

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	AMY HOWE, ESQ.	
4	On behalf of the Petitioner	3
5	DEANNE E. MAYNARD, ESQ.	
6	On behalf of the Respondent	16
7	JAY T. JORGENSEN, ESQ.	
8	As amicus curiae, support of the	
9	judgement below	32
10	REBUTTAL ARGUMENT OF	
11	AMY HOWE, ESQ.	
12	On behalf of the Petitioner	56
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:10 a.m.)

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

6 Ms. Howe.

7 ORAL ARGUMENT OF AMY HOWE

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

8 JUSTICE GINSBURG: Is that based on any --
9 any precedent of this Court's?

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

12 JUSTICE GINSBURG: So just on the
13 cross-appeal rule?

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

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

25 CHIEF JUSTICE ROBERTS: Well, but the court

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

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

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

12 MS. HOWE: Yes, under this rule.

13 JUSTICE KENNEDY: Other than for assistance
14 --

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

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

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

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

1 vindictiveness is unnecessary, and it just can't be
2 increased on remand?

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

5 MS. HOWE: Yes, we --

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

8 MS. HOWE: Perhaps.

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

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

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

25 MS. HOWE: Well, our argument would be that

1 the government had forfeited the right to make that
2 argument and that the district court would not be -- you
3 know, that would essentially be sua sponte ordering --

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

5 MS. HOWE: You know, if the government had
6 --

7 JUSTICE KENNEDY: It's a resentencing.
8 There's a new judgment, a new conviction. What happens
9 then?

10 MS. HOWE: New judgment and conviction -- it
11 -- the rule may be different. Unless double jeopardy
12 may apply as well.

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

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

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

18 (Laughter.)

19 JUSTICE GINSBURG: Let's go back to where
20 you started, and that was with the statute, 37 -- what
21 is it? 42?

22 MS. HOWE: 42.

23 JUSTICE GINSBURG: -- (f). And the -- that
24 has two subparts, and the first part just says the court
25 of appeals can decide whether a sentence was imposed in

1 violation of law, period.

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

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

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

25 And our interpretation, again, which we

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

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

23 The second reason is that this is a very
24 thin reed to rest this construction of the statute on,
25 given that Congress must have been aware of the

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

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

10 MS. HOWE: I'm sorry?

11 JUSTICE BREYER: We have a government
12 appeal. The sentence was 10 years. The government
13 thinks it should be 20.

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

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

23 JUSTICE BREYER: Well, that's a pretty tough
24 position. It -- it seems to me there could be errors --
25 and I guess if he's sentenced to death, it's the same.

1 I mean, the -- the -- it's a pretty tough position,
2 isn't it? That there is no authority in the courts of
3 appeals, or in the district court, or anywhere in the
4 system to create -- to correct a serious error where a
5 person could, in fact, be in prison for a long time
6 contrary to the law.

7 MS. HOWE: Well --

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

10 MS. HOWE: I have three points,
11 Justice Breyer.

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

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

24 JUSTICE STEVENS: I believe you say it has
25 decided not to make an exception to the cross-appeal

1 rule. Of course, the cross-appeal rule itself is not
2 statutory, is it?

3 MS. HOWE: The cross-appeal rule itself is
4 not statutory, but --

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

8 MS. HOWE: It is indeed, Justice Stevens,
9 but --

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

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

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

22 So he may be able to go back to the district
23 court under section 2255 and obtain relief in that
24 manner.

25 JUSTICE SCALIA: I thought it was sort of an

1 important part of your case that the cross-appeal rule
2 was an established rule. You now know that it's
3 not an established rule?

4 MS. HOWE: Well, we do believe it is
5 jurisdictional, Justice Scalia. In the Morley case,
6 which we think --

7 JUSTICE SCALIA: Not just jurisdictional but
8 well-established.

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

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

23 JUSTICE SCALIA: But you say it is a
24 well-established at least rule of practice.

25 MS. HOWE: Absolutely.

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

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

6 JUSTICE SCALIA: Well, they --

7 MS. HOWE: They acknowledge.

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

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

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

25 MS. HOWE: It makes a difference,

1 Justice Ginsburg, in the sense that it cannot be waived
2 if it is jurisdictional. The Court can raise it at any
3 time. If it is a rule of practice, it is subject to
4 exception below. In this -- as in this case with this
5 rule, the Court has not found an exception in over 200
6 years. The -- in the sentencing context in particular,
7 it is not subject to exception.

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

11 CHIEF JUSTICE ROBERTS: Thank you, Ms. Howe.
12 Ms. Maynard.

13 ORAL ARGUMENT OF DEANNE E. MAYNARD
14 ON BEHALF OF THE RESPONDENT

15 MS. MAYNARD: Mr. Chief Justice, and may it
16 please the Court:

17 The Court of Appeals erred in increasing
18 Petitioner's sentence for two reasons:

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

22 Second, even assuming it did not strictly
23 lack jurisdiction, it nevertheless violated the
24 mandatory claim- processing rule that a judgment may not
25 be increased in favor of an appellee in the absence of a

1 timely --

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

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

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

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

24 MS. MAYNARD: If the court of appeals had
25 found an error at the defendant's request, yes,

1 Justice Stevens, and remanded it, depending on the scope
2 of the mandate and under the scope of the mandate --

3 JUSTICE STEVENS: And you could have ended
4 up with precisely the same result that they ended up
5 with in this case.

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

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

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

23 JUSTICE GINSBURG: Even though the
24 prosecution didn't ask for it? I thought that you were
25 relying on the division of authority between the

1 executive, the prosecutor, and the court. And that is
2 that a court reacts to the charges that the prosecutor
3 brings, and if the prosecutor isn't asking for a higher
4 sentence, the court has no authority to grant it.

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

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

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

21 So if it were back in the district court and
22 the district court were free under the scope of the
23 court of appeals mandate to impose sentence, then the
24 government would be obligated to argue the law before
25 the district court. What --

1 CHIEF JUSTICE ROBERTS: Well, usually the
2 mandate in these cases simply says, you know, the case
3 is remanded to the district court.

4 If that's all the mandate says, does that
5 authorize the district court to do the right thing under
6 the law?

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

11 And there's actually some disagreement in
12 the circuit on what one assumes from a general mandate.

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

18 MS. MAYNARD: Well, no, Your Honor. I think
19 rule 35 speaks to what the district can do within seven
20 days of renouncing the sentence. Once the sentence is
21 timely appealed, if the defendant were to prevail or if
22 the government were to prevail in a case in which the
23 government had actually appealed and it were to be
24 remanded, then the defendant --

25 JUSTICE KENNEDY: Within the scope of the

1 appeal, which brings us right back to this case.

2 MS. MAYNARD: Within the scope of the
3 mandate.

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

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

18 MS. MAYNARD: Well --

19 JUSTICE SOUTER: Because, in effect, I think
20 you are saying, by structuring the mandate in a certain
21 way, the court of appeals can open the door to something
22 that the court of appeals, itself, could not do. But by
23 structuring the mandate in a different way, the court of
24 appeals can cut off the possibility of district court
25 orders of a sort that the court of appeals couldn't do.

1 And that seems -- that is what seems to me inconsistent
2 with your theory of the limited court of appeals
3 jurisdiction.

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

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

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

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

21 JUSTICE SOUTER: Then what is the play in
22 the mandate that you are assuming when you say it
23 depends on the mandate? What the district court can do
24 would depend on the mandate.

25 MS. MAYNARD: Well, I'm not sure I

1 understand the --

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

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

12 JUSTICE SOUTER: Yeah.

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

16 JUSTICE SOUTER: Okay.

17 MS. MAYNARD: But one --

18 JUSTICE SOUTER: Now you say that could
19 leave open -- if a mandate is general, that could leave
20 open. Can the mandate be specific in precluding?

21 MS. MAYNARD: Given the lack of an appeal
22 here.

23 JUSTICE SOUTER: Yeah.

24 MS. MAYNARD: By the government?

25 JUSTICE SOUTER: Yeah.

1 MS. MAYNARD: I -- I suppose it -- it might
2 do that. I suppose it -- it might be able to do that.
3 Here --

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

8 MS. MAYNARD: That's right.

9 JUSTICE KENNEDY: If he cross-appeals, fine;
10 if he doesn't cross-appeal, he knows what the stakes
11 are.

12 MS. MAYNARD: That's right.

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

19 MS. MAYNARD: Well, because it -- once
20 the court -- if the Petitioner -- I mean -- at any risk
21 in any appeal, and this is true in civil cases, too, you
22 know, if you seek a new trial on damages, for example,
23 in a civil case, because of instructional error, and you
24 go back, I think, you know, the jury who decides the
25 damages a second time isn't bound by the first jury's

1 decision. Any time --

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

7 And nothing else? That's the only relief I
8 seek?

9 MS. MAYNARD: I think if the court of
10 appeals finds error in the sentence it vacates under the
11 -- the remedial provisions in 3742 for the -- for the
12 court -- for the district court to resentence the
13 Petitioner.

14 For example --

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

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

23 MS. MAYNARD: Well, if the defendant wins in
24 the sentencing appeal, there -- there's always a chance
25 that on -- on remand, the -- the district court will

1 reconfigure the sentence.

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

12 MS. MAYNARD: Well, I think, you know, if
13 you look at cases -- recent -- I think post-Booker for
14 example --

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

24 MS. MAYNARD: Right. I was going to use the
25 Booker case as an example. Post-Booker, you know,

1 defendants have appeals, saying I was innocent, or
2 mandatory Guidelines regime, and I want to be sentenced
3 under the advisory Guidelines regime. And when those is
4 cans have gone back, this -- courts of appeals have --
5 most of the courts of appeals have held that the
6 district court is not bound by original sentence -- it's
7 not free from the mandatory Guidelines. It can consider
8 all the factors as instructed by the Court, and isn't
9 simply decrease the sentence. And I think --

10 JUSTICE SOUTER: Then the cross-appeals rule
11 is essentially a rule of appellate court procedure and
12 nothing more.

13 MS. MAYNARD: Well, I think in this
14 situation, actually -- it definitely is a rule of
15 appellate court procedure.

16 JUSTICE SOUTER: Yeah. But --

17 MS. MAYNARD: And it's definitely a
18 mandatory --

19 JUSTICE SOUTER: But it doesn't go beyond
20 that?

21 MS. MAYNARD: I think that's correct. If
22 you succeed on your appeal you may end up in the
23 district court worse off than when you began. But the
24 issue before this Court is what can a court of appeals
25 do in the absence of a party pressing a claim before it.

1 And --

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

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

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

16 MS. MAYNARD: Well, the Government is not
17 agreeing that there was -- with the Petitioner there was
18 no deal error. What the Government is saying -- the
19 question is -- so this is not a situation like you're
20 positing, where the parties are trying to agree to the
21 governing law. This is a question of which issues are
22 properly in the court of appeals to start with.

23 CHIEF JUSTICE ROBERTS: No, in my
24 hypothetical they weren't agreeing. One side was saying
25 B, the other side was saying A.

1 MS. MAYNARD: Fair enough.

2 CHIEF JUSTICE ROBERTS: And the right answer
3 was C.

4 MS. MAYNARD: Fair enough, but here it is,
5 there's no disagreement about what the merits of the
6 governing law is; the question is, is that question
7 properly before the court of appeals.

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

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

20 CHIEF JUSTICE ROBERTS: Is there problem of
21 getting the Solicitor General's office to authorize the
22 appeal?

23 (Laughter.)

24 JUSTICE SCALIA: Ms. Maynard --

25 MS. MAYNARD: But the --

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

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

9 JUSTICE SCALIA: The statute talks about the
10 general --

11 MS. MAYNARD: In general --

12 JUSTICE SCALIA: The general cross-appeal
13 rule --

14 MS. MAYNARD: But there --

15 JUSTICE SCALIA: It happens all the time,
16 that there's an error in the judgment which the court of
17 appeals does not -- does not reach because there's no
18 court -- no cross-appeal. It's totally unexceptionable.

19 MS. MAYNARD: Exactly, Your Honor. And that
20 -- the danger to parties, in particular to the
21 government in having courts reach out and arrogate to
22 themselves the decision -- thank you -- the decision to
23 appeal is -- is illustrated by this particular case. In
24 footnote 6 of the court of appeals opinion it recognizes
25 a second error that aggrieves the government, deciding

1 it was plain --

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

7 Has that generated a whole lot of problems
8 over the years? I mean there are isolated cases that
9 you've all been able to find searching 30 or 40 years of
10 jurisprudence, but I don't see any widespread problem
11 being generated by the courts of appeals who have
12 disagreed with your view.

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

19 And second, I'm aware of no case in this
20 Court where this Court has reached out to find plain
21 error on behalf of a nonpetitioning respondent or a
22 non-appealing appellate.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Ms. Maynard.

25 Mr. Jorgensen.

1 ORAL ARGUMENT OF JAY T. JORGENSEN,
2 AS AMICUS CURIAE,
3 IN SUPPORT OF THE JUDGMENT BELOW
4 MR. JORGENSEN: Mr. Chief Justice, and may
5 it please the Court:

6 There are three questions really in this
7 case, and the Court need not resolve all of them
8 depending upon how it resolves the others, but some of
9 them get lost sometimes, so I would like to state what
10 the three are.

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

18 If the Court concludes that it's neither --
19 if a Court a court concludes either that it is a grant
20 of jurisdiction, or rather a power -- or that it's not,
21 that it's an affirmative limit, then the -- if the Court
22 concludes that 3742 is more like 1291, just a general
23 appellate statute that does not give the answer here,
24 then the Court has to go on to decide is this case -- is
25 this rule, this cross-appeal rule, in the criminal

1 context not the civil context that is -- that is subject
2 of this 200 years of discussion, but in the criminal
3 context is it a jurisdictional limit on what the courts
4 can do or is it a rule of practice.

5 And then finally, if the Court concludes --
6 if the Court concludes it is a jurisdictional limit,
7 then that's the end. If the Court concludes that it is
8 a rule of practice, the final third question is: Is it
9 a waivable rule of practice or is it a firm and
10 inflexible rule of practice? I think what often gets
11 assumed. But, of course, in Kontrick, in Bowles, the
12 Court addresses the issue in that case -- in those cases
13 and decides whether the rule of practice at issue in
14 that case --

15 JUSTICE GINSBURG: Mr. Jorgensen, suppose I
16 think there's a larger anterior question to all of this?
17 And that is what I suggested in the colloquy with
18 Ms. Howe, we have a system in which the prosecutor can
19 bring charges. The judge may think, my goodness,
20 looking at this set of facts, you could have charged
21 much more.

22 The judge can't do that, he can't tell the
23 prosecutor you have to charge "Y" in addition to "X".
24 The government chooses not to appeal. Now, what right
25 does the court say, I know you didn't appeal,

1 Government, but should have so we're going to take care
2 of it for you?

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

12 MR. JORGENSEN: The answer to that question,
13 Justice Ginsburg, is multi-part, and I'll try to move
14 through it quickly. This Court had said -- made the
15 very point that you made at the charging stage. That at
16 the charging stage the court -- the district court
17 cannot decide what a criminal will be charged with; but
18 that once the trial has proceeded to judgment, that
19 prosecutorial discretion is at an end. I wish I could
20 remember the name of the case, but Justice Scalia was
21 the author.

22 JUSTICE SCALIA: Me, too.

23 (Laughter.)

24 MR. JORGENSEN: The point being that once a
25 crime has been proven, the law kicks in, and the

1 defendant must be sentenced in accordance with lawful.
2 The same is true on appeal. I'm not advocating here
3 for, I think, what your question would assume, which
4 would be a roving court of jurisdiction -- a roving
5 court of appeals that could reach out and take
6 jurisdiction over a case that has not been brought to
7 it.

8 Under 3742 no one questions that the court
9 has jurisdiction over the case, over the very sentencing
10 issues because somebody has filed a notice of appeal and
11 brought it to the court. The only question is when the
12 defendant says to the court under 3742(a)(1) was my
13 sentence imposed and the statutory languages in
14 violation of law, can the Eighth Circuit provide the
15 right answer or is it powerless to provide the right
16 answer to only provide an answer that benefits him?

17 JUSTICE SCALIA: Could we discuss -- let's
18 leave aside for the moment what the background rule of
19 law is and discuss whether -- I guess it was your first
20 point -- whether this particular statute proscribes the
21 answer, and therefore, we don't have to go any further.

22 Why do you say it proscribes the answer?

23 MR. JORGENSEN: I believe that it does,
24 Justice, because everybody agrees that the Sentencing
25 Reform Act was a clean break with the past and imposed

1 an entirely new regime. So, the talk about the regime
2 of the past is somewhat beside the point.

3 So then you get down to the language itself
4 of section 3742. Under (a), it provides that a
5 defendant may ask the court of appeals was my sentence
6 imposed in violation of law; and under (b)(1), the
7 government can raised same appeal. Then under (d), the
8 parties certify to the court or bring to the court the
9 record that they think addresses the issue that either
10 side raised; and then in (e), the court -- (e) says the
11 court shall decide whether it was imposed in violation
12 of law; and then (f) (1) says if the court determines
13 that it was imposed in violation of law, it shall send
14 it back with instructions.

15 Now, the main answer to that is well,
16 (f)(1) -- you have to get all the way to (f)(1) before
17 you have got the answer. And that's unsurprising. I
18 don't think any member of the court would say that the
19 Eighth Circuit lacks the power, is barred from noticing
20 the 924(c) error here.

21 Certainly the Eighth Circuit could see it;
22 certainly the Eighth Circuit could say it. I see the
23 error here. The only question is, can it provide the
24 remedy? And that's what (f)(1) says.

25 JUSTICE SCALIA: Well, why would -- why

1 would Congress want a different disposition for (f)(1)
2 than for (f)(2)? It's clear under (f)(2) if the
3 sentence is outside the applicable guidelines and the --
4 or if the departure is based on an impermissible factor
5 or is to an unreasonable degree or the sentence was
6 imposed for an offense for which there is no applicable
7 guideline and its plainly unreasonable, for that, it is
8 clear that if it hasn't been raised by one or the other
9 party, the court doesn't get into it.

10 Why would it want a different rule for those
11 two? In other words, I'm saying that far from
12 supporting your case, as your brief suggests, (f)(2) (a)
13 and (a) seems to me harms your case.

14 MR. JORGENSEN: If I can give a two-part
15 answer, Justice. First, the court is not in the
16 practice of overturning what the plain language says on
17 a sort of legislative history or surmising what Congress
18 may have been motivated by. But even if it were, there
19 is a clear answer.

20 (F)(1) subsumes (a)(1) and (a)(2) and (b)(1)
21 and (b)(2). And the questions under those statutes or
22 rather those provisions are legal questions. The kind
23 of questions was this sentence imposed under (a)(1),
24 (b)(1) in violation of law or (a)(2), (b)(2), was it an
25 incorrect application of Sentencing Guidelines?

1 If the court of appeals gets that wrong,
2 that's the kind of thing that's going to be imposed in
3 everybody else's case. Under (3) and (4) it's this
4 defendant's case.

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

11 MR. JORGENSEN: Indeed.

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

14 Then the other part says if it is too low
15 and it was the government that appealed, the court shall
16 set it aside and send it back with such instructions as
17 it considers appropriate, again subject to (g).

18 So all three say the same thing.

19 JUSTICE SCALIA: Not if it's too high and
20 the defendant has appealed.

21 JUSTICE BREYER: That's what --

22 JUSTICE SCALIA: Not if it's too high and
23 the government has appealed.

24 JUSTICE BREYER: That's right.

25 JUSTICE SCALIA: If it's too high and the

1 government has appealed, you don't get any relief
2 under -- under --

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

5 (Laughter.)

6 JUSTICE BREYER: I see.

7 MR. JORGENSEN: You're exactly right,
8 Justice Scalia. So the question is, why would Congress
9 say what is plainly said, which is under (f)(1)
10 violations of law and incorrect applications of the
11 Sentencing Guidelines, the court gives the right answer
12 no matter who appeals. But under (f)(2) Congress
13 specifies it matters under this who appeals. And the
14 reason is, in those instances, it is too high in this
15 defendant's case, and this defendant can be entrusted to
16 forward his own cause; but under (a)(1) and (a)(2), then
17 you get a court of appeals precedent that gives the
18 wrong answer, if a question of law or the application of
19 the Sentencing Guidelines.

20 So there is a difference between (a)(1),
21 (a)(2), (b)(1), (b)(2) as --

22 JUSTICE SCALIA: Of course, that difference
23 disappears if you say that, in fact, the whole thing
24 assumes that the factor complained of has been brought
25 to the court's attention by the proper person. So that

1 (f)(1) assumes that if it's the government appealing in
2 violation of law because the defendant was given too
3 little, or if it's the defendant appealing because in
4 violation of law that he was given too much, it makes
5 much more sense that way, it seems to me.

6 MR. JORGENSEN: That -- that -- if the Court
7 were to go there, Justice, I believe that goes back to
8 your previous question of: Should we assume or should
9 the Court believe that Congress was aware of its
10 history --

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

15 MR. JORGENSEN: It is a very --

16 JUSTICE BREYER: So the way you should
17 handle it, given this section, is the court of appeals
18 would send -- I'm trying this on -- the court of appeals
19 says, well, it's the defendant that appealed, who
20 appealed. He says the sentence is too high. Given what
21 we have in front of us in the issues, he's right; now we've
22 noticed that there's other problems here. So what we
23 do is send it back for resentencing. And, Judge, when
24 you resentence, look at it. And see if maybe we're
25 right. That would be a perfectly fair way to handle it,

1 and a normal way to handle it. Is that right?

2 MR. JORGENSEN: Well, importantly, Justice,
3 one, two, three, and four, one being: Is it posed in
4 violation of law? Two: Is it incorrection application
5 of Sentencing Guideline (c)(3)? Or is it too high?
6 There's a body of case law as to what kind of a field --
7 fields fit within what category. And the parties and
8 the courts of appeals are united in believing that the
9 Petitioner's question in this case fits within (a)(1):
10 Was his sentence imposed in vital of law.

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

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

15 JUSTICE SCALIA: But it's not enough to say,
16 well, we've noticed by the way we're -- you know, in
17 looking at the proper appeal by the proper -- my
18 goodness, look what we've noticed.

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

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

25 MR. JORGENSEN: Indeed.

1 JUSTICE SCALIA: And it's extraordinary.

2 MR. JORGENSEN: Indeed, although it is what
3 3742 says, and I believe it's actually not that
4 different than what happens with jurisdictional issues.
5 The court must resolve those that are brought to it.

6 JUSTICE SCALIA: Precisely so.

7 MR. JORGENSEN: And then the court notices
8 the ones that are obvious, has a duty to look for them
9 because --

10 JUSTICE SCALIA: Which is why we have tried
11 to pare down what is jurisdictional.

12 MR. JORGENSEN: And on that question, I --
13 before the time runs out, I want to, Justice Scalia,
14 follow up on your question, which is: What if the Court
15 assumes that 3742 does not provide the answer? Which is
16 I believe where you're going.

17 Then the Court confronts the question of, is
18 the cross-appeal rule jurisdictional or a rule of
19 practice? Now, the Court has provided the answer to
20 that once in, I believe it said, Langnes, and said that
21 it is a rule of practice. And then since, there's been
22 obviously a long period of time. And then the Court has
23 had its series of cases contra Bowles, Arbaugh. And
24 under those cases, there is no good argument that it's
25 jurisdictional. The teachings of those cases is that

1 the Court has used the phrases "power" and
2 "jurisdiction" too broadly, too loosely, and is now, as
3 you say, trying to cut back on those jurisdictional
4 limits. And a rule like this can only be jurisdictional
5 if it's based on a statute, and I believe all the
6 parties agree this rule is not based on a statute.

7 So then that gets us finally to the question
8 of, if 3742 does not provide the answer and it is a rule
9 of practice, is it a mandatory rule of practice, an
10 inflexible rule of practice? Or one where the Court can
11 use discretion as to whether or not to apply it when
12 it's invoked?

13 And the -- there can be no question that
14 there are discretionary rules of practice. Indeed, in
15 Bowles, the one issue on which all nine Justices agreed
16 is just that: Justice Souter, writing for the dissent,
17 would have found that that rule or practice was
18 discretionary. Justice Thomas, writing for --

19 CHIEF JUSTICE ROBERTS: Well, if it's
20 discretionary, how would you -- I assume it's reviewable
21 for abuse of discretion.

22 MR. JORGENSEN: Indeed.

23 CHIEF JUSTICE ROBERTS: How would you know
24 whether it's an abuse of discretion or not? I mean, the
25 issue is going to be the same in every case. There was

1 no cross-appeal. If there had been, we would have
2 increased the sentence, and one court of appeals says,
3 well, we're not going to do it; and the other court of
4 appeals says, yes, we're going to do it.

5 Which one is reversed for abuse of
6 discretion?

7 MR. JORGENSEN: I believe the one that
8 refused to correct such a plain error, obviously.

9 CHIEF JUSTICE ROBERTS: I thought you might
10 say that. But I mean --

11 (Laughter.)

12 MR. JORGENSEN: But your question was, what
13 is the standard? If I may, I believe that's the
14 question. And the Court has, I think, provided the --
15 several formulations of what the standard is. In
16 Langnes, the Court said good cause was the standard. In
17 Reynolds, which contrary to what Petitioner said was a
18 case where this Court afforded relief on a sentence to a
19 criminal Petitioner who had not brought that issue to
20 this --

21 JUSTICE BREYER: Well, could do you this?
22 Because this is quite helpful to me. Reading, I started
23 out where Justice Scalia was at the beginning of this
24 argument. I thought the district court normally has it
25 open, to the judge, to resentence. Resentence is

1 resentence. You can't be vindictive, but that's the
2 limit. That's how it works normally, I thought.

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

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

13 MR. JORGENSEN: I --

14 JUSTICE BREYER: So if you were going to do
15 something other than that, in the court of appeals,
16 you'd have to have a reason, and it would have to be a
17 fairly good reason. So you don't close off the escape
18 hatch because we can't all foresee the future perfectly,
19 but you say it's going to be few and far between.

20 Now does that work?

21 MR. JORGENSEN: I believe it does work,
22 Justice Breyer.

23 JUSTICE BREYER: All right.

24 MR. JORGENSEN: And I believe it --

25 JUSTICE SCALIA: This argument is not an

1 argument under the statute? This is an argument giving
2 your interpretation of what the background rule is?

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

4 JUSTICE SCALIA: And you would limit the
5 background rule to plain error?

6 MR. JORGENSEN: Yes -- yes, Your Honor, I
7 would. And that does not really contradict what the
8 Eighth Circuit did here. Rule 52(b) is really another
9 formulation of the very same thing that the court said
10 in Langnes; that's good cause. In Neztosie, it -- the
11 Court phrased it "countervailing considerations" which
12 outweigh the institutional interests in fair notice and
13 repose. And, of course, rule 52(b) talks about
14 "fairness, integrity, and public reputation of judicial
15 proceedings." They're all different formulations of the
16 same --

17 CHIEF JUSTICE ROBERTS: But if it's such a
18 --

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

20 CHIEF JUSTICE ROBERTS: If it's such a plain
21 error, it's fair to to ask why the Government didn't
22 cross-appeal. If you --

23 MR. JORGENSEN: There is nothing in the
24 record here, Justice, on that. The Government has been
25 very careful not to say or urge you on reply -- to ask.

1 I believe it was a blunder, and so to adopt --

2 JUSTICE SOUTER: A blunder?

3 MR. JORGENSEN: A blunder. So, to adopt the
4 Government's rule is to adopt a new -- a new
5 exclusionary rule that the defendant goes free when the
6 constable blunders.

7 JUSTICE KENNEDY: Well, if this were to be a
8 more frequent occurrence, i.e., plain errors, then we
9 were to rule for you and court of appeals generally
10 would do this, then a defendant might think twice
11 about appealing in a complex case.

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

13 JUSTICE KENNEDY: Because there's nothing
14 that could happen -- once the district court rules and
15 the seven days for error goes by, there's nothing that
16 anybody can do to raise it.

17 MR. JORGENSEN: Well, the first part of your
18 question was true, Justice Kennedy, but respectfully the
19 second part was not.

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

25 JUSTICE GINSBURG: Well, he doesn't have to

1 pursue it if the Government appeals.

2 MR. JORGENSEN: That's exactly right. And
3 the Government makes that point that at some point, if
4 the Government raises its appeal, he could strike a deal
5 with them. Now, it's not correct to assume that he
6 could then unilaterally walk away because there is a
7 notice of appeal, the Government's notice of appeal. So
8 he has to strike a deal with the Government at that
9 point. That's no different than in this case. At oral
10 argument, the Eighth Circuit asked both parties about
11 this error. He could have struck a deal then.

12 If this case turns on notice, there isn't a
13 notice problem here. It's all over the record. It's
14 raised at sentencing. It's raised on appeal. It's
15 discussed in the briefs. It's discussed at oral
16 argument. This error was known to all.

17 Now --

18 JUSTICE GINSBURG: I didn't understand that
19 a party couldn't voluntarily withdraw a notice of
20 appeal.

21 I mean, suppose the only way that the court
22 of appeals can get into this is because the defendant
23 has pursued an appeal.

24 Suppose this comes up and the defendant
25 says, oh, my goodness, I stand to get 15 more years in

1 prison; I'm withdrawing my notice of appeal. There's
2 nothing before the court of appeals then. Nothing.

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

7 JUSTICE GINSBURG: Yes.

8 MR. JORGENSEN: But under the hypothetical
9 we were discussing, I perhaps assumed incorrectly. I
10 thought we were talking about the defendant files his
11 notice of appeal before the Government ever files; then
12 subsequently the Government files as well. Now, if the
13 defendant withdraws, there's still a notice of appeal
14 before the court.

15 JUSTICE GINSBURG: Right.

16 MR. JORGENSEN: But if the government had
17 never filed, you're exactly right that the defendant
18 could take his back. But the problem is it doesn't
19 answer Justice Kennedy's question. His question was:
20 Isn't a defendant entitled to know that he's -- that the
21 Government might appeal, that he might be at risk, that
22 there might be a problem here? And my point is he
23 doesn't know under the current system anyway. He has to
24 make his choice before the Government ever makes its
25 choice. Now --

1 JUSTICE SOUTER: Mr. Jorgensen, may I take
2 you back to something you mentioned earlier in the
3 argument? And I thought I followed it at the time, and
4 I may not have understood you.

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

9 MR. JORGENSEN: Right.

10 JUSTICE SOUTER: -- the concern is that, if
11 there is an error, it's an error which will in effect
12 infect all cases. It's a circuit error, and it's
13 potentially there for any case that comes along for
14 sentencing; whereas, in (f)(2), if there's an error, the
15 limited damage is simply to the case itself, to the
16 particular defendant.

17 Where I don't follow that reasoning is in
18 the fact that F 1 refers not only to an incorrect -- to
19 a violation of law, but incorrect application of
20 sentencing guidelines, which would seem to include a --
21 the particulars of a given case. So am I either
22 misunderstanding your argument or maybe misunderstanding
23 subsection 1.

24 MR. JORGENSEN: Well, Justice Souter, the
25 lines between A 1, 2, 3, and 4 are not as bright as they

1 might be. But when Congress enacted it, in response to
2 Justice Scalia's question of why might Congress have
3 done this when it wrote it, which was before Booker,
4 which introduced some additional theory as to which of
5 those four does an appeal fit within, one was: Is it
6 imposed in violation of law?

7 And, using that clear language, you can
8 imagine the Congress would be concerned that violations
9 of law not go unremedied.

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

12 MR. JORGENSEN: And then 2 is an incorrect
13 application of the sentencing guidelines, which, again,
14 at the time of the Sentencing Reform Act were intended
15 to be, I believe, mandatory.

16 JUSTICE SCALIA: So that it was a violation
17 of law?

18 MR. JORGENSEN: Indeed. There isn't that
19 much of a difference between 1 and 2. But then when you
20 get to 3 and 4, then you get into the language that
21 addresses the particulars of this case: Was this
22 defendant's -- was the application to this defendant too
23 high based on an unreasonable fact or to an unreasonable
24 degree, I believe is the --

25 JUSTICE SOUTER: I guess the problem I still

1 have is some incorrect applications of the sentencing
2 guidelines pre-Booker were, in fact, violations of law.
3 But not all of them were, any more than all of them are
4 now. But forget the situation now. Not all of them
5 were.

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

12 MR. JORGENSEN: I think that's right,
13 Justice Souter. And I could only say that what we're
14 doing here is we are hypothesizing why would Congress
15 have said what they said; and it is a dangerous game to
16 play. But that is my best hypothesis. But it does say
17 what it says.

18 Now, if I can return -- and I hope this is
19 helpful -- to the questions that began the entire
20 argument, which is the sentencing -- the sentence
21 packaging rule or the sentencing package rule which
22 Justice Breyer addressed, I believe the right answer to
23 your question, Justice Stevens, is that under the way
24 the sentencing package rule works, which is applied, I
25 believe, by all circuits, is that if any part of a --

1 JUSTICE SCALIA: What do we mean by the
2 "sentencing packaging rule"?

3 MR. JORGENSEN: That's a very good question,
4 Justice Scalia. Under section 3553(a) after the
5 Sentencing Reform Act was imposed, judges were --
6 district judges were empowered and given the obligation
7 to build a sentence that took into consideration a
8 number of competing factors such that you might, if
9 you were a judge, a district judge, reduce a sentence
10 under one count of an indictment if you were going to
11 give more under another; and you put together a
12 sentencing package; and then that's the sentence that
13 the defendant receives.

14 And then when that goes up on appeal, if any
15 part of that package is undone, the whole package is
16 undone. This is the rule that the circuits follow.

17 To your question, Justice Ginsburg, I don't
18 believe they have a precedent of this Court to fall --
19 to base that on. But it is the rule that is nearly
20 uniformly followed. So then when the case goes back to
21 the district court, the district court is free to
22 construct a new sentence.

23 So, as here, if the defendant had prevailed
24 in any way, then back on remand the district judge could
25 have imposed the same sentence.

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

5 JUSTICE SCALIA: Getting what he deserves,
6 right?

7 MR. JORGENSEN: Exactly. And that can't be
8 done. But, otherwise, with that narrow exception, the
9 sentence can be exactly the same, even though the
10 defendant prevailed on appeal.

11 Now, that played out exactly in this case.
12 In this case, when it went back to the district court,
13 the defendant said to the district court: Don't give me
14 more. You can fit the new fifteen years within what I
15 already have. Give me what I already have.

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

18 Now, the answer clearly, I think, cannot
19 turn on the fact that the Seventh -- excuse me -- the
20 Eighth Circuit knew the answer. We had some questions
21 about what if the Eighth Circuit said: Well, I see an
22 error here, but I don't know how it affects your
23 sentence, so I am sending you back. Would that be okay?

24 But it can't turn on the -- that the Seventh
25 Circuit knew in this instance that he would get an

1 increased sentence as versus it would be okay to send it
2 back without saying what the effect would be for the
3 district judge to impose.

4 And, Justice Kennedy, your question was:
5 What happens if there's a new trial? As my children
6 would say, it is a complete do-over. When the trial
7 starts all over again, new facts are found or not found,
8 and the sentence is completely constructed all over
9 again based on the facts as found by the jury in the
10 second trial.

11 If I can end, Justices, I would end by
12 saying that I believe section 3742 does provide the
13 answer here. Congress provided a clean break with the
14 past. The idea that Congress was aware of a clear rule
15 that they would have followed, I think, is contradicted
16 by Reynolds, where this Court did the opposite; Langnes,
17 where this Court said that the cross-appeal rule was a
18 rule of practice, not a jurisdictional limit; and the
19 confusion in the courts of appeals.

20 I believe the answer to your question,
21 justice Scalia, on whether it is well-established is
22 that in the civil context I believe the D.C. Third,
23 Fourth, Eighth, and Ninth Circuits say that this is a
24 rule of practice while the Senate has debated it back
25 and forth.

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

4 It is slightly different in the criminal
5 context. I believe the Eighth and the Tenth Circuits
6 have not followed -- have not followed the rule, while
7 the Second, Third, Fourth and Seventh have; and the
8 Fifth is internally inconsistent. I may -- I may have
9 some error, honestly, in that recitation. I did it from
10 memory when you asked.

11 But my point, I think, comes through no
12 matter what, which is: How could Congress have assumed
13 this is a clear rule and, when we write these words, the
14 courts will know that's what we mean, when there's all
15 this confusion amongst the courts?

16 Thank you, Your Honors.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Ms. Howe, you have two minutes remaining.

19 REBUTTAL ARGUMENT OF AMY HOWE

20 ON BEHALF OF THE PETITIONER

21 MS. HOWE: Mr. Chief Justice, I have two
22 points. The first is that the amicus argues that
23 subsection (e) of section 3742 provides the answer in
24 this case: That upon a review of the record the Court
25 of Appeals shall determine. And so his argument is that

1 this authorizes and, in fact, requires the court of
2 appeals to determine whether any of the errors that are
3 outlined in subsection (e) have occurred. But (e) can't
4 possibly be this sort empowering, roving, free-standing
5 authority that the amicus believes it is.

6 Because if you look at the language of
7 subsection (e), all it provides -- and this Court has
8 recognized that it merely provides the scope of review
9 -- that, upon review of the record, the court of appeals
10 shall determine. It doesn't say anything about whether
11 a notice of appeal has been filed, how the record got
12 there. And to figure out those things you have to look
13 at the structure of the statute.

14 And when you look at the structure of the
15 statute, it is clear that subsections (a) and (b) are
16 the provisions that provide for appellate jurisdiction
17 in sentencing cases.

18 Amicus also tries to argue that, you know --

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

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

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

24 MS. HOWE: That's absolutely right. That
25 merely provides the remedy, Justice Scalia.

1 And the amicus tries also to argue that this
2 is not some sort of free-standing, roving appellate
3 authority. That, you know, for example, if the case is
4 brought under (A)(1), a violation of law, the court of
5 appeals only needs to determine whether it is a
6 violation of law. But he also argued that the court of
7 appeals is not obligated to scour the record for errors.
8 It is only to notice plain error.

9 But if one should start placing these
10 limits, these limits come from subsections (a) and (b)
11 and the background of traditional appellate practice.
12 And once you start placing these limits which do not
13 appear in the text on subsection (e), the entire
14 construction falls apart.

15 The second point I would make is that the
16 amicus argues that, somehow, section 3742 represents as
17 a break from the past; that Congress did not have in
18 mind the background of this well- established appellate
19 procedure. But in section 3742 Congress made clear --
20 may I finish -- it was only providing for limited
21 appellate review.

22 And if you are going to treat sentencing
23 cases differently in light of this court's historic
24 practice of construing the availability of government
25 appeals narrow rate, you need to treat -- you need to be

1 even more reluctant to deviate --

2 CHIEF JUSTICE ROBERTS: Thank you, Miss
3 Howe.

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

8 The case is submitted.

9 (Whereupon, at 11:09 a.m., the case in the
10 above-entitled matter was submitted.)

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

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

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

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

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

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

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

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

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

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

49:10 50:3 three 10:8 12:10 32:6,10,11 38:18 41:3 45:4 tight 15:24 time 4:15,24 12:5 16:3,10 18:21 24:25 25:1 30:15 31:4 42:13,22 50:3 51:14 timely 14:21 15:17 16:8 17:1 20:21 today 3:4 totally 8:17 26:21 30:18 tough 11:23 12:1 traditional 4:1 58:11 treat 58:22,25 treated 3:24 trial 7:7,16,22 24:22 34:18 55:5,6,10 tried 42:10 tries 57:18 58:1 trouble 25:19 true 6:5 19:6 24:21 35:2 47:12,18 try 34:13 45:4 52:8 trying 28:20 40:18 43:3 Tuesday 1:10 turn 17:15 22:8 54:19,24 turns 48:12 twice 47:10 two 8:24 9:2 11:2 16:18 18:14 31:13,14 37:11 41:3,4 56:18,21	two-part 37:14 type 20:9 <hr/> U <hr/> ultimately 14:17 22:13 understand 21:4 23:1 26:3 48:18 51:11 understood 19:6 50:4 undertaking 59:7 undone 53:15,16 unexceptiona... 30:18 uniformly 53:20 unilaterally 48:6 united 1:1,7,13 3:5 5:4 41:8 unnecessary 7:1 unreasonable 18:14 37:5,7 51:23,23 unremedied 51:9 unsurprising 36:17 unusual 40:14 unwarranted 10:18 upward 9:23 urge 46:25 USC 16:21 use 26:24 43:11 usually 20:1 U.S.C 3:19 <hr/> V <hr/> v 1:6 vacate 23:11 38:9 vacated 5:17 17:12 18:19 19:8 24:14 25:5 vacates 17:6	22:7 25:10 verdict 20:16 versus 3:4 5:4 55:1 view 31:12 vindictive 45:1 vindictively 6:24 vindictiveness 7:1,13 54:2 violated 16:23 violation 9:1 32:15 35:14 36:6,11,13 37:24 40:2,4 41:4 50:19 51:6,16 58:4,6 violations 39:10 51:8 52:2,11 virtue 6:2 vital 41:10 voluntarily 48:19 <hr/> W <hr/> wait 38:5 39:4,4 waivable 33:9 waived 16:1 walk 48:6 want 25:4,5 26:15,16 27:2 28:15 37:1,10 42:13 Washington 1:9 1:16,19,21 way 10:22 11:3 17:20 21:21,23 22:15 23:14 36:16 40:5,11 40:16,25 41:1 41:16 45:8 47:20 48:21 52:23 53:24 well-established 14:8,10,24 55:21 went 54:12	weren't 28:24 we're 8:17 12:21 28:14 34:1 40:24 41:16 44:3,4 52:13 we've 28:13 40:21 41:16,18 wide 26:11 widespread 31:10 wins 25:19,23 26:10,18 wish 34:19 withdraw 48:19 withdrawing 49:1 withdraws 49:13 within(a)(1) 41:13 won 4:23 worded 18:19 words 37:11 56:13 work 12:8 45:20 45:21 works 45:2 47:20 52:24 worse 25:21 27:23 worth 10:6 wouldn't 6:4 19:11 29:13 write 56:13 writing 23:5 43:16,18 45:11 written 45:5 wrong 11:15 28:14 38:1 39:18 57:23 wrote 51:3 <hr/> X <hr/> x 1:2,8 33:23 <hr/> Y <hr/> Y 33:23 Yeah 23:12,23	23:25 27:16 year 11:16 years 3:11 7:10 11:12,19 16:6 19:13,20 25:6 31:8,9 33:2 48:25 54:14 <hr/> 0 <hr/> 07-330 1:6 3:4 <hr/> 1 <hr/> 1 9:13,18,19 10:1 17:5,6 36:6,12,16,16 36:24 37:1,20 37:20,20,23,24 38:7 39:9,16 39:20,21 40:1 41:9 50:6,7,18 50:23,25 51:19 58:4 10 11:12 19:18 19:20 25:6 10:10 1:14 3:2 11:09 59:9 1291 32:22 15 1:10 48:25 16 2:6 18 3:19 16:21 1970 11:5 12:14 1984 3:17 <hr/> 2 <hr/> 2 9:2,11,11,21 10:9 37:2,2,12 37:20,21,24,24 38:5,6 39:12 39:16,21,21 50:6,14,25 51:12,19 57:21 2)and 57:20 20 11:13 200 3:11 16:5 33:2 2007 29:15 2008 1:10 2255 13:20,23
---	---	---	--	--

25 19:20				
3				
3 2:4 9:22 38:3 41:5 50:25 51:20				
30 31:9				
32 2:9				
35 20:13,15,19				
3553(a) 53:4				
37 8:20				
3742 3:19,21,25 14:13 25:11 30:8 32:11,22 35:8 36:4 42:3 42:15 43:8 49:5 55:12 56:23 58:16,19				
3742(a)(1) 35:12				
3742(b) 16:21				
4				
4 38:3 50:25 51:20				
40 31:9				
42 8:21,22				
5				
5a 9:7				
52(b) 46:8,13				
56 2:12				
6				
6 30:24				
6a 9:11				
8				
8,000 29:14				
9				
924(c) 19:17 36:20				