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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOSE ANTONIO LOPEZ, :

4 Petitioner, :

5 v. : No. 05-547

6 ALBERTO R. GONZALES, :

7 ATTORNEY GENERAL; :

8 and :

9 REYMUNDO TOLEDO-FLORES, :

10 Petitioner, :

11 v. : No. 05-7664

12 UNITED STATES. :

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14 Washington, D.C.

15 Tuesday, October 3, 2006

16

17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United States
19 at 10:03 a.m.

20 APPEARANCES:

21 ROBERT A. LONG, JR., ESQ., Washington, D.C.; on behalf of
22 Petitioner Lopez.

23 TIMOTHY CROOKS, ESQ., Supervisory Assistant Federal Public
24 Defender, Houston, Texas; on behalf of Petitioner
25 Toledo-Flores.

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1 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
2 Department of Justice, Washington, D.C.; on behalf of
3 the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ROBERT A. LONG, JR., ESQ.	
4	On behalf of Petitioner Lopez	4
5	ORAL ARGUMENT OF	
6	TIMOTHY CROOKS, ESQ.	
7	On behalf of Petitioner Toledo-Flores	17
8	ORAL ARGUMENT OF	
9	EDWIN S. KNEEDLER, ESQ.	
10	On behalf of the Respondents	27
11	REBUTTAL ARGUMENT OF	
12	ROBERT A. LONG, JR., ESQ.	
13	On behalf of Petitioner Lopez	56
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 [10:03 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Lopez versus Gonzales and
5 Toledo-Flores versus United States.

6 Mr. Long.

7 ORAL ARGUMENT OF ROBERT A. LONG, JR.

8 ON BEHALF OF PETITIONER LOPEZ

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

11 A drug-trafficking crime is defined in 18 U.S.
12 Code Section 924(c) as any felony punishable under the
13 Controlled Substances Act or two other Federal statutes.
14 "Punishable" is a key term. If that word is omitted, the
15 remaining phrase, "any felony under the Controlled
16 Substances Act," clearly refers to felony violations of
17 the Controlled Substances Act. The parties agree that
18 "punishable" means "subject to criminal sanctions." So, a
19 "drug-trafficking crime," under 924(c), is conduct that is
20 subject to being punished under the Controlled Substances
21 Act.

22 State felonies are not, themselves, punishable
23 under the Controlled Substances Act. It is not a Federal
24 crime to violate State law. The defendant's conduct may
25 be punishable under both Federal and State law, but a

1 State felony is not a felony punishable under the
2 Controlled Substances Act.

3 JUSTICE KENNEDY: Well, do you agree that if
4 there were a State conviction for an offense that would
5 have been punishable under the Federal law, their both
6 being felonies, that enhancement can apply, in that
7 instance, and that that does meet the definition?

8 MR. LONG: Yes, Justice Kennedy. Our position
9 is, if the conduct would violate a felony provision of the
10 Controlled Substances Act or one of the other two Federal
11 statutes, it then is a drug-trafficking crime under 18
12 U.S. Code Section 924(c), and, therefore, it is an
13 aggravated felony.

14 But there are three additional textual
15 indications, in addition to simply the "felony punishable"
16 language, that misdemeanor offenses under the Controlled
17 Substances Act are not drug-trafficking crimes under
18 Section 924(c). The first one is, there are other
19 provisions of Section 924 -- (e), (g), and (k) -- where
20 Congress actually used very similar language. It referred
21 to conduct punishable under the Controlled Substances Act
22 or the two other statutes, or offenses under the
23 Controlled Substances Act or the two other Federal
24 statutes. But then, it added an express reference to
25 State offenses, so --

1 JUSTICE SCALIA: Where --

2 MR. LONG: -- the implication is that when
3 Congress meant to include State offenses, it said so.

4 JUSTICE SCALIA: Where are those sections?

5 MR. LONG: The -- you can find them; they're in
6 the appendix to Lopez's blue brief, Justice Scalia --

7 JUSTICE SCALIA: Okay.

8 MR. LONG: -- and the provisions on (e), (g),
9 and (k) -- 924 begins on page 3A of the appendix, and (e)
10 begins on 5A, and you can pick up -- (g) is on 6A, (k) is
11 on 7A.

12 JUSTICE SCALIA: What are the sections -- (b)?

13 MR. LONG: They're subsections (e), (g), and
14 (k).

15 JUSTICE SCALIA: All right.

16 CHIEF JUSTICE ROBERTS: Well, that doesn't carry
17 too much weight, though, because the provision that -- I'm
18 looking at (g)(3), "violates any State law relating to any
19 controlled substance," can be broader than what's
20 punishable under the Federal Controlled Substances --

21 MR. LONG: It --

22 CHIEF JUSTICE ROBERTS: -- Act.

23 MR. LONG: It is a bit broader, Mr. Chief
24 Justice, but if you look at all of these provisions, the
25 implication is clearly that Congress was referring to

1 State law when it meant to include State law. I mean, the
2 -- if you looked at (e), for example, there it's a
3 parallel construction; it's not broader. I think perhaps
4 the government would say, "Well, we're talking about
5 offenses." That's a little different from a felony, but
6 "offenses" is actually a broader term.

7 I'll mention an additional statute, which was
8 not in the appendix -- 18 U.S. Code Section 3559(c)(2)(H).
9 This provision -- it's a similar provision; it defines a
10 "serious drug offense" as an offense that is punishable
11 under the specific sections of the Controlled Substances
12 Act, or an offense under State law that, had the offense
13 been prosecuted in a court of the United States, would
14 have been punishable under the CSA.

15 An additional textual indication is, it's agreed
16 -- and this Court has already said, in *Gonzales* against
17 the United States, that a drug-trafficking crime under
18 924(c), under the criminal statute, must be a Federal
19 crime. 924(c)(1)(A) refers to a crime that may be
20 prosecuted in a court of the United States, and that
21 clearly refers to a Federal crime. The definition of
22 drug-trafficking crime, by its term, says it is for
23 purposes of 924(c), so there is no reason why Congress
24 would have wanted to include State felonies in a
25 definition that applies to a Federal criminal provision

1 that all concede applies only to Federal predicate
2 offenses. And --

3 JUSTICE ALITO: In --

4 MR. LONG: -- the Government's interpretation
5 would significantly broaden Section 924(c) to include
6 Federal misdemeanors.

7 JUSTICE ALITO: In 8 U.S.C. 1101(a)(43)(B),
8 what, in your view, does the first phrase, "illicit
9 trafficking in a controlled substance," add to the
10 reference to a drug-trafficking crime --

11 MR. LONG: Justice --

12 JUSTICE ALITO: -- as defined by 924(c)?

13 MR. LONG: Justice Alito, in our view, "illicit
14 trafficking" means any offense that has a trafficking
15 element -- that is, distribution, possession with intent
16 to distribute, manufacture --

17 JUSTICE ALITO: But are there any trafficking
18 offenses that would not fall within 924(c) if you define a
19 "trafficking offense" that way?

20 MR. LONG: Yes. They're -- most offenses under
21 the Controlled Substances Act are trafficking offenses.
22 There are a few that are simple possession. There is a
23 date-rape drug that I will not try to pronounce, but it's
24 listed in 21 U.S.C. Section --

25 JUSTICE ALITO: Well, no, there --

1 MR. LONG: -- 844.

2 JUSTICE ALITO: -- are possessory -- there are
3 "mere possession" offenses that are outlawed by 924(c),
4 but is it not the case that any -- if you interpret
5 "trafficking" to mean trafficking in the way the word
6 would be used in ordinary speech -- that any State
7 trafficking offense you can think of would have a
8 corresponding felony violation under the Controlled
9 Substances Act, so that if you read the statute that way,
10 the initial phrase is superfluous?

11 MR. LONG: I believe the Government has a
12 footnote in their brief where they suggest there are some
13 State trafficking offenses that actually do not have a
14 parallel in Federal law. Soliciting, I think, may be one
15 of them. So, I think there are, in fact, some. And our
16 position, of course, is that by adding illicit trafficking
17 -- any trafficking offense, State or Federal, whether or
18 not it is punishable under the Controlled Substances Act,
19 is an aggravated felony.

20 JUSTICE ALITO: Let me ask the same question a
21 different way. If -- since 924(c) includes some "mere
22 possession" offenses, and illicit trafficking in a
23 controlled substance includes all violations of 924(c),
24 doesn't that show that the way Congress used "illicit
25 trafficking in a controlled substance" is not in the sense

1 in which the term is used in ordinary speech, but's much
2 broader, so that it can include "mere possession"
3 offenses?

4 MR. LONG: The -- Justice Alito, there is an
5 argument -- it's developed in the brief of the American
6 Bar Association -- that, because illicit trafficking is
7 the general category, that all the aggravated felonies in
8 this category should have a trafficking component; and,
9 therefore, the felonies punishable under the Controlled
10 Substances Act that are "simple possession" offenses
11 should not, in fact, be included. That is not an argument
12 that we have pressed in our brief. We read the phrase to
13 say "illicit trafficking, including any felony punishable
14 under the Controlled Substances Act." So, I would agree
15 with you, to the extent that if it is a felony punishable
16 under the Controlled Substances Act, Congress has said, by
17 definition, that it is included in the category of illicit
18 trafficking.

19 JUSTICE BREYER: But that's ambiguous. That's
20 perfectly ambiguous. Because, the case of your client, it
21 is a felony, and it is punishable under the Controlled
22 Substances Act.

23 MR. LONG: Well, Justice Breyer, it is a
24 misdemeanor under --

25 JUSTICE BREYER: No, that's --

1 MR. LONG: -- the Controlled --

2 JUSTICE BREYER: -- right. But it is a felony
3 under South Dakota law. And what the statute says -- and
4 that's the Government's argument -- they say "any felony
5 punishable under the Controlled Substances Act." They
6 don't mean, necessarily, any felony punishable as a felony
7 under the Controlled Substances Act.

8 MR. LONG: Well --

9 JUSTICE BREYER: It might mean anything that is
10 a --

11 MR. LONG: But --

12 JUSTICE BREYER: -- felony, and --

13 MR. LONG: But --

14 JUSTICE BREYER: -- it is also punishable; in
15 which case, you lose. But, in the first case, you win.

16 MR. LONG: But, you know --

17 JUSTICE BREYER: So, what am I supposed to look
18 to, to decide which is --

19 MR. LONG: Well, you could look to the case of
20 Jerome against United States, which is -- which was a
21 unanimous decision of this Court -- in which the Court
22 held that the -- just the phrase "any felony" --

23 JUSTICE BREYER: Uh-huh.

24 MR. LONG: -- in the Federal bankruptcy statute
25 should be interpreted to mean any Federal felony, so --

1 JUSTICE BREYER: Oh, but you don't mean that,
2 because you're prepared to concede -- at least I thought
3 you were, until your last argument -- you're prepared to
4 concede that if a person engages in a crime that is
5 punishable as a felony under South Dakota law, and it is
6 also punishable as a felony under Federal law, under 801,
7 et seq, well, that counts.

8 MR. LONG: Well, but, I mean, the Government --

9 JUSTICE BREYER: Do you --

10 MR. LONG: -- accuses us --

11 JUSTICE BREYER: Do you concede that --

12 MR. LONG: The --

13 JUSTICE BREYER: -- or not?

14 MR. LONG: The Government accuses us of making
15 that concession --

16 Justice Breyer: No, no.

17 MR. LONG: -- but we --

18 JUSTICE BREYER: You --

19 MR. LONG: -- really don't.

20 JUSTICE BREYER: -- you say your answer is, you
21 don't make the concession?

22 MR. LONG: We really don't. I mean, we concede
23 that if the -- I mean, 8- -- 924(c), the criminal statute,
24 says nothing about State law. It says nothing about any
25 conviction under Federal or State law. It's simply a

1 question of whether the conduct is punishable, capable of
2 being punished, under the Controlled Substances Act --

3 JUSTICE KENNEDY: But I thought that --

4 MR. LONG: -- the Federal statute.

5 JUSTICE KENNEDY: -- was the concession you made
6 in response to my --

7 MR. LONG: Well --

8 JUSTICE KENNEDY: -- question.

9 MR. LONG: -- yes. I -- but I just want to be
10 careful about the language in which we make --

11 JUSTICE STEVENS: But you --

12 MR. LONG: -- this concession --

13 JUSTICE STEVENS: -- make the concession, as I
14 understand it, because it's a Federal felony, not because
15 it's a State felony --

16 MR. LONG: Right.

17 JUSTICE STEVENS: -- isn't that right? Yes.

18 JUSTICE GINSBURG: Is it --

19 MR. LONG: Precisely.

20 JUSTICE GINSBURG: Is it -- if this is an
21 ambiguous statute, do you -- what mileage do you get from
22 Barrett? There is certainly an argument that what was --
23 Congress was trying to do was to codify that practice of
24 saying, "If there is analogous felony -- if there is
25 analogous crime under State law, that should be included."

1 And that made good sense.

2 MR. LONG: Yes. If it's ambiguous, and you look
3 to the legislative history, I think we get considerable
4 mileage from Barrett. The Congress was pretty clear that
5 what it was doing was codifying Barrett. The Barrett
6 approach, which was then followed by the BIA for more than
7 a decade, was that they would count State drug crimes, but
8 only if they were felonies under the Federal statutes,
9 under the Controlled Substances Act. So, I think we get
10 considerable mileage out of that.

11 JUSTICE GINSBURG: What --

12 JUSTICE KENNEDY: You've --

13 JUSTICE GINSBURG: -- about the --

14 JUSTICE KENNEDY: -- answered Justice Breyer by
15 citing the Jerome case. After Jerome, we decided United
16 States vs. Gonzales, having to do with the consecutive or
17 concurrent sentencing terms. And it -- are those two
18 cases in some tension? Gonzales didn't mention Jerome.
19 And I noticed that none of the briefs mentioned it either.
20 Is there some tension in the cases? And, if so, is this a
21 case where, when we write an opinion, whatever the
22 outcome, we should talk about that? And, if that's so,
23 what should we say?

24 MR. LONG: I don't see any tension. Gonzales
25 was just about consecutive versus concurrent sentences

1 under State versus Federal law. I mean, the Court has
2 applied that principle --

3 JUSTICE KENNEDY: But it does --

4 MR. LONG: For example, in Taylor --

5 JUSTICE KENNEDY: -- it does seem to limit the
6 broad statement in Jerome, without mentioning Jerome.

7 MR. LONG: Well, but -- I mean, with respect,
8 Justice Kennedy, I don't see how it limits it. And there
9 have been other cases -- Taylor is an example -- where the
10 Court adopted a single definition of "burglary" for
11 purposes of 924(e). That applies the Jerome principle. I
12 mean, it's a principle that has been applied in a number
13 of this Court's cases.

14 CHIEF JUSTICE ROBERTS: But has it ever been
15 applied in a -- to a statute that specifically says that
16 the term "aggravated felony" applies to an offense
17 described in this paragraph, whether in violation of
18 Federal or State law?

19 MR. LONG: Well --

20 CHIEF JUSTICE ROBERTS: That would seem to me to
21 be a very express legislative repudiation of the Jerome --

22 MR. LONG: Well --

23 CHIEF JUSTICE ROBERTS: -- principle.

24 MR. LONG: -- when we get to that language, Mr.
25 Chief Justice -- and I do think it helps the analysis to

1 first decide, What is the definition of a "drug-
2 trafficking crime" under 924(c), the criminal statute?
3 Once you've decided that -- now, when you move back to the
4 INA, there is this language. The term "aggravated felony"
5 applies to an offense described in 101(a)(43), whether in
6 violation of Federal or State law, or the law of a foreign
7 country. Now, we think that's pretty straightforward. It
8 has to be an offense described. So, the simple example is
9 money laundering. It -- the offense described in 18 U.S.
10 Code Section 1956, "money laundering," is an aggravated
11 felony. So, a violation of State law or of foreign law
12 can be an aggravated felony, but only if it is the offense
13 described in 1956. If States or a foreign government has
14 a broader definition of "money laundering," that can't
15 count, because it's not the offense described. And when
16 you turn to a drug-trafficking crime, the way that offense
17 is described in 101(A)(43) is -- Congress picked up, in
18 its entirety and without any modification, the definition
19 of "drug-trafficking crime" in 924(c), a felony punishable
20 under the Controlled Substances Act.

21 So, if you agree that, in the criminal statute,
22 that means a felony violation of the Controlled Substances
23 Act, the offense described is the felonies in the
24 Controlled Substances Act, not the felonies in the
25 misdemeanors. And State -- if State law wants to call a

1 -- something that's a misdemeanor under Federal law a
2 felony, they can do that, but they can't expand the
3 offense described. The offense described, the way
4 Congress did that, is --

5 JUSTICE STEVENS: But are you saying it would
6 also include State trafficking offense, because it's
7 described in the word "trafficking"?

8 MR. LONG: Yes. I'm focusing on the definition
9 of "drug-trafficking crime." It -- also, there's the
10 illicit trafficking piece of this. And, I should add, any
11 State offense that is illicit trafficking is going to be
12 an aggravated felony. We recognize that.

13 If there are no further questions, I'd like to
14 reserve the balance of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.

16 Mr. Crooks, we'll hear now from you.

17 ORAL ARGUMENT OF TIMOTHY CROOKS

18 ON BEHALF OF PETITIONER TOLEDO-FLORES

19 MR. CROOKS: Mr. Chief Justice, and may it
20 please the Court:

21 I would first like to address the Government's
22 contention that Mr. Toledo-Flores's appeal is moot. His
23 appeal of his sentence is not moot, primarily because he
24 is still subject to the sentence that is the subject of
25 that appeal. Even though Mr. Toledo-Flores was released

1 from prison on April 21st of this year, and deported to
2 Mexico, he's still subject to the supervised-release
3 portion of his sentence, because supervised release is not
4 automatically extinguished by deportation.

5 CHIEF JUSTICE ROBERTS: But there's no
6 supervised release of people outside the United States.

7 MR. CROOKS: There's no supervision of people
8 outside the United States, Mr. Chief Justice, but he is
9 still subject to the jurisdiction of the District Court,
10 and still subject to the conditions of supervised release
11 that are not dependent upon supervision.

12 CHIEF JUSTICE ROBERTS: Well, like what?

13 MR. CROOKS: Well, for example, he shall not
14 excessively use alcohol, he shall not associate with
15 persons who --

16 CHIEF JUSTICE ROBERTS: What's going to happen
17 to him if he does that?

18 MR. CROOKS: If the District Court learns about
19 it he could be violated -- he could be extradited back
20 from Mexico, and he could face up to a year more in
21 prison.

22 CHIEF JUSTICE ROBERTS: Has anything like that
23 ever happened before with people subject to supervised
24 release who are then deported? It would be the first
25 time, if the District Court did that, right?

1 MR. CROOKS: There have been instances in the
2 case law where people on supervised release have been
3 extradited back from foreign countries based on violations
4 of their supervised release. But the point is, under the
5 statutory scheme, Mr. Toledo-Flores is still subject to
6 the District Court's jurisdiction. The District Court
7 retains jurisdiction to modify his supervised release, to
8 change the conditions, or to cut the supervised release.
9 If the District Court learns of a violation and a
10 violation warrant is filed within the supervised-release
11 period then the supervised-release period is effectively
12 tolled and the District Court --

13 JUSTICE GINSBURG: And that --

14 MR. CROOKS: -- retains --

15 JUSTICE GINSBURG: -- that period has how many
16 months to run?

17 MR. CROOKS: Until April 20th of next year, Your
18 Honor.

19 JUSTICE GINSBURG: Do you -- you said you rely
20 primarily on that argument -- do you have another
21 argument?

22 MR. CROOKS: Yes, we do, Your Honor. After
23 April 20th, of course, in accordance with this Court's
24 decisions in Spencer v. Kemna and Lane v. Williams, the
25 Court needs to look for a collateral consequence of the

1 then-expired sentence. And, in this case, we point to the
2 possibility that a retrospective reduction in the term of
3 imprisonment -- which, of course, will not give excess
4 prison time back to Mr. Toledo-Flores -- but even to
5 reduce the number of the sentence, on paper, could be a
6 favorable factor for him to get a waiver of
7 inadmissibility, should he ever want to get a nonimmigrant
8 visa in the future to come visit his U.S.-citizen
9 children.

10 JUSTICE SCALIA: We have a case involving
11 standing which says that -- you know, the doctrine of
12 standing is more than a -- an exercise in the -- in the
13 conceivable. And this seems to me an exercise in the
14 conceivable. Nobody thinks your client is really, you
15 know, abstaining from tequila down in Mexico because he's
16 on supervised release in the United States, or is going --
17 is going to apply -- having been deported from the country
18 for criminal offenses, is going to apply to come back in
19 the -- these are ingenious exercises in the conceivable.
20 This is just not the real world.

21 MR. CROOKS: Well, my answer to that, Justice
22 Scalia, is that this Court has never said that an appeal
23 of a sentence may become moot before that sentence is
24 expired. And in cases like Lane v. Williams and Spencer
25 v. Kemna, the sentences were completely expired, and,

1 therefore, the Court had to look for collateral
2 consequences of the now-expired sentence. Here, in
3 consequence -- in contrast, Mr. Toledo-Flores is still
4 under the sentence, which is a direct consequence --

5 JUSTICE SCALIA: That depends on whether you
6 consider the sentence to be effectively expired once he
7 leaves the country, if the sentence is one of supervised
8 release, which is impossible once he leaves the country.
9 Supervision being impossible, supervised release is not a
10 realistic consequence of the prior conviction.

11 MR. CROOKS: But that argument could be made
12 with respect to a person who is in the United States, who
13 is subject to a term of probation where the only condition
14 is that he not further violate the law. In that --

15 CHIEF JUSTICE ROBERTS: Well, no, because --

16 MR. CROOKS: -- instance --

17 CHIEF JUSTICE ROBERTS: -- in that -- in that
18 instance, action can be taken against him if he does
19 further violate the law under the terms of probation. The
20 point is that the jurisdiction of the probation office or
21 the District Court doesn't extend to Mexico.

22 MR. CROOKS: Well, that's true. But if we're
23 talking about future violations of the law, it is very
24 often the case that persons who are deported to Mexico do
25 come back, and do have their supervised release --

1 CHIEF JUSTICE ROBERTS: Well --

2 MR. CROOKS: -- revoked.

3 CHIEF JUSTICE ROBERTS: -- you don't want to say
4 that your case is not moot because your client is going to
5 violate the law again in the future.

6 MR. CROOKS: No, not at all, Your Honor, but I'm
7 saying that, in the respect that you just talked about for
8 the U.S. citizen, it's not any different, that the court
9 retains jurisdiction to violate the supervised release,
10 and to revoke it, and then to send him back to prison.

11 JUSTICE SOUTER: No, but it is different, in the
12 respect that he would first have to violate the law by
13 entering the United States.

14 MR. CROOKS: That is true. But in most cases,
15 that is the only violation of supervised release for which
16 they are later revoked. And, in that respect, it would be
17 no different from a person who violates his probation by
18 driving while intoxicated or committing some other legal
19 violation.

20 JUSTICE BREYER: Do you work in --

21 JUSTICE GINSBURG: On --

22 JUSTICE BREYER: -- this area?

23 JUSTICE GINSBURG: On collateral consequences,
24 do you have -- what is your best authority to say that in
25 -- it would keep this case from being moot?

1 MR. CROOKS: We cited, in our reply brief at
2 page 4, Your Honor, the Hamdi case, United States v.
3 Hamdi, from the Second Circuit, where the Second Circuit
4 found that the possibility of reducing the term of
5 imprisonment, even retrospectively, could have an impact
6 on the ability to get a waiver of inadmissibility in --

7 JUSTICE GINSBURG: Because --

8 MR. CROOKS: -- the future.

9 JUSTICE GINSBURG: Because the length of the
10 sentence counts heavily in the attorney general's
11 assessment, is that --

12 MR. CROOKS: That's correct, Your Honor. In
13 Hamdi, they pointed out that the length of the sentence
14 goes to two of the three factors that are evaluated by
15 Immigration officials -- under a decision called Matter of
16 Heronka -- that are used in evaluating whether a person
17 should be granted a waiver of inadmissibility in the
18 discretion of the attorney general --

19 JUSTICE SCALIA: Do you think there's a
20 realistic possibility that this person is going to be
21 readmitted? A realistic possibility?

22 MR. CROOKS: I do not know, Your Honor. He's --

23 JUSTICE SCALIA: Oh.

24 MR. CROOKS: -- got U.S. citizen --

25 JUSTICE SCALIA: Do you think there's a

1 realistic possibility he's going to try to get readmitted,
2 so that he can be subjected to really enforced supervised
3 release?

4 MR. CROOKS: Well, I think that there is a
5 possibility that he -- he could qualify for a nonimmigrant
6 visa at some point --

7 JUSTICE SCALIA: Has he applied for such a visa?
8 Has he expressed any intention to apply?

9 MR. CROOKS: He has not, Your Honor, but he does
10 have U.S.-citizen --

11 JUSTICE SCALIA: Well --

12 MR. CROOKS: -- children --

13 JUSTICE SCALIA: -- then it's an exercise in the
14 conceivable, it seems to me.

15 MR. CROOKS: But this Court has never held that
16 a -- it would be unfair to hold that an appeal of a
17 sentence can be moot while that sentence is still in
18 effect, and when it can still have consequences for Mr.
19 Toledo-Flores. And that's what distinguishes this case
20 from all the other cases decided by this Court, is that
21 the sentence itself is the concrete and continuing injury
22 that defeats --

23 JUSTICE STEVENS: May I --

24 MR. CROOKS: -- mootness in this case.

25 JUSTICE STEVENS: -- ask this question? It's --

1 presuming -- supposing we say it's not moot, and you
2 prevail. Could he be resentenced without being present in
3 court?

4 MR. CROOKS: Yes, he could, Your Honor. We do
5 resentencing in absentia all the time in the Southern
6 District of Texas --

7 JUSTICE BREYER: In the Southern --

8 MR. CROOKS: -- in circumstances that are
9 similar.

10 JUSTICE BREYER: In the -- have you ever heard
11 of, or had, a client -- or heard of a person from Mexico
12 who had been deported because he has been involved in
13 drugs, and the Government wants to bring him back because
14 he may be a witness -- maybe something develops, some
15 other members of the gang are there, they'd like his
16 information?

17 MR. CROOKS: That does happen occasionally.
18 People are paroled, then, to testify in court proceedings
19 or to cooperate with Federal --

20 JUSTICE BREYER: So, if --

21 MR. CROOKS: -- or State --

22 JUSTICE BREYER: -- they pick up some friends of
23 his who are engaged in drugs, the Government might decide
24 to try to get him back.

25 MR. CROOKS: That's correct, Your Honor.

1 JUSTICE SCALIA: Is there any indication that
2 that's in the works, or is this just another conceivable
3 thing?

4 MR. CROOKS: There is no indication in the
5 record --

6 JUSTICE SCALIA: Yes.

7 MR. CROOKS: -- that that is in the work. I do
8 want to point out that --

9 JUSTICE BREYER: Well, it's conceivable, I
10 guess, that people will break their parole. Often it
11 doesn't happen; sometimes it does. Sometimes they want to
12 get him back; sometimes they don't.

13 MR. CROOKS: That's all very true, Justice
14 Breyer.

15 I wanted to point out that, in Campo Serrano,
16 which we've cited in our brief, this Court held that a
17 deported alien's probation term was a continuing criminal
18 sentence that saved the case from mootness. And the Court
19 pointed to the fact that he -- that the deported alien in
20 Campo Serrano could, just like Mr. Toledo-Flores, have his
21 conditional release revoked, and he could be reimprisoned,
22 upon a finding that he had violated his conditions. And
23 we believe that Campo Serrano points very strongly in the
24 direction that this case is not moot.

25 On the merits, I would just like to point out

1 that the interpretation that is advanced by the
2 petitioners here promotes the very sort of uniformity that
3 this Court has found desirable in cases like *Jerome v.*
4 *United States* and its progeny, including *Taylor v. United*
5 *States*, in that the same conduct of conviction will have
6 the same immigration and same Federal sentencing
7 consequences, irrespective of the labels or maximum prison
8 terms affixed by the particular States that set out that
9 conduct. And --

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

11 MR. CROOKS: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

13 ORAL ARGUMENT OF EDWIN S. KNEEDLER

14 ON BEHALF OF RESPONDENTS

15 MR. KNEEDLER: Mr. Chief Justice, and may it
16 please the Court:

17 In order for a State drug offense to be an
18 aggravated felony under Section 1101(a)(43)(B) of the INA,
19 two -- there are two requirements. The underlying conduct
20 must be punishable under the Controlled Substances Act or
21 one of the other specified Federal statutes, and it must
22 be a felony.

23 Because Petitioner's underlying conduct here was
24 punishable under the Controlled Substances Act, and was a
25 felony under State law, they are -- they were properly

1 found to have committed aggravated felonies. That
2 conclusion follows, not just from Section 924(c), but,
3 more importantly, by the fact that what is relevant here
4 is, What is the meaning of 1101(a)(43), which is the
5 operative provision, which just happens to incorporate the
6 definition of "drug-trafficking crime" from 924(c)? And
7 there are three features of 1101(a)(43) with --

8 JUSTICE KENNEDY: Why don't you say "it just
9 happens"? I mean --

10 MR. KNEEDLER: No. No. But -- no, but -- yes.
11 No, it's --

12 JUSTICE KENNEDY: -- it's there in the statute.

13 MR. KNEEDLER: It's -- I'm sorry.

14 JUSTICE KENNEDY: That's why you're here.

15 MR. KNEEDLER: It expressly incorporates it,
16 yes. Yes. But the -- but the operative provision is
17 section 1101(a)(43) of the INA, and there are three
18 features of that that we think reinforce this conclusion.
19 The first is that the consequences of aggravated felony
20 status under the INA turn on whether one is convicted, not
21 whether they have committed the crime, and that's true
22 both with respect to the enhancement of sentences under
23 1326 and the -- and the immigration consequences. And we
24 think it makes particular sense when you're talking about
25 a conviction to look about how the -- to look at how the

1 crime is treated under the jurisdiction of conviction.

2 JUSTICE SCALIA: I thought the Government has
3 taken the position -- and as far as I know, all the Courts
4 of Appeals have bought the Government's argument -- that
5 there -- you do not need a conviction --

6 MR. KNEEDLER: You do --

7 JUSTICE SCALIA: -- that so --

8 MR. KNEEDLER: -- not need a conviction under
9 Section 924 if you're bringing a prosecution under Section
10 924(c).

11 JUSTICE SCALIA: Yes. You don't --

12 MR. KNEEDLER: You do not -- you do not need a
13 conviction. But, in order -- the immigration consequences
14 --

15 JUSTICE SCALIA: Yes, but --

16 MR. KNEEDLER: -- have been --

17 JUSTICE SCALIA: -- but 924(c) is incorporated
18 in 1101(a)(43). It's --

19 MR. KNEEDLER: Right.

20 JUSTICE SCALIA: -- incorporated. So, you want
21 us to interpret 924(c) one way for criminal convictions --
22 a criminal sentence -- that is, you don't need a
23 conviction in order to get the enhancement -- but another
24 way for --

25 MR. KNEEDLER: No.

1 JUSTICE SCALIA: -- for the INA?

2 MR. KNEEDLER: Our point is not that 924(c)
3 requires a conviction when it's in the Immigration Act,
4 it's that the immigration consequences of that
5 incorporation turn on whether someone was convicted of an
6 aggravated felony.

7 JUSTICE SCALIA: Why is --

8 MR. KNEEDLER: So --

9 JUSTICE SCALIA: -- that?

10 MR. KNEEDLER: Well, the ground of deportation
11 that refers to "aggravated felony" refers to someone who
12 has been convicted of an aggravated felony. The
13 ineligibility for cancellation of removal turns on whether
14 someone has been convicted of an aggravated felony, and
15 the enhanced penalties under Section 1326 for someone
16 whose illegal reentry, following aggravated felony, is for
17 a conviction for an aggravated felony. So, my point is
18 that, under the INA, the consequences turn on conviction,
19 and it makes sense to look at the jurisdiction of
20 conviction -- here, State law -- to see whether it -- to
21 look at the -- to determine the status of the crime. And
22 since State law determines it to be a felony, that's the
23 --

24 JUSTICE GINSBURG: Mr. Kneedler --

25 MR. KNEEDLER: -- proper place to look.

1 JUSTICE GINSBURG: -- if there is room for more
2 than one construction of this statute, it seems to me
3 unseemly, in the immigration context, to say that two
4 people who have committed the identical acts, one of them
5 is barred from ever coming back, doesn't have any of the
6 dispensations, and the other does, because of the
7 happenstance of the State in which they were convicted.
8 That kind of disuniformity in an area where the
9 Constitution expressly charges Congress with authority to
10 make uniform laws, it's -- doesn't that uniform-law
11 specification in the Constitution tug in the direction of
12 the interpretation that Mr. Long was --

13 MR. KNEEDLER: No, we --

14 JUSTICE GINSBURG: -- presenting to us?

15 MR. KNEEDLER: -- we think it does, for several
16 reasons. First, with respect to the constitutional
17 requirement, the uniformity provision applies to uniform
18 rules of naturalization; that is, citizenship. This --
19 we're not talking about citizenship here, we're talking --
20 we're talking about the eligibility of aliens to remain in
21 the country. Beyond that, even where the Uniformity
22 Clause applies -- and there's, for example, a parallel
23 Uniformity Clause for bankruptcy -- that's never been
24 interpreted to mean that consequences of certain conduct
25 under State law can have no impact on bankruptcy law, and

1 that there can't be a variation. The State-law homestead
2 exemption under the -- under the bankruptcy laws is a good
3 example of that.

4 But, going beyond that, with respect to the
5 issue of uniformity generally, Congress has established
6 uniform standards in Section 1101, either in terms of
7 identifying the conduct in certain instances; in other
8 instances, by identifying the minimum sentence that was
9 actually imposed. In this case, we think, with respect to
10 drug-trafficking crimes, it -- it's imposed a uniform
11 standard, in terms of the length of the sentence; it has
12 to be a felony. That's -- that is uniformity.

13 But the -- to answer your point more directly,
14 it is a principle throughout 1101(a)(43) that one looks to
15 State law, not to -- not to a -- some supposed uniform
16 standard of Federal law. And, for example, if you --
17 several subparagraphs -- and if you'll -- 1101(a)(43) is
18 set out at page 12(a) of the appendix to our brief --
19 three subparagraphs -- (j), (q), and (t) -- refer to the
20 sentence that may be imposed for a violation. Well, when
21 you're talking about a State conviction, that's clearly
22 referring to the sentence that may be imposed under State
23 law for a conviction. Four other subparagraphs -- (f),
24 (g), (r), and (s) -- turn on the sentence that was
25 actually imposed. That means that -- in the case of a

1 State crime, as we have here, that State law has to
2 authorize the sentence, and that the State Court, applying
3 State sentencing principles, has actually imposed a crime
4 of -- for -- of at least 1 year. So, it is -- it is
5 infused in Section 1101(a)(43) that, in fact, you do look
6 to the consequences of an offense under State law.

7 JUSTICE BREYER: I'm prepared to accept perfect
8 ambiguity here, linguistically. And I thought of an
9 empirical question, that you may know the answer to, that
10 might shed some light.

11 Now, going along the way -- maybe I'm making a
12 mistake to point it out, if I am -- but I go to the key
13 thing here, which is the words in 924(c), What is a
14 "drug-trafficking crime"? A "drug-trafficking crime" is a
15 crime -- "any felony punishable under the Controlled
16 Substances Act." That could mean an act, physically, that
17 is a felony under some law, and is also punishable under
18 the Controlled Substances Act as a misdemeanor. Okay?
19 Felony under -- it could pick that up. And it also could
20 mean any conduct which is punishable as a felony under the
21 Controlled Substances Act. And I could look at those
22 words a thousand times and not have a clue which it means.

23 So, I thought of an empirical test. This
24 statute, 924(c), happens to be a statute that, if you
25 engage in a drug-trafficking crime, as defined, and you

1 have a gun with you, you get mandatory 5 years. That's
2 the point of it. And the Government does all the
3 prosecuting. So, in how many cases where a person
4 committed a misdemeanor offense, simple possession, and
5 had a gun, did the Government insist that they get the 5-
6 years minimum? Now, if you're prepared to tell me "a lot
7 of 'em," I'm prepared to tell you, the Government has
8 consistently interpreted the statute the way you are now.
9 But if you're prepared to tell me "zero," I would say I
10 would be suspicious of an interpretation that comes along
11 now for the first time. And my mind is open on it. I'm
12 quite interested in the answer.

13 MR. KNEEDLER: To my knowledge, we have not
14 brought crime -- prosecutions under 924(c)(1), based on
15 the circumstances you posit, but that's --

16 JUSTICE BREYER: But if --

17 MR. KNEEDLER: -- but I don't think that that
18 goes very far with respect to answering this question.
19 For one thing, as this Court pointed out in the Gonzales
20 decision, the requirement that there be a Federal crime,
21 and, therefore, a Federal felony under 924(c)(2), comes
22 from the language in 924(c)(1) that says that the crime
23 must be subject to prosecution in a court of the United
24 States. And this Court, in Gonzales, said it's that
25 language that renders the -- renders it a requirement that

1 it be a Federal crime. The definition of --

2 JUSTICE BREYER: No, no. We both agree. All --
3 everybody agrees here. It doesn't have to be a Federal
4 crime.

5 MR. KNEEDLER: It doesn't have to be --

6 JUSTICE BREYER: And --

7 MR. KNEEDLER: -- under 1101 --

8 JUSTICE BREYER: Correct, it doesn't have --

9 MR. KNEEDLER: Right.

10 JUSTICE BREYER: -- to be. It could be conduct
11 that violates the State law, but -- and punish it under
12 the State law -- but the conduct involved would have to
13 constitute what is a felony under the Controlled
14 Substances --

15 MR. KNEEDLER: Would have to --

16 JUSTICE BREYER: -- Act.

17 MR. KNEEDLER: -- in our view, it would have to
18 constitute --

19 JUSTICE BREYER: A felony or a misdemeanor.

20 MR. KNEEDLER: -- it would have to be punishable
21 under the Controlled Substances --

22 JUSTICE BREYER: Yes.

23 MR. KNEEDLER: -- Act.

24 JUSTICE BREYER: All right.

25 MR. KNEEDLER: But the important point here is

1 --

2 JUSTICE BREYER: All right. So, I say it's
3 suspicious.

4 MR. KNEEDLER: But the question is not what
5 924(c)(2) means, standing alone or in the abstract; it's
6 what it means, as incorporated into 1101(a)(43). And --

7 CHIEF JUSTICE ROBERTS: And, of --

8 MR. KNEEDLER: -- there --

9 CHIEF JUSTICE ROBERTS: -- course, that's --
10 when you get to that, it must give you pause that your
11 analysis is of a term, "drug-trafficking crime" or
12 "illicit trafficking," and your theory leads to the
13 conclusion that simple possession equates with drug
14 trafficking.

15 MR. KNEEDLER: Well, the Petitioner has
16 conceded, as I understand it -- I heard Mr. Long, I think,
17 concede -- that possession offenses can constitute
18 aggravated felonies under this provision, that there is
19 the recidivist possession, there is the possession of the
20 date-rape drug, there is possession of 5 grams or more of
21 cocaine. All of those are specified as being -- of being
22 felonies under the -- under 940 -- or 844. But, beyond
23 that, it's important to take into account that a lot of
24 State statutes dealing with drugs do not -- are not
25 patterned directly after the Federal statute, and there's

1 no reason why Congress would have insisted that they do so
2 in order for this statute to operate sensibly. And one
3 notable example, for instance, is, when it comes to
4 possession of a substantial amount of drugs, that that
5 certainly would create a strong implication that the
6 defendant was engaged in trafficking activities, or
7 intended to.

8 The Federal statute deals with that by making it
9 a felony to possess with intent to distribute the drug. A
10 number of States don't do that. They, instead, have
11 graduated possession offenses, based on the quantity of
12 drugs that the defendant is possessing; that above a
13 certain quantity of drugs, it would be a felony. They're
14 getting at the same problem, but they've come at it in a
15 different way.

16 JUSTICE GINSBURG: Then, in those cases, you can
17 say the conduct would constitute a felony under the
18 Federal statute; but here, if I recall correctly, the
19 amount involved would not have qualified for possession
20 with intent to distribute, under Federal law.

21 MR. KNEEDLER: Well, it would always be up to
22 the jury to decide that. Now, in Mr. Lopez's case, he was
23 -- he was initially charged with a series of offenses that
24 went beyond the aiding and abetting of possession that he
25 ultimately pleaded guilty to, but, as he testified in his

1 -- in his immigration hearing, his aiding and abetting of
2 possession was assisting someone in purchasing drugs,
3 which was, itself, a trafficking element. And so, this
4 shows that the way the State crimes are defined or applied
5 are often getting at what Federal law --

6 JUSTICE STEVENS: Yes. We have a case in which
7 we're assuming, for our purposes, we just have possession.
8 I mean, I understand the facts of this case. And I wanted
9 to ask -- I have two questions, Mr. Kneedler. One of them
10 -- the second one, I'd ask that -- you were going to
11 mention three different points, one about conviction; you
12 had two other points you didn't get to. I want to learn
13 what those were. But, before that, it seems to me that,
14 when you put the whole statute -- all the -- all the
15 different statutory provisions together, you really boil
16 down and focus on 924(c)(2) and the words "for purpose of
17 this subsection, the term 'drug-trafficking crime' means
18 any felony punishable under the Controlled Substances
19 Act." And if the word "Federal" had been inserted before
20 the word "felony" in the statute, would that not make the
21 statute perfectly clear?

22 MR. KNEEDLER: It probably would, but I think
23 it's interesting that the version of 924(c) that was in
24 effect prior to 1988 said exactly that. It said "felony
25 violation of Federal law."

1 JUSTICE STEVENS: It was a question of --

2 MR. KNEEDLER: It was -- it was explicit.

3 JUSTICE STEVENS: -- whether the change was
4 intended to be --

5 MR. KNEEDLER: Well, but --

6 JUSTICE STEVENS: -- substantive --

7 MR. KNEEDLER: -- Congress --

8 JUSTICE STEVENS: -- or merely --

9 MR. KNEEDLER: But --

10 JUSTICE STEVENS: -- stylistic.

11 MR. KNEEDLER: -- Congress did change it, in the
12 1988 Act, but it did it -- and this is significant -- it
13 did it in connection with two changes in the immigration
14 law. One is the enactment of the definition of
15 "aggravated felony," which, as I have explained, the
16 definition of "aggravated felony" looks to State law, in a
17 number of respects, in terms of the severity of the
18 offense or the punishment actually imposed. That was one
19 change.

20 The other change that was made in the 1988 Act
21 was to amend Section 1326 with respect to illegal
22 reentries, and it did that by enhancing the penalty for
23 conviction of any felony other than an aggravated felony,
24 and an aggravated felony. And certainly the conviction of
25 any felony includes State law offenses in this --

1 JUSTICE STEVENS: Just again, Mr. Kneedler --
2 focusing again on that specific language, you're saying,
3 in effect, that that phrase means any State or Federal
4 felony punishable under the Federal statutes.

5 MR. KNEEDLER: It says -- yes, it says "any
6 felony." And that is our -- doing it -- and what --

7 JUSTICE STEVENS: And is it ever true that a
8 State felony is punishable under a Federal statute?

9 MR. KNEEDLER: The conduct is --

10 JUSTICE STEVENS: Yes, I know, but --

11 MR. KNEEDLER: -- punishable. The conduct is
12 punishable, not --

13 JUSTICE STEVENS: -- but do you know of any
14 instance where we've said a State felony is punishable
15 under a Federal statute?

16 MR. KNEEDLER: I think not -- I think not used
17 in that sense, but I think it's important -- it's
18 important to look at the language, as a whole. It does
19 not say "punishable as a felony under" --

20 JUSTICE STEVENS: But you do agree --

21 MR. KNEEDLER: -- "under the Controlled" --

22 JUSTICE STEVENS: -- that the key to the case is
23 how we read that one sentence.

24 MR. KNEEDLER: Well, no, I agree that the -- I --
25 in my view, the key to the case is in 1101(a)(43),

1 because, if you look at the structure of 1101(a)(43) --
2 and this gets to the question you -- you said -- you
3 mentioned that I had three reasons. One is that under the
4 -- under the INA, the conviction consequences turn on the
5 conviction of an aggravated felony, and it only makes
6 sense to look at the jurisdiction of conviction to
7 determine the nature of the crime, whether it's a felony.

8 JUSTICE SCALIA: Well, but you don't -- you
9 don't look to the jurisdiction of conviction. Are you
10 telling me you require a conviction? You -- I thought you
11 told me you don't require a conviction.

12 MR. KNEEDLER: No. Under 924(c), you don't.
13 But under the -- under the -- if you're bringing a Federal
14 prosecution under 924(c), the term "aggravated felony" has
15 no role in that determination. It is a -- it is a
16 separate Federal crime. We're talking about, here, the
17 consequences of -- the consequences of being an aggravated
18 felon under 1101(a)(43) are, Where does the definition of
19 "aggravated felony" apply? It only applies under the INA
20 if someone has been convicted of an aggravated felony.
21 You're only -- you're only subject to deportation for
22 aggravated felony if you've been convicted, you're
23 ineligible for cancellation or removal, you're subject to
24 sentence enhancement. All those things follow on
25 conviction. And we think it only makes sense to look to

1 the jurisdiction of conviction. That is --

2 JUSTICE SOUTER: All right, Mr. Kneedler,
3 assuming that -- as I understand it, the answer you just
4 gave, your second point, as well as the point that you and
5 Justice Stevens were debating, turns, in your view, on a
6 definition, or a reading, of the statute that would work
7 this way: that if, under State law, the act were a felony,
8 but, under Federal law, the action was merely a
9 misdemeanor, it would still, for purposes of this
10 definition, be an aggravated felony.

11 MR. KNEEDLER: That's correct.

12 JUSTICE SOUTER: That -- isn't that very
13 strange, that Congress would have wanted a reading of the
14 statute that would turn its definition of a "misdemeanor
15 crime" into an aggravated felony for purposes of the
16 immigration law?

17 MR. KNEEDLER: I don't think so at all. And for
18 one -- for one thing -- as I've mentioned, the structure
19 of the act, as a whole, of 1101(a)(43) -- and there are
20 numerous subsections -- look to how the crime -- what the
21 authorized punishment was, or look to how the person was
22 actually sentenced under State law, not under Federal law.

23 JUSTICE SOUTER: No, but I'm --

24 MR. KNEEDLER: And I --

25 JUSTICE SOUTER: -- saying, if --

1 MR. KNEEDLER: No -- I --

2 JUSTICE SOUTER: No, go ahead.

3 MR. KNEEDLER: I also haven't mentioned the
4 explicit provision, that one of the other Justices
5 mentioned earlier -- I think, the Chief Justice -- that
6 the penultimate sentence of 1101(a)(43) says that
7 something -- a -- an offense constitutes an aggravated
8 felony, whether in violation of Federal or State laws.

9 JUSTICE SOUTER: Well --

10 MR. KNEEDLER: So --

11 JUSTICE SOUTER: -- I know it says that, but
12 that doesn't necessarily take you any further than saying
13 that if the words of the statute refer to something that
14 could be a State law felony, under the -- under the
15 penultimate sentence, it will count. It does not
16 necessarily answer the question that we have, and that is
17 whether a particular reference in the statute is a
18 reference to a Federal felony or a State felony. So, it
19 has a -- the penultimate sentence has work to do. And, in
20 fact, we can see the work being done in the -- in the very
21 definition of "drug trafficking" -- but it doesn't
22 necessarily lead to the conclusion that you draw from it.

23 MR. KNEEDLER: Well, we think -- we think it is
24 quite a -- we think it's a strong confirmation of the
25 pattern in 1101(a)(43), that the statute looks to what

1 happened in State Court, and the State punishment that was
2 authorized there, and the express mention of that -- or --

3 JUSTICE SOUTER: Even when --

4 MR. KNEEDLER: -- requirement.

5 JUSTICE SOUTER: -- the consequence, in effect,
6 is to turn for -- turn the gravity of the Federal
7 misdemeanor into the gravity of --

8 MR. KNEEDLER: But the --

9 JUSTICE SOUTER: -- a felony that --

10 MR. KNEEDLER: -- the Federal Controlled --

11 JUSTICE SOUTER: -- just happens to be a State
12 felony.

13 MR. KNEEDLER: The Federal Controlled Substances
14 Act does not occupy the field of drug control in the
15 country, any more than any other Federal crime occupies
16 that field. And --

17 JUSTICE SOUTER: No, I realize that. But, if
18 we're asking, "What is important in the mind of Congress,
19 for purposes of the immigration law?" one would suppose
20 that the most obvious touchstone of importance is the way
21 Federal law deals with it -- i.e., in the case of a crime,
22 whether Federal law calls it a felony or Federal law calls
23 it a misdemeanor. You know, in your reading, when Federal
24 law calls it a misdemeanor, if State law calls it a
25 felony, it becomes a Federal felony for the immigration

1 law. And that's what seems to me odd.

2 MR. KNEEDLER: Right. And this is not the only
3 place where that consequence can arise. There are --
4 there are cases involving "What's a crime of violence?"
5 which is -- which, under subparagraph (g), is another
6 aggravated felony. The crime of violence is defined in 18
7 U.S.C. Section 16, subsection (b) of that -- this Court
8 considered that statute in Leocal -- requires that the
9 offense be a felony which creates a serious risk of
10 physical harm. The courts have looked to the State law of
11 conviction to determine whether something is a felony --

12 JUSTICE SCALIA: Mr. Kneedler, could --

13 JUSTICE SOUTER: Yes, but --

14 MR. KNEEDLER: -- under that provision.

15 JUSTICE SOUTER: May I just ask one --

16 JUSTICE SCALIA: Sure.

17 JUSTICE SOUTER: It's one thing to turn to State
18 law to get an answer where there is no other answer. The
19 problem here is that State law and Federal law are at odds
20 in determining the gravity of the offense. The Federal
21 law, on my hypothesis, would say, "It is minor; it's just
22 a misdemeanor." The State says, "No, it is a felony." It
23 seems to me very odd, given the tension between the State
24 and Federal classifications, to say that, for Federal
25 purposes, the State classification is going to trump the

1 Federal classification; and that's a different situation
2 from the one you posit.

3 MR. KNEEDLER: Well, and -- if I could just
4 mention one other -- on other example, under the theft-
5 offense category in subsection -- I think it's (f) --
6 where a theft offense is deemed to be an aggravated felony
7 if a sentence of at least 1 year was imposed. There are
8 misdemeanor offenses there that -- as a matter of Federal
9 law, it can be a misdemeanor for certain types of theft
10 offenses; and yet, they are covered as aggravated
11 felonies. And, again, that would --

12 JUSTICE SCALIA: Mr. Kneedler, could I ask you
13 about your assertion that you "look to the State of
14 conviction"? What do you mean by that? For purposes of
15 1101. Does that mean, if you're convicted, in State
16 court, of a misdemeanor -- and even though that action
17 would be a Federal felony, it's not an aggravated felony?

18 MR. KNEEDLER: That is our position, yes.
19 Because the requirement -- the --

20 JUSTICE SCALIA: So, it's sort of a double
21 inconsistency. Not only do you treat State -- State
22 actions that are -- that are minimal -- I'm sorry, where
23 the State treats it more seriously than the Federal
24 Government, not only do you follow the State, but, where
25 the State treats it less leniently than the Federal

1 Government, you also follow the State.

2 MR. KNEEDLER: Well, and --

3 JUSTICE SCALIA: Is that right?

4 MR. KNEEDLER: Yes. And we -- yes. We think
5 that's --

6 JUSTICE SCALIA: So, you look to the State of
7 conviction. What --

8 MR. KNEEDLER: that's --

9 JUSTICE SCALIA: That's for purposes of the
10 immigration law.

11 MR. KNEEDLER: Of the immigration law. And,
12 again, we think that --

13 JUSTICE SCALIA: Okay. Now, do you do the same
14 for purposes of the felony enhancement provision?

15 MR. KNEEDLER: 924(c)? No, you don't, because --

16 JUSTICE SCALIA: You --

17 MR. KNEEDLER: -- the aggravated-felony question
18 has no -- has no -- the "aggravated felony" term has no
19 operative significance under 924 --

20 JUSTICE SCALIA: Well, that seems to me --

21 MR. KNEEDLER: -- itself.

22 JUSTICE SCALIA: -- very strange. You would
23 look to the -- you would look to the State law for
24 purposes of the immigration section; but, for purposes of
25 924(c), what would you look to? Either one. Either one.

1 Whichever --

2 MR. KNEEDLER: No, 924 --

3 JUSTICE SCALIA: -- whichever -- for 924 --
4 whichever one would make it a felony.

5 MR. KNEEDLER: No, under --

6 JUSTICE SCALIA: You lose.

7 MR. KNEEDLER: -- under 924(c)(1), this Court --
8 this Court, in the Gonzales case, said that it -- that it
9 has to be a Federal crime, but not because of the --

10 JUSTICE SCALIA: Yes.

11 MR. KNEEDLER: -- definition in --

12 JUSTICE SCALIA: Right.

13 MR. KNEEDLER: -- 924(c)(2) --

14 JUSTICE SCALIA: All right.

15 MR. KNEEDLER: -- but --

16 JUSTICE SCALIA: If it's a felony under either
17 one, for purposes of 924(c), you lose, right?

18 MR. KNEEDLER: I don't think I --

19 JUSTICE SCALIA: If the act is either a State
20 felony or a Federal felony, you lose. I mean, the
21 defendant gets the enhanced sentence, right, under 924(c)?

22 MR. KNEEDLER: No.

23 JUSTICE SCALIA: No?

24 MR. KNEEDLER: Under 924(c), the cases that have
25 been brought have all been situations where it is a

1 Federal offense. But, because -- not because of the
2 language in 924(c)(2) --

3 JUSTICE SCALIA: Well --

4 MR. KNEEDLER: -- but because of the -- of the
5 language --

6 JUSTICE SCALIA: Listen.

7 MR. KNEEDLER: -- in 924(c)(1).

8 JUSTICE SCALIA: Listen. My question is a
9 simple one. If it's -- it seems to me, if it's -- what
10 you're saying is, if it is either a felony under Federal
11 law or a felony under State law, you get the enhanced
12 sentence under 924(c), isn't that right?

13 MR. KNEEDLER: I -- my understanding of the way
14 924(c)(1) has operated is that if it is a misdemeanor
15 under Federal law, but maybe it would be a Federal felony,
16 it would not be -- it would not give rise to the
17 enhancement, because it is not a --

18 JUSTICE SCALIA: I thought that's --

19 MR. KNEEDLER: -- it --

20 JUSTICE SCALIA: -- what the whole argument is
21 about, whether it has to be a felony under Federal law.
22 You're telling me, if it's a misdemeanor under Federal
23 law, that you don't get --

24 MR. KNEEDLER: But not --

25 JUSTICE SCALIA: -- the enhanced sentence?

1 MR. KNEEDLER: -- but not under -- not under
2 924(c)(2) --

3 JUSTICE BREYER: But why not?

4 MR. KNEEDLER: -- the definitional --

5 JUSTICE SCALIA: You've thoroughly confused me
6 now.

7 JUSTICE BREYER: But 924(c)(1) says that if you
8 have a gun, and you have a drug-trafficking crime, book, 5
9 years.

10 Okay, now we go to two, what's a "drug-
11 trafficking crime"? It means any felony punishable under
12 the -- under the Controlled Substances Act. Now, in your
13 definition, we first look to see whether simple possession
14 is punishable under the -- in Controlled Substances Act.
15 It sure is. It sure is. It's punishable as a
16 misdemeanor. So, it meets that. Under your definition,
17 is it a felony? Yup, it's a felony in South Dakota.
18 Okay. So, now we've got a prosecution, in Federal Court
19 in South Dakota. And, on your reading of the statute,
20 that guy should get a bump-up of 5 years.

21 MR. KNEEDLER: No, that is not our reading of
22 the statute. The --

23 JUSTICE BREYER: Because?

24 MR. KNEEDLER: The only thing that is
25 incorporated into 1101(a)(43) is the definition in (c)(2)

1 -- not (c)(1), the definition of --

2 JUSTICE BREYER: Yes.

3 MR. KNEEDLER: -- of "drug-trafficking crime" in
4 (c)(2), which says --

5 JUSTICE BREYER: Yes.

6 MR. KNEEDLER: -- "felony punishable under the
7 Controlled" --

8 JUSTICE BREYER: Right.

9 MR. KNEEDLER: -- "Substances Act."

10 JUSTICE BREYER: Right.

11 MR. KNEEDLER: That is what gets plugged into --

12 JUSTICE BREYER: That's correct.

13 MR. KNEEDLER: -- 1101(a) - --

14 JUSTICE BREYER: Right.

15 MR. KNEEDLER: -- -(43).

16 JUSTICE BREYER: Right.

17 MR. KNEEDLER: Along with all of the other
18 provisions in 1101(a)(43), you look to State law, in the
19 case of a State offense -- the State of conviction, the
20 jurisdiction --

21 JUSTICE BREYER: Yes.

22 MR. KNEEDLER: -- of conviction -- to determine
23 the nature of the crime.

24 JUSTICE BREYER: But you still have to know
25 whether that word, "felony," in (2) means "any felony

1 punishable as a felony under the Controlled" --

2 MR. KNEEDLER: Right. And --

3 JUSTICE BREYER: -- "Substances Act."

4 MR. KNEEDLER: And --

5 JUSTICE BREYER: And there --

6 MR. KNEEDLER: -- a number --

7 JUSTICE BREYER: Yeah. You have to know the
8 answer to that.

9 MR. KNEEDLER: -- a number of Courts of Appeals
10 that have looked at this in the sentencing context over
11 the years have concluded that it -- that the absence of
12 that language is very significant, and the presence of the
13 language that says "any felony" is also significant.

14 JUSTICE SCALIA: Never mind sentencing, let's
15 get back to the immigration. If I understand what you're
16 now saying, if you're convicted in State Court of action
17 that is a Federal felony, but it's just a State
18 misdemeanor -- right? -- you look to the State of
19 conviction, and it would be a misdemeanor, and the
20 immigration provisions would not -- would not take effect.
21 Is --

22 MR. KNEEDLER: Yes.

23 JUSTICE SCALIA: -- that right?

24 MR. KNEEDLER: And that -- and that -- that's
25 not true --

1 JUSTICE SCALIA: That's extraordinary.

2 MR. KNEEDLER: No, but it's -- that's not --
3 only true under this provision of 1101(a)(4). The other
4 -- the other provisions -- (f) and (g) and (j) and (q) and
5 (t) that I mentioned, that looked to the sentence that may
6 be imposed under State law, or that was actually imposed
7 -- would, likewise, render someone in that situation who
8 was convicted of only a misdemeanor in State Court -- even
9 though it might be a felony under Federal law, they would
10 not be -- they would not be convicted of an aggravated
11 felony, because --

12 JUSTICE GINSBURG: Mr. Kneedler --

13 MR. KNEEDLER: -- of the way Congress chose to
14 write 1101(a)(43).

15 JUSTICE STEVENS: But is --

16 JUSTICE GINSBURG: Do you --

17 JUSTICE STEVENS: -- that a reasonable -- let's
18 say the statute's ambiguous, and you've convinced us
19 there's no constitutional requirement of uniformity. But
20 is it reasonable to assume that Congress would want the
21 different consequences to depend on the State of
22 conviction?

23 MR. KNEEDLER: I think it is. I mean, they're
24 --

25 JUSTICE STEVENS: Is there anything in the

1 legislative history suggesting that?

2 MR. KNEEDLER: I think -- as I say, I think it's
3 on face of the statute.

4 JUSTICE GINSBURG: Barrett suggests otherwise.
5 If what Congress was trying to do was to codify that
6 practice of looking for an analogous crime under State
7 law, that's -- that seems to me the -- at least what
8 Congress was trying do.

9 MR. KNEEDLER: Well, that -- the legislative
10 history of the amendment in 1990 does not discuss the
11 aspect of Barrett that went to the comparison to decide
12 what -- in what circumstances there would be an analogous
13 Federal crime. It was clear that it wanted to ratify the
14 result that State crimes are covered.

15 But we think that that was evident from the 1988
16 amendments to -- that both enacted the definition of
17 "aggravated felony," revised the definition of "drug-
18 trafficking crime" to delete the requirement that it be a
19 Federal felony -- that was deleted in 1988 -- and enhanced
20 sentences --

21 JUSTICE GINSBURG: You --

22 MR. KNEEDLER: -- under 1326, clearly on the --
23 on -- by reference to whether someone was convicted of a
24 State felony, without any -- without any general Federal
25 minimum.

1 JUSTICE GINSBURG: May I --

2 MR. KNEEDLER: What Congress --

3 JUSTICE GINSBURG: May I just switch gears for a
4 moment, because your time is almost up, and we -- you
5 haven't addressed the mootness problem in Toledo-Flores.

6 MR. KNEEDLER: In Toledo-Flores.

7 JUSTICE GINSBURG: Is the Second Circuit wrong
8 in U.S. v. Hamdi? Because it seems to me that U.S. v.
9 Hamdi is on all fours with respect to mootness.

10 MR. KNEEDLER: Yes. We think it is wrong, be --
11 under this Court's decision in Spencer versus Kemna and
12 other cases, that, if the possible consequence turns on a
13 discretionary judgment that may be made by someone else,
14 that is too speculative to constitute a real live case or
15 controversy. And that's what I understand Toledo-Flores
16 to be arguing, is that if he applied for discretionary
17 relief in the future, that it might -- it might matter,
18 because his sentence might be reduced slightly.

19 I should point out that in the District Court
20 Toledo-Flores conceded that if he didn't get an eight-
21 level sentence enhancement, he would get a four-level
22 sentence enhancement, because this is at least a felony,
23 within the meaning of the adjacent provision of the
24 guidelines. That would result in a guideline range of 24
25 to 30 months. He would then have gotten 24 months, under

1 that guideline range, the very same thing that he got
2 here. And, under the guidelines at the time, a term of
3 supervised release was mandatory. And a 1-year term of
4 supervised release was mandatory in those circumstances.
5 He would have gotten exactly the same term of supervised
6 release if he had been -- if he had gotten only the four-
7 level enhancement, rather than the eight-level
8 enhancement.

9 I also think that it is somewhat farfetched to
10 think that, given the fact that Toledo-Flores had more
11 than 12 illegal entries into the United States, and
12 various State offenses, that the determination of whether
13 the attorney general would actually grant discretionary
14 relief would turn on a marginal difference in the sentence
15 on that particular offense.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kneedler.
17 Mr. Long, you have 4 minutes remaining.

18 REBUTTAL ARGUMENT OF ROBERT A. LONG, JR.

19 ON BEHALF OF PETITIONER LOPEZ

20 MR. LONG: Thank you, Mr. Chief Justice.

21 In answer to Justice Breyer's question, Mr.
22 Kneedler said that a Federal misdemeanor is a drug-
23 trafficking crime under Section 924(c) if a State punishes
24 it as a felony. He said, "Well, the Federal Government
25 never prosecutes Federal misdemeanors under Section

1 924(c)." He said, "The reason is because of
2 924(c)(1)(A)," and the language there is, it has to be an
3 offense for which the person may be prosecuted in a court
4 of the United States. But that language -- a person may
5 be prosecuted in a court of the United States for a
6 misdemeanor. So, the Government is making an argument
7 that, to my knowledge, has never been accepted by any
8 court, has not ever been advanced by the Government in a
9 criminal context, and that would significantly expand
10 Section 924(c) and numerous other criminal statutes that
11 we cite in our brief that used the same definition of
12 "drug-trafficking crime."

13 The -- Mr. Kneedler also said that the
14 aggravated felony provisions in Section 101(a)(43) refer
15 to State law, but I read them just the opposite. There
16 are two kinds. There are 21 of them. Many of them say,
17 "an offense described in 18 U.S. Code Section X." I mean,
18 that's really what -- we're dealing with one of those
19 here. So, it clearly goes to Federal law to define the
20 offense. Now, if State law or foreign law also punishes
21 that offense, then it's an aggravated felony, but,
22 clearly, Federal law is defining the offense.

23 There are other categories, such as murder and
24 theft, that are defined, in general terms; but the
25 Government's position, as I understand it, is, again, you

1 use a generic uniform definition. You don't pick any
2 definition that the States may have. The Court just
3 granted --

4 CHIEF JUSTICE ROBERTS: Well, I thought -- I
5 thought you conceded that a State offense could constitute
6 illicit trafficking --

7 MR. LONG: Well, yes --

8 CHIEF JUSTICE ROBERTS: -- in a Controlled
9 Substance --

10 MR. LONG: Yes, Mr. Chief Justice. But, again,
11 to be clear -- and I think this is consistent with the
12 Government's position in other cases -- ultimately, there
13 will be some uniform Federal definition of what
14 constitutes illicit trafficking. It would be -- some
15 commercial element would probably be the definition the
16 Court hasn't decided. States can define it more broadly.
17 But the actual definition -- just as the definition of
18 "burglary" or "theft" --

19 JUSTICE ALITO: You think there's a uniform
20 Federal definition of a theft offense?

21 MR. LONG: Well, it's -- I mean, as -- this --
22 in the Taylor case, in burglary, the Court has a
23 methodology for this. You pick a sort of generic
24 definition. It may not -- it may not come from a Federal
25 statute; it could --

1 JUSTICE ALITO: There's -- they'll -- there's no
2 variation in State offenses that would fall within that, a
3 theft offense?

4 MR. LONG: Well, it's -- again, this is -- the
5 provision we're dealing with is -- looks to Federal law,
6 the Controlled Substances Act and two other statutes. My
7 understanding of the Government's position -- and it's
8 consistent with this Court's cases, in Taylor -- is that,
9 even when it's a generic offense, you would -- you would
10 still have a uniform definition. And that is certainly
11 consistent with the principle of uniformity that applies
12 both in criminal law and in immigration law. I mean, if
13 there's any ambiguity, at the end of the day, ambiguities
14 are supposed to be resolved in favor of uniformity,
15 uniform Federal law -- uniform Federal criminal law, and
16 uniform immigration law. Effectively, what the Government
17 is arguing that -- is that States can banish noncitizens,
18 and can do so by enacting drug laws, deciding to make a
19 simple possession offense a felony. That's a decision
20 that a State would make, almost certainly, for reasons
21 that have little or nothing to do with immigration, and
22 it's highly unlikely that Congress would have left that
23 determination to States.

24 On uniformity, aggravated felonies is a
25 condition for citizenship. If you're convicted of an

1 aggravated felony, you may not become a U.S. citizen. You
2 are foreclosed from establishing good moral character.
3 So, in fact, citizenship is at stake here, and the
4 Uniformity Clause is in play.

5 If there are no further questions, thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.

7 The case is submitted.

8 [Whereupon, at 11:03 a.m., the case in the
9 above-entitled matter was submitted.]

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A	adopted 15:10	amendment 4:7 10:5,11 54:10	54:11
abetting 37:24 38:1	advanced 27:1 57:8	amendments 11:4 12:3	based 19:3
ability 23:6	affixed 27:8	13:22 17:17	34:14 37:11
above-entitled 1:17 60:9	aggravated 5:13 9:19 10:7	19:20,21 21:11	begins 6:9,10
absence 52:11	15:16 16:4,10	27:13 29:4	behalf 1:21,24
absentia 25:5	16:12 17:12	49:20 56:18	2:2 3:4,7,10,13
abstaining 20:15	27:18 28:1,19	57:6	4:8 17:18
abstract 36:5	30:6,11,12,14	asking 44:18	27:14 56:19
accept 33:7	30:16,17 36:18	aspect 54:11	believe 9:11
accepted 57:7	39:15,16,23,24	assertion 46:13	26:23
account 36:23	41:5,14,17,19	assessment 23:11	best 22:24
accuses 12:10,14	41:20,22 42:10	Assistant 1:23	beyond 31:21
act 4:13,16,17	42:15 43:7	assisting 38:2	32:4 36:22
4:21,23 5:2,10	45:6 46:6,10	associate 18:14	37:24
5:17,21,23	46:17 47:18	Association 10:6	BIA 14:6
6:22 7:12 8:21	53:10 54:17	assume 53:20	bit 6:23
9:9,18 10:10	57:14,21 59:24	assuming 38:7	blue 6:6
10:14,16,22	60:1	42:3	boil 38:15
11:5,7 13:2	aggravated-fe... 47:17	attorney 1:7	book 50:8
14:9 16:20,23	agree 4:17 5:3	23:10,18 56:13	bought 29:4
16:24 27:20,24	10:14 16:21	authority 22:24	break 26:10
30:3 33:16,16	35:2 40:20,24	31:9	Breyer 10:19,23
33:18,21 35:16	agreed 7:15	authorize 33:2	10:25 11:2,9
35:23 38:19	agrees 35:3	authorized 42:21 44:2	11:12,14,17,23
39:12,20 42:7	ahead 43:2	automatically 18:4	12:1,9,11,13
42:19 44:14	aiding 37:24	a.m. 1:19 4:2	12:16,18,20
48:19 50:12,14	38:1	60:8	14:14 22:20,22
51:9 52:3 59:6	ALBERTO 1:6	B	25:7,10,20,22
action 21:18	alcohol 18:14	b 6:12 45:7	26:9,14 33:7
42:8 46:16	alien 26:19	back 16:3 18:19	34:16 35:2,6,8
52:16	aliens 31:20	19:3 20:4,18	35:10,16,19,22
actions 46:22	alien's 26:17	21:25 22:10	35:24 36:2
activities 37:6	Alito 8:3,7,12,13	25:13,24 26:12	50:3,7,23 51:2
acts 31:4	8:17,25 9:2,20	31:5 52:15	51:5,8,10,12
actual 58:17	10:4 58:19	balance 17:14	51:14,16,21,24
add 8:9 17:10	59:1	banish 59:17	52:3,5,7
added 5:24	ambiguities 59:13	bankruptcy 11:24 31:23,25	Breyer's 56:21
adding 9:16	ambiguity 33:8	32:2	brief 6:6 9:12
addition 5:15	59:13	Bar 10:6	10:5,12 23:1
additional 5:14	ambiguous 10:19,20 13:21	barred 31:5	26:16 32:18
7:7,15	14:2 53:18	Barrett 13:22	57:11
address 17:21	amend 39:21	14:4,5,5 54:4	briefs 14:19
addressed 55:5			bring 25:13
adjacent 55:23			bringing 29:9
			41:13
			broad 15:6
			broaden 8:5

broad 6:19,23 7:3,6 10:2 16:14	certain 31:24 32:7 37:13 46:9	clearly 4:16 6:25 7:21 32:21 54:22 57:19,22	28:18 36:13 43:22	14:3,10
broadly 58:16	certainly 13:22	client 10:20	concrete 24:21	considered 45:8
brought 34:14 48:25	37:5 39:24 59:10,20	20:14 22:4 25:11	concurrent 14:17,25	consistent 58:11 59:8,11
bump-up 50:20	change 19:8	clue 33:22	condition 21:13 59:25	consistently 34:8
burglary 15:10 58:18,22	39:3,11,19,20	cocaine 36:21	conditional 26:21	constitute 35:13 35:18 36:17 37:17 55:14 58:5
but's 10:1	changes 39:13	Code 4:12 5:12 7:8 16:10 57:17	conditions 18:10 19:8 26:22	constitutes 43:7 58:14
C	character 60:2	codify 13:23 54:5	conduct 4:19,24 5:9,21 13:1 27:5,9,19,23 31:24 32:7 33:20 35:10,12 37:17 40:9,11	Constitution 31:9,11
c 3:1 4:1 50:25 51:1,4	charged 37:23	collateral 19:25 21:1 22:23	confirmation 43:24	constitutional 31:16 53:19
call 16:25	charges 31:9	come 20:8,18 21:25 37:14 58:24	confused 50:5	construction 7:3 31:2
called 23:15	Chief 4:3,9 6:16 6:22,23 15:14 15:20,23,25 17:15,19 18:5 18:8,12,16,22 21:15,17 22:1 22:3 27:10,12 27:15 36:7,9 43:5 56:16,20 58:4,8,10 60:6	comes 34:10,21 37:3	Congress 5:20 6:3,25 7:23 9:24 10:16 13:23 14:4 16:17 17:4 31:9 32:5 37:1 39:7,11 42:13 44:18 53:13,20 54:5,8 55:2 59:22	contention 17:22
calls 44:22,22,24 44:24	children 20:9 24:12	coming 31:5	connection 39:13	context 31:3 52:10 57:9
Campo 26:15,20 26:23	chose 53:13	commercial 58:15	consecutive 14:16,25	continuing 24:21 26:17
cancellation 30:13 41:23	Circuit 23:3,3 55:7	committed 28:1 28:21 31:4 34:4	consequence 19:25 21:3,4 21:10 44:5 45:3 55:12	contrast 21:3
capable 13:1	circumstances 25:8 34:15 54:12 56:4	committing 22:18	consequences 21:2 22:23 24:18 27:7 28:19,23 29:13 30:4,18 31:24 33:6 41:4,17 41:17 53:21	control 44:14
careful 13:10	cite 57:11	comparison 54:11	consider 21:6	controlled 4:13 4:15,17,20,23 5:2,10,16,21 5:23 6:19,20 7:11 8:9,21 9:8 9:18,23,25 10:9,14,16,21 11:1,5,7 13:2 14:9 16:20,22 16:24 27:20,24 33:15,18,21 35:13,21 38:18 40:21 44:10,13 50:12,14 51:7 52:1 58:8 59:6
carry 6:16	cited 23:1 26:16	completely 20:25	considerable	controversy 55:15
case 9:4 10:20 11:15,15,19 14:15,21 19:2 20:1,10 21:24 22:4,25 23:2 24:19,24 26:18 26:24 32:9,25 37:22 38:6,8 40:22,25 44:21 48:8 51:19 55:14 58:22 60:7,8	citing 14:15	component 10:8		convicted 28:20 30:5,12,14 31:7 41:20,22 46:15 52:16
cases 14:18,20 15:9,13 20:24 22:14 24:20 27:3 34:3 37:16 45:4 48:24 55:12 58:12 59:8	citizen 20:8 22:8 23:24 24:10 60:1	concede 8:1 12:2 12:4,11,22 36:17		
categories 57:23	citizenship 31:18,19 59:25 60:3	conceded 36:16 55:20 58:5		
category 10:7,8 10:17 46:5	classification 45:25 46:1	conceivable 20:13,14,19 24:14 26:2,9		
	classifications 45:24	concession 12:15,21 13:5 13:12,13		
	Clause 31:22,23 60:4	concluded 52:11		
	clear 14:4 38:21 54:13 58:11	conclusion 28:2		

53:8,10 54:23 59:25 conviction 5:4 12:25 21:10 27:5 28:25 29:1,5,8,13,23 30:3,17,18,20 32:21,23 38:11 39:23,24 41:4 41:5,6,9,10,11 41:25 42:1 45:11 46:14 47:7 51:19,22 52:19 53:22 convictions 29:21 convinced 53:18 cooperate 25:19 correct 23:12 25:25 35:8 42:11 51:12 correctly 37:18 corresponding 9:8 Counsel 27:10 count 14:7 16:15 43:15 countries 19:3 country 16:7 20:17 21:7,8 31:21 44:15 counts 12:7 23:10 course 9:16 19:23 20:3 36:9 court 1:1,18 4:10 7:13,16 7:20 11:21,21 15:1,10 17:20 18:9,18,25 19:6,9,12,25 20:22 21:1,21 22:8 24:15,20 25:3,18 26:16 26:18 27:3,16 33:2 34:19,23	34:24 44:1 45:7 46:16 48:7,8 50:18 52:16 53:8 55:19 57:3,5,8 58:2,16,22 courts 29:3 45:10 52:9 Court's 15:13 19:6,23 55:11 59:8 covered 46:10 54:14 create 37:5 creates 45:9 crime 4:11,19 4:24 5:11 7:17 7:19,19,21,22 8:10 12:4 13:25 16:2,16 16:19 17:9 28:6,21 29:1 30:21 33:1,3 33:14,14,15,25 34:14,20,22 35:1,4 36:11 38:17 41:7,16 42:15,20 44:15 44:21 45:4,6 48:9 50:8,11 51:3,23 54:6 54:13,18 56:23 57:12 crimes 5:17 14:7 32:10 38:4 54:14 criminal 4:18 7:18,25 12:23 16:2,21 20:18 26:17 29:21,22 57:9,10 59:12 59:15 Crooks 1:23 3:6 17:16,17,19 18:7,13,18 19:1,14,17,22 20:21 21:11,16	21:22 22:2,6 22:14 23:1,8 23:12,22,24 24:4,9,12,15 24:24 25:4,8 25:17,21,25 26:4,7,13 27:11 CSA 7:14 cut 19:8 <hr/> D D 4:1 Dakota 11:3 12:5 50:17,19 date-rape 8:23 36:20 day 59:13 dealing 36:24 57:18 59:5 deals 37:8 44:21 debating 42:5 decade 14:7 decide 11:18 16:1 25:23 37:22 54:11 decided 14:15 16:3 24:20 58:16 deciding 59:18 decision 11:21 23:15 34:20 55:11 59:19 decisions 19:24 deemed 46:6 defeats 24:22 defendant 37:6 37:12 48:21 defendant's 4:24 Defender 1:24 define 8:18 57:19 58:16 defined 4:11 8:12 33:25 38:4 45:6 57:24	defines 7:9 defining 57:22 definition 5:7 7:21,25 10:17 15:10 16:1,14 16:18 17:8 28:6 35:1 39:14,16 41:18 42:6,10,14 43:21 48:11 50:13,16,25 51:1 54:16,17 57:11 58:1,2 58:13,15,17,17 58:20,24 59:10 definitional 50:4 delete 54:18 deleted 54:19 Department 2:2 depend 53:21 dependent 18:11 depends 21:5 deportation 18:4 30:10 41:21 deported 18:1 18:24 20:17 21:24 25:12 26:17,19 Deputy 2:1 described 15:17 16:5,8,9,13,15 16:17,23 17:3 17:3,7 57:17 desirable 27:3 determination 41:15 56:12 59:23 determine 30:21 41:7 45:11 51:22 determines 30:22 determining 45:20 developed 10:5	develops 25:14 difference 56:14 different 7:5 9:21 22:8,11 22:17 37:15 38:11,15 46:1 53:21 direct 21:4 direction 26:24 31:11 directly 32:13 36:25 discretion 23:18 discretionary 55:13,16 56:13 discuss 54:10 dispensations 31:6 distinguishes 24:19 distribute 8:16 37:9,20 distribution 8:15 District 18:9,18 18:25 19:6,6,9 19:12 21:21 25:6 55:19 disuniformity 31:8 doctrine 20:11 doing 14:5 40:6 double 46:20 draw 43:22 driving 22:18 drug 7:10 8:23 14:7 16:1 27:17 36:13,20 37:9 43:21 44:14 50:10 54:17 56:22 59:18 drugs 25:13,23 36:24 37:4,12 37:13 38:2 drug-trafficki... 4:11,19 5:11
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

5:17 7:17,22 8:10 16:16,19 17:9 28:6 32:10 33:14,14 33:25 36:11 38:17 50:8 51:3 57:12 D.C 1:14,21 2:2	55:21,22 56:7 56:8 enhancing 39:22 entering 22:13 entirety 16:18 entries 56:11 equates 36:13 ESQ 1:21,23 2:1 3:3,6,9,12 established 32:5 establishing 60:2 et 12:7 evaluated 23:14 evaluating 23:16 everybody 35:3 evident 54:15 exactly 38:24 56:5 example 7:2 15:4,9 16:8 18:13 31:22 32:3,16 37:3 46:4 excess 20:3 excessively 18:14 exemption 32:2 exercise 20:12 20:13 24:13 exercises 20:19 expand 17:2 57:9 expired 20:24 20:25 21:6 explained 39:15 explicit 39:2 43:4 express 5:24 15:21 44:2 expressed 24:8 expressly 28:15 31:9 extend 21:21 extent 10:15 extinguished	18:4 extradited 18:19 19:3 extraordinary 53:1	52:17 53:9 54:13,19,24 56:22,24,25 57:19,22 58:13 58:20,24 59:5 59:15,15 felon 41:18 felonies 4:22 5:6 7:24 10:7,9 14:8 16:23,24 28:1 36:18,22 46:11 59:24 felony 4:12,15 4:16 5:1,1,9,13 5:15 7:5 9:8,19 10:13,15,21 11:2,4,6,6,12 11:22,25 12:5 12:6 13:14,15 13:24 15:16 16:4,11,12,19 16:22 17:2,12 27:18,22,25 28:19 30:6,11 30:12,14,16,17 30:22 32:12 33:15,17,19,20 34:21 35:13,19 37:9,13,17 38:18,20,24 39:15,16,23,23 39:24,25 40:4 40:6,8,14,19 41:5,7,14,19 41:20,22 42:7 42:10,15 43:8 43:14,18,18 44:9,12,22,25 44:25 45:6,9 45:11,22 46:6 46:17,17 47:14 47:18 48:4,16 48:20,20 49:10 49:11,15,21 50:11,17,17 51:6,25,25 52:1,13,17	53:9,11 54:17 54:19,24 55:22 56:24 57:14,21 59:19 60:1 field 44:14,16 filed 19:10 find 6:5 finding 26:22 first 4:4 5:18 8:8 11:15 16:1 17:21 18:24 22:12 28:19 31:16 34:11 50:13 focus 38:16 focusing 17:8 40:2 follow 41:24 46:24 47:1 followed 14:6 following 30:16 follows 28:2 footnote 9:12 foreclosed 60:2 foreign 16:6,11 16:13 19:3 57:20 found 23:4 27:3 28:1 four 32:23 56:6 fours 55:9 four-level 55:21 friends 25:22 further 17:13 21:14,19 43:12 60:5 future 20:8 21:23 22:5 23:8 55:17
E e 3:1 4:1,1 5:19 6:8,9,13 7:2 earlier 43:5 EDWIN 2:1 3:9 27:13 effect 24:18 38:24 40:3 44:5 52:20 effectively 19:11 21:6 59:16 eight 55:20 eight-level 56:7 either 14:19 32:6 47:25,25 48:16,19 49:10 element 8:15 38:3 58:15 eligibility 31:20 em 34:7 empirical 33:9 33:23 enacted 54:16 enacting 59:18 enactment 39:14 enforced 24:2 engage 33:25 engaged 25:23 37:6 engages 12:4 enhanced 30:15 48:21 49:11,25 54:19 enhancement 5:6 28:22 29:23 41:24 47:14 49:17	F f 32:23 46:5 53:4 face 18:20 54:3 fact 9:15 10:11 26:19 28:3 33:5 43:20 56:10 60:3 factor 20:6 factors 23:14 facts 38:8 fall 8:18 59:2 far 29:3 34:18 farfetched 56:9 favor 59:14 favorable 20:6 features 28:7,18 Federal 1:23 4:13,23,25 5:5 5:10,23 6:20 7:18,21,25 8:1 8:6 9:14,17 11:24,25 12:6 12:25 13:4,14 14:8 15:1,18 16:6 17:1 25:19 27:6,21 32:16 34:20,21 35:1,3 36:25 37:8,18,20 38:5,19,25 40:3,4,8,15 41:13,16 42:8 42:22 43:8,18 44:6,10,13,15 44:21,22,22,23 44:25 45:19,20 45:24,24 46:1 46:8,17,23,25 48:9,20 49:1 49:10,15,15,21 49:22 50:18	G g 4:1 5:19 6:8,10 6:13,18 32:24 45:5 53:4 gang 25:15 gears 55:3 general 1:7 2:1		

10:7 23:18 54:24 56:13 57:24 generally 32:5 general's 23:10 generic 58:1,23 59:9 getting 37:14 38:5 GINSBURG 13:18,20 14:11 14:13 19:13,15 19:19 22:21,23 23:7,9 30:24 31:1,14 37:16 53:12,16 54:4 54:21 55:1,3,7 give 20:3 36:10 49:16 given 45:23 56:10 go 33:12 43:2 50:10 goes 23:14 34:18 57:19 going 17:11 18:16 20:16,17 20:18 22:4 23:20 24:1 32:4 33:11 38:10 45:25 Gonzales 1:6 4:4 7:16 14:16,18 14:24 34:19,24 48:8 good 14:1 32:2 60:2 gotten 55:25 56:5,6 government 7:4 9:11 12:8,14 16:13 25:13,23 29:2 34:2,5,7 46:24 47:1 56:24 57:6,8 59:16 Government's	8:4 11:4 17:21 29:4 57:25 58:12 59:7 graduated 37:11 grams 36:20 grant 56:13 granted 23:17 58:3 gravity 44:6,7 45:20 ground 30:10 guess 26:10 guideline 55:24 56:1 guidelines 55:24 56:2 guilty 37:25 gun 34:1,5 50:8 guy 50:20 H Hamdi 23:2,3 23:13 55:8,9 happen 18:16 25:17 26:11 happened 18:23 44:1 happens 28:5,9 33:24 44:11 happenstance 31:7 harm 45:10 hear 4:3 17:16 heard 25:10,11 36:16 hearing 38:1 heavily 23:10 held 11:22 24:15 26:16 helps 15:25 Heronka 23:16 highly 59:22 history 14:3 54:1,10 hold 24:16 homestead 32:1 Honor 19:18,22	22:6 23:2,12 23:22 24:9 25:4,25 Houston 1:24 hypothesis 45:21 I identical 31:4 identifying 32:7 32:8 illegal 30:16 39:21 56:11 illicit 8:8,13 9:16,22,24 10:6,13,17 17:10,11 36:12 58:6,14 immigration 23:15 27:6 28:23 29:13 30:3,4 31:3 38:1 39:13 42:16 44:19,25 47:10,11,24 52:15,20 59:12 59:16,21 impact 23:5 31:25 implication 6:2 6:25 37:5 importance 44:20 important 35:25 36:23 40:17,18 44:18 importantly 28:3 imposed 32:9,10 32:20,22,25 33:3 39:18 46:7 53:6,6 impossible 21:8 21:9 imprisonment 20:3 23:5 INA 16:4 27:18	28:17,20 30:1 30:18 41:4,19 inadmissibility 20:7 23:6,17 include 6:3 7:1 7:24 8:5 10:2 17:6 included 10:11 10:17 13:25 includes 9:21,23 39:25 including 10:13 27:4 inconsistency 46:21 incorporate 28:5 incorporated 29:17,20 36:6 50:25 incorporates 28:15 incorporation 30:5 indication 7:15 26:1,4 indications 5:15 ineligibility 30:13 ineligible 41:23 information 25:16 infused 33:5 ingenious 20:19 initial 9:10 initially 37:23 injury 24:21 inserted 38:19 insist 34:5 insisted 37:1 instance 5:7 21:16,18 37:3 40:14 instances 19:1 32:7,8 intended 37:7 39:4	intent 8:15 37:9 37:20 intention 24:8 interested 34:12 interesting 38:23 interpret 9:4 29:21 interpretation 8:4 27:1 31:12 34:10 interpreted 11:25 31:24 34:8 intoxicated 22:18 involved 25:12 35:12 37:19 involving 20:10 45:4 irrespective 27:7 issue 32:5 i.e 44:21 J j 32:19 53:4 Jerome 11:20 14:15,15,18 15:6,6,11,21 27:3 JOSE 1:3 JR 1:21 3:3,12 4:7 56:18 judgment 55:13 jurisdiction 18:9 19:6,7 21:20 22:9 29:1 30:19 41:6,9 42:1 51:20 jury 37:22 Justice 2:2 4:3,9 5:3,8 6:1,4,6,7 6:12,15,16,22 6:24 8:3,7,11 8:12,13,17,25
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

9:2,20 10:4,19 10:23,25 11:2 11:9,12,14,17 11:23 12:1,9 12:11,13,16,18 12:20 13:3,5,8 13:11,13,17,18 13:20 14:11,12 14:13,14,14 15:3,5,8,14,20 15:23,25 17:5 17:15,19 18:5 18:8,12,16,22 19:13,15,19 20:10,21 21:5 21:15,17 22:1 22:3,11,20,21 22:22,23 23:7 23:9,19,23,25 24:7,11,13,23 24:25 25:7,10 25:20,22 26:1 26:6,9,13 27:10,12,15 28:8,12,14 29:2,7,11,15 29:17,20 30:1 30:7,9,24 31:1 31:14 33:7 34:16 35:2,6,8 35:10,16,19,22 35:24 36:2,7,9 37:16 38:6 39:1,3,6,8,10 40:1,7,10,13 40:20,22 41:8 42:2,5,12,23 42:25 43:2,5,9 43:11 44:3,5,9 44:11,17 45:12 45:13,15,16,17 46:12,20 47:3 47:6,9,13,16 47:20,22 48:3 48:6,10,12,14 48:16,19,23 49:3,6,8,18,20	49:25 50:3,5,7 50:23 51:2,5,8 51:10,12,14,16 51:21,24 52:3 52:5,7,14,23 53:1,12,15,16 53:17,25 54:4 54:21 55:1,3,7 56:16,20,21 58:4,8,10,19 59:1 60:6 Justices 43:4 <hr/> K k 5:19 6:9,10,14 keep 22:25 Kemna 19:24 20:25 55:11 Kennedy 5:3,8 13:3,5,8 14:12 14:14 15:3,5,8 28:8,12,14 key 4:14 33:12 40:22,25 kind 31:8 kinds 57:16 Kneedler 2:1 3:9 27:12,13 27:15 28:10,13 28:15 29:6,8 29:12,16,19,25 30:2,8,10,24 30:25 31:13,15 34:13,17 35:5 35:7,9,15,17 35:20,23,25 36:4,8,15 37:21 38:9,22 39:2,5,7,9,11 40:1,5,9,11,16 40:21,24 41:12 42:2,11,17,24 43:1,3,10,23 44:4,8,10,13 45:2,12,14 46:3,12,18 47:2,4,8,11,15	47:17,21 48:2 48:5,7,11,13 48:15,18,22,24 49:4,7,13,19 49:24 50:1,4 50:21,24 51:3 51:6,9,11,13 51:15,17,22 52:2,4,6,9,22 52:24 53:2,12 53:13,23 54:2 54:9,22 55:2,6 55:10 56:16,22 57:13 know 11:16 20:11,15 23:22 29:3 33:9 40:10,13 43:11 44:23 51:24 52:7 knowledge 34:13 57:7 <hr/> L labels 27:7 Lane 19:24 20:24 language 5:16 5:20 13:10 15:24 16:4 34:22,25 40:2 40:18 49:2,5 52:12,13 57:2 57:4 laundering 16:9 16:10,14 law 4:24,25 5:5 6:18 7:1,1,12 9:14 11:3 12:5 12:6,24,25 13:25 15:1,18 16:6,6,11,11 16:25 17:1 19:2 21:14,19 21:23 22:5,12 27:25 30:20,22 31:25,25 32:15	32:16,23 33:1 33:6,17 35:11 35:12 37:20 38:5,25 39:14 39:16,25 42:7 42:8,16,22,22 43:14 44:19,21 44:22,22,24,24 45:1,10,18,19 45:19,21 46:9 47:10,11,23 49:11,11,15,21 49:23 51:18 53:6,9 54:7 57:15,19,20,20 57:22 59:5,12 59:12,15,15,16 laws 31:10 32:2 43:8 59:18 lead 43:22 leads 36:12 learn 38:12 learns 18:18 19:9 leaves 21:7,8 left 59:22 legal 22:18 legislative 14:3 15:21 54:1,9 length 23:9,13 32:11 leniently 46:25 Leocal 45:8 let's 52:14 53:17 level 55:21 56:7 light 33:10 likewise 53:7 limit 15:5 limits 15:8 linguistically 33:8 listed 8:24 Listen 49:6,8 little 7:5 59:21 live 55:14 Long 1:21 3:3 3:12 4:6,7,9	5:8 6:2,5,8,13 6:21,23 8:4,11 8:13,20 9:1,11 10:4,23 11:1,8 11:11,13,16,19 11:24 12:8,10 12:12,14,17,19 12:22 13:4,7,9 13:12,16,19 14:2,24 15:4,7 15:19,22,24 17:8,15 31:12 36:16 56:17,18 56:20 58:7,10 58:21 59:4 60:6 look 6:24 11:17 11:19 14:2 19:25 21:1 28:25,25 30:19 30:21,25 33:5 33:21 40:18 41:1,6,9,25 42:20,21 46:13 47:6,23,23,25 50:13 51:18 52:18 looked 7:2 45:10 52:10 53:5 looking 6:18 54:6 looks 32:14 39:16 43:25 59:5 Lopez 1:3,22 3:4 3:13 4:4,8 56:19 Lopez's 6:6 37:22 lose 11:15 48:6 48:17,20 lot 34:6 36:23 <hr/> M making 12:14 33:11 37:8 57:6
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

mandatory 34:1 56:3,4	mileage 13:21 14:4,10	51:23	59:3,9,19	56:15
manufacture 8:16	mind 34:11 44:18 52:14	necessarily 11:6 43:12,16,22	offenses 5:16,22 5:25 6:3 7:5,6	parties 4:17
marginal 56:14	minimal 46:22	need 29:5,8,12 29:22	8:2,18,20,21	pattern 43:25
matter 1:17 23:15 46:8 55:17 60:9	minimum 32:8 34:6 54:25	needs 19:25	9:3,13,22 10:3	pattered 36:25
maximum 27:7	minor 45:21	never 20:22 24:15 31:23	10:10 20:18	pause 36:10
mean 7:1 9:5 11:6,9,25 12:1 12:8,22,23	minutes 56:17	52:14 56:25	36:17 37:11,23	penalties 30:15
15:1,7,12 28:9	misdemeanor 5:16 10:24	57:7	39:25 46:8,10	penalty 39:22
31:24 33:16,20	17:1 33:18	noncitizens 59:17	56:12 59:2	penultimate 43:6,15,19
38:8 46:14,15	34:4 35:19	nonimmigrant 20:7 24:5	office 21:20	people 18:6,7,23
48:20 53:23	42:9,14 44:7	notable 37:3	officials 23:15	19:2 25:18
57:17 58:21	44:23,24 45:22	noticed 14:19	Oh 12:1 23:23	26:10 31:4
59:12	46:8,9,16	now-expired 21:2	Okay 6:7 33:18	perfect 33:7
meaning 28:4 55:23	49:14,22 50:16	number 15:12 20:5 37:10	47:13 50:10,18	perfectly 10:20
means 4:18 8:14 16:22 32:25	52:18,19 53:8	39:17 52:6,9	omitted 4:14	38:21
33:22 36:5,6	56:22 57:6	numerous 42:20 57:10	once 16:3 21:6,8	period 19:11,11
38:17 40:3	misdemeanors 8:6 16:25		open 34:11	19:15
50:11 51:25	56:25	O	operate 37:2	person 12:4
meant 6:3 7:1	mistake 33:12	O 3:1 4:1	operated 49:14	21:12 22:17
meet 5:7	modification 16:18	obvious 44:20	operative 28:5	23:16,20 25:11
meets 50:16	modify 19:7	occasionally 25:17	28:16 47:19	34:3 42:21
members 25:15	moment 55:4	occupies 44:15	opinion 14:21	57:3,4
mention 7:7 14:18 38:11	money 16:9,10 16:14	occupy 44:14	opposite 57:15	persons 18:15
44:2 46:4	months 19:16 55:25,25	October 1:15	oral 1:17 3:2,5,8	21:24
mentioned 14:19 41:3	moot 17:22,23 20:23 22:4,25	odd 45:1,23	4:7 17:17	Petitioner 1:4
42:18 43:3,5	24:17 25:1	odds 45:19	27:13	1:10,22,24 3:4
53:5	26:24	offense 5:4 7:10 7:10,12,12	order 27:17	3:7,13 4:8
mentioning 15:6	mootness 24:24 26:18 55:5,9	8:14,19 9:7,17	29:13,23 37:2	17:18 36:15
mere 9:3,21 10:2	moral 60:2	15:16 16:5,8,9	ordinary 9:6	56:19
merely 39:8 42:8	morning 4:4	16:12,15,16,23	10:1	petitioners 27:2
merits 26:25	move 16:3	17:3,3,6,11	outcome 14:22	Petitioner's 27:23
methodology 58:23	murder 57:23	27:17 33:6	outlawed 9:3	phrase 4:15 8:8
Mexico 18:2,20 20:15 21:21,24 25:11	N N 3:1,1 4:1	34:4 39:18	outside 18:6,8	9:10 10:12
	naturalization 31:18	43:7 45:9,20	P	11:22 40:3
	nature 41:7	46:5,6 49:1	P 4:1	physical 45:10
		51:19 56:15	page 3:2 6:9 23:2 32:18	physically 33:16
		57:3,17,20,21	paper 20:5	pick 6:10 25:22
		57:22 58:5,20	paragraph 15:17	33:19 58:1,23
			parallel 7:3 9:14 31:22	picked 16:17
			parole 26:10	piece 17:10
			paroled 25:18	place 30:25 45:3
			particular 27:8 28:24 43:17	play 60:4
				pleaded 37:25
				please 4:9 17:20 27:16
				plugged 51:11

point 19:4 20:1 21:20 24:6 26:8,15,25 30:2,17 32:13 33:12 34:2 35:25 42:4,4 55:19 pointed 23:13 26:19 34:19 points 26:23 38:11,12 portion 18:3 posit 34:15 46:2 position 5:8 9:16 29:3 46:18 57:25 58:12 59:7 possess 37:9 possessing 37:12 possession 8:15 8:22 9:3,22 10:2,10 34:4 36:13,17,19,19 36:20 37:4,11 37:19,24 38:2 38:7 50:13 59:19 possessory 9:2 possibility 20:2 23:4,20,21 24:1,5 possible 55:12 practice 13:23 54:6 Precisely 13:19 predicate 8:1 prepared 12:2,3 33:7 34:6,7,9 presence 52:12 present 25:2 presenting 31:14 pressed 10:12 presuming 25:1 pretty 14:4 16:7 prevail 25:2 primarily 17:23	19:20 principle 15:2 15:11,12,23 32:14 59:11 principles 33:3 prior 21:10 38:24 prison 18:1,21 20:4 22:10 27:7 probably 38:22 58:15 probation 21:13 21:19,20 22:17 26:17 problem 37:14 45:19 55:5 proceedings 25:18 progeny 27:4 promotes 27:2 pronounce 8:23 proper 30:25 properly 27:25 prosecuted 7:13 7:20 57:3,5 prosecutes 56:25 prosecuting 34:3 prosecution 29:9 34:23 41:14 50:18 prosecutions 34:14 provision 5:9 6:17 7:9,9,25 28:5,16 31:17 36:18 43:4 45:14 47:14 53:3 55:23 59:5 provisions 5:19 6:8,24 38:15 51:18 52:20 53:4 57:14 Public 1:23	punish 35:11 punishable 4:12 4:14,18,22,25 5:1,5,15,21 6:20 7:10,14 9:18 10:9,13 10:15,21 11:5 11:6,14 12:5,6 13:1 16:19 27:20,24 33:15 33:17,20 35:20 38:18 40:4,8 40:11,12,14,19 50:11,14,15 51:6 52:1 punished 4:20 13:2 punishes 56:23 57:20 punishment 39:18 42:21 44:1 purchasing 38:2 purpose 38:16 purposes 7:23 15:11 38:7 42:9,15 44:19 45:25 46:14 47:9,14,24,24 48:17 put 38:14	R r 1:6 4:1 32:24 range 55:24 56:1 ratify 54:13 read 9:9 10:12 40:23 57:15 reading 42:6,13 44:23 50:19,21 readmitted 23:21 24:1 real 20:20 55:14 realistic 21:10 23:20,21 24:1 realize 44:17 really 12:19,22 20:14 24:2 38:15 57:18 reason 7:23 37:1 57:1 reasonable 53:17,20 reasons 31:16 41:3 59:20 REBUTTAL 3:11 56:18 recall 37:18 recidivist 36:19 recognize 17:12 record 26:5 reduce 20:5 reduced 55:18 reducing 23:4 reduction 20:2 reentries 39:22 reentry 30:16 refer 32:19 43:13 57:14 reference 5:24 8:10 43:17,18 54:23 referred 5:20 referring 6:25 32:22 refers 4:16 7:19 7:21 30:11,11 reimprisoned	26:21 reinforce 28:18 relating 6:18 release 18:3,6 18:10,24 19:2 19:4,7,8 20:16 21:8,9,25 22:9 22:15 24:3 26:21 56:3,4,6 released 17:25 relevant 28:3 relief 55:17 56:14 rely 19:19 remain 31:20 remaining 4:15 56:17 removal 30:13 41:23 render 53:7 renders 34:25 34:25 reply 23:1 repudiation 15:21 require 41:10,11 requirement 31:17 34:20,25 44:4 46:19 53:19 54:18 requirements 27:19 requires 30:3 45:8 resentenced 25:2 resentencing 25:5 reserve 17:14 resolved 59:14 respect 15:7 21:12 22:7,12 22:16 28:22 31:16 32:4,9 34:18 39:21 55:9 respects 39:17
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Respondents 2:3 3:10 27:14	saved 26:18	28:24 30:19	34:4 36:13	9:13,17 12:24
response 13:6	saying 13:24	40:17 41:6,25	49:9 50:13	12:25 13:15,25
result 54:14	17:5 22:7 40:2	sensibly 37:2	59:19	14:7 15:1,18
55:24	42:25 43:12	sentence 17:23	simply 5:15	16:6,11,25,25
retains 19:7,14	49:10 52:16	17:24 18:3	12:25	17:6,11 25:21
22:9	says 7:22 11:3	20:1,5,23,23	single 15:10	27:17,25 30:20
retrospective	12:24,24 15:15	21:2,4,6,7	situation 46:1	30:22 31:7,25
20:2	20:11 34:22	23:10,13 24:17	53:7	32:15,21,22
retrospectively	40:5,5 43:6,11	24:17,21 26:18	situations 48:25	33:1,1,2,3,6
23:5	45:22 50:7	29:22 32:8,11	slightly 55:18	35:11,12 36:24
revised 54:17	51:4 52:13	32:20,22,24	Soliciting 9:14	38:4 39:16,25
revoke 22:10	Scalia 6:1,4,6,7	33:2 40:23	Solicitor 2:1	40:3,8,14 42:7
revoked 22:2,16	6:12,15 20:10	41:24 43:6,15	somewhat 56:9	42:22 43:8,14
26:21	20:22 21:5	43:19 46:7	sorry 28:13	43:18 44:1,1
REYMUNDO	23:19,23,25	48:21 49:12,25	46:22	44:11,24 45:10
1:9	24:7,11,13	53:5 55:18,21	sort 27:2 46:20	45:17,19,22,23
right 6:15 11:2	26:1,6 29:2,7	55:22 56:14	58:23	45:25 46:13,15
13:16,17 18:25	29:11,15,17,20	sentenced 42:22	SOUTER 22:11	46:21,21,23,24
29:19 35:9,24	30:1,7,9 41:8	sentences 14:25	42:2,12,23,25	46:25 47:1,6
36:2 42:2 45:2	45:12,16 46:12	20:25 28:22	43:2,9,11 44:3	47:23 48:19
47:3 48:12,14	46:20 47:3,6,9	54:20	44:5,9,11,17	49:11 51:18,19
48:17,21 49:12	47:13,16,20,22	sentencing	45:13,15,17	51:19 52:16,17
51:8,10,14,16	48:3,6,10,12	14:17 27:6	South 11:3 12:5	52:18 53:6,8
52:2,18,23	48:14,16,19,23	33:3 52:10,14	50:17,19	53:21 54:6,14
rise 49:16	49:3,6,8,18,20	separate 41:16	Southern 25:5,7	54:24 56:12,23
risk 45:9	49:25 50:5	seq 12:7	specific 7:11	57:15,20 58:5
ROBERT 1:21	52:14,23 53:1	series 37:23	40:2	59:2,20
3:3,12 4:7	scheme 19:5	serious 7:10	specifically	statement 15:6
56:18	second 23:3,3	45:9	15:15	States 1:1,12,18
ROBERTS 4:3	38:10 42:4	seriously 46:23	specification	4:5 7:13,17,20
6:16,22 15:14	55:7	Serrano 26:15	31:11	11:20 14:16
15:20,23 17:15	section 4:12	26:20,23	specified 27:21	16:13 18:6,8
18:5,12,16,22	5:12,18,19 7:8	set 27:8 32:18	36:21	20:16 21:12
21:15,17 22:1	8:5,24 16:10	severity 39:17	speculative	22:13 23:2
22:3 27:10,12	27:18 28:2,17	shed 33:10	55:14	27:4,5,8 34:24
36:7,9 56:16	29:9,9 30:15	show 9:24	speech 9:6 10:1	37:10 56:11
58:4,8 60:6	32:6 33:5	shows 38:4	Spencer 19:24	57:4,5 58:2,16
role 41:15	39:21 45:7	significance	20:24 55:11	59:17,23
room 31:1	47:24 56:23,25	47:19	stake 60:3	State-law 32:1
rules 31:18	57:10,14,17	significant	standard 32:11	status 28:20
run 19:16	sections 6:4,12	39:12 52:12,13	32:16	30:21
	7:11	significantly 8:5	standards 32:6	statute 7:7,18
	see 14:24 15:8	57:9	standing 20:11	9:9 11:3,24
S	30:20 43:20	similar 5:20 7:9	20:12 36:5	12:23 13:4,21
s 2:1 3:1,9 4:1	50:13	25:9	State 4:22,24,25	15:15 16:2,21
27:13 32:24	send 22:10	simple 8:22	5:1,4,25 6:3,18	28:12 31:2
sanctions 4:18	sense 9:25 14:1	10:10 16:8	7:1,1,12,24 9:6	33:24,24 34:8

36:25 37:2,8 37:18 38:14,20 38:21 40:8,15 42:6,14 43:13 43:17,25 45:8 50:19,22 54:3 58:25 statutes 4:13 5:11,22,24 14:8 27:21 36:24 40:4 57:10 59:6 statute's 53:18 statutory 19:5 38:15 Stevens 13:11 13:13,17 17:5 24:23,25 38:6 39:1,3,6,8,10 40:1,7,10,13 40:20,22 42:5 53:15,17,25 straightforward 16:7 strange 42:13 47:22 strong 37:5 43:24 strongly 26:23 structure 41:1 42:18 stylistic 39:10 subject 4:18,20 17:24,24 18:2 18:9,10,23 19:5 21:13 34:23 41:21,23 subjected 24:2 submitted 60:7 60:9 subparagraph 45:5 subparagraphs 32:17,19,23 subsection 38:17 45:7 46:5	subsections 6:13 42:20 substance 6:19 8:9 9:23,25 58:9 Substances 4:13 4:16,17,20,23 5:2,10,17,21 5:23 6:20 7:11 8:21 9:9,18 10:10,14,16,22 11:5,7 13:2 14:9 16:20,22 16:24 27:20,24 33:16,18,21 35:14,21 38:18 44:13 50:12,14 51:9 52:3 59:6 substantial 37:4 substantive 39:6 suggest 9:12 suggesting 54:1 suggests 54:4 superfluous 9:10 supervised 18:3 18:6,10,23 19:2,4,7,8 20:16 21:7,9 21:25 22:9,15 24:2 56:3,4,5 supervised-rel... 18:2 19:10,11 supervision 18:7 18:11 21:9 Supervisory 1:23 suppose 44:19 supposed 11:17 32:15 59:14 supposing 25:1 Supreme 1:1,18 sure 45:16 50:15 50:15 suspicious 34:10 36:3 switch 55:3	<hr/> T <hr/> t 3:1,1 32:19 53:5 take 36:23 43:12 52:20 taken 21:18 29:3 talk 14:22 talked 22:7 talking 7:4 21:23 28:24 31:19,19,20 32:21 41:16 Taylor 15:4,9 27:4 58:22 59:8 tell 34:6,7,9 telling 41:10 49:22 tension 14:18,20 14:24 45:23 tequila 20:15 term 4:14 7:6,22 10:1 15:16 16:4 20:2 21:13 23:4 26:17 36:11 38:17 41:14 47:18 56:2,3,5 terms 14:17 21:19 27:8 32:6,11 39:17 57:24 test 33:23 testified 37:25 testify 25:18 Texas 1:24 25:6 textual 5:14 7:15 thank 17:15 27:10,11 56:16 56:20 60:5,6 theft 46:4,6,9 57:24 58:18,20 59:3 then-expired 20:1 theory 36:12	they'd 25:15 thing 26:3 33:13 34:19 42:18 45:17 50:24 56:1 things 41:24 think 7:3 9:7,14 9:15 14:3,9 15:25 16:7 23:19,25 24:4 28:18,24 31:15 32:9 34:17 36:16 38:22 40:16,16,17 41:25 42:17 43:5,23,23,24 46:5 47:4,12 48:18 53:23 54:2,2,15 55:10 56:9,10 58:11,19 thinks 20:14 thoroughly 50:5 thought 12:2 13:3 29:2 33:8 33:23 41:10 49:18 58:4,5 thousand 33:22 three 5:14 23:14 28:7,17 32:19 38:11 41:3 time 17:14 18:25 20:4 25:5 34:11 55:4 56:2 times 33:22 TIMOTHY 1:23 3:6 17:17 told 41:11 Toledo-Flores 1:9,25 3:7 4:5 17:18,25 19:5 20:4 21:3 24:19 26:20 55:5,6,15,20 56:10 Toledo-Flores's	17:22 tolled 19:12 touchstone 44:20 trafficking 8:9 8:14,14,17,19 8:21 9:5,5,7,13 9:16,17,22,25 10:6,8,13,18 16:2 17:6,7,10 17:11 36:12,14 37:6 38:3 43:21 50:11 54:18 56:23 58:6,14 treat 46:21 treated 29:1 treats 46:23,25 true 21:22 22:14 26:13 28:21 40:7 52:25 53:3 trump 45:25 try 8:23 24:1 25:24 trying 13:23 54:5,8 Tuesday 1:15 tug 31:11 turn 16:16 28:20 30:5,18 32:24 41:4 42:14 44:6,6 45:17 56:14 turns 30:13 42:5 55:12 two 4:13 5:10,22 5:23 14:17 23:14 27:19,19 31:3 38:9,12 39:13 50:10 57:16 59:6 types 46:9 <hr/> U <hr/> Uh-huh 11:23 ultimately 37:25
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

58:12 unanimous 11:21 underlying 27:19,23 understand 13:14 36:16 38:8 42:3 52:15 55:15 57:25 understanding 49:13 59:7 unfair 24:16 uniform 31:10 31:17 32:6,10 32:15 58:1,13 58:19 59:10,15 59:15,16 uniformity 27:2 31:17,21,23 32:5,12 53:19 59:11,14,24 60:4 uniform-law 31:10 United 1:1,12,18 4:5 7:13,17,20 11:20 14:15 18:6,8 20:16 21:12 22:13 23:2 27:4,4 34:23 56:11 57:4,5 unseemly 31:3 use 18:14 58:1 U.S 4:11 5:12 7:8 16:9 20:8 22:8 23:24 24:10 55:8,8 57:17 60:1 U.S.C 8:7,24 45:7	55:8,8 variation 32:1 59:2 various 56:12 version 38:23 versus 4:4,5 14:25 15:1 55:11 view 8:8,13 35:17 40:25 42:5 violate 4:24 5:9 21:14,19 22:5 22:9,12 violated 18:19 26:22 violates 6:18 22:17 35:11 violation 9:8 15:17 16:6,11 16:22 19:9,10 22:15,19 32:20 38:25 43:8 violations 4:16 9:23 19:3 21:23 violence 45:4,6 visa 20:8 24:6,7 visit 20:8 vs 14:16	9:21,24 16:16 17:3 29:21,24 33:11 34:8 37:15 38:4 42:7 44:20 49:13 53:13 weight 6:17 went 37:24 54:11 we'll 4:3 17:16 we're 7:4 21:22 31:19,19,20 38:7 41:16 44:18 57:18 59:5 we've 26:16 40:14 50:18 whichever 48:1 48:3,4 Williams 19:24 20:24 win 11:15 witness 25:14 word 4:14 9:5 17:7 38:19,20 51:25 words 33:13,22 38:16 43:13 work 22:20 26:7 42:6 43:19,20 works 26:2 world 20:20 write 14:21 53:14 wrong 55:7,10	<hr/> Z <hr/> zero 34:9 <hr/> 0 <hr/> 05-547 1:5 05-7664 1:11 <hr/> 1 <hr/> 1 33:4 46:7 51:1 1-year 56:3 10:03 1:19 4:2 101(a)(43) 16:5 16:17 57:14 11:03 60:8 1101 32:6 35:7 46:15 1101(a) 51:13 1101(a)(4) 53:3 1101(a)(43) 28:4 28:7,17 29:18 32:14,17 33:5 36:6 40:25 41:1,18 42:19 43:6,25 50:25 51:18 53:14 1101(a)(43)(B) 8:7 27:18 12 56:11 12(a) 32:18 1326 28:23 30:15 39:21 54:22 16 45:7 17 3:7 18 4:11 5:11 7:8 16:9 45:6 57:17 1956 16:10,13 1988 38:24 39:12,20 54:15 54:19 1990 54:10 <hr/> 2 <hr/> 2 50:25 51:4,25 20th 19:17,23 2006 1:15	21 8:24 57:16 21st 18:1 24 55:24,25 27 3:10 <hr/> 3 <hr/> 3 1:15 6:18 3A 6:9 30 55:25 3559(c)(2)(H) 7:8 <hr/> 4 <hr/> 4 3:4 23:2 56:17 43 51:15 <hr/> 5 <hr/> 5 34:1,5 36:20 50:8,20 5A 6:10 56 3:13 <hr/> 6 <hr/> 6A 6:10 <hr/> 7 <hr/> 7A 6:11 <hr/> 8 <hr/> 8 8:7 12:23 801 12:6 844 9:1 36:22 <hr/> 9 <hr/> 924 5:19 6:9 29:9 47:19 48:2,3 924(c) 4:12,19 5:12,18 7:18 7:23 8:5,12,18 9:3,21,23 12:23 16:2,19 28:2,6 29:10 29:17,21 30:2 33:13,24 38:23 41:12,14 47:15 47:25 48:17,21 48:24 49:12
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56:23 57:1,10 924(c)(1) 34:14 34:22 48:7 49:7,14 50:7 924(c)(1)(A) 7:19 57:2 924(c)(2) 34:21 36:5 38:16 48:13 49:2 50:2 924(e) 15:11 940 36:22				
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--	--	--	--