18 They chose to not cover everything and to
19 cover cross-border transportation's where there's
20 evidence of some intent on the part of that individual
21 to conceal or disguise. And when you think about it,
22 they had set up regulatory provisions like the
23 transaction reporting requirement when there's no
24 conceal or disguise. There were other controls in place
25 as, say, the first line of defense against money

1 laundering to say, \$10,000 or more is leaving the
2 country, we're going to know about it because we have
3 reporting requirements.

4 Here the Senate report says that they made
5 the decision to require evidence of concealment.

6 "Evidence of concealment of a crime" is what the report
7 says. And any time one of these attributes of illegal
8 proceeds is being concealed or disguised, that is
9 concealing a crime in a way that impairs law enforcement
10 from finding those proceeds.

11 JUSTICE STEVENS: May I ask -- may I ask
12 this question? If the statute did include -- and I know
13 you think it does not -- a requirement of trying to
14 create an appearance of legitimate wealth, you would
15 lose? In this case.

16 MS. SCHERTLER: I don't think so, Your
17 Honor, and I would -- I would go back to the evidence
18 that Justice Alito has pointed out that is in this
19 record, that there's evidence in this record that --
20 that the -- by taking the funds to Mexico, they would be
21 able to be used in a way that would not raise suspicion.

22 JUSTICE STEVENS: Well, there's also,
23 consistent with the evidence, they want to pay the drug
24 dealer for the drugs. And then a jury -- you can't say
25 it's clear beyond a reasonable doubt that that was not

1 what it was going on.

2 MS. SCHERTLER: There was -- I would not --
3 I would not disagree with that. I think that we do -- I
4 see that my red light is on.

5 CHIEF JUSTICE ROBERTS: Why don't you finish
6 your answer?

7 MS. SCHERTLER: Your Honor, there was --
8 there was evidence in this case that the proceeds were
9 removed -- this is expert testimony -- removed from the
10 United States to conceal so as not to go through
11 reporting requirements, so that the money would not be
12 identified to U.S. law enforcement. We believe the jury
13 could also infer that further efforts to conceal and
14 disguise those proceeds would occur at the point of
15 destination.

16 Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Ms. Schertler.

19 Mr. Beard, you have four minutes remaining.

20 REBUTTAL ARGUMENT OF JERRY V. BEARD

21 ON BEHALF OF THE PETITIONER

22 MR. BEARD: Justice Scalia, when I left we
23 were discussing --

24 JUSTICE SCALIA: I forget what it was that I
25 didn't understand.

1 (Laughter.)

2 MR. BEARD: Happily I've been thinking about
3 it. Disruption versus detection I had told you, told
4 the Court that this was not a detection statute as much
5 as it is a disruption statute.

6 I think it is important for the Court to
7 recall that the very broad interpretations that the
8 government advances today are essentially the very broad
9 interpretations that the Congress rejected explicitly 20
10 years ago. The Congress rejected the notion that the
11 transportation of illicit funds in and of itself created
12 money laundering liability. And we've discussed that.

13 I think it's important, Justice Scalia, in
14 particular, in response to your question to bring this
15 up, because the Congress recognized that detection would
16 be harder in rejecting that type of legislation, but
17 rejected that they did.

18 The Congress has also shown itself capable
19 of -- of -- in the 1957 context of taking transactions
20 involving unlawful proceeds and making those per se
21 illegal. They could have easily done the same thing in
22 the transportation context if they had wanted to, but
23 instead they were looking at the separate behavior that
24 comprises money laundering. I mean, it is the notion
25 that you're taking money somewhere else and you're doing

1 something else and it gives rise to separate liability.

2 I think the true harm in the government's
3 interpretation, it basically conflates liability for
4 money laundering with the underlying offense, because
5 all of the underlying offenses involve concealment.

6 JUSTICE STEVENS: May I ask the same basic
7 question of you? Do you think that this line, "create
8 an appearance of legitimate wealth" is an essential
9 element of the offense?

10 MR. BEARD: It is not an element,
11 Justice Stevens. As I said, so --

12 JUSTICE STEVENS: So then your question
13 presented raised that question, you're walking away from
14 that question?

15 MR. BEARD: We have spoken in the question
16 presented in that broad term, because we think that that
17 language encapsulates what's taking place.

18 JUSTICE STEVENS: It is not an essential
19 element of the offense?

20 MR. BEARD: It's not an element. But what
21 is an essential element is the need for the
22 transportation -- the transportation to be designed to
23 accomplish the same thing, to obfuscate those
24 attributes. It's -- and that's -- and therein is the
25 reason why --

1 JUSTICE ALITO: -- the same thing,
2 appearance of legitimate wealth goes to one of the
3 attributes, the nature of what's being transported. It
4 doesn't go to all the other attributes.

5 MR. BEARD: The Congress had identified,
6 Justice Alito, those particular attributes as being key
7 to allowing the launderer to inject the money back into
8 commerce. It may be that nature is implicated more
9 often, but the Congress chose to list the others because
10 they felt that those were the particular attributes
11 that, broadly speaking, allowed for the laundering
12 process.

13 This notion of --

14 JUSTICE KENNEDY: Suppose the evidence is
15 clear that he knew he was taking it across the border
16 and it was to pay the drug dealer? Would that suffice?

17 MR. BEARD: For liability under the statute,
18 Justice? No, because the purpose there was not to
19 obscure the attributes. It is simply repayment. It's
20 the final leg, if you will --

21 JUSTICE KENNEDY: Well, but -- no, no. He
22 conceals it, in order to pay the drug dealer.

23 MR. BEARD: Yes. I'm saying that -- I may
24 have misunderstood. If you are saying Mr. Cuellar were
25 to know he was paying the drug dealer?

1 JUSTICE KENNEDY: Yes.

2 MR. BEARD: That wouldn't give rise to
3 laundering, because all you have there basically is
4 money spending. It's the conduct of the underlying --

5 JUSTICE KENNEDY: It's concealing who owns
6 and controls.

7 MR. BEARD: No, I don't think so. I think
8 what you would have under these circumstances is merely
9 the final step, if you will, in the underlying unlawful
10 activity.

11 JUSTICE SCALIA: Mr. Beard, can't you give
12 us something we can get this guy on?

13 (Laughter.)

14 MR. BEARD: I'm not comfortable doing that.

15 JUSTICE SCALIA: He's carrying dirty money.
16 It even smells of drugs.

17 (Laughter.)

18 JUSTICE SCALIA: Can't we get him as an
19 accessory to drug dealing or something? You say he has
20 to walk?

21 MR. BEARD: Well, Justice, I'm not
22 uncomfortable with the notion of him walking, because
23 I'm not uncomfortable with the notion you brought up
24 earlier with that there may indeed be a gap. If there
25 is a gap, then there's a remedy for that. But I think

1 that if --

2 JUSTICE GINSBURG: The point -- the point
3 about aiding and abetting something, this money reeks of
4 marijuana, and that was very puzzling to me. Why this
5 is the standard operating procedure to take this money
6 and wrap it in containers that had contained the drug.
7 So when the police find it, they know it's drug money.

8 MR. BEARD: Justice, I know that the --
9 initially the way this went down was the money that was
10 in his pocket. That's what triggered the -- that's what
11 they said smelled like raw marijuana. And then
12 eventually, they found the drug money. And I can't tell
13 you why they did it this way. But I think that your
14 question underscores they were concerned not with
15 obfuscating any attributes, obviously, they were
16 concerned with getting this money back to repay the
17 person who had sent the drugs north under the
18 government's theory.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Beard. The case is submitted.

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

23

24

25

A	14:25 15:4,6 15:10,13,15,24 16:10,21 25:6 25:16,22 28:14 39:1,11,14 53:18 57:1,6 Alito's 29:7 allowed 57:11 allowing 57:7 amount 7:9 amounts 12:11 13:22 analysis 23:3 43:21 answer 13:9 14:4 26:9 27:4 31:7,8 42:10 42:12 54:6 anyway 14:14 apparently 20:17 appearance 13:7,8,25 15:25 16:22 27:23 43:20 44:3 45:4 51:12 53:14 56:8 57:2 APPEARAN... 1:15 apply 48:9 appropriate 31:16 argue 15:24 arguing 5:9 21:11 43:24 argument 1:13 2:2,7 3:3,6 5:2 16:2 23:5,24 27:18 44:20 45:2 48:18 54:20 arms 47:6 arose 7:16 arranged 39:25 40:3 ascertain 25:9	asked 15:7 asking 19:3,9 44:17 asks 33:13 48:3 assert 41:3 Assistant 1:16 1:18 assume 17:13,17 17:22,24 18:2 24:17 assumes 24:14 assuming 40:4 attempt 16:22 43:19 attribute 20:1 34:7 40:15,23 41:18 43:2,7 attributes 4:3,6 4:8 5:10 10:9 11:9 16:8,8 19:15,24 23:15 23:20 39:9 47:12 53:7 56:24 57:3,4,6 57:10,19 59:15 avoid 8:4 21:13 21:15 aware 9:11,22 9:23,23 16:4 a.m 1:14 3:2 59:21	bank 12:11 13:23 25:7,7,8 25:18 26:7 37:12 banking 8:18 25:20 based 32:20 42:8 basic 56:6 basically 14:11 20:6 35:13 56:3 58:3 basis 33:25 40:17 41:25 47:11 Beard 1:16 2:3,8 3:5,6,8,25 4:23 5:4,18 6:1,18 6:22 7:5,13 8:6 8:9,16,23 9:10 9:21 10:21 11:3,5,25 12:16 13:1,10 13:13 14:3,17 14:23 15:2,5,7 15:12,14,17 16:3,19,24 17:20,24 18:8 18:12,24 19:5 19:13,20,23 20:2,5,9,12,23 21:3,13,18,23 22:2,8,16,22 23:9,17 24:3,6 24:15,19 25:11 25:21,23 26:8 26:14 27:3,13 54:19,20,22 55:2 56:10,15 56:20 57:5,17 57:23 58:2,7 58:11,14,21 59:8,20 beginning 12:3 behalf 1:17,20 2:4,6,9 3:7 27:19 54:21	behavior 7:2,3 7:16 25:3 55:23 believe 54:12 better 24:1 beyond 28:5 30:5 32:21 34:1 45:13 46:21,21 51:4 53:25 Biden 49:19 50:8 Biden's 50:23 big 39:24 bit 26:1 blank 25:17 board 12:24 border 9:7 12:6 12:9 16:13 21:10 28:1,7 28:16 29:1 30:22 31:5 32:18,19 36:9 37:3 38:7 42:14 46:21 47:5 49:1 57:15 bottom 34:22 box 26:6,19 Breyer 4:16,24 5:4 10:16,22 11:4 29:6 34:25 35:3,8 35:19 50:6,12 50:18,21 Breyer's 31:3 brief 7:15 15:24 40:13 41:2 48:8 briefly 27:4 bring 21:4 39:3 55:14 bringing 6:16,18 6:19 brings 42:14 broad 11:10 43:18 52:15
----------	--	--	---	---

55:7,8 56:16 broad 3:25 24:23,23 29:15 31:22 43:16 44:12 broadly 22:12 48:3 52:17 57:11 brook 20:23 brother 33:10 33:14,22 37:24 37:25 38:4 brought 58:23 bulk 7:7,18 8:10 8:21 22:10 48:9,12,13,14 48:18,22 burden 42:8 business 38:4	8:21 9:5 12:11 12:14 13:7,22 15:11,16 17:16 17:16 22:11 45:7 48:9,12 48:14,18,22 49:24 category 22:15 Cayman 26:25 certainly 3:21 3:24 5:7,19 8:24 10:2 15:17 18:2,12 21:4 30:24 38:5 44:15 49:13 52:14 cetera 30:20 change 20:16,17 changes 4:13 26:12,15 character 13:21 characteristics 5:22 charge 48:14 chase 44:18 Chief 3:3,8,21 3:25 8:25 9:10 9:14 10:17 22:18,23 23:4 23:13,17 24:1 24:4,13,16,19 26:10 27:10,12 27:17,20 33:19 40:11 41:1,11 41:15,22 42:1 43:10 45:5,20 49:25 54:5,17 59:19 choice 48:11 chose 52:18 57:9 chosen 28:23 circumstances 9:25 42:9 58:8 clean 17:5 20:21 cleans 14:6 cleansed 27:25 cleansing 16:9	clear 42:11,22 46:4 53:25 57:15 close 33:18 49:15 closely 29:25 closer 9:13 10:1 18:16 clothes 42:2 come 18:7,16 24:14 27:4 comes 9:6 45:23 comfortable 58:14 coming 6:5 commerce 4:10 14:8 24:9 57:8 common 7:11 29:17 compartment 5:20 45:18 46:17 complete 15:22 complex 36:7 component 30:17 comprises 55:24 conceal 3:16,19 4:5 5:24 9:1,8 9:19 10:19,24 11:2,23 12:3 12:24 13:16,19 13:20,20 21:2 21:4 22:20,21 25:13 27:2,2 28:8 32:24 34:2,24 35:15 36:24 37:5,22 38:6,11 39:8 40:18 41:5,12 41:20 42:3,23 43:1,12 45:13 46:10 47:2,18 47:23 48:5 49:12 52:21,24 54:10,13 concealed 3:18	3:22,24 4:1,13 4:20 13:2 34:6 42:15 46:23 53:8 concealing 3:13 8:3 11:23 22:25 23:1,6,8 33:23 34:7,20 34:20,21 35:16 35:17,20 40:1 41:15 42:13 46:5,8 49:12 53:9 58:5 concealment 14:2 20:19 25:2 27:22 30:21,23 32:7 32:15 40:14,23 43:5,6,7,9 46:14 47:11 50:5 52:1,6 53:5,6 56:5 conceals 10:25 57:22 concede 7:24,24 conceive 17:10 conceived 28:21 concept 24:24 conception 39:17 concern 14:12 concerned 36:8 36:11 51:25 52:10 59:14,16 concerning 41:6 conduct 28:25 35:25 36:5 37:19 38:20 44:11 45:3 48:19,24 49:17 49:18 50:3 58:4 conducting 29:2 47:13 conducts 32:17 confines 18:14 conflates 56:3	confronted 36:1 confronting 35:14 Congress 29:23 31:24 34:15 35:25 36:8 38:14,20 44:10 44:11,15 49:5 49:18 51:1 52:14 55:9,10 55:15,18 57:5 57:9 Congress's 37:18 consider 10:5 44:19 considerations 22:3 considering 8:2 consistent 53:23 construction 28:1 contained 48:24 59:6 container 5:16 containers 59:6 contains 27:23 contemplate 19:24 contemplated 14:11 contemplates 10:6 contemplating 16:25 24:8 context 4:12,14 8:18 23:10 30:6 55:19,22 control 3:20 31:13 34:20 37:6,22 38:11 40:5 45:14 46:11 controls 30:11 49:22 52:24 58:6 converted 20:20
C C 2:1 3:1 call 35:9,10 Canada 45:6,7 capable 55:18 car 3:22 4:15 5:15,19 34:22 36:16,19 37:3 37:15 41:13 carefully 46:23 carries 38:6 carry 42:2 carrying 28:18 58:15 case 3:4,13 5:7 5:11,14 6:8,12 7:25 8:2 9:16 10:10,13 18:12 18:15 34:13 45:6,11,15 48:13 51:19 53:15 54:8 59:20,21 cases 30:21,23 51:11 cash 7:7,18,22 8:10,11,19,19				

converting 36:6	36:4	Defender 1:16	36:3 44:14	dissenting 11:21
conviction 3:14	criminal 3:11	defense 47:5	45:19 55:3,4	11:22
7:21 18:1 25:5	7:3 49:4	52:25	55:15	distinction
core 14:12 50:3	criminalize 3:12	deliver 36:17	difference 5:5,7	11:21 35:15
correct 5:5 7:13	criminals 30:9	delivered 39:25	23:21,24 29:14	distinctions
11:25 13:9	30:13 36:3,9	demand 27:24	45:11 46:22,25	46:14
Counsel 22:18	38:24 44:14	Department	different 20:20	distinguishing
counteract	49:23 50:9	1:19 49:13	22:2 23:16,19	8:16
38:24	cross 27:25	deposit 26:6,19	26:1,2,16 45:6	dog 45:19
country 12:10	crosses 31:5	deposits 12:11	direct 7:14	dogs 5:21
12:13 25:7,17	32:19	13:23	directed 35:20	doing 49:7 55:25
32:6,11 34:6	crossing 30:22	describe 31:20	37:21 50:4,24	58:14
36:20 37:15	31:6	described 10:1	directs 28:11	domestic 49:22
46:15 49:9	cross-border	12:18 14:9	dirty 5:16,16	doubt 28:5
51:1,22 52:1,3	28:12 34:15	25:25	13:3,3,4,6,7,16	32:21 34:1
53:2	41:8,21 47:16	describing 16:7	13:20,24,24	45:13 51:5
coupled 11:8	52:19	description 17:5	14:5 17:3,4,6,6	53:25
courier 6:15	Cuellar 1:4 3:4	design 4:5 6:3,6	19:16,17 20:6	drafted 31:22
7:11 10:3,23	3:17 6:3 18:13	6:6 9:24 12:24	20:11,18 52:2	drawing 16:1
36:15,21 37:2	18:15 57:24	13:15,18,20	58:15	drew 35:14
37:4,8,13 48:9	Cuellar's 3:14	15:25 25:13	disagree 44:2	drive 17:3
couriers 29:19	7:6	34:24 35:3	54:3	driver 37:16
course 6:23 8:11	culpability 7:6	36:21,23 37:5	discern 30:7	drives 37:15
14:24 15:19	curious 50:23	37:7,8 38:10	discover 24:10	driving 45:6
16:3 21:6 33:7	currency 8:11	39:8,15,15	discovery 43:13	drove 36:19
40:8,11	8:17 48:16	41:4,19 42:5,6	discuss 45:18	drug 5:21 6:11
Court 1:1,13 3:9	49:9	43:12,13 46:9	discussed 55:12	6:23 9:3 12:14
27:21 52:14	currency-repo...	46:15 47:1,16	discussing 48:7	12:25 15:22
55:4,6	21:19,23 22:5	47:18	54:23	16:15 20:16,19
cover 30:20 49:4		designated	disguise 4:6	32:17,17 36:13
52:18,19	D	28:24	12:14 18:19	37:3,8 38:4
covered 34:16	D 3:1	designed 3:16	20:22 21:2,6	39:20,24 40:22
36:5 48:20	daily 32:18	14:5 19:7 28:8	25:13 28:9	45:19 53:23
covers 48:1,2,25	dangerous	28:10,19 30:5	36:24 37:5	57:16,22,25
49:17 52:17	45:21	32:24 34:2,2	39:9 40:19	58:19 59:6,7
co-sponsors	deal 6:11	39:6 40:18	41:5 43:2	59:12
49:20,25	dealer 32:17	42:25 43:3	45:13 46:18	drugs 9:17
create 15:25	36:13 39:21,24	45:12 48:4,5	47:2,11,18	17:12,13,15
16:22 21:6	40:22 53:24	50:16 51:11	48:6 52:21,24	53:24 58:16
43:19 51:11	57:16,22,25	56:22	54:14	59:17
53:14 56:7	dealing 58:19	destination	disguised 40:6,7	D.C 1:9,19
created 55:11	decision 53:5	12:10 40:16,24	53:8	E
creates 45:3	decisions 39:18	41:10 42:18,24	disguising 8:3	E 2:1 3:1,1
crime 6:17,23	defeat 28:2 31:9	47:3 54:15	40:15,23	earlier 42:14
7:3 22:15	defendant 28:5	detect 30:12	disruption 55:3	58:24
38:21 53:6,9	36:19 37:13	detection 5:21	55:5	easier 12:19
crimes 30:13	48:16	10:6 27:8,16	dissent 35:14	

15:8	et 30:20	eyes 7:21	30:19,19	give 17:11 31:19
easily 17:16	evade 48:17		focuses 11:6	32:10 38:6
55:21	49:1	F	focusing 25:2	58:2,11
economy 15:1	eventually 59:12	face-on 35:14	follow 23:5	gives 10:8 33:9
15:11 17:17	everybody	fact 3:18 5:15	foremost 19:14	56:1
45:7	14:15,21 39:20	6:3 7:17 8:13	forget 24:18	giving 37:25
effect 39:14	40:21	10:24 11:10	54:24	glove 46:17
effectively 5:11	evidence 5:24	12:2 19:11	forgetting 43:17	go 6:5 21:17
effort 42:23	6:10 7:14	29:4 37:1	forms 36:7	22:19 29:6
efforts 54:13	10:11 14:13,18	factfinder 40:17	Fort 1:17	34:8,12 37:12
either 4:8 22:15	15:1,4,6,7,18	facts 25:23 28:9	forth 5:16	46:18 47:5,5
24:8 49:15	18:13 32:20	fall 12:15 16:18	forward 21:4	53:17 54:10
elaborate 37:11	33:25 36:14	25:10	found 4:15 16:4	57:4
46:18	40:14 41:4,6,9	falls 10:20 49:7	41:6 59:12	goat 3:23 5:20
element 56:9,10	41:10,19,23	false 21:6	four 54:19	45:18
56:19,20,21	44:15 46:25	familiar 44:1	fraud 32:3	goes 13:6 42:13
eliminated	47:1,19 48:13	famous 39:23	full 28:11	57:2
30:18	48:15 51:17,19	fancy 37:1	funds 5:12 29:5	going 9:6 10:12
enacted 31:10	52:20 53:5,6	far 34:8,13	32:5 34:6	10:14 13:3,3
36:1	53:17,19,23	February 1:10	53:20 55:11	14:15 18:10
encapsulates	54:8 57:14	Federal 1:16	funny 35:21	20:13,18 21:20
56:17	exactly 12:7	fellow 9:6 17:12	further 54:13	24:14,17 29:4
encompass	31:20 35:24	18:7 45:5,21	future 51:20	35:4 37:12
24:20 48:6	37:18 45:10	felt 57:10		38:6 40:9
enforcement 4:8	examination 4:2	FIDEL 1:3	G	45:15 49:23
31:25 33:21	28:11	filled 48:23	G 3:1	50:22 53:2
38:25 46:21	example 6:4	49:14	gambling 29:20	54:1
53:9 54:12	7:15 22:24	filter 34:17	gang 45:23	good 11:23
engaged 38:16	24:21 32:10	final 57:20 58:9	gap 48:23 49:5	goose 44:18
engaging 9:3	33:20 38:9	find 9:16 10:19	49:13,14 58:24	government 5:8
entertain 49:6	43:11	25:19 26:23,25	58:25	7:25 8:7 15:20
entire 28:20	exception 43:10	31:14 32:2	General 1:19	23:20 25:1
equally 8:1	excuse 4:7	33:13 34:1,11	generated 30:14	31:19 32:20
31:16,16	existence 3:13	34:24 41:4	getting 4:25	55:8
equate 12:20	23:20 49:10	42:24 43:3,11	30:16 31:4	government's
ESQ 1:16,18 2:3	expert 15:10,19	44:17 45:12,23	37:18 38:20,25	6:9 7:21 14:18
2:5,8	15:21 54:9	47:11,17 59:7	46:20 59:16	30:25 37:14
essential 56:8,18	explain 24:2	finding 53:10	Ginsburg 6:15	48:10 56:2
56:21	27:15	finish 54:5	6:19 7:1,8 8:20	59:18
essentially 6:10	explaining 12:7	first 3:3,15	11:20 20:15	grand 36:21
55:8	explanation	19:14 30:4	22:4,14 26:5	guidelines 38:15
establish 16:14	21:5,7	52:25	36:11,25 37:7	38:15
16:17	explicitly 55:9	fit 12:22 22:15	37:17 46:13	guilty 7:18 22:6
established	extent 16:24	five 39:9	47:22,25 48:8	22:9 49:8,11
14:18 15:20,20	25:1	flow 50:17	59:2	52:3
establishes	extremely 43:18	flush 9:12,24	Ginsburg's	guy 9:17 58:12
40:14	eyebrows 15:16	focus 27:8 29:24	38:13	

<p>H</p> <p>H 1:18 2:5 27:18</p> <p>hair 3:23 5:20 45:18</p> <p>halt 50:17</p> <p>happen 29:5 51:5</p> <p>happened 13:4</p> <p>happens 31:5 42:18 51:4,23</p> <p>Happily 55:2</p> <p>harder 16:14,16 55:16</p> <p>harm 56:2</p> <p>hazard 14:23</p> <p>hear 3:3</p> <p>heard 45:8 50:7</p> <p>held 18:4</p> <p>help 9:16 50:13</p> <p>helping 11:14,17</p> <p>he'll 17:15</p> <p>hidden 36:20 37:3,14 52:7,8</p> <p>hide 23:11 24:16 24:20 29:9,13 29:17,18</p> <p>hiding 22:24 23:7,21,22,25 23:25 24:7,13 24:21 35:11 45:22,24 52:9</p> <p>highlight 12:2</p> <p>hold 26:11,11</p> <p>hole 26:20</p> <p>home 13:8 17:3</p> <p>Honor 6:22 8:10 8:23 11:6 12:1 15:3 21:18 22:8 26:9 30:2 31:9 32:8 33:7 33:12 34:9 35:23 39:7 44:2 45:11 46:3,7 48:2 50:2 51:18 52:13 53:17 54:7,16</p>	<p>hope 27:15</p> <p>house 24:22</p> <p>huge 5:5 12:11 23:21,24</p> <p>HUMBERTO 1:3</p> <p>hurt 18:7</p> <p>hypo 13:19</p> <p>hypothesize 42:22</p> <p>hypothetical 6:24 13:14 16:11 18:15 26:17 40:20 42:11,19</p> <p>hypotheticals 51:10</p> <p>I</p> <p>idea 31:14</p> <p>identical 7:16</p> <p>identified 48:22 54:12 57:5</p> <p>if's 41:2</p> <p>ignored 44:8</p> <p>ii 8:8 21:12</p> <p>illegal 7:9 8:15 8:21 27:25 28:6,7,13,25 30:12 31:11 32:2,6,11,22 32:22 34:5,16 35:5 36:3 39:9 41:20 45:25 49:1 50:25 52:17 53:7 55:21</p> <p>illegitimate 36:6</p> <p>illicit 36:19 55:11</p> <p>impairs 53:9</p> <p>implicate 8:18 12:4 22:2</p> <p>implicated 5:8 57:8</p> <p>implicates 12:18 14:12 18:3</p>	<p>implicating 18:16 25:3</p> <p>implication 13:24</p> <p>important 10:4 10:8 21:11 22:23 27:6 38:22 42:18 46:20 55:6,13</p> <p>imposed 31:24</p> <p>impossible 25:8 25:19</p> <p>include 28:22 44:15 53:12</p> <p>included 36:5</p> <p>includes 29:16 45:3</p> <p>including 29:8</p> <p>incorrect 48:21</p> <p>incur 11:11</p> <p>independent 4:11 20:13 40:14</p> <p>indicated 21:21 42:17</p> <p>indicates 7:10</p> <p>indict 8:8 21:12 48:11</p> <p>individual 7:17 16:25 24:7 28:24 38:16 49:6 52:20</p> <p>infer 54:13</p> <p>inference 7:14 33:7</p> <p>inferences 7:20 7:22</p> <p>inferring 40:17</p> <p>information 47:15</p> <p>initially 59:9</p> <p>inject 4:9 57:7</p> <p>injection 14:7 24:9</p> <p>innocent 7:2 20:17</p> <p>instance 4:20</p>	<p>43:12 47:21</p> <p>Instruments 35:10</p> <p>intended 48:17 48:20</p> <p>intent 3:11 25:13 39:2,12 39:15 52:20</p> <p>intercept 4:9</p> <p>interest 30:25</p> <p>interested 11:1</p> <p>international 27:22 30:6,17 38:5 50:4</p> <p>interpretation 5:1 37:10 56:3</p> <p>interpretations 55:7,9</p> <p>interpreted 22:12</p> <p>investigate 9:6</p> <p>investigative 32:2</p> <p>involve 56:5</p> <p>involved 3:16 38:18</p> <p>involving 55:20</p> <p>irrelevant 43:25 44:1,20,24</p> <p>Islands 26:25</p> <p>issue 47:13</p> <p>i.e 12:25 20:20</p> <p>J</p> <p>JERRY 1:16 2:3 2:8 3:6 54:20</p> <p>Juarez 39:21</p> <p>judge 11:21,22 12:2</p> <p>jurisdiction 25:25</p> <p>jury 34:1 41:4 41:25 42:4,24 43:11 45:12,25 46:2,2,8,25 47:15 53:24 54:12</p>	<p>Justice 1:19 3:3 3:8,21,25 4:16 4:23,24 5:4,13 5:18,23 6:2,15 6:18,19 7:1,8 7:23 8:7,14,20 8:25 9:11,14 10:16,17,22 11:4,13,17,20 12:5,17,22 13:1,5,11,18 14:3,13,17,21 14:25 15:4,6 15:10,13,15,24 16:10,21 17:8 17:20,22 18:5 18:9,18,24 19:2,9,17,21 19:25 20:3,7 20:11,15 21:1 21:8,15,21 22:1,4,14,18 22:19,23 23:4 23:13,18 24:1 24:4,13,16,19 25:6,11,16,22 26:5,10,22 27:3,10,12,14 27:17,20 28:14 29:6,7 30:15 31:3,15 32:4 32:10,14 33:1 33:4,9,14,19 34:3,10,12,19 34:25 35:3,8 35:13,19 36:11 36:25 37:7,17 37:24 38:3,8 38:13 39:1,11 39:14,20,23 40:7,11,21 41:1,11,15,22 42:1,10,11,19 43:5,16,24 44:5,7,16,24 45:5,20 46:4 46:13 47:4,9</p>
--	--	--	--	---

47:22,25 48:8 48:21 49:3,13 49:25 50:6,12 50:18,21 51:7 51:9,15,24 52:5 53:11,18 53:22 54:5,17 54:22,24 55:13 56:6,11,12,18 57:1,6,14,18 57:21 58:1,5 58:11,15,18,21 59:2,8,19 Justice's 43:11	52:2 53:2,12 57:25 59:7,8 knowing 7:8 knowledge 22:7 known 6:4 28:7 28:13,25 32:22 48:25 knows 28:5,6 35:3 36:15,16 37:1 39:20 40:22	46:21 53:9 54:12 lawful 8:22 laws 25:8,18 lay 41:2 lead 26:16 leave 24:17 leaves 51:2,22 leaving 50:25 53:1 left 22:9 49:5 54:22 leg 6:10 57:20 legislation 55:16 legitimate 4:9 14:7 16:1,22 17:2 27:23 36:6 43:20 44:3 45:4 47:20 51:12 53:14 56:8 57:2 let's 17:17 32:16 liability 7:6,6 10:2,14 11:12 12:4 18:16 55:12 56:1,3 57:17 lie 7:6 light 54:4 limited 29:3 31:2 line 22:19 52:25 56:7 LISA 1:18 2:5 27:18 list 57:9 listed 4:3 5:10 10:9 16:8 23:20 literal 12:23 literally 4:25 30:1 little 24:2 26:1 51:3 lives 39:2,4,21 location 3:19,22	3:23 4:1,3,11 4:13,14,15,19 4:21,22 9:1,9 9:20 23:2,8,10 23:16,22,23,25 24:7,14 25:9 32:24 34:21 41:18,20 43:12 45:17 46:10 47:12,14 look 20:16 28:20 30:5 45:1 looking 6:2 40:13 55:23 lose 31:13,13 32:1 53:15 lot 14:15,21 15:16 21:10 33:2 36:25 luxury 13:23	means 4:6,14 19:4,5,15,15 19:22 20:4,22 28:18 31:6 36:7 41:6 43:1 meant 44:10 mechanism 16:9 merely 18:21 32:22 58:8 met 42:8 method 3:15 4:21 5:5,9,14 25:2 28:16,23 29:9,9 30:19 41:7 43:1 45:9 45:12 47:14 methods 32:2 46:14 Mexican 15:1 Mexico 6:8 9:25 14:19,22 15:9 15:11 17:16 32:20 37:12 39:2,21 45:8 45:16,22 47:20 53:20 mind 28:22 35:25 49:18 minimize 3:11 minute 43:18 minutes 54:19 misunderstood 13:19 57:24 modified 26:16 modify 16:11 Monday 1:10 Monetary 35:10 money 3:10,18 3:24 4:9,13,15 5:12 6:4,7,13 6:14 7:2,4,10 7:20 8:22 9:12 9:24 10:1,5,6 10:13,18 11:12 12:4,6,14,18 12:19,20,21,25 12:25 13:2,3
K Kennedy 7:23 8:7,14 21:8,15 21:21 22:1 32:4,10,14 34:3,10,12,19 42:10 43:5 47:4,9 48:21 51:9,15 57:14 57:21 58:1,5 key 57:6 kind 5:16 13:7 37:19 kingpin 9:23 37:11 knew 18:13 31:25 48:16 57:15 know 6:9,11 7:11 8:7 9:4,4 9:15 10:2 11:10 12:9 13:13 14:14,16 14:17 15:19 16:13,15 17:14 18:10 19:20,21 22:5 26:15 33:21 35:9 36:15,16,22 45:21,23 49:10 49:14 50:2 51:3,20,22	L lack 40:17 Land 14:15 language 12:23 18:19 37:1 56:17 large 13:22 Laughter 11:16 11:19 33:16 35:12 47:8 55:1 58:13,17 launder 50:9,13 50:18 51:21 laundered 50:10 launderer 24:10 37:16 57:7 laundering 3:10 5:12 7:4,20 10:2,5,13 11:12 12:4,21 13:12 18:4 22:10,13 25:5 27:7,23 29:17 29:19,22,25 30:7 35:9,21 35:24 36:1,2 39:5 41:12 44:1,7,9,13,19 45:1 48:11,20 48:23 49:17,22 50:5,19 53:1 55:12,24 56:4 57:11 58:3 law 4:8 31:25 33:21 38:25		M making 11:21 23:24 34:13 55:20 man 39:24 marijuana 6:16 6:20,24 9:4 59:4,11 matter 1:12 8:20 38:19 44:22 46:16 59:22 mattress 24:23 26:20 mean 5:14,15 8:14 15:13,14 15:15 16:11 17:10 18:6,20 20:17,24 22:25 27:15 28:15 29:23 34:14 37:8 44:10 50:7 55:24 meaning 4:11 10:8 19:10 20:5,14 21:3 23:16,19 45:3	

13:21 14:12,16 14:19,22 15:8 16:13,16 17:5 17:6,11 18:3,3 18:4,10 20:16 20:19,21 21:7 22:10,12,24 23:1,11,21,22 23:22,25 24:8 24:11,17,20,21 25:4,9,19,24 26:19 27:7,22 29:10,17,19,21 29:21,25 30:6 32:11,12 35:21 35:24 36:1,2 36:16,17,19 37:2,3,14,16 37:25 38:22,23 38:25 39:3,4 39:25 40:22 41:11,16 42:7 42:23 43:14 44:1 45:22 46:15 47:6 48:11,20,23 49:17,22 50:5 50:9,10,15,19 51:2,5,8,22,25 52:3,7,8,17,25 54:11 55:12,24 55:25 56:4 57:7 58:4,15 59:3,5,7,9,12 59:16 moneys 50:25 money's 3:13 17:1 motive 5:24 movement 32:5 34:5	narrow 29:24 45:3 nature 3:19 8:4 12:14,24 13:2 15:1 18:19,23 19:8,10,11,14 20:1,14,16,18 20:18,20,22 21:17 22:20 23:6,7 45:16 46:10 57:3,8 necessarily 4:6 5:12 10:3,5 11:11 16:7 17:5 22:25 23:1 necessary 47:18 51:19 necessitate 22:11 need 17:3 34:11 38:23 46:24 47:15 56:21 needs 36:22 neither 49:8 north 59:17 notion 10:6 11:9 12:19 55:10,24 57:13 58:22,23 number 26:12 32:17 numbers 4:4 numerical 26:12	54:14 occurs 16:7 offense 38:17,18 56:4,9,19 offenses 56:5 offered 15:18,19 oh 19:20 22:1 42:17,21 okay 11:24 19:20 24:13 33:2 35:1 44:5 once 16:14 18:9 25:9,19 31:11 42:15 51:5 ones 34:18 operating 59:5 operation 29:20 opposed 7:14 31:5 oral 1:12 2:2 3:6 27:18 order 11:2 27:2 29:12 30:12 31:19 36:20 38:23 50:13,18 57:22 ordinary 32:1 outside 30:10 31:12 32:6,11 34:6 owned 6:4,5 owner 37:22 ownership 3:19 5:25 9:2,9,20 16:15,17 34:21 37:6 38:11 40:5 42:13 45:14 46:10 owns 58:5	41:21 43:3,4 46:9 48:5,5 50:3 52:20 particular 4:3,6 5:7 6:9,12 10:8 15:21 37:19 55:14 57:6,10 particularly 23:19 parties 37:19,21 party 37:20 38:9 38:17 40:10 45:15 47:13 pay 10:23 17:12 17:23 18:6,9 29:19 53:23 57:16,22 paying 57:25 penalty 6:17 36:12 people 12:10 15:15 16:15 29:20 47:6 percent 35:5 perfectly 8:22 permit 33:7 person 12:7,8 16:12 25:17 36:13,17 39:1 39:3 41:7 59:17 pertinent 40:15 40:23 Petitioner 1:5 1:17 2:4,9 3:7 29:3 44:12 54:21 Petitioner's 28:1 45:2 48:18 51:18 phrase 28:10,19 physically 29:12 49:23 50:15 pick 30:22 place 9:23 12:10 13:6,21,22 25:14 28:18	30:22,23 37:12 39:3 52:24 56:17 plain 44:25 49:16 plan 4:7 28:11 28:20 32:25 36:23 37:11 39:17 42:6 planned 28:13 28:21 48:4 plans 51:20 play 25:1 51:16 pleaded 7:17 please 3:9 27:21 pocket 32:19,23 59:10 point 4:1 11:1 12:1 16:19 17:3 25:11 39:19,19 40:16 40:24 41:3,9 42:24 47:3 54:14 59:2,2 pointed 53:18 police 9:3,11,22 9:22 10:9,19 24:9 26:22,24 59:7 position 43:8 48:10 51:18 possess 6:24 possesses 7:1 possibility 22:16 49:6 potential 12:18 precisely 38:20 premise 31:11 50:20 51:21 presented 4:8 42:5 43:21,23 56:13,16 presumably 6:22 prevail 51:20 prevent 14:7 30:9 36:3
N N 2:1,1 3:1 name 26:11,24 35:21 names 26:1	O O 2:1 3:1 obfuscate 19:8 56:23 obfuscated 16:8 obfuscating 59:15 objective 31:17 obscure 57:19 observed 4:10 obviously 49:7 59:15 occur 40:16 41:9	P P 3:1 page 2:2 40:13 paid 17:15 part 28:8,11,19 30:6 36:22,23 37:5 38:10		

38:24 43:13 44:14 51:7 preventing 50:25 primary 17:22 principal 17:9 17:10,13 principle 49:3 probably 4:17 problem 4:18,25 37:9 procedure 59:5 proceeds 3:12 3:20 6:21 8:14 9:7 14:6,6 18:19,21 19:1 19:11,18,22 20:7,9 22:20 22:21 27:25 28:6,8,10,13 28:25 30:9,12 30:12 31:11 32:2,6,22,23 34:16 36:4,9 37:22 38:12 39:10,19 40:5 40:15 41:12,20 43:2 44:14 45:14,17,19,25 47:2 49:1 53:8 53:10 54:8,14 55:20 process 57:12 profit 36:4 prohibition 29:8 proof 18:21 27:24 28:4 51:4 properly 7:7 30:19 prove 36:18 provide 41:23 41:24 provider 17:12 17:15 provides 41:19 provision 7:12	48:25 50:16,24 provisions 52:22 Public 1:16 purchases 12:12 purpose 6:13 15:21 17:8,9,9 17:10,13,18,23 18:6,6 20:19 25:16 28:3 30:4,7,8 31:10 31:20 37:18,20 42:6 47:16,19 57:18 purposed 14:5 19:7 purposely 34:25 purposes 8:21 put 9:23 26:6 33:15 36:15 43:14 46:16,17 46:17 47:6 51:12,15 puts 32:18 33:1 33:2 34:25 putting 26:19 32:23 puzzling 59:4 <hr/> Q quarrel 20:23 question 14:4 23:14 29:7,11 30:3 31:3 35:17 38:14 39:11,12 42:15 43:17,19,21,23 46:2 53:12 55:14 56:7,12 56:13,14,15 59:14 questioning 22:19 49:19,20 <hr/> R R 3:1 raise 53:21 raised 56:13 raising 15:16	range 36:5 raw 59:11 reach 30:10 46:21 read 4:24 19:23 29:8,10,24 41:1 50:22 readily 49:14 reading 29:24 29:25 49:16 ready 18:10 real 18:6,6 really 24:25 44:8,17 reason 10:7 12:8 12:17 29:18 31:23 48:21 56:25 reasonable 28:5 32:21 34:1 40:17 45:13 51:5 53:25 reasons 3:15 29:1 rebuttal 2:7 27:5 54:20 recall 55:7 recognized 55:15 record 10:12 14:24 48:14,16 53:19,19 recorded 12:6 red 54:4 reeks 59:3 refer 29:11 referenced 23:14 referring 5:19 REGALADO 1:3 regulatory 52:22 rejected 55:9,10 55:17 rejecting 55:16 relevant 34:7	51:10 remain 13:5 remained 13:4 remaining 54:19 remedy 58:25 remove 18:14 removed 54:9,9 render 5:11 repay 14:19 59:16 repayment 6:12 6:14 10:13 57:19 reply 7:15 report 50:16 53:4,6 reporting 8:4 21:8 48:16 49:2 52:23 53:3 54:11 require 7:14 8:3 18:25 28:4 51:4 53:5 required 18:25 requirement 4:5 8:5 17:4,18 21:9,16,19,22 21:24,25 22:5 27:24 30:18 31:2,17,19,24 44:4 48:17 52:1,23 53:13 requirements 49:2 53:3 54:11 requires 3:11 7:8 22:6 reserve 27:10 resort 49:23 50:14 respect 31:23 respected 39:24 respects 43:1 Respondent 1:20 2:6 27:19 response 7:19 38:13 51:9	55:14 responses 30:3 rests 27:9 result 17:19 26:2,16 resurfacing 10:7 17:1 24:8 returning 6:20 reveals 4:3 reversed 3:14 right 10:17,20 17:24 20:2 24:3 46:6 rise 56:1 58:2 roads 45:21 ROBERTS 3:3 3:21 8:25 9:14 22:18 23:4,13 24:1,4,13,16 26:10 27:12,17 33:19 40:11 41:11,15,22 42:1 45:5,20 49:25 54:5,17 59:19 run 29:20 <hr/> S S 2:1 3:1 safe 26:6 safety 26:19 satisfied 18:21 47:18 satisfies 17:25 satisfy 14:1 17:18 38:1 saw 36:2 38:21 saying 7:2 23:15 25:4 32:4 34:5 35:4,6,6,8 40:9 47:25 57:23,24 says 11:22 12:8 16:12 25:17 30:1 33:10 41:5 44:22 45:21 50:16 53:4,7
---	---	--	--	--

Scalia 11:13,17 14:13,17,21 17:8,20,22 18:5,9 26:22 27:14 33:1,4 35:13 39:20,23 40:7,21 46:4 49:3 51:7,24 52:5 54:22,24 55:13 58:11,15 58:18	52:16 secure 42:7 43:14 see 4:18 10:16 20:12 22:1 38:19 46:19 47:7 54:4 seen 5:3 select 40:9 Senate 50:16 53:4 Senator 49:19 50:8,22 send 50:10 sending 16:12 25:17,24 26:3 sense 4:1 9:2 19:17 51:1,23 52:11 sent 14:19 25:14 59:17 sentence 40:25 41:5 sentencing 38:14 separate 55:23 56:1 series 41:2 set 30:11 34:17 39:1 52:22 shipment 21:9 shoe 29:21 33:1 33:2,15 34:22 35:1,10 shorthand 16:6 show 19:1 32:21 50:6,7 51:11 shown 55:18 shows 36:14 48:19 side 32:18 signifies 5:10 simply 10:14,23 11:10 13:6 16:6 18:16 20:15,24 37:13 57:19	single 46:11 situation 47:10 smelled 59:11 smells 58:16 Smith 12:2 smuggling 7:7 7:18,22 8:1,5 8:10,11 22:11 48:14,19,22 social 38:5 sold 9:4,17 sole 39:2 solely 30:19 42:9 Solicitor 1:18 somebody 37:2 sorry 15:5 sort 45:7 sounds 11:20 source 3:19 46:10 Souter 13:5,11 13:18 14:3 30:15 31:15 33:9,14 37:24 38:3,8 South 21:20 speaking 57:11 speaks 8:11,12 specifically 11:8 49:18 specified 18:20 19:18 spend 15:8,16 17:16 40:1 spendable 18:11 spending 12:19 12:20 13:23 14:9,10,10 18:3,3 58:4 spends 40:22 Spenny 14:15 spent 12:19 13:4 spoken 56:15 sprinkled 5:20 stages 48:6 standard 59:5 start 39:5	statement 50:23 States 1:1,7,13 3:4 6:16,20 12:13 13:25 28:1 29:1 30:11,24 31:12 32:1 46:22 49:24 50:9,15 51:3 54:10 statute 3:10,12 5:1 7:7 8:1,2,5 8:11,21 10:5 10:20 11:1,6 12:15,23 14:4 16:4,18 17:18 18:1 22:6,13 23:15,18 25:10 27:7,8,9,16,23 28:2,4,9 29:15 30:7,8,8 31:4 31:10,11,22 33:13 35:9,18 35:20,22,24 37:10,21 38:1 42:15 43:7,17 44:4,6,21,22 48:1,9,14,19 48:20,22,23 49:9,10,17 50:4,5 51:4,20 51:21 52:10 53:12 55:4,5 57:17 statutes 49:4,15 statutory 17:8 step 58:9 Stevens 5:13,18 5:23 6:2 18:18 18:24 19:2,9 19:17,21,25 20:3,7,11 21:1 43:16,24 44:5 44:7,16,24 53:11,22 56:6 56:11,12,18 Stevens's 22:19 stick 29:20	stools 49:8 stores 13:23 streams 14:7 strengthen 49:21 strong 7:25 8:1 stumbled 10:10 submit 28:22 submitted 59:20 59:22 subsequent 24:12 suffice 57:16 sufficient 25:4 suggest 10:12 16:5 29:4 suggested 7:5 16:6 25:12,14 52:15 suggesting 20:25 23:17 26:18 suggestion 13:15 suggests 4:4 24:7 28:20 29:11 31:3 44:12 suitcase 41:12 41:18,23 42:2 42:7 support 7:22 25:4 45:2 supported 7:20 28:2 suppose 7:19 9:2 12:5 16:11 32:5 37:24 39:1 57:14 Supreme 1:1,13 sure 9:15 13:1 21:24 24:11 42:19 surreptitiously 12:6 36:10 surround 4:12 surrounding
---	---	--	--	---

23:11 survive 24:12 suspect 9:3 suspicion 53:21 system 25:20 31:13 38:15	23:1 26:6 55:21 56:23 57:1 things 46:11 think 4:2 6:1 8:6 8:9,12 9:5,12 9:14,17,21 10:4,7,15 11:3 11:5 12:1,16 13:15 14:3,10 15:18 16:20 17:1,7 18:15 18:25 19:3,5 19:13,15 20:4 20:14 21:25 22:22,23 23:2 23:9 24:6,25 25:24 26:2 27:3,6 29:23 33:11,25 34:12 35:21 37:9,10 41:24 42:22 43:19 45:24 46:1 52:12,21 53:13,16 54:3 55:6,13 56:2,7 56:16 58:7,7 58:25 59:13 thinking 55:2 thinks 33:20 third 37:19,20 37:21 38:9,17 40:9 45:14 47:13 thought 4:17,19 5:2 11:14,18 13:19 20:5 throw 5:21 time 6:25 27:11 29:17,19 35:5 42:13 53:7 times 23:14 tin 24:22 title 35:23 44:1 44:21 today 3:4 55:8 told 55:3,3	tool 31:20 torture 49:15 total 44:18 totally 30:17 43:25 44:1,8 44:20 tough 50:8 town 10:18 39:23 trace 30:13 trafficking 6:11 6:23 transaction 8:15 8:17,18 15:22 15:23 52:23 transactions 8:12 32:17 52:17 55:19 transaction-re... 21:13,16,25 transfer 25:7 transfers 11:7 transformed 21:2 transmission 11:8 transport 9:7 11:23 12:3 29:12 35:16,17 35:20 43:14 46:5,8 49:12 50:12 transportation 3:15,17 4:20 4:21 5:6,6,9,11 5:14 6:6,7,13 8:4 9:8 10:25 11:7 12:23 15:22 17:11 19:6 28:7,12 28:15,15,16,17 28:21,24,25 29:2,5,9,12 30:20 34:16 36:23 38:11 39:7,8 40:4,9 40:12,18 41:4	41:8,21 42:25 43:6 45:10,12 46:9 47:2,14 47:17 48:4,25 52:7,9,10 55:11,22 56:22 56:22 transportation's 11:11 52:19 transported 9:19 57:3 transporting 9:1 10:18,19,22,24 11:2,22 12:8 12:12 27:1 35:15 47:22 49:11,23 transports 12:5 37:14 travel 42:8 46:16 triggered 59:10 true 8:24 21:3 31:16 37:22 56:2 trunk 41:13 truth 49:21 try 5:21 12:2 27:4 30:7 trying 20:3 24:10,11 51:7 53:13 turned 47:20 turns 9:18 two 3:14 29:14 49:8 type 5:22 7:16 9:24 23:2 25:3 25:12 55:16	underlying 38:17,18 56:4 56:5 58:4,9 underscores 59:14 understand 5:8 6:24 8:17 9:10 11:14 18:18 20:3 21:18 22:8,24 23:5 27:7,14 35:6 44:16,19 52:6 54:25 understanding 22:12 understood 4:12 13:14 23:10 44:10 51:2 United 1:1,7,13 3:4 6:16,20 12:13 13:25 28:1 29:1 30:11,24 31:12 32:1 46:22 49:24 50:9,15 51:2 54:10 unlawful 3:12 3:20 14:6 18:20,22 19:1 19:12,18,22 20:7,9 55:20 58:9 use 12:11 13:22 30:12 32:1 37:4,20 41:18 41:22 42:1,7 45:17 U.S 54:12
T T 2:1,1 taint 3:11 21:5 take 7:9,23,25 14:5,5 15:14 16:11 19:7 23:11 29:18 30:22,23 32:11 32:18 33:10 35:4 37:2 48:10 51:18 52:2 59:5 taken 4:1 31:12 31:12 takes 9:12 32:18 38:15 talking 17:7 18:23 19:25 36:12 41:17 50:19,21 tape 12:7 16:12 taped 16:25 tell 18:22 59:12 tells 33:14 term 23:10 44:7 44:9 45:1 56:16 terms 44:22,25 testimony 42:5 54:9 tests 28:2 Tex 1:17 Texas 7:16 text 4:2 43:17,18 Thank 3:8 27:12 54:16,17 59:19 theory 36:18 37:14 59:18 thing 18:14 21:17 22:25		U ultimate 47:1 ultimately 30:21 33:8 unclean 19:16 uncomfortable 58:22,23	V v 1:6,16 2:3,8 3:6 54:20 valid 42:16 variety 36:2 verb 21:1,2 versus 3:4 55:3 viable 48:15	

viewing 44:11	whatsoever 42:23	1957 52:16		
violates 35:18	wide 36:5	55:19		
37:20	wild 44:18	1986 36:2		
violation 44:17	willing 49:5	<hr/> 2 <hr/>		
<hr/> W <hr/>	wire 25:6	20 55:9		
wad 29:21	witness 49:20	20-year 36:12		
walk 58:20	word 4:18 18:23	2008 1:10		
walking 56:13	19:10,10 28:14	25 1:10		
58:22	28:17 29:17	27 2:6		
wallet 32:19	words 4:10,12	<hr/> 3 <hr/>		
43:15 46:18	16:4 17:4 23:6	3 2:4		
want 7:24 29:24	23:11 30:5	<hr/> 4 <hr/>		
30:5 50:7	31:18 40:20,21	41 40:13		
53:23	work 4:18	<hr/> 5 <hr/>		
wanted 55:22	worker 38:5	54 2:9		
wants 23:20	worse 52:8			
warrant 9:18	Worth 1:17			
Washington 1:9	wouldn't 8:1			
1:19	12:22 16:21			
wasn't 15:10	21:16 30:16			
18:5	33:5 58:2			
watched 33:21	wrap 59:6			
way 10:25 28:12	wrapped 5:15			
28:21 29:10	written 52:15			
31:23 38:21,21	wrong 11:4,5			
40:4 44:10,11	wrote 52:16			
47:7 52:11,15	<hr/> X <hr/>			
52:16 53:9,21	x 1:2,8 7:9			
59:9,13	<hr/> Y <hr/>			
ways 36:2 38:24	yard 24:21			
44:13	26:21			
weak 7:20	years 55:10			
wealth 16:1,22	<hr/> \$ <hr/>			
17:2 27:24	\$10,000 53:1			
36:6 43:20	\$80,000 9:17			
44:4 45:4	<hr/> 0 <hr/>			
47:20 51:12	06-1456 1:6 3:4			
53:14 56:8	<hr/> 1 <hr/>			
57:2	10:02 1:14 3:2			
went 15:8 25:14	100 35:5			
59:9	11:04 59:21			
We'll 3:3	1956 3:10			
we're 6:2 8:2				
17:7 40:4				
41:17 53:2				
we've 45:8 55:12				